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Letter from the Editor...

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Sincerely,

Christian B. Corrigan

Editor
Christian B. Corrigan

Administrative Law & Regulation

Redressing Politicized Spending

*By Daniel Z. Epstein**

Note from the Editor:

This article is about politicized spending in the federal discretionary budget. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about discretionary spending, standards of review for agency decisions, and the constitutional issues surrounding politicized decision making. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2380 (2001): http://www.harvardlawreview.org/media/pdf/vol114_kagan.pdf
- Office of Management & Budget, Budget Concepts & Budget Process (2013): http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/concepts.pdf
- Drew McLelland & Sam Walsh, Litigating Challenges to Federal Spending Decisions: The Role of Standing and Political Question Doctrine, Harvard Law School Federal Budgget Policy Seminar Briefing Paper No. 33 (2006): http://www.law.harvard.edu/faculty/hjackson/LitigatingChallenges_33.pdf
- Jamie Dupree, *A look at Executive Branch earmarks*, Atl. J.-Const. (July 24, 2012): http://www.ajc.com/weblogs/jamie-dupree/2012/jul/24/look-executive-branch-earmarks/

In 2007, the Bush White House sent senior political officials to brief political appointees in federal agencies on how they could help steer federal funds to favor Republican congressional candidates.[1] In 2010, the Obama White House had direct involvement in shaping the U.S. Department of Energy (DOE) Loan Program Office's loan and loan guarantee funding decisions.[2]

These are not isolated anecdotes. They characterize a body of empirical evidence demonstrating that federal agencies' discretionary spending and other decisions are susceptible to capture by the political interests of Congress and especially the President.[3] Politicized spending undermines transparency and the "level playing field" needed to maintain public trust and confidence in government. Furthermore, large-scale discretionary spending without an effective independent check on the government's ability to steer discretionary funds to favored firms, organizations, and individuals corrodes the foundations of any system based on principles of limited and accountable government.

For the most part, Congress has failed to cabin agency discretionary funding powers. The Office of Management and Budget (OMB) has issued guidelines for agency spending, but these merely encourage a system of merit-based discretionary decision making.[4] And, unless backed by legislative teeth, these guidelines have proven ineffective as a check against politicized spending.[5]

However, judicial remedies are available for persons injured when political or other biases infect federal agency discretionary spending; these remedies would ensure fairness and remedy the harms associated with overbroad agency power. Therefore, this article reviews both statutory and constitutional remedies and suggests approaches claimants can take to obtain judicial review and thereby increase agency accountability for discretionary spending decisions. Part I analyzes the rise of politicized discretionary spending. Part II examines the current standards of review for discretionary agency decisions, including the Administrative Procedure Act, the Tucker Act, implied contractual duties, and suggested improvements to redressability. Part III discusses constitutional theories for challenging politicized decision making, including *Bivens* claims and procedural due process theories. This article concludes that congressional action clarifying that persons injured by politicized agency discretionary spending have standing would be useful to help check agency overreach.

I. The Rise of Politicized Discretionary Spending

In 2010 and 2011, the U.S. House of Representatives and Senate, respectively, imposed a moratorium on congressional earmarks, which are specifically tailored pieces of legislation designed to "reward" targeted congressional members with federal spending in their districts and states. Contemporaneous with these moratoriums was a shift in the system of federal spending. Federal grant spending has risen 40 percent since 2001 and has increased tenfold over the last four decades.[6] Spread across more than 1,700 programs and 26 agencies, federal grant outlays reached $538 billion in FY2012, trailing only Social Security

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and national defense in the federal budget.[7] In the same year, nearly $80 billion was allocated through discretionary, as opposed to formula-based, grants.[8] According to the Catalogue of Federal Domestic Assistance, of the 2,240 federal assistance programs listed for 2012, 1,530 were for discretionary grants.[9] The volume and nature of discretionary spending raises concerns of the potential for abuse.

Traditionally, concerns about politicized spending focused on congressional earmarking practices.[10] Scholarship on the subject of congressional credit-claiming largely posits that members have little incentive to credit-claim based on discretionary grant awards. Professor Frances Lee, in analyzing federal domestic assistance, asserted, "most federal grant money is simply not distributed in a way that maximizes credit-claiming opportunities for individual members."[11] Based on her research, Lee concluded that "[e]ven within the system of intergovernmental grants—one of the most fertile fields for credit-claiming—individual House members often find themselves unable to 'peel off pieces of governmental accomplishment' . . . to demonstrate that they are taking care of constituents."[12] Therefore, the congressional earmark moratorium should have greatly reduced the politicized direction of taxpayer funds to politically expedient and self-serving projects. Yet there has been public scrutiny on a number of federal grant projects that may have provided the type of credit-claiming opportunities that drives politicized spending.[13] Appropriations lobbyists have observed an increase in lawmakers' writing to "federal agencies asking them to consider specific grant applications due to the earmark bans."[14]

In addition to congressional intervention, the executive branch is also susceptible to politicization of spending decisions. Research from the Congressional Research Service (CRS) suggests that the President will use agency budget requests to influence agency-based discretionary spending in order to reward members of Congress for their votes on a presidential priority.[15] Then-chairman of the powerful House Appropriations Committee Congressman David Obey stated that "it has been very difficult to make people understand the extent and the nature of the directed spending that is going on in the executive branch, and that directed spending—just as surely as you take your next breath—is the functional equivalent and the political equivalent of [c]ongressional earmarking."[16] That federal agencies make spending and other discretionary decisions based on the political interests of the President is well-established in the political science literature.[17] John Hudak, a fellow at the Brookings Institution, found that discretionary authority over the allocation of federal dollars provides presidents with the opportunity to engage in porkbarrel politics, "strategically allocating funds to key constituencies at critical times."[18]

The Bush Administration came under criticism for the politicization of discretionary spending through the steering of agency funds to politically expedient causes. In 2007, the *Washington Post* reported that Bush White House officials "conducted 20 private briefings on Republican electoral prospects for senior officials in at least 15 government agencies covered by federal restrictions on partisan political activity."[19] According to the Office of Special Counsel, officials at the General Services Administration "felt coerced into steering federal activities to favor those Republican candidates cited as vulnerable."[20] The Bush White House was also accused of sending "senior political officials to brief top appointees in government agencies on which seats Republican candidates might win or lose, and how the election outcomes could affect the success of administration policies."[21]

Contemporaneous with these agency actions, President Bush used the budget reconciliation process to request earmarks in congressional appropriations bills.[22] A House Appropriations Committee report showed that "Bush requested 17 special projects worth $947 million, more than any single member of Congress."[23] CRS reported that in regular appropriations bills from FY2008 through FY2010 President Obama was the "only requester" for 1,265 earmarks worth $9.5 billion.[24] CRS found that in FY2010, 68 percent of all earmarks were either solely requested by President Obama or requested jointly by the President and members of Congress.[25] CRS also determined that "[b]oth the number and value of earmarks requested solely by the President increased since FY2008."[26] The 126-percent increase in the value of President Obama's earmarks substantially exceeds the eleven percent increase in the total value of earmarks since FY2008.[27] A Heritage Foundation study suggested that the current Administration has used federal discretionary spending to buy votes for contentious legislation.[28] The phenomenon of presidentially-requested earmarks, combined with politically-directed discretionary spending occurring subsequent to a moratorium on congressional earmarking, has been dubbed "executive-branch earmarking."[29]

The distribution of the significant amount of discretionary spending is thus clearly vulnerable to politicization from both Congress and the President. Under this paradigm, it seems prudent to inquire whether there is a proper judicial remedy for such politicized spending.

II. Judicial Review of Discretionary Decision Making

Federal agencies generally act by engaging in either informal rulemaking or adjudication.[30] As this article focuses on the redressability of politicized decision making affecting individual grant applicants, the relevant case law and judicial theories concern informal adjudications.[31]

The Administrative Procedure Act (APA)[32] allows aggrieved parties to seek judicial review of final "agency action" so long as review is not precluded by another statute or "committed to agency discretion by law."[33] Such decisions are unreviewable when courts lack "meaningful standard[s] against which to judge the agency's exercise of discretion."[34] However, courts will invalidate agency actions if they are arbitrary, capricious, or an abuse of discretion; contrary to a constitutional right; or in excess of statutory jurisdiction or authority (known as the *State Farm* test).[35] Courts have established that political interference in the discretionary decision-making process runs afoul of the APA's standards.[36]

The remedy for such interference is limited but palpable. Reviewing courts will remand to the agencies and instruct them to make new determinations limited to the merits and without regard to any considerations not made relevant by Congress.[37] This approach recognizes that not all political contact with a

decision maker *per se* taints the final decision. In determining whether political pressure overwhelmed an agency's process, the D.C. Circuit has established a bright-line standard instructing agencies to establish a "full-scale administrative record" such that if a decision is challenged, the agency can rely on the record to support its decision.[38] Under this standard, reviewing courts will provide the agency an opportunity to cure its politically tainted decision. Remand, "rather than a reinstatement of the untainted decisions, is the proper remedy" because, in these cases, courts cannot predict how a decision would have been properly decided on the merits and there is no reason to think that on remand the taint would necessarily occur again.[39]

Several scholars and legal commenters, including now-Justice Elena Kagan, have found the federal courts' consideration of political influence in an arbitrary-and-capricious analysis to be unwarranted.[40] These scholars have instead advocated that reviewing courts apply *Chevron*[41] deference to agency decision making when presidential influence is involved.[42] These scholarly approaches—unlike the courts' approach to insulate decision makers from political pressure—embrace the inherent political nature of the executive branch's discretionary decisions, under a policy rationale that the President, like Congress, is accountable in ways courts are not.[43] However, these approaches are unlikely to gain traction in the jurisprudence, where courts have held that agency authority to act comes only from Congress.[44] In fact, the Supreme Court has held that a decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider."[45] The federal courts are likely to hold that if Congress wanted Presidents and other executive branch officials to incorporate political motivations into their decision-making process, Congress would have included intelligible criteria in its authorizing statutes.

A. APA Redress is Limited in Current Form

While the APA is a common means for attacking agency decisions, it is not always available to unsuccessful grant or loan applicants. Moreover, when it is available, it offers only injunctive, rather than monetary relief.[46] The APA also excludes from judicial review matters that are "committed to agency discretion by law."[47] In any case brought by an unsuccessful applicant, the agency is likely to argue that authorizing statutes for the individual discretionary grant program explicitly provide for agency discretion. Specifically, that they limit how funds may be spent or that the authority is within general welfare provisions (*e.g.*, broad statements of purpose that lack specific direction, such as "to provide support, and maintain a commitment, to eligible low-income students").[48] The answer, of course, depends on the language of the specific authorizing statute.

Respecting those discretionary grant decisions subject to judicial review, an agency action that bypasses a merit-based process in favor of political considerations would clearly violate the *State Farm* test.[49] Such politicization would also fail to demonstrate a rational connection between the facts (*i.e.*, the merit of grant applicants as determined by their scores and ranks) and the agency's selection of grant recipients. Because agencies typically do not voluntarily release the scoring and ranking numbers of grant applicants, it would be difficult to prove that an agency decision was arbitrary and capricious without resorting to expensive and time-consuming litigation, assuming a litigant can plead the sufficient facts necessary for a court to grant a merits review.

B. Congress Could Provide "Meaningful Standards"

There are two possible legislative remedies that would enhance a litigant's ability to show that an agency was arbitrary and capricious when it allowed politicization of a spending program. First, Congress could pass a law that would require agencies to disclose the criteria by which they will evaluate grant applications, post the scores and rankings online, and disclose the methods by which they chose specific recipients. Congressman James Lankford introduced a bill in the 113th Congress to do just that.[50] The GRANT Act would require agencies to "establish and make publicly available online specific merit-based selection procedures," so that the agency, grant applicants, and the general public are all aware of how the agency will evaluate applications for grant programs.[51] The bill would also require agencies to post online the "[d]ocumentation explaining the basis for the selection decision for the grant . . . [and] with respect to the proposal that resulted in the grant award, the numerical ranking of the proposal."[52] Finally, the bill would require that in any "case in which the award of the grant is not consistent with the numerical rankings or any other recommendations made by grant reviewers" the agency must disclose "a written justification explaining the rationale for the decision not to follow the rankings or recommendations."[53] One shortcoming of the legislation is that it does not provide specific statutory standing for an aggrieved grant applicant who believes that his application was mishandled. However, the scores, rankings, and agency decision-making rationale would all provide exactly the type of "meaningful standards" that courts desire when they are looking for "law to apply" in an APA arbitrary-and-capricious review.

Second, Congress could also enact a "sunshine law" that would require agencies to disclose the type, amount, and frequency of political contact that members of Congress or executive branch officials made with the agency during the decision-making process.[54] This approach could amend the APA itself to mirror the disclosure requirements in the Clean Air Act during the rulemaking process.[55] The disclosure approach could be widened by statute or executive order to require that agencies include contacts and motivations for certain adjudicative actions.[56] However, this approach has serious drawbacks because agencies would have a strong incentive not to disclose the most egregious politicization of discretionary grant decisions.

C. The Potential for Tucker Act Jurisdiction

In addition to the APA, an aggrieved grant applicant could seek redress through a civil claim for damages. The federal government has sovereign immunity and may not be sued unless it waives its immunity or consents to be sued.[57] The Tucker Act waives the federal government's sovereign immunity in suits arising out of contracts to which the federal government is a party.[58] The Act grants the Court of Federal Claims jurisdiction over claims "founded upon any express or implied contract with

the United States" but the Act does not speak to the substance of the claims themselves.[59]

Courts typically apply Tucker Act jurisdiction to cases arising from procurement *contracts*; although the Act also covers tax, land, and military employment actions. This should not be construed to eliminate claims by a grant or loan applicant who has a contract for the underlying award or a contract for fair consideration of his application. However, based on a theory of an implied-in-fact contract, *grant* recipients seeking review of the government's performance of its duties under an agreement have used the Tucker Act to seek redress.[60] Even if a grant recipient is able to gain review under the Act, the government will likely take the same position that the Government Accountability Office (GAO) has when it noted that it "does not follow . . . nor has GAO or any court suggested, that all of the trappings of a procurement contract somehow attach to a grant."[61] However, if the grant or loan program itself is governed by procurement rules, then the Tucker Act's bid protest rules should apply. GAO also argued, "it is clear that the many varied rules and principles of contract law will not be automatically applied to grants."[62]

While there are few examples of grant recipients using the Tucker Act to get into court, none of these cases reviewed the agency's treatment of an application. [63] The implied-in-fact contract for the underlying award sufficient to gain Tucker Act jurisdiction has only been recognized once the grant is awarded. The federal government would likely respond to a suit involving the politicized nature of the grant *application process* by arguing such claims are outside of the Tucker Act's jurisdictional grant. However, the notion that agencies have a duty to treat grant applications in an unbiased manner is well within existing precedent.[64]

D. Agencies Have an Implied-in-Fact Contractual Duty to Review Submissions Fairly

An applicant who believes that politicized decision making has infected a discretionary spending program may be able to seek redress through a variety of contract law-based claims. One such claim is that when the government creates a discretionary spending program and seeks applicants to fulfill the government's programmatic goals, the government has entered into an implied-in-fact contract to fairly consider the applications it receives.[65] This argument is well established in government contracting and there is ample basis to demonstrate that it applies in grant programs as well.

Prior to 1996, the Court of Federal Claims (and its predecessor, the United States Claims Court) used an implied-in-fact contract theory to require the government to fairly consider contract bids.[66] In 1996, Congress amended the Tucker Act to clarify that the court has jurisdiction over procurement challenges "without regard to whether suit is instituted before or after the contract is awarded."[67] Although the 1996 Tucker Act amendments removed the need for the courts to use the implied-in-fact theory in the procurement sphere, the court's analysis of how and why government should treat applicants fairly in the contract process is particularly useful for those seeking redress of politicizing grant spending.[68]

1. An Implied Duty to Treat Applications Fairly

The Court of Federal Claims has recognized that the government has an implied duty to conduct contract-bid reviews in a fair and honest manner.[69] The government's duty to treat the bid honestly "runs first of all to the enterprise submitting that bid."[70] The court's assertion that the duty runs between the applicant and the agency creates a problem for a third-party contract or grant applicant who is attempting to assert that the agency has politicized contract or grant decisions. In that situation, the "agency's enforceable responsibility to a bidder to read or evaluate properly *his competitor's bid* may be appreciably less" than the duty the agency owes the party directly.[71] But this begs the question, if a competitor's bid is given preference because of political intervention, how should a third-party bidder obtain relief?

If the plaintiff was seeking damages for the underlying award, it would need to show causation between the favoritism or politicization and the denial of its grant application. The unsuccessful grant applicant could do this by showing that it "would likely have received the award but for incorrect preference given his successful competitor's bid[.]"[72] The government has traditionally responded that "there is no assurance that any bidder would have obtained the award since the [g]overnment retains . . . the right to reject all bids without any liability."[73] In such a case, the court would need to review the full administrative record to determine whether the disappointed applicant would have received federal funds if the program had not been politicized. If, however, the plaintiff was only pursuing damages for the cost of the application process, then a simple showing of politicization would be sufficient without the need to go the extra step and show that but for the unfair treatment the plaintiff would have received the award.

The *Heyer Products* line of cases is a valuable reminder that once the government holds out a contract or solicits bids for a grant or loan program, an implied duty based in contract law does arise and is not barred by sovereign immunity. Applying this rationale to a discretionary grant program is the first step toward providing redress for those injured by politicized spending programs.

At least one plaintiff has already unsuccessfully attempted to extend the *Heyer Products* rationale to loan guarantees. In *Tree Farm Development Corp. v. United States*, the unsuccessful applicant claimed that the U.S. Department of Housing and Urban Development (HUD) had an implied-in-fact contractual duty to review Tree Farm's application on the merits.[74] However, the Court of Federal Claims found there was no showing of unfair treatment or particularly egregious behavior, only a showing that HUD ended the program before awarding the applicant a loan guarantee.[75] The court declined to extend *Heyer Products* in part because the cases "show[ed] a total absence of the arbitrary and capricious type of governmental conduct which the *Heyer* doctrine was designed to prevent."[76] In essence, the court declined to expand the duty from one protecting against arbitrary treatment to one that would cover all applications for government programs. However, nothing in *Tree Farm* precludes a loan guarantee applicant who was rejected as a result

of political considerations from being eligible for judicial review.

In a pending case challenging the loan guarantee process of the infamous U.S. Department of Energy Advanced Technology Vehicle Manufacturing (ATVM) and loan guarantee program, XP Vehicles and Limnia have both argued that their "loan application[s] ha[ve] been 'set aside' in favor of applications from politically-connected government cronies and that [the Department of Energy] ha[s] 'fixed' the ATVM loan process to benefit political donors, cronies and insiders."[77] These alleged abuses of discretion are exactly the type of harm that the *Heyer Products* line of case was intended to protect against.

2. Establishing a Breach of the Implied Duty

In addition to establishing that an implied duty exists, the Court of Federal Claims has set out several factors for determining whether that duty has been breached.[78] First, courts examine whether the "favoritism or discrimination stems from subjective bad faith (*e.g.*, predetermination of the award)[.]"[79] Second, courts will find a breach if "there was 'no reasonable basis' for the administrative decision" denying the application.[80] Third, courts balance "the degree of proof of error necessary for recovery" against "the amount of discretion entrusted to the procurement officials by applicable statutes and regulations."[81] Fourth, a "proven violation of pertinent statutes or regulations [could], but need not necessarily, be a ground for recovery."[82] Additionally, courts examine the "type of error or dereliction" and whether it "occurred with respect to the claimant's own bid or that of a competitor.[83]

E. Implied-In-Fact Contract for Final Award

In addition to claiming that an implied duty to fairly review an application exists, a plaintiff could also attempt to assert that the agency has entered into an implied-in-fact contract for the final grant award. [84] When the United States is a party, the Court of Federal Claims has found an implied-in-fact contract if the plaintiff shows "(1) mutual intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) evidence that the government representative whose conduct is relied upon had actual authority to bind the government in contract."[85]

A party claiming that a discretionary grant decision has been politicized and that an implied-in-fact contract exists must allege (and eventually prove) all of these elements identified above. First, a plaintiff whose application has been rejected or ignored would have to show that the agency expressed the intent to contract. This element depends heavily on the circumstances surrounding each individual application; a disappointed applicant that received repeated assurances from the agency during the application process is a prime candidate for an implied-in-fact contract claim. Second, a plaintiff would need to show that sufficient consideration was exchanged between the parties.[86] The government will likely argue, as GAO has, that "a grant is a form of assistance to a designated class of recipients, authorized by statute to meet recognized needs. Grant needs, by definition, are not needs for goods or services required by the federal government itself."[87] However, the better reasoned approach is to look at the application itself (and the preparation expense thereof) as the consideration that flows to the government. When reviewing contract claims, courts are not concerned with the adequacy of consideration, only its presence.[88] Agencies are charged by Congress with implementing grant and loan programs to achieve some societal goal that Congress has deemed worthy of taxpayer dollars. This would be impossible, were it not for companies and organizations that are willing to put the time, money, and effort into complying with an agency's application procedures and requirements, in the hope that they might receive a federal loan or grant. Were this of no value to Congress and the agency, no grant or loan program would exist in the first place.

III. Avenues for Constitutional Redress

A. Constitutional "Tort" Claims

One potential option for unsuccessful grant applicants is the pursuit of a constitutional claim against federal officials in their personal capacities.[89] The Supreme Court has recognized that certain constitutional violations do not have a statutory remedy and thus require recognition of an implied cause of action in order to discourage the violation and compensate the victim.[90] In the over 40 years since *Bivens*, the Supreme Court has expressly extended it only twice: for employment discrimination under the Due Process Clause and for Eighth Amendment violations by prison officials.[91] In both instances, the Court implied the *Bivens* remedy in very narrow circumstances, and elsewhere it has "responded cautiously" to requests for a *Bivens* remedy because "implied causes of action are disfavored."[92] The Court has made clear that "[*Bivens*] is not an automatic entitlement" and "in most instances [such a remedy is] unjustified."[93] Courts appear loath to create *Bivens* claims when (1) an alternative process to protect the interest at issue already exists, or (2) when there are any other special factors counseling hesitation to creating the implied cause of action.[94]

While *Bivens* could allow a rejected grant applicant to sue the head of a grant-making agency (or a grant program official) for violating Due Process or Equal Protection if no other remedial avenues exist, the government will likely argue that an unsuccessful grant applicant has an alternative process to protect its interest, if at all, under the APA. This argument should be rejected, however, because the APA is only a procedural mechanism for enforcing substantive rights, and does not, in itself, confer any substantive rights.[95] Additionally, the government will likely argue that the Tucker Act is a remedial scheme barring a *Bivens* remedy.[96] Both the APA and the Tucker Act fail to provide sufficient procedural and substantive rights.[97] Even though a court might eventually hold that an unsuccessful grant applicant has another remedial avenue which provides an alternative process sufficient to protect the applicant's interest and therefore counsels against the recognition of a *Bivens*-style remedy, they can alternatively plead a claim under that remedial scheme and a *Bivens* claim in order to protect their interest until such a decision is made.

In *Ashcroft v. Iqbal*, the Supreme Court articulated that *Bivens* claims must "plausibly draw a reasonable inference that the defendant is liable for the misconduct alleged."[98] Some

courts have since interpreted *Iqbal* to require that a *Bivens* complaint allege facts that focus on the individual's actions and "suggest that defendants acted with purposeful intent . . . to violate plaintiffs' constitutional rights."[99] A *Bivens* claim is particularly well suited to disappointed applicants who have evidence (even publicly available evidence) that a particular agency or program was politicized or run with favoritism, especially where it appears this occurred at the direction of the named defendants. Based on such evidence, a disappointed applicant should be entitled to a presumption that the general politicization and/or favoritism present infected the review of his specific application.[100] An applicant need only show that the claim is true on its face and courts must give the aggrieved applicant "the benefit of all inferences that can be derived from the facts alleged."[101]

Finally, government officials also enjoy protection under the doctrine of qualified immunity.[102] *Bivens* claims can overcome this hurdle when the conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[103] The "clearly established right" test has been most frequently interpreted to protect government officials unless they knowingly violate the law.[104] Indeed, it is difficult for individuals that run federal loan and grant programs to argue that they were unaware that they should not use congressionally appropriated funds to advance their own political agenda.

Courts have not yet recognized a Due Process or Equal Protection violation when discretionary grants are awarded out of rank order, let alone the violation of a "clearly established" right. However, a federal official could be found liable for a *Bivens* claim if there is a finding of that official's politicizing the discretionary grant award process.

B. Procedural Due Process

A prospective grantee may also look to the Fifth Amendment's procedural due process protections to vindicate its claim.[105] The Due Process Clause does not bar government from intruding on protected interests, it simply requires that sufficient process is afforded before doing so.[106] A prospective grantee that believes it was denied a grant because of politicized spending would appear to have a viable claim for violation of due process because it was denied an impartial decision maker.[107] In response, the government will claim that the Supreme Court has established a "presumption of honesty and integrity" in decision makers.[108] The party claiming bias on the part of a decision maker needs to show a "disqualifying interest" to rebut the presumption.[109]

The two most common grounds for establishing a biased decision maker are when the "adjudicator has a pecuniary interest in the outcome and [when] . . . he has been the target of personal abuse or criticism from the party before him."[110] In addition to personal motivations, the Supreme Court has recognized that institutional and political pressures of public office can taint a decision maker's objectivity.[111]

This jurisprudence provides two avenues for review of politicized spending. First, in the unlikely case that a decision maker in a discretionary spending program was to give a grant to a project in which he had a financial stake, the grant would seem ripe for invalidation. Standing for such a claim would not be difficult to show if the entire decision-making process were politicized. Second, if an unsuccessful grant applicant could show that the political appointees in an agency infected the decision-making process by virtue of the institutional pressure that their dual administrative-political positions create, then he may be able to contend he was denied an impartial decision maker. As an APA claim, the remedy for either of these violations of due process would only be a reconsideration of the grantee's application by an unbiased decision maker.

V. Conclusion

While scholars have traditionally focused on the problems of agency capture by special interest groups, the rise of discretionary spending has raised a novel problem of agency capture by political influencers, namely Congress and the President. While Congress has acted to curtail its own credit-claiming opportunities with appropriations, Congress has not sought to prevent presidents or their appointees from abusing the delegation of congressional powers to the executive branch for political self-interest. While strategic plaintiffs and engaged courts may find a remedy to agency political capture via the Administrative Procedure Act, the Tucker Act, implied contractual duties, or constitutional theories, the need for Congress to provide additional avenues for redress is clear.

Endnotes

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5 *See, e.g.*, 31 U.S.C. § 6301(3) ("promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements.").

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11 Frances Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Benefits*, 47 Am. J. Pol. Sci. 714, 715 (2003).

12 *Id*. at 726.

13 *See* Lachlan Markay, *'Buying' House Votes for Unpopular Legislation*, Heritage Found. Morning Bell (Feb. 21, 2012), *available at* http://blog.heritage.org/2012/02/21/morning-bell-buying-house-votes-for-unpopular-legislation/; Marlys Harris, *Are 'lettermarks' Congress' new end-around on the earmarks ban?* MinnPost (Sept. 20, 2013), *available at* www.minnpost.com/politics-policy/2013/09/are-lettermarks-congress-new-end-around-earmarks-ban (explaining that "lettermarking" is where members of Congress write executive branch officials and "phonemarking" is where telephone calls are made in order to persuade officials to fund specific projects); Kevin Bogardus, *Keep the earmark requests coming, say some lawmakers to constituents*, The Hill (Mar. 17, 2011), *available at* http://thehill.com/business-a-lobbying/150329-keep-the-earmark-requests-coming-say-some-lawmakers-to-constituents (citing Congressman Mike Thompson's statement that "Now that the earmark ban is in place, one option is to have communities apply for federal grants. My office has been happy to help local communities as they navigate the application process, from determining eligibility to writing the grant proposal." and Senator Sherrod Brown's statement that "Any requests that our office receives are used internally to help guide the senator as he advocates for programmatic funding levels of grant requests."); Ron Nixon, *In Post-Earmark Era, Small Cities Step Up Lobbying to Fight for Federal Grants*, N.Y. Times, (Feb. 2, 2012), *available at* http://www.nytimes.com/2012/02/03/us/in-the-post-earmarks-era-small-cities-struggle-for-federal-grants.html?_r=0; Eliza Newlin Carney, *The Earmarks Paradox*, Nat'l J. (Feb. 13, 2011), *available at* http://www.nationaljournal.com/columns/rules-of-the-game/the-earmarks-paradox-20110213 ("Some argue that earmarks will now simply go underground, and that lawmakers will channel federal money to pet projects through federal grants, tax credits, and other avenues"). The foregoing examples show that executive branch earmarks are just as problematic credit-claiming opportunities as congressional earmarks.

14 Bogardus, *supra* note 13 at *id*.

15 Clinton T. Brass, Cong. Research Serv., Distribution of FY 2007 Funding for Selected Programs, Compared with Other Fiscal Years 6 (2008); *see also* 110th Cong. 1st session, Rpt. 110-187, Department of the Interior, Environment, and Related Agencies Appropriation Bill, 2008 (June 22, 2007), Supplemental Report [to accompany H.R. 2643] [Rep. Dicks, Investigators on Appropriations], Executive and Legislative Branch Projects at 15 ("Earmarking or directed spending of Federal dollars does not begin with Congress. It begins with the Executive Branch . . . The Administration, in selecting these projects, goes through a process that is the functional equivalent of earmarking").

16 Obey Press Briefing, June 11, 2007, CQ Top Docs, www.cq.com, at 10; *see also* Clinton T. Brass et al., Cong. Research Serv., Bush Administration Policy Regarding Congressionally Originated Earmarks: An Overview, CRS-4, n. 13 (2008), *available at* http://fpc.state.gov/documents/organization/110375.pdf.

17 John P. Forrester, *Public Choice Theory and Public Budgeting: Implications for the Greedy Bureaucrat*, *in* Evolving Theories of Pub. Budgeting 101-24 (John Bartle ed., 2001); Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 Am. Pol. Sci. R. 783 (2010).

18 John J. Hudak, The Politics of Federal Grants: Presidential Influence Over the Distribution of Federal Funds at 28 (2011) (Unpublished Ph.D. dissertation, Vanderbilt University), available at http://www.vanderbilt.edu/csdi/research/CSDI-WP-01-2011.pdf.

19 Smith, *supra* note 1 at *id*.

20 *Id*.

21 *Id*.

22 Alexander Bolton, *Bush Called Out for His Earmarks*, The Hill, (June 28, 2007).

23 *Id*.

24 Carol Hardy Vincent & Jim Monke, Cong. Research Serv., Earmarks Disclosed by Congress: FY 2008-2010 Regular Appropriations Bills 7 (2010).

25 *Id*. at 8.

26 *Id*. at 15.

27 Clinton T. Brass, Cong. Research Serv., Distribution of FY 2007 Funding for Selected Programs, Compared with Other Fiscal Years (2010).

28 Rob Bluey and Lachlan Markay, *Buying House Votes for Unpopular Legislation*, Heritage Found., (Feb. 21. 2012).

29 *See* Jamie Dupree, *A look at Executive Branch earmarks*, Atl. J.-Const. (July 24, 2012), *available at* http://www.ajc.com/weblogs/jamie-dupree/2012/jul/24/look-executive-branch-earmarks/. *See also* Blog, Taxpayers Protection Alliance, *The Proliferation of Executive Branch Earmarks*, http://www.protectingtaxpayers.org/index.php?blog&action=view&post_id=222 (last visited Feb. 6, 2014).

30 *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239. U.S. 441 (1915) (discussing general rulemaking standards) *and* Londoner v. City and County of Denver, 210 U.S. 373 (1908) (discussing general adjudicatory standards); *see also* Andrew F. Popper et al., Administrative Law: A Contemporary Approach 25-31 (2d ed. 2010).

31 *See* Section of Admin. Law and Regulatory Practice, Am. Bar Ass'n, A Guide to Federal Agency Adjudication § 9.02 (Michael Asimow ed.) (2003) (stating decisions regarding "grants, benefits, loans, and subsidies" are informal adjudications).

32 5 U.S.C. §§ 500-706; *see also* W. Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1123 (9th Cir. 2009).

33 5 U.S.C. § 551(13); 5 U.S.C. § 701(a). The Supreme Court has held that a decision is committed to agency discretion when "there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

34 Heckler v. Chaney, 407 U.S. 821, 830 (1985).

35 5 U.S.C. § 706(2). The Supreme Court gave more definition to this test in *Motor Vehicles Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . Normally, an agency [decision] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. 29, 43 (1983).

36 In *D.C. Federation of Civic Ass'ns v. Volpe*, the D.C. Circuit Court of Appeals found that the Secretary of Transportation moved a bridge project forward too quickly because of undue pressure from a member of Congress. 459 F.2d 1231 (D.C. Cir. 1972). The court refused to allow the action to stand because "extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based." *Id*. at 1246.

37 *See id*. *Compare* Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1546 (9th Cir. 1993) (where the Ninth Circuit held that political interference in a formal adjudication violated the APA) *and* ATX, Inc. v. U.S. Dep't of Transp., 41 F.3d 1522, 1527 (D.C. Cir. 1994) (where the D.C. Circuit found political pressure did influence the decision maker but instead focused not on the content of the political pressure but on "the nexus between the pressure and the actual decision maker.").

38 Aera Energy LLC v. Salazar, 642 F.3d 212, 222 (D.C. Cir. 2012). In *Aera Energy LLC*, the D.C. Circuit upheld a regional director's politicized decision to exclude certain oil deposits from a leasing scheme because the director admitted that if there was no political influence then he would have *included* the deposits based on criteria not in the statute. The court reasoned that when politics infects a decision, the remedy is not to simply provide the plaintiff with the opposite decision, but instead to remand the decision to an unbiased appeals board or administrative law judge. *Id*. at 218.

39 *Id*. at 220 (internal brackets and quotation marks omitted) (citing Koniag, Inc., Uyak v. Andrus, 580 F.2d 601, 611 (D.C. Cir. 1978)).

40 *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2380 (2001) ("A revised doctrine would acknowledge and, indeed, promote

an alternative vision centered on the political leadership and accountability provided by the President. This approach, similar to the one I have considered in discussing the *Chevron* doctrine, would relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question").

41 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

42 Kagan, *supra* note 40 at 2380; *see also* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181 (1986). Similarly, Yale Law Professor Kathryn Watts urged the courts to consider "the content and form of political influence" and engage in line drawing between "between permissible and impermissible political influences" because "not all political influences should be treated equal." Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 83 (2009); *see also* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich L. Rev. 1127 (2010). Watts advised courts to distinguish between "valid 'political' factors . . . [such as] political actors that speak to policy judgments or value-laden judgments [and less-valid] raw partisan politics." *Id.*

43 *Chevron*, 467 U.S. at 855-866 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

44 Am. Library Ass'n v. FCC, 406 F.3d 689, 691 (D.C. Cir. 2005) ("It is axiomatic that administrative agencies may . . . [act] only pursuant to authority delegated to them by Congress.").

45 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

46 5 U.S.C. § 702.

47 5 U.S.C. § 701(a)(2).

48 Higher Education Opportunity Act, Pub. L. No. 110-315, § 404(a), 122 Stat. 3078, 3206 (2008).

49 *See* Motor Vehicles Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29, 43 (1983) (*see State Farm* test supra note 35.

50 Grant Reform and New Transparency Act of 2013 (GRANT Act), H.R. 3316, 113th Cong. (2013).

51 *Id.* at § 7402(b).

52 *Id.* at § 7404(d)(2)(C).

53 *Id.* at § 7404(d)(2)(D).

54 *See* Mendelson, *supra* note 42 at 1163; Nicholas Jimenez, Note, *Controlling Administrative Politics with Sunshine by Expanding the* Aera Energy v. Salazar *Principles*, 39 Ecology L.Q. 345, 369 (2012).

55 42 U.S.C. § 7607(D); Jimenez, *supra* note 54 at 369.

56 Mendelson, *supra* note 42 at 1164.

57 Gray v. Bell, 712 F.2d 490, 506-507 (D.C. Cir. 1983).

58 28 U.S.C. § 1491; *see* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602, 606-07 (2003).

59 28 U.S.C. § 1491(a)(1); *see* Sisk, *supra* note 58 at 612.

60 In *Pennsylvania Department of Public Welfare v. United States*, the court found that a well-pled complaint from a grant recipient alleging the existence of an implied contract with the agency could survive a jurisdictional challenge.

48 Fed. Cl. 785, 786 (2001). The plaintiff lost on the merits because it was unable to show that the grant agent had authority to bind the government in the manner plaintiff alleged. *Id.* at 787-89. *Compare to Thermalon Industries, LTD. v. United States*, where the plaintiff was able to survive a motion to dismiss on Tucker Act jurisdiction by showing that a research grant satisfied all of the elements of a contract. 34 Fed. Cl. 411 (1995).

61 U.S. Gov't Accountability Office, GAO-06-382SP, Principles of Federal Appropriations Law Third Edition, Volume II at 10-9 (hereinafter Red Book).

62 *Id.* at 10-12.

63 *Id.* at 10-6 to -8.

64 *See* Heyer Products Co. v. United States, 177 F. Supp. 251, 252 (Ct. Cl. 1959); XP Vehicles, Inc., v. U.S. Dep't of Energy, No. 13-37 (D.D.C. filed Jan. 10, 2013); XP Vehicles, Inc. v. United States, No. 12-774 (Fed. Cl. filed Nov. 14, 2012).

65 17A Am. Jur. 2d *Contracts* §§ 12-18 (2013) (discussing express, implied, and constructive contracts).

66 United States v. John C. Grimberg Co., Inc. 702 F.2d 1362, 1367 (Fed. Cir. 1983).

67 28 U.S.C. §§ 1491(b)(1), (4).

68 Ramcor Servs. Group v. United States, 41 Fed. Cl. 264, 268 (1998); *see also* MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503, 523-524 (2011) (citing 48 C.F.R. § 1.602-2(b) (explaining that this implied duty, as applied to contracting officers, is now codified by regulation)).

69 In *Heyer Products Co. v. United States*, the court held that when the government issues solicitations for contract bids, it "impliedly promise[s] that it [will] give honest and fair consideration to all bids received and [will] not reject any one of them arbitrarily or capriciously" and that it will use "its honest judgment" when doing so. 177 F. Supp. 251, 252 (Ct. Cl. 1959); *see also* New Am. Shipbuilders, Inc. v. United States 871 F.2d 1077, 1079 (Fed. Cl. 1989).

70 Keco Indus., Inc. v. United States, 492 F.2d 1200, 1205 (Ct. Cl. 1974) (emphasis added) (citing *Heyer Prod. Co. v. Unites States*, 140 F. Supp. 409 (Ct. Cl. 1956); Cont'l Bus. Enter. v. United States, 452 F. 2d 1016 (Ct. Cl. 1971)).

71 *Keco Indus*. 492 F.2d at 1205.

72 *Id.*

73 *Id.* (citing Robert F. Simmons & Assocs. v. United States, 360 F. 2d 962 (Ct. Cl. 1966) (discussing an agency's discretion to reject all bids without breaching the implied duty to consider bids fairly)).

74 585 F.2d 493 (Ct. Cl. 1978).

75 *Id.* at 495.

76 *Id.* at 499.

77 Second Amended Verified Complaint at 6, XP Vehicles, Inc. v. United States, Case No. 12-774 (Fed. Cl. filed Oct. 16, 2013).

78 In *NKF Engineering v. United States*, the court held that "a breach occurs . . . if the contracting agency acts in an arbitrary and capricious, *i.e.*, irrational or unreasonable, manner . . . ." 805 F.2d 372, 375-76 (Fed. Cir. 1986) (citing Nat'l Forge Co. v. United States, 779 F.2d 665, 667 (Fed. Cir. 1985); CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1573 (Fed. Cir. 1983); Burroughs Corp. v. United States, 617 F.2d 590, 597 (Ct. Cl. 1980); *Keco Indus*., 492 F.2d at 1203-04).

79 In *Keco Industries, Inc. v. United States*, the court found prima facie bad faith when an agency "accepts a bid knowing that costly changes will be required" because of the competitor's undue advantage. 492 F.2d 1200, 1205 (Ct. Cl. 1974).

80 *Id.* (citing *Cont'l Bus. Enter*., 452 F. 2d at 1021).

81 *Keco Indus*., 492 F.2d at 1204 (citing *Cont'l Bus. Enter*., 452 F. 2d at 1021; Keco Indus., Inc. v. United States, 428 F. 2d 1233, 1240 (Ct. Cl. 1970)).

82 *Keco Indus*., 492 F.2d at 1204.

83 *Id. But cf. NFK Eng'g,* 805 F.2d 372 (1986) (courts did not find a breach of the implied duty when the Naval Sea Systems Command rejected a bid based on the appearance of impropriety raised by a contracting agent taking a job with one of the bidders).

84 An implied-in-fact contract is an actual, not constructive, contract, but

one that is formed through the parties' conduct, not a written document. 17A Am. Jur. 2d *Contracts* §§ 12-18 (2013); *see also* Hercules, Inc. v. United States, 516 U.S. 417, 423-24 (1996).

85 Greer v. United States, **No. 07-123C,** 2007 U.S. Claims LEXIS 469 at *5 (Fed. Cl. Aug. 1, 2007) (internal brackets and quotation marks omitted) (citing Anderson v. United States, 73 Fed. Cl. 199, 201 (2006); *see also* New Am. Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1080 (Fed. Cir. 1989) (stating "Oral assurances do not produce a contract implied-in-fact until all the steps have been taken that the agency procedure requires; until then, there is no intent to be bound. Thus, it is irrelevant if the oral assurances emanate from the very official who will have authority at the proper time, to sign the contract or grant.").

86 A contract is not binding unless there is consideration that burdens and benefits both parties. 17A Am. Jur. 2d *Contracts* § 102 (2013).

87 Red Book, *supra* note 61 at 10-9. However, consider that the majority of federal grants go to charitable organizations, which receive their tax-exempt status in part because they "lessen the burden on government" by providing a service the government may otherwise have to provide. *See* Robert Louthian & Amy Henchey, *Lessening the Burdens of Government*, 1993 EO CPE Text, *available at* http://www.irs.gov/pub/irs-tege/eotopicb93.pdf; *see also Instrumentalities – Lessening the Burdens of Government*, 1984 EO CPE Text at 17, *available at* http://www.irs.gov/pub/irs-tege/eotopicl84.pdf ("there are . . . numerous examples of situations in which an organization was held to be charitable even though it fulfilled no charitable purpose beyond relieving the burdens of government.").

88 Axion Corp. v. United States, 68 Fed. Cl. 468, 476 (2005).

89 In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court held that an implied cause of action could be asserted against federal agents who violated the Fourth Amendment by conducting an unreasonable search and seizure. 403 U.S. 388 (1971).

90 42 U.S.C. § 1983 allows individuals to sue state or local officials who deprive them of rights protected under federal law. Until the Court's decision in *Bivens*, however, there was no similar remedy against deprivations of rights by federal officials.

91 Davis v. Passman, 442 U.S. 228 (1979) (employment discrimination); Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment violations).

92 Schweiker v. Chilicky, 487 U.S. 412, 421 (1988); Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

93 Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (no *Bivens* remedy for retaliation against exercise of property rights); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 66-74 (no Bivens remedy for mistreatment of inmate in corporate halfway house); FDIC v. Meyer, 510 U.S. 471, 473, 483-86 (1994) (no *Bivens* remedy for suit against federal agency); *Chilicky*, 487 U.S. at 420-29 (no *Bivens* remedy for denial of disability benefits); Chappell v. Wallace, 462 U.S. 296, 297-305 (1983) (no *Bivens* remedy for harms suffered by military personnel through activity incident to service); Bush v. Lucas, 462 U.S. 367, 368, 373-90 (1983) (no *Bivens* remedy for First Amendment violations arising in federal-employment context); Minneci v. Pollard, 132 S. Ct. 617 (2011) (no *Bivens* remedy against privately-employed prison guards).

94 *See* Davis, 442 U.S. at 245; *Bivens*, 403 U.S. at 396.

95 Navab-Safavi v. Broad. Bd., 650 F. Supp. 2d 40, 66 (D.D.C. 2009), *aff'd*, 637 F.3d. 311 (D.C. Cir. 2011).

96 *See* Janicki Logging Co. v. Mateer, 42 F.3d 561, 564 (9th Cir. 1994); Evers v. Astrue, 536 F.3d 651, 661 (7th Cir. 2008).

97 *Navab-Safavi*, 650 F. Supp. 2d at 71.

98 *Iqbal*, 556 U.S. at 678.

99 Klay v. Panetta, 924 F. Supp. 2d 8, 21-22 (D.D.C. 2013).

100 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)).

101 Aref v. Holder, 2013 U.S. Dist. LEXIS 97510, No. 10-539, at *31 (D.D.C. July 12, 2013).

102 Harlow v. Fitzgerald, 457 U.S. 800 (1982).

103 *Id*. at 818. In *Saucier v. Katz*, the Supreme Court established that courts should first consider whether a constitutional right was violated, and second whether the right was clearly established at the time it was violated. 553 U.S. 194, 200-202 (2001).

104 Malley v. Briggs, 475 U.S. 335, 341 (1986).

105 In order to raise a claim under procedural due process, a plaintiff must first show a violation of a recognized interest in life, liberty, or property. The liberty interest is the most promising avenue for a prospective grantee when he believes has been discriminated against either because he did not support the current administration or supports the opposing political party. The Court has also recognized that just because an inmate has lost some physical liberty due to incarceration, he does not sacrifice his liberty interests for purposes of a procedural due process claim; *see* Vitek v. Jones, 445 U.S. 480, 492-93 (1980). In *Bolling v. Sharpe*, the Court noted that although it had not "assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Liberty under law extends to the full range of conduct which the individual is free to pursue . . . ." United States. v. Guest, 383 U.S. 745, 758 (1966). There are several liberty interests that courts will recognize in a procedural due process claim. The right to interstate travel is a well-recognized constitutional right that implicates a liberty interest. Wisconsin v Constantineau 400 U.S. 433 (1971). In some cases, government harming a citizen's reputation will constitute a violation of a liberty interest if that reputational harm implicates a different constitutional right. However, pure reputational harm alone will not suffice. "Injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (citing Paul v. Davis, 424 U.S. 693 (1976)). Equal protection of the laws is also a protected liberty interest. In *United States v. Windsor*, the Court wrote that the "liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." 133 S. Ct. 2675, 2695 (2013).

106 In *Goldberg v. Kelly*, the Court broadly described the types of process that are due when protected interests are threatened. 397 U.S. 254 (1970). They include: proper notice; an opportunity to participate in the process; an opportunity present a defense by confronting adverse witnesses and rebutting evidence; retaining counsel; maintaining a record of the proceedings; and an impartial decision maker. *Id*. Subsequently, in *Matthews v. Eldridge*, the Court classified the three-part test that it would use when determining whether the amount of process was sufficient. 424 U.S. 319 (1976). First, the Court will examine:

> the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The *Goldberg* list includes the types of process that are due; the *Matthews* list is used to determine how those factors were applied.

107 NEC Corp. v. United States, 151 F.3d 1361, 1371 (Fed. Cir. 1998) ("The right to an impartial decision maker is unquestionably an aspect of procedural due process").

108 Withrow v. Larkin, 421 U.S. 35, 47 (1975).

109 Wolkenstein v. Reville, 694 F.2d 35, 42 (2d Cir. 1982).

110 *Withrow*, 421 U.S. at 47. For example, in *Aetna Life Insurance Co. v. Lavoie*, the U.S. Supreme Court vacated an Alabama Supreme Court decision against an insurance company because one of the Alabama justices had a pending legal action against the insurance company and was so biased as to make his participation unjustified. 475 U.S. 813 (1986).

111 In *Ward v. Monroeville*, the Court considered an Ohio statute that empowered mayors to act as judges for certain traffic offenses. 409 U.S. 57 (1972). While the Court did not object to the melding of executive and judicial functions, it found that the mayor's "responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id*. at 60. This institutional pressure on one official who "perforce occupies two practically and seriously inconsistent positions, one partisan and

the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.* (citing Tumey v. Ohio, 273 U.S. 510, 534 (1927).

The Social Cost of Carbon

By Susan E. Dudley & Brian F. Mannix*

In May 2013, the White House released a revised Technical Support Document (TSD) with a new estimate of the "social cost of carbon" (SCC), to be used by various agencies when evaluating the benefits of emissions regulations, energy efficiency standards, renewable fuel mandates, technology subsidies, and other policies intended to mitigate global warming. Federal agencies immediately began using the revised SCC to make regulatory decisions, prompting objections from the public and requests for an opportunity to comment on the SCC and the underlying models and analyses. On November 1, 2013, the White House released updated values for the SCC, and on November 26 invited the public to comment.

This article is based on a comment we filed on the public record, which made four points:

- First, we endorsed the administration's effort to arrive at a uniform SCC, to help ensure at least internal consistency across a portfolio of policies directed at reducing carbon emissions.
- Second, we applauded the Office of Management and Budget's (OMB's) effort to seek public comment on the TSD, and urged the administration to follow through with scientific peer review and with other measures to ensure transparency in regulatory decisions.
- Third, we cautioned that the task of estimating the SCC was undertaken with an apparent bias that needs to be corrected before it can be taken as objective.
- Finally, we pointed out that the logical next step is not, contrary to the subtitle of the TSD, for regulatory agencies to incorporate the SCC into Regulatory Impact Analyses (RIAs). Rather, the next step is to seek an international consensus on the value of the SCC and to negotiate a coordinated global policy response, which is the only way that the theoretical benefits of government actions to reduce global carbon emissions can be translated into actual results.

I. The Rationale for a Uniform SCC

President Obama has publicly committed to addressing climate change through an ambitious regulatory agenda, to be undertaken by multiple federal agencies, using a wide range of existing statutory authorities. While the merits of this climate agenda as a whole are debatable, the use of a unified SCC to impose some order on its components is sensible. The SCC summarizes in a single number (more properly, a range of numbers) a vast array of information derived from scientific and economic research and modeling. All of this information is subject to disagreement, and the relationships embedded in the calculation of the SCC are extraordinarily complex, presenting a daunting challenge to anyone trying to arrive at a consensus figure. Nonetheless, it is worthwhile to try. The SCC may appear to be a gross oversimplification of a complex underlying reality; but, in fact, it is the right simplification to undertake. This is because any damage that greenhouse gas emissions may inflict on global climate systems is independent of the source of the emissions. To the climate, all CO_2 molecules look the same.

This simple fact does not tell us whether it makes sense to regulate energy efficiency or subsidize certain technologies, but it does tell us that any cost-effective portfolio of climate policies will have a single implicit marginal cost of carbon. For this reason, we commend the efforts of the interagency working group to reach agreement on the value of the SCC. A common SCC should be used to evaluate climate-related regulatory mandates, grant programs, and tax policies.

Certainly it makes more sense for policymakers to focus on the SCC than to try to figure out the "right" level of greenhouse gas (GHG) emissions from every source category, or the "right" temperature of the earth, or the "right" combination of fuels and technologies to pursue as a policy goal. Indeed, past efforts to develop an international climate policy framework were doomed, in part, by their focus on negotiating the level of emissions each country would be allowed—an unproductive diplomatic zero-sum game. An international conversation about the marginal cost of carbon emissions might instead have led to some useful policy outcomes. Similarly, the domestic Renewable Fuels Standard attempts to set, in statute and regulation, the required level of various renewable transportation fuels. The program has degenerated into a rent-seeking contest for subsidies, with little or no (or negative) benefit to the environment.[1] The marginal cost of GHG emissions—the SCC—may be very difficult to calculate, but is a far more promising path to pursue than the various attempts to guess at optimal quantities of emissions or technologies.

II. The Need for an Open Public Process

The influential nature of the SCC value for a variety of future policies, as well as the difficulties and uncertainties of calculating the SCC, demand conscientious attention—including public comment and peer review—to the task of getting it right. The May 2013 SCC revision of the SCC, for example, raised the estimated social cost of U.S. CO_2 emissions by about $100 billion per year. If the U.S. were using a carbon tax to address climate change, this would amount to a trillion-dollar tax increase over the next decade. Instead, this trillion dollars will be placed on the scale of benefit-cost analysis, weighing in favor of expanded regulation by the DOE, the DOT, the EPA, and all of the other federal agencies engaged directly or indirectly in climate policy. The implications for the

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economy are troubling, particularly since—assuming they are real—few, if any, of those climate benefits will accrue to the U.S.

The process of scientific inquiry revels in debate, discussion, and discourse. Public comment and peer review of how the government selected, weighed, and combined the integrated assessment climate models, what those models mean, and the appropriateness of the various assumptions and inferences made to deal with economic and scientific uncertainty will not only add credibility to future government climate policies, but encourage advances in scientific understanding of these complex issues.

For this reason, OMB was right to seek public comment on the revised TSD. In addition to public comment, however, TSD would benefit from a rigorous peer review process. President Obama has stressed the importance of adhering to established scientific procedures, including peer review, when making policy decisions, stating:

> When scientific or technological information is considered in policy decisions, the information should be subject to well-established scientific processes, including peer review where appropriate, and each agency should appropriately and accurately reflect that information in complying with and applying relevant statutory standards.[2]

OMB itself has observed:

> Peer review is an important procedure used by the scientific community to ensure that the quality of published information. Peer review can increase the quality and credibility of the scientific information generated across the federal government.[3]

In 2004, the OMB called for more consistency in the use of peer review across government agencies, issuing an *Information Quality Bulletin for Peer Review* ("Bulletin").[4] The Bulletin implemented the Information Quality Act of 2001,[5] which directed OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information" disseminated by federal agencies.[6] It established "minimum standards for when peer review is required for scientific information and the types of peer review that should be considered by agencies in different circumstances," noting:

> The use of a transparent process, coupled with the selection of qualified and independent peer reviewers, should improve the quality of government science while promoting public confidence in the integrity of the government's scientific products.

The SCC TSD appears to be precisely the kind of information the Bulletin was intended to cover. Section I(5) of the Bulletin defines "scientific information" to include "factual inputs, data, models, analyses, technical information, or scientific assessments based on the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences."

The SCC TSD also qualifies as "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." As the Bulletin notes, "information dissemination can have a significant economic impact even if it is not part of a rulemaking."

The Bulletin explicitly covers "scientific assessments," defined as "an evaluation of a body of scientific or technical knowledge, which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information."

> These assessments include, but are not limited to, state-of-science reports; technology assessments; weight-of-evidence analyses; meta-analyses; health, safety, or ecological risk assessments; toxicological characterizations of substances; integrated assessment models; hazard determinations; or exposure assessments. Such assessments often draw upon knowledge from multiple disciplines. Typically, the data and models used in scientific assessments have already been subject to some form of peer review.

Thus, the fact that the models evaluated in the SCC TSD may have been reviewed separately does not absolve the federal government of the requirement for peer review. The Bulletin states: "prior peer review and publication is not by itself sufficient grounds for determining that no further review is necessary."

Nor does the fact that the SCC TSD combines scientific inputs with economic and social science information negate the importance of peer review. The Bulletin references the Congressional/Presidential Commission on Risk Assessment and Risk Management, which recognized that "peer review of economic and social science information should have as high a priority as peer review of health, ecological, and engineering information."[7]

As President Obama has announced his intent to address climate change through various rulemakings issued by different parts of the federal government, the use of a consistent set of SCC values can encourage more cost-effective policies than if different agencies were permitted to develop different estimates. But that makes peer review all the more important. As the Bulletin notes, "the need for rigorous peer review is greater when the information contains precedent-setting methods or models, presents conclusions that are likely to change prevailing practices, or is likely to affect policy decisions that have a significant impact."

According to the Bulletin:

> A scientific assessment is considered "highly influential" if the agency or the OIRA Administrator determines that the dissemination could have a potential impact of more than $500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest. One of the ways information can exert economic impact is through the costs or benefits of a regulation based on the disseminated information. The

> qualitative aspect of this definition may be most useful in cases where it is difficult for an agency to predict the potential economic effect of dissemination. In the context of this Bulletin, it may be either the approach used in the assessment or the interpretation of the information itself that is novel or precedent-setting. Peer review can be valuable in establishing the bounds of the scientific debate when methods or interpretations are a source of controversy among interested parties.

Peer review and public participation are necessary to support the President's commitment to "creating an unprecedented level of openness in Government."[8] According to the Bulletin:

> Whenever feasible and appropriate, the agency shall make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public. When employing a public comment process as part of the peer review, the agency shall, whenever practical, provide peer reviewers with access to public comments that address significant scientific or technical issues. To ensure that public participation does not unduly delay agency activities, the agency shall clearly specify time limits for public participation throughout the peer review process.[9]

III. The Problem of Bias

The problem of integrating climate forecasts and economic forecasts in order to estimate a net social cost of carbon is extraordinarily complex, and requires careful judgment. Other informed observers have expressed serious misgivings about the current state of the art and about the particular Integrated Assessment Models (IAMs) used in the TSD.

> These models have crucial flaws that make them close to useless as tools for policy analysis: certain inputs (e.g. the discount rate) are arbitrary, but have huge effects on the SCC estimates the models produce; the models' descriptions of the impact of climate change are completely ad hoc, with no theoretical or empirical foundation; and the models can tell us nothing about the most important driver of the SCC, the possibility of a catastrophic climate outcome. IAM-based analyses of climate policy create a perception of knowledge and precision, but that perception is illusory and misleading.[10]

We do not want to argue that the task is hopeless. There is, however, one crucial ingredient that appears to be lacking in the current effort: a balanced, good faith inquiry, without a preconceived outcome or directional bias.

For example, the choice of discount rates in the TSD does not conform to the standard guidance issued by OMB,[11] and is biased in the direction of low discount rates. Without going through all of the arguments bearing on the choice of discount rates, we will simply note that the choices at the lower end tend not to be grounded in empirical observations of consumer preferences, but rather in a prescriptive notion of what consumers *ought* to want. As one early participant in the TSD process observed, "the prescriptive approach reflects the normative judgments of the decisionmaker."[12] As such, it cannot be characterized as a true representation of public welfare as benefit-cost analysis traditionally defines it. If the Administration's intent is to issue a *prescriptive* SCC, it should be labeled as such. Moreover, it would be irresponsible to produce a prescriptive SCC, derived from the preferences of agency decisionmakers, without also producing for comparison an empirical SCC derived from observations of consumers' actual revealed preferences.

Another illustration of bias in the development of the TSD is its explicitly one-sided line of enquiry: a focus only on anthropogenic effects, and not on non-anthropogenic climate variability; only on warming, and not on cooling; only on warm-side catastrophes, and not on cold side-catastrophes; only on the 95th percentile outcomes, and not on the 5th percentile. While a similar bias is pervasive in the government-sponsored scientific literature about climate change, one would expect an economic analysis—particularly one aimed at calculating the expected value of a highly uncertain metric—to take greater pains to adopt an unbiased perspective.

Consider that, while an extra ton of carbon emissions is likely to mean that the earth's climate will be warmer in the future than it would otherwise be, that does not necessarily mean that the climate will be warmer than it is today. We know that, over long periods of time, absent any anthropogenic effect, the earth will almost certainly cool. This effect is not small and it is not seriously in doubt. Glacial advances have happened repeatedly in the past; and, absent anthropogenic warming, they will happen again, with catastrophic consequences. Absent warming, we know that glaciers will cover New York City again one day. Moreover, the effects of the glacial advance will not be limited to coastlines; we will likely lose Chicago, too, and most of Canada. We know from the historical record that such events also produce mass species extinctions by a variety of mechanisms. We cannot predict the timing of a glacial advance accurately, but even a simple regression-towards-the-mean analysis tells us that catastrophic natural cooling scenarios are not so improbable that they can safely be neglected.

Moreover, to the extent we think the SCC should "account for extreme scenarios,"[13] the cooling catastrophes become more important. To the extent we think long-term effects deserve greater weight (i.e., very low discount rates), cooling becomes a greater concern. To the extent we look for evidence of climate "tipping points" that are highly disruptive, the tipping point that triggers glacial advance cannot be ignored. If we take an honest look at the 5th percentile of climate outcomes, as well as the 95th, it becomes clear that cooling scenarios need attention. The TSD's examination of only one tail of the climate probability distribution displays a bias that could lead to serious policy mistakes.

IV. The Need for an International Consensus

While the SCC TSD purports to provide guidance to federal agencies for their use in RIAs, its use for that purpose would, at this point, be a mistake. The Interagency Working Group chose to calculate a global SCC, which purports to represent the *global* benefits of a *global* reduction in greenhouse gas emissions. Even if we accept that *global* benefits are the right ones to count (a questionable assumption), the fact remains that unilateral actions by the United States cannot be assumed to achieve a *global* reduction in emissions.

> The interagency group concluded that a global measure of the benefits from reducing US emissions is preferable to a domestic measure because the climate change issue is highly unusual in at least two respects. First, it involves a global externality. That is, emissions of most GHGs contribute to damages around the world even if they are emitted in the United States. Consequently, to address the global nature of the problem, the interagency group concluded that the SCC should incorporate the full (global) damages caused by GHG emissions. Second, climate change is a problem that the United States cannot solve alone. Even if the United States were to reduce its GHG emissions to zero, it would be insufficient to avoid substantial damages from climate change.[14]

This reasoning makes sense if, *and only if*, the intent is to use the SCC to support the development of a global system of constraining carbon emissions. It does not make sense to use that same global SCC to characterize the benefits of unilateral domestic actions that are unlikely to achieve the stated global benefits. Too often, agencies produce RIAs that estimate only the intended energy savings, without regard to usage elasticities, now commonly called "rebound effects." Moreover, the world economy is a vast competitive web of elasticities that frustrate any attempt to push a policy lever here to save a ton of carbon there. This is particularly true when the regulatory instruments in question do not have global reach. Carbon intensive production will migrate away from carbon restricting regimes, so that, to a first approximation, unilateral efforts to reduce carbon emissions can be expected to have no net effect on global carbon emissions.

It is simply not plausible to claim that any unilateral U.S. action could achieve, in practice, the global benefits that are implied by the SCC as it is calculated in the TSD. International competition will cause the domestic costs of unilateral action to be amplified, even while the global benefits evaporate. The place to use the global SCC is not—at least for now—in the RIAs of U.S. regulatory agencies, but in the international fora where climate policies are being negotiated.

There is a second reason to bring the SCC into the international negotiations on climate policy: it is likely to make those conversations more productive. As long as such talks focus on allowable quantities of carbon, they will be a proxy for international economic competition. Each delegation will be charged with ensuring that its nation gets a "fair share" of the fixed pie. Negotiations over price (the SCC) can finesse these arguments, and focus attention instead on the development of cost-effective climate policies. In contrast, negotiations over quantities (caps) necessarily will be consumed by self-interest, rather than on finding the common interest. There will be a consensus (there always is) that the U.S. should do more; but that has little to do with climate; instead, it is a reflection of economic envy, a desire to constrain U.S. growth, and a plea for compensation. Whatever the merits of these arguments, they have been, and will continue to be, a serious impediment to reaching agreement on effective forward-looking action.

With international talks focused on the SCC, the rent-seeking opportunities will be much more limited, and a serious discussion can take place on effective remedies. If other countries want to press a claim that the U.S. should pay compensation for past emissions, that can be a separate conversation, and need not hold up progress on figuring out just what common level of stringency all countries should strive for.

The absence of an international consensus is problematic for another reason. We know that the vast majority—perhaps all—of the benefits incorporated into the SCC will not accrue to the U.S. It might be possible to justify using the SCC as a guide for domestic regulations if they are being undertaken within an international framework that promises reciprocal action by other countries. Even in that context, it seems likely that the U.S. would be a net loser – bearing more of the costs of effective global action, and receiving less of the benefits. Nonetheless, with proper Congressional authorization, such actions might be justified. If carbon emissions are, as argued in the TSD, a global externality, then it makes sense that there will be winners and losers in a corrective global regulatory regime, and it is not hard to imagine the U.S. being willing to do its part despite not being a net beneficiary of a global regime.

In the absence of such reciprocal action by other nations, however, the global benefits in the SCC cannot be regarded as a legitimate entry in the benefit-cost ledger. Basing unilateral domestic action on the global SCC would put U.S. government agencies in the impossible position of acting *contrary* to the interests of U.S. citizens, using the excuse that they are acting as representative agents of foreign countries. Moreover, since the *actual* representative agents of those foreign countries have declined to take comparable action to constrain carbon emissions, U.S. agencies would be making the implausible argument that they are better representatives of foreign interests than are the governments of those countries. Domestic regulatory agencies have only those powers which the Congress has delegated to them, and the legitimacy of individual regulatory actions will have to be measured against the applicable authorizing statutes. In creating the Corporate Average Fuel Economy program at DOT, or the Appliance Efficiency Standards at DOE, for example, did Congress intend those agencies to set standards that, on behalf of silent foreign interests, affirmatively harm U.S. consumers and the U.S. economy? If not, then the global SCC cannot be used to justify such standards.

V. Conclusion

Establishing a consistent set of SCC values for use government-wide is sound public policy; it can discourage

government agencies from trying to outbid each other in their efforts to save the planet. Moreover, given the influential nature of the SCC value for a variety of future policies, as well as the difficulties and uncertainties of calculating the SCC, it is appropriate that the Administration has sought public comment on the values it plans to use. The Administration should also seek peer review of the figures and work to correct the apparent biases imbedded in the calculations before the SCC can be considered a descriptive measure suitable for positive economic analysis. The most valuable application of the SCC will be in international negotiations. By seeking an international consensus on the value of the SCC (as opposed to caps on allowable emissions levels) and negotiating of a coordinated global policy response, is the only way that the theoretical benefits of government actions to reduce global carbon emissions can be translated into actual results.

Endnotes

1 *See, e.g.*, Sofie Miller, *Crony Environmentalism*, Regulation, Spring 2013, *available at* http://object.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-14.pdf#page=1.

2 President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity (Mar. 9, 2009), *available at* http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09.

3 Office of Mgmt. & Budget, *Information Quality Bulletin for Peer Review* (Oct. 2002).

4 Memorandum From Joshua B. Bolten, Dir., Office of Mgmt. & Budget, to Heads of Dep'ts and Agencies on Issuance of OMB's Final Information Quality Bulletin for Peer Review (Dec. 16, 2004) [hereinafter Bulletin], *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf.

5 Pub. L. No. 106-554, § 515(a).

6 OMB also issued Information Quality Guidelines (October 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/iqg_oct2002.pdf.

7 Presidential/Congressional Commission on Risk Assessment and Risk Management, Risk Commission Report, Volume 2, *Risk Assessment and Risk Management in Regulatory Decision-Making*, 1997:103.

8 Memorandum from President Barack Obama to Heads of Executive Departments and Agencies on Openness and Transparency (January 21, 2009), *available at* http://www2.gwu.edu/~nsarchiv/news/20090121/2009_transparency_memo.pdf.

9 Bulletin, *supra* note 4, at § III(5).

10 Robert Pindyck, *Climate Change Policy: What do the Models Tell Us?* (National Bureau of Economic Rsearch Working Paper No. 19244, July 2013), *available at* http://www.nber.org/papers/w19244.

11 OMB Circular A-4 references OMB Circular A-94, which "states that a real discount rate of 7 percent should be used as a base-case for regulatory analysis." Circular A-4 goes on to tell agencies "For regulatory analysis, you should provide estimates of net benefits using both 3 percent and 7 percent."

12 Michael Greenstone, Massachusetts Institute of Technology, Estimating the Social Cost of Carbon for the United States Government 32 (Nov. 2010), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0564-106.pdf/$file/EE-0564-106.pdf.

13 Interagency Working Group on Social Cost of Carbon, U.S. Goverment, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12899 29 (Feb. 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf.

14 Greenstone, *supra* note 12, at 35.

Civil Rights

History and Recent Developments in Same-Sex Marriage Litigation

*By Austin R. Nimocks**

Note from the Editor:

The purpose of this article is to provide a comprehensive national survey of recent cases regarding same-sex marriage laws. The cases span over half the states and are being litigated in both federal and state courts. We hope this article serves as a useful reference and guide to any questions you may have about the legal landscape of same-sex marriage. The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. This article presents a number of important issues, and is part of an ongoing conversation. To this end, we provide links to additional sources of information on same-sex marriage litgation.

Related Links:

- Lamda Legal, Marriage: http://www.lambdalegal.org/issues/marriage
- Freedom to Marry, States: http://www.freedomtomarry.org/states/
- American Civil Liberties Union, Freedom to Marry Cases: https://www.aclu.org/lgbt-rights/aclus-freedom-marry-cases

Introduction

In 2013, the nationwide legal debate over same-sex marriage reached a temporary crescendo at the U.S. Supreme Court. The Court heard two cases—one regarding a state marriage law, and one regarding the federal marriage law (DOMA—Defense of Marriage Act).[1] Each case presented distinct, though similar questions regarding the constitutionality of laws defining marriage as the union of one man and one woman. Scholars on both sides speculated that the Supreme Court could attempt to conclusively decide many of the questions surrounding the debate once and for all. And because of the potential gravity of the rulings, the public interest reached immense levels. Virtually every domestic and international media outlet was focused on the cases and their potential outcomes. Within the Court, over 170 total amicus briefs were filed in both cases.

The Supreme Court's rulings in June 2013 did anything but settle the issue. In the "state" case, *Hollingsworth v. Perry*, the Court never reached the merits of whether Proposition 8—California's constitutional amendment defining marriage as the union of one man and one woman—passed constitutional muster. Instead, the Court dismissed the case on standing grounds,[2] vacating the opinion of the Ninth Circuit Court of Appeals,[3] and leaving only the opinion of the district court intact.[4]

The "federal" case, *United States v. Windsor*,[5] struck down as unconstitutional section 3 of DOMA, which defined the terms "marriage" and "spouse" as referring to unions of one man and one woman for all purposes under federal law.[6] In its opinion, the Court criticized Congress for defining marriage itself, and not deferring to the definitions of the states.[7] However, it stopped short of passing constitutional judgment on state laws defining marriage in the traditional sense. Indeed, the Court expressly limited *Windsor*'s impact, stating that "[t]his opinion and its holding are confined to those lawful marriages" recognized by the states.[8]

Nevertheless, as one might expect, the absence of a merits-based resolution on *Hollingsworth*, coupled with language from the Supreme Court's decision in *Windsor*, unleashed a new wave of marriage litigation across the country. Judge Bernard Friedman of the Eastern District of Michigan, in a case challenging the constitutionality of Michigan's marriage laws, recently described the post-*Windsor* legal environment this way:

> The United States Supreme Court's recent decision in *United States v. Windsor*, No. 12-307 (U.S. Jun. 26, 2013), has provided the requisite precedential fodder for both parties to this litigation. [Marriage law defenders] will no doubt cite to the relevant paragraphs of the majority opinion espousing the state's "historic and essential authority to define the marital relation." They will couch the popular referendum that resulted in the passage of the [state marriage law] as "a proper exercise of the state's sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." After all, what could more accurately embody "the dynamics of state government in the federal system . . . to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other," than a legitimate vote of the people . . . to preserve their chosen definition of marriage in the fabric of the state constitution.

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> On the other hand, [same-sex marriage advocates] are prepared to claim *Windsor* as their own; their briefs sure to be replete with references to the newly enthroned triumvirate of *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003) and now *Windsor*. And why shouldn't they? The Supreme Court has just invalidated a federal statute on equal protection grounds because it "placed same-sex couples in an unstable position of being in a second-tier marriage." Moreover, and of particular importance to this case, the justices expressed concern that the natural consequence of such discriminatory legislation would not only lead to the relegation of same-sex relationships to a form of second-tier status, but impair the rights of "tens of thousands of children now being raised by same-sex couples" as well.[9]

The case filed in Judge Friedman's court is just one of several dozen ongoing marriage or marriage-related cases in this post-*Windsor* era. These cases span over half the states and are being litigated in both federal and state courts.

Not every lawsuit focuses on the constitutional due process and equal protection questions raised by same-sex marriage advocates in the *Hollingsworth* and *Windsor* cases. For example, several cases in state courts involve same-sex couples asking the state courts to grant them a divorce from their same-sex marriage acquired in another jurisdiction. One of the cases in federal court in Utah involves polygamy, where the stars from the reality show "Sister Wives" are challenging Utah and Congress's prohibition of the practice of polygamy as a condition of Utah's statehood.[10] And in Pennsylvania, nearly ten pending cases, spread between state and federal court, raise questions involving same-sex couples ranging from state tax liability, to the recognition of marriage licenses from other jurisdictions, to even a loss of consortium claim in a medical malpractice action. However, the vast majority of these pending cases in state and federal courts regard the essence of the post-*Windsor* struggle articulated by Judge Friedman. Additionally, many of the post-*Windsor* state and federal cases raise full faith and credit questions, asking whether states are constitutionally required to recognize the same-sex marriage licenses issued by other states.

I. *Romer*, *Lawrence*, and *Windsor*

Judge Friedman predicted that the arguments of same-sex marriage advocates would "be replete with references to the newly enthroned triumvirate of *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003) and now *Windsor*." The arguments and briefs challenging traditional marriage laws across the country frequently reference these cases and assert that their combined force requires the constitutional embrace of same-sex marriage. But what exactly is this "triumvirate"? And for what collective proposition do these cases stand?

To many, these three cases have a topical congruence aside from the fact that they are all authored by the same man—Associate Justice Anthony Kennedy. One newspaper said that "[t]he *Windsor* opinion caps a trilogy of historic Kennedy opinions affirming gay equality."[11] Another commented that "*Windsor* marks the third time Justice Kennedy has authored a majority opinion in a groundbreaking gay rights case, and his reasoning makes clear that the prior two cases were not aberrations, as some had speculated."[12]

In *Romer v. Evans*, the Supreme Court invalidated a Colorado law that named a solitary class of persons—those who identify as gay, lesbian, or bisexual—either by "orientation, conduct, practices or relationships," and excluded them from state antidiscrimination laws.[13] The Court concluded that the statute "impos[ed] a broad and undifferentiated disability on a single named group," and that it was "born of animosity toward the class of persons affected."[14] And because "a bare . . . desire to harm a politically unpopular group," is not a rational basis,[15] the law was declared unconstitutional.

Seven years later, in *Lawrence v. Texas*, the Supreme Court struck down Texas' sodomy law, enacted in the 1970's,[16] which punished as a crime "the most private human conduct, sexual behavior, and in the most private of places, the home."[17] *Lawrence* overruled *Bowers v. Hardwick*, which held that a similar law in Georgia was *not* constitutionally infirm.[18] Justice Kennedy wrote that the *Bowers* court "misapprehended the claim of liberty there presented," finding rather that the "right to liberty under the Due Process Clause gives [citizens] the full right to engage in their conduct without intervention of the government."[19]

Justice Kennedy's opinion in *United States v. Windsor* spent several introductory pages establishing that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States," and that section 3 of DOMA was unconstitutional because the federal government invaded the "virtually exclusive province of the States."[20] The primacy of "[t]he State's power in defining the marital relation is of central relevance in this case."[21] Some States have elected to "use[their] historic and essential authority to define the marital relation" to include same-sex couples, while others have not.[22] The federal government thus erred, the Court held, in its "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" by passing a law whose "avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[23]

Romer, *Lawrence*, and *Windsor* are thus extensively cited and studied to see how the Court may rule on same-sex marriage in the future. To that end, when you factor in Justice Kennedy's express reservation in *Lawrence* (that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"), and the limited holding in *Windsor* ("This opinion and its holding are confined to those lawful marriages [created or recognized by the states]."), it might be difficult to contend that the "triumvirate" stands for the proposition that same-sex marriage is a fundamental right, or that same-sex marriage must be constitutionally imposed nationwide. However, Justice Scalia (and others that join his skepticism) isn't so convinced that the "triumvirate" will not lead to the imposition of nationwide same-sex marriage, by one path or another.[24]

Nonetheless, the legal footing upon which the

"triumvirate" may stand is this: that a law or classification is unconstitutional if it is motivated solely by animus and lacks any rational explanation for its existence. The "triumvirate" reveals that to make this determination, the Supreme Court has focused on two queries: (1) whether a law creates and/or imposes an unusual or novel disability upon the group, and (2) whether the law intrudes into states' or localities' traditional sovereign sphere.[25]

In *Romer*, the Court stressed both factors as indicating impermissible animus. There, the law's lack of precedent (a.k.a., unusual novelty) and breadth (intruding upon the prerogative of local governments) signaled its unconstitutional motive.[26] *Lawrence*, though decided on due process grounds, emphasized the unique novelty of Texas's sodomy law, as there was "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," and "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."[27] "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."[28]

Similarly, in *Windsor*, Justice Kennedy referenced the novelty of DOMA, as well as its intrusion into the "virtually exclusive province of the States."[29] DOMA "creat[ed] two contradictory marriage regimes within the same State,"[30] and "undermine[d] both the public and private significance of state-sanctioned same-sex marriages."[31] The Court concluded that Congress impermissibly enacted DOMA to "interfere with state sovereign choices about who may be married."[32]

Thus, the post-*Windsor* era of cases may be viewed through this lens—whether state marriage laws emanate exclusively from animus, as determined by the two relevant queries.

II. *Baker v. Nelson*

Apart from the "triumvirate," traditional marriage advocates counter with precedent of their own—*Baker v. Nelson*.[33] In *Baker*, a Minnesota clerk denied the issuance of a marriage license to two men. The men challenged the denial, but the Minnesota Supreme Court found that no fundamental right to marry someone of the same sex exists and that the state's marriage laws easily survive rational-basis review.[34]

The men's appeal to the U.S. Supreme Court presented three questions: (1) whether they were deprived of the right to marry under the Due Process Clause of the Fourteenth Amendment; (2) whether they were deprived of equal protection under the Fourteenth Amendment; and (3) whether they were deprived of privacy under the Ninth and Fourteenth Amendments.[35] The Supreme Court summarily dismissed the appeal, stating: "The appeal is dismissed for want of a substantial federal question."[36]

Though the summary dismissal in *Baker* is brief, it has important legal implications. Summary dismissals for want of a substantial federal question are rulings on the merits, and lower courts are "not free to disregard th[ese] pronouncement[s]."[37] "[T]he lower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs them that they are not."[38] And summary dismissals "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the dismissal.[39]

Traditional marriage defenders contend that *Baker* forecloses current federal challenges since the questions presented in both *Baker* and post-*Windsor* challenges are identical.[40] But same-sex marriage proponents note that "if the [Supreme] Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise.*"[41] The Supreme Court never defined what exactly constituted a "doctrinal development."

In *Windsor*, the Second Circuit stated that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence."[42] As that Court explained:

> When *Baker* was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."[43]

But the First Circuit concluded in 2012 that, notwithstanding *Romer* and *Lawrence*, *Baker* definitively forecloses arguments that "presume or rest on a constitutional right to same-sex marriage."[44] Four district courts reached the same conclusion.[45]

But even if "doctrinal developments" exist, the Supreme Court said in *Hicks* "that the lower courts are bound by summary decisions by this Court '*until such time as the [Supreme] Court informs them that they are not*.'"[46] In other words, lower courts don't get to make the "doctrinal developments" determination themselves. Marriage defenders thus maintain that since the Supreme Court has yet to expressly overruled *Baker*, it remains applicable.

But apart from what hasn't been said by the Supreme Court, does the "triumvirate" represent the type of "doctrinal development" that dismisses *Baker*'s impact? The District Court of Nevada recently sought to balance developments against *Baker* in addressing the pending constitutional challenge to Nevada's marriage laws:

> The equal protection claim is the same in this case as it was in *Baker*, i.e., whether the Equal Protection Clause prevents a state from refusing to permit same-sex marriages. There is an additional line of argument potentially applicable in this case based upon *Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996), concerning the withdrawal of existing rights or a broad, sweeping change to a minority group's legal status. A *Romer*-type analysis is not precluded by *Baker*, because the *Romer* doctrine was not created until after *Baker* was decided. But the traditional equal protection claim is precluded . . . .[47]

Thus, the District Court of Nevada concluded that *Baker*,

on the one hand, and *Romer*, on the other hand, establish two different equal protection methodologies. And while the First Circuit and district courts in Nevada, Hawaii, Florida, and Washington acknowledge *Baker* as controlling same-sex marriage challenges to state marriage laws, district courts in Michigan,[48] Oklahoma,[49] Texas,[50] Utah,[51] Virginia,[52] and West Virginia[53] found that "doctrinal developments" make *Baker* no longer applicable. The 10th Circuit may soon be the first court of appeal to opine on *Baker*'s applicability.

III. *Loving v. Virginia*

Another case that factors into the post-*Windsor* world is *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, the Supreme Court struck down Virginia's miscegenation law that precluded whites from marrying anyone of color. Though about 37 states once had these laws, many were repealed and Virginia's law was one of just 16 remaining at the time. And to the extent that *Loving* may have furthered the cause of same-sex marriage at the time, the *Baker* decision in 1972 (just five years later) seemed to negate it.

Nevertheless, in *Windsor*, the Supreme Court affirmed that the States' regulation of domestic relations was its virtually exclusive province "[s]ubject to certain constitutional guarantees."[54] Thus, same-sex marriage advocates include *Loving* in their repertoire of authority as supporting their right to marry the one they choose.[55] Thus far, some federal courts have embraced this view of *Loving*.[56] However, the *Loving* court stated that marriage is "fundamental to our very existence and survival," affirming its gendered nature and historical procreative purpose.[57] Thus, while *Loving* appears to stand for a limited right to marry the opposite-sex partner of your choice, whether its ultimate import is broader remains to be seen.

IV. The Post-*Windsor* Era

With the Supreme Court failing to reach the merits in *Hollingsworth* last year, there remains no federal appellate court ruling on the constitutionality of state marriage laws. In an effort to get one, however, and seemingly put the constitutionality of state marriage laws back before the Supreme Court as soon as possible, two things are happening.

First, same-sex marriage proponents filed lawsuits everywhere—not just in federal circuits thought most friendly to their cause. Of the thirteen federal circuits, ten are available for same-sex marriage challenges,[58] and cases have been filed in all of them.

Second, advocates for same-sex marriage are moving with great speed and seeking quick trial court dispositions. As examples, one case instituted a trial on February 25, 2014—a mere 8 months after *Windsor* was decided.[59] Another case completed summary judgment briefing just over 3 months after it was filed.[60] Appealable rulings by federal district courts were made in ten cases,[61] oral arguments have been held or scheduled in the 4th, 9th, and 10th Circuits, and many other cases are soon expected to produce appealable rulings on a variety of dispositive motions, meaning that several appeals will be docketed yet in 2014.

And although the litigation is voluminous and geographically diverse, the nature of the various cases, and the arguments presented in each one, do not vary significantly. The arguments made in the post-*Windsor* federal challenges are primarily threefold: (1) substantive due process; (2) equal protection; and (3) full faith and credit.

A. Substantive Due Process

Harris v. McDonnell is a class action lawsuit filed on behalf of two same-sex couples and "all others similarly situated."[62] The suit contends that "[e]ach member of the Plaintiff Class either has been unable to marry his or her same-sex partner in Virginia because of the marriage ban or validly married a partner of the same sex in another jurisdiction but is treated as a legal stranger to his or her spouse under Virginia law."[63] Until recently, the class action approach to marriage litigation has not been significantly utilized. However, a couple of other class action cases have been filed in other jurisdictions.[64]

The *Harris* plaintiffs have since intervened and joined the appeal in the Fourth Circuit in *Bostic v. Rainey*, a similar non-class action case from the Eastern District of Virginia involving two same-sex couples. The plaintiffs in both of these Virginia cases claim that their inability to marry someone of the same sex deprives them of substantive due process under the Fourteenth Amendment.[65] Advocates of traditional marriage contend that there exists no fundamental right to same-sex marriage, and that one should not be recognized since same-sex marriage is not deeply rooted within the history and traditions of our nation.[66] And the Supreme Court said as much in *Windsor*, acknowledging that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[67]

However, plaintiffs in *Harris* and *Bostic* contend that they are not advocating for the creation or recognition of a new fundamental right, but to exercise the *existing* fundamental right to marry, to wit:

> The right to marry the unique person of one's choice and to direct the course of one's life in this intimate realm without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Defendants' actions to enforce the marriage ban directly and impermissibly infringe Plaintiffs' choice of whom to marry, interfering with a core, life-altering, and intimate personal choice.[68]

And this claim for a fundamental right to marry the person of one's choosing is not unique to Virginia. The claims to a fundamental right to marry a person of the same sex are prolific, as they have been made in almost every single pending federal lawsuit. For example, in the Western District of Wisconsin, plaintiffs claim that the marriage laws deprive them of "the fundamental right to marry the person of one's choice and related constitutional rights to liberty, dignity, autonomy, family integrity, and association."[69] In the Eastern District of Michigan, plaintiffs claim:

> If marriage is a fundamental right, then logic and emerging Supreme Court precedent dictate that the legitimacy of two adults' love for one another is the same in the eyes of the law regardless of sexual orientation and that the rights of consenting adults to marry and to form a family, should they choose to do so, do not depend on sexual orientation.[70]

Thus, plaintiffs argue that the martial desires of same-sex couples are encompassed *within* the existing fundamental right to marry, and do not encompass a new fundamental right.

Potentially obstructing the recognition of a fundamental right for same-sex couples to be issued marriage licenses, however, lays several obstacles. First, in identifying fundamental rights, the Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[71] "The right to marry the unique person of one's choice," in those express terms, has never been deeply rooted within our country's history and tradition, even within the realm of opposite-sex couples. Restrictions on who one may marry have always included, *e.g.*, age and consanguinity, so any right to marry *per se* the "person of one's choice" is arguably non-existent, much less deeply rooted.

Second, the right to marry cannot seemingly survive in this broad, abstract manner, but requires "careful description" resting on "concrete examples" of how the right has been instantiated.[72] Even in *Lawrence*, where the right to sexual intimacy was arguably broadened, it was nonetheless restricted by age to consenting adults.[73] To date, every Supreme Court case involving the fundamental right to marry regarded opposite-sex couples, and none of those cases even present dictum that expressly relates to same-sex couples.[74]

Third, whether same-sex relationships fit within the fundamental right to marry is at odds with *Baker*.

Finally, scholars contend that it has been 40 years since the Supreme Court last recognized a new fundamental right.[75] Reversing the gravity of this trend may be difficult to do. Nonetheless, whether same-sex marriage is enveloped within the fundamental right to marry is an active question, as the most recent federal district courts to opine on the matter have been unable to reach a consensus.[76]

B. Equal Protection

In the cases making equal protection challenges, same-sex couples claim that the state's enforcement and defense of its laws defining marriage as the union of one man and one woman violate the Equal Protection Clause of the Fourteenth Amendment.[77]

In most of the post-*Windsor* cases, the equal protection claims regard the categories of both sex (or gender) and sexual orientation.[78] But before March 26, 2013, the argument that marriage laws discriminated unconstitutionally based on sex or gender was virtually dead. As stated in 1999 by the Vermont Supreme Court, "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex."[79] The Vermont Supreme Court also concluded that "there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct."[80] The only contrary authority, *from any appellate court*, came from the Hawaii Supreme Court in 1993.[81] Prior to *Windsor*, all other federal and state courts rejected the proposition that marriage laws discriminate on the basis of gender or sex.[82]

On March 26, 2013, Justice Anthony Kennedy, during the oral argument in *Hollingsworth v. Perry*, reignited the discussion by asking whether marriage laws implicate "gender-based classification[s]," and noting that it is "a difficult question that I've been trying to wrestle with."[83]

And if Justice Kennedy is still wrestling with that question, then notwithstanding the authorities against the proposition that marriage laws discriminate on the basis of sex, same-sex marriage advocates will continue to make that argument.[84] However, only the District Court of Utah, in its post-*Windsor* challenge, has determined that "the [marriage] law differentiates on the basis of sex" and "discriminates on the basis of sexual identity without a rational reason to do so."[85] Thus, apart from this single conclusion, the real equal protection struggle in these cases seems to regard sexual orientation and determining if marriage laws unconstitutionally discriminate on the basis of sexual orientation.

In virtually every case, same-sex marriage advocates contend that sexual orientation should be analyzed under heightened scrutiny.[86] However, strict scrutiny has been applied only to laws regarding race, alienage, or national origin classifications.[87] And only classifications based on sex or illegitimacy have received intermediate scrutiny.[88]

Moreover, the Supreme Court has used only rational basis review with sexual orientation classifications.[89] In *Windsor*, though the Second Circuit applied intermediate scrutiny for sexual orientation, the Supreme Court did not.[90] The First Circuit also rejected the application of intermediate scrutiny for sexual orientation in its DOMA case.[91] Indeed, before the Second Circuit's decision in *Windsor*, every federal circuit that addressed sexual orientation classifications applied rational basis review.[92]

Nevertheless, even assuming the application of rational basis review, it is unclear what analysis should be deployed: a traditional or classic equal protection analysis, vs. courts looking only at the animus-based approach grounded within *Romer*, vs. applying both.[93]

For advocates of same-sex marriage, the "triumvirate" approach appears to be the most popular to this point. As an example, in one brief, same-sex marriage advocates contend that in light of *Romer*, *Lawrence,* and *Windsor*, there is no principled or rational basis for arguing that gays and lesbians do not have the same rights as heterosexuals.[94]

Predictably, the arguments of marriage defenders focus on the fact that marriage laws between one man and one woman, created long ago, cannot be said to have been enacted with an animosity towards same-sex couples. The

Virginia Attorney General argued that:

> The common law definition of marriage as between a man and a woman, husband and wife,—which the 1975 legislation did not change—in turn is too old to have been the product of bare animus because, as the *Windsor* majority noted, no one would have thought same-sex marriage possible at the time the definition was adopted.[95]

This argument, of course, accompanies a plethora of arguments defending the importance, necessity, or rational basis of laws defining marriage as between one man and one woman.[96] Many of these arguments are captured in resources cited by Justice Alito in his *Windsor* dissent,[97] as well as many of the briefs filed by traditional marriage defenders in pending cases.[98]

But same-sex marriage advocates are sure to note that unconstitutional animus may not necessarily contain "malicious ill will."[99] Instead of a "bare . . . desire to harm a politically unpopular group,"[100] "negative attitudes" may suffice,[101] as well as an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves."[102]

Traditional marriage advocates would also suggest that while nobody disputes that prevailing attitudes have been negative towards certain groups over the course of our country's history (religious, racial, or otherwise), to prevail in their claims, advocates of same-sex marriage would seemingly need to demonstrate that, as to marriage, *both* the incepting and continuing purposes behind *all* marriage laws, and not just recent amendments, possess no legitimate reason (rational basis) beyond a "bare . . . desire to harm a politically unpopular group." However, most of the recent district court opinions on the constitutionality of state marriage laws have not found them to survive rational basis review. Whether the courts of appeal will view matters the same way remains to be seen.

C. Full Faith and Credit & Section 2 of DOMA

Palladino v. Corbett, pending in the Eastern District of Pennsylvania, is demonstrative of the full faith and credit issues raised in many of the pending cases across the country. Filed on Sept. 26, 2013, the plaintiffs are a same-sex couple with a marriage license from Massachusetts. They challenge the constitutionality of Pennsylvania's refusal to recognize their legal relationship.[103] Similar claims are pending in a variety of other cases across the country.[104] *Palladino* and a handful of other cases, like *Bradacs v. Haley*, No. 13-cv-02351 (D. S.C.), present only the exclusive question of whether one state must recognize the same-sex marriage of another state. However, most of the post-*Windsor* lawsuits already referenced are hybrid cases, presenting both (1) a claim for the issuance of marriage licenses to some plaintiffs, and (2) a claim that the existing marriage licenses of other plaintiffs from different jurisdictions be recognized by the state at issue.

As to the claims that existing same-sex marriages be recognized, two unique issues are presented in these challenges. First regards whether section 2 of DOMA was a valid exercise of Congress's Article IV authority. Section 2, unaddressed by *Windsor*, reads:

> **Section 2. Powers reserved to the states**
>
> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

The Full Faith and Credit Clause of the U.S. Constitution provides as follows:

> Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.*[105]

The second sentence provides the basis for section 2 of DOMA. When passed, some scholars believed that section 2 was a valid exercise of Congress's power, though ultimately unnecessary as it merely affirmed the status quo—that states did not need to recognize same-sex marriages from other states.[106] Others believed that section 2 of DOMA was an unconstitutional exercise of Congress's power.[107]

If section 2 of DOMA is upheld as constitutional, then the efforts to force states to recognize the same-sex marriages of other states may be short-lived. But if section 2 of DOMA is declared unconstitutional, that does not settle the ultimate question of whether states must recognize every marriage license of every other state. For within the realm of legal statuses affirmed by licenses, there has never been a quid pro quo. Lawyers do not expect an automatic right to practice law in one state with a license from another. The same is true even when addressing a fundamental right, like the right to bear arms. Within Virginia, for example, a resident that obtains a concealed handgun permit may carry such a weapon about the person and hidden from common observation.[108] If one crosses into Maryland, however, their Virginia license means nothing and carrying a concealed handgun without a Maryland concealed carry license is a jailable offense.[109] Thus, whether section 2 of DOMA is an unconstitutional exercise of Congress's authority, or whether a pure application of the Full Faith and Credit Clause of the U.S. Constitution requires states to recognize other states' marriage licenses remains to be seen.

On April 14, 2014, the Southern District of Ohio ruled that Ohio was required to recognize same-sex marriage licenses issued by California, Massachusetts, and New York.[110] That same court reached a similar ruling about a same-sex marriage license from Maryland.[111] However, neither of those decisions addressed the ongoing validity of section 2 of DOMA, nor the pure questions of full faith & credit regarding interstate licensure recognition, as the court concluded in both cases that "Section 2 of DOMA is not specifically before [the] Court." Similarly, though a recognition question was presented to it, the Western District of Kentucky did not address the constitutionality of

section 2 of DOMA in issuing its decision.[112] However, the Northern District of Oklahoma concluded that its plaintiffs lacked standing to challenge section 2 of DOMA because it was state law, and not federal law, that caused the plaintiffs' alleged injuries. In *Bishop*, the court concluded that "Section 2 is an entirely permissive federal law," and that "[i]t does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon non-recognizing states, and does not punish recognizing states."[113]

Complicating these questions are the grey areas of full faith and credit applied to judgments, on the one hand, and public acts, on the other hand. The Supreme Court long ago recognized and explained the necessary distinction between judgments and acts (or statutes) with respect to the Full Faith and Credit Clause. Indeed, the Court has recognized "that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy."[114]

But with respect to statutes or acts, the consideration for sovereignty is even greater, because "[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."[115] And the Court has reaffirmed that while the purpose of the Full Faith and Credit Clause:

> [W]as to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[116]

Thus statutes, as opposed to judgments, historically receive radically different treatment under the Full Faith and Credit Clause.[117]

As the appeals of the many recognition cases progress, the opinions of the courts of appeal should address more substantively these important questions and better define the shades of grey that presently define them. On the other hand, if same-sex marriage is declared to be a fundamental right under the U.S. Constitution, then recognition questions could become moot.

D. State Court Cases

State court cases demanding a right to same-sex marriage, or some form of recognition of a same-sex relationship, exist in several states across the country. While some of these cases have the potential to be significant, their importance is presently overshadowed by the concurrent federal litigation.

Several of the pending state cases are same-sex divorce cases. Same-sex divorce cases are nothing new and were an expected legal phenomenon once Ontario began issuing marriage licenses to same-sex couples from the U.S. in 2002. Prior to the *Windsor* decision, many states had same-sex dissolution claims filed in their courts, to wit: Connecticut (*Rosengarten v. Downes*), Indiana (*Ranzy v. Chism*), Iowa (*Brown v. Perez*), Maryland (*Port v. Cowan*), Michigan (*Dubey v. Rose*), Missouri (*Sparks v. Sparks*), Nebraska (*Mueller v. Pry*), New Jersey (*Hammond v. Hammond*), New Mexico (*Haught v. Carrejo*), New York (*Sharma v. Agrawal*), Oklahoma (*O'Darling v. O'Darling*), Rhode Island (*Chambers v. Ormiston*), and Wyoming (*Christiansen v. Christiansen*).

However, these cases continue to be filed as more and more same-sex couples acquire marriage licenses but later, like many couples, see their relationships sour. The arguably leading same-sex divorce cases are pending currently before the Texas Supreme Court—*In the Matter of J.B. and H.B.* (No. 11-0024) and *Texas v. Naylor & Daly* (No. 11-0114). Both same-sex couples acquired marriage licenses in Massachusetts. Naylor and Daly successfully obtained a divorce in Texas state court, while J.B. and H.B. did not. The central question in these cases is whether the Texas state courts can exercise subject matter jurisdiction over a legal relationship that state law expressly does not recognize. This same question is also pending in Alabama (*Richmond v. Richmond*), Indiana (*Wetli v. Shaffer*), Kentucky (*Romero v. Romero*), Mississippi (*Czekala-Chatham v. Melancon*), Nebraska (*Nichols v. Nichols*), Tennessee (*Dayandante v. Dayandante*), and perhaps other jurisdictions.

Of course, not all same-sex couples that have marriage licenses from other jurisdictions are looking to divorce. Many are asking their home states to recognize that license. For example, in the Orphans Court of Northhampton County, Pennsylvania, the surviving partner of a same-sex couple with a marriage license from Connecticut is challenging the Commonwealth's imposition of an estate tax in *In re Estate of Catherine Burgi-Rios* (No. 2012-1310). In *Nelson v. Kansas Department of Revenue* (13-c-001465), same-sex couples are seeking the right to file joint tax returns. And in Kentucky, the existence of a Vermont civil union is being used as the basis for asserting the spousal privilege in a murder case in *Kentucky v. Cleary* (No. 11CR3329). And though brought in federal court under diversity jurisdiction, *Lohr v. Zehner*, 2:12-cv-00533 (M.D. Al.), is a state law wrongful death claim seeking the recognition of a same-sex survivor as a spouse under Alabama law.

Beyond the recognition of existing marriage licenses from other jurisdictions, other lawsuits are demanding some form of state recognition of unlicensed same-sex relationships. In the Alaska Supreme Court, a relationship recognition question is pending in a workers' compensation context. In *Harris v. Millennium Hotel* (No. S15230), a surviving same-sex partner of a deceased employee is challenging the state's reservation of death benefits in workers' compensation matters to only opposite-sex spouses in accordance with state law. A similar claim is pending in the District Court of Lewis and Clark County, Montana, in *Donaldson v. Montana* (Cause No. BDV-2010-702), where several same-sex couples seek not only the right to be included in the state's workers' compensation laws,

but several other statutory schemes.

In Pennsylvania, a host of same-sex relationship recognition cases are pending in state court. In *Ankey v. Alleghany* (No. GD-13-005851), the Court of Common Pleas of Alleghany County is considering a claim that employment benefits be extended to same-sex partners. In *Wolf v. Association of Podiatric Medicine and Surgery* (No. 130301079), a cohabiting same-sex couple submitted a claim for loss of consortium regarding a foot surgery. In the Pennsylvania Court of Appeals, a common law same-sex marriage is being asserted in a claim objecting to the imposition of estate taxes in *Nixon v. Pennsylvania Department of Revenue*.

Finally, several of the cases pending in state courts are virtually identical to many of the cases pending in federal court. Same-sex couples are claiming rights, under their state and/or federal constitutions, to have marriage licenses issued to them. These cases are pending in Arkansas (*Wright v. Arkansas*, Cir. Ct. of Pulaski Co., 60CV-13-2662), Colorado (*Brinkman v. Long*, Dist. Ct., Adams Co., No. 2013CV032572; *McDaniel-Miccio v. Hickenlooper*, Dist. Ct., City and Co. of Denver, 2014CV030731), Florida (*Paretov. Ruvin*, Cir. Ct., Eleventh Jud. Cir. for Miami-Dade Co., 2014-1661-CA-01), and Wyoming (*Courage v. Wyoming*, First Jud. Dist. Ct., Co. of Laramie, Docket 182, No. 262).

The cases referenced above are not an exhaustive list of the cases pending in state courts across the country. All-in-all, however, though not receiving the same level of media and public attention as the plethora of pending federal cases, the state courts across the country are brewing with litigation over the recognition and validity of same-sex relationships.

Conclusion

Shortly after the publication of this article, rulings from many federal courts of appeal are expected to further change and define the legal landscape of the arguments and legal issues articulated herein. The 10th Circuit will rule on cases from Utah and Oklahoma, the 9th Circuit will rule on a case from Nevada, the 4th Circuit will rule on cases from Virginia, the 5th Circuit will rule on a case from Texas, and the 6th Circuit will rule on cases from Ohio, Kentucky, Tennessee, and Michigan. Appeals have not been docketed in the 1st, 3rd, 7th, 8th, and 11th Circuits, but they should be in the near future. Clearly, marriage will remain a hot topic of federal and state litigation in the foreseeable future. These cases, and others, may determine important issues, such as if *Baker* forecloses marriage law opinions by lower courts and if the "triumvirate" of *Romer*, *Lawrence*, and *Windsor* requires the result that same-sex marriage advocates are demanding. Perhaps the next Supreme Court term will see another marriage case.

Endnotes

1 Pub. L. No. 104-199, 110 Stat. 2419 (1996).

2 Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

3 Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

4 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

5 United States v. Windsor, 133 S. Ct. 2675 (2013).

6 Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

7 *Windsor*, 133 S. Ct. at 2691-92.

8 *Windsor*, 133 S. Ct. at 2696.

9 Opinion and Order Denying Defendants' Motion to Dismiss Amended Complaint, DeBoer v. Snyder, 2013 WL 3466719, at *2 (E.D. Mich. July 1, 2013) (internal brackets and citations omitted).

10 Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

11 *See* Garrett Epps, *Kennedy's Marriage Ruling is About Gay Rights, Not States' Rights*, The Atlantic, June 26, 2013, http://www.theatlantic.com/national/archive/2013/06/kennedys-marriage-ruling-is-about-gay-rights-not-states-rights/277251/.

12 *See* Julie A. Nice, *And Marriage Makes Three: A Gay Rights Trilogy Secures a Legacy*, Huffington Post, July 3, 2013, http://www.huffingtonpost.com/julie-a-nice/and-marriage-makes-three-_b_3537739.html.

13 Romer v. Evans, 517 U.S. 620, 624 (1996) (internal quotation marks omitted).

14 *Id*. at 632, 634.

15 *See*, *e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

16 Lawrence v. Texas, 539 U.S. 558, 570 (2003).

17 *Id*. at 567.

18 Bowers v. Hardwick, 478 U.S. 186 (1986).

19 *Lawrence*, 539 U.S. at 567, 578. Proponents of same-sex marriage contend that the decision of whom to marry is at the core of individual autonomy and personal liberty protected by *Lawrence*. *See*, *e.g.*, Brief for Respondents at 13-14, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 648742. Conversely, advocates of traditional marriage rely heavily upon Justice Kennedy's closing note from *Lawrence* that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

20 *Windsor*, 133 S. Ct. at 2689-90, 2691 (internal quotation marks omitted).

21 *Id.* at 2692.

22 *Id.*

23 *Id.* at 2693.

24 "The penultimate sentence of the majority's opinion is a naked declaration that '[t]his opinion and its holding are confined' to those couples 'joined in same-sex marriages made lawful by the State.' Ante, at 2696, 2695. I have heard such 'bald, unreasoned disclaimer[s]' before. *Lawrence*, 539 U.S., at 604, 123 S. Ct. 2472." *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

25 This second factor is not overtly present in *Lawrence*, as the criminal law has historically operated at a state level. In like vein, it can be argued that this factor is irrelevant to marriage laws— the "virtually exclusive province of the States." Nonetheless, because of this factor's overt presence in both *Romer* and most recently *Windsor*, analyzing the "triumvirate" necessitates its inclusion.

26 Romer v. Evans, 517 U.S. 620, 632-33 (1996).

27 *Lawrence*, 539 U.S. at 568, 569.

28 *Id.* at 570.

29 *Windsor*, 133 S. Ct. at 2691.

30 *Id.* at 2694.

31 *Id.*

32 *Id.* at 2693.

33 Baker v. Nelson, 409 U.S. 810 (1972).

34 Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971) (en banc).

35 Jurisdictional Statement at 3, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

36 *Baker*, 409 U.S. at 810.

37 Hicks v. Miranda, 422 U.S. 332, 343-45 (1975).

38 *Id.* at 344-45 (internal quotation marks omitted) (internal alterations omitted).

39 Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

40 *See*, *e.g.*, Bostic v. Rainey, 2014 WL 561978, at *9 (E.D. Va. Feb. 13, 2014) ("There is also no dispute asserted that questions presented in *Baker* are similar to the questions presented here."); McGee v. Cole, 2014 WL 321122, at *9 (S.D. W. Va. Jan. 29, 2014) ("the Court declines to find that differences in the facts of each case or the issues presented warrant nonapplication of *Baker* to this case.").

41 *Hicks*, 422 U.S. at 344 (quotation omitted) (emphasis added).

42 Windsor v. United States, 699 F.3d 169, 178-79 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

43 *Id.* (internal citations omitted). The federal courts, including the Second Circuit in *Windsor*, did not equate the questions presented regarding the challenges to the *federal* definition of marriage to be controlled by *Baker*. "*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012). "The question [regarding . . .] Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." *Windsor*, 699 F.3d at 178. *See also* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 308-09 (D. Conn. 2012); Dragovich v. U.S. Dep't of Treasury, 872 F. Supp. 2d 944, 952 (N.D. Cal. 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012); Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 872-73 (C.D. Cal. 2005), *aff'd in part, vacated in part on other grounds, and remanded*, 447 F.3d 673 (9th Cir. 2006).

44 *Massachusetts*, 682 F.3d at 8.

45 *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1087 (D. Haw. 2012); Wilson v. Ake, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004).

46 *Hicks*, 422 U.S. at 344-45 (quoting Doe v. Hodgson, 478 F.2d 537, 539, cert. denied sub nom (1973)). Doe v. Brennan, 414 U.S. 1096 (1973) (emphasis added) (internal alterations omitted)).

47 *Sevcik*, 911 F. Supp. 2d at 1003.

48 DeBoer v. Snyder, 2014 WL 1100794, at *15 n.6 (E.D. Mich. Mar. 21, 2014).

49 Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014).

50 De Leon v. Perry, 2014 WL 715741, at *10 (W.D. Tex. Feb. 26, 2014).

51 Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013).

52 Bostic v. Rainey, 2014 WL 561978, at *10 (E.D. Va. Feb. 13, 2014).

53 McGee v. Cole, 2014 WL 321122, at *10 (S.D. W. Va. Jan. 29, 2014).

54 *Windsor*, 133 S. Ct. 2675, 2680 (2013) (citing Loving v. Virginia, 388 U.S. 1 (1967)).

55 *See*, *e.g.*, Brief for Appellees at 27, Bostic v. Rainey, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Apr. 11, 2014), ECF No. 129.

56 *See*, *e.g.*, De Leon v. Perry, 2014 WL 715741, at *19 (W.D. Tex. Feb. 26, 2014).

57 *Loving*, 388 U.S. at 12.

58 I exclude the Second and D.C. Circuits since all of the jurisdictions within them embrace same-sex marriage. The Federal Circuit is excluded for subject matter jurisdiction. Puerto Rico is part of the First Circuit and has a pending case. *See* Complaint, Conde-Vidal v. Rius-Armendariz, No. 3:14-cv-01253 (D. P.R. Mar. 25, 2014), ECF No. 1.

59 Notice to Appear, DeBoer v. Snyder, No. 12-cv-10285 (E.D. Mich. July 1, 2013), ECF No. 90. Advocates in another case requested a trial on February 17, 2014. *See* Joint Case Management Plan at 17, Whitewood v. Corbett, No. 13-cv-01861 (M.D. Pa. Oct. 4, 2013), ECF No. 38.

60 Docket Report, Harris v. McDonnell, No.13-cv-00077 (W.D. Va. 2013) (showing Summary and Complaint issued on Aug. 1, 2013 and Reply to Response to Motion for Summary Judgment filed on Nov. 7, 2013).

61 *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Kitchen*, 961 F. Supp. 2d at 1181; Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1252 (N.D. Okla. 2014); Bourke v. Beshear, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); Bostic v. Rainey, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); Lee v. Orr, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (unpublished); *De Leon*, 2014 WL 715741; Tanco v. Haslam, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeBoer*, 2014 WL 1100794; Henry v. Himes, 1:14-cv-00129 (S.D. Ohio Apr. 14, 2014).

62 Complaint for Declaratory and Injunctive Relief at 1, Harris v. McDonnell, No. 13-cv-00077 (W.D. Va. Aug. 1, 2013), ECF No. 1.

63 *Id.* at 17.

64 *See*, *e.g.*, De Leon v. Perry, 13-cv-00982 (W.D. Tex.).

65 *Id.* at 29-31; Plaintiffs' First Amended Complaint for Declaratory, Injunctive, and Other Relief at 16, Bostic v. Rainey, 2:13-cv-00395 (E.D. Va. Sept. 3, 2013), ECF No. 18.

66 *See, e.g.*, Memorandum of State Defendants in Opposition to Plaintiffs' Motion for Summary Judgment, Harris v. McDonnell, No.13-cv-00077 (W.D. Va. Oct. 24, 2013), ECF No. 73; Appellant McQuigg's Opening Brief, Bostic v. Rainey, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Mar. 28, 2014), ECF No. 75.

67 United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

68 Complaint for Declaratory and Injunctive Relief at 30, Harris v. McDonnell, No.13-cv-00077 (W.D. Va. Aug. 1, 2013), ECF No. 1.

69 *See* Complaint for Declaratory and Injunctive Relief at 25, Wolf v. Walker, No. 3:14-cv-00064 (W.D. Wis. Feb. 3, 2014), ECF No. 1.

70 Plaintiffs' Brief in Opposition to State Defendants' Motion for Summary Judgment at 1-2, DeBoer v. Snyder, No. 12-cv-10285 (E.D. Mich. Sep. 9, 2013), ECF No. 76. *See also* Complaint for Declaratory and Injunctive Relief at 27, Forum for Equality Louisiana, Inc. v. Barfield, No. 2:14-cv-00327 (E.D. La. Feb. 12, 2014) ("Defendants' actions infringe Plaintiffs' fundamental right to marry by penalizing Plaintiffs based on their exercise of their constitutionally protected choice to marry the person they love."), ECF No. 1.

71 Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted).

72 *Id.* at 721-22.

73 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

74 *See*, *e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987).

75 *See*, *e.g.*, Erwin Chemerinsky, *In Defense of Roe and Professor Tribe*, 42 Tulsa L. Rev. 833, 833 (2007) ("*Roe* was the last time the Court recognized a new fundamental right.").

76 *Compare* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012), *with* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991-93 (N.D. Cal. 2010). *See also* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1204 (D. Utah 2013) ("The court therefore finds that the Plaintiffs have a fundamental right to marry that protects their choice of a same-sex partner."); De Leon v. Perry, 2014 WL 715741, at *20 (W.D. Tex. Feb. 26, 2014) ("By denying Plaintiffs . . . the fundamental right to marry, Texas denies their relationship the same status and dignity afforded to citizens who are permitted to marry."); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 978-82 (S.D. Ohio 2013) (recognizing a fundamental right to "marriage recognition" or to "remain married"); Lee v. Orr, 2014 WL 683680, at *1 ("There is no dispute here that the ban on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and infringes on the plaintiffs' fundamental right to marry.").

77 *See*, *e.g.*, Amended Complaint for Declaratory and Injunctive Relief at 7-10, DeBoer v. Snyder, No. 12-cv-10285 (E.D. Mich. Oct. 3, 2013), ECF No. 38. Michigan, like most states, recognizes marriage only between one man and one woman. Mich. Const. art. I, § 25.

78 *See*, *e.g.*, Complaint for Declaratory and Injunctive Relief at 18-23, Kitchen v. Herbert, No. 2:13-cv-00217 (D. Utah Mar. 25, 2013), ECF No. 2.

79 Baker v. Vermont, 744 A.2d 864, 880 n.13 (Vt. 1999).

80 *Id.*

81 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). In *Baehr*, a two judge plurality expressed the view that marriage laws constituted sex discrimination under the *state* constitution. *Id.* at 59-63. That view was later superseded by an amendment to the Hawaii Constitution. *See* Haw. Const. art. I, § 23.

82 *See* Wilson v. Ake, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005); Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 876-77 (C.D. Cal. 2005); *In re* Kandu, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004); *In re* Marriage Cases, 183 P.3d 384, 436-40 (Cal. 2008); Dean v. Dist. of Columbia, 653 A.2d 307, 363 n.2 (D.C. 1995) (Steadman, J., concurring); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973); Conaway v. Deane, 932 A.2d 571, 585-602 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id.* at 20 (Graffeo, J., concurring); Andersen v. King Cnty., 138 P.3d 963, 988 (Wash. 2006) (plurality opinion); Singer v Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

83 Transcript of Oral Argument at 13-14, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

84 *See*, *e.g.*, Complaint for Declaratory and Injunctive Relief at 33-35, Majors v. Horne, 2:14-cv-00518 (D. Ariz. Mar. 12, 2014), ECF No. 1.

85 Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1215 (D. Utah 2013).

86 *See*, *e.g.*, First Amended Complaint, Fisher-Borne v. Smith, 1:12-cv-589 (M.D.N.C. Jul. 19, 2013), ECF No. 40.

87 *See*, *e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). *But see* SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 481 (9th Cir. 2014) (finding that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.").

88 *See*, *e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

89 *See*, *e.g.*, Romer v. Evans 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2013).

90 *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973)).

91 Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 9 (1st Cir. 2012) ("[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche.").

92 *See, e.g.*, *id.*; Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950–51 (7th Cir. 2002); Citizens for Equal Protection v. Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); Price-Cornelison v. Brooks, 524 F.3d 1103, 1114 (10th Cir. 2008); Rich v. Sec'y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

93 *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012).

94 *See, e.g.*, Plaintiffs' Brief in Opposition to the Motion to Dismiss of Defendant Donald Petrille, Jr. at 15-17, Whitewood v. Corbett, No. 13-cv-01861-JEJ (M.D. Pa. Oct. 21, 2013), ECF No. 56; *see also* Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction at 37-41, Obergefell v. Wymyslo, No. 13-cv-00501 (S.D. Ohio Oct. 29, 2013), ECF No. 53.

95 Memorandum of State Defendants Robert F. McDonnell and Janet M. Rainey in Opposition to Plaintiffs' Motion for Summary Judgment at 29, Harris v. McDonnell, No. 13-cv-00077 (W.D. Va. Oct. 24, 2013) (citation omitted), ECF No. 73. *See also* Defendant Petrille's Brief in Support of Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6), and Failure to Join Parties Under Fed. R. Civ. P. 12(b)(7) and 19 at 30, Whitewood v. Corbett, No. 13-cv-01861 (M.D. Pa. Oct. 7, 2013), ECF No. 41 ("The two factors at the heart of *Romer*, *Lawrence*, and *Windsor* strongly support the Commonwealth's power to retain its traditional definition of marriage. First, the traditional definition of marriage is hardly a novel disability, but a centuries-old institution. . . . Far from an aberrant, novel disability, Pennsylvania's definition of marriage, like so many other provisions of Pennsylvania law, is consistent.").

96 For example, marriage laws promote raising children by their biological parents. Biological parents are uniquely linked to their offspring and can help them understand their genetic traits and lineages. Blood lines matter and are celebrated throughout domestic relations laws. Additionally, traditional marriages guarantee that one of the parents will be the same sex of all children born to that union, thus giving each child a role model of both the same sex and opposite sex.

97 United States v. Windsor, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting) (citing S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53–58 (2012); John Finnis, *Marriage: A Basic and Exigent Good*, 91 The Monist 388, 398 (2008)).

98 *See*, *e.g.*, Appellant's Principal Brief, Smith v. Bishop, Nos. 14-5003, 14-5006 (10th Cir. Feb. 24, 2014), ECF No. 01019207411; Appellant McQuigg's Opening Brief, Bostic v. Rainey, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Mar. 28, 2014), ECF No. 75; Brief of Appellants Gary R. Herbert and Sean D. Reyes, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 3, 2014).

99 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

100 *Windsor*, 133 S. Ct. at 2693 (citation and quotation marks omitted); *Romer*, 517 U.S. 620, 634 (1996) (citation and quotation marks omitted).

101 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

102 *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

103 Complaint for Declaratory and Injunctive Relief at 16-17, Palladino v. Corbett, No. 13-cv-05641 (E.D. Pa. Sept. 26, 2013), ECF No. 1.

104 *See*, *e.g.*, Plaintiffs' First Amended Complaint at 8-11, Bishop v. United States, No. 04-cv-848-TCK-TLW (Okla. Aug. 10, 2009); Class Action Complaint for Declaratory and Injunctive Relief at 38, Harris v. McDonnell, No. 13-cv-00077 (W.D. Va. Aug. 1, 2013), ECF No. 1; Verified Complaint for Declaratory, Injunctive, and Other Relief at 15-17, Bradacs v. Haley, No. 13-cv-02351 (D. S.C. Aug. 28, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 26-27, Tanco v. Haslam, No. 13-cv-01159 (M.D. Tenn. Oct. 21, 2013), ECF No. 1; Plaintiffs' Original Complaint for Declaratory and Injunctive Relief at 13, De Leon v. Perry, No. 13-cv-00982 (W.D. Tex. Oct. 28, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 3, 12, Jernigan v. Crane, No. 13-cv-00410 (E.D. Ark. July 15, 2013), ECF No. 1-2; Amended Complaint for Declaratory and Injunctive Relief at 2, 22, Bourke v. Beshear, No. 13-cv-00750 (W.D. Ky. Aug. 16, 2013), ECF No. 5; Complaint for Declaratory and Injunctive Relief at 2, 15-16, Franklin v. Beshear, No. 13-cv-00946 (W.D. Ky. Aug. 16, 2013), ECF No. 1; Amended Complaint for Declaratory and Injunctive Relief at 15-16, Robicheaux v. Caldwell, No. 13-cv-05090 (E.D. La. Aug. 9, 2013), ECF No. 10; Complaint for Declaratory and Injunctive or Other Relief at 4, 8, Geiger v. Kitzhaber, No. 13-cv-01834 (D. Or. Oct. 15, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 16-17, 22-24, Latta v. Otter, No. 13-cv-00482 (D. Idaho Nov. 8, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 11-12, Hard v. Bentley, 2:13-cv-922 (M.D. Ala. Dec. 16, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 38-40, Majors v. Horne, 2:14-cv-00518 (D. Ariz. Mar. 12, 2014), ECF No. 1.

105 U.S. Const. art. IV, § 1 (emphasis added).

106 *See*, *e.g.*, Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45 Fed. Law. 30, 33 (1998) ("Section 2 merely *does* clarify that the federal full faith and credit rules *do not require* other states to recognize or enforce same-sex marriages legalized or recognized in one state.").

107 *See*, *e.g.*, Letter from Professor Laurence H. Tribe to Senator Edward Kennedy (May 24, 1996), *reprinted in* 142 Cong. Rec. S5931-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy, "Unconstitutionality of S. 1740, The So-Called Defense of Marriage Act") (questioning constitutionality of DOMA under full faith and credit).

108 Va. Code Ann. § 18.2-308.01(a).

109 Md. Code Ann., Crim. Law § 4-101(d)(1).

110 *See* Order Granting Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction, Henry v. Himes, 1:14-cv-00129 (S.D. Ohio Apr. 14, 2014).

111 *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 968 (S.D. Ohio 2013).

112 Bourke v. Beshear, 2014 WL 556729, at *3 (W.D. Ky. Feb. 12, 2014).

113 Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1266 (N.D. Okla. 2014).

114 Ala. Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 546 (1935).

115 *Id.* at 547.

116 Pac. Emp'rs. Ins. Co. v. Indus. Accident Comm'n of Cal., 306 U.S. 493, 501 (1939).

117 Myriad cases, decided by the court up to the present day, establish and confirm this proposition. *See*, *e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Baker v. General Motors Corp., 522 U.S. 222 (1998); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

Criminal Law & Procedure

Chaidez v. United States and the Non-Retroactivity of New Rules in Criminal Law

*By Mike Hurst**

Note from the Editor:

This article is about the Supreme Court's 2013 decision in *Chaidez v. United States*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about this case and the Sixth Amendment. To this end, we offer links below to other perspectives on the case, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Chaidez v. United States, 133 S. Ct. 1103 (2013): http://www.supremecourt.gov/opinions/12pdf/11-820_j426.pdf
- Brief for Active and Former State and Federal Prosecutors as Amici Curiae Supporting Petitioner, Chaidez v. United States, 133 S. Ct. 1103 (2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-820_petitioneramcuactiveandfmrstateandfedprosecutors.authcheckdam.pdf
- Brief for National Association of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Petitioner, Chaidez v. United States, 133 S. Ct. 1103 (2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-820_petitioneramcunacdletal.authcheckdam.pdf
- Allison C. Callaghan, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. Davis L. Rev. 701 (2012): http://lawreview.law.ucdavis.edu/issues/46/2/Comment/46-2_Callaghan.pdf

In *Chaidez v. United States*,[1] the United States Supreme Court was tasked with deciding whether its prior holding in *Padilla v. Kentucky*[2]—that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea—should apply retroactively, such that a person whose conviction became final before the Court decided *Padilla* could benefit from that decision. The ultimate ruling in *Chaidez* consisted of a smorgasbord of typically ideologically-opposed Justices holding that *Padilla* had announced a new procedural rule in criminal proceedings which would not be applied retroactively. The two-Justice dissent declared multiple times the majority's holding was wrong because the holding of *Padilla* was not the announcement of a "new" rule but rather nothing more than the application of an old rule to a new set of facts.

However, because the Court failed to directly address and resolve the previous dichotomy of "collateral consequences versus direct consequences," practitioners should probably expect more litigation and lower court confusion in sorting out the classifications of consequences and the ultimate application of *Chaidez* and *Padilla*.

I. Factual Background

Roselva Chaidez came to the United States illegally from Mexico in the 1970s, later becoming a U.S. Lawful Permanent Resident in 1977. In 1998, Chaidez participated in an insurance fraud scheme and was subsequently indicted by the U.S. Attorney's Office for the Northern District of Illinois in 2003 for mail fraud. Chaidez pled guilty to two counts of mail fraud later that same year. Chaidez was sentenced to four years probation in April 2004, and was required to pay restitution in the amount of $22,500. Chaidez did not appeal her conviction which subsequently became final.

In July 2007, Chaidez filed an application for citizenship with the United States, and indicated on her application that she had never been convicted of a crime. After it was determined by immigration officials that she in fact had been previously convicted of not just a felony, but an aggravated felony under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[3] deportation proceedings were initiated against Chaidez in March 2009.

II. Procedural Background of Chaidez's Lawsuit

In January 2010, Chaidez filed a petition for a writ of error *coram nobis* in her criminal case in U.S. District Court, seeking to vacate her fraud conviction by arguing that her trial attorney had rendered ineffective assistance of counsel in violation of her Sixth Amendment rights by failing to inform her that deportation was a potential consequence of her guilty plea. According to Chaidez, "[u]nder *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], a lawyer renders ineffective assistance of counsel in connection with a guilty plea if (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defendant . . . insofar as 'there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty' to the charges at issue."[4]

On March 31, 2010, while Chaidez's petition was pending, the United States Supreme Court issued its decision in *Padilla v. Kentucky*. The Court held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel[;]" that "the ineffective

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assistance standard set forth in *Strickland* applies to Padilla's claim[;]" and that under *Strickland*, "an attorney must advise her client regarding the risk of deportation."[5]

Chaidez subsequently argued that *Padilla* should apply retroactively to her case, while the government asserted that "*Padilla* had announced a new procedural rule, and that under *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion), *Padilla's* holding should not be given retroactive effect in collateral challenges to convictions that had already become final when *Padilla* was decided."[6] However, the district court was persuaded by Chaidez and found that she was entitled to relief, holding that *Padilla* should be applied retroactively because "the holding in *Padilla* is an extension of the rule in *Strickland*"[7] and Padilla did not announce a new rule for *Teague* purposes.[8] Based upon its decision, the district court subsequently granted Chaidez's petition for writ of error *coram nobis* and vacated her conviction.[9]

The government appealed the district court's ruling to the Seventh Circuit, which ultimately reversed and remanded the lower court's decision. The Seventh Circuit held that *Padilla* had announced a nonretroactive, new rule under *Teague*, reasoning that a "new" rule is one that was not "dictated" by existing precedent at the time the defendant's conviction became final.[10] The court described the relevant analysis as whether *Padilla*'s outcome was "susceptible to debate among reasonable minds" and noted that the Supreme Court had "looked to both the views expressed in the opinion itself and lower court decisions."[11] Based on the fact that the members of the *Padilla* Court expressed such an "array of views" coupled with the fact that, prior to *Padilla*, all federal courts (including nine appellate courts) as well as thirty state courts (and the District of Columbia) had held that "the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea[,]" the Seventh Circuit concluded that this was "compelling evidence that reasonable jurists reading the Supreme Court's precedents in April 2004 could have disagreed about the outcome of *Padilla*."[12]

III. U.S. Supreme Court's Decision

A. Majority Opinion

Justice Kagan wrote the opinion for the majority, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito. The Court held that it had in fact announced a new rule in *Padilla* and therefore defendants whose convictions became final prior to *Padilla* could not benefit from that decision.

The Court first noted a split which had developed among federal and state courts as to the question of *Padilla* retroactivity.[13] The Court thereafter began its analysis by noting that its prior decision in *Teague* "makes the retroactivity of our criminal procedure decisions turn on whether they are novel."[14] Thus, a person may benefit on collateral review only from the Court's application of settled rules, not new rules. Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation" on the government and when "the result was not dictated by precedent existing at the time the defendant's conviction became final."[15] After *Teague*, the Court explained that a holding is not so dictated unless it would have been "apparent to all reasonable jurists."[16] The flipside, the Court explained, is where a principle from a previous decision is simply applied to a different set of facts. For this reason, the Court "will rarely state a new rule for *Teague* purposes."[17]

Next, the Court stated that if it were applying the standard *Strickland* test of determining ineffective assistance of counsel ("performance and prejudice")[18] to just another factual situation, it would not produce a new rule. However, according to the majority opinion, the Court had done more than simply apply the *Strickland* test in the *Padilla* case. In *Padilla*, the Court considered a threshold question: "Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction, rather than a component of the criminal sentence."[19] As the Court further explained, it first asked *whether* the Strickland test applied ("Should we even evaluate if this attorney acted unreasonably?") before it asked *how* the *Strickland* test applied ("Did this attorney act unreasonably?").[20] Because that preliminary question about the applicability of *Strickland* came to the *Padilla* Court unsettled, the Court's affirmative answer to that question ("Yes, *Strickland* governs here") required a new rule.[21]

It should also be noted that the Court at this point acknowledged that it had never attempted to set forth the sphere of "collateral consequences" and it continued to refuse to do so in *Padilla*. However, the Court did recount other effects of convictions that were commonly viewed as "collateral," such as civil commitment, civil forfeiture, sex offender registration, disqualification from public benefits, and disfranchisement.[22] The Court went on to provide background on its precedent, stretching back some twenty-eight years, where the Court had left open the issue of whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements.[23] In this context, the Court boasted that its "non-decision left the state and lower federal courts to deal with the issue; and they almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction's collateral consequences, including deportation."[24] According to the Court's survey of the legal landscape at the time, including all ten federal appellate courts that had considered the question and almost thirty state appellate courts, an attorney's failure to inform a client of collateral consequences of a guilty plea does not violate the Sixth Amendment.[25]

With this background in mind, the Court noted that in deciding *Padilla* it had "answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions."[26] It did this because *Padilla* had *a different starting point*—instead of being a normal *Strickland* case where the Court would have begun evaluating the reasonableness of an attorney's performance followed by an assessment of prejudice, the Court began in *Padilla* by asking whether *Strickland* applied at all. By not having addressed the distinction between collateral and direct consequences and their effect on the right to counsel, the Court defined deportation as "unique" and special and outside this dichotomy, thus "resolv[ing] the threshold question before us by breaching the previously chink-free wall between direct and collateral consequences: Notwith-

standing the then-dominant view, '*Strickland* applies to Padilla's claim.'"[27] According to the Court, "if that does not count as 'break[ing] new ground' or 'impos[ing] a new obligation,' we are hard pressed to know what would."[28] "Before *Padilla*, we had declined to decide whether the Sixth Amendment had any relevance to a lawyer's advice about matters not part of a criminal proceeding. . . . No precedent of our own 'dictated' the answer."[29] In fact, the Court noted that the lower court had filled that vacuum and had almost uniformly and categorically removed advice about a conviction's non-criminal consequences from the scope of the Sixth Amendment. It was the *Padilla* Court's rejection of that categorical approach and the fact that such a decision would not have been—in fact—"apparent to all reasonable jurists" prior to that decision that made the *Padilla* decision a "new rule."[30]

Finally, the majority opinion notes that Ms. Chaidez and the dissenting justices have a different account of *Padilla*—that it "did no more than apply *Strickland* to a new set of facts."[31] However, the majority opinion debunks that argument by noting that *before* it could even begin applying the *Strickland* test, the *Padilla* Court had to establish that the Sixth Amendment even applied at all. It is very interesting to note that, in this part of the opinion, the Court specifically said that it had not eschewed the direct-collateral divide across the board but rather had relied on the special nature of deportation to show that the categorical approach was not well suited to address Padilla's claim.[32] It was "in refusing to apply the direct-collateral distinction that the *Padilla* Court did something novel."[33] The cases cited by Mr. Chaidez for the proposition that *Strickland* applied to deportation advice was misplaced, as those few cases concerned material misrepresentations by an attorney [not Chaidez's situation], whether concerning deportation or another collateral matter. Further, such cases co-existed happily with other precedent from the same jurisdictions that held deportation was not so unique that it warranted an exception to the general rule that an attorney need not advise a criminal defendant of collateral consequences stemming from a guilty plea.

B. Justice Thomas's Concurrence

Justice Thomas concurred in the judgment only, articulating that the analysis under *Teauge* was unnecessary because *Padilla* had been decided incorrectly. According to Justice Thomas, "the Sixth Amendment does not extend—either prospectively or retrospectively—to advice concerning the collateral consequences arising from a guilty plea."[34]

C. Dissenting Opinion

Justice Sotomayor, joined by Justice Ginsburg, dissented in the case, arguing that "*Padilla* did nothing more than apply the existing rule of *Stickland* . . . in a new setting."[35] According to the dissent, the *Strickland* test requires that the reasonableness of an attorney's performance be measured by ever-changing standards of professional conduct, and "apply[ing] *Strickland* in a way that corresponds to an evolution in professional norms . . . make[s] no new law."[36]

In the dissent's view, the *Padilla* decision was "built squarely on the foundation laid out by *Strickland*" and "relied upon controlling precedent."[37] The dissent went on to describe the substantial changes in immigration laws over the years, as well as the more demanding standards which had evolved relating to immigration. Thus, according to the dissent, "[i]t was only because those norms reflected changes in immigration law that *Padilla* reached the result it did, not because the Sixth Amendment right had changed at all."[38]

The dissent then argued that the majority opinion claims *Padilla* broke new ground by "addressing the threshold question of whether advice about deportation is a collateral consequence of a criminal conviction that falls within the scope of the Sixth Amendment."[39] However, this is a mischaracterization of the majority opinion, as the Court's opinion clearly and directly set forth the fact that the *Padilla* decision had eschewed that specific categorical distinction and had held that deportation was unique and special, lying outside of that dichotomy. Rather, as the majority explained and it appears the dissent chose to ignore, the ground-breaking rule was the threshold question of whether *Strickland* applied at all, not considering at the beginning how it applied.

Finally, the dissent makes a last-ditch effort to negate the majority's finding that the legal landscape "before *Padilla* was nearly uniform in its rejection of *Strickland's* application to the deportation consequences of a plea."[40] However, according to the dissent, the cases relied upon by the majority were all mostly old and the more recent cases (that just happened to favor the dissent's opinion) were more in line with the most recently evolved standards of professional conduct requiring attorneys to provide advice about deportation consequences.[41] Based upon the dissent's reasoning, the most recent cases concerning affirmative misstatements by attorneys about immigration consequences of a guilty plea created an exception to the collateral/direct consequences distinction, and thus dealt a serious blow to that "wall between direct and collateral consequences" that the lower courts had erected and upon which the majority opinion had relied.[42]

IV. Legal Implications of *Chaidez* and *Padilla*

The implications and fallout from the decisions in *Padilla* and *Chaidez* are uncertain. One obvious question is whether other types of previously-considered collateral consequences akin to deportation will be interpreted to evolve into more "unique" or "special" consequences that require courts to make more exceptions to the traditional direct/collateral consequences dichotomy and set forth bright-line rules.[43] Another long-term question is whether this dichotomy is even still workable, or should we expect these categorical distinctions to eventually disappear, requiring defense counsel to perform Herculean feats of advocacy by advising clients of all consequences of pleading guilty (including previously heretofore collateral consequences). As one commentator put it:

> This liberal expansion of the type of advice that criminal defense attorneys are required to provide leads us down a path where legal professionals who were trained to navigate the criminal court system and negotiate plea deals for lesser charges and lower sentences are instead acting as therapists and life coaches, discussing with their clients all the social repercussions of committing a crime. While

> it may be admirable to try to provide a client with all the information that could possibly be relevant to him, it is simply impractical in the real world of limited financial and human resources.[44]

Further, if new consequences are found to be unique or special, outside the traditional direct/collateral dichotomy, will such consequences continue to be categorized as "new rules" and therefore not applied retroactively, when the Supreme Court has said that establishing new rules will be the exception and rare? Will the non-retroactivity holding of *Chaidez* be applied throughout the states or will states rely on their own laws to apply *Padilla* retroactively, as the Supreme Judicial Court of Massachusetts recently held?[46] There are many questions that await the continuing development and interpretation of these cases, with potentially huge repercussions for defense counsel, criminal defendants, and the government. We will have to wait and see if further bright-line rules will emerge and whether defendants will be given the opportunity to afford themselves of these future new rules through retroactive application.

Endnotes

1 133 S. Ct. 1103 (2013).

2 559 U.S. 356 (2010).

3 Pub.L. 104-208, 110 Stat. 2009-546 (Sept. 30, 1996)

4 Brief of Petitioner, On a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Chaidez v. United States, 2012 WL 2948891 (July 17, 2012).

5 *Id*. at 1482.

6 Brief for the United States, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at *4, Chaidez v. United States, 2012 WL 1097108 (Mar. 30, 2012).

7 United States v. Chaidez, 730 F.Supp.2d 896, 900 (N.D.Ill. 2010).

8 *Id.* at 904.

9 United States v. Chaidez, 2010 WL 3979664 (N.D. Ill. Oct. 6, 2010).

10 Chaidez v. United States, 655 F.3d 684, 688-690 (7th Cir. 2011).

11 *Id.* at 689.

12 *Id.* at 689-690.

13 The Court noted that the Fifth, Seventh, and Tenth Circuits, as well as the Supreme Court of New Jersey, had previously held that *Padilla* did not apply retroactively, while the Third Circuit and the Supreme Judicial Court of Massachusetts found that *Padilla* should apply retroactively. *Compare* Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011); United States v. Amer, 681 F.3d 211 (5th Cir. 2012); United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011); State v. Gaitan, 37 A.3d 1089 (N.J. 2012) *with* United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011); Commonwealth v. Clarke, 949 N.E.2d 892 (Mass. 2011).

14 Chaidez v. United States, 133 S.Ct. 1103, 1107 (2013).

15 *Id.*

16 *Id.* (citing Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997)).

17 *Id.*

18 In *Strickland*, the Court held that legal representation violates the Sixth Amendment if an attorney's *performance* falls "below an objective standard of reasonableness," as indicated by "prevailing professional norms," and the defendant suffers *prejudice* as a result. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

19 *Chaidez*, 133 S. Ct. at 1108.

20 *Id.*

21 *Id.*

22 *Id.* at 1108, n. 5 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1487-88 (2010) (Alito, J., concurring in judgment)).

23 *Id.* at 1108 (citing Hill v. Lockhart, 474 U.S. 52 (1985) (where defendant pled guilty to murder after attorney misinformed defendant about parole eligibility, Court avoided question of whether advice about parole could possibly violate Sixth Amendment and whether such advice was collateral because defendant had not alleged prejudice).

24 *Id*. at 1109.

25 *Id.* According to the Court, only two state courts had held that an attorney could violate the Sixth Amendment by failing to inform a client about deportation risks or other collateral consequences stemming from a guilty plea.

26 *Id.* at 1110.

27 *Id.*

28 *Id.* (citing Teague v. Lane, 489 U.S. 288, 301 (1989).

29 *Id.*

30 *Id.* at 1110-111.

31 *Id.* at 1111.

32 *Id.* at 1112.

33 *Id.* at 1112, n. 13.

34 *Id.* at 1114 (Thomas, J., concurring).

35 *Id.* (Sotomayor, J., dissenting).

36 *Id.* at 1115.

37 *Id.*

38 *Id.* at 1116.

39 *Id.* at 1117.

40 *Id.* at 1118.

41 *Id.*

42 *Id.* at 1119.

43 One commentator has noted that *Padilla* set forth a bright-line rule, one imposing an affirmative obligation on counsel, regardless of the specific circumstances of each individual case, which is an anomaly among *Strickland*-analyzed cases and in direct contravention of the Supreme Court's holding in *Roe v. Flores-Ortega*, 528 U.S 470, 478 (2000). *See* Derek Wikstrom, *No Logical Stopping-Point: The Consequences of* Padilla v. Kentucky*'s Inevitable Expansion*, 106 Nw. U. L. Rev. 351, 358-359(2012).

44 Colleen A. Connolly, *Sliding Down the Slippery Slope of the Sixth Amendment: Argument for Interpreting* Padilla v. Kentucky *Narrowly and Limiting the Burden it Places on the Criminal Justice System*, 77 Brook. L. Rev. 745, 779 (2012).

45 Commonwealth v. Sylvain, 2013 WL 4849098 (Mass. Sept. 13, 2013) ("as a matter of Massachusetts law and consistent with our authority as provided in *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (*Danforth*), that the Sixth Amendment right enunciated in *Padilla* was not a "new" rule and, consequently, defendants whose State law convictions were final after April 1, 1997, may attack their convictions collaterally on Padilla grounds.").

Federalism & Separation of Powers

An Originalist Future

By John O. McGinnis & Michael B. Rappaport***

Note from the Editor:

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Related Links:

- Ackerman, Bruce, "The Holmes Lectures: The Living Constitution" (2007). Faculty Scholarship Series. Paper 116: http://digitalcommons.law.yale.edu/fss_papers/116
- Mitchell Berman, Originalism is Bunk, 84 N.Y.U. L. Rev. 1 (2009): http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1078933
- David Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996): http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2999&context=journal_articles

Introduction

Orginalism is enjoying a comeback in constitutional law. The idea that the Constitution should be interpreted according to the meaning that was fixed at the time it was enacted was commonplace in the early republic. For instance, James Madison, the father of the Constitution, wrote: "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers." Orginalism continued to be dominant until the New Deal.

But it then suffered two body blows. Because the Constitution's enumeration of federal powers were thought incompatible with the need for national control of the commanding heights of the economy, the New Deal Justices no longer placed any substantial weight on historical analysis in limiting the scope of these powers. Then as the civil rights movement and sexual revolution proceeded apace, later Justices believed they needed to update the Constitution to protect individual rights—in part from the big government they themselves had enabled. It may well have been that some of their decisions, like *Brown v. Board of Education*, could have been justified through the original meaning, but the culture of originalism had so dissipated that the Justices chose to root controversial holdings in sociological and moral reasoning rather than in an historically based understanding of the constitutional text.

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The culture of originalism died out not only in the courts but in the academy as well. Law professors were devoted to justifying the Warren Court and providing theories of constitutional interpretation—often amusingly called "non-interpretive" theories of interpretation—that argued for looking to evolving moral principles or political concepts rather than historical meaning as guides to interpreting the Constitution.

But the world has changed. In *District of Columbia v. Heller*, the Court extensively inquired into the historical meaning of the Second Amendment to hold that possessing a gun in the home was a constitutional right. A measure of the increasing prevalence of originalism was Justice Stevens' dissent. He disagreed on the history but accepted the originalist methodology. *Heller* is by no means unique. In the recent case on the constitutionality of Obamacare, the five members of the Court who held that that the Commerce Clause did not permit Congress to mandate the purchase of health insurance relied on a careful reading of the text in its historical context to conclude that the authority to regulate commerce could not be understood as the authority to bring commerce into being. And by no means are all of these decisions politically conservative. For instance, in a series of decisions the Court, led by Justice Antonin Scalia, has enforced the Confrontation Clause of the Constitution to give criminal defendants broad rights to cross examine witnesses. Two Justices on the Court, Scalia and Clarence Thomas, are self-proclaimed originalists.

In the academy originalism is also undergoing a revival. Serious new ideas supporting originalism are the most vibrant area of constitutional theory. Many leading law reviews publish thoroughly researched historical analyses of specific provisions of the Constitution. Historically, most of this intellectual activity took place among conservatives. But over time libertarians have increasingly become originalists and have significantly contributed to its development. And now even liberals, like Yale law professor Jack Balkin, have abandoned their prior nonoriginalism to become originalists.

To be sure, the victory for originalism is far from complete. In *United States v. Windsor*, the case that declared section 3 of the Defense of Marriage Act unconstitutional, Justice Anthony Kennedy's opinion was unmoored from the constitutional text. Whatever one's view of the Act (and we are not supporters), it is troubling that on such a high profile issue five members of the Court regressed to a kind of reasoning that severs its decisions from the only document that gives their acts legitimacy. Moreover, even as originalism becomes more prominent among constitutional theorists, the academy largely remains antagonistic, with most applauding liberal results whatever the frailty of the analysis that supports them.

We believe that three important steps need to be taken, if the revival of originalism is ultimately to take hold. First, originalism needs to be justified as a compelling theory of the political good. Originalists have traditionally defended the theory on the grounds it creates clear rules and constrains judges. But clarity and judicial constraint are weak reeds, if the rules originalism creates are generally bad or even indifferent. If originalism is to command support in the pragmatic society that has always been America, it must be shown to have desirable consequences in the here and now.

Second, originalism must become a comprehensive theory of interpretation. Many of the new theorists of originalism—the so-called new originalists—believe that the original meaning controls the decision only in cases where the Constitution is sufficiently clear. The theoretical difficulty with this approach is that new originalism can then easily collapse back into living constitutionalism popular in the days of the Warren Court, because many key provisions of the Constitution, like the Equal Protection Clause, are not pellucid on their face. The practical difficulty is that this kind of analysis can lead to a Court where there are two streams of decisions with currents going in the opposite directions. One stream consists of decisions like *Heller*, which are originalist in methodology. The other consists of decisions that use political, moral, or other kinds of judgments to determine the operation of clauses the Justices decide are vague or ambiguous. The consequence is an incoherent jurisprudence, with no clear standards for judges to decide which route to take and the perpetual temptation to choose the methodology according to the desired result rather than to determine the result with the single correct methodology. A jurisprudential house divided will ultimately relegate originalism to the corner of constitutional decisionmaking.

Third, the culture of originalism needs to deepen and broaden in scope. That culture needs to deliver fuller historical investigation of specific provisions to better inform the judiciary. But most importantly, an originalist culture requires a reinvigoration of the amendment process. Originalism is necessary to prevent people from changing the Constitution outside the amendment process, but a reinvigorated amendment process is needed to permit us to change the Constitution without relying on judges to transform it in our name. Just as successful political campaigns are those that map a route to an attractive future, so successful constitutional theories are those that include a mechanism for addressing social change. This need is particularly salient in our restless world continuously transformed by relentless technological change.

Reviving a comprehensive originalism would greatly improve our polity, creating both better judicial decisions and a more vigorous constitutional politics. It is a world where constitutional decisions would have good consequences and constitution making would become both popular and future-oriented. It bears no resemblance to the world which critics of originalism fear—where the dead hand of the past traps the living into a dead end of anachronistic principles. Only through a systematically originalist jurisprudence can constitutional law become what it must be if it is to act as the true rudder of the nation–simultaneously law that is unchanging and objective, law that is of high quality, and law that is subject to revision by the people of each generation.

I. A Firmer Foundation for Originalism

The way to connect originalism to the good is to focus on the process of constitution making. Appropriate supermajority rules provide a sound method of producing legitimate and desirable constitutional provisions and no superior method is available. Unlike majority rule, supermajority rule for constitution making assures the kind of consensus and bipartisanship that creates allegiance for fundamental law. Supermajority rule also creates a veil of ignorance that improves decisionmaking, because citizens cannot be sure of their position and that of their children under a regime that cannot be easily changed. As a result, citizens are more likely to consult the public interest rather than parochial interest in framing constitutional provisions. For instance, it helps generate provisions that protect minorities, like the right to religious freedom for all. Finally, requiring a supermajoritarian consensus narrows the field of proposals on the agenda, generating a deeper deliberation that makes it more likely that provisions adopted will be enduringly beneficial.

This view of the Constitution does not, of course, mean that every individual provision of the Constitution is good. But the supermajoritiarian process is the best institution for generating a constitution and it is very likely to generate good provisions overall. In this respect, it resembles another of our key legal institutions: the criminal trial. A trial that follows desirable procedures is neither a necessary nor a sufficient condition for getting the right outcome, but we have devised no other better human institution for reaching the correct result. Consequently, when a case has complied with the appropriate procedures, we treat the outcome as final. So should we treat the constitution produced by appropriate supermajority rules. Given that supermajority rules are the best procedural device for generating a constitution, constitutions generated in compliance with such rules have a strong claim to substantive correctness.

The United States Constitution and its amendments have been passed in the main under appropriate supermajority rules, and thus the norms entrenched in the Constitution tend to be desirable. The Constitution establishes a limited government, separates powers at the federal level and between the federal government and the states, and protects individual rights. In fact, two of the key features of the Constitution—the Bill of Rights and federalism—are directly the result of the requirement that the Constitution be enacted by a supermajority of the states at the time.

While there is one important way the supermajority enactment rules were problematic —the exclusion of African-Americans and women—the worst consequences of that defect have been corrected. Of course, even with corrections our Constitution is likely not an exact replica of what would have been created by a truly inclusive electorate. But we cannot easily calculate what subtler changes a more inclusive electorate would have wrought beyond the nondiscrimination and voting guarantees of the Fourteenth, Fifteenth, and Nineteenth Amendments. Empowering judges to make such determinations threatens to unravel the Constitution because there would be no objective way of resolving disagreements.

Note that this defense of the goodness of the Constitution avoids the Scylla of completely formal defenses of originalism and the Charybdis of completely contestable assertions of what constitutes goodness. The structure is also consistent with perhaps the most common defense of originalism: that it generally ties judges to rules. These rules consist of the interpretative rule of originalism itself as well as the substantive rules in the Constitution. But to the virtue of rule-following, it adds the even more important virtue of following likely beneficial rules.

From these premises it follows that the desirability of the Constitution requires that judges interpret the document based on its original meaning because the drafters and ratifiers used that meaning in deciding whether to adopt the Constitution. It was this meaning that gained the supermajority support, not the meaning of some contemporary judge or political philosopher.

It also follows that modern courts should interpret the Constitution according to the same interpretive methods that the enactors would have used—a process we call "original methods originalism." The reason for interpreting the Constitution as the enactors would have is that the meanings they deemed applicable were part of the expected costs and benefits of the provisions and thus crucial to obtaining the consensus that produced a good constitution. Discarding these rules severs the connection between the document that existing judges implement and the document passed by a past consensus of enactors. To embrace orginalism without embracing the enactors' interpretive rules is like trying to decode a message using a different code than the authors of the message employed.

The benefits of originalism so understood can be easily contrasted with the defects of living constitutionalism—the primary competitor to originalism in constitutional theory. Under that jurisprudence judges update the Constitution themselves to reach their view of good results. But living constitutionalism gives a very small number of Justices the power to generate norms through their decisions, whereas good constitutional lawmaking requires the broader participation of many citizens. Second, the Supreme Court is drawn from a very narrow class of society: elite lawyers who then work in Washington. In contrast, actual constitution making includes diverse citizens with a wide variety of attachments and interests. Finally, constitutional lawmaking should be supermajoritarian, while the Supreme Court rules by majority vote. In short, these reasons suggest that the doctrines created by Supreme Court Justices are likely to lead to worse consequences than doctrines flowing from the Constitution's original meaning.

Sometimes it is said that the Supreme Court as a matter of practice tends to follow the will of the majority when it makes up new constitutional doctrine. We doubt this claim, because Supreme Court Justices are more responsive to elite than popular opinion. But even if were true, it would not show that living constitutionalism is as good as originalism, because supermajority consensus rather than a bare majority is needed to make a truly beneficial constitution.

II. Creating a Comprehensive Originalism

The supermajoritarian justification for originalism helps makes originalism more comprehensive as well. So-called "new originalists," or, more accurately in our view, "constructionist originalists" believe that original meaning controls the interpretation of provisions that are not ambiguous or vague, but that constitutional construction provides judges and other political actors with discretion to resolve ambiguity and vagueness based on values not derived from the Constitution. But under the view offered here, construction based on extra-constitutional values would be legitimate only if the original interpretive rules endorsed construction. But we find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing or even at the time of subsequent amendments. Rather, the evidence suggests that ambiguity and vagueness in a provision were resolved by the enactors and their generation by considering evidence of history, structure, purpose, and intent. Thus, orginalism has the capacity to provide the answer to all questions of constitutional interpretation. While it is true that not all provisions are clear, the best approach is to choose the better supported meaning of the possible interpretations. And the original rules of interpretation help guide one to that result.

Moreover, besides lacking a connection to historical practice, construction is also inferior to originalist interpretation on normative grounds. Because there is no accepted method for construction, some judges will choose one way to resolve constructions, whereas others will choose another way. Some judges may not even commit to one way of resolving constructions, but instead may use different methods in different cases. As a result, the construction process is likely to be less consistent and coherent than resolving ambiguity and vagueness by reference to the applicable interpretive rules. Moreover, construction undermines one of the basic purposes of a constitution: if the constitution is to limit government, then it is important that the government judicial officials do not have the power to vary or supplement the constitution with extra constitutional values. Always choosing the best interpretation of the text possible with the aid of the original methods makes for a more unified and attractive constitutional jurisprudence.

III. A Culture of Originalism

Whatever the theoretical justification for a legal theory, its practical success depends on support from the legal culture of its time. For years, academics and the broader legal culture have been hostile to originalism. As a result, scholars have not developed the cumulative knowledge of the historical meaning of both particular provisions and the original methods that would support the Supreme Court in a comprehensively

originalist application of constitutional law. Nor have Justices who consistently write originalist opinions received widespread praise for their performance.

But in a world dominated by originalism, academics can work to create the knowledge that would improve the performance of originalist judges and reinforce their inclination to be consistently originalist. Indeed, this new culture could help usher in a golden age of originalism because the modern world has characteristics particularly friendly to a theory of constitutional interpretation that rests on knowledge of the past.

First, law professors today have more specialized knowledge and as a result generate more comprehensive and accurate information within their specialized field. In the area of originalism, we are already witnessing the fruits of substantial specialization. Some originalist professors largely concentrate on questions of methodology. Others focus on a deeper understanding of the original meaning of particular constitutional provisions. Because historical knowledge of particular eras helps provide the context to clarify original meaning, some originalists specialize in particular periods of American history, like the Founding era in which the original Constitution was framed or the Reconstruction period in which the Thirteenth, Fourteenth, and Fifteenth amendments were enacted. Still others specialize in certain subject matter areas of the Constitution, like the provisions that divide the foreign affairs powers among the branches of the federal government. Despite such specialization, the modern academy circulates information ever more rapidly through conferences, online commentary, and blog posts, assuring that the various areas of knowledge do not remain hermetically sealed.

Yet another advantage for originalism is the variety of political ideologies to which originalists now adhere. The more heterogeneous the ideological priors of originalists, the richer originalist inquiry becomes. Bias must be made to counteract bias. Less committed scholars then can judge which side has the better assessment.

Already originalism has been greatly enriched as professors with different ideological perspectives have embraced it. The renaissance of originalism in the modern era began with a particular ideological valence—the conservative critique of the Warren Court. This critique, exemplified by the writings of Robert Bork, had a strong majoritarian flavor. As a result, the initial inclination of the originalist movement was to find an original meaning that gave space to the political branches, at the state and federal levels, to enforce the contemporary social norms they chose.

But this perspective may well have reflected as much the views of the Progressive Era and the New Deal as that of the Constitution's original meaning. Subsequently, more libertarian scholars discovered in the history an original meaning that protects individual liberty and limits the reach of the states, the federal government, or both. Even more recently, some liberal law professors have become originalists. They have found in the original meaning of the guarantees of equality in the Fourteenth Amendment politically liberal results.

To be sure, not every scholar can be equally correct. Ideology itself will prompt false starts and wrong turns. Sometimes originalist inquiry into original meaning is distorted by ideology. But over time, new scholars will enter these debates, sift through the various claims, and help the profession reach a better consensus.

The technology of our age also facilitates originalism. As more and more historical documents appear online, the past becomes more accessible to all. As more sophisticated techniques of search and categorization are honed, we can better evaluate the nuance and context of the Constitution's text. Modern information technology brings the past closer to the present than ever before.

This phenomenon of using modern technology to immerse us in the past is an important trend throughout the humanities. Recently, an English professor was able to recreate picture by picture an exhibit that had substantial impact on Jane Austen. In constitutional law, the same kind of technology allows us to look at every recorded usage of a word like commerce to better triangulate the meaning of the term in the Commerce Clause. Big data is a boon to all who seek to gain value from information. Originalism gains from new tools for understanding the rich historical context of our founding document in order to resolve ambiguities and vagueness.

The final step in an originalist world would be reconciling the originalist future with the often non-originalist past of Supreme Court decisions. It is not surprising that originalists have for the most part not yet seriously confronted the challenge of integrating originalism with precedent. This task did not seem fruitful until originalism gained enough power to potentially serve again as the warp and woof of the law. But once originalism has been connected to the desirability of its results, it is easier to fashion rules for precedent that would reflect the tradeoff between following the original meaning and following precedent.

Of course, the Court will not follow every twist and turn of originalism arising in the legal academy. There is a necessary division of labor between the high theory of law professors and the quotidian practice of the courts. But that division does not mean that the turn to originalism in legal academy will not have an effect on the wider world. The Chicago school of antitrust economics has transformed antitrust law, although the Courts have not written all the nuances of the theory of industrial organization into competition law.

IV. Originalism and the Reinvigoration of the Amendment Process

To be successful, a renaissance of originalism should also lead to a revival of the constitutional amendment process. When citizens recognize that they can no longer change the Constitution by getting the Supreme Court to update it according to their preferences, they will naturally focus on changing it through the only avenue left to them—the amendment process. A renewed focus on the constitutional amendment process can transform the constitutional identity of the citizenry. In an originalist world, a generation will naturally see itself not simply as subjects of the Constitution but also as its potential framers. Each generation then can contribute to our fundamental law no less than previous generations, including those of the Founding, Reconstruction, and Progressive eras.

There can be no normatively attractive originalism without

the amendment process. The case for originalism depends on a beneficial process, like Article V, that permits each generation to change the Constitution. But there also can be no effective amendment process without originalism. Without originalism, constitutional change can occur through other means, allowing groups to change the Constitution without amending it and leaving the amendment process a dead letter. Proper constitutional interpretation and a vigorous constitutional politics march under a single banner: no originalism without the amendment process and no vigorous amendment process without originalism.

As the culture of originalism takes hold, Article V should be restored to its central place in the constitutional order—a place it had from the early republic through the early twentieth century— when transformative constitutional amendments could be passed. Indeed, it is impossible to count all the amendments that have not been born because of nonoriginalism. Part of the tragedy of nonoriginalism is the "Lost Amendments"—amendments that would have represented a generation's contribution to high-quality fundamental law, but were not enacted because the Supreme Court wrongfully intruded into the process.

Originalism's renewal of the constitutional amendment process would have substantial benefits for our politics. First, because political and social movements could not depend on the courts to change the Constitution, they would then have to focus on persuasion in the high politics of the constitutional amendment process. This dynamic encourages more political compromise, harnessing the energy of social movements to move the nation forward while tamping down on their tendency to polarize the polity. Constitutional compromise was at the heart of the nation's founding. But as political and social movements came to believe they could get their wish list by engaging the courts rather than their fellow citizens, that art of compromise was lost. That loss reflects yet another aspect of the tragedy of nonoriginalism.

The amendment process delivers constitution making back into the hands of the people. Rather than leaving fundamental decisions about new societal norms to the judicial elites, the reinvigorated constitutional amendment process would tap into the dispersed judgments and diverse attachments of people across the nation. While there has been much discussion of the virtues of popular constitutionalism, a real popular constitutionalism—one that is likely to leads to good results—is possible only through a vigorous amendment process.

V. The Constitution as Formal Law, Higher Law, and Our Law

Originalism provides the only theory that reconciles three normatively attractive features of a constitution, making it formal law, higher law, and our law. Originalism provides a binding, determinable meaning, making the Constitution formal law like other written law. The supermajoritarian process that generates the Constitution and its amendments provides substantial assurance of its goodness and therefore of its higher law quality. Finally, the amendment process that originalism protects permits each generation to make the Constitution its own, by deciding whether to place its additional provisions in the Constitution on much the same terms as previous generations did.

First, originalism makes the Constitution formal law. Originalism's essential claim is that the meaning of law is fixed at the time of its enactment, placing limits on government and permitting citizens to rely on it into the indefinite future. Considering the original methods as part of originalism helps resolve ambiguities and vagueness by reference to other materials fixed by history. It thus reinforces the objective and formal nature of constitutional law, promoting additional stability and reliance.

In contrast, living constitutionalism undermines the objectivity of law. By its very nature, it seeks to base constitutional decisions on something other than the original meaning of the written text. What constitutes that secret sauce of constitutional decision making is something on which living constitutionalists themselves disagree. But the additional element, whether evolving moral principles or the current majority's view of good constitutional norms, is guaranteed to fluctuate, undermining stability and reliance on rights that the original meaning of the Constitution provides.

Second, under originalism, the Constitution is higher law because it is of higher quality than the ordinary legislation that it displaces when the two conflict. The appropriate supermajority rules used to enact the Constitution's provisions are likely to produce such higher quality entrenchments. The desirability of these provisions justifies judges in displacing ordinary law with higher law. Moreover, our argument creates an identity between formal law and higher law. Because the Constitution is higher law in virtue of the consensus that gave rise to it, we have shown that it should be interpreted according to the interpretive rules the Framers' generation would have deemed applicable to it—interpretive rules that reflect originalism as conventionally understood.

Living constitutionalism, in contrast, has no plausible theory of why its process of constitutional interpretation likely leads to good results. Updating the Constitution through judicial interpretation has none of the virtues of the consensus producing procedures that are at the heart of a good process for constitution making. Constructionist originalism has similar problems whenever it resorts to construction. The principles chosen for construction do not have to reflect majoritarian support, let alone consensus. They do not relate to a process that is likely to render constitutional decisions beneficent.

Third, the Constitution is also our law. It is ours by virtue of the fact that each generation can amend the Constitution under the same rules as previous generations could amend and under rules similar to those employed by the founding generation. The democratic and deliberative process of constitutional amendments assures that all voters have a chance to participate. It is manifestly a structure where "We the People" remain the pivotal decision makers.

But a vibrant amendment process and vigorous constitutional politics that draw in the citizenry at large are possible only through originalism. It is originalism that sustains the amendment process, because it forces those who want to

change the Constitution to use that process rather than persuade the Court to transform the Constitution without requiring a consensus of the American people.

The judicial updating inherent in living constitutionalism is necessarily in tension with a constitution belonging to the whole people. Supreme Court decisions may sometimes reflect popular social movements, but social movements are various and conflicting. The Tea Party does not agree with Occupy Wall Street. Secularists fight with those who want a politics animated by Christian values. It is Justices who choose which movement to embody in their decisions. Their decisive role assures that under living constitutionalism We the Elite Lawyers rather than We the People rule.

To be clear, we are not making an ideological point. Elites sometimes favor interests on the right and sometimes interests on the left. But the social movements that the Supreme Court chooses to heed almost always have elite support.

Originalism has the great advantage of making the content of our law coextensive with formal law and higher law. Some of the formal law was enacted by the original Constitution, and the rest was enacted by the similarly stringent process of constitutional amendment. Thus, all constitutional law derives from a similar process of intense public deliberation.

The union of our law, higher law, and formal law is a great achievement of originalism—a correspondence of elegance and beauty that helps sustain the republic. The final aspect of the tragedy of nonoriginalism is that years of nonoriginalist jurisprudence have obscured the powerful identity between these avatars of law which is a large part of the genius of the system of government we have inherited.

Our understanding of the making of the Constitution and its proper interpretation serves to link together several important strands of a desirable legal regime. The Constitution, enacted through supermajority rules and interpreted based on its original meaning, places a limit on government that protects people's liberty and preserves a desirable constitutional order. The amendment provisions, however, operate to ensure that each generation may contribute to the Constitution based on largely the same procedures. But the supermajoritarian requirement means that, whatever changes are made to the Constitution, must have been enacted through a process which promotes consensus provisions that protect minority rights. Overall, the Constitution functions as fundamental law that may change over time, but only if those changes are likely to have the same desirable qualities as the original Constitution.

Free Speech & Election Law

Ninth Circuit Upholds Professor's First Amendment Claim in *Demers v. Austin*

*By Arthur Willner**

Note from the Editor:

This article is about the Ninth Circuit's decision in *Demers v. Austin*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about free speech and the First Amendment in general. To this end, we offer links below to other sources, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

- Demers v. Austin, No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014): http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/04/11-35558.pdf
- *Ninth Circuit Finds* Garcetti *Official Duty Rule Inapplicable to Professorial Speech in Public-University Context*, 127 Harv. L. Rev. 1823 (2014): http://cdn.harvardlawreview.org/wp-content/uploads/2014/04/vol127_demers_v_austin.pdf

The decades-long debate over whether the First Amendment protects government-employed academics whose comments fail the "political correctness" test will ultimately be resolved by the U.S. Supreme Court, but until then, free speech advocates in the U.S. Court of Appeals for the Ninth Circuit can take heart from a recent decision that upholds the rights of public employee professors to speak freely on matters of public interest.

The Ninth Circuit recently denied a petition for panel rehearing and a petition for rehearing en banc in a case, *Demers v. Austin*, in which it strongly affirmed the First Amendment free speech rights of faculty employed at public colleges and universities.[1] The opinion's robust language in support of free speech should be cause for celebration by both faculty and students on campuses, once famously regarded as the "marketplace of ideas," where these days a purported right not to be offended is thought to trump the First Amendment right to free expression.

Any discussion of *Demers* must begin with the Supreme Court's decisions in *Pickering v. Board of Education*[2] and *Connick v. Myers*.[3] These cases held that, when speaking as a citizen, a public employee's First Amendment claims were governed by a balancing test in which the Court would determine whether the employee was speaking on a matter of public concern and, if so, whether the employee's interest in speaking outweighed the employer's interest in regulating that expression.

In 2006, the Supreme Court departed from the *Pickering* balancing test in *Garcetti v. Ceballos*.[4] *Garcetti* arose out of an incident in which a Los Angeles prosecutor alleged that his employer, the district attorney's office, had retaliated against him in violation of the First Amendment because he had written a memorandum in which he asserted that a police affidavit contained serious misrepresentations. The Supreme Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[5]

In a "not so fast" moment in *Garcetti*, however, dissenting Justice David Souter expressed concern that the majority opinion might "imperil First Amendment protection of academic freedom in public colleges and universities,"[6] noting the Court's long recognition of the importance of freedom of speech within the university environment. Justice Anthony Kennedy's majority opinion took note of this concern and acknowledged that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[7] Consequently, the Court chose not to reach the issue of whether its opinion applied to speech related to scholarship or teaching, carving out the issue for a later day, and in the meantime leaving the question to the various circuits.

Demers was the Ninth Circuit's first opportunity to address whether faculty speech at a public college or university falls within the *Garcetti* rule for public employees generally. The Plaintiff was a member of the Washington State University (WSU) faculty in its School of Communications. He sued various WSU administrators in a 42 U.S.C. § 1983 action when they allegedly retaliated against him after he circulated within the university community and to the media a "plan" containing his proposals for the restructuring of the school faculty as well as the draft of portions of a book he had authored that was critical of the academy in general and of certain events at WSU in particular. The U.S. District Court for the Eastern District of Washington granted summary judgment for the Defendant administrators, holding that the plan and book were written pursuant to the Plaintiff's official duties as a WSU faculty member, and were therefore unprotected under *Garcetti*. The district court also held, as to the plan, that it did not in any

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event address a matter of public concern.

The Ninth Circuit affirmed the district court's finding that the Plaintiff had prepared and circulated the plan pursuant to his official duties. However, it reversed the lower court's holding that the Plaintiff's speech was unprotected under *Garcetti.* Using particularly strong language affirming the importance of academic freedom under the First Amendment, the Ninth Circuit held that *Garcetti* does not apply to speech related to scholarship or teaching, and concluded that, "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[8] Instead, academic employee speech will be subject to the *Pickering* analysis—*i.e.*, the employee must show that the speech addressed a matter of public concern (as opposed to a mere private grievance); and, if so, the court will balance the employee's interests in speaking against the interests of the public entity, as an employer, in regulating the speech in furtherance of the efficient operation of its services.

In addition to the overall significance of the Ninth Circuit's ruling regarding the applicability of *Garcetti* to academic speech, *Demers* was also important in its analysis of certain underlying issues. For example, although the court acknowledged that the balancing process regarding disputes concerning esoteric topics of academic speech may be difficult, it warned against simply concluding that such disagreements are "mere squabbles over jobs, turf, or ego."[9] Furthermore, the court found that protected academic speech is not limited to what is generally considered "scholarship," such as writings on literature. Thus, speech pertaining to even mundane issues involving school organization, governance, budgets, and hiring may well address matters of public concern under *Pickering.* Finally, because there had been no previous Ninth Circuit case on point regarding the application of *Garcetti* to a professor's academic speech, one could not say that the law was sufficiently certain that a reasonable official in the Defendant administrators' positions would have understood that their conduct had violated the Plaintiff's rights. Therefore, the court found that the *Demers* Defendants were entitled to qualified immunity from monetary damages.

Academic speech, whether in the form of classroom teaching or writing, is central to the official duties of public college and university instructors. The Supreme Court will likely ultimately decide whether the application of *Garcetti* conflicts with their First Amendment rights. In the meantime, in the Ninth Circuit, faculty can take heart that their free speech rights will not be foreclosed simply because they spoke or wrote within the scope of their positions as public employees.

Endnotes

1 Demers v. Austin, No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014).

2 391 U.S. 563 (1968).

3 461 U.S. 138 (1983).

4 547 U.S. 410 (2006).

5 *Id.* at 421.

6 *Id.* at 438 (Souter, J, dissenting).

7 *Id.* at 426 (majority opinion).

8 Demers v. Austin, No. 11-35558, slip op. at 14 (9th Cir. Jan. 29, 2014).

9 *Id.* at 18.

Labor & Employment Law

Asserting Influence and Power in the 21st Century: The NLRB Focuses on Assisting Non-Union Employees

*By Elizabeth Milito**

Note from the Editor:

This article is a discussion about the National Labor Relations Board's relationship to non-union workplaces under sections 7 & 8 of the National Labor Relations Act. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about the NLRB, NLRA, and other labor law issues. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Mike Hall, *NLRB Says Workers Need to Know Their Rights, Bix World Flips Out*, AFL-CIO Now blog (Aug. 25, 2011): http://www.aflcio.org/Blog/Organizing-Bargaining/NLRB-Says-Workers-Need-to-Know-Their-Rights-Biz-World-Flips-Out
- *Interfering with employee rights (Section 7 & 8(a)(1)*, National Labor Relations Board: http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1
- NLRB Acting General Counsel Memorandum Concerning Social Media Cases (Jan. 24, 2012): http://op.bna.com/tpif.nsf/id/mlon-8wypya/$File/NLRB%20GC%20Jan%2024%202012%20Memo.pdf
- Michael K. Chropowicz, *Social media and employer liability under the NLRA*, Ill. St. Bar Ass'n Newsl., March 2013: http://www.isba.org/sections/laboremploymentlaw/newsletter/2013/03/socialmediaandemployerliabilityunde

"A right only has value when people know it exists. We think the right to engage in protected concerted activity is one of the best-kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers."

National Labor Relations Board Chairman Mark Gaston Pearce (June 12, 2012)[1]

Introduction

The National Labor Relations Act (NLRA or Act)[2] is a 78-year-old law that outlines employees' rights to unionize and bargain collectively in private sector workplaces. Pursuant to the NLRA, the National Labor Relations Board (NLRB or Board)[3] is an independent federal agency charged with conducting union elections and investigating and remedying unfair labor practices. Although the Act governs private sector employers and employees, most non-unionized employers have little appreciation for the breadth of the NLRA and the Board's jurisdiction. Historically, the Board's activities primarily focused on monitoring workers' efforts to organize or bargain collectively with employers.[4] As such, the NLRB meant little or nothing to a business unless it was already unionized or faced an organizing campaign.[5] Over the last few years, however, the NLRB has increasingly applied the Act to employer policies, practices, and actions that have not previously been the concern of the Board. While less than seven percent of private sector employees belong to a union,[6] creative marketing and legal maneuvering demonstrate the Board's intent to wield its authority in the other 93 percent of the workplaces. The motivation for the entry into non-union workplaces is no mystery.[7] But the method and manner has surprised many employers.[8] Under the leadership of Chairman Mark Gaston Pearce, the NLRB has issued complaints attacking well-established employer policies in non-union workplaces concerning employment-at-will,[9] employer proprietary and confidential information, and employee use of social media.[10] Other aggressive moves by the NLRB include a notice poster regarding employee rights and accelerated union election rules.[11]

The NLRB's recent focus on non-unionized workplaces comes from a broad reading of sections 7 and 8 of the Act, which apply to both unionized and non-unionized workplaces.[12] Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in section 7.[13] Section 7 states that employees shall, in addition to the right to organize and join unions, have the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[14] Courts generally find that concerted activity occurs when employees act jointly—*i.e.*, in concert—to improve working conditions. Using broadly interpreted section 7 rights, the Board, under the leadership of Chairman Pearce and Acting General Counsel Lafe Solomon, has challenged employer policies that allegedly impede employees' rights to

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act in concert with other workers.

The Board has gained entry into non-unionized workplaces with two simultaneous and campaigns. First, the Board has adopted an extensive marketing effort to educate non-union employees about their rights under the Act. Under this approach, the Board has updated and expanded its social media operation and issued a rule requiring employers to display a poster describing employees' NLRA rights.[15] Additionally, the Board has expanded an employee's section 7 rights by challenging a wide array of activities, including employer policies concerning social media, at-will employment, and workplace investigations.[16] The vigorous education campaign coupled with enforcement has caught employers, particularly non-unionized employers, unprepared.

This article will examine how the NLRB has expanded its reach into non-union workplaces with these education and enforcement campaigns and explore the impact on employers' rights. It concludes by suggesting that the Board has gone too far in supporting employees' rights under the guise of protected concerted activity to the detriment of employers' constitutional and statutory rights. If the Board continues on course, as legal experts anticipate it will, employers large and small, union and non-union, should prepare for further challenges to previously accepted policies.[17]

I. A Newly Invigorated Board Launches a Two-Prong Campaign: Educate and Enforce

A. Educating Non-union Employees on Protected Concerted Activity

In the last two and a half years, the NLRB has adopted an outreach campaign intended to educate non-union employees about their NLRA rights. The campaign launched on August 30, 2011, when the Board issued a rule that would require employers to display a poster describing rights under the NLRA.[18] The poster rule signaled the advent of a new era; one in which the Board would increasingly focus on activities in non-union workplaces.

After the NLRB issued the notice, several groups, including the National Association of Manufacturers, the Associated Builders and Contractors, the National Federation of Independent Business, the Coalition for a Democratic Workplace, the National Right to Work Legal Defense Foundation, and the U.S. Chamber of Commerce, challenged the rule in related lawsuits. Besides taking issue with the poster's pro-union language, challengers argued that the NLRB does not have authority to impose a posting requirement on over six million employers and that the rule violated the First Amendment.[19] While notifying employees of their statutory rights may not sound all that bad, challengers insisted that rule would undercut employers' free speech rights to "engage in non-coercive speech about unionization."[20]

In response, the Board argued that changing workforce demographics justified the poster rule. According to the NLRB, a higher percentage of non-English speaking workers combined with a lower percentage of union members means that workers do not know their NLRA rights.[21] Opponents of the rule said such an assumption is dubious in the Internet age and pointedly noted that the agency conducted no empirical study to back up its assertion that a (one-sided) poster in the break room will increase awareness of NLRA rights.[22] In other words, the NLRB had not shown the rule was necessary, a requirement for federal rulemaking even assuming the FLRA conveyed authority to issue a poster rule.

In March, 2012, Federal District Court Judge Amy Berman Jackson ruled that the NLRB had authority to issue the poster rule.[23] The groups appealed Jackson's order and asked the U.S. Court of Appeals for the D.C. Circuit to adopt the opinion of a federal district court judge in South Carolina who, in another lawsuit, struck down the rule.[24] On May 7, 2013, the U.S. Court of Appeals for the D.C. Circuit struck down the rule.[25] The court found unpersuasive the NLRB's claim that its posters are the Board's speech, not employer speech. In dismissing this argument, the court observed that the "'dissemination' of messages others have created is entitled to the same level of protection as the 'creation' of messages . . . [The] right to disseminate another's speech necessarily includes the right to decide not to disseminate it."[26] Moreover, the D.C. Circuit noted that Congress intended that section (8)(c) "encourage free debate on issues dividing labor and management" and therefore permits "employers to present an alternative view and information that a union would not present."[27] The decision was hailed by champions of free speech and free enterprise. The National Federation of Independent Business, one of the groups challenging the rule, said in a statement that the NLRB has "consistently failed to act as a neutral arbiter . . . and it overstepped its authority by compelling [employers] to post a pro-union notice."[28] On June 14, 2013, the U.S. Court of Appeals for the Fourth Circuit similarly struck down the rule.[29]

Although courts have thwarted the Board's attempt to make employers promote pro-union speech, educational outreach has continued unabated in other fora. In June 2012, the Board launched a webpage dedicated to protected concerted activity,[30] which explains the right of employees to act together for mutual aid and protection:

> The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court.[31]

The site's centerpiece consists of an interactive map of the United States, which allows visitors to click on a particular state and read about how an employee's workplace grievance in State X was protected concerted activity. The webpage also encourages non-union employees to contact the NLRB if they need help.[32] According to the site, upon receipt of an inquiry, the Board's Information Officer will investigate the nature of the activity, whether it sought to benefit other workers, and whether it was

carried out in a way that might cause it to lose protection under the NLRA.[33] Presumably, the Board could then encourage an employee to file a charge against the employer. Overall, the website provides evidence that the Board's reach now extends far beyond traditional union organizing.

And just in time for Labor Day 2013, the Board further expanded its educational and PR campaign with the release on August 30, 2013, of a mobile app that allows employees to download provisions from the NLRA and offers a convenient direct dial telephone connection to the NLRB. [34] In a press announcement, Chairman Mark Gaston Pearce again highlighted the Board's interest in the non-union workplace:

> The National Labor Relations Act guarantees the right of workers to join together, with or without a union, to improve their working lives. The promise of the law can only be fulfilled when employers and employees understand their rights and obligations. With this app, we are using 21st Century technology to inform and educate the public about the law and their rights.[35]

The Board's educational efforts have seemingly paid off. According to the agency, the NLRB received more than 82,000 public inquiries regarding workplace issues last year.[36]

B. Enforcing Newly-Expanded Section 7 Rights

When Congress passed the National Labor Relations Act in 1935, concerted activities consisted largely of in-person communications.[37] These conversations amongst co-workers led to the frequently-used term "water cooler" talk.[38] The arrival of the Internet, including email and social networking, has changed the face and scope of "concerted activities." As more employees communicate with coworkers online, the Board has found these communications may be recognized as concerted activity and taken on an increasing role in scrutinizing employers who respond to their employees' online activity.[39] Three times now, the NLRB has issued guidance and memoranda on social media polices and disputes.[40] On May 30, 2012, the NLRB released its third and most recent memorandum, in which the Board reviewed seven social media policies and found all but one to be unlawful.[41] The NLRB's memoranda and subsequent decisions regarding social media rules and employer policies have broadened the scope of protected concerted activity. And the Board's enhanced enforcement of this expanded right has provided a means of enforcement in non-union workplaces.

Take, for instance, the NLRB's seminal "Facebook termination" case. The disgruntled message posted by employee Dawnmarie Souza—"Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor"—elicited responses from coworkers, among them negative remarks about a supervisor that included expletives.[42] Souza's employer, the American Medical Response of Connecticut (AMR), subsequently fired her. As a result, Souza filed a complaint against AMR, which alleged that Souza's Facebook postings were protected concerted activity.[43] The employer responded that the termination resulted from Souza's "rude and discourteous service."[44] While this case ultimately settled, the Board's action signaled the dawn of a new era where nearly any employee communication with or to other employees about terms and conditions of employment, whether at the water cooler or online, garners the employee NLRA protections.[45]

In a more recent decision that also gained significant media attention, a Chicago-area car dealer disciplined a sales person for complaining on Facebook about the dealership's cheap food and beverage choices for a public event intended to advertise a new luxury car model.[46] Irked at the negative and sarcastic tone of the employee's Facebook posts, management asked him to delete the posts but later fired him anyway. The NLRB challenged the employer's disciplinary action, claiming that the employee was engaged in "protected concerted activity" under section 7.[47] While an administrative judge ultimately upheld the employee's termination based on another incident, the judge found that section 7 protected the employee's Facebook that mocked the sales event. Overall, it presented an equivocal opinion that distressed employers concerned about workers' ability to gripe online.[48]

In addition to social media cases, the NLRB has taken issue with other long-accepted employer policies that the Board alleges could reasonably chill an employee's ability to exercise section 7 rights. For instance, many employers routinely instruct employees not to discuss ongoing investigations. Such a practice could run afoul of the NLRA, according to a Board ruling announced on July 30, 2012.[49] The decision came in the case of James Navarro, a technician at Banner Estrella Medical Center. Banner used steam to sterilize equipment. During 2011, a broken steam pipe prevented the normal sterilization process. Navarro deemed alternate methods, which a supervisor had ordered, to be inadequate. Navarro discussed his concerns with co-workers, but a human resources manager directed him not to discuss the matter while the investigation was ongoing. Navarro filed a charge with the NLRB, and the Board found a violation of section 8(a)(1). The Board held that Banner's concern over protecting the investigation's integrity was insufficient to overcome the employee's right to engage in protected, concerted activity.

II. The Balance Tips

In January of 2013, Chairman Pearce proclaimed that "[m]any view social media as the new water cooler. All we're doing is applying traditional rules to new technology."[50] The Board's guidance and opinions on social media, however, indicate that the Board is not applying the same rules to social media or employer policies. Instead, the General Counsel's own report stated that traditional standards used to determine whether employee speech is protected under section 7 do not adequately address Facebook postings.[51] In a ruling finding that a posting was protected, the Board analyzed the dispute under a new test that weighs in favor of protection.[52] This modified analysis considered disruption in the workplace as a dispositive factor, concluding that online activity that occurs outside working hours does not disrupt the workplace.[53] The new test makes it virtually impossible for an employer to show that any Facebook posting about work is disruptive of the workplace and, therefore, not protected.[54]

Recent decisions by the Board highlight how broadly it

now interprets protected concerted activity and constrains employers when it comes to disciplining or discharging employees who engage in social media activity about the employer. This transformation presents unforeseen challenges to employers seeking to protect civility in the workplace while upholding their business reputation in the community. With every disciplinary action, employers are more likely to run afoul of the NLRB based on its expanding definition of concerted activity. This cannot be what was intended when Congress enacted the NLRA. In fact, when the U.S. Supreme Court first definitively addressed the scope of section 7 with regard to the employment-at-will doctrine it proclaimed that the NLRA "does not interfere with the normal exercise of the right of the employer to select its employees or discharge them."[55] Today, few employers would likely find much comfort in this 1937 quote.

Employers, like the Chicago-area car dealership discussed *infra*, are justifiably concerned about protecting their reputation. Moreover, the public nature of social networking posts means that employers confronted with inappropriate postings will want to act quickly to extinguish further improper activity.[56] At the same time, the Board's broad reading of concerted activity converts nearly every employee rant or comment about employers into protected activity under section 7 of the Act. And unfortunately for employers, a determination as to what activity exceeds the boundary of protection often depends on the "eye of the beholder."[57] As a result, employees can render themselves nearly termination-proof simply by posting an employment-related rant on social media, or "liking" an inappropriate posting concerning their job. Online comments about work under the Board's reading of section 7 may convert an at-will employee to one with almost tenured status.[58] Employers who confront and discipline employees for on-line misconduct or pursuant to a policy relating to on-line conduct face back pay awards and reinstatement of employees who engaged in actual misconduct or even intentionally tried to get fired.[59] This means that disciplinary action taken by an employer for online activity could land the employer in a legal quagmire. And even if terminated or disciplined employees do not pursue action with the Board, the potential risks are too serious and too expensive to dismiss as insignificant, especially in this pro-litigation era.[60] Regardless of the outcome, an employer's business reputation can be materially and irrevocably tarnished with just one adverse press release.[61]

Conclusion

In July 2013, the NLRB acquired, for the first time in ten years, a full slate of confirmed members.[62] Employers should be alert for additional labor-friendly initiatives. The NLRB's expansion of the law affects all employers, whether their employees are represented by a union or not. But many recent decisions by the Board will be more likely to affect non-union employers.

Endnotes

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11 *See* Raymond J. LaJeunesse, Jr., *Union Organizing and the NLRB Under President Obama*, Engage: J. Federalist Soc'y Prac. Groups, Oct. 2012, at 107 (2012) (analyzing the current administration's efforts to "ease union organizing" with expedited election procedures, mandated union notice, and aggressive actions by NLRB's Acting General Counsel).

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14 29 U.S.C. § 157.

15 *See infra* Part I.A.

16 *See infra* Part I.B.

17 *See* Lauren K. Neal, *The Virtual Water Cooler and The NLRB: Converted Activity in the Age of Facebook*, 69 Wash & Lee L. Rev. 1715 (2012) (discussing the Board's attack on common workplace polices).

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19 Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013).

20 *Id.* at 954 (internal citations omitted).

21 *Id.* at 951.

22 *See* Final Rule, 29 C.F.R. pt. 104 (2011) (Member Hayes dissenting), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-08-30/html/2011-21724.htm.

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24 Chamber of Commerce v. NLRB, 856 F.Supp.2d 778, 790 (D.S.C. 2012)

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38 *Id.*

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51 NLRB Office of the Gen. Counsel, Memorandum OM 12-31, *supra* note 40, at 24.

52 See *id.*

53 *Id.*

54 *See* Bielan, *supra* note 45, at 814 (concluding that absent a change in Board direction or legislative amendment observers should expect to see "continued infringement upon employer's rights").

55 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

56 Bielan, *supra* note 45, at 156.

57 *See* Jon E. Pettibone, *Don't Forget the NLRA*, Ariz. Att'y, May 2003, at 18, *available at* https://www.myazbar.org/AZAttorney/PDF_Articles/0503NRLApgs18-19.pdf.

58 Robert Sprague and Abigail E. Fournier, *Online Social Media and the End of the Employment-At-Will Doctrine*, 52 Washburn L.J. 557 (2013) (examining the interplay between the NLRA and social media in the private sector non-union workplace).

59 Each month, an average of 2,000 unfair labor practice charges and 200 representation petitions are filed with the NLRB. In 2012, the NLRB collected more than $44 million in backpay or the reimbursement of fees, dues and fines. More than 1,200 employees were offered reinstatement as a result of NLRB enforcement efforts. NLRB Press Release, *supra* note 34.

60 The fear of litigation can be extremely effective in driving employers to settle even the most frivolous of claims. *See* Gary Blasi & Joseph W. Doherty, *California Employment Discrimination and Its Enforcement* (UCLA-RAND Ctr. L. & Pub. Pol'y Research Paper No. 10-06) (estimating the median cost of defending an employment discrimination case by private counsel through trial is $150,000, with summary judgment proceedings costing an estimated $75,000), *available at* http://www.dfeh.ca.gov/res/docs/Renaissance/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf. *See also See* Jon E. Pettibone, *Don't Forget the NLRA*, Ariz. Att'y, May 2003, at 18, *available at* https://www.myazbar.org/AZAttorney/PDF_Articles/0503NRLApgs18-19.pdf

61 *See, e.g.*, Julianne Pepitone, *Facebook Firing Test Case Settled Out of Court*, CNN Money (Feb. 8, 2011), http://money.cnn.com/2011/02/08/technology/facebook_firing_settlement/; Jim Stanley, *Guilty Until Proven Innocent:Questions Regarding OSHA's Enforcement Approach*, OH&S Blog (Jul. 29, 2013), http://ohsonline.com/blogs/the-ohs-wire/2013/07/osha-enforcement.aspx (discussing impact of agency's "public shaming" press releases).

62 Press Release, National Labor Relations Board, The National Labor Relations Board Had Five Senate Confirmed Members (Aug. 12, 2013), *available at* http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app.http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members.

Religious Liberties

Sebelius v. Hobby Lobby Stores, Inc.

*By Hon. Michael W. McConnell**

Note from the Editor:

This article is a discussion about the *Sebelius v. Hobby Lobby Stores, Inc.* case before the U.S. Supreme Court. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about *Hobby Lobby*, the Religious Freedom Restoration Act, and the First Amendment. To this end, we offer links below to different perspectives on the case, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Brief for Petitioners, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*filed* Jan. 10, 2014): http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/01.12.14_brief_for_petitioners_doj.pdf
- Elizabeth Wydra, *Symposium: Under a straight-forward reading of constitutional text and history and fundamentals of corporate law, Hobby Lobby's claims fail*, SCOTUSblog (Feb. 27, 2014, 10:27 AM): http://www.scotusblog.com/2014/02/symposium-under-a-straight-forward-reading-of-constitutional-text-and-history-and-fundamentals-of-corporate-law-hobby-lobbys-claims-fail/
- Marty Lederman, *Symposium: How to understand Hobby Lobby*, SCOTUSblog (Feb. 23, 2014, 7:20 PM), http://www.scotusblog.com/2014/02/symposium-how-to-understand-hobby-lobby/
- Ilya Shapiro, *Symposium: Mandates make martyrs out of corporate owners*, SCOTUSblog (Feb. 24, 2014, 5:03 PM), http://www.scotusblog.com/2014/02/symposium-mandates-make-martyrs-out-of-corporate-owners/
- Richard Garnett, *Symposium: Accommodations, religious freedom, and the Hobby Lobby case*, SCOTUSblog (Feb. 28, 2014, 2:11 PM), http://www.scotusblog.com/2014/02/symposium-accommodations-religious-freedom-and-the-hobby-lobby-case/

Cutting through the politicized hype about the *Hobby Lobby* and *Conestoga* case[1] ("Corporations have no rights!" "War on Women!") the Justices during oral argument focused on four serious legal questions, which deserve a serious answer:

(1) Could Hobby Lobby avoid a substantial burden on its religious exercise by dropping health insurance and paying fines of $2,000 per employee?

(2) Does the government have a compelling interest in protecting the statutory rights of Hobby Lobby's employees?

(3) Would a ruling in favor of Hobby Lobby give rise to a slippery slope of exemptions from vaccines, minimum wage laws, anti-discrimination laws, and the like?

(4) Has the government satisfied the least restrictive means test?

I think the answer to all four questions is "no." I offer brief thoughts on each below.

I. Can Hobby Lobby Avoid a Substantial Burden by Dropping Insurance?

Justices Sotomayor, Kagan, and Kennedy asked several questions about whether Hobby Lobby could avoid a substantial burden on its religious exercise by dropping insurance altogether and paying an annual "tax" of $2,000 per employee.[2] Some have suggested,[3] based on admittedly "speculative" calculations, that this option would actually save Hobby Lobby money, because health insurance typically costs more than $2,000 per employee. This argument—which the government never raised below and which no lower court has addressed—is wrong both in principle and on the facts.

First, the Greens (owners of Hobby Lobby) have alleged that their religious beliefs include a belief in treating employees well, a belief they practice by, among other things, offering quality health care to their employees. (Their religious beliefs are also why they start employees at nearly double the minimum wage, reduce operating hours to promote family time, and provide other benefits.) The government has never contested the sincerity of those beliefs. And that should end the argument. The government is forcing the Greens to cover contraception or drop insurance altogether, both of which would burden their religious exercise.

Even apart from religious convictions, the right of an employer to provide health insurance coverage for its employees is a valuable right under the law. If employers were better off dropping insurance coverage and paying the "tax," we would expect many large employers to do so. That has not happened—which confirms the common-sense conclusion that dropping insurance coverage is bad for employees and bad for business.

In any event, the speculation that Hobby Lobby could save money by dropping its employees' health insurance plan,

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paying the tax, and making it up to them in increased salary disregards three important facts: (1) employer-provided health insurance is tax-exempt to the employee, but the compensatory increase in salary would not be; (2) the provision of insurance is tax-deductible to the employer, but payment of the tax is not; and (3) employer-based group coverage is cheaper and usually better than individual plans on the exchanges. It is almost certainly cheaper for Hobby Lobby to provide health insurance than to pay for its employees to purchase equivalent coverage on the exchanges.

True, some of Hobby Lobby's employees might be eligible for subsidies, which in theory might lower its costs. But those subsidies depend on information an employer does not have—family size and income—and employers cannot pay different amounts to workers based on these factors. To make all of its employees whole, Hobby Lobby would have to assume none will receive subsidies.

In short, if Hobby Lobby drops insurance, it would not simply pay a $2,000 "tax." Requiring it to cease providing insurance would cause massive disruption to Hobby Lobby's employees, major uncertainty for its business, and cost millions of dollars in taxes and salaries beyond what it was previously paying just for insurance. It is easy to see how imposing such a choice constitutes a substantial burden—which is likely why the government never raised the issue, and the courts of appeals never considered it.

II. Does the Government Have a Compelling Interest in Protecting the Statutory Rights of Hobby Lobby's Employees?

Turning to strict scrutiny, the government's main argument is that it has a compelling interest in protecting the "statutory rights" of third parties—namely, the right of Hobby Lobby's employees to get cost-free contraception through Hobby Lobby's insurance plan. Evaluating the strength of the government's interests is often one of the most difficult inquiries in constitutional law. But in this case, the government has almost insuperable difficulties in making the case.

First and foremost, the government's compelling interest argument suffers from a rather glaring problem: Congress did not impose the contraceptive mandate, but left it to the Department of Health and Human Services (HHS) to decide what "preventive services" must be covered. If Congress really viewed contraceptive coverage as a compelling interest it would not have left it to the vagaries of the administrative process, which are subject to political change from administration to administration.

The interest is further undermined by HHS's statutory authority to grant religious exemptions to whomever it chooses—which HHS itself understands to include authority to grant such exemptions to for-profit businesses.[4] Genuinely compelling interests—that is, those that cannot tolerate religious exemptions—do not come with open-ended regulatory authority to create exceptions.

The government argues that it necessarily has a compelling interest in protecting the "statutory rights" of the employees to contraceptive coverage. The employees, it argues, cannot be made to bear the burden of the employer's religious exercise.

This argument is circular. It assumes the conclusion—that employees are legally entitled to this benefit—when that is the very question before the Court. The Affordable Care Act shifts the legal responsibility for paying for an employee's contraceptive coverage from the employee to the employer. There is nothing wrong with that in principle; the government shifts economic burdens all the time. But when the burden is an imposition on conscience the government may not shift the burden without a compelling justification. If the mere fact that the statute creates a new "statutory right" for a third party were enough to make the government's interest compelling, no one could ever raise a First Amendment or Religious Freedom Restoration Act (RFRA) challenge to a law forcing them to do something for someone else.

As Justice Kennedy pointed out in oral argument, the government could require employers to pay for employees' abortions (or could require for-profit doctors to perform them), and RFRA would be no help, because the government would always have a compelling interest in protecting the "statutory rights" of third parties. That cannot be the law.

Religious accommodations often impose burdens on third parties. In *Sherbert*,[5] the employer's unemployment tax rate was increased on account of covering an employee who could not work on Saturday; military draft exemptions for religious conscientious objectors—the most venerable of all religious accommodations—make it more likely that other people will be drafted; Title VII's religious accommodation requirement requires employers and other employees to adjust their practices; conscience clauses force women seeking abortions to locate a different doctor or hospital. It would break with long-standing law and tradition to say that religious accommodations can never shift a burden to a third party.

The government's argument cannot be squared with the Court's recent, unanimous, decision in *Hosanna-Tabor*,[6] allowing religious employers to impose substantial burdens on the "statutory rights" of employees. In that case, the Court held, without dissent, that religious organizations have a First Amendment right to fire ministerial employees for any reason at all—even reasons that would violate anti-discrimination laws. Obviously, firing an employee in violation of anti-discrimination laws is a more substantial deprivation of the employee's "statutory rights" than declining to pay for the employee's contraception.

The government struggles to distinguish *Hosanna-Tabor* on the ground that it arises in "the special context of autonomy for churches and religious institutions."[7] But that simply dodges the question: *Why* should the government have no interest when a religious group imposes a severe burden, but a compelling interest when a business imposes a light burden? Perhaps the government thinks this is because a for-profit business is categorically incapable of exercising religion. But for reasons that I[8] and others[9] have explained, that argument is untenable. And it certainly found little support at oral argument. So we are left with the conclusion that burdens on third parties do not automatically foreclose a claim of religious freedom.[10]

This conclusion is consistent with other areas of the law,

where the Court consistently protects civil rights—even when they impose burdens on third parties. In the free exercise context, the Court has recognized a right to sacrifice animals, despite "a substantial health risk . . . [to] the general public" and "emotional injury to children who witness the sacrifice of animals."[11] It has recognized a right to use illicit drugs, despite the harm to third parties from diversion of the drugs for recreational use.[12] And it has recognized a right to keep children out of public school, despite the harm to children who leave the Amish faith and are "ill-equipped for life."[13]

Outside the free exercise context, the Court protects free speech, even when it causes financial and emotional harm to third parties.[14] It protects freedom of the press, even when it could undermine national security and thus the safety of third parties.[15] It protects freedom from unreasonable search and seizure, even when it allows dangerous criminals to escape conviction for crimes committed against third parties.[16] And it protects the right against self-incrimination, even when it does the same.[17] In short, the fact that a civil right may impose burdens on third parties is not, standing alone, sufficient reason to restrict that right. What we need is theory of which burdens give rise to a compelling governmental interest, and which do not. But the government offers no such theory.

One objective way to decide which governmental interests are compelling is to look at whether the government exempts a significant amount of conduct that undermines that interest. As the Court said in *Lukumi*, "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[18] Here, due to exemptions for grandfathered plans, exceptions for small businesses, accommodations for religious non-profits, the failure to reach church plans, and exemptions for religious employers, the contraception-coverage provision does not apply to tens of millions of employees.

Another way to evaluate the strength of the government's interest is to look at how the government itself treats that interest. As Justice Alito pointed out,[19] the HHS regulations require grandfathered health plans to comply immediately with "certain particularly significant protections"—such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods[20]—but *not* with the contraception mandate. Thus, HHS itself characterized the contraception mandate as *not* "particularly significant."

Finally, there is something Alice in Wonderland-ish about the government's position. According to the government, there may be some employees who need contraception, who can't use one of the 14 kinds of free contraception provided under Hobby Lobby's plan, and who might be deterred from buying Plan B, ella, or IUDs with their own money. Yet the government also argues that, in order to avoid the burden on its religious exercise, Hobby Lobby should drop its insurance coverage, pay a fine, and force its employees to obtain coverage on a government exchange. In that case, all 13,000 employees would lose excellent health insurance and be forced to buy their own insurance on an exchange. That imposes a far greater burden on Hobby Lobby's employees. The government strains at a gnat while swallowing a camel.

III. Would a Ruling in Favor of Hobby Lobby Produce a Parade of Horribles?

In its reply brief, the government argued that a ruling in favor of Hobby Lobby "would entitle commercial employers with religious objections to opt out of virtually any statute protecting their employees"—including anti-discrimination laws, minimum-wage laws, Social Security taxes, or immunization-coverage requirements. Several Justices raised this issue at oral argument. But the government's parade of horribles argument is quite weak.

First, as Hobby Lobby's counsel pointed out, the government's parade of horribles is identical to Justice Scalia's parade of horribles in *Smith*. Justice Scalia argued that courts should not be in the business of balancing the importance of general laws against the significance of burdens on religious practice; Justice O'Connor disagreed, arguing that courts could strike sensible balances. In RFRA, Congress obviously sided with Justice O'Connor. So the parade of horribles is simply an argument against Congress's decision to enact RFRA, not an argument against Hobby Lobby.

Second, we can be quite confident that taking Congress at its word will not produce the parade of horribles the government suggests. RFRA has been on the books for 20 years; *Sherbert* was the law for almost 30 years; and more than half of the states apply the same legal standard as a matter of state law—yet this parade of horribles has not even come close to appearing. If there were serious objections to complying with these laws, they would have been raised long ago by churches, religious non-profits, sole proprietorships, and partnerships—all of which the government concedes can bring RFRA claims. And if, as Justice Kagan suggested, a stringent interpretation of RFRA would bring religious objectors "out of the woodwork," we would have seen that after the Court's stringent, unanimous ruling in *O Centro* eight years ago. But we haven't.

Third, if new cases do arise, RFRA requires the Court to analyze each case on its own merits. Some cases will be rejected on grounds of insincerity or lack of a substantial burden—such as the minimum-wage claim in *Tony and Susan Alamo Foundation v. Secretary of Labor*.[21] Of course, when a for-profit business claims a religious exemption that results in a windfall, courts view such claims with skepticism—just as they view claims to the use of marijuana or special treatment in prison with skepticism.

Other claims will be rejected under the compelling interest test. For instance, immunization-coverage requirements may be justified by the need for herd immunity,[22] a public health benefit that only becomes possible when a large portion of the population is immunized. As Justice Alito noted, the government already provides free vaccines to children[23] who lack insurance coverage for vaccines. Courts typically regard antidiscrimination laws, especially with respect to race, as one of the most compelling of governmental interests, superseding free exercise rights.[24]

In short, the government's parade of horribles is contrary to the basic premise of RFRA, far-fetched, and easily distinguishable. The Court should reject it—just as it did in *O*

Centro and *Hosanna-Tabor*.[25]

IV. Has the Government Satisfied the Least Restrictive Means Test?

None of these approaches to the case involves making new law. But if the Justices wish to rest the decision on a still narrower ground, it could hold that the government failed to prove that the mandate is the least restrictive means of achieving its claimed interests. Justice Breyer may have been laying the groundwork for this type of resolution by asking why employer coverage is the least restrictive way to provide that access.[26] A decision focusing on least restrictive means would be easiest for the Court to distinguish in later cases, thus leaving the most room for the government to win future RFRA cases when its claims might be more meritorious.

Even accepting (arguendo) the notion that insurance coverage for contraceptives is a compelling interest, it is hardly obvious that the least restrictive way to provide that coverage is by forcing employers to provide it. Indeed, the government's argument that Hobby Lobby should just drop insurance altogether demonstrates that the government actually does *not* view it as essential that people receive insurance *through their employers* as opposed to from other sources. The important point for the government, it seems, is that employees who work at Hobby Lobby have access to this coverage from *some* source.

This could be structured in any number of ways. The government could extend the same accommodation to the small number of businesses with this conscientious objection that it already has to religious employers. It could subsidize the contraceptive coverage directly. Employers with conscientious objections could compensate for not providing contraceptive coverage by adding other valuable coverage to the employees' plans, thus ensuring that the employer receives no financial benefit from the objection and that the employees bear no net burden. The government could allow employers to substitute cash for coverage on a tax-free and tax-deductible basis.

Ultimately, the government's problem here is that it has essentially reduced its own compelling interest to a funding question: Who should pay for the contraceptive coverage the government has decided people should have? Almost by definition, where the government's claimed interest is merely a question of who should fund something, there will always be less restrictive alternatives, because the government can always choose to fund its own priorities (which it of course does with a great many things that even the government would not claim to be compelling interests).

The political dynamics of this case have attracted extraordinary attention, but the Supreme Court is a court of law, not of politics. The excellent questions posed at oral argument are evidence that the Court intends to decide this case in accordance with standard principles of constitutional and statutory analysis. My guess is that in the cold light of legal principle, the challenge to the contraceptive mandate will carry the day.

Endnotes

1 Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*argued* Mar. 25, 2014).

2 Transcript of Oral Argument at 23-29, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*argued* Mar. 25, 2014).

3 Marty Lederman, *Hobby Lobby Part III—There is no "Employer Mandate*," Balkinization, (Dec. 16, 2013, 9:36 AM), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html.

4 *See* 77 Fed. Reg. 16504 (March 21, 2012) ("The Departments seek comment on which religious organizations should be eligible for the accommodation and whether, as some religious stakeholders have suggested, for-profit religious employers with such objections should be considered as well.").

5 Sherbert v. Verner, 374 U.S. 398 (1963).

6 Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Employment Commission, 132 S. Ct. 694 (2012).

7 Reply Brief of Petitioners at 13, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*filed* Mar. 12, 2014), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/03/13-354rbUnitedStates1.pdf.

8 Brief for Christian Booksellers Association et al. as Amici Curiae Supporting Respondents, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*filed* Jan. 28, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cbaetal.authcheckdam.pdf.

9 Eugene Volokh, *2B. Does RFRA Allow Exemptions from Burdens Imposes on Corporations?*, The Volokh Conspiracy (Dec. 3, 2013, 11:15 AM), http://www.volokh.com/2013/12/03/rfra-allow-exemptions-burdens-imposed-corporations/.

10 *See also* Transcript of Oral Argument at 43-44., Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*argued* Mar. 25, 2014).

11 Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 529-30 (1993).

12 Gonzales v. O Centro Espirita Beneicentre Uniao do Vegetal, 546 U.S. 418, 426 (2006).

13 Wisconsin v. Yoder, 406 U.S. 205, 224 (1972).

14 Snyder v. Phelps, 131 S. Ct. 1207 (2010); N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

15 N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

16 Mapp v. Ohio, 367 U.S. 643 (1961).

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

18 Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993).

19 Transcript of Oral Argument at 60, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*argued* Mar. 25, 2014).

20 75 Fed. Reg. 34538, 34540, 34542 Tbl. 1 (June 17, 2010).

21 471 U.S. 290 (1985).

22 *Community Immunity ("Herd Immunity")*, Vaccines.gov, http://www.vaccines.gov/basics/protection/ (last visited Apr. 1, 2014).

23 *Vaccines for Children Program (VFC)*, Centers for Disease Control and Prevention, http://www.cdc.gov/vaccines/programs/vfc/about/index.html (last visited Apr. 1, 2014).

24 *E.g.*, Bob Jones University v. United States, 461 U.S. 574 (1983).

25 *See* Gonzales v. O Centro Espirita Beneicentre Uniao do Vegetal, 546 U.S. 418, 436 (2006) ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."); Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Employment Commission, 132 S. Ct. 694, 710 (2012) (noting that the government "foresee[s] a parade of horribles that will follow our recognition of a ministerial exception," but that "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise").

26 Transcript of Oral Argument at 63, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (*argued* Mar. 25, 2014).

Book Reviews

Fragile by Design: The Political Origins of Banking Crises and Scarce Credit

By Charles W. Calomiris & Stephen H. Haber

*Reviewed by Andrew Olmem**

"In this age, in this country, public sentiment is everything. With it, nothing can fail; against it, nothing can succeed."

Abraham Lincoln

For most people, the Financial Crisis of 2008 was an unexpected, unforgettable, and harrowing event. For Charles Calomiris of Columbia University and Stephen Haber of Stanford University, however, the crisis was just the latest in a long series of banking crises throughout American history. By their count, the United States has endured 12 banking crises since 1840. In their view, the more surprising and consequential number is the number of banking crises experienced by Canada during the same time period: zero.

In *Fragile by Design*, Calomiris and Haber set out to explain why some countries, like the United States, appear prone to banking crises, while other countries, like Canada, have been crisis free. Their conclusion is that it all comes down to politics. While this may appear to be an easy answer, their account of how politics shapes banking systems is a must-read for anyone interested in understanding the complex, political foundations of banking.

Calomiris and Haber begin by noting the sharp differences among countries with respect to the performances of their banking systems. Of 117 countries reviewed, most experienced at least one banking crisis since 1970, but 34 countries had no crises, while 21 countries had experienced more than one. Moreover, their analysis also revealed a wide-spectrum on the availability of credit. Only 6 countries had banking systems that were stable (no crises since 1970) and produced abundant credit.

What accounts for these differences? Calomiris and Haber contend that a country's politics shapes its banking system due to the interdependence of governments and banks. Banks need governments to enforce property rights and provide charters, while governments need banks to function as modern states, especially to fulfill military and welfare state commitments. Thus, banks are inherently connected to and impacted by governments.

What really matters though is how a government makes its decisions. This is where a country's political institutions play a decisive role because the powers and structures of political institutions affect outcomes. Through a process the authors' label the "Great Game of Bank Bargains," political institutions interact with banks, regulators, interest groups, and voters to first establish and then oversee a country's bank regulatory regime. The authors contend that the resulting "bargain" closely tracks the nature of the political institutions involved. For example, autocratic governments have a difficult time establishing banking systems because bankers and consumers/depositors (unsurprisingly) are unwilling to engage in banking in countries where property rights depend on the whims of the rulers. On the other hand, democracies with histories of protecting property rights are accompanied by banking systems where credit is widely available.

This emphasis on the importance of institutions is not novel. It is reminiscent of David Hume's essay *That Politics May Be Reduced to a Science,* where he argued that whether a government was "good or bad" depends not upon "the character and conduct of the governors," but upon "forms of government." What is unique, however, is Calomiris and Haber's use of economic history to support their conclusion.

To make their case, Calomiris and Haber recount the histories of banking for five countries (Brazil, Canada, Mexico, the United Kingdom and the United States). These economic histories make up the bulk of the book's 500 pages, but are hardly a slog. Rather, they provide not only a fascinating and illuminating tour of modern banking, but also a provocative discussion of the art of statecraft.

The histories of banking in Mexico and Brazil vividly illustrate the incompatibility of political instability and autocracy with a healthy banking system. Brazil and Mexico also provide Calomiris and Haber with examples of how changes in a country's political system produce corresponding changes to its banking systems. The recent emergence of democratic governments in those countries has been accompanied by significant advances in their banking systems. Banking supervision has improved, competition has steadily grown, and bank balance sheets have strengthened. In addition, inflation rates have fallen dramatically. It turns out that voting provides the public with a reasonably effective tool for preventing the government from expropriating the assets they hold at banks.

Yet, the existence of democratic governments in Brazil and Mexico does not mean that banking crises will be a thing of the past. Calomiris and Haber believe those countries still have a long way to go before their banking systems can be deemed successful. While democracy may be a necessary condition for a stable, healthy banking system, Calomiris and Haber by no means view it as sufficient. As their histories of banking in Canada and the United States reveal, structural differences in the political institutions of democratic governments can lead to very different banking systems and vastly different outcomes.

In Canada, the national government was granted exclusive authority over bank regulation by the Canadian Constitution. As a result, Canada created a national banking system comprised of large banks with nationwide branching. As noted earlier, this system has proven remarkably resistant to banking crises. Calomiris and Haber single out Canada's

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allowance of nationwide branching as particularly important because it allowed Canadian banks to allocate assets in response to regional economic shocks. Consequentially, regional economic problems did not lead to bank failures. Branches also enabled banks to capture economies of scale, further enhancing their financial resiliency, while also allowing them to efficiently serve Canada's dispersed small farming communities, as well as its large coastal cities. In this way, nationwide branching has been good for Canadian banks and Canadian consumers alike.

Calomiris and Haber also argue that by placing the responsibility for banking law in Canada's national (and bicameral) legislature, the Canadian Constitution made Canada's banking system more durable. Although transient political movements might be able to capture a provisional government, they are far less likely to be able to build the broad coalition needed to secure passage of national legislation, especially if, as Calomiris and Haber contend, Canadian banks have satisfied the needs of businesses and consumers across the country. Hence, throughout Canadian history this structural aspect of its government has provided security for property rights and limited government interference with Canadian banks. Indeed, Canada did not even have deposit insurance until 1967.

While Canada was establishing its national banking system, the United States was proceeding in the opposite direction. In contrast with the Canadian Constitution, the federalism of the United States Constitution preserved the states' authority to charter banks. Although Alexander Hamilton was initially successful in establishing the First Bank of the United States, his efforts to create a national banking systems were quickly overwhelmed by a state-based coalition of agrarian farmers, local merchants, and unit banks opposed to national banks. With Andrew Jackson's veto of a bill to reauthorize the Second Bank of the United States (the charter for the First Bank of the United States was allowed to lapse, but soon thereafter the need to finance the War of the 1812 prompted Congress to charter the Second Bank of the United States), this coalition achieved complete victory and its "bank bargain" was adopted. For the next 150 years, the banking system of the United States was highly fractured as states prohibited interstate, as well as intrastate, branching to keep banking confined to local communities.

Calomiris and Haber view the adoption of unit banking as a grievous error that left the country highly vulnerable to banking crises. Unlike in Canada, regional economic crises in the United States produced wide-spread bank failures as banks were unable to diversify their portfolios or act collectively to stem crises. Yet, unit banking endured according to Calomiris and Haber due in large part to the strength of state governments and local interests under the U.S. Constitution. Had the United States Constitution vested authority for banking law exclusively with Congress, the history of American banking would likely have followed a another course.

If this book had been written twenty-five years ago, this history would strongly recommend that the United States foster diversified national banks. And starting in the 1980's and culminating with the Riegel-Neal Interstate Banking and Branching Efficiency Act of 1994, this is exactly what happened. As Calomiris and Haber recount, these reforms were finally possible because the once invincible unit bank coalition had broken down in the face of demographic (growth in urban populations), regulatory (rising inflation), technological (automated underwriting; ATMs), competitive (emergence of large foreign banks), and market (rising bank failures) factors. Calomiris and Haber should have added growing popular support for federal regulation to this list as well, but they make the point nevertheless. By the mid-2000s the United States, like Canada, had nationwide branching and banks could operate coast-to-coast. Unfortunately, however, these reforms were insufficient to prevent the Financial Crisis of 2008.

To their credit, Calomiris and Haber recognize this dilemma and dedicate two chapters to explaining their views on the crisis. Many readers will find these chapters the most interesting, but the more valuable and insightful aspect of this book lies in its last chapter. There, Calomiris and Haber temper their earlier position on the importance of institutions, reflecting that in a democracy "[w]hat is crucial is *persistent popular support* for good ideas." This is a simple, but far too often neglected, truth with important implications. In particular, it signifies the limits of institutions. Certainly, as Calomiris and Haber persuasively demonstrate, institutions play a critical role in formulating and implementing policy, but, ultimately, their policies, as well as their authority, depend on public support.

Therefore, despite their emphasis on the role of institutions, Calomiris and Haber sensibly conclude by emphasizing the need for persuasive leaders to build coalitions favoring prudent policies. To demonstrate their point, Calomiris and Haber look to the success of Margret Thatcher in convincing the British public to support her economic reforms, including modernization of the financial system. Although London's place as a global financial center is often assumed to be a legacy of its empire, Calomiris and Haber correctly note that prior to Thatcher, its banking system was a relatively minor aspect of the British economy, having been over-regulated for decades under Britain's post-war welfare state experiment. It was Thatcher's Big Bang that really put London on the modern global financial map. It is worth noting that Thatcher's financial reforms were not accompanied by any corresponding changes in British political institutions. What made reform possible and durable was Thatcher's ability to persuade the British public that reform was in their interests. The consensus she forged was so strong that, even in the wake of the 2008 Financial Crisis, it remains largely intact.

Some readers will be disappointed that Calomiris and Haber refrain from setting forth the reform agenda future Thatchers should rally around. This is an understandable criticism, but their omission should be excused. The focus of this book is on the process by which banking systems are created. And in focusing on the process, Calomiris and Haber have wisely shown that the first step in preventing banking crises in democracies is securing public opinion. The task

cannot merely be delegated to experts and regulators. The public must understand the reasons behind and steadfastly back at the ballot box the necessary policies to have a stable and healthy banking system. Absent such public support for sound underwriting, market pricing, and prudent regulation, however implemented, political institutions simply will be unable to do their part. Calomiris and Haber clearly see the difficulties in building the necessary coalition, but, as their valuable work reveals, in a free society there is no alternative.

APPENDIX: POST-*WINDSOR* LITIGATION IN STATES THAT DO NOT RECOGNIZE SAME-SEX MARRIAGE

STATE	CONTEMPORARY CASE(S) RE: MARRIAGE (NON-ACTIVE CASES IN *ITALICS*)	CURRENT COURT	WHO IS DEFENDING STATE MARRIAGE LAWS	WHO IS OPPOSING STATE MARRIAGE LAWS/ADVOCATING SAME-SEX MARRIAGE (SSM)	DESCRIPTION/STATUS
Alabama	**Hard v. Bentley**	U.S. District Court for the Middle District of Alabama	Alabama Attorney General	Southern Poverty Law Center	Plaintiff, whose same-sex spouse was killed in a car accident (the couple was married in Massachusetts), challenges the constitutionality of Alabama's Marriage Protection Act and the Alabama Marriage Amendment, alleging that these laws violate due process and equal protection under the Fourteenth Amendment to the extent that they deny recognition to his marriage and prevent him from collecting wrongful death proceeds. Plaintiff seeks a declaration that these laws are indeed unconstitutional and an injunction requiring the State to recognize his marriage to his deceased spouse, which would permit him to receive the wrongful death proceeds. Scheduling order requires Plaintiffs' motion for summary judgment to be filed by 8/29/14.
	Searcy v. Bentley	U.S. District Court for the Southern District of Alabama	State of Alabama/ Attorney General	Private Attorneys	Plaintiffs are a female same-sex couple raising one partner's biological daughter. Plaintiffs received a marriage license from California in 2008. The lawsuit challenges the constitutionality of Alabama's Marriage Protection Act and the Alabama Marriage Amendment, alleging that these laws violate due process and equal protection under the Fourteenth Amendment to the extent that they deny recognition of their California marriage license and prevent the non-biological parent from adopting the child. Lawsuit filed on 5/7/14.
	Richmond v. Richmond	Alabama Court of Civil Appeals	Uncontested		An uncontested petition for divorce from a SSM was filed in Madison County, Alabama Circuit Court in March 2013. The female couple received a marriage license in Iowa in 2012. The case was dismissed on 3/12/13 and is now on appeal.

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Alaska	**Harris v. Millennium Hotel**	Alaska Supreme Court	Private Attorneys	Lambda Legal	Appeal from the Alaska Workers' Compensation Appeals Commission regarding denial of death benefits to surviving same-sex partner. The issue presented for review, as described by the Plaintiff-Appellant, is: Does the absolute exclusion of same-sex partners from eligibility for death benefits under the Alaska Workers' Compensation Act violate the right to equal protection on the basis of sexual orientation or sex, and the rights to liberty, due process, and privacy under the Alaska and U.S. Constitutions? Oral argument heard on 5/13/14.
	Hamby v. Parnell	U.S. District Court for the District of Alaska	TBD	Private Attorneys	Plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. They allege that Alaska's marriage laws violate equal protection and due process under the Fourteenth Amendment, and seek the right to obtain marriage licenses in-state and have SSM from out-of-state recognized in Alaska.
Arizona	**Connolly v. Roche**	U.S. District Court for the District of Arizona	Arizona Governor/ Attorney General	Private Attorneys	Plaintiffs filed a class action § 1983 complaint on 1/6/14 seeking a declaration that Arizona's marriage laws are unconstitutional, and seeking a permanent injunction against their enforcement. More specifically, Plaintiffs contend that those laws violate the due process and equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs also allege that to the extent that Arizona seeks to justify its marriage laws under section 2 of DOMA, the court should find that that provision exceeds the congressional authority granted by the Full Faith and Credit Clause of the U.S Constitution. The complaint has since been amended and is no longer a class action.

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	Majors v. Horne	U.S. District Court for the District of Arizona	Arizona Attorney General	Lambda Legal	Plaintiffs challenge Arizona's marriage laws, which prohibit SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the laws violate the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief.
Arkansas	**Jernigan v. Crane**	U.S. District Court for the Eastern District of Arkansas	Arkansas Attorney General	Private Attorneys	Equal protection and due process challenge to Arkansas's marriage laws. The State filed a motion to dismiss on 1/31/14. Awaiting ruling.
	Wright v. State of Arkansas	Circuit Court of Pulaski County Second Division (Little Rock)	Arkansas Attorney General/ Faulkner County Attorney	Private Attorneys	Equal protection and due process challenge to Arkansas's marriage laws. On 5/9/14 Judge Chris Piazza held that the marriage laws were unconstitutional under both the state and federal constitutions. Appeals are pending. On 5/14/14 the Arkansas Supreme Court stayed the trial court's ruling pending appeal.
Colorado	**Brinkman v. Long**	Adams County District Court	Colorado Attorney General/ Adams County Attorney	Private Attorneys	Equal protection (on the basis of sex) and due process challenge to Colorado's marriage laws.
	McDaniel-Miccio v. Colorado	Denver County District Court		Private Attorneys	Plaintiffs, unmarried same-sex couples and same-sex couples legally married in other jurisdictions, challenge Colorado's marriage laws (statutory and constitutional amendment) which prohibit SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the laws violate the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief.

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STATE	CONTEMPORARY CASE(S) RE: MARRIAGE (NON-ACTIVE CASES IN *ITALICS*)	CURRENT COURT	WHO IS DEFENDING STATE MARRIAGE LAWS	WHO IS OPPOSING STATE MARRIAGE LAWS/ADVOCATING SAME-SEX MARRIAGE (SSM)	DESCRIPTION/STATUS
Florida	**Pareto v. Ruvin**	Eleventh Judicial Circuit of Florida (Miami-Dade County)	Clerk of Court	Private Attorneys/ National Center for Lesbian Rights	Suit filed by six same-sex couples in Miami-Dade County Circuit Court alleging that Florida's opposite-sex definition of marriage violates the Due Process and Equal Protection Clauses of the U.S. Constitution. They also contend that Florida's marriage laws discriminate based on sex and sexual orientation, and argue further that sexual orientation warrants heightened judicial scrutiny. They seek declaratory relief and a permanent injunction.
	Brenner v. Scott	U.S. District Court for the Northern District of Florida	Florida Governor/ Attorney General	ACLU/Private Attorneys	Plaintiffs challenge Florida's marriage laws and allege that, because they do not recognize SSMs entered into in other jurisdictions, they violate the Fourteenth Amendment's guarantee of equal protection and due process.
	Grimsley v. Scott (consolidated with Brenner)	U.S. District Court for the Northern District of Florida	Florida Governor/ Attorney General	ACLU/Private Attorneys	Plaintiffs challenge Florida's marriage laws and allege that, because they do not recognize SSMs entered into in other jurisdictions, they violate the Fourteenth Amendment's guarantee of equal protection and due process.
Georgia	**Inniss v. Aderhold**	U.S. District Court for the Northern District of Georgia	Georgia Attorney General	Private Attorneys/ Lambda Legal	Plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. They allege that Georgia's marriage laws violate equal protection and due process under the Fourteenth Amendment, and seek the right to obtain marriage licenses in-state and have SSM from out-of-state recognized in Georgia.
Idaho	**Latta v. Otter**	U.S. District Court for the District of Idaho	Idaho Governor/ Private Attorneys/ Attorney General/ Ada County Prosecutor	Private Attorneys/ National Center for Lesbian Rights	Equal protection (on the basis of sex and sexual orientation) and due process challenge to state's marriage laws. On 5/13/14 Magistrate Judge Dale found Idaho's marriage laws unconstitutional. She further declined the State's motion for a stay. An appeal is pending. On 5/15/14 the Ninth Circuit issued a temporary stay of the ruling pending its resolution of Appellants' emergency motion for a stay pending appeal.

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Indiana	**Brennon v. Milby Productions**	Indiana Court of Appeals	Private Attorneys	Private Attorneys	Plaintiffs filed a claim in Marion County Superior Court alleging that Indiana's definition of marriage, which provides that marriage may only be between one man and one woman, caused damage to their marital relationships. The court found that a claim for damage to the marital relationship after the death of one of the same-sex spouses is prohibited under Indiana law, and cited *Morrison v. Sadler* in support of its holding. On that claim the court granted summary judgment to defendants on 12/12/13. Plaintiffs appealed to the Indiana Court of Appeals on 1/10/14.
	Center for Inquiry, Inc. v. Clerk, Marion Circuit Court	U.S. Court of Appeals for the Seventh Circuit	Indiana Attorney General/ Indianapolis Corporation Counsel	ACLU/Center for Inquiry (CFI)	Center for Inquiry's complaint seeks injunctive relief to bar Indiana from enforcing § 31-11-6-1 of the Indiana Code (re: state marriage solemnization requirements) on Establishment Clause grounds. The district court denied injunctive relief. CFI appealed to the Seventh Circuit. The case is fully briefed and arguments were heard on 4/19/13. Awaiting decision.
	Wetli v. Shaffer	Allen Circuit Court	Uncontested		Plaintiff seeks a same-sex divorce in Indiana from the spouse he married in Iowa.

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	Love v. Pence	U.S. District Court for the Southern District of Indiana	Indiana Governor/ Attorney General	Private Attorneys	Plaintiffs, Indiana residents comprising both same-sex couples legally married outside Indiana, and couples who wish to marry in Indiana, allege that Indiana's marriage laws and DOMA section 2 violate due process and equal protection under the Fourteenth Amendment, and seek declaratory and injunctive relief. Their claims also purport to implicate the Full Faith and Credit Clause and the right to travel.
	Baskin v. Bogan	U.S. District Court for the Southern District of Indiana	Indiana Governor/ Attorney General	Lambda Legal	Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief.
	Fuji v. Governor, State of Indiana	U.S. District Court for the Southern District of Indiana	Indiana Governor/ Attorney General	ACLU	Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief.

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	Bowling v. Pence	U.S. District Court for the Southern District of Indiana	Indiana Governor/ Attorney General	Private Attorneys	Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. Plaintiffs also seek a declaration that the state's laws violate the Full Faith and Credit Clause, the Establishment Clause, and the right to travel.
	Lee v. Pence	U.S. District Court for the Southern District of Indiana	Indiana Governor/ Attorney General	Private Attorneys	Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. Plaintiffs also seek a declaration that the state's laws violate the Full Faith and Credit Clause.
Kansas	**Nelson v. Kansas Department of Revenue**	Shawnee County District Court			On 12/30/13 Plaintiffs, legally married same-sex couples residing in Kansas, filed a petition in Shawnee County District Court seeking a writ of mandamus compelling the Kansas Department of Revenue to permit Plaintiffs to file joint income tax returns as married persons. Plaintiffs allege that the due process and equal protection guarantees under the federal and state constitutions compel this result.
Kentucky	**Bourke v. Beshear**	U.S. Court of Appeals for the Sixth Circuit	Kentucky Governor (retained private attorneys)	Private Attorneys	Equal protection (on the basis of sex and sexual orientation) and due process challenge to Kentucky's Marriage Amendment and marriage statutes declining to recognize SSM from other jurisdictions. The Plaintiffs specifically complain about the effect the marriage statutes have on their ability to adopt one another's

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					children. Court ruled for Plaintiff on 2/12/14. Appeal currently being briefed.
	Love v. Beshear	U.S. District Court for the Western District of Kentucky	Kentucky Governor (retained private attorneys)	Private Attorneys	Plaintiffs intervened in *Bourke v. Beshear* and seek the right to marry in Kentucky. They claim that Kentucky's marriage laws violate equal protection and due process.
	Franklin v. Beshear (transferred to W.D. Ky and consolidated with Bourke v. Beshear)	U.S. Court of Appeals for the Sixth Circuit	Kentucky Governor (retained private attorneys)	Private Attorneys	Equal protection (on the basis of sex and sexual orientation) and due process challenge to Kentucky's Marriage Amendment and marriage statutes declining to recognize SSM from other jurisdictions. Filed by same attorneys as the *Bourke* case, no adoption issues included in this complaint. On 10/2/13, case transferred to U.S. District Court for the Western District of Kentucky and consolidated with *Bourke v. Beshear* for convenience.
	Commonwealth of Kentucky v. Clary	Kentucky Circuit Court, Jefferson County	Commonwealth Attorney representing the Commonwealth of Kentucky	Louisville Metro Public Defender	Defendant charged with first degree murder seeks to invoke spousal privilege to prevent a woman with whom Clary had previously obtained a civil union in Vermont from testifying against her on behalf of the Commonwealth in the murder trial. They allege that there is no distinction between Vermont civil unions and Vermont SSMs. They also allege Kentucky's policy not recognizing SSM licenses from other jurisdictions violates the U.S. and Kentucky Constitutions' due process provisions and the Full Faith and Credit Clause of the U.S. Constitution. They also allege that not recognizing the spousal privilege violates the Equal Protection Clauses of both the U.S. and the Kentucky Constitutions. On 9/23/13, the Court denied Clary's motion to invoke spousal privilege. Clay pled guilty in January 2014.

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	Romero v. Romero	Jefferson Family Court	Unknown	Private Attorneys	Kentucky woman seeks to divorce her same-sex partner, whom she married in Massachusetts. Case challenges Kentucky's Marriage Amendment, which does not permit the recognition of SSMs from out-of-state.
	Kentucky Equality Federation v. Beshear	Franklin Circuit Court	Kentucky Attorney General	Private Attorneys	News reports indicate lawsuit filed 9/12/2013.
Louisiana	**Robicheaux v. Caldwell**	U.S. District Court for the Eastern District of Louisiana	Special Attorney General	Private Attorneys	A same-sex couple with a marriage license from Iowa has brought a due process, equal protection (on the basis of sex and sexual orientation), and full faith and credit challenge to Louisiana's Marriage Amendment and marriage laws, which decline to recognize SSM.
	Robicheaux v. George (consolidated with Robicheaux)	U.S. District Court for the Eastern District of Louisiana	Special Attorney General		Equal protection and due process challenge to the state's marriage laws.
	Forum for Equality v. Barfield (consolidated with Robicheaux)	U.S. District Court for the Eastern District of Louisiana	Special Attorney General	Private Attorneys	Plaintiffs, same-sex couples married in other jurisdictions, and an LGBT group, challenge Louisiana's marriage laws (code and constitutional amendment) to the extent that they deny recognition to out-of-state SSMs, and allege that they violate due process and equal protection under the Fourteenth Amendment. They seek declaratory and injunctive relief as to plaintiffs and other couples validly married in other jurisdictions.

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STATE	CONTEMPORARY CASE(S) RE: MARRIAGE (NON-ACTIVE CASES IN *ITALICS*)	CURRENT COURT	WHO IS DEFENDING STATE MARRIAGE LAWS	WHO IS OPPOSING STATE MARRIAGE LAWS/ADVOCATING SAME-SEX MARRIAGE (SSM)	DESCRIPTION/STATUS
	In re Angela Costanza and Chastity Brewer	3rd Circuit Louisiana Court of Appeals	Special Attorney General	Private Attorneys	Equal Protection, Due Process, and Full Faith and Credit Clause challenges to the state's marriage laws. Plaintiffs seek recognition of their California marriage along with a joint adoption.
	In re Nicholas Ashton Costanza Brewer	3rd Circuit Louisiana Court of Appeals	Louisiana Attorney General	Private Attorneys	Plaintiffs filed a petition in Fifteenth Judicial District Court seeking a stepparent adoption for a same-sex spouse of the child's biological mother, alleging that any Louisiana law denying a same-sex couple the right to adopt violates the federal Equal Protection, Due Process, and Full Faith and Credit Clauses. On 2/5/14 the judge entered an order permitting the two women to adopt the child. The State appealed on 3/6/14.
Michigan	**DeBoer v. Snyder**	U.S. Court of Appeals for the Sixth Circuit	Michigan Attorney General	Private Attorneys	Equal protection and due process challenge to state adoption and marriage laws. After a trial the judge found Michigan's marriage laws unconstitutional. An appeal is underway.
Mississippi	**Lauren Beth Czekala-Chatham v. Dana Ann Melancon**	DeSoto County Chancery Court	Mississippi Attorney General	Private Attorneys	Plaintiff filed a divorce petition asking the court to recognize their California marriage license for the purpose of granting a divorce. On 12/2/13 the judge refused to grant the parties a divorce. On 12/23/13 Plaintiff appealed. Appellant's brief is due by 6/9/14.
Missouri	**Barrier v. Vasterling**	16th Judicial District of Jackson County	Missouri Attorney General	ACLU/Private Attorneys	Plaintiffs, same-sex couples married in other jurisdictions, challenge pursuant to § 1983 Missouri's marriage laws (code and constitutional amendment) to the extent that they deny recognition to out-of-state SSMs, and allege that the laws violate due process and equal protection under the Fourteenth Amendment. They seek declaratory and injunctive relief as to plaintiffs and other same-sex couples validly married in other

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					jurisdictions. Oral argument on summary judgment motions scheduled for 9/25/14.
	Glossip v. Missouri Department of Transportation and Highway Patrol Employees' Retirement System	*Missouri Supreme Court*	*Missouri Attorney General*	*ACLU*	*Plaintiff is seeking survivor benefits from his same-sex partner who was killed in the line of duty. Plaintiff acknowledges in his complaint that marriage is not available in Missouri to same-sex couples, but alleges equal protection and due process violations due to the denial of these benefits. The court ordered additional briefing after* Windsor. *On 10/29/13 the Missouri Supreme Court upheld Missouri's marriage law 5-2. The court decided the case on narrow grounds and upheld the two challenged laws concerning death benefits as constitutional under rational basis review. The court said that the laws distinguished between individuals solely based on marital status.*
Montana	**Donaldson v. State of Montana**	Montana First Judicial District Court Lewis and Clark County	Montana Attorney General	ACLU/Private Attorneys	Plaintiffs challenge under equal protection Montana's marriage laws, which effectively prohibit same-sex couples from receiving the statutory benefits that are given to opposite-sex couples but not to those in same-sex relationships. Plaintiffs expressly disclaim that they seek the right to marry.
Nebraska	**Nichols v. Nichols**	Nebraska Court of Appeals	Nebraska Attorney General is *amicus curiae*	Private Attorneys	Plaintiff seeks a divorce from her same-sex partner, whom she married in Iowa in 2009. The district court dismissed for lack of jurisdiction because Nebraska recognizes only opposite-sex marriages, meaning that it could not render a decree of dissolution for a foreign SSM. The Nebraska Supreme Court granted Plaintiff's Petition for Bypass and the case is currently pending there.

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Nevada	**Sevcik v. Sandoval**	U.S. Court of Appeals for the Ninth Circuit	Coalition for the Protection of Marriage	Lambda Legal	On 4/10/12, eight same-sex couples filed a federal lawsuit in the U.S. District Court for Nevada, challenging Nevada's laws affirming marriage as a man-woman union. These couples sought declaratory and injunctive relief under the Fourteenth Amendment to the U. S. Constitution because they claimed that they were denied the right to marry in the State of Nevada, and that they are denied recognition of SSM licenses that they received in other states. The trial court ultimately rejected the plaintiffs' challenge to state's marriage laws. On appeal, the opening brief was filed with the Ninth Circuit in late 2013. The appellees' briefs were filed on 1/21/14. As of 5/15/14, the parties are still waiting for the court to set oral argument.
North Carolina	**Fisher-Borne v. Smith**	U.S. District Court for the Middle District of North Carolina	North Carolina Attorney General	ACLU /Private attorneys	Equal protection and due process challenge to state adoption and marriage laws, which limit marriage to opposite-sex couples. Motions to dismiss, for preliminary injunction, and for a stay are currently pending.
	Gerber v. Cooper	U.S. District Court for the Middle District of North Carolina	North Carolina Attorney General	ACLU/Private Attorneys	Plaintiff same-sex couples seek the recognition of their out-of-state marriages and seek a preliminary injunction predicated upon asserted "serious, life-threatening medical issues that make it likely that [Plaintiffs] and their families will suffer irreparable harm unless the State recognizes their legal out-of-state marriages. There is also an imminent risk of potential harm to child plaintiff J.G.-M." Plaintiffs allege the state's marriage laws violate their right to due process and equal protection under the Fourteenth Amendment, and seek recognition and adoption rights as well. Motions to dismiss, for preliminary injunction, and for a stay are currently pending.

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Ohio	**Obergefell v. Himes**	U.S. Court of Appeals for the Sixth Circuit	Ohio Attorney General	Private Attorneys	Plaintiffs are a same-sex couple who are residents of Ohio, but who received a marriage license in Maryland. They allege that Ohio's refusal to recognize their SSM constitutes a due process and equal protection violation, as well as a violation of their right to free association. On 7/22/13, the court granted a temporary restraining order directing the local registrar of death certificates not to accept for recording a 2013 death certificate for John Arthur that did not identify his status as married and/or does not record James Obergefell as his surviving spouse. On 12/23/13 Judge Black declared that Ohio's marriage laws, as applied to Plaintiffs, were unconstitutional, and held that the state "must recognize valid out-of-state marriages between same-sex couples on Ohio death certificates, just as Ohio recognizes all other out-of-state marriages, if valid in the state performed, and even if not authorized nor validly performed under Ohio law." The State appealed and briefing due to conclude at the 6th Circuit by 5/30/14.
	Henry v. Ohio Department of Health	U.S. Court of Appeals for the Sixth Circuit	Ohio Department of Health	Private Attorneys/ Lambda Legal	Plaintiffs filed a § 1983 suit in which they seek an order requiring Ohio to recognize their SSM with respect to their requests for birth certificates, by permitting both partners to be listed on the birth certificate regardless of biological parentage. Plaintiffs claim that the holding in *Obergefell* compels this result, and claim that the "right to remain married" is a fundamental constitutional right (Plaintiffs were married in jurisdictions that permit SSM). Plaintiffs also claim that their right to travel is being violated by Defendants. Plaintiffs further assert that Ohio's marriage laws violate the First and Fourteenth Amendments to the U.S. Constitution, and that the State's refusal to recognize an adoption decree from another state violates the Full Faith and Credit Clause. Plaintiffs seek a temporary and permanent injunction with respect to Ohio's marriage laws as to the issuance of birth certificates to Plaintiffs. On 4/14/14 Judge Black ruled that Ohio must recognize marriages legally performed in other states. The State appealed the case to the 6th Circuit. Appellant's opening brief is due 6/30/2014. Appellees' 7/31/2014.

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Oklahoma	**Bishop v. Oklahoma**	U.S. Court of Appeals for the Tenth Circuit	Alliance Defending Freedom/ Tulsa District Attorney	Private Attorneys	Oklahoma residents sued the Governor of Oklahoma, the United States, and the County of Tulsa challenging Oklahoma's constitutional provision limiting marriage to one man and one woman. An opinion and judgment terminating the case was issued on 1/14/14, in which the court declared unconstitutional Oklahoma's voter-approved constitutional amendment defining marriage as one man and one woman. An appeal to the Tenth Circuit was then filed, and oral argument was heard on 4/17/14. Awaiting decision.
Oregon	**Geiger v. Kitzhaber & Rummell v. Kitzhaber (consolidated)**	U.S. District Court for the District of Oregon	The Oregon Attorney General has refused to defend the marriage laws. The National Organization for Marriage (NOM) has been denied intervention.	Private Attorneys	Same-sex couples filed a lawsuit to declare unconstitutional and to enjoin state officers from enforcing the Oregon Constitution limiting marriage to a man and a woman. The suit is against the Governor and the Attorney General and other officials. Two of the Plaintiffs want to marry in Oregon. The other two Plaintiffs want Oregon to recognize their foreign marriage from British Columbia. Oregon Attorney General Rosenblum announced, on 2/20/14, that she would not defend the Marriage Amendment because she says it cannot survive any level of constitutional scrutiny. NOM attempted to intervene but that request was denied; NOM appealed the intervention denial to the Ninth Circuit. On 5/19/14 the court ruled that Oregon's marriage laws were unconstitutional. Proposed Intervenor NOM filed an emergency motion for a stay with the Ninth Circuit that same day, but that request was denied.
Pennsylvania	**Whitewood v. Corbett**	U.S. District Court for the Middle District of Pennsylvania	Pennsylvania Governor/ Private Attorneys	ACLU/Private Attorneys	The ACLU of Pennsylvania, the ACLU, and volunteer counsel from the law firm of Hangley Aronchick Segal Pudlin & Schiller have filed a federal lawsuit on behalf of 21 Pennsylvanians who wish to marry in Pennsylvania or want the Commonwealth to recognize their out-of-state marriages. The lawsuit alleges that Pennsylvania's Defense of Marriage Act and refusal to marry lesbian and gay couples or recognize their out-of-state marriages violates the fundamental right to marry as well as the Equal Protection Clause of the Fourteenth Amendment. The case has been briefed on summary judgment and is awaiting decision.

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	Palladino v. Corbett	U.S. District Court for the Eastern District of Pennsylvania	Pennsylvania Treasury Department	Private Attorneys	Plaintiffs are a same-sex couple who are residents of Pennsylvania, but received a SSM license when they resided in Massachusetts. They complain that Pennsylvania does not recognize them as married and that this is a violation of the Equal Protection, Due Process, and Full Faith and Credit Clauses, as well as a violation of the fundamental right to travel. Dispositive motions hearing held on 5/15/14. Awaiting decision.
	Cozen O'Conor v. Tobits	U.S. District Court for the Eastern District of Pennsylvania	*Thomas More/ Independence Law Center*	*N/A - case concluded*	*Interpleader action concerning benefits of deceased and whether they should go to the deceased's same-sex partner or parents. The court issued an order determining that if the place of celebration would have considered the partners married, they should be considered married under the plan. An appeal was filed, but then withdrawn.*
	Wolf v. Associates of Podiatric Medicine and Surgery	Court of Common Pleas Philadelphia County	Private Attorneys	Private Attorneys	The Plaintiff has filed a malpractice action due to a piece of metal left in her foot during a surgery, but she has added a claim for loss of consortium for her same-sex partner. They have a domestic partnership, have cohabitated for ten years, and "hold themselves out as a married couple," having exchanged bands in or around 2004. Judge ruled that since Plaintiffs were not married at the relevant time, and a marriage between persons of the same sex is not recognized in Pennsylvania, Plaintiff's loss of consortium claim must be dismissed.
	Cucinotta v. Commonwealth of Pennsylvania	Commonwealth Court of Pennsylvania	Private Attorneys	Private Attorneys	The Plaintiffs are a female same-sex couple that indicate that they "have chosen to be married to one another" but they argue that state law impedes their ability to do so because of their sex. Plaintiffs challenge Pennsylvania marriage laws under the Pennsylvania Constitution. Oral argument scheduled for 6/18/14.
	Ballen v. Corbett (listed as related to Cucinotta)	Commonwealth Court of Pennsylvania	Private Attorneys	Private Attorneys	Plaintiffs are same-sex couples who received marriage licenses in other jurisdictions, but who reside in Pennsylvania. They allege the refusal to recognize their marriage license constitutes a denial of equal protection and due process and violates article I of the Pennsylvania Constitution.

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	Commonwealth of Pennsylvania v. Hanes	Supreme Court of Pennsylvania	Pennsylvania Governor	Montgomery County Solicitor's Office	The Pennsylvania Governor filed a petition for writ of mandamus to stop the Montgomery County Clerk from issuing marriage licenses to same-sex couples. An order requiring the clerk to issue marriage licenses in accordance with state marriage laws, which prohibit SSM, was issued 9/12/13. An appeal to the Supreme Court was docketed 10/4/13. Briefing appears to have been completed on 2/4/14.
	In re estate of Catherine Burgi-Rios	Northhampton County's Orphans Court	Unknown	Private Attorneys	Surviving same-sex partner of Catherine Burgi-Rios filed a petition in Northampton County's Orphan's Court saying she married Catherine Burgi-Rios in Connecticut and should not have to pay the 15% levy on Burgi-Rios' estate. Equal protection (on the basis of sex and sexual orientation) and due process challenge of state's marriage laws. Oral argument held 4/29/14-awaiting decision.
	Nixon v. Pennsylvania Department of Revenue	Pennsylvania Department of Revenue Board of Appeals	Pennsylvania Department of Revenue	Private Attorney	Surviving same-sex partner is seeking to have the State waive a $21,000 inheritance tax on the estate of her partner. Plaintiff is seeking to have the relationship recognized as a common law marriage.
	Ankney v. Allegheny Intermediate Unit	Allegheny County Court of Common Pleas	Private Attorneys	ACLU-PA and Women's Law Project	Teacher is suing the Allegheny Intermediate Unit (AIU) because AIU refuses to provide health insurance and other benefits to the same-sex partners of its employees, while providing those benefits to employees' opposite-sex spouses.
Puerto Rico	**Conde v. Rius**	U.S. District Court for the District of Puerto Rico	Secretary of the Puerto Rico Health Department	Plaintiffs proceeding pro se (but appears to be an attorney)	Plaintiffs, a same-sex couple legally married in Massachusetts, challenge Puerto Rico's marriage laws, which provide for only opposite-sex marriage. They allege these laws violate their due process and equal protection rights under the Fourteenth Amendment, and seek declaratory and injunctive relief. Case appears to have been dormant since 3/27/14.

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South Carolina	**Bradacs v. Haley**	U.S. District Court for the District of South Carolina	South Carolina Attorney General	Private Attorneys	Equal protection (on the basis of sex & sexual orientation), due process, and full faith & credit challenge to constitutional amendment and statutes defining marriage as the union of one man and one woman. The same-sex couple seeks recognition of their marriage license from the District of Columbia. The case has been stayed pending the Fourth Circuit's resolution of *Bostic v. Schaefer*.
Tennessee	**Tanco v. Haslam**	U.S. Court of Appeals for the Sixth Circuit	Tennessee Attorney General	National Center for Lesbian Rights	Plaintiffs assert violation of due process as a deprivation of liberty and property interest in their SSM validly entered into in other jurisdictions, denial of due process rooted in the fundamental right to marry, denial of due process based on denial of family privacy, autonomy and association. Plaintiffs also allege denial of equal protection of the laws on the basis of sexual orientation discrimination and sex discrimination, as well as discrimination based on exercise of fundamental rights and liberties. Plaintiffs also allege deprivation of the right to travel. On 3/14/14 the court issued a preliminary injunction prohibiting the State from enforcing its marriage laws. The State moved for a stay at the district court but was denied. The State then moved for a stay before the Sixth Circuit which granted it pending the appeal. Briefing is due to be completed 6/26/14.
Texas	**In the Matter of J.B and H.B**	Supreme Court of Texas	Texas Attorney General	Private Attorneys	Parties to a SSM out-of-state reside in Texas and are seeking a divorce. The court has requested supplemental briefing on the subject of the effect of *Windsor* on this same-sex divorce challenge. Supplemental briefing re: *Windsor* was completed on August 6. Appellate Court held no jurisdiction to grant divorce, but the case is on review at the Texas Supreme Court. Oral argument took place 11/5/13. Decision pending.

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	State of Texas v. Angelique S. Naylor and Sabina Daly	Supreme Court of Texas	Texas Attorney General	Private Attorneys	Same-sex couples seek divorce in Texas. Petition filed on 3/21/11, and oral argument took place 11/5/13. Decision pending.
	DeLeon v. Perry	U.S. Court of Appeals for the Fifth Circuit	Texas Solicitor General and Attorney General	Private Attorneys	Equal protection (on the basis of sexual orientation) and due process challenge to Texas's marriage laws. Plaintiffs seek declaratory and injunctive relief barring defendants from enforcing Texas's Marriage Amendment and marriage laws. Court issued order granting Plaintiffs' motion for preliminary injunction on 2/26/14. The State filed an appeal on 3/1/14. Awaiting court scheduling order.
	Pidgeon v. Parker	U.S. District Court for the Southern District of Texas (removed from Harris County District Court (2013-75301, Court:310)	Houston City Attorney (Texas Attorney General is *amicus curiae*)	Private Attorneys	Suit originally filed by the Harris County GOP seeking to enjoin the City of Houston from extending same-sex spousal benefits to its employees. After the state court granted an ex parte preliminary injunction, Defendants removed the matter to federal court, where they allege that the matter implicates federal questions, most notably whether due process and equal protection principles under the U.S. Constitution require the provision of spousal benefits to those employees legally married in jurisdictions that recognize SSM.
	Freeman v. Parker	U.S. District Court for the Southern District of Texas	Houston City Attorney	Lambda Legal	Suit filed by three employees of the City of Houston, alleging that Defendants' denial of same-sex spousal benefits, in the wake of a state court decision preliminarily enjoining that practice, constitutes a violation of due process and equal protection under the U.S. Constitution. Awaiting scheduling order from court.

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	Zahrn v. Perry	U.S. District Court for the Western District of Texas	Texas Attorney General is *amicus curiae*	Private Attorneys	Class action § 1983 complaint alleging that Texas's denial of marriage licenses to same-sex couples violates the Fourteenth Amendment's equal protection and due process guarantees. Plaintiffs seek a declaration that Texas laws against SSM are unconstitutional and also seek a permanent injunction against the enforcement of those laws.
	McNosky v. Perry	U.S. District Court for the Western District of Texas	Texas Attorney General	Pro se	Plaintiffs are challenging under § 1983 Texas laws (both statutory and constitutional) against SSM as violative of the Fourteenth Amendment's guarantee of due process and equal protection. Plaintiffs allege that Texas laws outlawing SSM are a form of sex discrimination, and seek to enjoin Texas from enforcing those laws. Plaintiffs filed a motion for summary judgment to this effect on 12/23/13. Defendants filed a motion to stay the case on 3/12/14, which was opposed by Plaintiffs. That motion remains pending.
Utah	**Kitchen v. Herbert**	U.S. Court of Appeals for the Tenth Circuit	Utah Attorney General/ Private Attorneys	National Center for Lesbian Rights/Private Attorneys	Plaintiffs challenge Utah's marriage laws as violative of the U.S Constitution and seek to seek to legalize SSM in the state. On 12/20/13 Judge Robert Shelby held that Utah's marriage laws violated both due process and equal protection under the Fourteenth Amendment. On 1/6/13 after both Judge Shelby and the motions panel of the Tenth Circuit denied the State's request for a stay, the Supreme Court granted a stay pending Tenth Circuit review on the merits. Oral argument was heard on 4/10/14. Awaiting decision.
	Brown v. Buhman (polygamy)	U.S. District Court for the District of Utah	Utah Attorney General	Private Attorneys	Equal protection challenge to state's laws criminalizing polygamy. The U.S. DOJ declined involvement in this case to defend Congress' condition of statehood that Utah (and all other states) not permit the practice of polygamy. On 12/13/13, the court issued a ruling concluding that *Reynolds v. U.S.* has been overruled by *Lawrence v. Texas* and other recent legal developments. While keeping in place the Utah law against issuing multiple marriage certificates for polygamous marriage, the court invalidated the criminal law against multiple adults cohabiting together as a family. Judgment filed 12/17/2013, but vacated three days later while a pending issue is

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					resolved. As of 5/8/14, the parties were waiting for the district court to rule on a motion to reconsider. (This is the "Sister Wives" case.)
	Evans v. Utah	U.S. District Court for the District of Utah (removed to federal court on January 28, 2014 from 3rd Judicial District, Salt Lake County, case # 140400673)	Utah Attorney General	Private Attorneys/ACLU	Plaintiffs, Utah same-sex couples married in the time between the district court's *Kitchen* decision and the Utah Supreme Court's stay of that decision, challenged Utah's decision not to recognize those marriages and allege that that decision violates due process under the Utah and U.S. Constitutions. Plaintiffs seek declaratory and injunctive relief, including immediately recognizing their marriages, regardless of whether the marriage laws are eventually reinstated. On 5/19/14 the court ruled that Utah must recognize as legally valid those marriages entered between the decision and the eventual stay granted by the Utah Supreme Court.
Virginia	**Bostic v. Schaefer**	U.S. Court of Appeals for the Fourth Circuit	Alliance Defending Freedom (for Prince William County Clerk); Private Attorneys for Clerk Schaefer	Private Attorneys	Plaintiffs are a same-sex couple that were denied a marriage license by the Clerk for the Circuit Court of the City of Norfolk, and another couple seeking recognition of their California marriage license. They present equal protection and due process challenges to Virginia's Marriage Amendment and marriage laws. The district court ruled for Plaintiffs on 2/13/14. Defendants appealed and oral argument was heard on 5/13/14. Awaiting decision.
	Harris v. Rainey	U.S. District Court for the Western District of Virginia (intervened in 4th Circuit: Bostic v. Schaefer)	Staunton County Clerk (retained private attorneys)	ACLU/ Lambda Legal	On 8/2/13, the ACLU and Lamba Legal filed a class action lawsuit seeking injunctive and declaratory relief from the state's constitutional amendment and marriage statutes on the basis of equal protection and due process violations. The court granted class certification on 1/31/14, but stayed the case on 3/31/14 after the class successfully intervened in *Bostic v. Schaefer* at the Fourth Circuit.

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	Tucker v. State Farm Mutual Auto Insurance Company	U.S. District Court for the Western District of Virginia	Private Attorneys	Private Attorneys	Plaintiff sought disability insurance under her same-sex partner's insurance, but State Farm only covers spouses recognized under state law. Since Virginia does not recognize SSM, State Farm has declined to cover Plaintiff. Bench trial set for 8/11/14, but the parties filed a joint motion for a stay in light of *Bostic* on 5/15/14.
West Virginia	**McGee v. Cole**	U.S. District Court for the Southern District of West Virginia	West Virginia Attorney General/ Private Attorneys	Lambda Legal/ Private Attorneys	Plaintiffs are three same-sex couples and one minor child; they are challenging the constitutionality of § 48-2-104, § 48-2-401, and § 48-2-603 of the West Virginia Code. Plaintiffs allege a due process violation (under the U.S. Constitution) based on deprivation of the right to marry and privacy related to family integrity and association. Plaintiffs also allege denial of equal protection under the U.S. Constitution on the basis of sex and sexual orientation. They also allege discrimination based on parental status. Defendants are two county clerks. The State of West Virginia successfully intervened on 12/2/13. Cross motions for summary judgment have been filed. Awaiting decision.
Wisconsin	**Wolf v. Walker**	U.S. District Court for the Western District of Wisconsin	Wisconsin Governor/ Attorney General	ACLU	Plaintiff same-sex couples filed this § 1983 suit alleging that Wisconsin's Marriage Amendment, codified as art. XIII, § 13 of the Wisconsin Constitution, and all relevant Wisconsin marriage statutes, violate the federal constitutional guarantees of due process and equal protection.
	Appling v. Walker	Wisconsin Supreme Court	Alliance Defending Freedom	Private Attorneys	Plaintiffs are taxpayers challenging the state domestic partnership law as an unconstitutional violation of the Marriage Protection Amendment, which expressly prohibits the creation of any status "substantially similar to marriage." Oral argument was held 10/23/13. Awaiting Decision.
Wyoming	**Courage v. State of Wyoming**	First Judicial District Court, Laramie County, Wyoming	State of Wyoming	Private Attorneys/ National Center for Lesbian Rights	Unmarried same-sex couples and same-sex couples legally married in other jurisdictions are challenging state's marriage laws, defining marriage as the union of one man and one woman, as violative of the due process and equal protection clauses of the Wyoming Constitution. Plaintiffs seek declaratory and injunctive relief.