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Engage

The Journal of the Federalist Society's Practice Groups

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Volume 5, Issue 2

Letter from the Editor...

Engage, the journal of the Federalist Society for Law and Public Policy Studies, is a collaborative effort involving each of the Society's fifteen Practice Groups. The Federalist Society's Practice Groups spark a level of debate and discussion on important topics that is all too often lacking in today's legal community. Through their programs, conferences and publications, the Practice Groups contribute to the marketplace of ideas in a way that is collegial, measured, and open to all.

Volume 5, Issue 2, following the trend of our recent issues, is dedicated almost exclusively to original articles produced by Society members and friends. Some of the many complex legal questions raised as the United States wages a war on international terrorism are discussed, from the role of legal counsel in military tribunals to the emerging Iraqi sovereignty displayed in the Iraqi Special Tribunal. This issue features a piece on changes in campaign finance in the new landscape of BCRA and "527s." Activity in the courts is also well documented, with *Crawford v. Washington, Hiibel v. Sixth Judicial Dist. Court of Nevada,* and an exhaustive analysis of recent property rights cases representing some of the jurisprudence discussed in the pages that follow. In addition, we are pleased to reproduce a groundbreaking Federalist Society study that documents the continued growth of federal crime legislation.

Also notable in this issue are several reviews of fantastic books. Included among these is Mark A. Behrens and Andrew W. Crouse's review of Robert Levy's very recent book, *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process.*

Upcoming issues of *Engage* will feature other original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find this and future issues thought-provoking and informative.

E n g a g e

Volume 5, Issue 2 October 2004

The Journal of the Federalist Society's Practice Groups

Editor
Katherine J. Mendis

Administrative Law and Regulation

Constitutional Restoration by Executive Order

*By John O. McGinnis**

Introduction

I offer here a fresh normative defense of the president's exercise of regulatory review authority and his role in enforcing federalism— responsibilities embodied in executive orders issued by President Ronald Reagan and continued in large measure by President William Jefferson Clinton.[1] These executive orders move in some measure toward the restoration of two central principles of the original Constitution—tricameralism (i.e., the combination of bicameralism and the presidential veto) and federalism. While the previous orders advance this constitutional restoration, further revisions would make the orders even more effective instruments of reviving the original constitution.

The federalism executive order[2] and the regulatory review executive order[3] revive the key constitutional principles of federalism and tricameralism and strengthen their objectives for the modern era. Through the federalism order, the president, within the discretion provided by regulatory statutes, can use his authority to revive sensible limitations on the national government by reserving to the states the authority to address regulatory problems within their jurisdictions and the authority to provide distinctive public goods appropriate to their citizens' preferences. Perhaps most importantly, the order may help revive the decentralized structure that the Framers believed essential to quicken the spirit of self-government within citizens of a continental republic.

For similar reasons, the president has incentives to revive the restraints on lawmaking that the original Constitution imposed through bicameralism and the presidential veto (tricameralism) and that have been eroded by the modern administrative state. Regulatory review by the Office of Information and Regulatory Affairs (OIRA), under presidential direction, compensates in some measure for the decline of tricameralism in the last sixty years. By allowing the president to monitor regulation by the executive branch, the regulatory review order also compensates for the loss of the veto power over government regulation that has resulted from broad delegation. Finally, the substance of the cost-benefit analysis mandated by the regulatory review order[4] helps screen public interest regulations from those sought by special interests—a core object of the constitutionalism.

Given this view of the federalism order and the regulatory review order as means toward constitutional restoration, this Essay presents suggestions for strengthening both these orders to better reflect their potential to restore the original constitutional structure. For instance, the federalism order should be revised to make more explicit the virtues of regulatory competition and to direct that, within the discretion provided by law the federal government should regulate only when state regulation would be inadequate to address the problem.

Turning to the regulatory review order, I suggest that just as bicameralism and the presidential veto apply to all bills, the regulatory review order should apply to all regulations to screen more comprehensively special interest regulations from public interest regulations. The regulatory review order should be extended to independent agencies. Furthermore, the regulatory review order should not impose restrictions on the delays that OIRA could impose in the course of its review unless the regulatory law at issue can be fairly read to require the implementation of a regulation by a specific date.

On the substance of cost-benefit analysis, this Essay recommends that the order be revised to take account of the dynamic costs of regulations. Just as the effects of tax revisions should take account of the resulting changes in taxpayer's behavior, so should the costs of regulations take account of changes in interest groups' behavior. If regulations make rent seeking more attractive, as they frequently do, such increased rent seeking decreases the productivity of society and must be reflected in any cost-benefit analysis.

I. The Background of the Current Executive Orders

Elected on a platform of restoring the authority of the states, President Ronald Reagan promulgated a federalism executive order, Executive Order 12,612.[5]

The order reasserts the doctrine of enumerated powers[6] and mandates that executive branch agencies recognize the distinction between what is best regulated nationally and what is best regulated locally.[7] In addition, the federalism order permits federal agencies to preempt state law only when a statute contains language clearly showing that Congress intended to preempt state law.[8]

President Clinton's final federalism order, Executive Order 13,132,[9] does not differ substantially from President Reagan's. It too reiterates the importance of federalism and although not setting forth a test as to what constitutes a national or local problem, Clinton's federalism order directs agencies to "consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means."[10] It also requires clear evidence of Congress's intention to preempt before permitting preemption, although the standard is slightly less emphatic than that in President Reagan's order.[11] Clinton's federalism order added the additional requirement that agencies provide, to the extent permitted by law, a waiver process to allow states that are accomplishing the same objectives with their own laws to be exempted from those aspects of a federal regulatory regime. [12]

President Reagan issued the regulatory review order, Executive Order 12,291,[13] shortly after he took office. The order required the agencies whose heads served at his pleasure to submit their major regulatory proposals to the Office of Information and Regulatory Affairs (OIRA), a unit of the Office of Management and Budget (OMB), together with a "regulatory impact analysis."[14] Only after OIRA signed off on their orders were the agencies permitted to issue the regulations; there were no time limits to the period OIRA could demand for completion of its review.[15] The order also established cost-benefit analysis as the overarching principle that would govern regulation, insofar as that principle was consistent with the agency's statutory framework.[16]

These orders continued in force during the presidency of George Bush, President Reagan's successor. In 1994 President Clinton issued Executive Order 12,866,[17] which maintained the principal objectives and structures of the Reagan executive orders while making some important changes. First, President Clinton modified the cost-benefit provisions, making it clear that government would take into account soft as well as hard costs and consider the "equity" and "distributive" consequences of regulation.[18] In response to critics of the secrecy of the regulatory review process, the new regulatory review order also required very substantial disclosure. In response to criticisms of the undue delays that OIRA imposed, Clinton's order imposed strict limits on the time OIRA could spend evaluating an agency's regulations.[19]

II. Constitutional Restoration Through Presidential Review

A. Reviving Constitutional Federalism

The president is the political actor most likely to revive the virtues of the Framers' federalism. To be sure, federal legislators are closer to their individual states than the president. But they are interested in the welfare of people in their individual states, not the welfare of the nation as a whole. Indeed, unlike the contribution that federalism makes to economic growth through jurisdictional competition, the geographic nature of representation at the federal level detracts from economic growth. For instance, each legislator has an incentive to bring back pork barrel legislation for his state despite the economic losses this causes the nation. In the case of spending, the representational nature of federalism can cause a geographic tragedy of the commons in which each representative has an incentive to overgraze the federal budget at the expense of the nation's economic prosperity. Exactly the same incentives work to the disadvantage of the nation at the regulatory level: each individual representative wants to obtain a regulatory framework that benefits his state even if it hurts the nation as a whole.

In contrast to their interest in bringing back pork, federal legislators do not have as strong an interest in strengthening state autonomy. Protecting autonomy has benefits that are much less visible to voters and thus do not advance the career prospects of politicians. Additionally, more powerful states mean more powerful state officials, and these officials represent an important source of competition for federal legislators for reelection (or, in the case of members of the House of Representatives, for both reelection and promotion to the Senate). Moreover, even if individual members of the legislature want to strengthen state autonomy, they cannot achieve this goal as easily as they can succeed in bringing back pork. Pork barrel legislation creates no free-rider problems among legislators: all legislators are rewarded with pork for their own districts if they support similar legislation for others. State autonomy brings no such individualized payoffs because the autonomy of all states is increased by the action of an individual senator protecting state autonomy. Given this free-rider problem, it

will be difficult to mobilize the critical mass of legislative support needed to achieve a restoration of state authority through federal legislation.

The pathologies that flow from this system have become so palpable that they set the stage for new ways of reconstituting a federalism that preserves liberty and generates wealth. Here the president is the leading actor on the set. First, the electoral fortunes of the president and his successor are more dependent on economic growth than those of national legislators. Moreover, unlike national legislators, the president has no free-rider problems in enforcing a system of competitive federalism. The president also should be less reluctant than national legislators to cede power to state officials because even more substantially empowered state officials are not going to overshadow the president. Finally, the federalist structure of the electoral college also gives the president an interest in appeasing state officials, particularly state governors, because governors and state party committees play an important role in presidential elections.

Of course, the president is not going to be a perfect enforcer of federalism. He also has factions that he wants to satisfy at the expense of long-term growth. But he is likely to prove better at preserving federalism because he has a strong countervailing interest in continuing economic growth for the foreseeable future. Moreover, the federalism executive order (and the regulatory review order as well) can act as a precommitment device. It thus enables the president to make it more difficult for himself to heed the pleas of these factions at the expense of this overriding interest. More to the point, perhaps, the federalism executive order may redirect these factions to other sources of rents or status that are unlikely to interfere with competitive federalism.

Although President Reagan issued the federalism executive order, President Clinton continued the order, thus showing that the movement toward presidential enforcement of federalism may be beyond partisan politics. It is true that President Clinton's first version of the executive order was criticized particularly by state officials as cutting back on the strong federalism of the Reagan executive order. That order was suspended and the final version was very similar to Reagan's executive order. Although neither order is explicit about restoring constitutional federalism per se, both resurrect key concepts in distinguishing between what is best regulated locally and what is best regulated nationally and directing agencies to focus only on national problems.[20]

Ideally, the federalism executive order should allow the president and his advisers the flexibility to make economically sound judgments about what is best regulated locally and what is best regulated nationally, taking into account both the advantages of jurisdictional competition and the advantages of national harmonization. In short, the president is not limited by formalism and could help implement a more effective system of competitive federalism.

Much of government regulation concerns matters that, although important, do not stir great political passions. As to these matters, the presidential order can be an effective counterweight to federal bureaucracies' natural tendency to impose federal solutions. Thus, even if the federalism executive order does not restore federalism to its former glory, it may be the most substantial revival possible in the current polity.

B. Reviving Tricameralism

The process of regulatory review can best be understood as an attempt to compensate for the decline of bicameralism and the presidential veto occasioned by delegation. As discussed in connection with the federalism executive order, the president is now the logical candidate for reviving normative structures that restrain special interests or factions. The OIRA review process envisioned in the regulatory review order facilitates this restoration.

1. Restoring Bicameralism Through OIRA. The requirement that a regulation receive the approval of OIRA as well as agency approval introduces, like the addition of another legislative chamber to a previously unicameral legislature, an additional barrier to restricting citizens' freedom. Furthermore, like an additional legislative chamber elected from different jurisdictions, OIRA impedes interest group legislation to some extent. Even assuming that the same interest groups were as capable of influencing OIRA as administrative agencies, the additional layer of review makes it harder for these interest groups to gain rents through regulation just as bicameralism makes it harder for interest groups to gain rent through legislation.

2. Restoring the Presidential Veto Through OIRA. Another effect of the regulatory review process is to compensate for the loss of the president's veto power. The review process reduces his transaction costs in monitoring agencies and thus helps him keep agency heads within the margin of autonomy that their independent authority (even in the important but limited sense that they often must be fired to stop their exer-

cise of authority contrary to the president's will) permits. It thus strengthens the president's autonomy and makes his regulatory review power similar to his power to veto bills.

3. Advancing the Objectives of Tricameralism Through Cost-Benefit Analysis. The final aspect of the regulatory review order that attempts constitutional restoration is the substantive requirement of cost-benefit analysis. The original constitutional filters of bicameralism and presentment offered the promise of distinguishing public goods from special interest legislation overall. The cost-benefit analysis accomplishes much the same objective, at least if the baseline for regulation is the absence of government intervention, because cost-benefit analysis should authorize government intervention only if its net benefits are greater than those provided by the market or nonmarket forms of spontaneous order like the family. Such intervention produces public goods—services that the market or the family either cannot provide or cannot provide as efficiently.

Even if no single aspect of the president's executive order on regulatory review compensates for the loss of tricameralism occasioned by delegation, both the procedural and substantive aspects of the regulatory review order move us back toward the Framers' system designed to filter public good provisions from special interest impositions.

III. Recommended Revisions of the Federalism and Regulatory Review Executive Orders

A. Revising the Federalism Executive Order

The analysis sketched above leads to the following recommendations for revising the federalism executive order:

1. Strengthening Competitive Federalism. The original Constitution recognized that there were costs to centralized regulation and circumscribed the government's regulatory powers. The federalism order should be amended to strengthen competitive federalism. It should specifically allude to the original design and suggest that federal regulation is warranted, unless otherwise required by law, only when the presence of interstate externalities or spillovers suggests that federal regulation is necessary. Even when there needs to be some federal involvement, the order should direct OIRA to consider whether there remains a role for state regulatory competition within an overall federal framework.

2. Applying Federalism Principles to Agency Recommendations About Legislation. One important limitation on the degree of constitutional restoration that the federalism order affords is that its application is limited to the executive branch. Congress can pass statutes that do not comply with the federalism principles that limit the role of the federal government to solving social problems with substantial externalities. One partial response to this difficulty is to direct agencies to follow the principles of the federalism order in their recommendations as to whether the president should sign such legislation.

3. Revising the Preemption Section of the Federalism Order. Executive Order 13,132 imposes a Clear Statement Rule on Agencies in Preemption Matters. Section 4 of the order essentially directs the agency to interpret a statute as requiring preemption only when Congress expressly or clearly intends to preempt state laws and to interpret it as permitting preemption only when that delegation is clearly expressed or intended.[21] The breadth of the clear statement rule should be slightly narrowed to those areas in which preemption would undercut jurisdictional competition, because such a scope would better comport with a view of the federalism order as constitutional restoration and because it would be easier to defend as a matter of law.

Recall that this Essay contends that the federalism order is necessary to restore the jurisdictional competition that has been eroded by Congress's use of plenary powers. Accordingly, at least when Congress is not addressing some interjurisdictional spillover or strengthening the conditions for interjurisdictional competition (such as permitting free movement of people and capital), there are policy reasons for the executive to employ its administrative discretion against interpreting a statute to require preemption or to delegate authority for preemption to the agency. It would follow from this rationale that in those few instances when Congress is addressing spillovers or protecting the free flow of capital among the states, the presumption against preemption should not apply because the model of jurisdictional competition assigns these responsibilities to the federal government. As with other issues in federalism, the executive has an advantage over the judiciary in creating a pragmatic doctrine of preemption that actually advances the general values of efficient constitutional design.

4. Judicial Review of Executive Orders. An issue common to both the regulatory review and federalism executive orders is whether judicial review should be

available to litigate compliance with the orders. Currently both orders flatly bar judicial review.[22] But if the orders are seen as a means of constitutional restoration, it is not clear that judicial review should be barred, at least for procedural matters. Permitting judicial review will make it more likely that agencies will scrupulously comply with the procedures set out in these orders.

Strong countervailing considerations, however, suggest that the substantive provisions of the orders, such as cost-benefit analysis and the review of whether sufficient spillovers exist to justify national regulation, should not be subject to judicial review. These provisions involve policy determinations and the weighing of economic costs and benefits—areas in which the executive has a comparative advantage over the judiciary.

B. Revising the Regulatory Review Order

From this normative analysis emerge some recommendations to strengthen the regulatory review executive order as well:

1. Expanding the Scope. A revised regulatory review order should reject the decision to restrict the full application of the order to only major rules.[23] Just as bicameralism and presentment apply to all proposed laws, so should the OIRA process apply to all regulations. The filtering process afforded by the regulatory review order should improve regulations overall, not only the set of regulations with very substantial regulatory costs. Moreover, without careful review, it is difficult to know whether even a minor regulation will create a dynamic that generates further regulation in the future.

2. Including Independent Agencies in the Regulatory Review Order. The regulatory review order does not include independent agencies—agencies whose heads do not serve at the pleasure of the president—within its full review process.[24] Independent agencies' exercise of quasi-legislative authority undermines tricameralism to an even greater extent than the exercise of such discretion by nonindependent agencies because such independence diminishes the president's formal authority to direct agency heads in the exercise of their discretion and makes that authority even less comparable to his veto power. If presidential review is seen as constitutional restoration, the case for including independent agencies under all aspects of the presidential regulatory review order is even stronger than including nonindependent agencies. The Clinton regulatory review order already has moved in this direction by applying the regulatory planning process of OMB to independent agencies in a way that allowed the vice president and other participants in the interagency process to request further consideration of rules that conflicted with the president's program. [25]

3. Deleting Time Limits. The decision in President Clinton's regulatory review order to put limits on the time OIRA can review a prospective regulation is a mistake.[26] The regulatory review process should not be terminated on an arbitrary date, because the advantages of filtering will be decreased by the agencies' ability to wait out the regulatory review process. To be sure, Congress can set a deadline for regulation that the administration must respect. In that event, however, Congress has managed to get a specific timing directive approved through bicameralism and presentment and the deadline will have survived the tricameral procedure established by the Constitution. Consequently, there is less need for a regulatory process to substitute for the absence of tricameralism.

4. Revising Cost-Benefit Analysis. The regulatory review process should be more explicit about cost-benefit analysis. Compared to President Reagan's order, President Clinton's regulatory review order is not quite as clear that the cost-benefit analysis should be its sole focus.[27] To be effectively balanced even soft costs should be given as accurate an approximation as possible. An agency must make choices and must tote up benefits and costs as best it can, and a single scale would facilitate this process.

A revised order also should make clear that regulation should consider the costs that regulations themselves bring about. Cost-benefit analysis should employ a dynamic scoring of costs that takes account of the more substantial opportunities for rent seeking that result from centralized regulation. These public choice problems should be highlighted by the new regulatory review order because they represent some of the costs that the high hurdles of tricameralism in the original Constitution avoided.

5. Revising Disclosure Requirements. The revised order should retain the requirements (initiated in President Clinton's regulatory review order) that OIRA disclose contacts from parties outside the administration about the regulation.[28] This disclosure rule helps restrain special interests, thus making the order a more effective substitute for other constitutional structures that have been dissolved.

In contrast, the requirements for internal executive branch disclosure introduced by the Clinton order should be deleted.[29] These requirements do not constrain special interests by bringing their activity to the light of day. In attempting to avoid this danger, OIRA may pull its punches and reduce the searching nature of its analysis of agency regulations.

Conclusion

I do not claim that even revised executive orders can wholly compensate for the decline of the original Constitution. These executive orders address only the regulatory side of the modern administrative state and do not seek to dissolve the welfare state that also has transformed the polity that the Framers bequeathed to us. The federalism and regulatory review executive orders, even revised according to these suggestions, will not and should not end the debate about the proper scope of government regulation.

Unlike some other commentators, I do not see the presidential review process simply as a technocratic one designed to create better coordination within the executive branch[30] or to advance the undoubted virtue of government accountability.[31] Instead, the federalism and regulatory review orders replace New Deal norms concerning the appropriate government structure with norms that are closer to those of the Framers and that more effectively restrain the special interests that seek to live off the modern administrative state.

There are broader lessons from this analysis of the regulatory review and federalism executive orders. If these orders essentially compensate for the decline of certain aspects of the original Constitution, it shows that our constitutional norms can reassert themselves other than through the judicial or amendment process. Moreover, the analysis offered here also suggests that there are routes to the restoration of legal norms that do not simply revive the original Constitution. If we are to restore the Framers' principles of government in a world that they could not have imagined and in which their governmental framework has been distorted substantially, it may not be possible or effective to revive the exact replica of the Framers' design. New ways must be sought to reconstitute a limited interlocking structure of state and federal government that efficiently produces necessary public goods. The federalism and regulatory review executive orders can be an important part of this process of reconstituting the polity and reclaiming the system of government from the special interests that have been empowered by constitutional decline in the twentieth century.

*John O. McGinnis is the Class of 1940 Research Professor at Northwestern University Law School. A longer discussion of this subject may be found in John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 Duke L.J. 901 (2001).

Footnotes

[1] President Reagan's executive order on regulatory review, Exec. Order No. 12,291, 3 C.F.R. 127 (1981), was revoked by President Clinton's regulatory review order, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000). President Reagan's executive order on federalism, Exec. Order No. 12,612, 3 C.F.R. 252 (1987), was revoked by President Clinton's federalism order, Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000).

[2] Throughout this Essay, the "federalism executive order" and the "federalism order" refer to President Clinton's federalism order, Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000), which replaced President Reagan's federalism order, Exec. Order No. 12,612, 3 C.F.R. 252 (1987).

[3] Likewise, throughout this Essay the "regulatory review executive order" and the "regulatory review order" refer to President Clinton's regulatory review order, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000), which replaced President Reagan's regulatory review order, Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

[4] Exec. Order No. 12,291 § 2, 3 C.F.R. 127, 128; Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 638.

[5] Exec. Order No. 12,612, 3 C.F.R. 252 (1987), revoked by Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000).

[6] Id., 3 C.F.R. at 252-53.

[7] Id. § 3(b)(1), 3 C.F.R. at 254.

[8] Id. § 4(a)-(b), 3 C.F.R. at 255.

[9] Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000).

[10] Id.

[11] Id. § 4(a)-(b), 3 C.F.R. at 208.

[12] Id. § 7(a)-(d), 3 C.F.R. at 210.

[13] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000).

[14] Id. § 3, 3 C.F.R. at 128-30.

[15] Exec. Order No. 12,291 § 3, 3 C.F.R. at 128-30.

[16] Id. § 3(d), 3 C.F.R. at 129.

[17] Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C.

§ 601 (2000).

[18] Id. § 1(a), 3 C.F.R. at 638-39.

[19] Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. at 646-47 (requiring OIRA to review proposed regulations within ninety days and providing for one thirty-day extension).

[20] Exec. Order No. 12,612 § 3(b)(1), 3 C.F.R. 252, 254 (1987), revoked by Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000). The order states:

[21] Exec. Order No. 13,132 § 4(a)-(b), 3 C.F.R. 206, 208 (1999), reprinted in 5 U.S.C. § 601 (2000).

[22] Exec. Order No. 12,612 § 8, 3 C.F.R. 252, 256 (1987), revoked by Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000); Exec. Order No. 13,132 § 11, 3 C.F.R. 206, 211 (1999), reprinted in 5 U.S.C. § 601 (2000).

[23] Exec. Order No. 12,866 § 3(f), 3 C.F.R. 638, 641-42 (1994), reprinted in 5 U.S.C. § 601 (2000).

[24] Exec. Order No. 12,866 § 4(c), 3 C.F.R. 638, 642 (1994), reprinted in 5 U.S.C. § 601 (2000).

[25] *See* Exec. Order No. 12,866 § 2(b)-(c), 3 C.F.R. at 640 (stipulating the review roles of the OMB and the vice president in the regulatory planning process).

[26] *See* Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. at 647 (setting a strict time limit of ninety days for OIRA review and prescribing one possible extension of thirty days).

[27] Exec. Order No. 12,866 § 1(a), 3 C.F.R. at 639.

[28] Exec. Order No. 12,866 § 6(b)(4), 3 C.F.R. at 644-48.

[29] Exec. Order No. 12,866 § 6(b)(5), 3 C.F.R. at 648.

[30] See Comm'n on Law and the Econ., Federal Regulation: Roads to Reform 72-73 (Am. Bar Ass'n ed., 1979) (justifying coordination within the executive branch).

[31] See Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 460 (1987) (discussing the advantages of the executive order in promoting political accountability).

Civil Rights

The Conservative Case against the Federal Marriage Amendment

*By Anntim J. Vulchev and John Yoo**

Introduction

Can you blame conservatives for proposing the Federal Marriage Amendment (FMA)[1]? Having been deprived of their voice on social issues by the Supreme Court on several occasions, conservatives now fear that continued judicial activism will soon also foreclose democratic decision making on marriage policy. No one should be surprised that opponents of same-sex marriage have taken a big step toward ensuring that laws about marriage are made in legislatures and not in courtrooms. However, the same principles that reject the judicial imposition of uniform social policies should also lead to a rejection of the FMA. By nationalizing marriage policy, the FMA undermines the benefits of federalism, such as decisionmaking by local governments closer to the people and competition among jurisdictions offering a diversity of policies.

This essay focuses on the right of states to withhold recognition of out-of-state same-sex marriages, and whether the FMA is necessary to achieve that end. Part I of this article describes current constitutional doctrine regarding the interstate recognition of same-sex marriages. Part II lays out the conservative case against the FMA, based on such antecedents as Prohibition and the nationalization of abortion policy. Part III proposes a better approach. If an amendment is necessary, its purpose should be to restore the *status quo ante* that existed before judges upended the social order in Massachusetts.[2] An amendment in keeping with our federal system would be one that preserved the definition of marriage to each state to decide for itself, just as our constitutional system permitted for the first two centuries of its existence.

Part I Current Law and the Definition of Marriage

The possibility that one state's recognition of same-sex marriages can redefine the definition of marriage for other states depends on how courts would answer several questions. Specifically, would the Privileges and Immunities Clause of Article IV[3] or the Privileges or Immunities Clause of the Fourteenth Amendment[4] force states to recognize out-of-state same-sex marriages? Would the Full Faith and Credit Clause[5] require the same result? Lastly, what effect, if any, would the federal Defense of Marriage Act (DoMA)[6] have?

The answers to these questions will also inevitably be shaped by the U.S. Supreme Court's decision in *Lawrence v. Texas*.[7] An in depth analysis of *Lawrence* and the preceding case, *Romer v. Evans,*[8] is outside the scope of this paper. Nonetheless, it seems clear from these decisions that the Court is likely to consider laws that regulate homosexuality as the product of "animus"[9] that further "no legitimate state interest."[10] In neither *Lawrence* nor *Romer* did the Court accept the state's reasons as sufficient to overcome even rational basis review. It is also unclear from the decisions what legitimate state interest would justify the differential regulation of homosexuals, and what type of record the state would need to assemble to show that its interest is not the mere product of animus.

A state can obviously permit same-sex marriage through its own mechanisms of government, as happened in Massachusetts. However, this does not rise to the level of a national question. The people of Massachusetts through their legislature have the opportunity to overrule their high court and amend their constitution, and the more important concern is not whether same-sex marriages are performed anywhere, but whether they can be forced upon unwilling states from without.

Returning to the question of the interstate effects of one state's recognition of same-sex marriage, it is clear that the Privileges and Immunities Clauses of the Constitution would not require interstate recognition of same-sex marriages. Yet, the opposite argument has been made,[11] and so for that reason the Clauses should be examined briefly.

First, Article IV's Privileges and Immunities Clause is not implicated when a state that prohibits same-sex marriages within its own borders also refuses to recognize the validity of an out-of-state same-sex marriage. The out-of-state visitors are not denied anything that in-state residents already enjoy. According to Professor Tribe, there has "been little debate,"[12] about the approach exemplified by the Supreme Court's pronouncement in *Toomer v. Witsell*[13] that the Privileges and Immunities Clause "was designed to insure [sic] to a citizen of State A who ventures into State B the same privileges which the citizens of State

B enjoy."[14] Art. IV, § 2 protects the rights of out-of-state visitors, but only if those rights are "fundamental"[15] *and* already enjoyed by citizens of the state.

Similarly, the Fourteenth Amendment's Privileges or Immunities Clause,[16] embraced by the Supreme Court after 130 years of neglect,[17] also does not provide a basis for requiring interstate recognition of same-sex marriages. In *Saenz v. Roe*,[18] the Court held that because the right to travel is fundamental, the Privileges or Immunities Clause also guaranteed that a state's new residents will be treated the same as more established residents.[19] The *Saenz* Court was not concerned merely with a deterrence to travel, but rather "a citizen's right to be treated equally in her new State of residence."[20] But the equality in question was in regards to benefits that existed entirely within a state's borders. If the Privileges or Immunities Clause requires a state that does not allow same-sex marriages to recognize the same-sex marriage of transplants from, say, Massachusetts, it would mean that the Clause has created a certain minimum floor of rights in the family law area. But the Clause has not yet been read to do that. It protects the rights of citizens *qua* national citizens, and so far that has not been read to extend to family law issues.

An analysis of the Full Faith and Credit Clause *vis-à-vis* interstate recognition of same-sex marriages is more complicated. The Supreme Court has held that the Clause "does not require a State to apply another State's law in violation of its own legitimate public policy."[21] In the context of marriage, Professor Lea Brilmayer has argued that the Clause has never "been read to require one state to recognize another state's marriages,"[22] and further, that the Clause and its attending judicial interpretation adequately safeguard a state's liberty to not recognize same-sex marriages.[23] Notwithstanding Professor Brilmayer's argument, a state court has relied on the Full Faith and Credit Clause to recognize certain marital rights for a same-sex couple in New York based on their Vermont civil union. [24]

Professor Brilmayer's analysis, however, also does not adequately deal with *Lawrence* and *Romer*. States generally recognize marriages granted in other states, subject to a few narrow exceptions. Suppose a state continues to recognize out-of-state marriages, *except for* those between members of the same sex. This would trigger review under *Romer* and *Lawrence* to determine whether the state prohibition is anything more than the product of animus. The "public policy exemption," after all, is not absolute,[25] and must survive the requirements of other parts of the Constitution. If, for example, a state recognized all out-of-state marriages except for those between members of different races, there seems to be little doubt that such a law would undergo – and fail – strict scrutiny under the Equal Protection Clause.

After *Romer* and *Lawrence,* it is likely that states may be forced to accept the legality of out-of-state same-sex marriages due to the Full Faith and Credit Clause. States could not take advantage of the public policy exemption to the Clause because a law discriminating against out-of-state same-sex marriages would not survive rational basis review as applied in the two decisions. It is difficult to see how a Court interested in being consistent could find that Texas' criminal prohibition of sodomy did not further a legitimate state interest, but that a bar on out-of-state gay marriage did. Nor is it clear whether states could satisfy any minimal standard of evidence to show that such a prohibition was *not* the product of animus.

Anticipating the possibility that Full Faith and Credit would require interstate recognition of same-sex marriages, Congress passed DoMA. The first part of the act limits federal benefits of marriage to opposite sex couples.[26] More importantly, the second part, pursuant to Congress's powers under Art. IV, **§** 1 to enact laws regarding "the manner in which [the] acts, records and proceedings [of other states] shall be proved and the effect thereof,"[27] confirms state power to refuse recognition of out-of-state same-sex marriages.[28] The law has been criticized as an inappropriate use of the Full Faith and Credit Clause,[29] but there is no obvious reason to believe it would be struck down on these grounds.

DoMA's viability, however, is entirely dependent on how, once again, the reasoning of *Romer* and *Lawrence* is applied. Congress has used its power to regulate the recognition of out-of-state acts, records and proceedings to select one type of state action – the granting of marriages to same-sex couples – for prohibition. It seems this would be subject to *Romer* and *Lawrence* type scrutiny, assuming that the Court reads the Due Process Clause of the Fifth Amendment as it has read the Fourteenth Amendment's Due Process Clause.[30] To use the race example again, imagine if Congress had passed a law allowing states to refuse to recognize interracial marriages. It seems clear that such a law would be subject to equal protection-style analysis under the Fifth Amendment, and that it would fail constitutional scrutiny. To be sure, *Lawrence* and *Romer* call for a lower level of scrutiny

– rational basis review – than the strict scrutiny applied in racial discrimination cases. Nonetheless, it is again difficult to see the justification that Congress could provide for DoMA that would surpass that provided by Texas in *Lawrence*. It is probable that DoMA would be struck down as a violation of the Fifth Amendment Due Process Clause.

Part II The Conservative Case against the FMA.

While this article is about the wisdom of the FMA and not about the wisdom of same-sex marriage, each inquiry informs the other. More specifically: a) the starting observation that the nation's significant opposition to same-sex marriage rights[31] is a manifestation of what is best termed "philosophical conservatism," leads to b) the conclusion that the very principles which animate opposition to same-sex marriage should also lead to strong doubts about the FMA.[32] Describing the tradition of Edmund Burke, the influential historian J.G.A. Pocock identified "philosophical conservatism" as "the claim that human beings acting in politics always start from within a historically determined context, and that it is morally as well as practically important to remember that they are not absolutely free to wipe away this context and reconstruct human society as they wish."[33] This is the essence of principled disapproval of the rush towards same-sex-marriage, and it is this historical sensibility that should give marriage traditionalists pause in their current attempts to amend the Constitution.

Consider the history of constitutional amendments in general. The Framers designed the founding document to be difficult to amend, likely to be done only in response to strict necessity. Article V requires that two-thirds of the House and Senate propose the text, which must then receive the approval of three-quarters of the state legislatures. (Another process, never used, allows for two-thirds of the state legislatures to call a constitutional convention). As James Madison explained in the Federalist No. 43, this process allows for the correction of errors in the Constitution without allowing it to become as flexible as an ordinary piece of legislation. "It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[34] In addition, wrote Madison, the amendment process worked a valuable role in maintaining the balance of powers between the federal and state governments. It "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."[35]

It should not be surprising that this hurdle has led to relatively few amendments. Since 1791, when the Bill of Rights added the first 10 amendments to the Constitution, the nation has approved only 17 more over the course of the following 213 years. Many of these changes have focused on modernizing the workings of our democracy, such as expanding the electorate to include African-Americans, women and 18-year-olds, providing for the direct election of senators, limiting presidents to two terms, and specifying the order of presidential selection and succession. Almost all of the amendments have the purpose of either organizing or limiting the powers of the federal or state governments, such as the Equal Protection and Due Process Clauses requirement of equal and fair treatment by the government. The most notable effort to regulate purely private conduct—the 18th Amendment's establishment of Prohibition—failed miserably and led to the rise of organized crime.

Our Republic is a consequence of the Founders pursuit of liberty. According to Tocqueville, the distinguishing characteristics of the original republic were "decentralized order" (federalism) and "mediating institutions,"[36] and the latter were reinforced by the former.[37] Thus, in turn, federalism was the great guarantor of liberty. [38] The hard choice that opponents of same sex marriage have to face is that "federalism's survival… may depend on the willingness of citizens to defend the autonomy of their states even when confronted by national policies that would otherwise be attractive."[39]

Here the analogy with Prohibition is instructive. Much like the current movement behind the FMA, in large part a response to decades of imposition by federal judges on a multitude of social issues, the "drys" behind Prohibition were in significant measure motivated to pursue their goals nationally after the Supreme Court on occasion stymied their ability to regulate alcohol at the state level.[40] Liquor merchants defeated state regulations by relying upon the Commerce Clause.[41] Prohibitionists eventually prevailed in 1913 with the passage of the Webb-Kenyon Act,[42] which prohibited the importation of liquor into any state with laws against its use. In 1917, the Supreme Court upheld the act in *Clark Distilling Co. v. Western Maryland Railway.*[43] But not satisfied by their victory with the Webb-Kenyon Act, prohibitionists succeeded with their demand that social policy be woven into the Constitution itself.

The irony was that a movement shaped by frustration with nationally imposed limits on state policy ended up greatly enhancing the power of the federal government. In addition to burgeoning federal agencies, the Supreme Court, for example, upheld broad powers for Congress under the Eighteenth Amendment's enabling clause, a consequence that would outlive Prohibition by influencing future constitutional litigation.[44] Enforcement of Prohibition was uneven and brutal,[45] but also ineffectual.[46]

A blanket prohibition on same sex marriages would similarly lead to a multitude of unforeseen circumstances. Many Americans passionately believe in gay marriage, and their numbers over the long run might increase. One salient question is: what will be the outlet of those citizens' passion on the subject? How will the nation cope with inevitable civil disobedience? Surely we shouldn't lightly approve of the violation of the Constitution. But then, it is worth asking whether a constitutional ban on gay marriage will promote the goals its advocates seek, rather than producing disregard for the law.

The example of *Roe v. Wade*[47] also sheds light on the harms of nationalization. There is a vast difference in legitimacy between a binding decision on a contentious social issue by a handful of justices, and a majoritarian preference sealed by a two-thirds majority in both chambers of Congress and approved by the legislatures of three-fourths of the states. However, many of the effects of the FMA would be the same as those begotten by *Roe*. Justice Scalia's dissent in *Planned Parenthood v. Casey* could be read as an eloquent warning about the dangers of injuring federalism by nationalizing any social policy:

> Not only did *Roe* not …*resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue — as it does over other issues, such as the death penalty — but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.[48]

The mere effort to nationalize marriage could produce the same long-term negative effects, in which candidates of both parties must make pledges on gay marriage and the issue dominates our appointments to the federal courts. Allowing gay marriage to be decided state-by-state could avoid the political divisiveness produced by *Roe v. Wade* and, in fact, lead to a more enduring settlement of the issue.

Part III An Amendment that Protects a Democratic Consensus on Marriage and Preserves Federalism

If courts applied the reasoning of *Lawrence* and *Romer* to strike down DoMA and state DoMAs, the solution would be a constitutional amendment that would merely restore power to the states. Such an amendment might be similar to the second part of DoMA,[49] its purpose being to ensure each state's right to not recognize out-of-state same-sex marriages. It would thus preserve the benefits of federalism by allowing states to compete for residents and businesses by offering different mixes of economic and social policies. As in a market, citizens can satisfy their preferences by deciding to live in states that provide the tax, education, welfare or family policies with which they agree. Some states, such as Massachusetts, might choose to permit gay marriage, while others such as California might choose to define marriage as between a man and woman, and Americans could choose to live in either state depending on what policy they support.

A pro-federalism amendment also makes sense as a matter of public policy. Advocates on both sides of this emotional debate are floating a variety of arguments about the effects of gay marriage. Supporters claim that it leads to the stability of relationships and extends the positive benefits of marriage to homosexual couples. Opponents argue that it undermines the institution of marriage and could lead to higher divorce and lower marriage rates.

All sides should admit that the sample size for making these judgments is far too small—there simply are not enough jurisdictions that have permitted gay marriage. Allowing each of the fifty states to choose a different policy on gay marriage would provide that diversity of experience that would allow us

to see whether gay marriage indeed causes negative effects on society or the opposite.

This would truly take advantage of Justice Brandeis' famous description of the states as "laboratories of democracy."[50] As he observed, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[51]

Conclusion

The Federal Marriage Amendment in the 108th Congress is dead,[52] and some of its supporters couldn't be happier.[53] In politics, tactical defeats are the constituency-motivating precursors of strategic victories, and traditionalists who oppose gay marriage may in fact be heading toward a future victory with the FMA (or at least collateral victories).[54] But neither the fight nor the prize is worth it. A better approach should seek to enhance federalism. Conservatives who have criticized the Supreme Court's nationalization of abortion in *Roe v. Wade* should support a more modest amendment that would prevent one state, such as Massachusetts, from deciding the policy on same-sex marriage for all other states.

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Footnotes

[1] S.J. Res. 30, 108th Cong. (2004): "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

[2] Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003).

[3] U. S. Const. art. IV, § 2.

[4] U. S. Const. amend. XIV, § 1.

[5] U. S. Const. art. IV, § 1.

[6] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. 7 (2000) and 28 USCS § 1738C (2000)).

[7] Lawrence v. Texas, 539 U.S. 558 (2003).

[8] Romer v. Evans, 517 U.S. 620 (1996).

[9] Id. at 632.

[10] Lawrence, 539 U.S. at 578.

[11] *See, e.g.,* Mark Strasser, The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel, 52 Rutgers L. Rev. 553 (2000) (arguing that the privileges and/or immunities clauses force states to recognize out-of-state same-sex marriages as an inherent part of the right to travel).

[12] Laurence H. Tribe, American Constitutional Law 6-36, at 1250 (3d ed. 2000). In the early case of Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (no. 3230), Justice Bushrod Washington attempted to "import the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause of Article IV." (Tribe 6-36 at 1252). The rights protected were "fundamental; which belong, of right, to the citizens of all free government." 6 Fed. Cas. at 552. However, the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), firmly circumscribed the Privileges and Immunities Clause. The Clause was held not to be a source of rights, and Corfield was read as further limiting the Clause, so in effect states could discriminate between residents and non-residents if the rights in question were not sufficiently important.

[13] Toomer v. Witsell, 334 U.S. 385 (1948).

[14] Id. at 395.

[15] Corfield, 6 F. Cas. at 552. A more recent interpretation of the privileges and immunities protected by Art. IV is found in Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371, 383 (1978) ("Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted**;** other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.").

[16] U. S. Const., amend XIV, § 1.

[17] Prior to 1999, the Clause was used by the Supreme Court only once previously to invalidate a state law, Colgate v. Harvey, 296 U.S. 404 (1935), and that case was overruled shortly thereafter. Madden v. Kentucky, 309 U.S. 83 (1940).

[18] 526 U.S. 489 (1999).

[19] Id. at 502-505.

[20] Id. at 505.

[21] Nevada v. Hall, 440 U.S. 410, 422 (1980). *See also* Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003), quoting Sun Oil v. Wortman, 486 U.S. 717 (1988) ("…the Full Faith and Credit Clause does not compel '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'.").

[22] Lea Brilmayer, Full Faith and Credit, Wall St. J., March 9, 2004 at A16.

[23] "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?" Full Faith and Credit, Family Law, and the Constitutional Amendment Process: Testimony of Professor Lea Brilmayer. March 3, 2004 (developing the argument that states have had, and will continue to have, latitude to reject marriages from sister states).

[24] In Langan v. St. Vincent's Hosp., 196 Misc. 2d 440 (N.Y. Misc.,

2003), a New York court ruled that a decedent's partner, because of the couple's Vermont-sanctioned civil union, could maintain a survivorship action against a hospital, where, under New York law, he normally would not be able to do so. The court noted, however, that it could reach its holding in large part because New York has no public policy on same-sex marriage or DoMA that would contravene the judgment.

[25] *See, e.g.,* Hyatt 538 U.S. at 499 (the exemption was applied where the Court did not face a situation "in which a State has exhibited a'policy of hostility to the public Acts' of a sister State.")

[26] 1 USCS § 7.

[27] U. S. Const. Art. IV, § 1.

[28] "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." 28 USCS § 1738C.

[29] Tribe, *supra* note 10, 6-35 at 1247 n. 49 ("…[B]ut this statement cannot plausibly be construed to empower Congress to prescribe that states may choose to give *no effect at all* to an entire category of official state Acts.").

[30] See, e.g., Bolling v. Sharpe 347 U.S. 497 (1954).

[31] The current national majority that at this point opposes same-sex marriage transcends political parties and draws significant support from Democrats, moderates, and African- Americans. *See Democrats Seen More Open to Gay Marriage*, Associated Press, July 21, 2004 available at http://abcnews.go.com/wire/Politics/ap20040721_1629.html (citing Pew Research Center polls).

[32] The philosophical consistency of disapproving both of same-sex marriage and the FMA is also mirrored by the nation's simultaneous opposition to same-sex marriage and its hesitancy to embrace the FMA. *See* Alan Cooperman, *Christian Groups Say They Won't Give Up*, Washington Post, July 15, 2003, A04 ("'The polls tell us that most people oppose gay marriage,' said Pew pollster Andrew Kohut. 'They also tell us that the public is pretty conservative when it comes to fiddling with the old Constitution.'").

[33] J.G.A. Pocock. *Introduction* to Edmund Burke, Reflections on the Revolution in France vii. (J.G.A. Pocock, ed., Hackett Publishing Co., 1987) (1789-1799).

[34] Federalist No. 43 at 278 (Clinton Rossiter ed., 1961).

[35] *Id.* at 278-9.

[36] *See* John McGinnis, Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery, 90 Calif. L. Rev. 485, 491 (2002).

[37] *See id.* 507-511.

[38] *See* John C. Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. 1311, 1357-1404 (1997).

[39] McGinnis, *supra* note 35, at 495.

[40] See Sidney J. Spaeth, Note, The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest, 79 Calif. L. Rev. 161, 171-173 (1991) (Giving an overview of state regulation and corresponding Supreme Court decisions).

[41] Id.

[42] Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1982)).

[43] 242 U.S. 311 (1914).

[44] *See* David Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 Duke L.J. 65, 118, ("Most significant for future constitutional litigation, however, were three decisions of the Taft period giving a broad construction to Congress's authority under section 2 of the [Eighteenth Amendment] 'to enforce this article by appropriate legislation'.")

[45] *See* Spaeth, *supra* note 39, at 161-162, N. Clark, Deliver Us From Evil: An Interpretation of American Prohibition 165 (1976).

[46] *See* Mabel Walker Willebrandt, The Inside of Prohibition (1929). Willebrandt, a former U.S. Deputy Attorney General in charge of Prohibition enforcement, labeled Prohibition a failure, primarily because of the obstructionism of unwilling officials. She also condemned the heavy-handed approach of officials who sought to compensate for local laxity with increasing numbers of federal agents. Id. at 177-179.

[47] 410 U.S. 113 (1973).

[48] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 995 (1992).

[49] 28 USCS § 1738C.

[50] The reference is to New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[51] *Id.*

[52] The Amendment was decisively defeated in the Senate, and while the House could still pick it up during the 108th Congress, the amendment would still need to pass through the Senate to advance out of Congress.

[53] *See, e.g.,* Alan Cooperman, *Gay Marriage As The "New Abortion*", Washington Post, July 26, 2004, A03. ("Until the Senate vote, evangelical leaders were bemoaning their supporters' passivity over the Massachusetts court decision. But several said they believed the vote energized grass-roots conservatives. 'We lost the vote, but I'm ecstatic,' [Southern Baptist Convention official, Rev. Richard Land] said.").

[54] *See also* Alan Cooperman, *Christian Groups Say They Won't Give Up,* Washington Post, July 15, 2003, A04, ("[Prison Fellowship Ministries head Charles Colson] and other evangelical leaders said the Senate vote achieved several objectives, including energizing grass-roots conservatives, forcing senators to take a stand and forging bonds between the Republican Party and socially conservative black churchgoers who have traditionally been steadfast Democrats.").

Supreme Court Preview: Disparate Impact Claims Under the ADEA

*By Michael A. Carvin and Louis K. Fisher**

Later this year the Supreme Court will hear arguments in *Smith v. City of Jackson*,[1] which presents the question whether so-called "disparate impact" claims are available under the Age Discrimination in Employment Act of 1967.[2] Under "disparate impact" theory, an action is unlawful if it has disproportionate adverse effects on members of a protected class and lacks sufficient justification, even if the action is not taken with a purpose to discriminate on the basis of the protected characteristic. The Court's decision, which should hold that ADEA disparate impact claims are *not* cognizable, will be extremely important to public and private employers.

The Supreme Court has allowed disparate impact claims under Title VII of the Civil Rights Act of 1964,[3] but it has held that several other civil rights statutes (including Title VI of the same Act) as well as the Fourteenth and Fifteenth Amendments authorize only "disparate treatment" claims – *i.e.*, claims of intentional discrimination.[4] Until 1993, the courts of appeals reflexively assumed that disparate impact claims allowed under Title VII were also permissible under the ADEA.[5] In *Hazen Paper Co. v. Biggins*,[6] however, the unanimous opinion of the Court emphasized that "we have never decided whether a disparate impact theory of liability is available under the ADEA,"[7] and a concurring opinion for three Justices stated that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[8] Since *Hazen Paper*, five courts of appeals have held that ADEA disparate impact claims are not available,[9] and three courts of appeals have adhered to their pre-*Hazen Paper* holdings that such claims are allowed.[10]

City of Jackson is the second case in which the Supreme Court granted *certiorari* on this issue. In 2002, the Court heard arguments in *Adams v. Florida Power Corp.*, but then dismissed the case on the ground that *certiorari* had been improvidently granted.[11] During the hearing, some Justices expressed concern about the fact that the plaintiffs challenged the employer's reduction-in-force itself, without identifying any specific selection practices through which the RIF fell more heavily on older employees.[12] In *City of Jackson*, a group of police officers are challenging a pay plan that raised the salaries of *all* officers but, according to the plaintiffs, generally gave higher increases to officers under age forty.[13] Although this claim does not suffer from the same type of flaw as the claim in the *Florida Power* case, its validity would be dubious even if disparate impact claims were generally cognizable. Even under Title VII, the Court has held that disparate impact doctrine is not applicable to a discriminatory *compensation* claim.[14] In addition, the plaintiffs focus on salary *increases* rather than on the salaries themselves, and the City's experts reported – without contradiction – that older officers statistically were paid more overall than younger officers, even *after* the allegedly discriminatory pay increases. As discussed below, moreover, the facts of the *City of Jackson* case highlight the particular problems with applying disparate impact theory in the age context.

As argued by the City in its brief to the Supreme Court, the text and legislative history of the ADEA, bolstered by pragmatic considerations, convincingly demonstrate that disparate impact claims are not available under the statute. The ADEA's prohibitory sections make it unlawful for an employer to take certain actions "because of [an] individual's age."[15] This language is a conventional reference to discriminatory intent. Indeed, the classic description of the difference between disparate treatment and disparate impact is that, under the former, "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[16] The *City of Jackson* plaintiffs argue that the "because of" language merely establishes a causation requirement and that, for example, an older worker who fails a physical strength test does so "because of" age. On the contrary, even if physical strength is negatively correlated with age, the two factors are analytically distinct, making it incorrect to say that an action taken because of physical weakness is an action taken because of age. The effort to *equate* decreased physical strength with old age is precisely the sort of generalized stereotype that the ADEA was designed to prohibit.

Other ADEA provisions confirm that the prohibitory section covers only disparate treatment. In particular, the ADEA affirmatively provides that an action is lawful where "based on reasonable factors other than age."[17] This "RFOA" provision further demonstrates that the legality of an employment practice depends on the employer's motives, which would be ir-

relevant to a disparate impact prohibition. According to the *City of Jackson* plaintiffs, the RFOA provision would be unnecessary if the ADEA otherwise applied only to intentional discrimination. No court of appeals, however, has concluded that the RFOA provision *supports* disparate impact liability. To the contrary, the courts of appeals uniformly have applied the RFOA provision to disparate treatment claims. Under these decisions, the provision confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination,[18] and also that an action is lawful in a "mixed-motive" case where age was a factor but the same decision would have been made based solely on other factors.[19] Nor is there merit to the contention that the word "reasonable" signals a prohibition of decisions based on *unreasonable* factors other than age. The term "reasonable" in the RFOA provision is best understood simply to restate the traditional requirement of antidiscrimination law that there be a rational basis for a purportedly nondiscriminatory action. Thus, it is sometimes said in disparate *treatment* cases that a *prima facie* showing by the plaintiff establishes liability unless there was a "reasonable" or "valid" or "legitimate" basis for the employer's action.[20] These modifiers add nothing beyond the basic requirement of nondiscriminatory intent.

Still other ADEA provisions, together with the statute's legislative history, confirm that the statute was not intended to address adverse effects on older workers by prohibiting age-neutral practices. The report of the Secretary of Labor (who was charged by Congress with making a report and recommendations on age discrimination) and the ADEA's statement of findings and purposes reflect that the statute prohibits only "arbitrary age discrimination."[21] In turn, the report clearly defines "arbitrary age discrimination" as the type of discrimination that occurs through "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications."[22] The *City of Jackson* plaintiffs erroneously focus on the Secretary's and Congress's recognition that, due to the "force of certain circumstances," many practices inevitably will "affect older workers more strongly, as a group, than they do younger workers."[23] The report and the statute show that these adverse effects were to be addressed not through prohibitions but through a broad range of non-coercive measures, which are in fact found in Section 3 of the ADEA.[24] Furthermore, the legislative history – like Sherlock Holmes' "dog that didn't bark" – contains neither any mention of disparate impact liability nor any discussion of the many subsidiary issues that would have arisen if such liability had been contemplated.[25]

Although the text and legislative history are wholly dispositive, there are also important pragmatic reasons for not recognizing ADEA disparate impact claims. The difficulties of resolving the complex and/or amorphous questions inherent in disparate impact theory – *e.g.*, whether the disparity is substantial, whether the selection practice is justifiable, and whether an effective alternative exists – would be greatly exacerbated in the context of the ADEA, which provides a right to a jury trial on all issues of fact.[26] In addition, because age (unlike other protected characteristics such as race or sex) is a continuum, there is no non-arbitrary way to divide people into two age groups for the purpose of assessing disparate impact. Most importantly, for reasons that are neither avoidable nor lamentable, older workers *are* different from younger workers in myriad ways. As a result, it is to be expected that many sound and efficacious work, selection, and compensation practices will have a disproportionate impact on older workers. In fact, some neutral practices adversely affect older workers because those workers started off in a *better* position than their younger counterparts. This is illustrated by the facts of the *City of Jackson* case: The City has asserted, and the plaintiffs have not disputed, that younger officers generally received higher raises because they are employed in the lowest paid ranks, where the new minimum salaries resulted in greater increases over prior pay. Because an adverse effect on older workers is neither unusual nor suspect, it is inappropriate to second-guess every employment practice correlated with age, as would occur under a disparate impact regime.

In an attempt to deflect these points, the plaintiffs in *City of Jackson* are taking a different tack. They contend that, even if the best reading of the ADEA does not authorize disparate impact claims, those claims should be allowed because (1) disparate impact claims are available under Title VII, which has language similar to the ADEA, and (2) the Equal Employment Opportunity Commission allegedly has a longstanding regulation authorizing ADEA disparate impact claims. Neither of these arguments withstands scrutiny.

Any reliance on the Supreme Court's decision in *Griggs*, which interpreted Title VII to authorize disparate impact claims, is mistaken because "*Griggs* perverted both the language and the legislative history of the act."[27] Regardless of whether an erroneous holding would be followed under the doctrine of *stare decisis*, it should under no circumstances be trans-

planted into a different statute. Speaking realistically, however, it is questionable whether even one or two Justices would reach out to repudiate the reasoning of *Griggs*. And even if *Griggs* was decided correctly, there would be no basis to carry its interpretation of Title VII over to the ADEA. *Griggs* was not decided until four years *after* the enactment of the ADEA, so Congress cannot be deemed to have known of, much less accepted, *Griggs*' holding. Furthermore, the prohibitory provisions of the two statutes, though similar, are materially different. The common understanding of discrimination "because of . . . age" is narrower than the common understanding of discrimination "because of . . . race [or] sex"; for example, the Supreme Court held just last Term that Title VII prohibits discrimination against employees of *any* race or sex, whereas the ADEA prohibits only discrimination against *older* employees.[28] Most importantly, the Court repeatedly has held that an interpretation of one statute based on purpose rather than text cannot be transported to another statute with similar text but a different purpose.[29] *Griggs* unquestionably rests not on the text of Title VII but on its perceived "purpose" of counteracting deep-seated animus and the lingering effects of past discrimination.[30] Because neither of these factors affects employment opportunities for older people, however, no such purpose underlies the ADEA.

The *City of Jackson* plaintiffs' argument for deference to the EEOC fails for a much simpler reason: The agency has not in fact adopted a regulation providing that practices with disparate impact are prohibited by the ADEA. The plaintiffs point to a regulation that purports to flesh out the ADEA's description of *lawful* practices,[31] but, at most, this regulation merely *assumes* that the statute's prohibitory section encompasses disparate impact. Such assumptions, even if agency lawyers later seek to justify them, do not represent the type of considered agency action that is arguably entitled to deference.[32] Moreover, the EEOC's assumption conflicts with the original interpretations of the Department of Labor,[33] and it appears to be based on nothing more than an erroneous belief that *Griggs* applies with as much force to the ADEA as to Title VII.[34] In all events, the EEOC's position on disparate impact is contrary to the ADEA's plain meaning, discussed above. Notably, no court of appeals has relied on that position, and the Solicitor General has not appeared in the *City of Jackson* case to defend it.

In conclusion, the Supreme Court's decision in *Smith v. City of Jackson* will be one of the most significant of October Term 2004. The Court should read the ADEA to prohibit only disparate treatment, and it should allow neither *Griggs* nor the view of the EEOC to unsettle that interpretation.

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Footnotes

[1] No. 03-1160 (cert. granted Mar. 29, 2004).

[2] 29 U.S.C. §§ 621-634.

[3] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[4] *See* Alexander v. Sandoval, 532 U.S. 275, 288-93 (2001) (Title VI); Washington v. Davis, 426 U.S. 229, 238-48 (1976) (Fourteenth Amendment); City of Mobile v. Bolden, 446 U.S. 55, 61-74 (1980). (Fourteenth and Fifteenth Amendments).

[5] *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

[6] 507 U.S. 604 (1993).

[7] *Id.* at 610.

[8] *Id.* at 618 (Kennedy, J., concurring).

[9] Smith v. City of Jackson, 351 F.3d 183, 186-95 (5th Cir. 2003); Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1076-78 (7th Cir. 1994).

[10] Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); Smith v. Xerox Corp., 196 F.3d 358, 367 (2d Cir. 1999); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996).

[11] 535 U.S. 228 (2002).

[12] Tr. of Oral Arg. at 6-8, 14-16, *available at* www.supremecourtus.gov/oral_arguments/ argument_transcripts/01-584.pdf.

[13] *See* 351 F.3d at 186.

[14] *See* County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981); Los Angeles v. Manhart, 435 U.S. 702, 710-11 n.20 (1978); *cf.* Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977) (declining to decide whether disparate impact doctrine applies to cases arising under subsection 703(a)(1), the provision applicable to discriminatory compensation claims).

[15] 29 U.S.C. § 623(a)(1) & (2).

[16] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). (footnote omitted).

[17] 29 U.S.C. § 623(f)(1).

[18] *E.g.*, Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979).

[19] *E.g.*, Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982).

[20] *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 399-400 (1983); Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003).

[21] Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-22 (1965), *reprinted in* EEOC, *Legislative History of the Age Discrimination in Employment Act* 37-38 (1981); 29 U.S.C. § 621(b).

[22] Report at 6, *Legislative History* at 23.

[23] Report at 11-15, *Legislative History* at 28-32; *see also* 29 U.S.C. § 621(a)(2).

[24] 29 U.S.C. § 622; *see also id.* § 621(b); Report at 22-25, *Legislative History* at 38-41.

[25] Church of Scientology v. IRS, 484 U.S. 9, 17-18 (1987); *see* Michael E. Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 Berkeley J. Emp. & Lab. L. 1, 40 (2004).

[26] 29 U.S.C. § 626(c)(2).

[27] Richard A. Epstein, Forbidden Grounds 197 (1992).

[28] Gen. Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236 (2004).

[29] *E.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 523-25 (1994); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212-13 (2001).

[30] *See* 401 U.S. at 429-31.

[31] 29 C.F.R. § 1625.7(d).

[32] *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275, 287-89 & n.5 (1978); SEC v. Sloan, 436 U.S. 103, 117-18 (1978).

[33] *See, e.g.*, Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, *in* Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 102 (Monte B. Lake ed., 1983).

[34] *See* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (1981).

Affirmative Action for Immigrants? By Edward Blum and Roger Clegg*

President Bush has proposed that there be a new "temporary worker program to match foreign workers with willing U.S. employers when no Americans can be found to fill the jobs" (we quote from the White House website). Senator Kerry attacked this plan as "exploitative." Conservatives can find things to like and things not to like in this proposal; the *Wall Street Journal*'s editorial page recently discussed how simple immigrant-bashing may not be as politically popular as some Republicans think.

But there ought to be one thing all conservatives—and, perhaps, many liberals as well—can agree on: Affirmative action should not be a part of this program, meaning that no temporary worker—nor, indeed, any recent immigrant—ought to be given a preference on the basis of his or her skin color or country of national origin.

That ought to be an uncontroversial proviso for anyone, not just conservatives. Someone who has just entered the country can hardly claim a right to favored treatment to make up for past discrimination against him by American employers or the government. Yet, amazingly, many recent immigrants are benefiting from our bizarre system of racial and ethnic preferences.

What's more, the premise of the President's proposal, as quoted above, is that these temporary workers aren't supposed to be in competition with workers already here anyhow, so denying them a preference shouldn't affect their opportunities.

This last point might be turned around, and some might argue that it makes the antipreference proviso unnecessary. But this is not so clear.

For starters, the temporary worker might decide to do some moonlighting as a contractor, where frequently bidding preferences are awarded on the basis of ethnicity. Or he might take a second job in which he *is* competing with American workers. Or he might become eligible for a promotion after being here awhile, and the new job may be one that American workers want, too. Or he—or his children or spouse—might decide to enroll at a university, where ethnic preferences are also frequently awarded.

The profusion of such preferences is no far-fetched fear. The bean-counters for employers and universities use racial and ethnic preferences all the time, and make no effort to distinguish between new arrivals and not-so-new arrivals in this nation of immigrants. If anything, indeed, universities are probably more likely to lower admission standards for the former than the latter. Student applicants with Cuban ancestry, for instance, were treated as whites by the University of Michigan law school in the case recently before the Supreme Court, while those of Mexican ancestry were treated as blacks.

The use of contracting set-asides is troubling here, too. Data are hard to come by, but there is abundant anecdotal evidence that a very high percentage of the companies that cash in on their "minority" status—in, for example, the automobile parts industry—are owned by recent immigrants.

No legal or illegal immigrant, including any of the newly proposed "temporary workers," their families, and their children, should be eligible for any form of racial or ethnic preference, a.k.a. affirmative action. Unless this ban is a part of the proposal that the President submits to Congress, if and when it passes millions more people will qualify for preferences in education, contracting, and employment simply because of their national origin.

It is not too much to expect any new immigrant to our country to compete for jobs, schooling, and contracts on his own qualifications and efforts, rather than his skin color or ethnic heritage. Any immigration bill considered by Congress should include this proviso.

All this helps illuminate another critical omission in the President's proposal to date, a part of a more general failure in our current immigration and naturalization policy, namely the woeful neglect of attention given to assimilating the immigrants once they arrive. Reasonable conservatives can differ about appropriate immigration levels, but whether those levels are relatively high or relatively low, we ought to demand that those who make their homes in America become Americans.

How to do that is a subject for another day, but here are ten requirements for new arrivals—and old arrivals as well, no matter their color or ethnicity, and

no matter whether they crossed the Rio Grande or came over on the Mayflower or a leaky boat in the South China Sea:

-Don't disparage anyone else's race or ethnicity;
-Respect women;
-Learn to speak English;
-Be polite;
-Don't break the law;
-Don't have children out of wedlock;
-Don't demand anything because of your race, ethnicity, or sex;
-Don't view working and studying hard as "acting white;"
-Don't hold historical grudges; and
-Be proud of being an American.

So we needn't single out immigrants. The vast majority of Americans (upwards of 90 percent, according to many polls) don't like preferences for *any* racial or ethnic group. As immigration levels increase, and America becomes an increasingly multiracial and multiethnic nation, the division of Americans into favored and unfavored groups becomes increasingly untenable. There needs to be less focus on the superficial characteristics of skin color and ancestry that we don't have in common, and more on the qualities of character that we should.

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Corporations

Measuring the Explosive Growth of Federal Crime Legislation

*By John S. Baker, Jr.**

Executive Summary

The Federalist Society commissioned a study to ascertain the current number of crimes in the United States Code, and to compare that figure against the number of federal criminal provisions in years past. The purpose of the study was to ascertain, as best as possible, the rate of growth in the enactment of federal crimes. We analyzed legislation enacted after 1996 and combined that data with the compilations of federal crimes assembled in several previous studies. The study reaches several significant conclusions, all confirming the conventional assumption that the federal criminalization of legal disputes is on the rise:

* There are over 4,000 offenses that carry criminal penalties in the United States Code. This is a record number, and reflects a one-third increase since 1980.

* Previous studies conducted in 1989, 1996 and 1998 all reported "explosive" growth in the number of offenses created by Congress in the years since 1970. The rate of enactment has continued unabated since 1970.

* A review of Congressional enactments from the past seven years reveals that a very substantial number addresses environmental issues.

* The report does not attempt to document changes in the facial mens rea requirements for federal crimes. However, as documented elsewhere, there is uncertainty as to what state of mind various standards of intent actually require. Unclear mens rea requirements, combined with the "explosive" growth in the number of federal crimes enacted since 1970, combine to create an environment of uncertainty and unpredictability over exactly what acts are criminal.

On December 28, 2003, the Associated Press syndicated an article by Jeff Donn entitled "Expanded fed role against common crime called 'out of control.'"[1] The title and the article quoted this author. The article estimated the number of federal crimes to be about 3,500. Mr. Donn based that number on several sources, including this author. At the time, we were collecting data for the present Report. Based on the rate of increases in the number of federal crimes, there had to be at least 3,500 federal crimes. With the completion of our research for this Report, it has become evident that there are many more than 3,500 federal crimes. For reasons discussed below, this author concludes that there are over 4,000 offenses carrying criminal penalties.

This Report cannot provide a complete count of federal crimes. That would require much more time and resources than were available. More importantly, even if those resources were available, rendering a complete and accurate account encounters serious obstacles. In the course of attempting to understand and explain these obstacles, it became clear that the inability to make an accurate count is the failure of federal law to identify clearly what is a crime as distinguished from a regulatory violation. The purpose of this Report regarding the number of crimes is two-fold: to determine 1) whether Congress continues to pass federal criminal laws at the same pace found by the ABA Report, as well as to offer some estimate of the total number of federal crimes; and 2) whether the statutes reflect that Congress more often than in the past dispenses with the mens rea requirement.

I. Counting Federal Crimes

Counting the number of federal crimes might seem to be a rather straightforward matter. Simply count all the statutes that are designated as crimes. Unlike state law, federal law has never had a common law of crimes. Locating purely common-law crimes requires consulting judicial opinions; even then determining what is and is not a common-law crime is problematic.[2] Given that federal courts lack common-law jurisdiction over crimes, all federal crimes must be statutory. *United States* v. *Hudson & Goodwin*, 11 U.S.(7 Cranch) 32 (1812). So it would seem that counting statutes should be an easy task.

A. Obstacles to a Complete Count

Unfortunately, getting an accurate count is not as simple as counting the number of criminal statutes. As the American Bar Association's Task Force on the Federalization of Crime stated : "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."[3] Not only are the number of statutes large, the statutes are scattered and complex.[4] The situation presents a two-fold challenge: 1) determining what statutes count

as crimes and 2) differentiating whether, as to the different acts listed within a section or subsection, there is more than a single crime and, if so, how many.

The first difficulty is that federal law contains no general definition of the term "crime." Title 18 of the U.S. Code is designated "Crimes and Criminal Procedure," but it is not a comprehensive criminal code. Title 18 is simply a collection of statutes. It does not provide a definition of crime. Until repealed in 1984, however, Section 1 of Title 18 began by classifying offenses into felonies and misdemeanors, with a subclass of misdemeanors denominated "petty offenses." Later amendments re-introduced classifications elsewhere in Title 18.[5] As discussed further below, however, the repeal and later amendments were tied to the creation of the United States Sentencing Commission. Its creation represented a new focus on sentencing. Unfortunately, as discussed below, the focus on sentencing has done nothing to solve, and probably has exacerbated, the problem of determining just what should be counted as "crimes." That issue is particularly pertinent for offenses not listed in Title 18, which are more often regulatory or tort-like.[6] Title 18 does contain many, but not all, of the federal crimes.[7] Other crimes are distributed throughout the other forty-nine titles of the U.S. Code.[8]

The second problem is that, whether contained in Title 18 or some other title, one statute does not necessarily equal one crime. Often, a single statute contains several crimes. Determining the number of crimes contained within a single statute involves a matter of judgment. Different people may make different judgments about the number of crimes contained in each statute, depending on the criteria used.[9] In the absence of a definition of crime, it is incumbent on the compiler to explain the criteria employed to determine the count. Not intending to reinvent the criteria, we have looked to previous attempts to count the number of federal crimes.

The most comprehensive effort to count the number of federal crimes was conducted by the Office of Legal Policy ("OLP") in the U.S. Department of Justice during the early 1980s, in connection with the effort to pass a comprehensive federal criminal code. A person who oversaw the effort, Mr. Ronald Gainer, later published an article entitled, "Report to the Attorney General on Federal Criminal Code Reform," 1 *Crim. L. Forum* 99 (1989). That article cited the figure "approximately 3,000 federal crimes,"*id*. at 110, a number that has been much cited since. In a later article, "Federal Criminal Code Reform: Past and Future," 2 *Buff. Crim. L. Rev*. 46 (1998), Mr. Gainer cited the figure of "approximately 3,300 separate provisions that carry criminal sanctions for their violation." *Id*. at 55, n.8. The latter number was based on a count done by the Buffalo Criminal Law Center, "employing somewhat different measures." *Id.*

In 1998, a Task Force of the American Bar Association, on which this author served, issued a report, referred to above, entitled *The Federalization of Criminal Law* (Hereafter "ABA Report"). This report was concerned with the growth in federal criminal law and thus had to identify the number of federal crimes enacted over periods of time. The Task Force decided, however, not to "undertake a section by section review of every printed federal statutory section," which was too "massive" for its "limited purpose." *Id.* at 92. As previously noted, that would have meant reviewing 27,000 pages of statutes.[10] At the same time, the ABA Report noted that the 3,000 number was "surely outdated by the large number of new federal crimes enacted in the 16 or so years since its estimation." *Id*. at 94. As described below, the count in the ABA Report was less comprehensive than the OLP count, but it was more up-to-date in terms of the criteria employed.

Lacking even the limited time and resources available to the ABA Task Force, this Report could not conduct a comprehensive count on the scale of the OLP count, nor even update the OLP count since it was done in the early 1980s. This Report, therefore, begins with the section and subsection counts through 1996 used in the ABA Report as a base and, using the same methodology, updates that count for the years 1997 through 2003. Based on these findings, the Report provides an updated estimate of the OLP count. As discussed below, the ABA count is far from comprehensive. Even the OLP count, the most complete count for the period covered, is still something of an estimate; it employs certain judgments about how many crimes are contained in a particular statute. To demonstrate the problem, the Appendix counts the crimes contained in the statutes enacted since 1996. The count in the Appendix lays out the criteria upon which judgments were made.

B. Ways of Counting Federal Crimes

The period of time considered (7 years) by itself was too short to make the kind of dramatic statements in the ABA Report, which observed:

> The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: *More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970.*[11]

As reflected in a chart in the ABA Report,[12] the number of new criminal sections added per year varied significantly from one year to the next. If the numbers for the three years 1997 through 1999 are added to those in the ABA Report for 1990 through 1996, however, the total would be virtually the same for the last decade of the century as for the prior two decades.[13]

As explained below, following the ABA methodology greatly undercounts the actual number of federal crimes. Even though the data are therefore unavoidably incomplete, a year-by-year look at the numbers confirms one fact which is hardly surprising: Congress passed many more completely new criminal sections in all the three election years ('98, '00, and '02) than it did in any of the non-election years.

1) The Methodology Employed in Various Counts

Coverage: The count in the 1998 ABA Report runs through 1996. The present Report covers statutes enacted from 1997 through 2003. Like the ABA Report, this Report considers only statutes, not regulations. As the ABA Report noted, if regulations are included, that would have added, as of the end of 1996, possibly 10,000 more crimes.[14] According to another estimate from the early 1990s, however, "there are over 300,000 federal regulations that may be enforced criminally."[15]

OLP did a complete hand count of federal crimes, which meant reading through the many thousands of pages in the U.S. Code. Without doing that, obtaining a complete count of the crimes in the Code – regardless of other obstacles – is practically impossible. The ABA Report, for its more limited purposes, instead conducted a Westlaw search of the statutes "us[ing] the key words 'fine' and 'imprison' (including any variations of those words, such as 'imprisonment.')."[16] For continuity purposes, our Report also did a Westlaw search using the same terms.

In order to understand the limits of the search terms employed by the ABA Report, however, the researcher for this Report, Ms. Ellerbe, ran a search employing more terms (fine! or imprison! or crim! or illegal! or culp!). The search for just one year produced hundreds of documents. The search was too broad to be efficient; that is to say, if one were to do that extensive a search, it would be just as well and more accurate to do a complete hand-count. Nevertheless, a partial search of the documents from the one year produced a number of crimes not yielded by the search using only "fine" and "imprison" (including the variations on those words). It confirmed that the ABA had good reason not to attempt a broad computer search of all the titles in the U.S. Code.

The Unit of Measure: This is the hard part. The ABA Report focuses on statutory sections and (sometimes) subsections. So in its two charts, the ABA Report refers to 1,020 "statutory sections." That number excludes the 414 sections added in 1948 as part of the Title 18 recodification. The ABA Report acknowledges that it had thereby excluded some sections from existing law.[17] Including the recodification would have distorted the picture[18] presented by the charts which graph the growth of federal crimes from year to year (ABA Chart 1) and from decade to decade (ABA Chart 2). Thus, the statements in the ABA Report about the growth of crime from 1970 through 1996 chart the year-to-year numbers, and the decade-to-decade percentages are based on this number of 1,020.

The ABA Report also includes a grid in its Appendix C, which lists and describes 1,582 statute section numbers. That number is more than 50% higher than the number 1,020. It separately counts some subsections which are not broken out in the number 1,020. "The grid ... contains all the statute section numbers representing federal crime provisions on the Sentencing Commission's selective list at the time the list was obtained, complimented by the non-duplicative sections located through the computer search, with the exception of those statutes which have been repealed."[19] Thus, this list includes 184 entries which represent a different subsection of a statute identified in a listing. Eliminating those 184 duplicates reduces the sections in Appendix C to 1,398.

Whether it is 1,020, 1,398, or 1,582, the numbers in the ABA Report are a long way from the 3,000 in the OLP count from the early 1980s. Yet, as previously noted, the ABA Report stated that the 3,000 number was "surely outdated" and that the present number was "unquestionably higher."[20] The ABA Report generally avoided making the more detailed analysis and debatable judgments of how many crimes were really contained in individual sections and subsections.

But it did not avoid the judgments altogether. Although in its charts it only considered statutory sections, the inclusion of 158 separate entries for additional subsections in Appendix C reflected the judgment that the subsections included discrete crimes.

In doing its count, OLP made more judgments about how many crimes were included within a single statute. As explained to this author by Mr. Ronald Gainer,[21] who was responsible for the OLP count, statutes containing more than one act corresponding to a common-law crime were determined to have as many crimes as there were common law crimes. On the other hand, OLP counted a statute as having only one crime, even though it contained multiple acts, if those acts did not constitute common law crimes.

Our Count for 1997 through 2003: The Appendix to this Report lists all the federal statutes located using the same search terms as those used by the ABA Report. Our search identified 164 new and amended statutes. The ABA Report, however, does not include amended statutes.[22] Eliminating the amendments leaves 79 new sections and subsections. That number reflects the same criteria for the number 1,582 in Appendix C of the ABA Report. Eliminating "duplicates" leaves 67, which number reflects the same criteria used for the number 1,020.

The number 67 breaks down by year as follows: 1 for '97; 18 for '98; 3 for '99; 18 for '00; 6 for '01; 18 for '02; 6 for '03. As mentioned above, the numbers for the election years significantly surpass the numbers for non-election years. Of course, this may be attributable to the two-year cycle in Congress and the time it takes to pass a bill. On the other hand, work done on legislation in a previous Congress need not be completely duplicated when proposals are reintroduced in a new Congress.

The total for the years 1997 through 1999 is 22 (1, 18, and 3). From Chart 2 of the ABA Report,[23] 12% of the 1,020 sections or roughly 122 sections were adopted during the period of 1990 through 1996. Adding the 122 and the 22 in order to complete the decade equals 144. By comparison, the decade of 1970-1979 produced 14% of the 1020 sections or approximately 143 and the decade of 1980-1989 produced 15% of the 1020 or approximately 153. *Thus, the decade of the 1990s, according to the search terms used, reflected that Congress was enacting new federal criminal legislation at virtually the same pace it had been doing for the previous two decades which, as the ABA Report noted, reflects "explosive growth"*[24] *since 1970.*

2) Evaluation and Estimation of the Number of Federal Crimes

Conservatively speaking, the U.S. Code contains at least 3,500 offenses which carry criminal penalties. More realistically, the number exceeds 4,000. Any number put forward admittedly rests on a series of judgments. The estimate of over 4,000 rests on an evaluation of the information already covered about the counts conducted by OLP, the University of Buffalo, the ABA, and the Appendix to this Report.

None of the counts considers it sufficient simply to tally the number of sections in the U.S. Code which contain at least one criminal offense and to count each of these sections as only one crime. The ABA Report used such an approach to measure growth rates only. It recognized, however, that the actual number of crimes was much higher than the 1,020 sections.[25] Moreover, its Appendix C counted subsections separately for a number of sections in the Code.

When going beyond counting sections and/or subsections, the compiler necessarily makes judgments about the different acts listed in the statute. Unfortunately, the criteria employed in the OLP and the University of Buffalo studies were not published. In fact, the counts themselves were not published; these totals were referenced in more general articles about a possible federal criminal code.[26] Mr. Gainer, however, has graciously provided the author with information about the criteria used in the OLP count. Mr. Gainer cannot speak with the same authority about the University of Buffalo count.

The University of Buffalo counted, as of early 1998, approximately 3,300 criminal offenses in the U.S. Code. Although more than 3,000, that number was produced approximately 16 years after the OLP count. During that sixteen-year period, there was significant growth – regardless of how that is measured – in the number of federal crimes. Apparently, the criteria used by the University of Buffalo were somewhat more conservative than the OLP count. Still, six years have elapsed since the University of Buffalo count. During that period, the number of federal crimes, as measured by sections, has increased at least 6.6%.[27] Adding 6.6%[28] of 3,300 to that number for a total of 3,517 produced the conservative estimate of at least 3,500 crimes.

The better number to update, however, is the 3,000 count given by OLP in the early 1980s. *Since the OLP count in the early 1980s, the number of federal crimes has increased by over one-third*. That is to say, per the ABA Report, during a sixteen-year period from 1980 through 1996, Congress enacted more than 25% of all the sections in the U.S. Code. A figure that is 25% of a total represents a 33% or one-third increase over the number that represents 75% of the total.

It is not clear exactly when the OLP count was completed in the early 1980s. Nevertheless, the ABA Report states[29] and shows in a chart[30] that, as of the end of 1996, over one-quarter of all federal crimes enacted since the Civil War were passed in the sixteen-year period from 1980 - 1996. As shown above, the rate of new crimes during the entire decade of the 1990s was essentially the same as for the 1980s. So at whatever point the OLP count was completed in the early 1980s, (presumably prior to 1984), the number would have increased by one-third over roughly the next sixteen years. Thus, by 2000, the 33% increase of the 3,000 crimes would have produced a number of 4,000 crimes.

Since 2000, Congress has not stopped enacting new federal crimes. So the current number, using the OLP criteria, would be beyond 4,000. Just how much greater cannot be confidently estimated with the information available.

To further flesh out the elusive total for federal crimes, the researcher, Ms. Ellerbe, did her own count of crimes within the statutes. The criteria for that count, also stated in the Appendix, were the following:

> •Each traditional or common-law crime (e.g., theft, burglary, fraud, etc.) is counted separately as one crime. Thus, multiple crimes may be listed in a single statute.
>
> •Multiple forms of non-traditional crimes or elaborations on traditional crimes (e.g., theft by fraud, misrepresentation, forgery) are counted as one crime only, if listed together in one section or subsection.
>
> •If the same or similar non-traditional crimes are listed in separate sections or subsections, each section or subsection is counted as a separate crime.
>
> •An explanation is provided for each section or subsection.
>
> •A few of the sections or subsections have a "?" indicating uncertainty as to number of crimes or the mental elements.
>
> •The number of crimes listed for each section or subsection indicates the number added that year by a statute or amendment, not necessarily the total number of crimes in the section or subsection.

Of the 164 statutes identified in the search, 36 include no new crimes. That leaves 128 sections and subsections. According to the criteria used, these 128 provisions contain over 600 crimes. The actual count is put at 600. Three sections, however, have a "?" for the number of crimes because it seemed debatable whether two of the sections did or did not include any new crimes and just how to count the numerous potential crimes in a third section. Whatever the exact number over 600, the count in the Appendix produces approximately 4.69 crimes per section or subsection (600+ ÷ 128). This represents a much higher per section/subsection count than would be reflected in the OLP count. The point is not necessarily that everyone would agree with the criteria used in the Appendix, or that in using the criteria everyone would reach exactly the same count. Rather, *the count of 600+ crimes in the seven-year period from 1997 demonstrates the estimate of over 4,000 crimes today, which is a projection from the OLP study, is fairly conservative*.

This study, however, did little in the way of analyzing the number of offenses created in various discrete areas of substantive law. Earlier studies did not undertake that task, and consequently, there is no benchmark for comparison. But one fairly glaring trend did emerge which deserves mention. During the seven-year period of this Report from 1997, 24 of the 67 sections and subsections were created in the environmental area. That is over 35% of the total number of sections and subsections created by Congress during that period.[31]

As practitioners in the field know well, the number of criminal statutes does not tell the whole story. Measuring the rate of growth certainly confirms that Congress continues to enact criminal statutes at a brisk pace. But no matter how many crimes Congress enacts, it remains for federal prosecutors to decide which statutes to invoke when seeking an indictment.

Federal prosecutors have certain favorites, notably mail and wire fraud statutes,[32] which they use even when other statutes might be more applicable. That, of course, does not mean that the addition of

little-used crimes is unimportant. The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Every new crime expands the jurisdiction of federal law enforcement and federal courts. Regardless of whether a statute is used to indict, it is available to establish the legal basis upon which to show probable cause that a crime has been committed and, therefore, to authorize a search and seizure. The availability of more crimes also affords the prosecutor more discretion and, therefore, greater leverage against defendants. Increasing the number and variety of charges tends to dissuade defendants from fighting the charges, because (s)he usually can be "clipped" for something.

Moreover, the expansion of federal criminal law continues to occur even without new legislation. Federal prosecutors regularly stretch their theories of existing statutes. Thus, in the Martha Stewart case the prosecutors developed a "novel," indeed ludicrous, theory that Ms. Stewart committed fraud by proclaiming her innocence of the charges. Ultimately, the trial judge rightly threw out the fraud charge. Often, though, federal courts cooperate with prosecutors and happily make new law retroactively. What (then) Professor and (later federal Judge) John Noonan wrote in 1984 about bribery and public corruption continues to be generally true, namely that federal prosecutors and federal judges have been effectively creating a common law of crimes through expansive interpretations.[33]

Ultimately, the reason the ABA Report and this Report do a count is to provide some measure of the extent to which federal criminal law and its enforcement are over-reaching constitutional limits. The Supreme Court has admonished Congress twice within the last decade when it declared federal statutes unconstitutional, stating that it lacks a "plenary police power."[34] The counts in this and the ABA Report indicate that those cases have not dissuaded Congress from continuing to pass criminal laws at the same pace.

II. Judicial Interpretation of *Mens Rea*

As part of this Report, the Appendix identified the *mens rea* or the lack thereof for each section or subsection. The purpose was to determine whether Congress was more prone today to enact crimes without a *mens rea* than it was a few decades ago. A quick scan of the initial listing of the sections and subsections, with the *mens rea* indicated, demonstrated that the great majority of sections or subsections appeared to have a *mens rea*.[35] *But simply counting the number of offenses that appear to have a* mens rea *does not adequately capture the situation, again due to judicial interpretation. Regardless of what a statute says, 1) a crime that appears not to have a* mens rea *may be interpreted by courts to have one; 2) a crime that appears to have a* mens rea *may have the* mens rea *diluted as applied in prosecution and as interpreted by courts*. The problem of *mens rea* in federal criminal law is well summarized by a leading casebook, as follows:

> Federal statutes, for example, provide for more than 100 types of *mens rea*. Even those terms most frequently used in federal legislation–"knowing" and "willful"– do not have one invariable meaning. Particularly with respect to judicial interpretation of the term "willful," the precise requirements of these terms depend to some extent on the statutory context in which they are employed. Another layer of difficulty is attributable to the fact that Congress may impose one *mens rea* requirement upon certain elements of the offense and a different level of *mens rea*, or no *mens rea* at all, with respect to other elements.[36]

Moreover, whether an offense has a mens rea *may depend on the judgment about the number of crimes contained in a particular section or subsection*. Consider for example 18 U.S.C. § 1960, prohibiting "unlicensed money transmitting businesses," which was amended in the wake of 9/11. The statute has several subsections. The 2001 amendments add a new subsection under (b)(1), which expands the definition of "unlicensed money transmitting business."[37] The added section has a knowledge requirement. But with regard to an existing section, (b)(1)(A), the amendments dropped a *mens rea*.[38] If 18 U.S.C. § 1960 is counted as one crime only or if only the newly added subsection is considered, the elimination of "intentionally" may escape notice.[39] Once again, what counts as a crime dictates conclusions about what Congress has done in passing a statute, i.e., whether it has or has not eliminated a *mens rea*.

The linkage between the mens rea issue and what qualifies as a crime goes to the heart of the moral foundation of criminal law. The current confusion on this point has been well described, in an important article by Columbia University Professor John Coffee, published in 1991:

> My thesis is simple and can be reduced to four assertions. First, the dominant development in substantive federal criminal law

> over the last decade has been the disappearance of any clearly definable line between civil and criminal law. Second, this blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control. Third, to define the proper sphere of the criminal law, one must explain how its purposes and methods differ from those of tort law. Although it is easy to identify distinguishing characteristics of the criminal law – e.g., the greater role of intent in the criminal law, the relative unimportance of actual harm to the victim, the special character of incarceration as a sanction, and the criminal law's greater reliance on public enforcement – none of these is ultimately decisive. Rather the *factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives it norms to be legitimate and deserving of compliance*. Far more than tort law, the criminal law is a system for public communication of values. As a result, the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant. Thus, while tort law seeks to balance private benefits and public costs, criminal law does not (or does so only by way of special affirmative defenses), possibly because balancing would undercut the moral rhetoric of the criminal law. Characteristically, tort law prices, while criminal law prohibits.[40]

Professor Coffee despaired at the possibility of Congress or the Supreme Court drawing any meaningful distinction between tort and crime and hoped the Sentencing Commission would do so.[41] The Sentencing Commission has not done so. Its sentencing guidelines for organizations have only made matters worse.[42]

Consider offenses labeled "petty offenses." They are not truly crimes. "Petty offenses" have for some time been understood in terms of length of possible sentence, namely six months' imprisonment or less.[43] At an earlier stage, however, the Supreme Court maintained the common-law basis for the distinction between these offenses and true crimes. Generally, the issue has arisen in the context of whether the Sixth Amendment Right to Jury Trial applies to "petty offenses." In *Schick v. United States*, 195 U.S. 65 (1904), the Supreme Court recognized that crimes involve "moral delinquency."

> It will be noticed that the section characterizes the act prohibited as an offense, and subjects the party to a penalty of fifty dollars. So small a penalty for violating a revenue statute indicates only a petty offense. *It is not one necessarily involving any moral delinquency*. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. That by other sections of this statute more serious offenses are described and more grave punishments provided does not lift this one to the dignity of a crime.[44]

This has implications for counting crimes. As the Court went on to say, the same statute might include both a crime and a petty offense:

> Not infrequently a single statute in its several sections provides for offenses of different grades, subject to different punishments, and to prosecution in different ways. In some States in the same act are gathered all the various offenses against the person, ranging from simple assault to murder, and imposing punishments from a mere fine to death. This very statute furnishes an illustration. By one clause the knowingly selling of adulterated butter in any other than the prescribed form subjects the party convicted thereof to a fine of not more than one thousand dollars and imprisonment for not more than two years. An officer of customs violating certain provisions of the act is declared guilty of a misdemeanor and subject to a fine of not less than one thousand dollars nor more than five thousand dollars, and imprisonment for not less than six months nor more than three years. Obviously these violations of certain provisions of the statute must be classed among serious criminal offenses and can be prosecuted only by indictment, while the violations of the statute in the cases before us were prosecuted by information. The

> truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine *whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors*. Clearly both indicate that this particular violation of the statute is only a petty offense.[45]

The italicized part of this last quote seems to equate petty offenses and misdemeanors. A petty offense is a misdemeanor, but misdemeanors with potential penalties of more than six months are not today considered petty offenses. Whereas the Court in *Schick* spoke of both the nature of the offense and the length of the punishment, the trend for some time in criminal law has been to consider only the length of the possible punishment. Unfortunately, potential sentences continue to rise without much, if any, consideration of moral culpability. Without that distinction, physical and financial harms – which are the focus of tort law – are too easily labeled "crimes." Ronald Gainer, who held several senior positions in the Justice Department, puts the situation this way:

> This amalgamation of the criminal law and the non-criminal law has contributed to the development of the popular misconception that if a person has violated "The Law," he deserves to be imprisoned and that any lesser consequence demonstrates the legal system is unjust.[46]

Conclusion

As is repeated throughout this Report, one's opinion about what counts as a federal crime drives the count of federal crimes. Traditionally, crime requires a *mens rea*.47 Common law crimes are presumed to have a *mens rea*.48 Under the common law, an offense without a *mens rea* would not be labeled a "crime." When crimes and regulatory offenses are combined and confused as in federal law, however, the issue changes to whether the crime includes a *mens rea*. Simply focusing on the penalty may not be sufficient because one penalty often applies to several acts. While federal law classifies crimes by penalties, federal law unfortunately does not provide a clear definition of crime that would allow distinctions among separate criminal acts. That makes any count arguable. At the very least, however, this Report can justifiably conclude the following: based on the growth of federal crime legislation since the count in the early 1980s by the Office of Legal Policy in the Department of Justice, the United States Code today includes over 4,000 *offenses* which carry a criminal penalty

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Footnotes

[1] Jeff Donn, *Expanded Fed Role against Common Crime Called 'Out of Control*,' Associated Press, December 28, 2003).

[2] *See* Wayne R. LaFave, Substantive Criminal Law. (West Group, 2003) Vol. 1, Sec. 2.1(e) at 109-116.

[3] *The Federalization of Crime* (1998) (Hereafter "ABA Report") at 9.

[4] As noted elsewhere in the Report (pp. 9-10), an exact count of the present "number" of federal crimes contained in the statutes (let alone those contained in administrative regulations) is difficult to achieve and the count subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated. (For example, the language of 18 U.S.C. § 2113 encompasses bank robbery, extortion, theft, assaults, killing hostages, and storing or selling anything of value knowing it to have been taken from a bank, etc.) Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies. *Id*. at 93.

[5] *See* 18 U.S.C. §3581 (classification of felonies, misdemeanor and infraction in terms of sentencing; 18 U.S.C. § 3156(3)) (definition of "felony" for purposes of release and detention).

[6] *See, eg*, 21 U.S.C. §331, which criminalizes the misbranding of food in interstate commerce; or 42 U.S.C. 300j-23, which criminalizes the sale, in interstate commerce, of any drinking water cooler that is not lead free.

[7]

> The federal statutory law today is set forth in the 50 titles of the United States Code. Those 50 titles encompass roughly 27,000 pages of printed text. Within those 27,000 pages, there appear approximately 3,300 separate provisions that carry criminal sanctions for their violation. Over 1,200 of those provisions are found jumbled together in Title 18, euphemistically referred to as the 'Federal Criminal Code,' and the remainder are found scattered throughout the other 49 titles. The judicial interpretations of those provisions, which are necessary for their understanding, are found within the printed volumes reporting the opinions issued by judges in federal cases – volumes which now total over 2,800 and which contain approximately 4,000,000 printed pages.

Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 46; at 53.

[8] There are 50 titles, but two titles, 6 and 34, currently contain no un-repealed statutes.

[9] For example, 20 U.S.C. §9573 criminalizes knowing disclosure, publication and use of confidential student data. This could arguably be counted as one offense, or as many as three offenses

[10] *See* n. 5, *supra*.

[11] *ABA Report* at 7 (emphasis in the original) and see note 9 ("more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within the sixteen year period since 1980").

[12] *Id*. at 8, Chart 1.

[13] *See Id.* at 9, Chart 2.

[14] *See ABA Report* at 10.

[15] John C. Coffee, Jr., *Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law.* 71 B.U.L. Rev. 193 (1991) at 216. (Hereafter *Does 'Unlawful' Mean 'Criminal'*?)

[16] *ABA Report*, App. C at 91, n.1.

[17] *Id*. at 8, n. 10.

[18] *Id*.

[19] *Id*. at 91-92.

[20] *Id*. at 94.

[21] Telephone conversation between the author and Mr. Gainer on December 29, 2003.

[22] *ABA Report* at 8, n. 10.

[23] *Id*. at 9.

[24] *Id*. at 7.

[25] *Id*. at 94, Appendix C.

[26] Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Criminal Law Forum 99, 1 (1989); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev.. 46 (1998).

[27] In that period of time, our count shows an increase of 67 crimes calculated on the same criteria used by the ABA to establish that there were 1,020 sections with criminal punishments as of the end of 1996. Our count, using the same criteria, also shows that only one crime was added in 1997. An increase of 67 crimes to an existing count of 1,020 represents a 6.6% increase.

[28] Statisticians usually use a confidence interval, which means that the true value may be higher or lower than 6.6%.

[29] *ABA Report* at 7.

[30] *Id.* at 9, Chart 2.

[31] According to methodology of the Appendix, those 24 sections and subsections contained 84 crimes, which is 14% of the total of 600 crimes.

[32] 18 U.S.C. §§ 1341 (Mail Fraud) and 1343 (Wire Fraud).

[33] *See* John Noonan, Bribes (1984) at 585-86 and 620.

[34] United States v. Lopez, 514 U.S. 549, 566 (1995); quoted also in United States v. Morrison, 529 U.S. 598, 618 (2000).

[35] The information from this initial chart has been included in the Appendix.

[36] Julie R. O'Sullivan, Federal White Collar Crime (St. Paul; West Group, 2001) at 53 citing William S. Laufer, *Culpability and Sentencing of Corporations*, 71 Neb. L. Rev. 1049, 1064-65 (1994); and noting See, e.g., Ratzlaf v. United States, 510 U.S. 135, 141, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994) ("'Willful,' this Court has recognized, is a 'word of many meanings,' and 'its construction [is] often * * * influenced by its context.'") (quoting Spies v. United States, 317 U.S. 492, 497, 63 S.Ct. 364, 87 L.Ed.418 (1943)).

[37] (C) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity; (2) the term "money transmitting" includes transferring funds on behalf of the . . .

[38] Previously, (b)(1)(A) read "is intentionally operated . . . "; it now reads "is operated."

[39] Also, consider the following comments by then General Counsel of the Treasury, Mr. Aufhauser, regarding his deliberate elimination of the *mens rea* in the regulations applicable to financial institutions:

> Let me first tell you about that Executive Order, because it's important you get the perspective of where the PATRIOT Act falls in. It is not our only tool. It would be a fool's errand to think it was.
>
> *The Executive Order that we wrote is global in scope. It specifically targets financiers of terror*. It uses an operative phrase, which is an invention of my own, which is it *reaches not only people knowingly associated with it but anyone otherwise associated with the act of transmission. That was written deliberately so that there was no* mens rea, *that there was no scienter, that it was strict liability.*
>
> What we wanted to do is try to create a *code of conduct* here and abroad so that you are strictly liable for what happens in your institution. We *understand it was unprecedented*. We understand it's bold. But it's worked; I can tell you it's worked. I know how it's worked.
>
> I know that when we suspected that transactions have gone through institutions abroad or through intermediaries abroad, like lawyers, we've gone to them, sometimes directly, sometimes through intermediaries, and sometimes through their host governments. *We've told them we don't believe you know this. We believe you're too casual about things. We don't think your financial controls are good, so we're not going to do anything. We want you to be our partner. So share your books and records with us.*

> *We didn't have to complete the rest of that paragraph, because they know the Order. If they decline to give us the books and records and decline to be our partners, we would name not only their institution under the Executive Order that is freezing the assets and prohibiting all trade with that institution, but we would freeze the assets and prohibit trade with the fiduciaries in charge of those institutions.*
>
> Now in this respect the Executive Order is a powerful tool. *It's better in form of threat than actual execution. I can't tell you how we'd do in a court of law if somebody challenged it.* But anyway it's an extraordinary power under national security measures, and the President enjoys an awful lot of leeway with such circumstances.

Excerpted from remarks by General Counsel David D. Aufhauser at the Federalist Society's National Lawyers Convention, Nov. 15, 2002 (unpublished transcript, on file with author) (emphasis added).

[40] "Does 'Unlawful' Mean 'Criminal'?", *supra* n. 12 at 193-194. (footnotes deleted; emphasis added)

[41] *See* Id. at 194.

[42] See generally, John S. Baker, Jr., *Reforming Corporations through Threats of Federal Prosecution*, 89 Cornell L. Rev. 310 (2004).

[43] See Duncan v. Louisiana, 391 U.S. 145, 159 (1968); Baldwin v. New York, 399 U.S. 66 (1970) (both saying that the 6th Amendment right to jury trial does not apply to "petty offenses," i.e., those punishable by imprisonment for 6 months or less).

[44] 195 U.S. at 67-68. (emphasis added).

[45] *Id.* at 68. (emphasis added).

[46] Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Criminal Law Forum 99, 125 n. 37 (1989).

[47] See Morissette v. United States, 342 U.S. 246 (1952).

[48] *Id*.

Criminal Law and Procedure

Maximum Confusion: A Prosecutor's View of *Crawford* v. *Washington*

*By Donald LaRoche**

In *Crawford v. Washington*,[1] the Supreme Court decided that the Confrontation Clause of the Sixth Amendment bars admission of the testimonial statements of an unavailable witness absent an opportunity for cross-examination. The Court's decision left judges and prosecutors, on the federal and state levels, in the dark as to the definition of "testimonial evidence." The admissibility of statements made to the police by a witness during or immediately following a startling event is particularly unclear. This article will discuss *Crawford* and how the decision has been treated with regards to "police interrogations" in the short time since its issuance. As will be seen, the Supreme Court has yet again left prosecutors, defense counsel and judges with an unclear decision that insures maximum confusion and numerous appeals.

Crawford involved a defendant who was convicted in a Washington state court for assaulting a man who allegedly tried to rape his wife.[2] During his trial, the prosecution played for the jury the defendant's wife's tape-recorded statement to the police describing the assault and completely refuting the defendant's claim of self-defense.[3] The defendant did not have an opportunity to cross-examine his wife because she never testified, having invoked the state marital privilege.[4] Because the state marital privilege does not extend to a spouse's out-of-court statements, the state invoked the hearsay exception for statements against penal interest.[5]

The defendant argued that admitting the statements would violate his federal constitutional right to be "confronted with the witnesses against him."[6] The judge admitted the statements on the grounds that they bore "particularized guarantees of trustworthiness."[7] The jury subsequently convicted the defendant of assault.[8] The Washington Court of Appeals reversed the conviction finding that the statements did not meet a nine-factor test designed to determine whether they "bore particularized guarantees of trustworthiness."[9] This standard was taken from the Supreme Court's decision in *Ohio v. Roberts*, where the Court held that an unavailable witness's statement is admissible if it bears "adequate indicia of reliability."[10]

A unanimous Washington Supreme Court reinstated the conviction.[11] That court held that, although the wife's statement "did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness."[12] The court opined that, even though her statements were contradictory, further inspection found that they appeared to overlap with the defendant's statements.[13]

Justice Scalia, writing for the Supreme Court, reversed.[14] Justice Scalia concluded that the main problem at which the Confrontation Clause was directed was the use of *ex parte* examinations as evidence against the accused in a criminal proceeding.[15] This was a common practice in the countries that utilized the civil-law mode.[16] Sixteenth and Seventeenth Century English justices of the peace were notorious for using *ex parte* examinations of witnesses in felony cases as evidence against the accused in place of live testimony.[17]

The Court rejected the view that the Confrontation Clause applies only to in-court testimony and that its application to out-of-court statements introduced at trial depends upon the current law of evidence.[18] Such a view would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.[19] Justice Scalia wrote that the Confrontation Clause applies to "witnesses" against the accused; those who "bear testimony."[20] "The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."[21]

The Court listed various formulations of this core class of "testimonial" statements: "*ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[22] Justice Scalia also added that statements taken by police officers in the course of interrogations are testimonial under even a narrow standard.[23] He opined that police interrogations bear a striking resemblance to examinations by justices of the peace in England.[24]

"The involvement of government officers in the production of testimonial evidence presents the same

risk, whether the officers are police or justices of the peace."[25] For the Court, testimonial hearsay is a primary object of the Sixth Amendment, and interrogations by law enforcement officers fall within the class of statements the Sixth Amendment was designed to regulate.[26]

The Court also found that the historical record supports a proposition that the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination.[27] The right to be confronted with witnesses against the accused was read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the Founding.[28]

The Court reasoned that the requirement of prior opportunity to cross-examine as a condition for admissibility of testimonial statements was dispositive and not merely one of several ways to establish reliability.[29] Justice Scalia acknowledged that "there were always exceptions to the general rule of exclusion" of hearsay evidence.[30]

The Court also questioned the continuing viability of *White v. Illinois*.[31] *White* involved the statements of a child victim to an investigating police officer admitted as spontaneous declarations.[32] The *Crawford* Court doubted that testimonial statements would have been admissible on that ground in 1791 (the year the Sixth Amendment was adopted).[33] In *White*, however, the only question presented was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue.[34] The Court there took it as given that the testimony properly fell within the relevant exception to the Confrontation Clause.[35]

The Court in *Crawford* did not explicitly overrule the holding in *White* that the Confrontation Clause allows the prosecution to admit statements under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule. The Court similarly did not spell out a comprehensive definition of "testimonial." It held that whatever else the term covered it applied at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.[36] With regards to police interrogations, the Court would not enunciate a precise definition. It left to the imagination the various definitions of "interrogations."[37]

By not precisely defining "testimonial" or "interrogation," the Court left prosecutors, defense counsel, and judges in the criminal justice system the arduous task of figuring out what evidence will be testimonial and what will not. Of note are the domestic violence cases that produce statements from frantic callers to a 911 operator or the statements of a hysterical victim to a first responder to an emergency situation. *Crawford* provides precious little guidance as to whether these statements are admissible or not.

Chief Justice Rehnquist in his concurrence criticized the majority for just this. He noted that the majority "grandly" declared that it "'leave[s] for another day any effort to spell out a comprehensive definition of "testimonial."'"[38] He implored the majority to give "the thousands of federal prosecutors and the tens of thousands of state prosecutors" an answer as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule.[39] The Chief Justice wrote, "They need them now, not months or years from now. Rules of evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."[40] The Chief Justice would have eschewed the Court's grand pronouncement and reversed the conviction because the statement at question did not meet the *Ohio v Roberts* test.[41]

Several lower courts have begun to tackle the problem that the Court unceremoniously dumped on them. In *People v. Moscat*,[42] one of the first cases to interpret *Crawford*, a New York trial court had to determine whether a 911 call made by the victim was testimonial. The court criticized the *Crawford* decision for failing to give "urgently needed guidance as to how to apply the Sixth Amendment right now, in the 21st Century."[43] The court opined, "It thus falls to trial courts to work out the concrete meaning of *Crawford*, at least in the short term."[44] Furthermore, this "issue is of special importance to courts -- like this one -- dedicated to trying cases of alleged domestic violence."[45]

The court noted that, because complainants in domestic violence cases often do not appear for trial, prosecutors have in recent years increasingly tried to fashion "victimless" prosecutions.[46] Prosecutors are left with proving their cases by offering certain out-of-court statements made by the victim. "Perhaps the most common form of such evidence is a call for help made by a woman to 911."[47] The court wrote, "Prior to *Crawford*, such a call for help to 911 would ordi-

narily be admitted into evidence as an 'excited utterance' . . . [and] would not violate the Sixth Amendment's Confrontation Clause."[48]

The court held a 911 call for help is essentially different in nature than the "testimonial" materials listed in *Crawford*.[49] The court opined:

> A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril. Thus a pretrial examination is clearly "testimonial" in nature in part because it is undertaken by the government in contemplation of pursuing criminal charges against a particular person. But a 911 call is fundamentally different; it is undertaken by a caller who wants protection from immediate danger. A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.[50]

In *Moscat*, the court opined that the nature of the 911 calls is simply not equivalent to a formal pretrial examination by a justice of the peace in Reformation England.[51] "If anything, it is the electronically augmented equivalent of a loud cry for help."[52] For these reasons, the court found that a 911 call for help was not "testimonial" in nature, as that term was used in *Crawford*.[53]

Another case criticizing *Crawford* is *Hammon v. State*,[54] a domestic violence case where a trial judge admitted a defendant's wife's statements to a police officer that the defendant had physically attacked her by throwing her down into the glass from a shattered heater and that he punched her twice in the chest.[55] The Indiana Court of Appeals held that, "when the police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'"[56]

In *Hammon*, the court criticized the *Crawford* decision for not defining the "crucial words" "testimonial" and "police interrogations."[57] It opined, "It appears as though the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement."[58] Using a dictionary definition of "police interrogation," the court concluded that it does not apply to investigatory questions asked at the scene of a crime shortly after it has occurred.[59] The court wrote, "Such interaction with witnesses on the scene does not fit within a lay conception of police 'interrogations' bolstered by television, as encompassing an 'interview' in a room at the stationhouse."[60] The court went on, "it does not bear the hallmarks of an improper 'inquisitorial practice.'"[61] The statements to the police officer in *Hammon* were deemed not "testimonial" and its admissibility was not affected by the new rule announced in *Crawford*.[62]

These are just two of the many courts trying to resolve the confusion left by the *Crawford* opinion. Justice Scalia had no doubt that the lower courts in *Crawford* were acting in "utmost good faith when they found reliability."[63] Justice Scalia opined, "The Framers, however, would not have been content to indulge this assumption."[64]:

> They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable.[65]

The irony is that, by not explicitly providing a comprehensive definition of "testimonial" and leaving it for another day, the Court took the very posture against which the Framers wanted to guard. The Court's indefinite decision in *Crawford* assures that either the rights of countless victims of domestic violence will be violated by an overly expansive interpretation of Justice Scalia's words, or the rights of countless defendants will be violated by an overly narrow interpretation. The opinion failed to provide an articulable standard that the judges, defense counsel, and prosecutors could rely on to properly serve justice, an alarming trend of this past Term.

For example, in *Blakely v. Washington*,[66] the Court struck down Washington's sentencing guidelines and held that every defendant has the right to

insist that the prosecutor prove to a jury all facts legally essential to the punishment.[67] The Court, however, pointedly refused to opine on whether the federal sentencing guidelines survived its opinion, thus throwing the federal justice system into chaos.[68] In dissent, Justice Breyer bemoaned the fact that the Court left federal and state prosecutors without guidance on what to do next, "how to handle tomorrow's case."[69]:

> [T]his case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.[70]

For Justice Scalia, refusal to articulate a comprehensive definition of "testimonial" in the *Crawford* opinion "can hardly be any worse than the status quo."[71] At best this could be true in the sense that being shot in the arm can hardly be any worse than being shot in the head; and provides no explanation why the Court did not take the effort to provide guidance to the courts. But it is not true even in that limited sense. Since *Crawford*, state courts have been very busy attempting to draw an exact line separating testimonial and non-testimonial.[72] At least following *Roberts* and its progeny provided "an evenhanded, predictable, and consistent development of legal principles, fostering reliance on judicial decisions, and contributing to the actual and perceived integrity of the judicial process."[73] The majority in *Crawford* has taken the criminal justice system into the realm of the unknown without any directives as to how to proceed, or even an apology.

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Footnotes

[1] Crawford v. Washington, 124 S. Ct. 1354 (2004).

[2] *Id.* at 1357.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1358.

[6] *Id.*

[7] *Id*.

[8] *Id.*

[9] *Id.*

[10] Ohio v. Roberts, 448 U.S. 56, 65 (1980).

[11] Crawford v. Washington, 54 P.3d 656, 663 (Wash. 2002).

[12] *Id.*

[13] *Id.*

[14] *Crawford*, 124 S. Ct. at 1374.

[15] *Id.* at 1363.

[16] *Id.* at 1359.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1364.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1365.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1363.

[28] *Id.*

[29] *Id.* at 1367.

[30] *Id.*

[31] White v. Illinois, 502 U.S. 346 (1992).

[32] *Id.* at 349.

[33] *Crawford*, 124 S. Ct. at 1368 n.8.

[34] *Id.*

[35] *White*, 502 U.S. at 351.

[36] *Crawford,* 124 S. Ct. at 1374.

[37] *Id.* at 1365.

[38] *Id.* at 1378 (Rehnquist, C.J., concurring in the judgment (quoting *Crawford*, 124 S. Ct. at 1374).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] People v. Moscat, 777 N.Y.S.2d 875, 2004 N.Y. Misc. LEXIS 231 (N.Y. City Crim. Ct. 2004).

[43] *Id.* at 878.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 878-79.

[49] *Id.* at 879.

[50] *Id.*

[51] *Id.* at 881.

[52] *Id.*

[53] Other courts following the *Moscat* opinion are State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004), and People v. Isaac, No. 23398/02, 2004 N.Y. Misc. LEXIS 814 (N.Y. Dist. Ct. June 16, 2004).

[54] Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004).

[55] *Id.* at 947-48.

[56] *Id.* at 952.

[57] *Id.*

[58] *Id.*

[59] *Id*.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Crawford*, 124 S. Ct. at 1373.

[64] *Id.*

[65] *Id.*

[66] 124 S. Ct. 2531, Blakely v. Washington (2004).

[67] *Id.* at 2537.

[68] *Id.* at 2538 n.9.

[69] *Id.* at 2561 (Breyer, J., dissenting).

[70] *Id.* at 2562.

[71] *Crawford*, 124 S Ct. at 1374 n.10.

[72] In the four months since *Crawford* was handed down it has been cited by**:** Ko v. New York, 124 S. Ct. 2839 (2004); Goff v. Ohio, 124 S. Ct. 2819 (2004); Prasertphong v. Arizona, 124 S. Ct. 2165 (2004); Shields v. California, 124 S. Ct. 1653 (2004); Corona v. Florida, 124 S. Ct. 1658 (2004); Delarosa v. Bissonette, 2004 U.S. App. LEXIS 14402 (1st Cir. July 14, 2004); United States v. Brown, 2004 U.S. Dist. LEXIS 11623 (D. Mass. June 25, 2004); Roy v. Coplan, 2004 U.S. Dist. LEXIS 4892 (D.N.H. 2004); United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004); United States v. Pandy, 96 Fed. Appx. 50 (2004); Wilson v. McGinnis, 2004 U.S. Dist. LEXIS 12653 (S.D.N.Y. July 7, 2004); United States v. Perez, 2004 U.S. Dist. LEXIS 7500 (D. Conn. Apr. 29, 2004); United States v. Paulino, 2004 U.S. Dist. LEXIS 6036 (S.D.N.Y. Apr. 12, 2004); United States v. Ricks, 96 Fed. Appx. 96 (2004); United States v. Ricks, 96 Fed. Appx. 93 (2004); United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004); United States v. DeGideo, 2004 U.S. Dist. LEXIS 12238 (E.D. Pa. June 18, 2004); United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004); United States v. Avants, 367 F.3d 433 (5th Cir. 2004); United States v. Robinson, 367 F.3d 278 (5th Cir. 2004); Lave v. Dretke, 2004 U.S. Dist. LEXIS 11217 (N.D. Tex. June 17, 2004); United States v. Gaines, 2004 U.S. App. LEXIS 14168 (6th Cir. July 7, 2004); Scott v. Gundy, 2004 U.S. App. LEXIS 11550 (6th Cir. June 9, 2004); Dorchy v. Jones, 2004 U.S. Dist. LEXIS 9436 (E.D. Mich. May 26, 2004); Johnson v. Renico, 314 F. Supp. 2d 700 (E.D. Mich. 2004); United States v. Hite, 364 F.3d 874 (7th Cir. 2004); Purtle v. Knowles, 2004 U.S. App. LEXIS 13536 (9th Cir. June 24, 2004); United States v. Nielsen, 371 F.3d 574 (9th Cir. 2004); United States v. Jarvis, 94 Fed. Appx. 501 (2004); State v. Brown, 2004 Ark. LEXIS 168 (Ark. Mar. 25, 2004); People v. Nissen, 2004 Cal. LEXIS 2229 (Cal. Mar. 17, 2004); People v. Warner, 119 Cal. App. 4th 331 (2004); People v. Cervantes, 118 Cal. App. 4th 162 (2004); People v. Gomez, 2004 Cal. App. LEXIS 462 (Cal. App. Apr. 6, 2004); People v. Seijas, 2004 Cal. App. LEXIS 377 (Cal. App. Mar. 24, 2004); People v. Seijas, 115 Cal. App. 4th 1301 (2004); People v. Lockett, 2004 Cal. App. Unpub. LEXIS 6326 (2004); People v. Kilday, 2004 Cal. App. Unpub. LEXIS 6290 (2004); People v. Merrill, 2004 Cal. App. Unpub. Lexis 6225 (2004); People v. Kennan, 2004 Cal. App. Unpub. Lexis 6194 (2004); People v. Carrier, 2004 Cal. App. Unpub. Lexis 6140 (2004); People v. Engel, 2004 Cal. App. Unpub. Lexis 6024 (2004); People v. Clutts, 2004 Cal. App. Unpub. Lexis 6002 (2004); People v. Stout, 2004 Cal. App. Unpub. Lexis 5962 (2004); People v. Miranda, 2004 Cal. App. Unpub. Lexis 5885 (2004); People v. Fajardo, 2004 Cal. App. Unpub. Lexis 5648 (2004); People v. Hunter, 2004 Cal. App. Unpub. Lexis 5548 (2004); People v. Nissen, 2004 Cal. App. Unpub. Lexis 5248 (2004); People v. Phan, 2004 Cal. App. Unpub. Lexis 5047 (2004); People v. Holloway, 2004 Cal. App. Unpub. Lexis 5122 (2004); People v. Caballero, 2004 Cal. App. Unpub. Lexis 4669 (2004); People v. Gatica, 2004 Cal. App. Unpub. Lexis 4565 (2004); People v. Brown, 2004 Cal. App. Unpub. Lexis 4545 (2004); People v. Ewell, 2004 Cal. App. Unpub. Lexis 4398 (2004); People v. Martin, 2004 Cal. App. Unpub. Lexis 4411 (2004); People v. Lewis, 2004 Cal. App. Unpub. Lexis 4325 (2004); People v. Martin, 2004 Cal. App. Unpub. Lexis 3938 (2004); People v. Sammakieh, 2004 Cal. App. Unpub. Lexis 3916 (2004); People v. Zarazua, 2004 Cal. App. Unpub. Lexis 3831 (2004); People v. Reyes, 2004 Cal. App. Unpub. Lexis 3740 (2004); People v. Becerra, 2004 Cal. App. Unpub. Lexis 3702 (2004); People v. Conwell, 2004 Cal. App. Unpub. LEXIS 3557 (2004); People v. Becerra, 2004 Cal. App. Unpub. LEXIS 2692 (2004); People v. Conwell, 2004 Cal. App. Unpub. LEXIS 2409 (2004); People v. Edwards, 2004 Colo. App. LEXIS 1259 (Colo. Ct. App. July 15, 2004); People v. Candelaria, 2004 Colo. App. LEXIS 1021 (Colo. Ct. App. June 17, 2004); State v. Ross, 269 Conn. 213 (2004); State v. Crocker, 2004 Conn. App. LEXIS 292 (Conn. App. Ct. July 6, 2004); Globe v. State, 2004 Fla. LEXIS 416 (Fla. Mar. 18, 2004); Moody v. State, 277 Ga. 676 (2004); State v. Carter, 91 P.3d 1162 (Kan. 2004); State v. Young, 277 Kan. 588 (2004); Stoddard v. State, 850 A.2d 406 (Md. Ct. Spec. App. 2004); Commonwealth v. Sena, 441 Mass. 822 (2004); Commonwealth v. Negron, 441 Mass. 685 (2004); People v. Stephens, 2004 Mich. LEXIS 1305 (Mich. June 30, 2004); People v. Jackson, 2004 Mich. LEXIS 1207 (Mich. June

25, 2004); People v. Bell, 2004 Mich. LEXIS 1158 (Mich. June 11, 2004); People v. Brown, 470 Mich. 851 (2004); People v. Deshazo, 469 Mich. 1036 (2004); People v. Jackson, 2004 Mich. App. Lexis 1886 (Mich. Ct. App. July 8, 2004); People v. Brown, 2004 Mich. App. Lexis 1853 (Mich. Ct. App. July 6, 2004); People v. Tincher, 2004 Mich. App. Lexis 1834 (Mich. Ct. App. June 29, 2004); People v. Dabney, 2004 Mich. App. Lexis 1750 (Mich. Ct. App. June 24, 2004); People v. Peay, 2004 Mich. App. Lexis 1628 (Mich. Ct. App. June 17, 2004); People v. Jones, 2004 Mich. App. Lexis 1457 (Mich. Ct. App. June 10, 2004); People v. Al-Timimi, 2004 Mich. App. Lexis 1440 (Mich. Ct. App. June 8, 2004); People v. Rossbach, 2004 Mich. App. Lexis 1350 (Mich. Ct. App. May 27, 2004); People v. Williams, 2004 Mich. App. Lexis 1217 (Mich. Ct. App. May 13, 2004); People v. Landers, 2004 Mich. App. Lexis 1206 (Mich. Ct. App. May 13, 2004); People v. Mcmillian, 2004 Mich. App. LEXIS 1156 (Mich. Ct. App. May 6, 2004); State v. Stiernagle, 2004 Minn. App. LEXIS 776 (Minn. Ct. App. July 6, 2004); People v. Reynoso, 2004 N.Y. LEXIS 1541 (N.Y. June 10, 2004); People v. A.S. Goldmen, Inc., 2004 N.Y. App. Div. LEXIS 9449 (N.Y. App. Div. July 8, 2004); People v. Rogers, 2004 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. June 24, 2004); People v. McBee, 778 N.Y.S.2d 287 (N.Y. App. Div. 2004); People v. Rivera, 778 N.Y.S.2d 28 (N.Y. App. 2004); People v. Nunez, 776 N.Y.S.2d 551 (N.Y. App. Div. 2004); People v. Newland, 775 N.Y.S.2d 308 (N.Y. App. Div. 2004); State v. Tomlinson, 2004 Ohio 3295 (Ohio Ct. App. June 24, 2004); State v. Midgett, 680 N.W.2d 288 (S.D. 2004); State v. Ausmus, 2004 Wash. App. LEXIS 1220 (Wash. Ct. App. June 15, 2004); State v. Sherman, 2004 Wash. App. LEXIS 1131 (Wash. Ct. App. June 1, 2004); State v. Castilla, 121 Wn. App. 198 (2004).

Distinguished by: United States v. Stewart, 2004 U.S. Dist. LEXIS 12538 (S.D.N.Y. July 8, 2004); Diaz v. Herbert, 317 F. Supp. 2d 462 (S.D.N.Y. 2004); Llaca v. Duncan, 2004 U.S. Dist. LEXIS 7916 (S.D.N.Y. May 4, 2004); United States v. Cuong Gia Le, 316 F. Supp. 2d 330 (E.D. Va. 2004); Wheeler v. Dretke, 2004 U.S. Dist. LEXIS 12809 (N.D. Tex. July 6, 2004); Lies v. Jackson, 2004 U.S. App. LEXIS 10334 (6th Cir. May 24, 2004); United States v. Cozzo, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. Apr. 16, 2004); Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004); United States v. Reyes, 362 F.3d 536 (8th Cir. 2004); United States v. Barazza, 2004 U.S. Dist. LEXIS 9732 (S.D. Cal. May 17, 2004); People v. Gomez, 117 Cal. App. 4th 531 (2004); Watkins v. United States, 846 A.2d 293 (D.C. 2004); Springer v. State, 2004 Fla. App. LEXIS 7939 (Fla. Dist. Ct. App. June 4, 2004); Al-Amin v. State, 2004 Ga. LEXIS 413 (Ga. May 24, 2004); Clark v. State, 808 N.E.2d 1183 (Ind. 2004); Hendricks v. State, 809 N.E.2d 865 (Ind. Ct. App. 2004); People v. Geno, 2004 Mich. App. LEXIS 1067 (Mich. Ct. App. Apr. 27, 2004); State v. Tate, 2004 Minn. App. LEXIS 730 (Minn. Ct. App. June 29, 2004); Cassidy v. State, 2004 Tex. App. LEXIS 4519 (Tex. App. May 20, 2004); State v. McClanahan, 2004 Wash. App. LEXIS 597 (Wash. Ct. App. Apr. 5, 2004).

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Followed by, explained by: Horton v. Allen, 370 F.3d 75 (1st Cir. 2004); People v. Compan, 2004 Colo. App. LEXIS 865 (Colo. Ct. App. May 20, 2004); People v. Martinez, 810 N.E.2d 199 (Ill. App. Ct. 2004); State v. Cox, 2004 La. App. LEXIS 1493 (La. App. June 16, 2004); People v. Compan, 2004 Colo. App. LEXIS 865 (Colo. Ct. App. May 20, 2004); State v. Vaught, 268 Neb. 316 (2004); People v. Cortes, 2004 N.Y. Misc. LEXIS 663 (N.Y. Sup. Ct. May 26, 2004); State v. Allen, 2004 Ohio 3111 (Ohio Ct. App. June 17, 2004); State v. Manuel, 2004 Wisc. App. LEXIS 454 (Wis. Ct. App. May 27, 2004).

Explained by: Jones v. Albaugh, 2004 U.S. Dist. LEXIS 4529 (S.D.N.Y. Mar. 17, 2004); Cooper v. McGrath, 314 F. Supp. 2d 967 (N.D. Cal. 2004); State v. Plantin, 2004 Minn. App. LEXIS 816 (Minn. Ct. App. July 13, 2004); People v. Caruso, 776 N.Y.S.2d 337 (N.Y. App. Div. 2004); People v. Isaac, 2004 N.Y. Misc. LEXIS 814 (N.Y. Dist. Ct. June 16, 2004).

Distinguished by, followed by: Murillo v. Frank, 316 F. Supp. 2d 744 (E.D. Wis. 2004); United States v. Lee, 2004 U.S. App. LEXIS 14079 (8th Cir. July 8, 2004); State v. Rivera, 268 Conn. 351 (2004).

Distinguished by, explained by: Perkins v. State, 2004 Ala. Crim. App. LEXIS 87 (Ala. Crim. App. Apr. 30, 2004); Cooley v. State, 849 A.2d 1026 (Md. Ct. Spec. App. 2004); State v. Herrmann, 2004 SD 53 (2004); Bunton v. State, 2004 Tex. App. LEXIS 4292 (Tex. App. May 13, 2004).

Criticized by: Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004).

Criticized by, distinguished by: People v. Moscat, 777 N.Y.S.2d 875 (2004).

Followed by, Harmonized by: United States v. Saner, 313 F. Supp. 2d 896 (S.D. Ind. 2004).

Distinguished by, explained by, explained in concurring opinion at, cited in concurring opinion at: Smith v. State, 2004 Ala. Crim. App. LEXIS 93 (Ala. Crim. App. Apr. 30, 2004).

Followed by, cited in dissenting opinion at: People v. Fry, 2004 Colo. LEXIS 529 (Colo. June 28, 2004).

Distinguished by, distinguished in concurring opinion at, cited in concurring opinion at: Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004).

Cited in dissenting opinion at: Parson v. Commonwealth, 2004 Ky. LEXIS 158 (Ky. June 17, 2004); Somers v. State, 156 Md. App. 279 (2004); People v. Goldston, 2004 Mich. LEXIS 1524 (Mich. July 15, 2004).

Distinguished by, cited in dissenting opinion at: Commonwealth v. Given, 441 Mass. 741 (2004).

Distinguished by, cited in concurring opinion at: Brooks v. State, 2004 Miss. App. LEXIS 616 (Miss. Ct. App. June 29, 2004).

Distinguished by, followed by, explained by**:** People v. Khan, 2004 N.Y. Misc. LEXIS 944 (N.Y. App. Term June 23, 2004).

Followed by, explained in concurring opinion at: State v. Clark, 2004 N.C. App. LEXIS 1167 (N.C. Ct. App. July 6, 2004).

Distinguished by, followed by, cited in dissenting opinion at: State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004).

Distinguished by, cited in concurring opinion at: State v. Gonzales, 2004 N.C. App. LEXIS 503 (N.C. Ct. App. Apr. 6, 2004).

[73] Crawford, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in the judgment).

Silent no More: *Hiibel* and Its Implications

*By M. Christine Klein**

Introduction

In *Hiibel v. Sixth Judicial Dist. Court of Nevada*,[1] the Supreme Court held that a person, as to whom there is otherwise no probable cause for arrest, can be sent to jail merely for declining to identify himself to a police officer. This marked a watershed moment in Fourth[2] and Fifth[3] Amendment jurisprudence, although absent an understanding of the relevant Constitutional context, it may at first blush be difficult to see why. Perplexity arises even at the highest levels: during oral argument, one Justice wondered why any "responsible citizen" would refuse to give his name.[4]

But this is not the right question. The proper Constitutional focus is not on whether a citizen who wishes to remain anonymous is cantankerous, eccentric, or unreasonable, but on whether he has a right to be as cantankerous, eccentric, or unreasonable as he wishes, particularly when there is no probable cause to believe he has committed any crime. Justice Kennedy and the four other members of the *Hiibel* majority, concluding that Dudley Hiibel "refused to identify himself only because he thought his name was none of the officer's business,"[5] decided he does not. This article takes the position that the Court got it wrong.

Hiibel's Encounter With Deputy Dove

On a spring day in 2000, Dudley Hiibel was standing by the passenger side of his pick-up truck when he was approached by Deputy Dove of the Humboldt County's Sheriff's Office.[6] A witness had claimed that a man was assaulting a woman in a truck that looked like Hiibel's. Deputy Dove asked Hiibel if he "had any identification on him," and repeated his demand for identification no fewer than eleven times. After about two-and-a-half minutes, during which Hiibel refused to provide identification while attempting to ascertain the basis for the request, Deputy Dove arrested him.

Nevada, along with many other states,[7] has what is called a "stop-and-identify" statute, a codification of the Supreme Court's opinion in *Terry v. Ohio*.[8] The Nevada statute allows a police officer to "detain any person whom [he] encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."[9] The officer may detain the person "only to ascertain his identity and the suspicious circumstances surrounding his presence abroad."[10] The detainee "shall identify himself, but may not be compelled to answer any other inquiry."[11]

No consequences for a detainee's failure to identify himself are set forth in the "stop-and-identify" statute itself. However, Deputy Dove arrested Hiibel pursuant to another statute which makes it a misdemeanor to delay a police officer in "discharging . . . any legal duty of his office."[12] A Humboldt County justice of the peace held that Hiibel's "failure to provide identification obstructed and delayed Dove as a public officer," and fined him $250. It was this conviction that eventually led Hiibel to the Supreme Court.[13]

Basis and Scope of a "*Terry* Stop"

For over 175 years, probable cause was an "absolute" condition precedent to a constitutionally valid seizure under the Fourth Amendment.[14] But in *Terry v. Ohio*,[15] the Court held that a police officer may briefly detain a person when he has "reasonable suspicion" that criminal activity "may be afoot."[16] This was a seismic development in Constitutional law; as the Court subsequently acknowledged, "[h]ostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment."[17] Because *Terry* is an exception to the long-standing general rule of probable cause, the Court has been "careful to maintain" its "narrow scope."[18]

The Court also authorized police officers to conduct limited pat-down frisks for weapons during some "*Terry* stops." This "narrowly drawn authority" comes into play only when the officer has "reason to believe that he is dealing with an armed and dangerous individual" who might pose an immediate threat to the physical safety of the officer.[19] Thus, there is no authority to conduct a "general exploratory search" for anything other than "guns, knives, clubs, or other hidden instruments for the assault of the police officer."[20] The framework of a "*Terry* frisk" is imminent danger.

In his concurring opinion in *Terry*, Justice White addressed the "matter of interrogation during an investigative stop" that the majority had put aside.[21] He explained:

> There is nothing in the Constitution which prevents a policeman from addressing ques-

> tions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. *Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest*, although it may alert the officer to the need for continued observation.[22]

For over thirty-five years, while avoiding a direct ruling on the matter, the Court seemed to accept Justice White's limitations on "*Terry* stop" interrogations.[23] In fact, the only other federal court to review the Nevada "stop-and-identify" statute concluded that a *Terry* detainee's right not to identify himself was "clearly established."[24] Most recently, in *Berkemer v. McCarty*,[25] the Court compared a traffic stop to a "*Terry* stop" and observed that

> ...an officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.[26]

Various individual justices, in concurrences and dissents, have also assumed that a detainee is allowed to remain silent under the Fourth Amendment.[27] The dissent in *Hiibel* made reference to this "lengthy history" and concluded:

> The majority presents no evidence that the rule enunciated by Justice White and then by the *Berkemer* Court, which for nearly a generation has set forth a settled *Terry* stop condition, has significantly interfered with law enforcement. Nor has the majority presented any other convincing justification for change. I would not begin to erode a clear rule with special exceptions.[28]

The Right to Remain Silent

The "right to remain silent" is entrenched in American law and culture, and is a rule that is easily understood by police and citizens alike. Indeed, the Supreme Court recently observed that the possibility that a person under investigation might be unaware of his right to remain silent is "implausible."[29] When Dudley Hiibel was arrested, he was informed of his right to remain silent – *even though he had just been arrested for exercising that very right.*

The privilege against self-incrimination is based on an "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt," as well as "respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'"[30] It applies to communications that are "testimonial," as the Court has recognized nearly all verbal communications to be.[31] A privileged communication must also be "incriminating," meaning that it will itself "support a conviction" or "furnish a link in the chain of evidence needed to prosecute."[32] In *California v. Byers*, five of nine Justices concluded that stating one's name can be incriminatory.[33]

The *Hiibel* Opinion and Its Implications

The *Hiibel* majority weakened Fourth and Fifth Amendment protections by holding that a *Terry* detainee can not only be frisked for weapons that might pose an immediate physical threat, but can also be forced to disclose his name under penalty of arrest. There is a tendency to shrug one's shoulders, as a majority of the Nevada Supreme Court did, and reason that a mandatory identification requirement is "far less intrusive than conducting a pat down search of one's physical person."[34] And anyway, "we reveal our names in a variety of situations every day without much consideration."[35] As Justice Kennedy wrote, one's identity is "by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be . . . insignificant in the scheme of things . . . ."[36] And certainly, after September 11, 2001, "the dangers we face as a nation are unparalleled."[37] So surely, those unconcerned with the *Hiibel* ruling might think, sending to jail those citizens who refuse to identify themselves when there is reason to think they are engaged in wrongdoing will promote legitimate government interests with only a minimal intrusion on individual rights.

There are, however, flaws in this reasoning, both in general and, specifically, as a result of problematic aspects of the *Hiibel* opinion itself. The remainder of this article will address some of the more obvious concerns.

The Flawed "Terry Frisk" Analogy

It may at first seem evident that being physically handled during a weapons pat-down is more invasive than simply being asked, and forced to provide, one's name. But the apples-to-oranges comparison between a "*Terry* frisk" and compelled identification does not stand up to closer inspection.

As an initial matter, not every person subjected to a "*Terry* stop" will also, automatically, be subjected to a "*Terry* frisk." A weapons pat-down is permissible if and only if, along with suspecting the detainee generally of wrongdoing, the officer *also* has reason to believe that he is armed and presents an imminent danger to the officer's physical safety. On the other hand, under "stop-and-identify" statutes like Nevada's, every person subjected to a *Terry* stop *will* be compelled under threat of arrest to identify himself. The officer need not have any "reason to believe that he is dealing with [a] . . . dangerous individual."[38] But just as a weapons frisk must be justified by "*more* than the governmental interest in investigating a crime,"[39] so must compelled identification. A "*Terry* frisk" will instantly reveal the presence of life-threatening weapons. Compelled identification will result in the need to spend several minutes running a database search to find information about the detainee's criminal history. The exigencies that justify the first scenario simply do not arise to justify the second. Moreover, "it is the observable conduct, not the identity, of a person, upon which an officer must legally rely when investigating crimes and enforcing the law."[40]

In addition, although a weapons pat-down is a physical intrusion, it is limited in scope. A demand for identification is far more extensive in scope, for at least two reasons. First, a *"Terry* frisk" is limited to a search for weapons; an officer "may not detect a wallet and remove it for search."[41] But when identification is compelled, "the officer can now, figuratively, reach in, grab the wallet and pull out the detainee's identification."[42] Either the detainee must himself furnish identification or, if he refuses to do so, he must submit to an arrest pursuant to which the police will conduct a search and acquire his identification. That is, the "stop-and-identify" statute provides probable cause for an arrest where it would not otherwise exist. This is not an insignificant expansion of police authority during *"Terry* stops."

Second, unlike a frisk, which ends quickly and tells the officer only whether the detainee is armed, obtaining a person's identity is only the tip of the iceberg in terms of what information an officer can discover. In this age of multiple, cross-linked databases, disclosure of one's name is certain to unleash a torrent of additional information.[43] Justice Stevens made this very point in his *Hiibel* dissent, observing that a name "can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution."[44]

The "Reasonableness" of Anonymity

We provide our names to strangers all the time. No one lives his life in perfect anonymity. But we decide to whom, and under what conditions, we disclose our identities. There are consequences to anonymity, to be sure – the man who conceals his name at the airport will not be allowed to fly; the woman who conceals her name from the bank will not be permitted to open an account. But we decide which consequences are acceptable to us and which are not. In none of these voluntary, day-to-day transactions do we face arrest and a criminal record if we choose to stay anonymous.

The Nevada Supreme Court began its opinion by recognizing:

> Fundamental to a democratic society is the ability to wander freely and anonymously, if we so choose, without being compelled to divulge information to the government about who we are or what we are doing. This "right to be let alone" – to simply live in privacy – is a right protected by the Fourth Amendment and undoubtedly sacred to us all.[45]

But the court quickly jettisoned that observation by adding that "[r]easonable people do not expect their identities – their names – to be withheld from officers."[46] Here is the problem: the Fourth Amendment "does not impose obligations on the citizen but instead provides rights against the government."[47] Reasonableness is a burden imposed upon the State, not its citizens.[48] This is just as true for other Constitutional protections; for example, the content of a man's speech may prove him an unreasonable fool, but the State is precluded from infringing upon it. Similarly, a citizen, who has done nothing giving rise to probable cause for arrest, has every right to maintain his anonymity, whether or not his neighbor thinks it is unreasonable for him to do so.

In addition, this reasoning does not apply only to

"*Terry* stop" situations. If the only question is whether a "reasonable" or "responsible" citizen would provide his name, then any citizen — not only one as to whom there is reason to suspect wrongdoing — can be jailed for retaining his anonymity.

Speaking is Now the Default Rule

The *Hiibel* opinion will, as a practical matter, affect every citizen, not just those who are suspected of wrongdoing. This is why:

The *Hiibel* majority expanded upon the *Terry* Court's break with nearly two centuries of Fourth Amendment jurisprudence by authorizing a State to arrest any citizen who does not provide his name to an officer whose "reasonable suspicion" has been aroused. At least this appears at first glance to be the Court's ruling, and it would at least have the advantage of being bright-line and easy to understand. But matters are a bit more complicated than that, because "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop."[49] Muddying the waters further, the Court suggested two entirely different standards for determining whether a demand for identification is "reasonably related to the circumstances justifying the stop." The first standard, based on dicta from *Hayes v. Florida*,[50] is whether there is a "reasonable basis for believing" that disclosure of the name "will establish or negate the suspect's connection with [the] crime."[51] This standard seems to favor the detainee. (It also raises obvious Fifth Amendment concerns.) The second standard is whether the officer's request is a "commonsense inquiry."[52] Since it is difficult to imagine any circumstance in which it would *not* be common sense for an officer to ask a detainee his name, this standard strongly favors the State.

The *Hiibel* majority adds to the confusion in its Fifth Amendment analysis. First, the majority left for another day the question whether stating one's name is "testimonial," limiting its holding to its determination that in Hiibel's case, his name was not "incriminating."[53] Additionally, the majority suggested that even in a case where there is a substantial allegation that furnishing one's identity would prove incriminating, the Fifth Amendment's privilege still *might* not apply.[54] The majority also reasoned that a name is incriminating only in "unusual circumstances"[55] – which begs the question what interest the State has in it under the Fourth Amendment.

Before *Hiibel*, both police and citizens could adhere to a very simple, easy-to-understand rule: police could ask, but citizens did not have to answer. Now, although both citizens and police must conduct a complicated calculus, it is the citizen who bears the greater burden. Anyone approached by a police officer must decide whether remaining silent and preserving his anonymity – as under all but the most limited circumstances he is still permitted to do – is a constitutionally protected right or a crime.

He must first decide if he is the subject of a legitimate "*Terry* stop": if so, silence is a crime, if not, it is a right. He must then decide whether the officer's request for identification is "reasonably related" to his suspicion: if so, silence is a crime, if not, it is a right. But until the Court speaks again, a detainee must guess whether to use the strict *Hayes* "establish or negate" standard, or the more lenient "commonsense inquiry" standard. He must further decide if revealing his identity would lead to a substantial risk of self-incrimination, and if so, then silence *might* be a crime, but on the other hand it might be a right. Again, there is no way to be sure until the Court speaks again.

A citizen who chooses not to identify himself – even if he is correct that he need not do so — must hope that the police officer has sifted through the various factors and come up with the same answer. If the officer sees things differently, the citizen can vindicate himself only by submitting to an arrest record and incurring the expense of defending himself in court. Most *Terry* detainees are never arrested, and most citizens will not want to run the substantial risk that silence now presents. The *de facto* result is that the police can approach anyone, for any reason or no reason at all, and breach the cloak of anonymity.

As the Court has recognized in the past, "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases," and so a "single, familiar standard is essential to guide police officers."[56] In *Hiibel*, the Court has strayed far from this sensible observation.

Information Beyond a Name

At oral argument in *Hiibel*, counsel for the United States, arguing as *amicus curiae* on behalf of Nevada, was asked: "[W]hy do you stop at the name?" and responded: "I'm not sure that there's a limitation related to answers to questions."[57] The *Hiibel* dissent recognized this concern:

> Can a State, in addition to requiring a stopped individual to answer "What's your name?" also require an answer to "What's your license number?" or "Where do you live?" Can a police officer, who must know how to make a *Terry* stop, keep track of the constitutional answers?[58]

These are not idle concerns. The "stop-and-identify" statutes of many others states authorize police to demand information including a detainee's address, destination, and an explanation of his conduct. All these inquiries might be "common sense," the information gleaned might "establish or negate" the detainee's connection to a crime, and answers may or may not be incriminating. It could even be argued that the more information an officer has, the better able he is to assess his safety. The reasoning of the *Hiibel* majority provides no clear understanding of limitations to interrogations during "*Terry* stops," now that silence is no longer the rule.

Conclusion

We do live in difficult times, and the threat of terrorism is a real one. Civil liberties can impede effective police work. Police could be even more effective if they were allowed to approach whomever they wished and find out whatever they wanted to know. But the Constitution is not properly viewed as a mere impediment to arrest. As the Court recognized in another stop-and-identify case:

> Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, *it cannot justify legislation that would otherwise fail to meet constitutional standards* . . . .[59]

As written, the *Hiibel* opinion has abandoned clarity and replaced it with a complicated formula that no police officer can realistically be expected to apply consistently during a *"Terry* stop." Nor is it possible for citizens to understand the distinctions between protected silence and criminalized silence. *Hiibel* has opened the floodgates to piecemeal litigation as to the constitutionality of arresting citizens for not disclosing a wide variety of information beyond mere identity. One can only hope that, in the line of cases that will inevitably follow *Hiibel*, the Court declines to further erode Constitutional first principles.

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Footnotes

[1] 124 S. Ct. 2451 (2004).

[2] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

[3] The Fifth Amendment provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. The Fifth Amendment privilege against self-incrimination is applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

[4] Hiibel v. Sixth Judicial Dist. Court of Nevada, Transcript of Oral Argument, March 22, 2004, 2004 WL 720099 at *16.

[5] 124 S. Ct. at 2461.

[6] The videotape of Hiibel's arrest can be viewed at http://papersplease.org/hiibel/video.html.

[7] For an overview of "stop-and-identify" statutes in various states and localities, *see* M. Christine Klein & Timothy Lynch, *The Tale of the Anonymous Cowboy: And What He Has to Do with Your State's* Terry *Stop Legislation*, ALEC Policy Forum: A Journal for State and National Policymakers 34 (Spring 2004).

[8] State v. Lisenbee, 13 P.3d 947, 950 (Nev. 2000) (referring to Terry v. Ohio, 392 U.S. 1 (1968)). *Terry* is discussed at greater length *infra*, Section III.

[9] Nev. Rev. Stat. § 171.123(1) (2003).

[10] Nev. Rev. Stat. § 171.123(3) (2003).

[11] *Id.*

[12] Nev. Rev. Stat. § 199.280 (2003).

[13] Deputy Dove never directly asked Hiibel his name. Rather, as the Court recognized, he expected Hiibel to "produce a driver's license or some other form of *written* identification." *Hiibel*, 124 S. Ct. at 2455 (emphasis added). The Court determined that the "stop-and-identify" statute does *not* require documentary proof of identification, but rather allows a detainee to choose how he wishes to identify himself. *Id.* at 2457. But the Court upheld Hiibel's conviction anyway. This factual sleight-of-hand led Hiibel to file a petition for rehearing on July 26, 2004, which was denied on August 23, 2004.

[14] Dunaway v. New York, 442 U.S. 200, 208 (1979).

[15] 392 U.S. 1 (1968).

[16] *Id.* at 30. The Court understood that when a police officer "accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16.

[17] *Dunaway*, 442 U.S. at 213.

[18] Ybarra v. Illinois, 444 U.S. 85, 93 (1979).

[19] *Terry*, 392 U.S. at 27. The Court has subsequently reiterated that the police officer must have a "reasonable belief" that the detainee is "armed and *presently* dangerous." *Ybarra*, 444 U.S. at 92-93 (emphasis added).

[20] *Id.* at 29-30.

[21] *Id.* at 34 (White, J., concurring).

[22] *Id.* (White, J., concurring) (emphasis added).

[23] *See, e.g.,* Davis v. Mississippi, 394 U.S. 721, 726 n. 6 (1969) (referring to the "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to respond"); *Dunaway*, 442 U.S. at 210 & n.12 (emphasizing the "narrow scope" of *Terry* and quoting favorably Justice White's concurrence that a detainee cannot be compelled to answer questions).

[24] Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 881 (9th Cir. 2002) (finding the Nevada statute unconstitutional). However, prior to *Hiibel*, an inter-circuit split existed as to the constitutionality of "stop-and-identify" statutes generally. *See, e.g.,* Oliver v. Woods, 209 F.3d 1179 (10th Cir. 2000) (holding that a similar Utah statute was constitutionally sound).

[25] 468 U.S. 420 (1984).

[26] *Id.* at 439-40 (emphasis added) (footnotes omitted).

[27] *See, e.g.,* Michigan v. DeFillippo, 443 U.S. 31, 44, 46 (1979) (Brennan, J., joined by Marshall and Stevens, JJ., dissenting) (elaborating on, but not contradicting, an assumption made by the majority, and reasoning, based on "*Terry* and its progeny," both that "the privacy interest in remaining silent cannot be overcome at the whim of any suspicious police officer" and that "police acting on probable cause may not search, compel answers, or search those who refuse to answer their questions"); Kolender v. Lawson, 461 U.S. 352, 366 (1983) (Brennan, J., concurring) (reasoning that police officers "may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer . . . .) (emphasis in original).

[28] *Hiibel*, 124 S. Ct. at 2466 (Breyer, J., joined by Souter and Ginsburg, JJ., dissenting).

[29] Brogan v. United States, 522 U.S. 398, 405 (1998).

[30] Doe v. United States, 487 U.S. 201, 212 (1988) (*quoting* Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964)).

[31] *Id.* at 213-14 (recognizing that the "vast majority of verbal statements" are testimonial and to that extent covered by the Fifth Amendment privilege). An easy way to decide whether a communication is testimonial is to ask whether the detainee could tell a lie in response. George Fisher, Evidence 800 (2002).

[32] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[33] 402 U.S. 424, 448 (1971) (Harlan, J., concurring); *id.* at 460 (Black, J., joined by Douglas and Brennan, JJ., dissenting); *id.* at 464 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting). The plurality opinion, which is not the opinion of the Court, *see* Marks v. United States, 430 U.S. 188, 193 (1977), concluded that "[d]isclosure of a name and address is an essentially neutral act" in the context of a non-criminal regulatory scheme. *Id.* at 432 (plurality opinion of Burger, C.J., joined by Stewart, White and Blackmun, JJ.).

[34] Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1206 (Nev. 2002).

[35] *Id.*

[36] *Hiibel*, 124 S. Ct. at 2461.

[37] *Hiibel*, 59 P.3d at 1206.

[38] *Terry*, 392 U.S. at 27.

[39] *Id.* at 23.

[40] *Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting).

[41] *Id.*

[42] *Id.*

[43] For a discussion of the constitutional implications of readily accessible and comprehensive databases, *see* Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts, Hiibel v. Sixth Judicial Dist. Court of Nevada, 124 S. Ct. 2451 (2004) (No. 03-5554), *available at* 2004 WL 22970604 *and* http://www.abditum.com/hiibel/pdf/epic_amicus.pdf.

[44] *Hiibel*, 124 S. Ct. at 2464 (Stevens, J., dissenting). Technology has advanced at quantum speed in recent years, but even thirty years ago, Justice Harlan was already able to recognize the "dynamic growth of techniques for gathering and using information culled from individuals by force of criminal sanctions." *Byers*, 402 U.S. at 453-54 (Harlan, J., concurring) *See also* Lawson v. Kolender, 658 F.2d 1362, 1368 (9th Cir. 1981), *aff'd*, Kolender v. Lawson, 461 U.S. 352 (1983) (recognizing, in compelled identification case, that the identification of a "suspicious" individual "grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended.").

[45] *Hiibel*, 59 P.3d at 1204 (footnotes omitted).

[46] *Id.* at 1206.

[47] *Hiibel*, 124 S. Ct. at 2459.

[48] *See, e.g., Terry*, 392 U.S. at 20 (explaining that the central inquiry, when evaluating the constitutionality of a "*Terry* stop," is "whether the officer's action was justified as its inception, and whether it was *reasonably* related in scope to the circumstances which justified the interference in the first place.") (emphasis added).

[49] *Hiibel*, 124 S. Ct. at 2459.

[50] 470 U.S. 811 (1985).

[51] *Hiibel*, 124 S. Ct. at 2460.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 2461.

[55] *Id.*

[56] *Dunaway*, 442 U.S. at 213-14.

[57] Hiibel v. Sixth Judicial Dist. Court of Nevada, Transcript of Oral Argument, March 22, 2004, Argument of Sri Srinivasan, Esq., Assistant to the Solicitor General, U.S. Department of Justice, 2004 WL 720099 at *55.

[58] *Hiibel*, 124 S. Ct. at 2465-66 (Breyer, J., dissenting).

[59] *Kolender*, 461 U.S. at 361. *See also id.* at 365 (Brennan, J., concurring) ("We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. [citation omitted] But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion.").

Building a Better Terry Stop: the Case for *Hiibel*

*By Charles Hobson**

Hiibel v. *Sixth Judicial District Court*,[1] decided by the Supreme Court in June, is an easy case to misunderstand. Too often, public perceptions about this case frame the debate as a choice between civil liberties and an authoritarian state ordering individuals to present their papers or risk imprisonment.[2] The *Hiibel* decision does not go that far. While important, the Supreme Court decision only grants a limited authority to police officers in states with appropriately narrow stop and identify laws. People are at no greater risk of arbitrary arrest than they were before the decision. What has happened is that the "stop and frisk" sanctioned by *Terry* v. *Ohio*,[3] has become an even more effective public safety tool at little additional cost to civil liberty.

Hiibel affirmed the constitutionality of a Nevada stop and identify statute. If an officer stopped a person under a reasonable suspicion that the person had committed or was about to commit a crime, then the stopped individual is required to comply with a request for identification from the officer. Failure to comply is a misdemeanor.[4] These laws are found in many states.[5]

The Supreme Court properly rejected the Fourth and Fifth Amendment attacks on the Nevada law. The Fourth Amendment is not an absolute guarantee of privacy from searches and seizures, but instead prohibits only "unreasonable searches and seizures . . . ."[6] Therefore, the Fourth Amendment only protects expectations of privacy that society deems reasonable.[7] The Fourth Amendment attack on stop and identify laws fails because of the minimal privacy interest in one's identity. We constantly identify ourselves to the government and each other. Proof of identity is necessary to work, to drive, to have a bank account, and for other modern necessities.[8] Since many government agencies already know our identities, there is little, if any, loss of privacy in complying with a stop and identify law. [9] Given the needs of modern society, there is no reasonable expectation of privacy in one's identity in the context of a *Terry* stop.

Fourth Amendment challenges to searches or seizures are resolved by balancing the reasonable expectation of privacy against the legitimate government interests served by the intrusion.[10] The *Hiibel* Court correctly recognized that identifying the suspect at a *Terry* stop serves important and legitimate interests. Prompt identification allows the officer to determine highly relevant information, such as if the suspect is wanted for a crime or has a record of violence or mental disorder.[11] Also, identification can help quicken the release of an innocent suspect in some circumstances.[12] Since identity is a public matter for almost everybody, the balance of interests strongly favors allowing the state to require identification at *Terry* stops.

Critics of stop and identify statutes also claim that these laws allow police to circumvent the probable cause requirement for arrest. The claim is that stop and identify laws allow police to arrest people for merely being suspicious, and this encourages arbitrary police action.[13] The Supreme Court properly rejected this argument. Stop and identify laws only apply if the person is validly stopped under *Terry*'s reasonable suspicion standard. Supreme Court precedent prevents police from stopping people without suspicion and demanding identification,[14] and the *Hiibel* decision does not change this rule.[15]

Hiibel was not arrested because the officer had reasonable suspicion to make a *Terry* stop, but because the officer had probable cause to believe that Hiibel did not comply with Nevada's stop and identify law.[16] This demonstrates that fears of a repressive stop and identify regime are overblown. Any valid stop and identify law, like Nevada's, contains an important limit on officer discretion and the authority of the state. The Nevada law only required the detained person to answer the officer's request for a name.[17] A more stringent identification requirement would raise substantial constitutional questions. For example, California's stop and identify law, which required the detainee to provide "credible and reliable" identification, was struck down for being unconstitutionally vague in *Kolender* v. *Lawson*.[18] Just as vague, difficult to satisfy identification requirements give too much discretion to the officer,[19] the narrower, more easily satisfied requirement upheld in *Hiibel* effectively limits the discretion of the officer in the field. Since the detainee can avoid arrest by merely stating his or her name, *Hiibel* does not give officers the authority to make arbitrary arrests. While it is possible that a more stringent identification requirement would survive judicial review, the specter of *Kolender* counsels a more cautious approach.

It is true that an officer could overcome this limit by lying about the suspect's response, but this is a constitutional strawman. No constitutional standard can consistently defeat a sufficiently corrupt officer. Manufactured consent to a search can overcome the warrant requirement for searches, and planted evidence can overcome probable cause or even proof beyond a reasonable doubt. The overwhelming majority of police officers are honest and conscientious. Defense counsel, citizen oversight, and a vigilant press are much more effective at dealing with those few who are willing to perjure themselves to harass individuals than a punitively stringent constitutional criminal procedure. Fourth Amendment doctrine is predicated on the assumption that most officers are honest, and *Hiibel* is no different.

Fifth Amendment attacks on stop and identify laws are similarly unpersuasive. As the Supreme Court properly held, producing one's name to an officer carries "no reasonable danger of incrimination."[20] While providing one's identity may lead to arrest if there is an outstanding warrant, the mere fact of identity will not be used to convict the person at trial. While identity is unique, to each of us it is also a universal characteristic.[21] An arrestee must provide his or her identity, as does a witness who is about to invoke the self-incrimination privilege.[22] Also, if the state can readily establish a fact without compelling it from the individual, then testimony regarding that fact's existence is much less likely to be incriminating.[23] Every April we provide the federal government with our identities in our tax returns, yet this does not raise any genuine Fifth Amendment problem.[24] Barring highly unusual circumstances, identity is not incriminating, and stop and identify statutes do not violate the Fifth Amendment.[25]

Hiibel represents the triumph of common sense over hyperbole. Police can now make *Terry* stops even more effective tools for public safety than they were before. The decision allows states to fashion laws which will entitle police to non-incriminating but highly useful information that we give out to the public every day. There will be no random stops with demands for one's papers after *Hiibel*. However, there will be less crime and more apprehended criminals.

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Footnotes

[1] 542 U. S. __, 124 S. Ct. 2451 (2004).

[2] *See*, *e.g.*, A. Coughlin, Simple Question, Big Implication, Washington Post, March 28, 2004, p. B5 ("Defenders of Larry Hiibel argue that identification laws such as Nevada's dramatically and unnecessarily expand the power of police to intrude on our liberties—indeed that such laws authorize the police to arrest innocent people whose only transgression was to ask an officer to leave them alone.").

[3] 392 U. S. 1 (1968).

[4] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2455-56.

[5] *See id*., at 2456.

[6] U. S. Const. Amend. IV.

[7] California v. Greenwood, 486 U. S. 35, 39-40 (1988).

[8] *See* California v. Byers, 402 U. S. 424, 427-428 (1971) (plurality opinion).

[9] *See id*., at 39-40.

[10] *See* Delaware v. Prouse, 440 U. S. 648, 654 (1979).

[11] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2458.

[12] *See ibid*.

[13] *See id*., at 2459.

[14] *See* Brown v. Texas, 443 U. S. 47, 51-52 (1979).

[15] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2459.

[16] *See ibid*.

[17] *See ibid*.

[18] *See* 461 U. S. 352, 358 (1983).

[19] *See ibid*.

[20] *Hiibel*, *supra* note 1, 124 S. Ct., at 2460.

[21] *See id*., at 2461.

[22] *See ibid*.

[23] *See* Baltimore City Dept. of Social Servs. v. Bouknight, 493 U. S. 549, 555 (1990).

[24] *See* United States v. Sullivan, 274 U. S. 259, 263-264 (1927) (bootlegger during Prohibition does not have a Fifth Amendment privilege against identifying himself on an income tax return).

[25] *See Hiibel*, *supra* note 1, 124 S. Ct., at 2461.

Environmental Law and Property Rights

Dramatic State Cases Largely Support Property Rights

*By Steven J. Eagle**

The state courts have continued to issue environmental law and property rights cases. Some support private property rights. Others defer to command-and-control regulation. However, the trend seems to favor property rights, with the most dramatic case being the Michigan Supreme Court's repudiation of its *Poletown* Doctrine in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

As this issue went to press, the U.S. Supreme Court granted *certiorari* in *Kelo* v. *City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*,__S.Ct.__, 2004 WL 2069452 (Sept. 28, 2004) (No. 04-108). In *Kelo*, discussed in Section I.B., the Connecticut Supreme Court upheld the condemnation of the unblighted homes of long time New London residents for resale to a private redeveloper as part of an economic revitalization effort. This might well be the most important property rights case of the Court's 2004 term.

I. Battle Over Eminent Domain for Private Redevelopment Intensifies.

Probably the most interesting and important recent state cases have concerned the battle over the power of state and local governments to take private property for reconveyance to new private owners, ostensibly for "redevelopment" purposes.

Background: The Fifth Amendment says that "… nor shall private property be taken for public use without just compensation." The Supreme Court declared in 1798 that "a law that takes property from *A* and gives it to *B* … cannot be considered a rightful exercise of legislative authority." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). In recent times, however, the Court has held that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Furthermore, the Public Use Clause is "coterminous" with the police power. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). *Midkiff* involved condemnation of freehold interests for transfer to the respective ground lessees. More generally, *Berman* approved condemnation of even non-blighted parcels in blighted neighborhoods for reconveyance to private redevelopers, so long as private gains were incidental to public purposes.

However, judicial skepticism of condemnation for private redevelopment is increasing. The increasingly aggressive use of eminent domain by localities came to public awareness largely as a result of a 1998 article in the *Wall Street Journal*. "Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business."[1] A more comprehensive report from the Institute for Justice has documented this practice.[2]

Recent cases such as *Manufactured Housing Communities of Washington v. State of Washington*, 13 P.3d 183 (Wash. 2000), *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002) (*SWIDA*), and *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) mark a revival of meaningful judicial scrutiny of landowners' claims that the exercise of eminent domain, supposedly for public benefit, should be invalidated as primarily for private benefit.

A. The Michigan Supreme Court Overturns Poletown Doctrine in County of Wayne v. Hathcock *684 N.W.2d 765 (Mich. 2004).*

Background: In *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court upheld the condemnation of an entire vibrant and close-knit ethnic neighborhood, replete with 1600 homes, shops and churches, so that the land could be transferred to General Motors Corporation for construction of a Cadillac assembly plant. GM had threatened to build the plant outside the city at a time of high unemployment, which the court said made the public the primary beneficiary of the condemnation. *Poletown* has been the emblematic case permitting condemnation of non-blighted areas for private redevelopment.

Probably the most important recent state property rights decision was handed down by the Michigan Supreme Court on July 30, 2004. In *County of*

Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), the county sought to condemn land for its planned 1,300-acre "Pinnacle Aeropark Project," to be located south of Detroit Metropolitan Airport. The project had its roots in the expansion of the airport and concerns about aircraft noise. The Federal Aviation Administration contributed some $21 million for the purchase of nearby parcels, with the provision that the land be put to an economically productive use. The county conceived of constructing a "large business and technology park with a conference center, hotel accommodations, and a recreational facility." The county claimed that this "cutting-edge development will attract national and international businesses, leading to accelerated economic growth and revenue enhancement." Its expert testimony "anticipated that the Pinnacle Project will create thirty thousand jobs and add $350 million in tax revenue for the county." *Id*. at 770-71.

The court concluded that the condemnation would be legal under applicable state law, and went on to review its constitutionality.

1. *Poletown* Abrogated as Unconstitutional

The constitutional analysis in *Hathcock* was based on the understanding of "public use" as a legal term of art at the time of ratification of the 1963 Michigan Constitution. From this starting point, the court analyzed in some detail what it deemed the flaws in its earlier *Poletown* opinion. *Poletown* had incorrectly applied a minimal standard of judicial review in eminent domain cases, supported by no authority except a plurality opinion. "Before *Poletown*, we had never held that a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy." *Id*. at 786. The court quoted the eminent Michigan jurist Thomas M. Cooley, who opined that a statute permitting condemnation for private power mills, with no subsequent constraint on the owner, "will in some manner advance the public interest. But incidentally every lawful business does this." *Id*. (quoting Ryerson v. Brown, 35 Mich. 333, 339 (1877).

> Because *Poletown*'s conception of a public use – that of 'alleviating unemployment and revitalizing the economic base of the community' – has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use" in art. 10, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the Poletown analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled. *Id*. at 787 (quoting *Poletown*, 304 N.W.2d at 459).

The Michigan Supreme Court concluded that,

> "because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule Poletown in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law." *Id*.

Given that *Poletown* was such a "radical departure" from the court's constitutional jurisprudence, it was to apply retroactively to all pending cases in which a challenge to it had been made and preserved. *Id*. at 788.

2. *Hathcock* Established Three Permissible Bases for Exercises of Eminent Domain to be Followed by Reconveyance to Private Parties

The Court reviewed the history of the term "public use" under the Michigan constitutions, and concluded that "the transfer of condemned property is a 'pubic use' when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan" in his *Poletown* dissent:

> First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable."
> * * *
> Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.
> * * *
> Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the

> property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement. *Id*. at 781-783 (quoting *Poletown*, 304 N.W.2d at 478-480 (Ryan, J. dissenting).

Under the first test, the court found that the nation was "flecked" with "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." Therefore, the Pinnacle Project was "not an enterprise 'whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." *Id*. at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J. dissenting).

This analysis seems unquestionably correct. The "need" for the condemned parcels resulted only from the county's extensive purchases and commitments to the redevelopment project, which were spurred on by federal funds. The typical uses that border major airports – small fabricating plants, freight consolidation depots, and the like – are compatible with airport noise. In other words, the Pinnacle Project was a bootstraps operation.

Had the county attempted to acquire only those legal rights that were necessary to proper operation of the expanded airport, such as easements for noise, it is likely that the "public necessity" test of *Hathcock* would have been complied with.

The second *Hathcock* test requires that the transferee of the condemned land remain "accountable to the public in its use of that property." In the case itself, there was no mechanism for accountability, since none had been required under *Poletown*.

What if the private redevelopers of the Pinnacle Project had entered into formal and recorded covenants requiring them to "broaden[] the County's tax base [to include] service and technology," or "enhance the image of the County in the development community," or "aid[] in its transformation from a high industrial area, to that of an arena ready to meet the needs of the 21st century," or "attract national and international businesses?" *Id*. at 770-771. Such aspirational and gauzy promises might well be adjudicated as too vague to be enforceable, thus not providing meaningful accountability.

Localities might impose more specific requirements, but that would raise their costs. It seems likely that accountability would be better secured through the project's governance structure than through performance standards. Thus, one might expect post-*Hathcock* redevelopment agreements to stress the collaborative nature of what would be articulated as a public-private partnership. Under such a structure, the redevelopment agency might have an institutionalized voice in, or veto power over, modifications in the original project. Also, the conveyance to the private redeveloper might be for a limited period rather than in fee, in which case the public agency would gain leverage through the possibility of nonrenewal. The agency and the private redeveloper would have to devise language that would pass the judicial "accountability" standard. At the same time, however, the documentation would have to provide the redeveloper with sufficiently certain rights so as not to discourage prospective lenders or tenants.

The final *Hathcock* standard, the establishment that condemnation is appropriate on account of the present state of the parcel, as opposed to its future possibilities, relates to the original goal of urban renewal, slum clearance. It is unlikely that condemnation based on genuine urban blight would be contestable, although the distinction between genuine blight and "pretextual" blight (as noted in *99 Cents Only Stores*, 237 F.Supp.2d at 1129) might not always be easy to draw.

3. Conclusion

County of Wayne v. Hathcock 684 N.W.2d 765 (Mich. 2004), marks what might be an important turning point in American condemnation law. By abrogating the iconic *Poletown* decision, it both abets and calls sharp attention to the trend towards a closer examination of condemnation to further economic development. Also, its delineation of three permissible bases for the use of eminent domain where the parcel is to be reconveyed to another private party seems susceptible of wide adoption.

Hathcock does not require government to curtail urban renewal efforts. Nor, since it is based on the Michigan constitution, does it invoke authority that might be binding on another jurisdiction. However, the case is persuasive authority for the proposition that the diffused benefits thrown off by successful local business should not be sufficient to justify the use of eminent domain.

B. "Economic Development" as "Public Use" Withstands Facial Attack

In a case of first impression, the Supreme Court of Connecticut has held that economic development constitutes a public use for eminent domain purposes under the Federal and state constitution. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). The case involved the condemnation of homes adjacent to the site of a major drug company's new international research facility for compatible corporate use and for residential redevelopment that would link the site to an existing state park. The court described the New London project, for which residential parcels were condemned, as a "significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." *Id*. at 507.

The Connecticut Supreme Court emphasized legislative findings "*that the economic welfare of the state depends upon the continued growth of industry and business within the state;* that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; *that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes ... are public uses and purposes for which public moneys may be expended*." *Id*. at 520 (emphasis by court).

The court subsequently concluded that the project was primarily for public, as opposed to private, benefit. As this issue went to press, the U.S. Supreme Court granted certiorari in Kelo. 2004 WL 2069452 (Sept. 28, 2004) (No. 04-108)

C.Some Courts Distinguish "Public Purpose" from "Public Use" . . .

All legitimate government actions must be designed to accomplish a "public purpose." The criteria for "public purpose" are distinct from those for "public use" under the Takings Clause. The distinction is important—since a valid exercise of eminent domain must satisfy both requirements.

1. *Town of Beloit v. County of Rock,* 657 N.W.2d 344 (Wis. Mar. 4, 2003)

This is a "public purpose" case, not directly involving "public use" with respect to eminent domain. The town originally had acquired river-front land from farmers and resold it to the Caterpillar Company for industrial development. When that project did not work out, the town reacquired the land and attempted to sell it to other developers. After that proved unsuccessful, the town itself undertook to develop the residential Heron Bay Subdivision. The court found this exercise of municipal industrial policy legitimate, since land development by municipalities did not violate state law and since it was predicated on the creation of jobs and economic development. Quoting earlier holdings, the Wisconsin Supreme Court declared: "Only if it is 'clear and palpable' that there can be no benefit to the public is it possible for a court to conclude that no public purpose exists." *Id*. 351 (citations omitted).

Town of Beloit is significant for our purposes because the court very carefully quotes the landmark Illinois *SWIDA* decision: "While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case.... [The] flexibility [in terminology] does not equate to unfettered ability to exercise takings beyond constitutional boundaries." 657 N.W.2d at 356 (quoting *SWIDA*, 768 N.E.2d at 8). In other words, the Supreme Court of Wisconsin is serving notice that its liberal "public purpose" doctrine regarding the expenditure of public funds does not automatically translate into a liberal "public use" doctrine justifying the exercise of eminent domain.

2. *Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161 (Ill. Feb. 21, 2003)

This case draws the same distinction between "public purpose" for spending and "public use" for condemnation as did *Town of Beloit*. Here, the Illinois Supreme Court approved the use of public funds in financing the renovation of Soldier Field, largely for the benefit of the Chicago Bears. The court added that its landmark *SWIDA* decision was "inapposite," since it involved eminent domain, and that its "holding is not a retreat from [its *SWIDA*] analysis." *Id*. at 167.

3. Georgia D.O.T. v. Jasper County, 586 S.E.2d 853 (S.C. Sept. 15, 2003)

A county attempted to condemn undeveloped land owned by the Georgia Department of Transportation (GDOT) on the South Carolina side of the Savannah

River. Since GDOT had no extraterritorial power of eminent domain, it was treated as a private landowner. The county intended to lease part of the parcel after condemnation to a private company that would develop a large maritime terminal, which would operate in conjunction with a business park the county would itself develop on the rest of the condemned parcel. The trial court found that eminent domain would be for "public use," since the evidence indicated that the majority of the county's population had low-paying jobs in tourism and service industries and that 25% lived below the poverty line. The proposed project would add about 40% of the county's current tax base and would diversify its job base.

The South Carolina Supreme Court reversed, holding that the cases cited below related to "public purpose" under taxation and bond revenue laws. However, "'public purpose' discussed in these cases is not the same as a 'public use,' a term that is narrowly defined in the context of condemnation proceedings." 586 S.E.2d at 638 (citing *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956). The marine terminal would be gated, accessible only to those doing business with the lessee, and "public" only to the extent that different steamship lines would use it. The court emphasized that:

> The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it. 586 S.E.2d at 856-857 (quoting *Edens*, 91 S.E.2d at 283).

The court also "emphasize[d]," however, that "it is the lease arrangement in the context of a condemnation that defeats its validity." It did not rule out accomplishment of the project in a different manner. *Id*.

4. *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. Oct. 1, 2003)

The Bailey family had operated Bailey's Brake Service on the parcel for many years. At the behest of the owner of a nearby Ace Hardware store who desired to relocate to the parcel, it was included within the Mesa Town Center Redevelopment Area. The court ruled that the proposed taking was not for a public use. It noted that "when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is 'really public.'" *Id*. at 904.

D. . . . But Other Courts Cling to Deference.

1. *City of Las Vegas Downtown Redevel. Agency v. Pappas,* 76 P.3d 1 (Nev. Sept. 8, 2003), *cert. denied*, 124 S.Ct. 1603 (Mar. 8, 2004).

In order to alleviate what it determined to be the blight of the core of downtown Las Vegas, the redevelopment agency planned a massive project:

> Several components comprised the Fremont Street Experience, including a sculpted steel mesh canopy stretching across Fremont Street from Main to Fourth Streets. The canopy would allow light and air flow during daylight hours but would provide shade for tourists. At night, however, the Fremont Street Experience would present a sound and light show. In addition, the Fremont Street Experience would create a pedestrian plaza by closing Fremont Street to vehicular traffic from Main Street to Las Vegas Boulevard. Finally, because of a lack of adequate public parking, plans for the Fremont Street Experience included a five-story public parking structure with some retail and office space.
>
> Because the Agency lacked the financial resources to construct the project alone, it entered into an agreement with a consortium of downtown casinos. The consortium would finance and cover any operating losses of the feature attraction as well as the construction of the parking garage. The City would authorize the creation of the pedestrian mall, and the Agency would provide funds to acquire the land needed to construct the garage. In return for the risk taken by the consortium in absorbing all of the construction costs, start- up losses, and possible operating losses, the consortium would control the operation and revenues of the garage as well as the operation of the feature attraction. *Id.* at 7.

The Nevada Supreme Court upheld the project against a "public use" challenge, essentially deeming it a straight application of *Berman v. Parker*, 348 U.S.

26, 33 (1954). Of particular interest, the court attempted to differentiate the case from *99 Cents Only Stores* and *SWIDA*:

> In those cases, the courts found that eminent domain proceedings were not instituted to accomplish a public purpose, such as the elimination of blight. Rather, the courts indicated that the sole purpose for acquiring the property through condemnation proceedings was to benefit another private entity. Although, in these cases, the property to be condemned in each case was located in an area designated for redevelopment, the individual projects did not further redevelopment goals. Instead, the projects were simply expansions of existing business concerns. … There was no evidence that the areas in question suffered from high crime, unemployment, vacant business or other components of blight that would be addressed by the proposed projects. In contrast, when a project is intended to attack blight, such as creating a significant increase in jobs in an area suffering from high unemployment, even the relocation of one business through condemnation to make way for a new business is still considered a public purpose. *Id*. at 12 (citations omitted).

2. *Town of Corte Madera v. Yasin,* 2002 WL 1723997 (Cal. App. 2002)

Although *Yasin* is a 2002 case, and neither officially published nor citeable in California courts, it nicely illustrates that state's approach to property rights. The Yasins operated a delicatessen/liquor store near a tired shopping center that the town desired to spruce up. It condemned the Yasin parcel for shopping center parking. The court distinguished *SWIDA* on the grounds that the Illinois Supreme Court applied the narrower "more than a mere benefit to the public must flow from the contemplated improvement" standard. 2002 WL 1723997 at 5 (quoting *SWIDA*, 768 N.W.2d at 10). "In California, a mere benefit is enough. The use need only promote the general interest in relation to any legitimate object of government. *Id*. (citing *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982)).

II. Zoning

A. Open Space Preservation by "Inverse Spot Zoning"

Background: In the children's game of "musical chairs," the last child to scamper for a chair when the music stops has no place to sit. The same principle seems to animate state court holdings that the last property owner in an area to seek to develop land won't be permitted to do so, for that would use up what blithely is termed the community's green space. The leading example is *Bonnie Briar Syndicate v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999). The New York Court of Appeals upheld the rezoning of a country club parcel from residential to solely for recreational use. The surrounding area had been built up and the community needed green space. The rezoning was held to substantially advanced legitimate state interests in furthering open space, recreational opportunities, and flood control, and thus did not result in a regulatory taking requiring just compensation.

1. *In re Realen Valley Forge Greens Associates*, 838 A.2d 718 (Pa. Dec. 18, 2003)

A candidate for the best state property rights decision of the year is the Pennsylvania Supreme Court's *Realen Valley Forge* decision.

As was the case in *Bonnie Briar*, the parcel in *Realen* was a private golf course, "located in the heart of one of the most highly developed areas in the region, entirely surrounded by an urban landscape, and immediately adjacent to what is currently the world's largest shopping complex at one discrete location... We hold that this agricultural zoning, designed to prevent development of the subject property and to 'freeze' its substantially undeveloped state for over four decades in order to serve the public interest as 'green space', constitutes unlawful 'reverse spot zoning' beyond the municipality's proper powers." *Id*. at 721. "While the size of the zoned tract is a relevant factor in a spot zoning challenge, the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." *Id.* at 729.

2. *Smith v. Town of Mendon*, 771 N.Y.S.2d 781 (App. Div. Feb. 11, 2004)

Bonnie Briar remains alive and well. In *Smith*, the New York intermediate appellate court cited it in ruling that conditioning site plan approval on the placement of a conservation restriction on the parcel did not constitute a taking.

III. Penn Central - *Diminution in Value*

Background: Prior to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), many lower courts erroneously assumed that regulations resulting in less than complete deprivations of value could not be considered compensable takings. In *Palazzolo* and *Tahoe-Sierra*, the Supreme Court reiterated that partial regulatory takings may be compensable under the multifactor test outlined in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

A. Friedenburg v. New York Dept. of Environmental Conservation, 767 N.Y.S.2d 451 (A.D. Nov. 24, 2003).

In *Friedenburg*, the Appellate Division affirmed a trial court ruling that the Department of Environmental Conservation's denial of a wetlands permit to construct a single-family residence on a 2.5 acre property, almost all of which consisted of tidal wetlands, effected a taking. The court found no *per se* taking under *Lucas*. In proceeding with a *Penn Cen*tral analysis, it held that a 95% reduction in value (the state asserted 92.5%) worked a taking. The court emphasized that the plaintiff acquired the parcel prior to the enactment of the Tidal Wetlands Act of 1973. Had the plaintiff purchased subsequent to the imposition of strict wetlands controls, he would have been subject to the rule in *Gazza v. New York State Dept. of Environmental Conservation*, 679 N.E.2d 1035 (N.Y. 1997) "[T]he denial of the application of the property owner in *Gazza* for setback variances was not tantamount to a taking, because that property owner did not lose a development right; it had already been restricted prior to his purchase of the land." 767 N.Y.S.2d at 460.

Significantly, the court cited *Chase Manhattan Bank, N.A. v. State*, 479 N.Y.S.2d 983, 991-992 (App. Div. 1984) for the proposition that the owner deprived of 86 per cent of value would have a "reasonable probability of success in court" on a takings claim. 767 N.Y.S.2d at 460. The court did not address the state's parcel-as-a-whole and public trust doctrine arguments.

B. Sheffield Development Co., Inc. v. City of Glenn Heights, ___ S.W.3d ____, 2004 WL 422594 (Tex. Mar. 5, 2004).

If there were an award for the worst reasoned property rights case of the year, the Texas Supreme Court's *Sheffield* decision would be a leading contender.

Sheffield, an experienced developer, purchased the nascent "Stone Creek" subdivision at an attractive price from an anxious seller. Before closing on the deal, he had extensive talks with various officials of Glenn Heights, a small, but rapidly growing, suburb of Dallas. Sheffield said that he planned to continue development in accordance with the existing zoning, which permitted a density of 5.5 dwell units per acre. He specifically asked about possible zoning changes. After hearing no objections or reservations, Sheffield went through with the purchase. Under what was then Texas law, he could have immediately filed a plat which would have vested the plaintiff's development rights. According to the Texas Supreme Court, the defendant's ensuing 15-month moratorium and subsequent downzoning "blindsided Sheffield, just as the City intended." 2004 WL 422594 at *12. The plaintiff filed suit, alleging that both the moratorium and downzoning constituted takings of its property.

The court discussed *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), under which Sheffield could establish a compensable regulatory taking if the moratorium or downzoning (1) did not substantially advance the City's legitimate interests, (2) deprived Sheffield of all economically viable use of its property or (3) unreasonably interfered with Sheffield's use of the property as measured by the severity of the economic impact on Sheffield and the extent to which its investment-backed expectations had been defeated. Since Sheffield conceded that the land still was worth $600 per acre, the second claim was precluded.

The court then analyzed first the rezoning and subsequently the moratorium.

With respect to the rezoning, the court found substantial advancement of the legitimate governmental purpose of preserving the city's "smaller community environment." Turning to whether the city went too far in restricting Sheffield's land use, the court began with the three *Penn Central* factors. It noted that "the rezoning clearly had a severe economic impact," accepting the 50% diminution in value determined by the jury.

> But diminution in value is not the only, or in this case even the principal, element to be considered. It is more important that, according to the jury verdict, the property was still worth four times what it cost, despite the rezoning, because this makes the impact of the rezoning very unlike a taking. Sheffield argues that its business acumen

> or good fortune in acquiring the property cannot be considered in assessing the economic impact of rezoning, but we think that investment profits, like lost development profits, must be included in the analysis. 2004 WL 422594 at 12.

With respect to investment-backed expectations, the court took the "blindsiding" by the city as proof that Sheffield's expectations were reasonable.

> Although no City employee ever promised Sheffield that there would be no change in zoning (nor would any such promise have bound the City), it is fair to say that the moratorium and rezoning blindsided Sheffield, just as the City intended. Evidence of Sheffield's dealings with the City is not, as the City argues, an improper basis to estop the City, but proof of the reasonableness of Sheffield's expectations. However, it must also be said that the investment backing Sheffield's expectations at the time of rezoning—the $600/acre purchase price and the expenses of exploring development with the City—was minimal, a small fraction of the investment that would be required for full development. And as with most development property, Sheffield's investment was also speculative, as evidenced by the fact that the property Sheffield acquired had not been developed in the ten years since it was first zoned PD 10. *Id.*

The third *Penn Central* factor, the character of the regulation, was held to be that of a general rezoning not exclusively directed at Sheffield.
The court continued:

> Beyond the three *Penn Central* factors, we are concerned, as we have already indicated, about the City's conduct. The evidence is quite strong that the City attempted to take unfair advantage of Sheffield, and quite lacking in any indication of unfair action on Sheffield's part. The City, fearful that we might consider the improvident statements of individual officials and employees, argues that the actions and motives of those individuals are not those of the City itself. Of course, we agree. But it is exactly the City's conduct, not that of its officials and employees, that is so troubling. The City did not rezone or impose a moratorium on development, or indicate that it had the remotest intention of doing so, until Sheffield closed on the purchase of the property. The moratorium it imposed was for the purpose of "study," which was unquestionably completed within a month. Yet for a year the City Council delayed action on the Planning and Zoning Commission's decision that PD 10 not be rezoned. According to the City's own records, a reason for the delay was to muster the votes to reject the Commission's decision. On the other hand, the City Council continued to consider the zoning of many other PDs during the same time period, suggesting that the delay was lethargic rather than ill-motivated. And while the City's conduct is troubling, it must also be said that the benefits the City legitimately sought to achieve from rezoning were not thereby diminished.
>
> Taking all of these factors into account, the trial court concluded that the rezoning was not unreasonable, and a divided court of appeals disagreed. We agree with the court of appeals that the downzoning in this case is much different from the refusal to upzone in *Mayhew,* thereby maintaining the *status quo* and preventing the landowner from proceeding with an enormous development on land that had long been used solely for agricultural purposes in a small, uniquely rural environment. Nevertheless, we do not agree that the rezoning in this case went too far, approaching a taking. Rather, we think that the City's zoning decisions, apart from the faulty way they were reached, were not materially different from zoning decisions made by cities every day. On balance, we conclude that the rezoning was not a taking. *Id*. at 13.

Turning to the 15-month moratorium, the court noted that the landowner did not object to the first month, during which a study was undertaken. Also, the city argued, "candidly but remarkably, that using delay to extract concessions from landowners is a legitimate government function. We disagree, and were we convinced that this was the sole reason for the City's delay, we would be required to consider whether the moratorium constituted a compensable taking." *Id*. at 14.

The court went on to find that the city's resolution of other rezoning problems during the moratorium period evinced an orderly process. "One can wish that the process had hurried along, but we cannot say that the moratorium did not substantially advance a legitimate governmental purpose." *Id*. The court also determined that Sheffield showed no evidence of economic impact resulting from the moratorium, as distinguished from the rezoning, nor why the moratorium should not be within the ambit of reasonable investment-backed expectations. "We can easily imagine circumstances in which delay was aimed more at one person, or was more protracted with less justification, and more indicative of a taking. But the evidence in this case does not approach that situation." *Id*.

One issue that was not decided by the courts below was Sheffield's contention that the plat that it attempted during a short gap in the legislative moratorium (more accurately, moratoria) gave it vested rights. The city "rejected the plat on the asserted ground that the City Manager had continued the moratorium in effect without Council action." *Id*. at 2. The court ruled remanded the claim for a declaration that its rights were vested by the plat submission. *Id*. at 15.

C. Diamond B-Y Ranches v. Tooele County, ___ P.3d ____, 2004 WL 905956 (Utah App. Apr. 29, 2004)

The Utah appellate court, reversing a trial court ruling in the county's favor, held that whether the landowner had a property interest in the granting of a conditional use permit for sand and gravel extraction was not dispositive. Rather, the trial court would have to examine whether denial of the permit so reduced the economic uses to which the land could be put as to constitute a taking.

IV. Penn Central - *Investment-Backed Expectations*

A. Avenal v. Louisiana, 858 So.2d 697 (La. App. Oct. 15, 2003)

A Louisiana appellate court affirmed a trial court ruling that the change in water salinity levels resulting from joint federal-state coastal restoration made the plaintiffs' underwater lease area unsuitable for oyster propagation and thus required compensation under the state takings clause. In a well-known earlier decision involving the same situation and some of the same plaintiffs, Judge Jay Plager of the U.S. Court of Appeals for the Federal Circuit had ruled against the lessees, who he deemed were well aware that government activities were modifying salinity levels. "It is hard for them to claim surprise … that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage." *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996).

V. Penn Central - *Development Moratoria as Takings.*

Background: In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court held that whether development freezes imposed by planning moratoria constituted compensable takings would have to be determined by applying the *Penn Central* multi-factor criteria.

A. Leon County v. Gluesenkamp, 873 So.2d 460 (Fl. App. May 10, 2004)

In a decision reversing the trial court's determination, the Florida Court of Appeals held that a development moratorium extending for almost two years did not constitute a taking under *Penn Central*. It stressed that the land subsequently was sold for a profit and that the planning efforts that gave rise to the moratorium had been in place when the landowner purchased.

VI. Penn Central – *Relevant Parcel*

A. Zanghi v. Board of Appeals of Bedford, 807 N.E.2d 221 (Mass. App. May 3, 2004).

The intermediate Massachusetts court rejected a taking claim based on a zoning order requiring that buildable lots be one-half acre minimum in size, with no portion located within a flood plain or a designated wetland. The court asserted that the owner's lots could be combined for cluster housing and that there also were viable agricultural uses of the land.

B. Milton v. Williamsburg Township. Bd. of Zoning Appeals, 2004 WL 549583 (Ohio App., Mar. 22, 2004) (not reported in N.E.2d)

The Ohio appellate court held that zoning amendments that increased the minimum lot-size requirement for residential development from approximately one-half acre to 1.5 acres did not constitute a taking. Since the plaintiffs could combine and build a house upon three non-conforming lots, they had not been deprived of economically beneficial use of their property

VII. Compelled Speech Trumps Shopping Center Owner's Right to Exclude

Background: In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court ruled that members of the public had no First Amendment right to expressive conduct within privately owned shopping centers. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), however, the Court subsequently held that shopping center owners had no Fifth Amendment right to *prevent* such expressive activity if it were protected by state law. Since then, several states have decided *PruneYard* cases, with split results.

A. Wood v. State, 2003 WL 1955433 (Fla. Cir. Ct. Feb. 26, 2003) (not reported in So.2d.)

In *Wood*, a Florida appellate court has adopted the *PruneYard* approach as a matter of first impression in that state. In overturning a trespass conviction, it declared that the state constitution "prohibits a private owner of a 'quasi-public' place from using state trespass laws to exclude peaceful political activity." With no analysis of cases involving remotely similar facts, it concluded: "This state has long recognized that the exercise of the right to petition is a form of democratic expression at its purest. . . . Citizens of this state should be entitled to no less protection than citizens of other states." 2003 WL 1955433 at 2. Apparently, "citizens," in this context, do not include property owners.

VIII. *Dolan* - Individual Determination and Proportional Impact

Background: In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court held that, in order to condition issuance of a development permit on the exaction of a property interest, the city had to show that its administrative determination was based on an individualized determination and roughly proportional to the burden created by the proposed development. Several recent cases help elucidate the requirements of *Dolan*.

A. City of Olympia v. Drebick, 83 P.3d 443 (Wash. App., Jan. 22, 2004)

Invoking the *Dolan* decision, the Washington Court of Appeals ruled that a state statute should be interpreted as providing that a municipality could not impose a traffic impact fee based on city-wide average figures. Instead, it had to base the assessment on a property-specific calculation.

B. Town of Flower Mound v. Stafford Estates Limited Partnership, ___ S.W.3d ____, 2004 WL 1048331 (Tex., May 7, 2004)

The Texas Supreme Court held that the town failed to carry its burden of demonstrating that the conditioning of development approval for a 247-unit residential project upon the owner rebuild a public roadway abutting the development was roughly proportional to the impact of the development. It therefore found the requirement a taking under the state constitution. The court also rejected the argument that exactions covered by the *Dolan* test are limited to those requiring an actual transfer of real property to the locality, i.e., "dedicatory" exactions."

C. Hallmark Inns & Resorts, Inc. v. City of Lake Oswego, 88 P.3d 284 (Ore. App. Apr. 14, 2004)

The Oregon Court of Appeals affirmed the decision of the state Land Use Board of Appeals that the city could require the developer of a major commercial development to provide a pedestrian pathway across the property, connecting a residential area on one side to a shopping center on the other. The court held that, for purposes of *Dolan*, the city's attempts to quantify the impact of the development on the city's traffic circulation pattern correctly took into account not only the immediately projected uses of the property, but also potential uses in the future that were permitted under the city's property development authorization.

IX. State "Ripeness" Requirements

A. Miller v. Town of Westport, 842 A.2d 558 (Conn. Mar. 16, 2004)

The state trial court had ruled that the former owner of a parcel could not prevail on a temporary takings claim, because the validity of the zoning board of appeal's denial of a variance never had been decided due to the withdrawal of the administrative appeal. The state supreme court reversed. It ruled that "the denial of a variance by a zoning board of appeals is considered a final decision by an initial decision maker, which is all that is required to establish finality in order to bring a takings claim, and that once the zoning board of appeals makes its decision, the regulatory activity is final for purposes of an inverse condemnation claim," and that an administrative appeal is not necessary in order to bring an inverse condemnation action. *Id*. at 563-564 (citing *Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465 (1998)). Moreover, the doctrine of collateral estoppel did not pre-

clude the landowner from litigating all relevant factual issues in an inverse condemnation claim, regardless of whether those issues had been decided by a zoning board of appeals in ruling on the plaintiff's variance applications. *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107 (2002). "Simply put, our decisions in *Cumberland Farms I* and *Cumberland Farms II* clearly recognize that a plaintiff is not required to appeal a decision of the zoning board of appeals denying a variance in order to bring an inverse condemnation claim, and also that the plaintiff is entitled to *de novo* review of the factual issues underlying its inverse condemnation claim regardless of the prior determinations of those issues by the zoning board of appeals." *Miller* at 564.

X. Calling "Zoning" and "Easements" by Their Proper Names

Background: Confucius taught that if we don't call things by their proper names we can't understand them and, hence, cannot deal with them correctly. Of course, it's difficult to teach people something when their livelihoods depend on their not understanding it.

A. Greater Atlanta Homebuilders Association v. DeKalb County, 588 S.E.2d 694 (Ga. Nov. 10, 2003)

A county ordinance conditioned the issuance of all new building or land development permits in the county upon the submission of a tree survey and tree protection plan by the applicant and its approval by the County Arborist. The Homebuilders Association challenged the validity of the law, asserting that it was not enacted in accordance with the state Zoning Procedures Act, which provided minimum due process standards. The court noted that a zoning ordinance "is one that establishes 'procedures and zones or districts ... which regulate the uses and development standards of property within such zones or districts.'" *Id*. at 696 (citation omitted). The court upheld the ordinance, asserting that "[t]he Tree Ordinance applies to every building and development permit that allows land disturbance, regardless of the zoning district. The Tree Ordinance contains only three references to zones or districts." *Id*.

The ordinance contained extensive specifications of the size, type, and number of trees required. The dissent emphasized that "the primary substantive provisions of the ordinance, which specify where trees are to be saved and what densities are required upon completion of a project, depend on several different combinations of existing zoning classifications." *Id*. at 700.

B. Dudek v. Umatilla County, 69 P.3d 751 (Or.App. May 15, 2003)

Neighbors challenged a county decision to permit the partitioning of land without requiring a recorded road easement meeting county standards. The court found that the county's decision apparently was made in part to avoid violating the requirements of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Oregon appellate court held that, despite the general nature of the county ordinance, the decision as to whether to require an easement in a given case involved considerable administrative discretion, thus triggering *Dolan*'s requirement of "rough proportionality" between burdens placed on the community and corresponding governmental exactions. The neighbors claimed that the requirement here was not an exaction of "property," but rather an exaction of money, since the partitioning landowner could be forced to purchase land for reconveyance to the county. The Oregon courts have interpreted *Dolan* as not applicable to the payment of a "fee."

The court rejected this analysis. "An applicant who is required to purchase and then dedicate property is in a very similar position to an applicant who is required to dedicate a possessory interest in property that is owned at the time of the application. That condition effectively is a requirement to dedicate a property interest … and is therefore subject to heightened scrutiny under *Dolan*. *Id*. at 758.

C. Insist on a Factual Record (But Don't Shout)

Background: "Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings." *Bass Enterprises Products Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998) (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

1. *B.A.M. v. Salt Lake County*, 87 P.3d 710 (Utah App. Feb 20, 2004).

The county Planning and Zoning Commission had given preliminary approval for a proposed subdivision, conditioned upon the developer dedicating a wider strip of land than it had agreed, based on the anticipated future road widening. The developer said this would require reconfiguration of building lots and would result in substantial loss. Without holding a hearing, the Commission then denied the development application. The developer appealed to the county Board of Commissioners, which upheld the PZC without conducting a hearing. The developer brought suit in district court. Under state law, the district court "shall 'presume that land use decisions and regulations are valid;

and *... determine only whether or not the decision is arbitrary, capricious, or illegal*'" *Id.* at 712 (emphasis supplied by appellate court). The trial court undertook its own factual determination and concluded that there had been an unconstitutional taking. The appellate court reversed on the grounds that state law did not permit the trial court to develop its own record, but, rather, that the trial court should have found the lack of an evidentiary record to indicate that the county's initial determination was arbitrary and capricious. The appellate court then remanded for a rehearing by the PZC. The dissent admonished the prevailing attorney:

> "To the extent BAM has successfully persuaded me of the fundamental soundness of its position, that success should not be attributed, in any degree, to its counsel's unrestrained and unnecessary use of the bold, underline, and "all caps" functions of word processing or his repeated use of exclamation marks to emphasize points in his briefs. Nor are the briefs he filed in this case unique. Rather, BAM's counsel has regularly employed these devices in prior appeals to this court. While I appreciate a zealous advocate as much as anyone, such techniques, which really amount to a written form of shouting, are simply inappropriate in an appellate brief. It is counterproductive for counsel to litter his brief with burdensome material such as "WRONG! WRONG ANALYSIS! WRONG RESULT! WRONG! WRONG! WRONG!" It is also at odds with [the state] Rules of Appellate Procedure." *Id.* at 734 n.30 (Orme, J., dissenting).

XI. Other Issues

A. Schoene *Rides Again*

Background: In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court upheld the uncompensated destruction by Virginia of cedar trees that might harbor the communicable plant disease "cedar rust." While not harmful to the cedars, the rust was destructive to apple trees, which were much more commercially important in the state.

1. *In re Property Located at 14255 53rd Avenue*, 86 P.3d 222 (Wash.App. Mar. 22, 2004)

The Washington Court of Appeals held that the state Department of Agriculture's destruction of healthy trees on private land within a one-eighth mile radius of the site of the escape of citrus long-horned beetles did not effect a taking. It noted that the insect was a "dangerous pest."

The court rejected the contention that entering upon private land and destroying valuable trees constituted a per se taking under *Loretto v. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Rather, the court invoked the "line of cases applying what is known as the law of necessity or the conflagration doctrine." *Id.* at 225. "When immediate action is necessary in order to avert a great public calamity, private property may be controlled, damaged or even destroyed without compensation. . . . If the individual who thus enters and destroys private property happens to be a public officer whose duty it is to avert the impending calamity, the rights of the owner of the property to compensation are no greater." *Id.* at 226 (quoting 1 *Nichols on Eminent Domain*, 2d Ed. 263 Sec. 96, quoted in *Short v. Pierce Co.*, 78 P.2d 610, 615 (Wash. 1938).)

B. Mineral Rights "Cover-Up" is a Taking

1. *Alabama Department of Transportation v. Land Energy Limited,* ___ So.2d ____, 2004 WL 226094 (Ala. Feb. 6, 2004)

The Alabama Department of Transportation (ADOT) purchased the surface rights over some 34 acres of a 120-acre parcel for use as a highway right of way. ADOT then denied Land Energy, which owned sub-surface mineral rights in coal, the right to access them. The court found that there was sufficient bases for the jury to determine that there had been a regulatory taking and to award $650,000 in compensation.

XII. Wetlands Ripeness

A. Commonwealth v. Blair, 805 N.E.2d 1011 (Mass. App., Apr. 2, 2004)

The Massachusetts Appeals Court upheld a trial court determination that the owners of waterfront property had violated the state Watershed Protection Act by altering their beach and lawn without first obtaining a state permit. The court rejected the landowner's federal and state takings challenges to this enforcement action on ripeness grounds, since the owners had not sought a variance, as provided by the Act.

XIII. Condemnation Blight

A. *Merkur Steel Supply, Inc. v. City of Detroit,* 680 N.W.2d 485 (Mich. App. Mar. 9, 2004)

The Michigan Court of Appeals affirmed a trial court's award of some $ 7 million based on a jury determi-

nation of "condemnation blight." The court declared:

> [T]he city appears to minimize and mischaracterize plaintiff's claims …. This is not simply a case where a company's attempt to expand its business interferes with the city's management of its airport. Instead, this is essentially a case of blight by planning. In this case, the city of Detroit wanted to expand Detroit City Airport and it needed to condemn the properties around the airport. However, the city's plans were not concrete and, for over a decade, the city has failed to actually expand the airport. While the city has condemned some of the surrounding area and has viewed it as practically uninhabited or vacant, the city has failed to formally condemn plaintiff's property. However, although the city has never formally condemned plaintiff's property, it has made it virtually impossible for plaintiff to expand its own business. Essentially, the city, in over ten years, has thrown "roadblock" after barrier to discourage the expansion of plaintiff's business. *Id.* at 492.

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Footnotes

[1] Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

[2] Dana Berliner, *Public Power, Private Gain* (Washington D.C.: Institute for Justice, 2003). The text may be downloaded from http://ij.org/publications/castle/.

Federalism and Separation of Powers

The Federalism Aspect of the Establishment Clause

*By William H. Hurd & William E. Thro**

Introduction

In the early 21st century, the generally accepted understanding of the Establishment Clause is largely defined by two characteristics.[1] First, despite the fact that it refers only to Congress, the Establishment Clause is generally regarded as limiting the States as well.[2] Second, and more significantly, the Establishment Clause is generally regarded as mandating "a freedom from laws instituting, supporting, or otherwise establishing religion."[3] In this sense, the Establishment Clause, as interpreted by the courts, has "tended to prohibit contact between religious and civil institutions."[4] This second characteristic of the general understanding constitutes the "Libertarian Aspect" of the Establishment Clause.[5]

Yet, there is another aspect of the Establishment Clause. This aspect, which we will here call the "Federalism Aspect," prohibits the National Government from interfering with the States' exercise of their sovereign authority to make religious policy in areas where government action is not precluded by the National Constitution. In other words, in the zone between what the Establishment Clause prohibits and what the Free Exercise Clause requires, the National Government must allow the States to make their own policy choices. The Federalism Aspect of the Establishment Clause differs from the Libertarian Aspect in two distinct ways. First, whereas the Libertarian Aspect limits both the States and the National Government, the Federalism Aspect limits only the National Government. Second, whereas the Libertarian Aspect is designed to preclude unwarranted government intrusion into the sphere of religion, the Federalism Aspect focuses only on the preservation of the States' sovereign authority.

The purpose of this Article is to examine briefly the Federalism Aspect of the Establishment Clause. This purpose is accomplished in three distinct sections. The first section explores the Federalism Aspect of the Establishment Clause at the Founding. The second section explains how the application of the Establishment Clause to the States has changed the sweep of its Libertarian Aspect, while leaving intact the Federalism Aspect. The third section details the continuing practical impact of the Federalism Aspect of the Establishment Clause.

I. The Federalism Aspect at the Founding

The adoption of the Constitution in 1788 brought about a transformation.[6] Although the People could have chosen to transfer all sovereignty from the States to the new National Government, they did not do so. Alternatively, the People could have chosen to retain all sovereignty in the States and, thus, make the United States nothing more than an inter-governmental compact; however, they did not choose this course, either. Instead, the People, for the first time in the history of government, divided sovereignty between two separate sovereigns.[7] As Justice Kennedy observed:

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[8]

Justice Kennedy's observation that power was divided between dual sovereigns is an accurate statement of original intent.[9] James Madison, writing in *The Federalist*, observed:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each [is] subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.[10]

In other words, as the Court observed in 1992, "[T]he Constitution protects us from our own best intentions: *It divides power among sovereigns* . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[11] Although

the People transferred many sovereign powers from the States to the new National Government, the States retained "a residuary and inviolable sovereignty."[12] The principle that the Constitution divides power between *dual sovereigns* is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones.[13] Thus, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[14]

Among these sovereign powers retained by the States at the Founding was the power to make religious policy and even to establish a religion if the State so desired.[15] As one of America's leading constitutional historians observed:

> [A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.[16]

Thus, when the Establishment Clause was adopted in 1791, it was intended to serve two distinct objectives. The first objective was to protect the *People* of the United States by forbidding the Congress from establishing a national religion, however "establishment" might be defined. The second objective was to protect the *States*—and their citizens—against any federal efforts to interfere with their own religious policies, whatever those policies might be.[17] As Justice Thomas recently noted, "[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."[18] Moreover, in his classic *Commentaries on the Constitution of the United States,* Justice Story stated that the Religion Clauses were intended "to exclude from the national government *all power* to act upon the subject [of religion]."[19] Indeed, "[t]he *whole power* over the subject of religion is left *exclusively* to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."[20] Similarly, Professor Schrager has explained:

> [T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.[21]

In other words, except as they might be limited by their own constitutions, State governments were free to adopt any religious policy they wished, free from federal oversight or limitation.[22]

II. The Federalism Aspect After Incorporation

With ratification of the Fourteenth Amendment in 1868, federal law prohibited the States from depriving any person of "life, liberty, or property, without due process of law."[23] Even so, for several decades, this restriction was not regarded as having any affect on state religious policy. Then, in 1940, the Supreme Court decided *Cantwell v. Connecticut*, construing the Fourteenth Amendment to make the Free Exercise Clause applicable to the States.[24] In 1947, the Court decided *Everson v. Board of Education,*[25] making the Establishment Clause applicable to the States. As the result of these two decisions, the sovereign authority of the States to make religious policies was severely curtailed.[26] However, that authority was not wholly eliminated.[27] As the Supreme Court has repeatedly recognized, there is "play in the joints" between what the Establishment Clause prohibits and what the Free Exercise Clause requires.[28] It is here where the States retain authority to adopt policies regarding religion.

A few examples illustrate the point:

Suppose that a professor at a state university requires students to attend every lecture. A Jewish student requests to be excused so that he may observe Yom Kippur. Because the professor's attendance policy is generally applicable and is not intended to discriminate against religion, the Free Exercise Clause does not require the professor to excuse the student.[29] However, if the professor allows the Jewish student to be excused on what the student regards as the holiest day of the year, the Establishment Clause is not offended. This is so even though the professor does not excuse the absence of another student who wishes to take off the day to attend another First Amendment activity, a Bruce Springsteen concert.

Similarly, suppose that a police department requires all officers to wear pants as part of their uni-

form. A female officer, who is a Jehovah's Witness, has a religious scruple against wearing such historically male attire. She asks permission to wear a skirt instead. Because the policy is applicable to everyone, the department could refuse the request without violating the Free Exercise Clause.[30] Yet, it need not be so unbending. The department could also grant the request and not offend the Establishment Clause. This is so even though the department continued to enforce the policy for female officers who simply found the required attire to be objectionable for aesthetic reasons.

Or, suppose that a public school cafeteria serves ham for lunch every Friday. A Muslim student asks for an alternative meal, noting that the consumption of pork is prohibited by his faith. Because the policy of serving ham is generally applicable and not intended to single out a particular religious belief, the school could probably refuse the Muslim's request.[31] At the same time, the school could provide the Muslim a different meal and not offend the Establishment Clause. This is so even though similar accommodations were not made for students who object to pork based on its taste.

Finally, suppose that a State wishes to implement a college grant program to enable students to obtain undergraduate degrees. The program could include grants to students wishing to study for the ministry, or it could exclude such a course of study from funding by the program. The Establishment Clause does not prevent the former,[32] but neither does the Free Exercise Clause (or Free Speech Clause) preclude the latter.[33]

In all four examples, the State is not required to accommodate or support the religious interest, but it may choose to do so. Even though the Free Exercise Clause and the Establishment Clause apply to the States, there remains a small but important zone in which States retain discretion to make religious policy.

Within this zone of discretion, the Federalism Aspect of the Establishment Clause still holds sway to protect state authority from federal encroachment. The incorporation of the Religion Clauses imposed additional restraints upon the States; however, it did not expand the power of the National Government by authorizing it to dictate the religious policies of the States.[34] To the extent that the States retain sovereign authority to make religious policy, the National Government is still prohibited from interfering with the exercise of that authority, just as it was when the Bill of Rights was first adopted.[35] In other words, in 1791, when the Bill of Rights served only as a restraint against the National Government, the Federalism Aspect of the Establishment Clause prevented Congress from telling the States whether to establish a religion or even whether to accommodate religion. Today, the same Federalism Aspect still precludes Congress from telling States whether to accommodate religion. So long as a State's decision whether to accommodate religion falls within the constitutionally permissible zone of discretion, Congress may not interfere.

III. The Practical Effects of the Federalism Aspect

Although it is clear that the Framers intended for the Establishment Clause to have a Federalism Aspect, and although it is clear that incorporation did not wholly abolish the States' sovereign authority to make religious policy, the practical implications of the Federalism Aspect may not be immediately clear. After all, the National Government, which is already limited by the Libertarian Aspect, rarely makes religious policy, much less tries to make religious policy for the States. Thus, one must wonder whether the Federalism Aspect of the Establishment Clause is one of those rare constitutional principles that, like the Republican Form of Government Clause or the Equal Footing Doctrine, have little practical impact on governmental decision-making.

The answer to this question is two-fold. First, while it is true that the National Government generally has not interfered with the States' sovereign authority to make religious policy, it is easy to imagine circumstances in which the National Government might attempt to do so. For example, Congress might declare that if a State has a school choice program, it must include—or must not include—religious schools. Similarly, Congress might mandate that a State provide—or not provide—financial assistance to college students studying for the ministry. Congress might also seek to ensure that the States provide—or withhold—certain state tax benefits to members of the clergy. All of these actions, Congress might seek to justify by its already-expansive reading of the Spending Clause and Commerce Clause.

Second, Congress has recently passed a statute that represents a clear attempt to interfere with the States' sovereign authority to set religious policy within the zone of discretion between the two Religion Clauses. It is known as the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[36] Found within RLUIPA is a set of "Prison Provisions," which

mandate that, if a State receives federal funds for correctional purposes, the State must implement the prison religious accommodation policy favored by Congress—a policy different from the policies that many States have chosen to adopt on their own.[37] Specifically, these "Prison Provisions" of RLUIPA mandate that, whenever the State's policies of general applicability impose a "substantial burden" on religion, the State must accommodate the religious exercise unless it can demonstrate that its interests are compelling and that its interests cannot be achieved through less intrusive means.[38] Thus, the Prison Provisions have the effect of subjecting the denial of religious accommodation to strict scrutiny, the most demanding standard known to our constitutional jurisprudence. As a practical matter, this means, that, in the prison context, the State can rarely, if ever, exercise its discretion to grant or deny an accommodation of religion.

To illustrate, suppose that a prison has a policy that inmates may not wear hats or other head coverings because prisoners might use them to hide weapons or other contraband. A Sikh prisoner says that his religious beliefs require him to wear a turban. Because the policy is one of general applicability, the Constitution does not compel the State to provide accommodation.[39] Yet, the Prison Provisions require the State to accommodate the request unless the State can show that the denial satisfies the burden imposed by strict scrutiny.

Of course, policy makers might debate whether a State should accommodate requests to wear a head covering. Yet, it is the States' prerogative to make those policy choices. Within the zone of discretion, the Constitution protects the authority of the States to accommodate or not as they see fit. When the Federal Government takes away that religious policy discretion, as it has with the Prison Provisions, then the Federal Government violates the Establishment Clause.

By enacting the Prison Provisions, Congress has violated the Federalism Aspect of the Establishment Clause because it has interfered with States' discretion to fill "the play in the joints" as they deem best. Though the Prison Provisions *favor* the accommodation of religion, they interfere with State sovereignty no less than if Congress had *prohibited* such accommodation. If Congress may constitutionally enact the Prison Provisions, it is difficult to imagine how the Constitution could protect the States against a future Congress bent on using that same power for a contrary purpose.

Conclusion

As originally envisioned by the Framers, the Establishment Clause had both a Libertarian Aspect and a Federalism Aspect. The Libertarian Aspect protected the People from the National Government. The Federalism Aspect ensured that the States would be able to exercise their sovereign authority to make religious policy subject only to the restriction imposed by their own constitutions. Although the adoption of the Fourteenth Amendment and resulting incorporation of the Religion Clauses severely limited the sovereign authority of the States to make religious policy, these developments did not wholly abolish the State's authority. Nor did they alter the Federalism Aspect of the Establishment Clause. As a result, the Establishment Clause continues to limit the power of the National Government to interfere with the States' religious policy choices within the zone of discretion between the two Religion Clauses.

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Footnotes

[1] As Professor Leonard W. Levy observed, "Establishment Clause cases rarely concern acts of the national Government. The usual case involves an act of state, and the usual decision restricts religion in the public schools or government aid to sectarian schools." Leonard W. Levy, The Establishment Clause 165 (1986).

[2] The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

[3] Phillip Hamburger, Separation of Church and State 2 (2003).

[4] *Id.* at 3.

[5] Although it is clear that the Framers intended for the Establishment Clause to have a Libertarian Aspect, the nature of the Libertarian Aspect has been transmogrified so as to preclude a much wider range of government activity than was contemplated by the Framers. In his monumental work, Professor Hamburger explains that the Framers intended for the Libertarian Aspect simply to prohibit the National Government from providing benefits to a particular denomination or from discriminating against the members of particular sects. However, for a variety of reasons, including a desire to limit the power of the Roman Catholic Church and increasingly secularized social attitudes, this value of Disestablishment was transformed into the very different value summarized by the phrase, "Separation of Church and State." *See generally* HAMBURGER, *supra* note 3. As such, the Establishment Clause has been sometimes used to strike down state activity impinging very little—if at all—on the individual "liberty" that, under the Fourteenth Amendment, is the ostensible basis for judicial action in this area. Such an expansive use of the Establishment Clause is, however, a topic beyond the scope of this paper.

[6] Under the terms of the Constitution, it went into effect when nine of the thirteen States ratified it, but only for the ratifying States. U.S. CONST. art. VII. In June of 1788, New Hampshire became the ninth state to ratify the document. Virginia and New York—prominent States necessary for the success of the new government—ratified in the summer of 1788. North Carolina ratified late in 1789 and Rhode Island consented in 1790.

[7] As the Court has explained:

> Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "*specifically recognizes the States as sovereign entities*." Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. Any doubt regarding the constitutional role of the States as *sovereign entities* is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Alden v. Maine, 527 U.S. 706, 713-14 (1999) (citations omitted) (emphasis added).

[8] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[9] The idea of divided sovereignty has roots in efforts by the Colonists to reach a political accommodation with their kinsmen in Britain. As early as 1768, John Dickinson, in *The Letters from a Pennsylvania Farmer*, suggested that sovereignty was divided between the British Parliament and the Colonial Legislatures. *See* 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 46-47 (1991).

[10] THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of state governments; and these will have the same disposition towards the General Government.").

[11] New York v. United States, 505 U.S. 144, 187 (1992) (emphasis added).

[12] Printz v. United States, 521 U.S. 898, 919 (1997) (quoting James Madison in *The Federalist No. 39*).

[13] *See id.* at 919.

[14] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991). Moreover, because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), the Court has developed certain rules to preserve the delicate equilibrium that is dual sovereignty. For example, the Court required that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (citations omitted); *see also Gregory,* 501 U.S. at 460-61 (holding that a clear statement is required to dictate qualifications for state officials); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that there is no abrogation of sovereign immunity without a clear statement); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (Pennhurst I) (holding that a clear statement is required to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

[15] For a comprehensive review of the individual States policies toward religions, see generally LEVY, *supra* note 1, at 25-62.

[16] *Id*. at 74.

[17] Indeed, as Professor Hamburger has noted, some scholars have suggested that the *only* purpose of the Establishment Clause was to protect the States' policy choices regarding the establishment of religion. *See* HAMBURGER, *supra* note 3, at 106 n.40.

[18] Newdow v. Elk Grove Unified Sch. Dist., 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring).

[19] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833) (available at www.constitution.org/js/js_000.htm) (emphasis added). Of course, Justice Story's monumental work has long been regarded as a leading authority on original intent.

[20] *Id.* (emphasis added).

[21] Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-42 (1998)).

[22] *See* Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) (holding that no provision of the Bill of Rights is applicable to the States); *see also* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist, C.J., White, & Thomas J.J., dissenting) (noting that the Establishment Clause was adopted, in part, "to protect state establishments of religion from federal interference").

[23] U.S. CONST. amend. XIV.

[24] 310 U.S. 296, 303 (1940).

[25] 330 U.S. 1, 15-16 (1947).

[26] *See, e.g.,* Wisconsin v. Yoder*,* 406 U.S. 205, 214-15 (1972) (finding that the Free Exercise Clause allows parents to refuse to send children to school beyond the age of thirteen); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 224-25 (1963) (holding that the Establishment Clause prohibits the practice of daily Bible readings in the public schools, even where students are allowed to absent themselves upon parental request).

[27] At least one Justice believes that the Libertarian Aspect of the Establishment Clause does not curtail state authority at all. Justice Thomas recently stated:

> Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand. The best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Federal Government, to be free from coercive federal establishments. Incorporation of this individual right, the argument goes, makes sense. I have alluded to this possibility before.
>
> But even assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. For the reasons discussed above, it is more likely that States and only States were the direct beneficiaries. Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion. Nevertheless, the potential right against federal establishments is the only candidate for incorporation.

Newdow v. Elk Grove Unified Sch. Dist., 124 S. Ct. 2301, 2331 (2004) (Thomas, J., concurring) (citations omitted).

[28] Locke v. Davey, 124 S. Ct. 1307, 1311 (2004); *see also* Texas Monthly, Inc. v. Bullock*,* 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) ("'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' It is well established, too, that 'the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'") (citations omitted).

[29] *See* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

[30] *See id.*

[31] *See id*.

[32] Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

[33] *Locke*, 124 S. Ct. at 1307.

[34] In some extraordinary circumstances, Congress may be able to dictate how the States exercise their discretion with respect to religion. Section 5 of the Fourteenth Amendment empowers Congress to enforce the Establishment Clause and the Free Exercise Clause when it can be demonstrated that the States have engaged in unconstitutional conduct and when the resulting legislation is proportionate to the constitutional violations. City of Boerne v. Flores, 521 U.S. 507 (1997). In determining whether legislation is proportionate in contexts other than the Religion Clauses, the Supreme Court has upheld prophylactic measures that require or prohibit more than mere adherence to parameters imposed directly by the Constitution. *See, e.g.,* Tennessee v. Lane, 124 S. Ct. 1978, 1985 (2004). Assuming that Section 5 allows Congress to act in a similar fashion in the area of religion, and assuming that the other prerequisites of Section 5 are met, then a congressional mandate for States to exercise their discretion in a particular manner would not violate the Establishment Clause.

[35] Obviously, this means that the Establishment Clause applies against the National Government in ways for which there is no comparable application against the States. However, such a difference in application is mandated by the historical purposes of the Establishment Clause. *See* Zelman v. Simmons-Harris*,* 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. 'States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government.' Thus, while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.") (citation omitted); *see also* Roth v. United States, 354 U.S. 476, 503-504 (1957) (Harlan, J, dissenting) ("The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal."); Beauharnais v. Illinois, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting) ("The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.").

[36] 42 U.S.C. §§ 2000cc through 2000cc-5.

[37] Specifically, the Prison Provisions state:

> Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes

42 U.S.C. § 2000cc-1. RLUIPA also has another part, which primarily affects local governments, requiring that religious organizations be given preferential treatment with respect to local planning and zoning laws. *See* 42 U.S.C. § 2000cc ("Land Use Provisions").

[38] 42 U.S.C. § 2000cc-1(a).

[39] *See* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990). Even before the 1990 decision in *Smith*, strict scrutiny was not the operative standard by which the courts evaluated limitations on the religious rights of prisoners. Instead, a rational relationship standard was prescribed. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Safley, 482 U.S. 78 (1987). After *Smith*, it is not clear whether prisoner religious rights are now governed by the standard that case prescribes for other contexts or by the *Turner/O'Lone* standard; however, under either approach, prison officials could forbid the wearing of turbans, as part of a general ban on headgear, without violating the Constitution. *See, e.g.,* Hines v. S.C. Dep't of Corrections, 148 F.3d 353, 357 (4th Cir. 1998) (declining to resolve which standard governed prison grooming policy, but upholding policy under either approach).

The Nevada Gambit: Is Republican Government Still Guaranteed?

*By John C. Eastman**

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state Constitution, which prohibited the state Legislature from imposing new or increased taxes without the concurrence of two-thirds of the Members of each house of the Legislature.[2] Tax measures that do not receive the necessary two-thirds vote may still be adopted, but they must be submitted to the voters for approval before they can take effect.[3]

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn proposed to the Legislature a budget which included a $980 million tax increase,[4] by far the most massive tax increase in the State's history. Unable to garner the two-thirds vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution.[5] Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a few education funding bills.

Because the Nevada Constitution mandates a balanced budget,[6] and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature (assuming it was anywhere near the amount proposed) was going to require a tax increase of $800 to $900 million.[7] The Legislature did not have the option to consider reductions elsewhere in the budget as an alternative to a tax increase—the Governor's special session proclamation did not give the Legislature such authority. Moreover, the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved.[8]

During the course of two special sessions, the Nevada Assembly was unable to muster a two-thirds vote for any of the tax increases that reached the Assembly floor, although it was widely believed that a smaller tax increase would receive the necessary two-thirds vote.[9] Within minutes of midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn brought suit against the Nevada Legislature and every one of its Members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase. His apparent goal was to balance the budget and fund education by the means he had proposed, but for which he had been unable to obtain the constitutionally-required level of support among state legislators.

A group of legislators filed a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could consider reductions in the spending increases that had been approved earlier in the year.[10] Roughly fifty different organizations and individuals filed nearly a dozen *amicus curiae* briefs either in support of or in opposition to the Governor's petition.

On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "*simple majority rule*" rather than the two-thirds vote required by Article 4, § 18(2) of the Nevada Constitution,[11] unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation.[12] The court acknowledged the constitutional validity of the two-thirds vote provision of Article 4, § 18(2), but then found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. Despite the fact that the two-thirds vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education."[13]

Three days later, on Sunday, July 13, the Nevada Assembly conducted a floor vote on Senate Bill 6 ("SB 6"), a bill that sought to increase taxes in the State by $788 million. Although the bill failed to garner the two-thirds vote required by Article 4, § 18(2), the Speaker of the Assembly gaveled the bill "passed." The next morning, several members of the Nevada legislature (a number of Assemblymen and Senators sufficient to defeat the tax increase under the two-thirds vote requirement of the Nevada Constitution), joined by individual citizens, taxpayers, trade groups

and tax policy organizations, filed suit in the United States District Court for the District of Nevada. Their petition contended that the Assembly's action amounted to vote dilution and vote nullification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment[14] and ignored the structural commands of the Nevada Constitution in violation of the Republican Guarantee Clause of Article IV, § 4 of the United States Constitution.[15] The District Court, sitting *en banc*, granted plaintiffs request for a temporary restraining order that same day,[16] but by week's end it had dismissed the action, holding that it was without jurisdiction to consider the legislators' claims under the *Rooker-Feldman* doctrine.[17] The District Court suggested that the *Rooker-Feldman* doctrine also barred the claims of the non-legislators, but dismissed those claims under Rule 12(b)(6), without prejudice to re-filing in state or federal court.

Late in the evening of the next day, a Saturday, with the TRO lifted, the Nevada Assembly proceeded to consider another bill raising taxes, Senate Bill 5 ("SB 5"). SB 5 also failed to garner a two-thirds vote, but the Assembly Speaker nevertheless deemed the bill "passed," this time over a point of order objection that — in violation of parliamentary procedure — he refused to submit to a requested roll-call vote of the body.[18]

The following Monday, July 21, 2003, the group of legislators filed a Petition for Rehearing with the Nevada Supreme Court requesting that the court reconsider its ruling and recall its writ of mandamus. Their petition argued that the Nevada Supreme Court's ruling had effectively authorized the Nevada Legislature to violate federal rights under the Due Process, Equal Protection, and Republican Guarantee Clauses of the U.S. Constitution.[19] The group of legislators also filed an application for an emergency stay,[20] which the court set over for additional briefing and did not decide until summarily denying it nearly two months later on September 17, 2003 (ironically, Constitution Day).[21] The citizens and taxpayers who had joined them in the federal action filed a motion to intervene on July 21, 2003, seeking to present their federal claims to the Nevada Supreme Court as well. That motion was denied less than an hour later, in an order hurriedly signed by only four of the court's seven Justices.[22]

Late that evening, by its own account because of the changed dynamic in the Legislature produced by the Nevada Supreme Court's writ of mandamus, the Nevada Legislature adopted tax legislation by a two-thirds supermajority, in conformity with the Nevada Constitution.[23] The group of legislators who remained opposed to the tax increase then filed a motion to vacate the Nevada Court's original decision on the Nevada equivalent of *Munsingwear* grounds,[24] but the Nevada Supreme Court refused the request. Instead, it denied the petition for rehearing as moot and summarily denied the motion to vacate on September 17, 2003.[25] Justice Maupin, dissenting from the court's decision, noted that he would have granted the petition for rehearing, dissolved the mandamus, and vacated the prior majority opinion.[26]

The following March, the Supreme Court of the United States denied a petition for *certiorari* from the state court judgment.[27] In May 2004, the Ninth Circuit Court of Appeals affirmed the District Court's dismissal of the federal court action. The court did not rely upon the *Rooker-Feldman* ground as the District Court had, but instead held that the claims for injunctive and declaratory relief had become moot. It further held that the plaintiffs' unlawful vote dilution claims were not viable because the Assembly's action that deemed a tax bill "passed" without the necessary two-thirds vote had not actually led to the imposition of an unconstitutional tax.[28] At the time of this writing, a petition for writ of *certiorari* to review the Ninth Circuit's decision remains pending. If the Supreme Court denies the petition, a key, admittedly constitutional structural provision of the Nevada Constitution, recently enacted by overwhelming majorities of the citizens of Nevada as a restriction on government itself, will have been rendered a dead letter.

Of course, as a general matter, a state supreme court is the last word on matters of state law, including state constitutional law. But there are times when the state court's "interpretation" of state law is so far removed from existing precedent and canons of construction that federal rights might be implicated, rights under the Due Process Clause, for example, or even the Republican Guarantee Clause.

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government."[29] Claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances,[30] but recent court statements suggest that this view might be open to discussion. Justice O'Connor noted in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[31] "Contemporary commentators," she

noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances."[32] Since the Supreme Court's decision in *New York*, several lower courts have acknowledged that the Republican Guarantee Clause might present justiciable questions in certain circumstances, but thus far all have found that the Clause had not been violated in the particular circumstances at issue in the cases.[33]

The extraordinary actions taken by all three branches of the Nevada government to nullify a constitutional restriction imposed by the people of the State should lead to a reconsideration of the nonjusticiability of the federal guarantee of a republican form of government. Other states are already beginning to follow Nevada's lead, with great risk to the idea of self-government and the rule of law. In California, the Superintendent of Public Instruction threatened to file his own "Nevada-type litigation" in response to a standoff in that state's budget battle.[34] In Kentucky, the Governor has for the past two years taken it upon himself to write budgets in order to end-run a legislative stalemate.[35] In Arizona, an appropriations bill comprehensively covering all aspects of governmental operations *except education* was introduced, apparently in an attempt to set up a Nevada-style nullification of the restrictions on taxation in that state's constitution. And in Massachusetts, the Legislature unconstitutionally refused to forward to the people a proposed constitutional amendment confirming the historical, one-man/one-woman status of marriage. Its abdication of duty set the stage for the Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health*,[36] which altered the definition of marriage by judicial fiat, ignoring not only the long-standing existing law but also the people's thwarted effort to confirm that law. In each of these cases, state governmental officials have altered the method by which state government functions, making fundamental decisions not only without the input of the people but also in direct defiance of the people's will.

The Tenth Circuit noted in 1995 that the essence of the federal constitutional guarantee of a republican form of government is the right of a State's citizens to "structure their own governments as they see fit."[37] Chief Judge J. Harvie Wilkinson, writing in *Brzonkala v. Virginia Polytechnic Institute and State University*, stated that the federal courts are supposed to protect the structural preferences of a State's citizens, serving as a sort of "structural referee[ ]."[38] In *New York* itself, the Supreme Court dismissed the Guarantee Clause claim only because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government."[39]

In Nevada, the joint efforts of the Governor, Supreme Court, and Legislature permitted the imposition of a tax despite a failure to comply with the structural command of the Nevada Constitution. Their actions altered "the method" by which the Legislature functions when undertaking to impose new or increased taxes. The constitutional "method" for approving budgets in Kentucky is through the legislative process, not by proclamation of the Governor. And in Massachusetts, decisions about the nature of civil marriage are, by constitutional design, limited to the Legislature and the Governor, not the courts. In each of these states, therefore, the method by which the people have authorized their government to govern has been altered or ignored.

If there is anything to the federal guarantee for government by consent, these actions by state government officials, which have thwarted the will of the people, invite a reinvigoration of that guarantee.

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Footnotes

[1] Nev. Const. art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The two-thirds vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections. *See, e.g.*, Jim Gibbons, *Your Turn Jim Gibbons*, Reno Gazette-J., June 6, 2003, at 11A (discussing the Gibbons Tax Restraint Initiative and relating the 1994 and 1996 election results).

[2] Nev. Const. art. 4 § 18(2).

[3] *Id.* § 18(3).

[4] Guinn v. Legislature of Nev., 71 P.3d 1269, 1273 (Nev. 2003) ("Guinn I"), *opinion clarified and reh'g denied*, 76 P.3d 22 (Nev. 2003) ("Guinn II"), *cert. denied sub nom.* Angle v. Guinn, 124 S. Ct. 1662 (2004).

[5] *See id.*

[6] Nev. Const. art. 9, § 2.

[7] *See, e.g.*, Ed Vogel, *Guinn Says Threat to Close Some Schools Not Hollow*, Las Vegas Rev.-J., June 14, 2003, at 2A (noting the $1.6 billion education budget proposal, along with the need for a $ 860 million tax increase to pay for it).

[8] *See* Nev. Const. art. 5, § 9 ("[T]he Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened."); *see also Guinn II*, 76 P.3d at 27.

[9] *See Guinn II*, 76 P.2d at 28 ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase.").

[10] Supplemental Brief in Opposition to the Governor's Petition and Counter-Petition for a Writ of Mandamus and Other Extraordinary Relief at 25, *Guinn* (No. 41679). Filings in the case can be found on the Nevada Supreme Court's website: http://nvsupremecourt.us/decisions/dec_sc41679.html.

[11] *Guinn I*, 71 P.3d at 1276; *see also* Petition for Rehearing at 1, *Guinn* (No. 41679).

[12] *See* Petition for Rehearing at 5, *Guinn* (No. 41679).

[13] *Guinn I*, 71 P.3d at 1272.

[14] Angle v. Legislature of Nev., 274 F. Supp. 2d 1152, 1154 (D. Nev. 2003).

[15] *Id.*

[16] *See id.* at 1156.

[17] *Id.* at 1154-56.

[18] *See Assembly Standing Rules*, Nevada State Legislature, *at* http://www.leg.state.nv.us/70th/astdrule2.cfm (last visited Sept. 19, 2004) ("The presiding officer shall declare all votes, but the yeas and nays must be taken when called for by three members present, and the names of those calling for the yeas and nays must be entered in the Journal by the Chief Clerk.").

[19] *See* Petition for Rehearing at 5, 13-14, Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003) (No. 41679).

[20] Emergency Motion for Stay Pending Decision on Petition for Rehearing, *Guinn* (No. 41679).

[21] Guinn v. Legislature of Nev., 76 P.3d 22 (Nev. 2003) ("Guinn II"), *cert. denied sub nom.* Angle v. Guinn, 124 S. Ct. 1662 (2004).

[22] Order Denying Motion to Intervene at 1, *Guinn* (No. 41679).

[23] *See* Supplement to Petition for Rehearing and Motion to Withdraw Opinion at 2, *Guinn* (No. 41679) (discussing passage of SB 8).

[24] *See* United States v. Munsingwear, Inc., 340 U.S. 36 (1950); City of Las Vegas v. Sunward Sales, Inc., 643 P.2d 1207, 1208 (1982).

[25] *Guinn II,* 76 P.3d at 33.

[26] *Id.* at 34 (Maupin, J., dissenting).

[27] Angle v. Guinn, 124 S. Ct. 1662 (2004).

[28] Amodei v. Nev. State Senate, 2004 U.S. App. LEXIS 9407 (9th Cir. 2004).

[29] U.S. Const. art. IV, § 4.

[30] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 46-47 (1849).

[31] 505 U.S. 144, 185 (1992).

[32] *Id*. at 185 (citing John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 118 & nn. 122-123 (1980); Laurence H. Tribe, American Constitutional Law 398 (2d ed. 1988); William M. Wiecek, The Guarantee Clause of the U.S. Constitution 287-289, 300 (1972); Arthur Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 560-565 (1962); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 70-78 (1988)).

[33] *See* City of N.Y. v. United States, 179 F.3d 29 (2d Cir. 1999); Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist., 132 F.3d 1095, 1099-1100 (5th Cir. 1998); Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997); New Jersey v. United States, 91 F.3d 463, 468-69 (3d Cir. 1996); Padavan v. United States, 82 F.3d 23, 27-28 (2d Cir. 1996); Kelley v. United States, 69 F.3d 1503, 1511 (10th Cir. 1995); Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000). *But see* State *ex. rel.* Huddleston v. Sawyer, 932 P.2d 1145, 1157-62 (Or. 1997) (holding that Guarantee Clause claims remain nonjusticiable).

[34] *See, e.g.*, Press Release, California Department of Education, O'Connell to Ask State Supreme Court to Break Budget Impasse (July 17, 2003) (available at http://www.cde.ca.gov/nr/ne/yr03/yr03rel39.asp).

[35] *See* Commonwealth *ex rel* Miller v. Commonwealth *ex rel* Duke, No. 02-CI-00855 (Franklin Cir. Ct. 2002); Greveden v. Commonwealth *ex rel* Fletcher, No. 2004-CA-001588-I, 2004 Ky. App. LEXIS 251 (Ky. Ct. App. Sept. 3, 2004)

[36] 798 N.E.2d 941 (2003).

[37] *Kelley*, 69 F.3d at 1511.

[38] 169 F.3d 820, 895 (4th Cir. 1999) (Wilkinson, CJ., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

[39] 505 U.S. at 186.

Financial Services and E-Commerce

OCC Preemption: Advancing Regulator Competition

*By Charles M. Miller**

As a rule, I dislike federal preemption. I prefer the republican capitalism of 50 states competing to create the most attractive legal framework for individuals and corporations to live and operate under. This same rationale leads me to *favor* broad federal preemption for national banks. In banking law, preemption leads to more regulatory competition.[1]

Originally, states chartered banks. A bank was only authorized to transact business in the state where it was chartered. Bank notes issued in one state were not readily useable in other states. Our modern banking structure is rooted in the National Bank Act of June 3, 1864. What makes our banking system unique is a bank's ability to elect to operate under a federal or state charter. A bank chartered under federal law is called a national bank. A national bank receives its powers from the federal government through 12 U.S.C. 24. A state bank receives its powers from the state where it is chartered. The key feature of the dual banking system is that national banks are overseen by a federal regulator, the Treasury Department's Office of the Comptroller of the Currency ("OCC"), while state banks are regulated by the individual states.

Federal preemption of state banking law for national banks came to the forefront on January 13, 2004 when the OCC issued two sets of final rules. The first clarified interpretation of 12 U.S.C. 484 and addresses which entities possess visitorial powers over national banks, and defined the extent of those powers.[2] The second enacts new "predatory lending"[3] regulations and expressly codifies which areas of banking law are and are not preempted.[4] Combined, these regulations show the clear intention of the OCC to assert itself as the exclusive regulatory authority for national banks. During the rulemaking process, state attorneys general, state banking regulators and consumer advocates submitted comments opposing the new rules. Democrat Senators called for the OCC to delay the rule making process until Congressional hearings could occur.[5] The OCC ignored the request and finalized the rule on January 13, 2004.

Fifteen days later, the U.S. House Banking Committee's Subcommittee on Oversight and Investigations held a hearing on the new rules. The Senate held its own hearing on February 5, 2004. Many members, mostly Democrats, expressed outrage that the OCC enacted the rules without express congressional approval. Rep. Sue Kelly (R-NY), chair of the House subcommittee, went so far as to threaten to instill a "culture of change" into the OCC.[6] House Democrats chastised the OCC and questioned its resources to enforce the new rule in an amendment to the Financial Services Committee's Fiscal Year 2005 Budget Report.[7] Resolutions were introduced in both houses to disapprove the regulations, but were not acted upon in a timely fashion.[8] If history is any guide, inaction will prevail and the regulations will remain in force.[9] The likelihood of inaction is bolstered by the House Financial Services Committee chairman's support for OCC's position.[10] Absent a seismic shift at the polls this November, there is little chance that Congress will override of the new rules.

I. Preemption Standards & Predatory Lending

The OCC's new preemption and predatory lending rules do two things. First, they establish anti-predatory lending regulations applicable to national banks. Second, the rules codify a standard for determining when state law is preempted. Most critics of the new rule focus upon the preemption of state predatory lending laws. If the OCC had preempted state predatory lending laws without establishing its own rule, a void would have been created, for which legitimate complaints could be raised. The OCC, however, promulgated its own predatory lending rules governing national banks.

A. Preemption

The OCC's preemption regulations codify case law setting forth preemption rules. The OCC promulgated separate rules applicable to deposit taking,[11] non-real estate consumer lending,[12] national banking operations,[13] and consumer real estate lending.[14] The four rules are nearly identical. Each expressly preempts "state laws that obstruct, impair, or condition a national bank's ability" to fully exercise its powers granted by 12 U.S.C. 24. The rules expressly do not preempt state laws relating to contracts, torts, criminal law, property law, zoning, taxation, and the right to collect debts. These types of laws do not regulate banking, but "establish the legal infrastructure that makes practicable the conduct of that business."[15] The "legal infrastructure" is the background of laws that establish an orderly society and only incidentally relate to banking.[16] By listing these laws as not preempted, and explicitly reserving any banking or banking related law to the states, the OCC implicitly shows how

thoroughly it intends to occupy the field of regulating national banks.

The states, in contrast, view the duel banking system to be one where each bank "is subject to both federal and state law".[17] They argue that state laws and state enforcement merely compliment federal oversight.[18] Never before has a banking statute or regulation provided such an express statement of preemption. The OCC preemption rules, however, are not groundbreaking. "National banks have been national favorites."[19] The Court and the OCC believe the "very core of the dual banking system is the simultaneous existence of different regulatory options that are not alike in terms of statutory provisions, regulatory implementation and administrative policy."[20] The OCC justifies the preemption because "the variety of state and local laws that have been enacted in recent years—including laws regulating fees, disclosures, conditions on lending, and licensing—have created higher costs and increased operational challenges."[21] It concludes the dual banking system "is under attack" by state attempts to legislatively and administratively regulate national banks.[22]

The attorneys general admit that "under this dual system, federal authorities have overseen the business activities of national banks. . . ."[23] The Court recognized, "the 'business of banking' is not limited to the enumerated powers in [12 U.S.C.] § 24 Seventh and . . . the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."[24] "So long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, therefore, the Comptroller has the power to preempt inconsistent state laws."[25] The OCC decided to issue its preemptive regulation because it determined the national banks ability "to operate under uniform standards of operation and supervision[, which] is fundamental to the character of their national charter," has eroded at the hands of state legislators.[26] The question is not whether the OCC's determination is correct. The rule is reasonable. The OCC has the discretion to promulgate it.

1. The Standard: Obstruct, Impair or Condition

Critics of the preemption rules focus the brunt of their attack on the standard that preempts state laws that "obstruct, impair, or condition" the exercise of national banking powers. They claim that the OCC regulation preempts more laws than the most recent preemption rule announced by U.S. Supreme Court in *Barnett Bank of Marion Cty., N.A. v. Nelson*. In *Barnett*, the Court summarizes its own precedent on the topic, "[N]ormally Congress would not want States *to forbid, or to impair significantly*, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where * * * doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers."[27] The operative terms in *Barnett* were "forbid", "impair significantly", "prevent" and "significantly interfere".

The OCC cited six Supreme Court cases including *Barnett* as authority for its "obstruct, impair, or condition" standard. The OCC source for "obstruct" is *Hines v. Davidowitz*, which stated, "Our primary function is to determine whether [the state law at issue] stands as an *obstacle* to the accomplishment and execution of the full purpose and objectives of Congress."[28] Although "impair significantly" was used in *Barnett*, the OCC cites the more dated *National Bank v. Commonwealth* as its authority for "impair".[29] *National Bank* held, "[T]he agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or *impair* their efficiency in performing the functions by which they are designed to serve that government."[30] *Barnett* itself cites *Nat'l Bank v. Commonwealth* as the original precedent for the impair standard.[31] *Barnett* is cited as the OCC's authority for "condition."[32] "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."[33]

There is room to criticize the OCC's sources for its "obstruct, impair, or condition" standard. *Hines*, the source for "obstruct" was not a banking case. Although *Hines* addressed preemption in general, the controversy centered upon a state statute governing aliens.[34] To mirror Supreme Court precedent, the OCC should have modified "impair" with "significantly" as done in *Barnett*. The "condition" discussed in *Barnett* was Congress's decision whether or not state law would apply, not a condition imposed by a state. Critics, thus, conclude that the OCC standard permits broader ranging preemption than the language used in *Barnett*.

The Supreme Court stated in *Barnett* that it consistently "interpret[s] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law."[35] This pronouncement echoes *Franklin Nat'l. Bank of Franklin Square v. New York*, which noted that when Congress intends to subject an aspect of national banking to state restriction, it does so expressly.[36] As recently as 2003, the Court stated that it views federally chartered banks as part of "a banking system that needed protection from 'possible unfriendly

State legislation.'"[37] Few legal precedents walk as straight a path as that blazed by national banking law. These holdings all stem from those famous words penned in 1819 that states "have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control, the operations" of national banks.[38] While it has not consistently used the same language, the Court has consistently held the regulation of national banking to be the sole providence of the federal government. The "obstruct, impair, or condition" standard adopted by the OCC fits safely within the Court's long standing precedent.

The argument that the OCC's "obstruct, impair, or condition" standard is broader than *Barnett* neglects the importance of the *Chevron* doctrine. The Court defers to an agency's interpretation of a statute the agency is charged with enforcing.[39] The OCC has broad discretion to interpret Federal banking law.[40] An OCC regulation has the same preemptive effect as a Congressional enactment.[41] Courts need not ask whether the new rules track *Barnett*, but only whether the OCC has the authority to enact the regulation and whether the OCC's interpretation is reasonable. The OCC has the authority.[42] The OCC preemption rules is similar enough to *Barnett* that the Court will uphold and hereafter apply the OCC rules when deciding banking preemption issues.

I wish to note that the OCC expressly avoided implementing a regulation preempting the entire field of federal mortgage lending law. Officially, the OCC "concluded that the effect of such labeling is largely immaterial, and thus we [the OCC] decline to attach a particular label to the approach reflected in the Final Rule."[43] This is administrative speak for "we know what we did, but we don't want to admit it." Its disclaimer of field preemption appears designed to blunt criticism and to placate Congress. In reality, the OCC would be quite pleased if its rules were interpreted as field preemption. The effect of the final rules is clear. States may not regulate the banking activity of a federal bank except in areas where federal law specifically implicates state law. The only oversight a state may exercise is to enforce the general legal framework of the state's general laws, *e.g.*, contracts, torts, and zoning. The regulation also allows for state criminal law to apply, but not when the criminal law is especially applicable to banking activities.[44] Thus, despite its reluctance to so admit, the OCC, as authorized by Congress, has occupied the field of federal banking law.

Critics contend that this effective field preemption violates 12 U.S.C. 36(f)(3), enacted as part of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. It reads, "No provision of this subsection may be construed as affecting the legal standards for preemption of the application of State law to national banks."[45] Subsection (f) addresses when host state laws apply to intrastate branches of national banks. The critics contend that this provision prevents a broad interpretation of the OCC's ability to preempt state laws. However, the statute does no such thing. Section 36(f)(3) expressly states that the subsection should have *no affect* upon preemption analysis. When issuing the regulations, the OCC followed 12 U.S.C. 43, the procedural requirements governing OCC preemption of state law. If Congress intended to limit the OCC's ability to preempt state law, it would have expressly done so in or near section 43. The Court has long supported the notion of banking field preemption.[46] The OCC's preemptive authority will be upheld by the Court.

B. Predatory Lending

As discussed above, the OCC preemption rules expressly preempt state predatory lending laws. Consumer advocates argue that the OCC created a void where consumers are no longer protected from malicious lenders. The OCC responds by quoting an admission by the National Association of Attorneys General that "'most complaints and state enforcement actions involving mortgage lending practices have not been directed at banks.'"[47] The OCC also cites its enforcement action against Providian National Bank[48] and its advisory letters on predatory lending[49] as proof that it "will not tolerate" predatory and abusive lending practices.[50]

The OCC promulgated two new predatory lending rules—one, 12 C.F.R. 34.3(b), applies to consumer real estate lending; the other, 12 C.F.R. 7.4008(b), to all other forms of consumer lending. The rules are nearly identical. Each states that a national bank cannot make a consumer loan "based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms." Each rule also provides, "A bank may use any reasonable method to determine a borrower's ability to repay". These regulations are designed to prevent equity stripping. In addition to the anti-equity stripping regulations, the OCC will enforce federal law banning unfair and deceptive practices, 15 U.S.C. 45(a)(1).[51]

These regulations clearly prevail over contrary state laws. "[T]he entire legislative scheme [of federal banking law] is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the Na-

tional Banking Act."[52] "Where state and federal laws are inconsistent, the state law is preempted even if it was enacted by the state to protect its citizens or consumers."[53] Even when the federal and state laws share the same purpose, "[a] state law . . . is preempted if it interferes with the methods by which the federal statute was designed to reach th[at] goal."[54] Moreover, even prior to the existence of the OCC's anti-predatory lending rules, the OCC determined that state predatory lending laws do not apply to national banks.[55]

1. Federalism

Of course, the preemptive effect of the OCC rules does not make the rules wise. State regulators, attorneys general, and consumer advocates argue that predatory lending is a local issue, best handled locally. The OCC counters that the financial markets are increasingly national (if not international). Many national banks operate regionally or nationwide. The OCC concludes that national banks must be able to operate under the same standard nationwide.

Essentially, the states argue that local regulation is more effective than national regulation. This argument highlights a rationale for federalism—effectiveness—different from the one discussed in the introduction of this article—competition. Often effectiveness and competition are both promoted by federalism. In those cases, not only do states compete to develop the best laws, the states are also best positioned to implement the laws. As addressed in the introduction, regulatory competition is increased by the dual banking system. Therefore, banking law is one of the few areas where the desire to increase regulatory competition does not favor federalism. The states, then, ask us to choose between regulatory effectiveness and regulatory competition. When faced with this choice, competition is always the better option. Competition does not hinder effectiveness; it promotes it. If the states are better regulators of predatory lending, consumers will notice and shun national banks. The national banks and the OCC, in turn, facing the loss of customers and the stigma of being labeled predatory, will be forced to change to attract customers. Competition leads to effectiveness. Market participants demand as much.

The states' argument assumes the states are the best regulators. What if they are not? The OCC rules squarely address the form of predatory lending of most concern to the OCC – equity stripping. Perhaps the OCC's relatively simple rule will prove more effective than more complicated predatory lending laws. Comptroller Hawke put it, "We know that it's possible to deal effectively with predatory lending without putting impediments in the way of those who provide access to legitimate subprime credit…. We believe a far more effective approach would be to focus on the abusive practitioners, bringing to bear our formidable enforcement powers where we find abusive practices."[56] If wrong, the OCC will amend its rules to better address the problem. But if the OCC's rule works, perhaps states with more intricate and costly regulations will find it best to emulate the OCC. Competition works. It deserves to be borne out here.

2. Sub-Prime Borrowers

Some suggest that the OCC rules are weighted in favor of the banks, and against the consumer. However, overly broad predatory lending laws hurt consumers because the laws prevent sub-prime borrowers from accessing capital markets. The OCC rules focus upon the abusive lenders, not the terms of the loan. The rules allow a high credit risk borrower to receive a loan, albeit at an above-market rate, that the borrower would otherwise not be able to obtain. The mantra of consumer advocates is that sub-prime lenders charge higher interest rates to the people who are least able to afford them. This statement is true. However, it does not mean that the lenders are manipulating the sub-prime borrower. The sub-prime borrower is also the least likely to repay the loan, even when the terms are favorable to the borrower. As in all markets, greater risk warrants higher returns. If a bank loses the ability to demand higher returns from the sub-prime borrower, the bank will justly abandon that market. This leads to the sub-prime borrower losing his only loan source. To adopt the mantra of the consumer advocate, the person in most need of money is denied access to a loan. The OCC rule best serves the sub-prime borrower. It allows him access to capital, while protecting him from potential abuse.

3. Reverse Mortgages

The OCC predatory lending regulations appear to prevent national banks from offering reverse mortgages. Popular with the retired, a reverse mortgage is a loan, secured by a home, in which no payment is made until the borrower's death. At that time, the entire loan, with interest, comes dues. Both the bank and the borrower anticipate that the property will be sold in order to repay the loan. The difference between a predatory loan and a reverse mortgage is that in the reverse mortgage context the borrower intends for the property to be liquidated to pay off the loan. The new OCC rules are "intended to prevent borrowers from being unwittingly placed in a situation where repayment is unlikely without the lender seizing the collateral. Where the bargain agreed to by a borrower and a lender involves an understanding by the borrower that it is likely or expected that the collateral

will be used to repay the debt, such as with a reverse mortgage, it clearly is not objectionable that the collateral will then be used in such a manner."[57] With these words, the OCC clarifies that it views reverse mortgages to be permitted under its predatory lending rules. While it is clear that reverse mortgages are permitted by the spirit of the law, I believe that they violate the letter of the law.

Reverse mortgages are impermissible under a strict reading of 12 C.F.R. 34.3(b). The regulation states that a mortgage "shall not" be issued "based predominantly on the bank's realization of the foreclosure or liquidation value" of the home. A reverse mortgage is precisely such a loan. The OCC is correct that because of the borrower's knowledge of the probability of liquidation, a reverse mortgage lacks the objectionable aspects of a predatory loan. However, the regulations do not provide any exception.

The regulations go on to provide, "A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors."[58] While a lender may "use any reasonable method" when assessing a borrower's ability to repay, consideration of the collateral's liquidation value is not permitted. The only room that the rules offer to permit a reverse mortgage is the "other relevant factors" catchall. The borrower's intention to surrender the collateral is certainly a relevant factor. Nevertheless, this "other factor" is not strong enough to outweigh the clear statement that a "national bank *shall not* make a [mortgage] based predominantly on . . . the foreclosure or liquidation value of the borrower's collateral." While a reverse mortgage does not violate the spirit of the predatory lending rules, it does violate the letter. The OCC intends to interpret the rule as not prohibiting reverse mortgages. The courts will probably wag their rhetorical finger at the OCC for poor draftsmanship, but affirm the OCC's interpretation of the rule as reasonable. However, there is the potential for a court to find that the OCC did not provide itself any wiggle room in "shall not."

II. Visitorial Powers

On the same day the OCC promulgated the preemption and predatory lending rules, it also modified its visitorial powers regulation that implements 12 U.S.C. 484.[59] It added as 12 C.F.R. 7.4000(a)(3), "Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law." The OCC also revised 12 C.F.R. 7.4000(b) to clarify the OCC's interpretation of the "vested in the courts of justice" exception to the general rule that only Congress or the OCC may exercise visitorial powers over national banks.

The purpose of the modification to C.F.R. 7.4000 is to "clarify the appropriate agency for enforcing those state laws that are applicable to national banks."[60] According to the OCC, that agency is the OCC exclusively. The rule states that even where state banking law applies to a national bank, the OCC possesses exclusive powers to enforce the state law. For support for its interpretation of 12 U.S.C. 484, the OCC looks to 12 U.S.C. 36(f), which addresses when host state law "regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches" apply to national bank branches. The statute states that any such state law that applies "shall be enforced, with respect to such branches, by the Comptroller of the Currency."[61]

State courts only have authority to exercise power over a national bank to the extent that they would have power over any party before the court in the scope of litigation. The "vested in the courts of justice" exception does not grant to states the authority to implement through courts state laws enforceable only by the OCC. A state agency may file a declaratory judgment—in state or federal court— to ascertain whether a state law applies. Once a law is declared applicable, enforcement is exclusively the purview of the OCC.[62] This rule does not apply to a private civil action, which does not amount to visitation, and may be brought in a state court.[63]

The modification to the visitorial regulation creates no new law. Even prior to the change, the regulation provided, "Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks . . . ." The modification does signify that the OCC intends to assertively prevent states from encroaching upon its territory. State attorneys general have actively pursued high profile enforcement actions in recent years, e.g., actions against Microsoft and "Big Tobacco." The OCC apparently sensed the need to remind the attorneys general where the enforcement boundaries lie for actions against national banks.

III. Conclusion

In recent years, some lenders have adopted abusive practices that can be ruinous to the unsuspecting customer. States, to their credit, have aggressively pursued these lenders. So too has the OCC. At the same time, the OCC has become concerned about how complying with

multiple regulatory standards affect the competitiveness of national banks. It determined the better course to be to adopt one set of predatory lending standards applicable to all national banks.

National banks are perennial national favorites. So too is the OCC a favorite of the Supreme Court. National banks are protected from state regulation through federal statutes, administrative rules, and a long, unbroken line of case law. The Supreme Court recognizes that the OCC is vested with remarkably broad regulatory authority. The Court yields a wide berth to the OCC when interpreting national banking law. It also ensures states do the same. Despite consumer advocates' and state officials' arguments to the contrary, the authority of the OCC to promulgate the preemption, predatory lending, and visitorial rules is not in doubt. Through these rules, the OCC is furthering the very heart of the dual banking system—competing regulators.

In the dual banking system, a bank not only has the option of choosing the state in which to incorporate; once it has chosen a location, the bank can choose a state or federal regulator. Just as one state can enact a regulatory framework different from its neighbor, so too can the OCC adopt a framework for national banks. In criticizing the new OCC rules, Senator Sarbanes approvingly quotes a state banking supervisor, "'The OCC's preemption rule seems to be more about protecting its remaining multistate megabanks or attracting new ones to the fold than about "clarifying" a 140 year old law....The OCC's standard for preemption has been built on a political platform for the promotion of its charter.'"[64] Precisely. Promoting federal charters and attracting new banks to the federal system are legitimate goals of the OCC upheld by the Supreme Court.[65] The dual banking system's regulatory capitalism will ensure a strong and competitive U.S. banking system for decades to come.

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Footnotes

[1] Kenneth E. Scott, "The Dual Banking System: A Model of Competition in Regulation," 30 Stan. L. Rev. 1 (1977).

[2] 69 Fed. Reg. 1895 (2004).

[3] This term is often used pejoratively. In this article "predatory loan" means a loan issued where the lender, who believes that the borrower cannot repay the loan on its terms, issues the loan with the intent of profiting solely from fees, fines, and/or foreclosure. A sub-prime loan is not necessarily a predatory loan.

[4] 69 Fed. Reg. 1904 (2004).

[5]Letter from Senate Banking Committee Democrats to OCC (Nov. 24, 2003).http://banking.senate.gov/index.cfm?_FuseAction=PressReleases.Detail&PressRelease_id=158&Month=11&Year=2003

[6] Opening Statement of Subcommittee Chairwoman Sue Kelly, "Congressional Review of OCC Preemption" (January 28, 2004) http://financialservices.house.gov/media/pdf/012804ke.pdf

[7] House Committee on Financial Services, *Views and Estimates of the Committee on Financial Services on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005,* 108th Congress, 2d Sess. 15-16 (2004). http://financialservices.house.gov/media/pdf/FY2005%20Views_FINAL.pdf However, several Republicans who missed the vote voiced their opposition to the amendment, casting doubt over whether the committee will take any action to disapprove the regulations. Id. at 25-26, 39.

[8] S.J. Res. 31, S.J. Res. 32, H.R. 4236, and H.R. 4237.

[9] Marcel C Duhamel, "Predatory Lending and National Banks: The New Visitorial Powers, Preemption and Predatory Lending Regulations," 121 Banking L.J. 455 (2004).

[10] "In my view, the OCC regulations represent a thoughtful attempt to codify and harmonize past legal precedents, and there are many, and regulatory guidance into a coherent framework for resolving conflicts between Federal and State laws as they apply to national banks." Opening Statement of Michael G. Oxley, "Congressional Review of OCC Preemption" (January 28, 2004) http://financialservices.house.gov/media/pdf/012804ox.pdf

[11] 12 C.F.R. 7.4007

[12] 12 C.F.R. 7.4008

[13] 12 C.F.R. 7.4009

[14] 12 C.F.R. 34.4

[15] 69 Fed. Reg. at 1913

[16] "The duties to comply with contracts and the laws governing them and to refrain from misrepresentation, together with the more general provisions of the UCL, are principles of general application. They are not designed to regulate lending and do not have a disproportionate or otherwise substantial effect on lending. To the contrary, they are part of the legal infrastructure that undergird all contractual and commercial transactions. Therefore, their effect is incidental and they are not preempted." *Gibson v. World Savings & Loan Assn.*, 103 Cal.App.4th 1291, 1303-1304 (2002).

[17] M. Maureen Murphy, "Preemption of State Law for National Banks and Their Subsidiaries by the Office of the Comptroller of the Currency," CRS Report EBFIN59 (Apr. 30, 2004)

[18] Comment of Nat'l Assn. of Attys. Gen. at 2 (Oct. 6, 2003) http://www.naag.org/issues/20031006-multi-occ.php

[19] *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412, 21 L.Ed. 862 (1874)

[20] 30 Stan. L. Rev. at 41.

[21] 69 Fed. Reg. at 1908.

[22] Office of the Comptroller of the Currency, *Nat'l Banks and The Dual Banking System* (Sept. 2003) at 1. http://www.occ.treas.gov/DualBanking.pdf

[23] Comment of Nat'l Assn. of Attys. Gen. at 2.

[24] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co*., 513 U.S. 251, 258 n.2, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995).

[25] *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983)

[26] 69 Fed. Reg. at 1908.

[27] 517 U.S. 25, 33, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996) (emphasis added).

[28] 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)(emphasis added).

[29] 69 Fed. Reg. at 1910.

[30] 76 U.S. (9 Wall.) 353, 362, 19 L.Ed. 701 (1869) (emphasis added).

[31] 517 U.S. at 33 – 34.

[32] 69 Fed. Reg. at 1910.

[33] 517 U.S. at 34.

[34] "Obstacle" is used in *Barnett*: "the State's prohibition of those [banking] activities would seem to 'stan[d] as an obstacle to the accomplishment' of one of the federal statute's purposes." 517 U.S. at 31

[35] Id. at 32.

[36] *Nat'l Bank of Franklin Sq. v. New York*, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954).

[37] *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (quoting *Tiffany*, 85 U.S. (18 Wall.) at 412).

[38] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 436 (1819).

[39] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

[40] "'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.'" *Clarke v. Securities Industry Assn*., 479 U.S. 388, 403-404, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987) (quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971)).

[41] 710 F.2d at 882-883

[42]See n. 42, supra.

[43] Office of the Comptroller of the Currency, "Preemption Fine Rule – Questions and Answers" at 4-5 (January 7, 2004). http://www.occ.treas.gov/2004-3dPreemptionQNAs.pdf

[44] See, e.g., footnote accompanying 12 C.F.R. 7.4007(c)(3).

[45] 12 U.S.C. 36(f)(3)

[46] "[W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation." *Easton v. Iowa*, 188 U.S. 220, 232, 23 S.Ct. 288 (1903). "[B]rought into existence for this [federal] purpose, and intended to be so employed, the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'" *Famers' & Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29, 34 (1875).

[47] 69 Fed. Reg. at 1914 (quoting National Assoc. of Attys. Gen. comment letter on the propel at 10 (Oct. 6, 2003)).

[48] *In re: Providian Nat'l. Bank, Tilton, NH*, OCC Enforcement Action 2000-53 (June 28, 2000)(Providian consented to a cease and desist order and to pay $300,000,000 in restitution). http://www.occ.treas.gov/FTP/EAs/ea2000-53.pdf

[49] OCC Advisory Letters 2003-2 & 2003-3. http://www.occ.treas.gov/advlst03.htm

[50] 69 Fed. Reg. at 1913.

[51] 12 C.F.R. 7.4008(c) and 34.3(c). 15 U.S.C. 45(a)(1) reads, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

[52] 710 F.2d at 885

[53] *Assn. of Banks in Ins. Inc. v. Duryee*, 55 F. Supp. 2d 799, 802 (S.D. Ohio 1999) (affirmed at 270 F.3d 397 (6th Cir. 2001)).

[54] *Int'l. Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987).

[55] 68 Fed. Reg. 46264 (Aug. 5, 2003)

[56] http://www.occ.treas.gov/consumernews.htm

[57] 69 Fed. Reg. at 1911.

[58] E.g., 12 C.F.R. 34.3(b).

[59] 69 Fed. Reg. 1895.

12 U.S.C. 484 provides:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

[60] Id. at 1896

[61] 12 U.S.C. 36(f)(1)(B).

[62] 69 Fed. Reg. at 1900, (citing *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3rd Cir. 1980)).

[63] 69 Fed. Reg. at 1899.

[64] Statement of Sen. Paul S. Sarbanes, "Review of the National Bank Preemption Rules" (April, 07 2004) http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Testimony&TestimonyID=547&HearingID=106 (quoting Dudley Gilbert "OCC's Preemption Rule Is About Keeping Market Share" American Banker (Feb. 20, 2004)

[65] "It could not have been intended, therefore, to expose [national banks] to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks." 85 U.S. at 413.

Free Speech and Election Law

The Run for the Roses Meets the First Amendment: An Overview of *Desormeaux* v. *Kentucky Racing Commission*

*By William P. Barnette**

In addition to an upset winner and nationwide sensation in Funny Cide,[1] the 2003 Kentucky Derby produced a great deal of controversy. While the cheating allegations against, and subsequent exoneration of, winning jockey Jose Santos are well known,[2] less so is another issue which may have significant ramifications for the future of horse racing. During the running of the Derby, Santos and thirteen of his fellow riders wore patches on their pants promoting the Jockeys' Guild.[3] The patches, which measured 3 by 5 inches, were determined by the Churchill Downs' stewards to violate a regulation which prohibits jockeys from wearing during a race anything "'not in keeping with the traditions of the turf.'"[4] The stewards therefore fined each rider who wore the patch $500.[5] Following an unsuccessful appeal to the Kentucky Racing Commission (the "Commission"),[6] the jockeys have filed suit in Kentucky state court seeking to have the fines overturned.[7] The suit raises a number of interesting First Amendment issues, which will be discussed below.

I. Background

The wearing of advertising or other promotional items by jockeys "has been a hot-button issue for years in a number of racing jurisdictions throughout North America."[8] Regulations on jockey attire vary from state to state, but generally "racetracks and government regulators have been able to control advertising rights despite the collective protestations of jockeys."[9] Not entirely, however. For example, in the 2003 Belmont Stakes, "some jockeys wore patches advertising Wrangler and Budweiser," reportedly angering Visa, the sponsor of the Triple Crown.[10]

By its terms, the regulation under which the jockeys were fined, 810 KRA 1:009, § 14, prohibits commercial speech, *i.e.*, it bans any "advertising, promotional, or cartoon symbols or wording" which is "not in keeping with the traditions of the turf."[11] The Commission determined that the jockeys' purpose in wearing the Guild patch was "to promote their organization and gain more members."[12] The Commission, however, deemed this purpose to be commercial, rather than political, finding that the patch "is an advertising and promotional symbol."[13] Further, because the traditional attire of a "jockey does not include advertising or promotional symbols," the Commission concluded that wearing the patch violated the regulation.[14] In addition, the Commission reasoned that wearing the patch "*could* be a distraction to the eye and effect the concentration of the stewards in the performance of their duties."[15] Whether the Commission found the patch in fact to be a distraction is unclear, particularly given its later statement that "allow[ing] the patch in this case *could* lead down the slippery slope where the jockeys would resemble NASCAR drivers and therefore hinder the stewards in the performance of their duties."[16]

In contrast to the Commission's characterization, the *Desormeaux* plaintiffs explicitly disavow any commercial intent in wearing the patch, and instead allege that the emblem merely "identified the jockeys as members of their labor union . . . ."[17] Further, the jockeys allege that the purpose of "wearing the patch was to promote their labor union, to increase membership in the union and to bring to the attention of the public the unconscionable plight of disabled jockeys."[18] Thus, the jockeys assert, *inter alia*, that being fined for wearing the patch violated their First Amendment rights.[19]

Under the Supreme Court's interpretation of the First Amendment, different standards govern different types of speech. Thus, the proper characterization of the jockeys' wearing the patch—i.e., whether this amounts to commercial speech or so-called "pure speech"—is of critical importance in determining the validity of the regulation as applied by the Commission.[20] Because a state "cannot foreclose the exercise of constitutional rights by mere labels,"[21] the Commission's terming the patch an "advertising or promotional symbol," that consequently is subject to regulation, will likely not be dispositive. Rather, as will be discussed, there is a compelling argument that wearing the patch constitutes "pure speech," which is entitled to full First Amendment protection. On the broader question, however, of whether true commercial speech can be prohibited in these circumstances, the Commission has good arguments in support of the regulation.

II. Core First Amendment Speech: Strict Scrutiny

While the First Amendment's free speech guarantee is recognized as a fundamental right,[22] it is equally well recognized that this right is not "absolute at all times and under all circumstances."[23] Thus, there are "certain well-defined" classes of speech which may be prohibited consistent with the First Amendment.[24] On this low end of the constitutional spectrum are things like "fighting words," which have no protection under the First Amendment.[25]

Conversely, discussion of public issues—so-called "political speech"—is afforded the broadest protection by the First Amendment.[26] In *Pickering v. Board of Education*, the Supreme Court characterized the "public interest in having free and unhindered debate on matters of public importance" as the First Amendment's "core value."[27] Restrictions on such speech are subject to the most stringent form of review, strict scrutiny.[28]

Communications which attempt to persuade or dissuade the joining of labor unions are considered core speech protected by the First Amendment.[29] To illustrate, in *Thomas v. Collins* the defendant was cited for contempt for violating a restraining order prohibiting him from soliciting members for certain unions without first obtaining an organizer's card.[30] In reversing the conviction, the Supreme Court noted that the right "to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected" free speech.[31] Thus, the Court concluded that the defendant's First Amendment rights had been violated.[32]

Similarly, in *Thornhill v. Alabama* the Supreme Court recognized that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[33] The Court further termed "[f]ree discussion concerning the conditions in industry and the causes of labor disputes" to be "indispensable."[34] Accordingly, the Court found unconstitutional a law which forbade publicizing the facts of a labor dispute in the vicinity of the scene of the dispute, and reversed the defendant's conviction for picketing outside a business involved in a strike.[35]

While the First Amendment explicitly refers to "speech," it is well established that expressive conduct is also protected.[36] For example, in *Tinker v. Des Moines Independent Community School District* a group of high school students wore black arm bands to school in protest of Vietnam.[37] They were then suspended from school.[38] In reversing the dismissal of the students' subsequent suit against the school officials, the Supreme Court reasoned that wearing the armbands "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[39]

Recently, in *Newsom v. Albemarle County School Board*, the Fourth Circuit, reviewing the denial of a preliminary injunction, held there was a strong likelihood of success on a First Amendment claim against a school dress code which prohibited messages on clothing related to weapons.[40] Applying the *Tinker* standard,[41] the court concluded the dress code could "be understood as reaching lawful, nonviolent, and nonthreatening symbols of not only popular, but important organizations and ideals."[42] Because the code excluded a "broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory," the court held the injunction should have been granted.[43]

In *Desormeaux*, the plaintiffs allege they wore the Guild patch to promote their union, increase its membership, and bring attention to the issue of disabled jockeys.[44] This should be considered protected speech under *Thomas* and *Thornhill*, in that the jockeys allegedly were promoting their union and raising awareness of the dangerousness of their working conditions.[45] Further, under the reasoning of *Tinker* and *Newsom,* wearing the patch can be considered a form of expressive conduct protected by the First Amendment.[46]

Indeed, in a similar case, *In re Reynolds*, the California Supreme Court held that an inmate's First Amendment rights were violated when he was denied permission to wear a prisoner's union button while incarcerated.[47] Under this rationale, the *Desormeaux* plaintiffs appear to have a valid "as applied" First Amendment challenge to the regulation at issue. Whether that regulation should be struck on overbreadth grounds, however, is another issue, initially requiring analysis of the commercial speech doctrine.

III. Commercial Speech: Intermediate Standard

Traditionally, the First Amendment has given life to the "principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."[48] A regulation that "stifles speech on account of its message"—i.e., its content—"contravenes this essential right."[49] Such restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory

goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[50] In other words, through content-based restrictions the "'Government may effectively drive certain ideas or viewpoints from the marketplace.'"[51] To prevent an outcome so obviously contrary to the First Amendment, the Supreme Court has "consistently applied strict scrutiny to content-based regulations of speech."[52]

Determining whether a particular regulation is content-based is "not always a simple task."[53] The general rule, however, is that "laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based."[54] Singling out commercial speech for prohibition while leaving other forms of speech untouched—which the regulation at issue in *Desormeaux* does—arguably amounts to a content-based restriction, which ordinarily would be subject to strict scrutiny.[55] Restrictions on commercial speech, however, are not measured against strict scrutiny.[56]

On the contrary, commercial speech has a checkered history under Supreme Court precedents. In an early case, *Valentine v. Chrestensen,* the Supreme Court held that the First Amendment provided no "restraint on government as respects purely commercial advertising."[57] Reversing course, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* the Court held that simply because an advertiser's "interest is a purely economic one . . . hardly disqualifies him from protection under the First Amendment."[58] Rather, recognizing that society has a "strong interest in the free flow of commercial information," the Court struck down regulations prohibiting the advertising of prescription drug information.[59]

Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court settled on an intermediate standard for determining whether commercial speech is protected by the First Amendment.[60] Under this standard, a court examines: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than necessary to serve that interest.[61] In *Board of Trustees v. Fox*, the Supreme Court clarified that the last *Central Hudson* factor requires only a "reasonable fit" between the regulation and the interest, rather than the least restrictive means available.[62]

In upholding the *Desormeaux* plaintiffs' fines, the Commission identified two interests furthered by the prohibition on jockey advertising: (1) upholding the "traditions of the turf," and, relatedly; (2) protecting the ability of the stewards to perform their duties, i.e., ensuring the integrity and safety of the sport. The latter interest, in particular, would seem to be "substantial" within the meaning of *Central Hudson.*[63] Whether the advertising ban "directly advances" that interest, and whether there is a "reasonable fit" between the ban and the interest, are potential battlegrounds.[64]

Specifically, on the issue of "reasonable fit," there is a question as to whether all advertising or promotional symbols, regardless of size, have the ability to interfere with the stewards' performance.[65] The Commission, of course, concluded that even the 3 by 5 inch Guild patch, much less larger symbols, "could be a distraction to the eye and effect the concentration of the stewards in the performance of their duties."[66] The reasonableness of this determination will be significant in determining whether the ban satisfies the *Central Hudson* standard. But in any event, given the lesser value placed on commercial speech and the substantial state interest promoted by the advertising ban, the Commission has at least a colorable argument that the ban is constitutional.[67]

IV. Public Employer Analysis

Another possible avenue of defense for the Commission is to argue that it should be considered a public employer for purposes of analyzing the regulation. In *Pickering*, the Supreme Court recognized the need to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[68] Under the public employer doctrine, when an employee's "expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," government regulation "should enjoy wide latitude."[69] Moreover, even when an employee's speech arguably addresses matters of public concern, the expression can still be regulated if it "threatens to interfere with government operations."[70]

In a recent case, *Perez v. Hoblock*, the court relied on the public employer doctrine to uphold a state racing board's fine of a horse owner.[71] The board fined the owner $3,000 following his "profanity-laced verbal and physical outburst" at a meeting he requested with stewards for the Saratoga racetrack.[72] The regu-

lation under which the owner was fined permitted such a penalty for "any action detrimental to the best interests of racing."[73] The owner filed suit challenging this provision on First Amendment grounds; the court found the public employer doctrine applicable because the owner was "a licensee in an industry closely regulated by defendants."[74]

Rejecting his claim, the court looked to the first *Pickering* factor and noted that the owner was fined for disrupting the meeting with the stewards, not for "commenting on a matter of public concern."[75] In addition, the court recognized that the disruption of the meeting prevented the stewards from performing their duties—hearing and considering the owner's alleged grievance.[76] Thus, the court reasoned that whatever value the owner's speech possessed was outweighed by its interference with efficient government operations.[77] Accordingly, the court concluded his "disruptive and threatening behavior need not be" protected by the First Amendment.[78]

Similarly, in *Leroy v. Illinois Racing Board*, the Seventh Circuit rejected a horse owner's First Amendment challenge to sanctions levied by the state racing board.[79] As in *Perez,* the owner was fined for making threats and using profanity, in violation of a regulation which prohibited "improper language" or "improper conduct" towards members of the board.[80] In response to the owner's argument that the regulation was vague and overbroad, the court conceded that "addressed to the general public for the conduct of daily affairs, [the rule] would be seriously deficient."[81] Addressed solely to licensees, however, and governing only their relations with the board, the court considered the regulatory scheme to have "much in common with civil service laws, which despite their many vague terms were sustained" by the Supreme Court.[82] The court therefore held the regulation did not violate the First Amendment.[83]

The *Desormeaux* plaintiffs are licensees in the same regulated industry as the owners in *Perez* and *Leroy*. Thus, the Commission may attempt to argue that under the public employer doctrine the jockey advertising ban is proper. Key to such an argument would be: (1) showing that advertising worn by jockeys would not constitute "comment on a public matter;" or, more likely, (2) that the advertising would interfere with the stewards in the performance of their duties.[84]

On the first factor, it is worth noting that in *Perez* and *Leroy* the owners were fined for profanity and making threats, forms of speech which have little to no First Amendment value.[85] Conversely, advertising is protected by the First Amendment, although not to the same extent as "pure" or "political" speech.[86] Given the lesser value placed on commercial speech, it is not clear whether jockey advertising would be considered as relating to any matter of "social" or "other concern to the community."[87] If not, then the advertising ban could be upheld under the public employer doctrine.[88]

Assuming *arguendo* that jockey advertising would be considered "comment on a public matter," the analysis then entails whether such communications would interfere with government operations—i.e., the stewards' duties in officiating the races. As noted, the Commission determined that even the Guild patch could distract the stewards from performing their duties.[89] If this determination is reasonable, then the advertising ban could again be upheld under the public employer doctrine.[90]

V. Non-Public Forum Analysis

Finally, the Commission may argue that the advertising ban is a valid restriction of speech in a non-public forum. Because the First Amendment is not absolute, even in a public forum the government may impose "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[91] In contrast, in a non-public forum, a lesser standard applies: the government may prohibit all forms of communication, provided the ban is reasonable and content-neutral.[92]

The public forum determination is based on "how the locale is used. Streets, parks and sidewalks are the paradigms of a public forum because they have traditionally served as a place for free assembly and communication by citizens."[93] Likewise, "municipal theaters and auditoriums are designed for and dedicated to expressive activities" and therefore are considered public forums.[94]

In *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, the Third Circuit affirmed an order denying a religious society the right to distribute literature and solicit funds at the Meadowlands Sports Complex, which includes a football stadium and racetrack.[95] In so holding, the court concluded that the Meadowlands, despite being a public place, was not a public forum.[96]

On the contrary, according to the court, the Meadowlands did not fit any of the traditional definitions of a "public forum," but instead was a "commercial venture" aimed at "earn[ing] money by attracting and entertaining spectators with athletic events and horse races."[97]

Because the Meadowlands was not a public forum, the court looked only to whether the solicitation ban was reasonable.[98] This, in turn, was determined by whether the "proposed activity is basically incompatible with the normal character and function of the place."[99] Concluding that the proposed solicitation would "disrupt the normal activities of the [Meadowlands]," the court held the ban reasonable, and denied the First Amendment challenge.[100]

Given the above, the Commission could argue that Churchill Downs, where the Kentucky Derby is run, is, like the Meadowlands, a non-public forum. That is, it could be argued that the purpose of Churchill Downs is to be a place where horse races are run, not where messages are expressed. The question then would be the reasonableness of the jockey advertising ban.[101] The Commission's determination that the Guild patch could interfere with the stewards' duties may satisfy this burden.[102] In addition, whether advertising is "basically incompatible with the normal character and function of" the track could implicate the "traditions of the turf," which the Commission has determined do not include commercial messages worn by jockeys.[103] Thus, the advertising ban could be upheld as a reasonable restriction of speech in a non-public forum.

VI. Conclusion

The *Desormeaux* plaintiffs present a compelling "as applied" challenge to the jockey advertising ban in that they have been fined for essentially "pure speech," i.e., wearing union patches. On the issue of overbreadth, however, the Commission has good arguments in support of the prohibition, particularly given the lesser value accorded commercial speech and the other theories under which the ban could be upheld. Whatever the ultimate outcome, *Desormeaux* has the potential to make significant First Amendment law, as well as impact the future of the horse racing industry.

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Footnotes

[1] At odds of 12-1, Funny Cide became the first gelding to win the Derby since 1929 and the first New York-bred winner ever. Andrew Beyer, *Funny Cide Up*, Washington Post, E01 (May 4, 2003).

[2] Shortly after the race, media from coast to coast reported on a picture appearing to show Santos with a black object—possibly an illegal electrical device with which to shock Funny Cide—in his hand while aboard the horse. Andrew Beyer, *Derby Stewards on Wrong Track*, Washington Post, D01 (May 13, 2003). Ultimately, the "object" was determined to be an optical illusion. *Id.* The Churchill Downs' stewards thus cleared Santos of wrongdoing. *Id.*

[3] Marty McGee, *Riders file suit over logos worn in Kentucky Derby*, Daily Racing Form, p. 3 (November 9, 2003). The Jockeys' Guild is the labor union for jockeys. *Id*.

[4] *Id*.

[5] *Id.*

[6] *Id*.

[7] *See* Petition for Review of Final Order of Kentucky Racing Commission (the "Petition"), No. 03CI09792 (Jefferson Circuit Court, Kentucky, November 6, 2003). On November, 17, 2003, the case was transferred to Franklin Circuit Court.

[8] McGee, *supra* note 4.

[9] *Id.*

[10] Billy Reed, *Patch or no patch, jockeys are just climbing aboard the train of corporate sponsorship*, Snitch, p. 7 (November 26, 2003); *see also* Sigrid Kun, *Race Horses and Intellectual Property Rights: Racing Towards Recognition?*, 17 Quinnipiac L. Rev. 207, 225 n.167 (1997) (describing one jockey at Remington Park being sponsored by Pepsi and wearing its logo during workouts and races). In addition, jockeys, including certain of the plaintiffs in *Desormeaux*, have allegedly worn the Jockey Guild patch in races at tracks in California, Illinois, Maryland, and Texas. Petition, ¶ 42.

[11] Petition, ¶ 22.

[12] Commission's Findings of Fact and Conclusions of Law, attached as Exhibit A to the Petition, Finding of Fact No. 8.

[13] Conclusion of Law No. 9.

[14] Conclusion of Law No. 8.

[15] Finding of Fact No. 12 (emphasis added).

[16] Conclusion of Law No. 12 (emphasis added).

[17] Petition, ¶ 47.

[18] *Id.* ¶ 32. As independent contractors, jockeys are "responsible for their own expenses, including insurance premiums, which are astronomical because of the risk inherent in the profession." Reed, *supra* note 11. The Jockeys' Guild receives "an average of twenty-five hundred injury notifications per year, with two deaths and two and a

half cases of paralysis." LAURA HILLENBRAND, SEABISCUIT: AN AMERICAN LEGEND, p. 73 (Ballantine Books, 2001). As of 2001, the Guild was "supporting fifty riders who were permanently disabled on the job." *Id.*

[19] Petition, ¶ 16; *see* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). The provisions of the First Amendment are incorporated against the states by the Fourteenth Amendment. Schneider v. State, 308 U.S. 147, 160 (1939).

[20] The jockeys have challenged the regulation on overbreadth grounds. Petition, ¶ 51. The overbreadth doctrine is a "departure from traditional rules of standing," Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973), allowing an individual to "challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution . . . .'" Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (citation omitted). A law "should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." New York v. Ferber, 458 U.S. 747, 771 (1982). If a law is overbroad, "any enforcement" of it is "totally forbidden." *Broadrick*, 413 U.S. at 613. Conversely, if a law is found unconstitutional "as applied," it may not be applied to the challenger, but otherwise remains in effect. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758-59 (1988).

[21] NAACP v. Button, 371 U.S. 415, 429 (1963).

[22] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). In the words of the Supreme Court, the First Amendment secures "the great, the indispensable democratic freedoms." Thomas *v.* Collins, 323 U.S. 516, 530 (1945). As is oft noted, the First Amendment's purpose is "to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail . . . ." Turner Broadcasting Sys., Inc. v. Fed. Communications Comm'n, 507 U.S. 1301, 1304 (1993) (quotations omitted). Consequently, the First Amendment generally bars the government "from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002).

[23] *Chaplinsky,* 315 U.S. at 571. For example, in Schenck v. United States, 249 U.S. 47, 52 (1919) (citation omitted), the Supreme Court recognized that "the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic."

[24] *Chaplinsky*, 315 U.S. at 571.

[25] *Id.* In *Chaplinsky*, the Supreme Court affirmed the defendant's conviction for violating a statute that prohibited a person from addressing another with "offensive" words in public, reasoning that such "fighting words" were not entitled to protection under the First Amendment. *Id.* at 569, 571-72.

[26] Roth v. United States, 354 U.S. 476, 484 (1957).

[27] 391 U.S. 563, 573 (1968).

[28] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.") (citations omitted). In addition, strict scrutiny requires there be no less restrictive alternative available. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000).

[29] National Labor Relations Bd. v. Virginia Elec. & Power Co., 314 U.S. 469, 477, 479 (1941).

[30] 323 U.S. 516, 518 (1945). The defendant was the president of the International U.A.W. and resided in Detroit. *Id.* at 520. He came to Texas to give a speech to local union members and supporters. *Id.* Prior to his speech, a state court issued an order enjoining the defendant from soliciting members for any union without first obtaining an organizer's card, as required by statute; the defendant violated this order. *Id.* at 521 & n.3.

[31] *Id.* at 532.

[32] *Id.* at 532, 543.

[33] 310 U.S. 88, 102 (1940).

[34] *Id.* at 102, 103; *see also* Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937) ("Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.").

[35] *Thornhill*, 310 U.S. at 91-92, 101.

[36] The Supreme Court has "long recognized" that the First Amendment's "protection does not end at the spoken or written word." Texas v. Johnson, 491 U.S. 397, 404 (1989) (holding Texas flag-burning statute unconstitutional); Spence v. Washington, 418 U.S. 405 (1974) (reversing conviction for improper exhibition of United States flag where defendant displayed flag upside down with peace symbol attached).

[37] 393 U.S. 503, 504 (1969).

[38] *Id.*

[39] *Id.* at 505-06. The Court acknowledged the need for school officials, "consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. But, given that there was no evidence of conduct which would "'interfere with the requirements of appropriate discipline in the operation of the school,'" the Court concluded the armbands prohibition violated the First Amendment. *Id.*

[40] 354 F.3d 249, 251 (4th Cir. 2003). In *Newsom*, a student sought a preliminary injunction against the school dress code after being disciplined for wearing a tee-shirt which "depicted three black silhouettes of men holding firearms superimposed on the letters 'NRA' positioned above the phrase 'SHOOTING SPORTS CAMP.'" *Id.* at 252.

[41] The court recognized there was no evidence that clothing with messages related to weapons "disrupted school operations or interfered with the rights of others." *Id.* at 259.

[42] *Newsom,* 354 F.3d at 259-60. As an example, the court noted the code would prohibit clothing depicting the state seal of Virginia, which shows a woman holding a spear. *Id.* at 260. Likewise, the court reasoned that the "quintessential political message" the school was trying to promote—"'Guns and School Don't Mix'"—would be prohibited by the code. *Id.* at 260.

[43] *Id.*

[44] Petition, ¶ 32.

[45] *See Thomas*, 323 U.S at 532; *Thornhill*, 310 U.S at 102, 103.

[46] *See Tinker*, 393 U.S. at 505-06; *Newsom*, 354 F.3d at 260. The Commission, of course, could argue that the patch is "disruptive" based on its finding that the stewards could be distracted by it. *See* Finding of Fact No. 12; *Tinker*, 393 U.S. at 507. Given, however, that this finding was posited as a "slippery slope" consideration, such an argument is not particularly persuasive, especially when balanced against the high First Amendment value afforded union promotion speech. *See* Conclusion of Law No. 12.

[47] 599 P.2d 86, 87 (Cal. 1979). In so holding, the court noted there was no evidence of "disruption" in the prison, either past or future, caused by wearing the button. *Id.* at 88; *cf.* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (finding ban on inmate union meetings and solicitation reasonable where such activities could pose "additional and unwarranted problems and frictions in the operation of the State's penal institutions").

[48] Turner Broadcasting Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 641 (1994).

[49] *Id.*

[50] *Id.*

[51] *Id.* (citation omitted).

[52] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 574 (2001) (Thomas, J., concurring); *Turner Broadcasting*, 512 U.S. at 641-43.

[53] *Id.* at 642.

[54] *Id.* at 643.

[55] *See* 810 KRA 1:009, § 14 (banning commercial, but not other types, of speech). In fact, the *Desormeaux* plaintiffs have alleged that Pat Day, one of the other jockeys in the Derby, during the race wore a tunic with the symbol of a Crucifix, but was not fined by the stewards. Petition, ¶¶ 39, 41.

[56] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (applying intermediate standard to commercial speech and noting "[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message"); *see also Lorillard*, 533 U.S. 525, 554 (applying intermediate review to content-based advertising restriction); *id.* at 574-75 (Thomas, J., concurring).

[57] 316 U.S. 52, 54 (1942).

[58] 425 U.S. 748, 762 (1976); *see also* Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (Advertising is not "stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.").

[59] *Virginia State Board,* 425 U.S. at 764, 772.

[60] 447 U.S. 557 (1980).

[61] *Id.* at 566. Expounding on the interest necessary to sustain a restriction on commercial speech, the Court has noted that a state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); *see also* Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (restrictions on commercial speech require more than "mere speculation or conjecture") .

[62] 492 U.S. 469, 480 (1989). Subsequently, several members of the Court "have expressed doubt about the *Central Hudson* analysis and whether it should apply in particular cases." *Lorillard,* 533 U.S. at 554 (citations omitted). The Court, however, has seen "no need to break new ground." *Id.* (quotations omitted). Rather, *Central Hudson* remains an "adequate basis for decision." *Id.* at 555 (quotations omitted).

[63] 447 U.S at 564, 568-69.

[64] *Id.* at 566.

[65] *Id.*

[66] *See supra* notes 16 & 17.

[67] Whether the "traditions of the turf," standing alone, would be an interest sufficient to justify the restriction is more problematic.

[68] 391 U.S. at 568. This balance is similar to the consideration given, when measuring First Amendment claims, to the need to maintain discipline and order in public schools and prisons. *Tinker*, 393 U.S. at 507; *Jones*, 433 U.S. at 129.

[69] *Connick v. Myers*, 461 U.S. 138, 146 (1983).

[70] *Lewis v. Cohen*, 165 F.3d 154, 162 (2d Cir. 1999).

[71] 248 F. Supp. 2d 189 (S.D. N.Y. 2003).

[72] *Id.* at 190, 191. The owner sought the meeting to raise his concerns regarding the manner in which certain horses were selected to run in certain races. *Id.* at 191. When told by one official that his complaint was "ridiculous," the owner began his outburst. *Id.*

[73] *Id.* at 192; *see* 9 NYCRR § 4022.13.

[74] *Id.* at 192-93, 195.

[75] *Perez*, 248 F. Supp. 2d at 197.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 195 (quotations omitted); *see* Heil v. Santoro, 147 F.3d 103, 109 (2d Cir. 1998) ("the government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech").

[79] 39 F.3d 711, 715 (7th Cir. 1994), *cert. denied*, 515 U.S. 1131 (1995). The *Perez* court cited *Leroy* in support of its decision. 248 F. Supp. 2d at 196.

[80] *Leroy*, 39 F.3d at 715.

[81] *Id.*

[82] *Id.*; *see Broadrick,* 413 U.S. at 607-15; CSC v. Letter Carriers, 413 U.S. 548, 568-81 (1973).

[83] *Leroy*, 39 F.3d at 715.

[84] *See supra* notes 69-71 and accompanying text.

[85] *See supra* notes 73 & 81 and accompanying text.

[86] *See supra* notes 61-63 and accompanying text.

[87] *Connick*, 461 U.S. at 146. This, of course, assumes that certain communications are either commercial speech *or* something else, for

example, political speech. In reality, commercial speech can be blended with other, more protected forms of expression. The question then becomes what standard of review will be given to the blended communication—strict scrutiny or the intermediate *Central Hudson* test. In Nike, Inc. v. Kasky, 45 P.3d 243, 247 (Cal. 2002), the California Supreme Court held that certain statements made by Nike during a labor dispute amounted to commercial speech, despite the fact that the statements also formed part of the "public dialogue" on a matter of public concern. Because the speech was commercial, the court reasoned that any false or misleading statements by Nike were not protected by the First Amendment, again without regard to whether they were related to a matter of public concern. *Id.* at 262. The United States Supreme Court initially granted certiorari to review this decision, but then withdrew the writ as "improvidently granted." Nike, Inc. v. Kasky, 123 S.Ct. 2554 (2003).

[88] *Connick*, 461 U.S. at 146.

[89] *See supra* notes 16 & 17.

[90] *See Perez,* 248 F. Supp. 2d at 195.

[91] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

[92] United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981).

[93] International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority, 691 F.2d 155, 160 (3d Cir. 1982) (citing Hague v. C.I.O., 307 U.S. 496, 515 (1939)).

[94] *Id.* (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975)).

[95] *Id.* at 158. With the sole exception of concessionaires, no one was permitted to solicit funds or distribute literature at the Meadowlands. *Id.*

[96] *Id.* at 159 ("Not all public places are public forums.").

[97] *Id.* at 161.

[98] *International Society for Krishna Consciousness*, 691 F.2d at 161.

[99] *Id.* (citations omitted).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *See supra* note 16 & accompanying text.

Swift Boat Democracy & the New American Campaign Finance Regime

*By Lee E. Goodman**

The Bipartisan Campaign Reform Act of 2002

Commonly known as McCain-Feingold in the Senate and Shays-Meehan in the House, the Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Federal Election Campaign Act of 1971 ("FECA") to impose significant new restrictions on American politicians, political parties, interest groups and business corporations interested in expressing an opinion on public policy or presidential and congressional elections. BCRA passed Congress after years of attempts. Following the Enron and WorldCom scandals (which, by the way, had nothing to do with election activity), political conditions finally supported passage of sweeping new restrictions on corporate political activity. The Bipartisan Campaign Reform Act was passed by Congress and signed by the President in March 2002.[1] The new law went into effect November 6, 2002, and the Federal Election Commission (FEC) quickly implemented dozens of new regulations to implement the new law. The key provisions of the new law are summarized below. What remains to be seen is what impact they will have upon American elections and democratic speech.

Overriding Purpose of BCRA

The overriding purpose of the new reforms was to eliminate unlimited expenditures by corporations, unions and interest groups. Reformers argued that such expenditures "corrupted" politicians. Such unlimited expenditures had become known as "soft money" – vast election-season expenditures by interest groups and corporations and large, unlimited personal and corporate contributions to political parties. The new law's primary purpose was to eliminate "soft money" from influencing federal elections. The expenditures influenced elections in two primary respects: (1) large expenditures on "issue advocacy" on the eve of elections, and (2) unlimited contributions to the "non-federal" accounts of the political party committees.

"Issue advocacy," as it became known, was political advertising that identified a federal candidate by name but stopped short of expressly exhorting people to vote for or against the candidate (known as "express advocacy"). The messages would say, "John Smith voted twelve times to raise your taxes. Call John Smith and tell him you pay too much in taxes." Before enactment of BCRA, corporations and unions, as well as interest groups funded by them, were free to broadcast these messages under a bright line drawn by the Supreme Court in *Buckley v. Valeo*.[2] BRCA imposed strict limitations upon such advocacy when funded by corporations, labor unions and interest groups funded by corporations or unions.

Before BCRA, individuals, corporations, unions and interest groups also had been free to donate unlimited funds to the national party committees' "non-federal" accounts. The national party committees used these funds for generic party-building activities, get-out-the-vote drives, and state elections. BCRA eliminated "non-federal" accounts altogether on the theory that the national party committees were a conduit between large corporate, union and individual financial contributions and federal officeholders who would be beholden to the big party donors. BCRA also imposed new restrictions on funding of state political parties for their activities touching on federal elections.

Corporations, Unions and Interest Groups

At the heart of the new BCRA restrictions is its restriction against any reference or depiction of a federal candidate on television or radio within 30 days of the candidate's primary election or 60 days of the general election if the communication is funded by a corporation, labor union or interest group that receives funding from either. The 30- and 60-day blackout periods apply to any depiction, mention or "unambiguous reference" to a candidate, called an "electioneering communication" by BCRA. The blackout period applies even if the reference is made in the context of a legitimate issue message and even if the candidate is an incumbent casting votes in Congress on the eve of an election. The blackout rules do not apply to print, mail or Internet communications.

Prior to BCRA, corporate America understood its political speech rights to be defined by the Supreme Court's decision in *Buckley v. Valeo*. *Buckley* held that FECA restricts only speech that "expressly advocates" the election or defeat of candidates. That is, FECA regulated only public messages and advertisements that contain language expressly exhorting voters to "vote for Smith," "vote against Smith," "support Jones" or "oppose Jones."[3] That meant corporations could spend unlimited funds to discuss pub-

lic policy while mentioning the name of public officials in the context of policy, so long as they stopped short of saying "vote for" or "vote against" the public official. Such speech was believed to be protected by the First Amendment and was not restricted or even regulated under the FECA.[4]

Under *Buckley*, corporations had been free to fund advertisements that say "Senator Jones supports tax policies that will drive businesses and jobs to other countries … Call Senator Jones and tell him to change his position," but completely prohibited from funding advertisements that say "Senator Jones supports tax policies that will drive businesses and jobs to other countries … It's time to oppose Senator Jones." The first ad is an example of "issue advocacy" while the latter is "express advocacy" under the *Buckley* regime.

The *Buckley* bright line between "express advocacy" versus "issue advocacy" had defined the boundaries for permissible corporate political speech for 25 years. The Supreme Court consistently had upheld the Constitutional right of corporations to express a position – and to spend corporate funds to do so – on matters of public policy.[5]

However, with passage of BCRA, Congress took steps to close this avenue of public discourse. In the 1990s, those who believed stricter limits on political activity were needed to "cleanse" an expensive system of political campaigns became concerned that too many corporations and other "special interest" groups were exploiting the *Buckley* bright line as a "loophole" with carefully worded advertisements broadcast in the months leading up to elections. They believed these advertisements effectively moved public opinion and thereby unfairly impacted the outcome of elections. Therefore, in BCRA they banned "issue advertisements" funded with corporate funds that mention the name of any federal candidate within 30 days of any federal primary election and 60 days of any federal general election.

Political Parties

BCRA also closed another important avenue of political activity by America's corporations. For decades corporations, labor unions and individuals were permitted to donate unlimited funds to the "non-federal" accounts of the national political parties for non-express advocacy activities such as generic party-building activities, administrative overhead and get-out-the-vote activities. These funds, though unlimited, were still regulated in how they could be used and publicly disclosed. Critics labeled these funds "soft money." BCRA completely prohibits the national political parties from receiving any corporate funds and abolishes their "non-federal" accounts.

Likewise, state political parties are now restricted from spending "soft money" on activities which have the effect of aiding federal candidates. The BCRA imposed new restrictions on political parties engaged in "federal election activity." Under BCRA, federal election activity includes four categories of activities: (1) voter registration activity during the 120 days before a federal election, (2) voter identification, get-out-the-vote (GOTV) and generic campaign activity conducted in connection with an election in which a federal candidate is on the ballot, (3) a public communication that refers to a clearly identified candidate for federal office and promotes, supports, attacks or opposes a candidate for that office and (4) the services provided by certain political party committee employees.[6] Limits on federal election activity were applied in BCRA only to state and local political parties (and in certain circumstances to officeholders soliciting funds for non-party organizations). The limits are not absolute, however, and state parties may place contributions of no more than $10,000 from single donors into "Levin accounts" (named for Senator Carl Levin who proposed the limited exception) to spend on federal election activities.

Political Action Committees

Federal political action committees have been subject to strict contribution limits for nearly thirty years. In order to participate in federal elections, a PAC may accept no more than $5,000 from an individual and may contribute no more than $5,000 to a federal candidate in each election. BCRA did not alter these hard money limits. In fact, BCRA's legislative history is quite complimentary of PACs.

PACs also may pay for advertisements that expressly advocate the election or defeat of candidates as well as electioneering communications which reference candidates without an explicit exhortation to vote one way or the other. Although hard money limits restrict the amount of advocacy PACs can afford, PACs remain the principal mechanism for political action by business corporations, labor unions and interest groups.

Individual Citizens

In keeping with BCRA's goal of shifting more

political expenditures from "soft money" to "hard money" (funds subject to strict limits), BCRA increased individual contribution limits from $1,000 per election to $2,000 per election. BCRA also increased annual aggregate contribution limits for individuals from $25,000 per year to $95,000 per two-year election cycle. These increases were intended to update FECA's contribution limits, first implemented in 1974, for inflation and to encourage more "hard money" expenditures.

One area of individual activity BCRA did not restrict was the right of individual citizens to make unlimited "independent expenditures to advocate the election or defeat of federal candidates. "Independent expenditures" means an individual's expenditures of personal resources to express his or her own point of view on a candidate or election, and which is not coordinated in any way with a candidate, a political party or their agents. So long as an individual publicly discloses such expenditures, he remains free to spend his own money to communicate his opinions of federal candidates and elections.

Another activity BCRA appears to have left unrestricted is the right of individual citizens to combine their resources in a tax-exempt, unincorporated association to fund "electioneering communications" throughout the election season. Thus, a group of individuals may pool their funds to air all the television and radio messages referring to candidates they can afford. Thus, individual citizens – and especially wealthy citizens — remain free under BCRA to communicate their opinions about candidates and public officials. More discussion regarding tax-exempt associations of individuals follows below.

Constitutional Challenge: *McConnell v. FEC*

BCRA's new restrictions quickly became the subject of a constitutional challenge first in a consolidated federal court, and then in the United States Supreme Court in a case styled *McConnell v. Federal Election Commission*. In that case, a wide range of parties, including the California Republican and Democratic Parties, the AFL-CIO and the United States Chamber of Commerce, as well as dozens of other organizations representing the entire ideological spectrum, challenged the new restrictions as too restrictive under the First and Tenth Amendments of the Constitution. Representing the rights of American business community, the United States Chamber of Commerce, the Associated Builders & Contractors, and the National Association of Manufacturers quickly challenged the new restrictions on corporate political activity as unconstitutional under *Buckley* and its progeny. A similar lawsuit was filed by the AFL-CIO. In all, over 75 plaintiffs have challenged the law in 11 cases consolidated under the style *McConnell v. Federal Election Commission*. The lead plaintiff was U.S. Senator Mitch McConnell of Kentucky.[7]

A federal three-judge panel struck certain provisions and upheld others in May 2003, and then quickly stayed its own 1,630 page opinion in deference to the Supreme Court. The Supreme Court, recognizing the importance of settling the rules before presidential primaries were to commence in January 2004, expedited the appeal, hearing arguments shortly after Labor Day 2003. A landmark 5 – 4 opinion defining the constitutional rights of all American citizens, political parties, unions and corporations to participate in the democracy was handed down on December 10, 2003.[8]

The 5 – 4 majority (O'Connor, Stevens, Breyer, Souter, Ginsberg) of the Supreme Court upheld the constitutionality of substantially all provisions of the Bipartisan Campaign Reform Act of 2002. Of particular interest, the Court upheld the following provisions:

1. 30/60-Day Blackout Periods on "Electioneering Communications":
The Court upheld the new ban against corporate-funded communications broadcast over television, cable or radio that refer to a federal candidate within 30 days of a primary election and 60 days of a general election. Previously it had been permissible for trade associations and corporations (and labor unions) to broadcast "issue ads" that referred to but did not expressly advocate the election or defeat of a federal candidate at any time.

2. Prohibition Against National Party "Soft Money":
The Court upheld BCRA's prohibition against all corporate contributions to the national political parties' "non-federal" accounts. Previously the national parties had been permitted to receive unlimited corporate and individual contributions for state-related and party-building activities.

3. State Party "Levin Accounts":
The Court upheld BCRA's new restrictions on the ability of state political parties to

spend corporate contributions in those states where corporate contributions are permitted by state law, including the $10,000 contribution limit for "Levin Accounts." State parties may receive corporate contributions of up to $10,000, segregate those funds in special "Levin Accounts," and use those funds for combined state and federal election activity. Previously, federal law only scarcely restricted the activities of state political parties.

4. Coordination Without Agreement:
The Court upheld BCRA's revised definition of what constitutes "coordination" between a corporation (or other organization) and a federal candidate/campaign. Previously the law required an agreement between an outside group and a candidate/campaign before the outside group's independent political activities could be deemed a *contribution* to the candidate because it was "coordinated" with the candidate or his staff. Now a formal agreement is not required, and ordinary course meetings and conversations between a corporation's representatives and a candidate could trigger illegal contributions when corporations engage in political activities, such as issue advocacy, based upon information shared in those meetings.

5. Additional Disclosure Burdens on Broadcasters and Advertisers
The Court upheld the BCRA's requirement that broadcasters maintain certain publicly available records of politically related broadcasting requests. These include "candidate requests," "election message requests" and "issue requests."

The Supreme Court issued three separate majority opinions to address the BCRA's five challenged "Titles." Justices Stevens and O'Connor—joined by Justices Souter, Ginsburg and Breyer—delivered the opinion of the Court with respect to Titles I and II. Chief Justice Rehnquist—joined by all members of the Court to varying degrees—delivered the opinion of the Court with respect to Titles III and IV. Justice Breyer—joined by Justices Stevens, O'Connor, Souter and Ginsburg—delivered the opinion of the Court with respect to Title V. Separate dissents and opinions were authored by Chief Justice Rehnquist and Justices Stevens, Scalia, Thomas and Kennedy.

Swift Board Veterans for Truth and MoveOn.org: The 527 Phenomenon

As restrictive as the new BCRA was intended, however, it did not foreclose all avenues of political association and spending and public communications discussing federal candidates. A myriad of new tax-exempt interest groups have sprung up in the wake of campaign finance reform. Many of these organizations, like Swift Boat Veterans for Truth and the MoveOn.org Voter Fund, are what have become known as "527 organizations" (or "527s" for short), a title drawn from Section 527 of the Internal Revenue Code, pursuant to which the organizations claim their tax-exempt status. The participation of these and other tax-exempt organizations in the 2004 elections is the first field test of campaign finance reform.

Political organizations that claim tax-exempt status under Section 527 of the Internal Revenue Code are referred to as "527 organizations" or "527s." These organizations are formed and operated primarily to receive and make contributions for the purpose of influencing the selection, nomination, election or appointment of any individual to federal, state or local public office. 527 organizations are exempt from federal income tax on contributions received. These organizations do not need to file most of the reports required by the Internal Revenue Service.

Some 527 organizations – federal political action committees – must comply with the requirements of the FEC. A federal PAC is, by definition, a 527, but not all 527s are federal PACs. 527s that are not subject to the FEC's oversight are often called "shadow" or "soft money" organizations because they can raise unlimited funds from a variety of sources. Although 527 organizations do not need to be incorporated or have formal organizational documents, these organizations must register with the IRS and must disclose information about their contributions and expenditures.

Under the BCRA regime, different types of 527 organizations can engage in different kinds of political activity and communications depending upon how they are funded and constituted. An incorporated 527 that receives donations from corporations may not pay for express advocacy or electioneering communications. By comparison, an unincorporated 527 that receives only donations from individuals (even wealthy individuals) may pay for electioneering communications, but not express advocacy. A federal political action committee, another type of 527 organization, may pay for both express advocacy and electioneering contri-

butions because it abides by the FECA's hard money source and amount limits (that is, it receives contributions only from individuals in amounts of less than $5,000 per year).

The most prominent 527 organizations that have emerged during the Fall 2004 elections are those funded solely by individuals. These unincorporated associations of individual citizens have been left free to pool their resources to advertise the relative virtues of federal candidates so long as they do not expressly advocate the candidates' election or defeat. Thus, organizations such as Swift Boat Veterans for Truth and MoveOn.org Voter Fund have run television advertisements throughout the Fall of 2004 discussing John Kerry's secret meeting with Communist North Vietnamese officials in the early 1970s (Swift Boat Veterans) and George W. Bush's harmful economic policies (MoveOn.org).

Moreover, dozens of 527 and other tax-exempt organizations (including 501(c)(4) and 501(c)(6) organizations) have coordinated their collective efforts on the left and right ends of the political spectrum in a strategic effort to maximize their political effect in battleground states. A prominent consortium of left-leaning interest groups is Americans Coming Together ("ACT").

One political watchdog organization estimates that the combined total of all expenditures by 527 organizations in connection with the 2004 federal elections exceeded $221 million as of September 2004, with tens of millions more expected to be spent in the final month of the 2004 campaigns.[9] Total expenditures by all politically motivated organizations, including tax-exempt 501(c)(4) and 501(c)(6) organizations, on election-season communications focusing on narrow policy issues (not candidates) pushes the total even higher. The upshot of this political activity is that a significant amount of "soft money" continues to influence elections in the United States following enactment of BCRA in 2002.

FEC Attempts to Regulate 527s

The extent to which political activity by tax-exempt associations or individuals could be restricted even if Congress were to revisit campaign finance reform is the subject of continuing constitutional debate. The Supreme Court held in *FEC v. Massachusetts Citizens for Life*[10] that the government could not apply its prohibition on corporate expenditures to a non-profit 501(c)(4) organization funded solely by individual citizens. By extension, this constitutional protection may apply to 527 organizations funded by individuals. Nevertheless, some additional restrictions on 527 activity have been proposed as new regulations at the Federal Election Commission ("FEC"), although agreement on such restrictions has not been achievable thus far. The FEC has settled, for the time being, on a new restriction on 527 fundraising solicitations.

In 2003 and 2004, the FEC considered a rule to sweep 527s and their expenditures into regulated categories of "political committees" and "expenditures." Some FEC Commissioners argued that unregulated political advocacy by non-party 527 organizations might circumvent or undermine the goals of BCRA.[11] Unable to reach the four votes necessary to adopt the proposed rules, however, on August 19, 2004, the FEC adopted a new rule restricting fundraising appeals by 527 organizations. The rule, to take effect January 1, 2005, will count as "contributions" any funds provided "in response to any communication . . . if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." As contributions, such funds will be subject to hard money limits. According to discussions at the August 19, 2004 FEC meeting, it appears that this provision might apply even if a small part of an issue advocacy letter by a 527 organization states that the funds given to the organization as a result of the letter would be used to stop a federal candidate and implies that the stopping would be at the polls. The FEC's General Counsel stated that the rule would be textual and would apply to solicitations that say the funds will be used in connection with elections or the act of voting.

Conclusion

It has often been said that political expression in a democracy (as well as the resources that fund it) flows like a river – when one rock is put in place, it flows in another direction. Put another way, speech will find an outlet. The authors of BCRA may have intended to build a dam in order to diminish the influence of large political expenditures to highly controlled trickles, but it remains to be seen precisely how much political spending and speech BCRA has effectively blocked.

Increased "hard money" limits undoubtedly raised the spending bar for the two presidential aspirants during the primary season as well as many congressional candidates. But the most intriguing financial story of

the 2004 elections, once it is finally written, is what happened to "soft money." Quite possibly, the real effect of the BCRA reforms may turn out not to be *elimination* of "soft money" from federal elections, but that the democracy experienced a fundamental *shift* of "soft money" and political advocacy from the two national political parties to dozens of highly effective interest groups all with their own ideological agendas, and many established for the principal purpose of influencing the outcome of the 2004 federal elections. Assuming the 2004 elections actually give rise to such a measurable shift, it remains to be determined whether such a shift is a positive development for American democracy. Many observers argue that more speech regarding public policy and candidates is good for democracy, pitting interest against interest in a great rhetorical and get-out-the-vote melee as the Founders envisioned. BCRA advocates worry about what they call the "corrupting" effects of the hundreds of millions of dollars in expenditures to fund all that speech and political action. This fundamental disagreement animated the debate over campaign finance reform before enactment of the BCRA, and is likely to continue being debated long after the 2004 elections are concluded.

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Footnotes

[1] Pub. L. No. 107-155, 116 Stat. 81 (2002).

[2] 424 U.S. 1 (1976).

[3] 424 U.S. at 44, fn. 52.

[4] Although the FECA was held not to regulate these expenditures, the Internal Revenue Service adopted special rules regarding the tax treatment of such expenditures.

[5] *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986).

[6] *See* 2 U.S.C. § 431(20)-(24).

[7] To read briefs and court opinions in the *McConnell v. FEC* and track case developments access www.law.stanford.edu/library/campaignfinance.

[8] *McDonnell v. Federal Election Commission*, 540 U.S. 93 (2003).

[9] Center for Responsive Politics, www.opensecrets.org/527s/527cmtes.asp?level=E&cycle=2004 (compiling data collected from the IRS on Sept. 28, 2004).

[10] 479 U.S. 238 (1986).

[11] 66 Fed. Reg. 13681 (March 7, 2001); 63 Fed. Reg. 11736 (March 11, 2004).

Intellectual Property

Hidden Reefs: Potential Dangers to Intellectual Property Rights Under the Law of the Sea Treaty

*By Howard J. Klein**

Introduction

Earlier this year, the United States Senate held hearings on the Law of the Sea Treaty, after a hiatus of more than twenty years. While much of the attention of these hearings was focused on the military implications of the Treaty, it is the author's belief that the commercial implications also merit serious attention, particularly the potential impact of the Treaty on intellectual property rights.

When the United States first considered the ratification of the Law of the Sea Treaty in the early 1980's, the Reagan administration expressed grave reservations about a number of the Treaty's provisions. Consequently, despite intense international (and considerable domestic) pressure, President Reagan refused to sign it.

One of the principal reasons given by the Reagan administration for its opposition to the Treaty was the treatment afforded intellectual property rights. As originally drafted, the Treaty included a complex and onerous regime for the compulsory licensing of intellectual property rights in the technology relating to activities on or in the international seabed. (Annex III, Article 5) As the domicile of a large number of companies that had developed, or that had plans to develop, the technology for extracting resources (particularly oil. gas, and metal ores) from the seabed, the United States could not accept the exposure of the rights to such technological innovations to the perils and uncertainties of compulsory licensing.

The Treaty's backers, realizing that, without the U.S., the Treaty was all but meaningless, revised certain aspects of the Treaty in an attempt to assuage the concerns of the United States. Among the issues addressed during the revision process was the treatment of intellectual property rights. Most notably, as discussed below, the harsh provisions of Annex III, Article 5 were expressly abrogated, and replaced by what appears to be a "voluntary" scheme for the sharing of intellectual property rights.

It is the author's belief that, while the Treaty's treatment of intellectual property rights is much improved, there are still significant risks that it can (and will) be interpreted in a way that is inimical to the respect accorded these rights under U.S. law.

Definitions

The discussion below will use the following terms, as defined in the Treaty:

1. The Area: The portion of the seabed outside any national jurisdiction (Article 1, section 1).

2. The International Seabed Authority: Referred to as "the Authority." All member states are members of the Authority (Article 156, section 2).

3. The Enterprise: The "organ of the Authority which shall carry out activities in the Area" (Article 170, section 1).

Applicable Provisions

The provision of the Law of the Sea Treaty (hereinafter the "Convention") that deals explicitly with intellectual property (IP) is Part XI, Article 144 ("Transfer of Technology").

Under section 1 of this article, the Authority is required:

> (a) "to acquire technology and scientific knowledge" relating to activities in or on the international seabed ("the Area"); and
>
> (b) "to promote and encourage the transfer to developing states of such technology and scientific knowledge so that all States Parties benefit therefrom.

Article 144, section 2 requires the Authority and member States to "cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area so that the Enterprise and all States Parties may benefit therefrom."

Specifically, the Authority and member states "shall initiate and promote:

> "(a) programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area,

including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;

"(b) measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area."

As originally drafted, Annex III, Article 5 of the Convention set up an onerous and detailed regime for the compulsory licensing of the technology that would come within the ambit of Article 144, *supra*. These provisions were effectively abrogated, however, by Section 5 ("Transfer of Technology") of the Agreement Relating to the Implementation of Article XI of the Convention (the "Agreement"). Paragraph 2 of that section states: "The provisions of Annex III, article 5 of the Convention shall not apply."

Paragraph 1 of Section 5 of the Agreement stipulates:

"In addition to the provisions of article 144 of the Convention, transfer of Technology for the purposes of Part XI shall be governed by the following principles:

"(a) The Enterprise, and developing States wishing to obtain deep seabed mining technology, shall seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements;

"(b) If the Enterprise or developing States are unable to obtain deep seabed mining technology, the Authority may request…the contractors and their respective sponsoring State or States to cooperate with it in facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States seeking to acquire such technology on fair and reasonable terms and conditions, consistent with the effective protection of intellectual property rights. States Parties undertake to cooperate fully and effectively with the Authority for this purpose and to ensure that contractors sponsored by them also cooperate fully with the Authority."

Analysis

The operative provision of the Convention relating to IP rights is Part XI, Article 144 of the Convention, as amended (supplemented) by Section 5 of the Agreement. This article contains no express authorization for compulsory licensing; in fact, it expressly requires that the acquisition of technology be "consistent with the effective protection of intellectual property rights." A literal (and strict) interpretation of this provision, therefore, would seem to require that all acquisition of technology under this article should be by means of voluntary, arms-length, commercial transactions that do not vitiate any IP rights (particularly patent rights).

Nevertheless, it is possible that Section 5 of the Agreement could be interpreted to implicitly sanction the use of compulsory licensing to achieve the broad objectives of technology transfer that the Authority is required to pursue under section 1 of Article 144. Specifically, one could argue that a compulsory license (which leaves a patent valid and enforceable against any non-licensee) is "consistent with the effective protection of intellectual property rights." Moreover, the Agreement does not alter the Authority's mandate, under Section 1 of Article 144, to acquire technology and to facilitate its transfer to developing states. In other words, Section 5, paragraph (b) of the Agreement would have to be interpreted in a manner that allows the Authority to carry out its obligations under Section 1 of Article 144. Thus, if the desired technology is not otherwise available to the Enterprise, the Enterprise is empowered to "request" that contractors "cooperate with it in facilitating the acquisition" of that technology. This power could be exercised, for example, by conditioning access to the Area by a contractor on the transfer of the relevant technology, albeit on "fair and reasonable commercial terms and conditions."

In summary, the Authority has a broad mandate to acquire and facilitate the transfer of technology under Section 1 of Article 144. Under Section 5 of the Agreement, the Enterprise (through which the Authority would act under this article) would need to look first to the open market to acquire such technology [paragraph (a)], but, failing that, it could seek to employ more or less coercive means to fulfill its mandate, depending on the Enterprise's interpretation of

paragraph (b) of Section 5 of the Agreement. Under an expansive interpretation of these provisions, the only limitation would be the right of the IP rights holder to demand "fair and reasonable" compensation. Moreover, if access to the Area is conditioned on a contractor's agreement to license (or otherwise share) the technology, the contractor may be forced to accept whatever the Enterprise deems to be "fair and reasonable commercial terms and conditions," or else forfeit such access. In the case of deep sea mining technology (which is the particular focus of Section 5 of the Agreement), all meaningful commercial use of such technology would be in the Area. Therefore, failure of an IP rights holder to come to terms with the Enterprise could render such technology worthless, or at least reduce its value to whatever the Enterprise is willing to pay for it.

Conclusions

The treatment of intellectual property rights under the Law of the Sea Treaty deserves, at the very least, much closer scrutiny than it seems to have been given to date. The questions of interpretation discussed above should, at the very least, be clarified, and any remaining ambiguities should be addressed in a way that assures IP rights holders that their rights will be given due respect and meaningful protection.

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THE IRAQI SPECIAL TRIBUNAL: SECURING SOVEREIGNTY FROM THE GROUND UP

BY MICHAEL A. NEWTON*

Introduction

The exercise of punitive criminal accountability pursuant to domestic laws is at the heart of our understanding of what it means to have a society built on the rule of law, which in turn makes it the *sine qua non* of true sovereignty. It is so essential and so basic that the pursuit of justice often becomes a focal point of the mission for military forces deployed to a society where the legislative and judicial systems have become corrupted, replaced, or have simply collapsed under the weight of tyranny or corruption. Indeed, the civilian population demands justice and an end to repression even in the immediate aftermath of operations in areas where the citizens suffer from extreme poverty and overwhelming material needs.[1] The priority that the common people attach to the restoration of true justice perhaps reflects an inchoate realization that the freedom from oppression achieved by external military intervention cannot be sustained without the restoration of effective and fair mechanisms for societal justice. The elation that Iraqi citizens expressed as the statues of Saddam fell in Baghdad testified to their deep desire for a restoration of a society built on the rule of law rather than one dominated by the whims of a dictator supported by the machinery of bureaucratic oppression.

To this end, the Governing Council in Iraq sought to make the creation of an accountability mechanism for punishing those responsible for the atrocities of the Ba'athist regime one of its earliest priorities.[2] After months of debate, drafting, and consideration of expert advice solicited from the Coalition Provisional Authority, the Iraqi Governing Council issued the Statute of the Iraqi Special Tribunal (IST) on December 10, 2003.[3] The announcement of the Statute culminated a developmental process that was under the auspices of the Legal Affairs subcommittee of the Iraqi Governing Council led by Judge Dara. By sheer coincidence, the announcement of the Iraqi Special Tribunal preceded the capture of Saddam by only four days. The Iraqi people almost universally supported the concept of prosecuting Saddam inside Iraq rather than simply transferring him to an external judicial forum.[4]

To coincide with the announcement of the Statute, The Iraqi Governing Council and Coalition Provisional Authority (CPA) requested that the Defense Institute of International Legal Studies (DIILS)[5] present a seminar on investigating and prosecuting international crimes in an Iraqi domestic structure. The diverse group of 96 Iraqi judges, prosecutors, and lawyers who gathered in Baghdad were among the first Iraqis outside the Governing Council to review the Statute. Members of this group repeatedly and enthusiastically referred to Saddam's regime as the "entombed regime." Truth-based trials that conform to the principles of fundamental fairness will be a tangible demonstration that Iraqi society is on the road to a future built on the values of justice and personal liberty.

In that sense, the trial records generated from the work of the Iraqi Special Tribunal can be best conceived as the grave marker that will memorialize the misdeeds of the senior Ba'athists who subverted the rule of law in Iraq for nearly a quarter century. This article will briefly review the main structural aspects of the Iraqi Special Tribunal, pause to postulate the legality of its promulgation during the period of coalition occupation in Iraq, and conclude with some observations regarding the relationship between the IST and Iraqi sovereignty.

The Structure of the Iraqi Special Tribunal

Organs of the Tribunal

The Iraqi jurists who gathered in Baghdad in December 2003 were anxious to learn about the best practices for ensuring a neutral and effective judicial system free to function beyond the reach of political control. The Statute echoes this concern by mandating in its very first provision that the IST "shall be an independent entity and not associated with any Iraqi government departments."[6] Because the Iraqi domestic system is built on a civil law model, the IST is the most modern effort to meld common and civil law principles into a consolidated system that comports with accepted standards of justice. The Tribunal is structured similarly to the currently existing *ad hoc* international tribunals in that it contains one or more Trial Chambers,[7] and an Appeals Chamber[8] which is chaired by the President of the Tribunal who is responsible for exercising oversight of the "administrative and financial aspects of the Tribunal."[9]

Additionally, the Tribunal will contain a Prosecutions Department of up to twenty prosecutors.[10] Reflecting the concern of Iraqi jurists who watched the Ba'athist machinery corrode the rule of law, the Statute makes clear that "[e]ach Prosecutor shall act independently. He or she shall not seek or receive instructions from any Governmental Department or from any other source, including the Governing Council or the Successor Government."[11]

Lastly, up to twenty Tribunal Investigative Judges will be responsible for gathering evidence of crimes within the jurisdiction of the IST "from whatever source" considered "suitable."[12] As they investigate individuals for the commission of crimes proscribed under the Statute, the Investigative Judges will serve for a term of three years under terms and conditions as set out in the preexisting Iraqi Judicial Organization Law. Nevertheless, the Investigative Judges "shall act independently as a separate organ of the Tribunal" and "shall not seek or receive instructions from any Governmental Department, or from any other source, including the Governing Council or the Successor Government."[13]

Jurisdictional Reach of the IST

The principle that states are obligated to use domestic forums to punish violations of international law has roots that run back to the ideas of Hugo Grotius.[14] As early as 1842, Secretary of State Daniel Webster articulated the idea that a nation's sovereignty also entails "the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."[15] Though internationalized judicial mechanisms have permanently altered the face of international law,[16] the Iraqi Special Tribunal is built on the truism that that sovereign states retain primary responsibility for adjudicating violations of international law.[17]

Grounded as it is in the right of a sovereign state to punish its nationals for violations of international norms, the temporal jurisdiction of the IST covers any Iraqi national or resident of Iraq charged with crimes listed in the Statute that were committed between July 17, 1968 and May 1, 2003 inclusive. In addition, its geographic jurisdiction extends to acts committed on the sovereign soil of the Republic of Iraq, as well as those committed in other nations, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait.

Articles 11-13 of the Statute establish the competence of the Tribunal to prosecute genocide (Article 11), crimes against humanity (Article 12), and war crimes committed during both international and non-international armed conflicts (Article 13). These substantive provisions are perhaps the most significant aspect of the Statute because they accurately incorporate the most current norms under international humanitarian law into the fabric of Iraqi domestic law for the first time. In addition, Article 14 conveys jurisdiction over a core group of crimes defined in the Iraqi criminal code. The Iraqi lawyers involved in drafting the Statute demanded inclusion of a select list of domestic crimes because the proscribed acts were so corrosive to the rule of law inside Saddam's Iraq. Article 14 reads as follows:

> The Tribunal shall have power to prosecute persons who have committed the following crimes under Iraqi law:
> a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;
> b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and
> c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

For pundits or armchair lawyers tempted to dismiss the Tribunal as a bald assertion of coalition power, Article 14 reveals the offenses deemed most egregious by peace loving Iraqis seeking to rebuild an Iraq based on freedom. The officials who committed the acts included in Article 14 in essence waged war on the Iraqi people and society; the prosecution of those acts was seen *by the Iraqis* as a prerequisite for restoring the rule of law inside Iraq. From the Iraqi perspective, the crimes listed in Article 14 are of comparable severity to the grave violations of international norms found in Articles 11-13. Therefore, the Iraqis felt that prosecution of the domestic crimes described in Article 14 was a vital necessity for the IST if it is to achieve its higher goal of helping to heal the wounds inflicted on Iraqi society by the Ba'athists.

Furthermore, Article 14(a) implicitly signifies the urgent priority that the Iraqis attach to judicial inde-

pendence. While the Statute itself mandates the independent functioning of both the Investigative Judges and the Prosecution, there is no such correlative provision regarding the judges serving in either the Trial or Appeals Chambers. This gap led Human Rights Watch to recommend that the judges be required in writing to act independently and receive no instructions from any external source.[18] The International Covenant on Civil and Political Rights requires a "fair and public hearing by a competent, independent, and impartial tribunal established by law," and the provision of fair trials in the IST will be an important aspect of its legitimacy.[19] The jurists who gathered in Baghdad in December 2003 expressed a great deal of outrage at the manner in which the Hussein regime imposed its will on the Iraqi people through the use of Special or "Revolutionary" courts conducted by untrained minions.[20] The very fact that the Iraqis demanded the inclusion of Article 14(a) warrants the conclusion that they will be keenly sensitive to any attempts to exert political control over the conduct of trials and fiercely resistant to external attempts to manipulate the IST.

Procedural Rights for the Accused[21]

The Coalition Provisional Authority Order that delegated authority to the Iraqi leaders to promulgate the Statute required that the IST meet "international standards of justice."[22] Under the terms of the Statute, the Trial Chambers must "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[23] To illustrate the transformation of justice in a free Iraq, the Statute specifies that "[n]o officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party."[24]

Furthermore, the Statute incorporates a full range of trial rights that, in the aggregate, are fully compatible with applicable human rights norms. Echoing the fundamental guarantees of the International Covenant on Civil and Political Rights, Article 20 of the Statute reads as follows:

> a) All persons shall be equal before the Tribunal.
> b) Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law.
> c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute and the rules of procedure made hereunder.
> d) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:
>
> 1. to be informed promptly and in detail of the nature, cause and content of the charge against him;
> 2. to have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing in confidence. The accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi;
> 3. to be tried without undue delay;
> 4. to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
> 5. to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute and Iraqi law; and
> 6. not to be compelled to testify against himself or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

The Promulgation of the Statute Under the Law of Occupation

United Nations Security Council Resolution 1483 affirmed the need for an accountability mechanism for the crimes and atrocities committed under Saddam's regime, and specifically called upon the Coalition Pro-

visional Authority to "promote the welfare of the Iraqi people through the effective administration of the territory."[25] The law of belligerent occupation simultaneously imposed a highly developed system of rights and duties on the Coalition Provisional Authority.[26] The baseline principle of occupation law is that the civilian population should continue to live their lives as normally as possible. As a result of this baseline, the occupier has a range of duties towards the civilian population, even while maintaining legal rights to conduct operations and provide for security of military and civilian persons and property.

Pursuant to the baseline principle of normality, the Hague Regulations prescribed the rule that the occupying power must respect "unless absolutely prevented, the laws in force in the country."[27] Nevertheless, the international legal regime is not so inflexible as to elevate the provisions of domestic law and the structure of domestic institutions above the pursuit of justice. The promulgation of the IST based on the Chapter VII mandate of Resolution 1483 conformed to the law of occupation as it has been interpreted and developed.

International law allows a reasonable latitude for an occupying power to modify, suspend or replace the existing penal structure in the interests of ensuring justice and the restoration of the rule of law. The duty found in Article 43 of the Hague Regulations to respect local laws unless "absolutely prevented" (in French "*empêchement absolu*") imposes a seemingly categorical imperative. However, rather than being understood literally, *empêchement absolu* has been interpreted as the equivalent of "*nécessite*."[28] In the post World War II context, this meant that the Allies could set the feet of the defeated Axis powers "on a more wholesome path"[29] rather than blindly enforcing the institutional and legal constraints that were the main bulwarks of tyranny.[30]

Article 64 of the 1949 Geneva Conventions explained the implications of Article 43 in more concrete and precise terms. In ascertaining the implications of Article 64 with regard to the occupation in Iraq, it is important to realize its drafters did not extend the "traditional scope of occupation legislation."[31] In the Geneva Convention, the law developed to amplify the concept of necessity understood to be embedded in the old Hague Article 43. Article 64[32] reads as follows:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The summation of these interlinked provisions is that the concept of necessity under Article 64 was broad enough to permit the CPA to delegate the authority for promulgation of the IST to the Governing Council. At its core, Article 64 protects the rights of citizens in the occupied territory to a fair and effective system of justice. As a first step, and pursuant to the obligation to ensure the "effective administration of justice," the CPA issued an order suspending the imposition of capital punishment in the criminal courts of Iraq and prohibiting torture as well as cruel, inhumane, and degrading treatment in occupied Iraq.[33] The subsequent promulgation of CPA Policy Memorandum # 3 on June 18, 2003 was also based on the treaty obligation to eliminate obstacles to the application of the Geneva Conventions because it amended key provisions of the Iraqi Criminal Code in order to protect the rights of the civilians in Iraq as required in the Geneva Conventions.[34] Though Policy Memorandum # 3 effectively aligned Iraqi domestic procedure and law with the requirements of international law, it was at best a stopgap measure that was neither designed nor intended to bear the full weight of prosecuting the range of crimes committed by the regime. Indeed, Section 1 of the original June 18, 2003 Policy Memorandum #3 expressly focused on the "need to transition" to an effective administration of domestic justice weaned from a "dependency on military support."[35]

The Second paragraph of Article 64 is the key to understanding the promulgation of the IST. Juxta-

posed against the text of Article 64, Article 47 of the IV[th] Convention implicitly concedes power to the occupying force to "change the institutions or government" of the occupied territory, so long as those changes do not deprive the population of the benefits of the IV[th] Convention. The Commentary to the IV[th] Geneva Convention makes clear that the occupying power may modify domestic institutions (which would include the judicial system and the laws applicable thereto) when the existing institutions or government of the occupied territory operate to deprive human beings of "the rights and safeguards provided for them" under the IV[th] Geneva Convention.[36] Arguably, direct CPA promulgation of the Statute and the accompanying reforms to the existing Iraqi court system could have been justified based on any of the three permissible purposes (*i.e*. fulfilling its treaty obligation to protect civilians, maintaining orderly government over a restless population demanding accountability for the crimes suffered under Saddam, or enhancing the security of coalition forces).

In other words, the CPA would not have been barred by Article 47 and could have found affirmative authority in Article 64 to impose a structure on the Iraqis for the prosecution of the gravest crimes of the Ba'athist regime. Given the state of occupation law, the delegation of authority to the Governing Council to establish the IST meant that it was grounded in the soil of sovereignty rather than simply being viewed as a vehicle for foreign domination. The delegation of authority to the Governing Council to develop and implement the IST in turn increases the legitimacy and long range utility of the IST as a vehicle for restoring respect for the rule of law inside the citizenry of Iraq. In light of the demands of the local population for a system of fair justice, the imposition of individual criminal responsibility on regime elites is far more beneficial to the ultimate restoration of respect for the rule of law when its genesis and execution are the responsibility of Iraqi officials whose interests are directly linked to the long term welfare of the Iraqi people.

The Validity of the IST as a Domestic Mechanism

The IST was created by the Iraqi authorities with the support of international experts in a context that does not warrant the creation of an internationalized accountability mechanism. The best justice is that closest to the people, both from the standpoint of efficiency and utility. Why? Because crimes are being handled in a timely fashion in the country where people see justice being done. That's where the physical evidence is located and where the victims live. That's where justice can be achieved in the most expeditious manner which also does the most to restore long term societal stability.

United States policy is rightly focused on encouraging states to exercise their sovereign rights to pursue accountability for war crimes and other egregious violations of international and domestic law rather than simply abdicating to an internationalized process. There has never been an internationalized process created simply based on the nature of the underlying offenses as international norms. The United States Ambassador-at-Large for War Crimes has explained this as follows:[37]

> the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible . . . . International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent step in on an ad hoc basis as in Rwanda and Yugoslavia.

Even in the context of the Nuremberg Tribunal, it is important to note that the Moscow Declaration specifically favored punishment through the national courts in the countries where the crimes were committed.[38] The military commissions established in the Far East similarly incorporated the principle that the international forum did not supplant domestic mechanisms.[39]

The current *ad hoc* tribunals were both created in contexts where justice would not be achieved or even pursued in domestic forums. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created to fill the domestic enforcement void caused by the dictatorial control that the Milosevic regime exercised over the Yugoslav judicial system.[40] Similarly, in the context of the genocide and societal chaos in Rwanda, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) where there would have otherwise been a prosecutorial void due to the total disarray of the domestic judicial system.[41]

Based on the clear textual tenet of complementarity,[42] even the most ardent advocates of the International Criminal Court (ICC)[43] concede that

the very best world is one in which the ICC focuses on a smaller number of more severe or difficult prosecutions while states remain responsible for prosecuting the vast majority of offenses.[44]

The circumstances in Iraq do not warrant creation of an internationalized accountability mechanism because the Iraqi judiciary and people stand ready to take on the challenge of what will almost certainly be a range of incredibly complex trials. Without doubt, the IST will handle cases brought against generally unsympathetic individuals that require time-consuming applications of sophisticated international norms. Having said that, the Statute itself erects a delicate balance between budding Iraqi sovereignty and the proper implementation of international norms. There are a range of issues which manifest the intent of the Iraqis to enforce international law without completely surrendering control or authority over the IST to the international community.

The Bar Affiliation of Counsel

When interpreting the provisions of international law found in Articles 11-13, the Statute permits the Trial and Appellate Chambers to "resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions."[45] Instead of simply permitting international expertise to dominate the IST, the Statute requires that an accused "is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such suspect is Iraqi."[46] Furthermore, subject to one narrow exception (see below), the judges, investigative judges, prosecutors, and the Director of the Administrative Department shall be Iraqi nationals.[47] These provisions indicate a willingness to incorporate international expertise and current jurisprudence into a process that has the earmarks of Iraqi justice, which in turn will make it acceptable and legitimate to the civilian population as a whole.

The Issue of International Advisors

Even as they sought to retain the Iraqi nature of the IST, the Governing Council recognized that legitimacy in the eyes of the world would also contribute to the long term rehabilitation of Iraq into the community of nations. To that end, the Statute *requires* the appointment of non-Iraqi experts to work in an advisory capacity to facilitate the work of the Trial and Appellate Chambers, the Investigative Judges and the Prosecutions Department. International experts appointed within the specified offices of the IST are to be persons of "high moral character, impartiality, and integrity."[48] The provision requiring the appointment of international experts to advise the Investigative Judges reveals the underlying intent of the Governing Council and the important role projected for such advisors:[49]

> The Chief Tribunal Investigative Judge shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Tribunal Investigative Judges. The role of the non-Iraqi nationals and observers shall be to provide assistance to the Tribunal Investigative Judges with respect to the investigations and prosecution of cases covered by this Statute (whether in an international context or otherwise), and to monitor the protection by the Tribunal Investigative Judges of general due process of law standards. In appointing such advisors, the Chief Tribunal Investigative Judge shall be entitled to request assistance from the international community, including the United Nations.

The provisions addressing the appointment of non-Iraqi judges are similar, but preserve an important degree of Iraqi autonomy. Instead of a mandatory requirement to appoint international judges, the Statute simply provides that "[t]he Governing Council or the Successor Government, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity."[50] The combination of these provisions indicates that the distinguished judges and lawyers who helped create the Special Tribunal strove to build a structure influenced by and properly informed by international standards and jurisprudence without being dominated and manipulated by such external forces. This is surely an appropriate balance for those seeking to restore respect for the rule of law inside Iraqi society and the judiciary that serves that society.

The Issue of Punishments

One of the most important efforts to balance the enforcement of international norms with the preservation of Iraqi sovereign concerns is also one of the most visible and controversial. Article 24(a) of the Statute provides that the possible penalties for the IST are those "prescribed by Iraqi law (especially Law Number 111 of 1969 of the Iraqi Criminal Code), save that for the purposes of this Tribunal, sentences of life imprisonment shall mean the remaining natural life of the person." This provision conceivably permits the imposition of the death penalty for the gross violations of international law outlined in the Statute (geno-

cide, crimes against humanity, and war crimes). Even in this sensitive area, the drafters took a bow to the importance of international norms by specifying that the penalty for crimes described in Articles 11-13 "which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents."[51] These provisions raise the specter in some minds that the core goal of the IST is for vengeance to be achieved through the veneer of a judicial process.

However, the possibility that the Iraqi authorities could impose the death penalty for the gross violations of international law during the Ba'athist regime cannot be divorced from the rather extensive due process guarantees embedded in the Statute. Indeed, no fair reading of the Statute could lead to the conclusion that the drafters of the IST had no interest in seeking justice via a legitimate and truth-based institution. In addition, human rights law specifically envisions that the decision whether to abolish or enforce the death penalty in domestic penal systems is reserved to national processes.[52] The fact that none of the internationalized accountability mechanisms in the world today have the power to impose the death penalty should not be dispositive for the Iraqis as they address the problems of their recent past. The paradoxical result of a binding rule of international law that forbade the imposition of the death penalty for gross violations of international law would be to make the enforcement of those norms less likely.

Conclusion

When faced with the challenge of implementing humanitarian law, the only guarantee is that the task is difficult and the progress slow. The creator of the Hague Peace Conference, Czar Nicholas, cautioned that "[o]ne must wait longer when planting an oak than when planting a flower."[53] The IST has the potential to become a strong force for rebuilding the rule of law inside Iraq. Those Iraqis and non-Iraqi advisors who dedicate themselves to helping the IST achieve this lofty goal deserve the support, both legal and financial, of those individuals and nations that share that objective.

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Footnotes

[1] Georges Anglade, *Rules, Risks, and Rifts in the Transition to Democracy in Haiti*, 20 Fordham Int'l L.J. 1176, 1190 (1997)("In the presence of an inhuman spectacle of misery and its urgent material needs, one tends to forget that the primary needs of people are liberty, justice, and security. Because a pauper also needs justice, the object of a transition to democracy becomes the modern organization of justice in a State of law. This demands destruction of the old military-police apparatus in order to give birth to another organization in charge of public order. It also requires that the institutions of justice and the body of functionaries that make them work be reconsidered so as to produce a "just justice" and in order to guarantee a "free freedom." Haiti must reconstruct judicial power separate from the executive power, which too often has controlled judicial power. Justice by law is thus the initial goal in the transition to democracy as well as the object of the transition itself. It is essentially through the achievement of this goal that Haiti can unite a country broken in two, and create a single people from two profoundly antagonistic factions. Economic analysis also poses justice as a preliminary condition necessary to development.")

[2] Interview with David Hodgkinson, Office of Human Rights and Transitional Justice, Coalition Provisional Authority, Baghdad, December 11, 2003.

[3] *Available at* http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter IST Statute].

[4] Bathsheba Crocker, *Iraq: Going it Alone, Gone Wrong*, *in* Winning The Peace: An American Strategy for Post-Conflict Reconstruction 281 (Robert C. Orr ed., 2004)

[5] *See http://www.dsca.mil/diils/* The Defense Institute of International Legal Studies (DIILS) provides education teams to address over 300 legal topics, with a focus on Justice Systems, the Rule of Law, and the execution of disciplined military operations. Since its inception in 1992, DIILS officers have presented programs tailored to the needs of the host country to over 19,000 senior military and civilian government officials from 113 nations around the world. Seminars are designed for an audience of 40 to 60 military and civilian executive personnel from the host country, and take place both in the host nation and in the United States.

[6] IST Statute, art. 1(a), *supra* note 4. On May 8, 2004 Ambassador Bremer issued Coalition Provisional Authority Memorandum Number 12: Administration of Independent Judiciary on May 8, 2004, which laid out the governmental structures and procedures needed to ensure a robust and independent judiciary, *available at* http://www.cpa-iraq.org/regulations/20040508_CPAMEMO12_Administration_of_Independent_ Judiciary.pdf.

[7] Each of which, according to Article 4 of the Statute, will consist of five "permanent independent judges" and independent reserve judges. IST Statute, art. 4(a), *supra* note 4.

[8] The Appeals Chamber has "the power to review the decisions of the Trial Chambers." IST Statute, art. 3, *supra* note 4.

[9] IST Statute, art. 4(c)(ii), *supra* note 4.

[10] IST Statute, art. 8, *supra* note 4.

[11] IST Statute, art. 8(b), *supra* note 4.

[12] IST Statute, art. 7(i), *supra* note 4.

[13] IST Statute, art. 7(j), *supra* note 4

[14] *See* Richard Tuck, The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant (1999).

[15] John Bassett Moore, 1 A Digest of International Law 5-6 (1906).

[16] *See generally* Paul R. Williams & Michael Scharf, Peace With Justice ?: War Criimes and Accountability in the Former Yugoslavia (2002).

[17] The necessity for domestic states to use domestic criminal forums and penal authority to enforce norms developed in binding international agreements is perhaps one of the most consistent features of the body of law known as international criminal law. *See, e.g.,* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, G.A. Res. 2670, GAOR 3rd Sess., Pt.1 U.N. Doc. A/810, at 174, *entered into* force 12 January 1951 (Article V obligates High Contracting Parties to enact the necessary domestic legislation to give effect to the criminal provisions of the Convention.)

[18] Memorandum to the Iraqi Governing Council on The Statute of the Iraqi Special Tribunal, para. A.1., December 2003, *available at* http://www.hrw.org/backgrounder/mena/iraq121703.htm.

[19] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR (Supp. No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).

[20] Rajiv Chandrasekaran, *Tribunal Planners Hope to Start Trials by Spring*, Wash. Post, A1 (Dec. 16, 2003).

[21] The Iraqi lawyers selected this term rather than that used in the International Criminal Court negotiations. There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms "perpetrator" or "accused." Though some delegations were concerned that the term perpetrator would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapeau that "the term "perpetrator" is neutral as to guilt or innocence. *See* U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), *reprinted in* Knut Dormann, Elements of War Crimes Under The Rome Statute of the International Criminal Court 14 (2002).

[22] *See* Coalition Provisional Authority Order # 48: Delegation of Authority Regarding and Iraqi Special Tribunal, available at http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

[23] IST Statute, art. 21(b), *supra* note 4.

[24] IST Statute, art. 33, *supra* note 4.

[25] S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483, para. 4 (2003).

[26] *See generally* Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, *entered into force* Jan. 26, 1910, *reprinted in* Documentation on the Laws of War 73 (3d ed., eds. Adam Roberts & Richard Guelff 2000)[*hereinafter* 1907 Hague Regulations],Geneva Convention Relative to the Protection of Civilians in Time of War, arts. 47-78, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Civilians Convention].

[27] 1907 Hague Regulations, *supra* note 27, art. 43.

[28] Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* , 1 Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series 8 (Fall 2004). *See also* E.H. Schwenk, *Legislative Powers of the Military Occupant Under Article 43, Hague Regulations* 54 Yale L.J. 393 (1945).

[29] Morris Greenspan, The Modern Law of Land Warfare 223-7 (1959).

[30] For example, German forces were able to commit almost unthinkable brutalities under the shield of Nazi sovereignty based on the *Fuehrerprinzip* (leadership principle) imposed by Hitler to exercise his will as supreme through the police, the courts, the military, and all the other institutions of organized German society. The oath of the Nazi party stated: "I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me." Drexel A. Sprecher, Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account 1037-38. Accordingly, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This absolute and unconditional obedience to the superior in all areas of public and private life led in Justice Jackson's famous words to "a National Socialist despotism equaled only by the dynasties of the ancient East." Opening Statement to the International Military Tribunal at Nuremberg, II Trial of the Major War Criminals Before the International Military Tribunal 100 (1947).

[31] G. Schwarzenberger, The Law of Armed Conflict 194 (1968).

[32] Civilians Convention, *supra* note 27, art. 64.

[33] Coalition Provisional Authority Order Number # 7, 9 June 2003, Doc. No. CPA/MEM/9 Jun 03/03 §§ 2 and 3, *available at* http://www.cpa-iraq.org/regulations/index.html#Orders.

[34] Coalition Provisional Authority Memorandum Number 3: Criminal Procedures was revised on June 27, 2004, *available at* http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf. Articles 64-78 of the IVth Convention detail a range of specific rights belonging to the civilian population of the occupied territory that correspond to those generally accepted as core human rights provisions, *inter alia*, the right to a fair trial with the accompanying due process, credit for pretrial confinement, etc. *Cf.* International Covenant on Civil and Political Rights, G.A. Res. 2200A)XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), art. 14, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (describing analogous provisions derived from international human rights law).

[35] Copy on file with author.

[36] *See* IV Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 274 (O.M. Uhler & H. Coursier eds. 1960)(explaining the intended implementation of the language of Article 47, Civilians Convention, *supra* note 27, art. 47("any change introduced" to domestic institutions by the occupying power must protect the rights of the civilian population).

[37] Review of Terrorism Suspects Policies, Hearing on DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, Before the United States Senate Committee on the Judiciary, 107th Congress (2001) (statement of Pierre-Richard Prosper, United States Ambassador—at—Large for War Crimes Issues).

[38] IX Department of State Bulletin, No. 228, 310, *reprinted in* Report of Robert H. Jackson United States Representative to the International Conference on Military Tribunals 11, Department of State Publication 3080, Washington D.C. (1945). The Moscow Declaration was actually issued to the Press on November 1, 1943. For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, see Peter Maguire, Law and War: An American Story 85-110 (2000). The Declaration specifically stated that German criminals were to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein." The international forum was limited only to those offenses where a single country had no greater grounds for claiming jurisdiction than another country. Justice Jackson recognized this reality in his famous opening statement. He accepted the fact that the International Military Tribunal was merely a necessary alternative to domestic courts for prosecuting the "symbols of fierce nationalism and of militarism." Opening Statement to the International Military Tribunal at Nuremberg, II Trial of the Major War Criminals Before the International Military Tribunal 99 (1947). He further clarified that any defendants who succeeded in "escaping the condemnation of this Tribunal … will be delivered up to our continental Allies." *Id*. at 100.

[39] *See* Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Pacific, AG 000.5, 24 September 1945, para 5(b)("[p]ersons whose offenses have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of the local jurisdiction.")(copy on file with author).

[40] S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993). *See Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/2-5704 ¶ 26 (1993)(the "particular circumstances" of the impunity in the Former Yugoslavia warranted the creation of the international tribunal).

[41] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994). *See generally* Virginia Morris & Michael P. Scharf, The International Criminal Court for Rwanda (1998).

[42] *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 Mil. L. Rev. 20 (2001). *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 17, 19(1), 19(2), and 20(3), *reprinted in* 37 I.L.M. 998 (1998)[hereinafter Rome Statute].

[43] Rome Statute, *supra* note 43, arts. 12–19.

[44] History shows that the overwhelming number of prosecutions for violations of international humanitarian law and other serious crimes have come in national forums as opposed to international tribunals. For example, in contrast to the original twenty-four defendants charged before the International Military Tribunal at Nuremberg, Allied zone of occupation courts exercising sovereign power on German soil sentenced over five thousand Germans for war crimes. Marjorie Whiteman, 11 Digest Of International Law 947-56 (1968). The United Stats convicted 1814 (with 450 executions); the French convicted 2107 (109 executed); the British convicted 1085 (240 executed); there are no reliable numbers for the thousands executed by the Russians. M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 532 (2d ed. 1999). Similarly, from 1946 to 1948, Australian, American, Filipino, Dutch, British, French, Chinese, and Australian courts convicted some 4,200 war criminals in the Pacific theater. Marjorie Whiteman, 11 Digest Of International Law 1005 (1968).

[45] IST Statute, art. 17(b), *supra* note 4.

[46] IST Statute, art. 18(c), *supra* note 4.

[47] IST Statute, art. 28, *supra* note 4.

[48] IST Statute, arts. 6(c), 7(o), and 8(k), *supra* note 4.

[49] IST Statute, art.7(n), *supra* note 4.

[50] IST Statute, art. 4(d), *supra* note 4.

[51] IST Statute, art. 28(d), *supra* note 4.

[52] International Covenant on Civil and Political Rights, G.A. Res. 2200A)XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), art. 6 para. 2, 14, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[53] James Brown Scott, The Hague Peace Conferences of 1899 and 1907 xiv (1915).

Labor and Employment Law

Right to Work Laws are OK: Legal Challenges to Oklahoma's recently Enacted Right to Work Law

*By John R. Martin**

I. Introduction

Twenty-two states have Right to Work laws.[1] These laws prohibit compulsory unionism—usually an agreement between an employer and a union requiring all employees in a bargaining unit to pay union dues. F.A. Hayek endorsed Right to Work laws as a response to the special legal privileges, particularly monopoly bargaining, granted to unions by federal law.[2]

Oklahoma is the latest state to enact a Right to Work law. Federal and state courts have recently upheld this law against union challenges. The federal challenges in particular raised interesting preemption issues under the National Labor Relations Act. The federal challenges also brought to light drafting problems in the law, of which legislators in other states should be aware as they draft Right to Work laws for their own states.

II. Enactment of Oklahoma's Right to Work Law

In 2001, proponents of a Right to Work law, with strong support by then-Governor Frank Keating, had the votes in the Oklahoma legislature to enact it. To give organized labor "a fighting chance of defeating Right to Work,"[3] Senate President Pro Tempore Stratton Taylor, an opponent of the law, convinced the legislature to pass instead a resolution referring to the people for a vote a proposed Right to Work constitutional amendment under Oklahoma's referendum procedure.[4] A special election was set for September 25, 2001, sparking an unprecedented amount of spending by unions opposing the law and by proponents, with each side spending approximately $5 million.[5] The electorate approved State Question No. 695[6] by a vote of 447,072 to 378,465, a margin of 54% to 46%.[7] The law was codified as Article XXIII, Section 1A of the Oklahoma Constitution on September 28, 2001.[8]

III. Federal Preemption

A. The District Court's Opinion

The first legal challenge to the Right to Work law came on November 13, 2001, when seven unions operating in Oklahoma, and one unionized company, sued Governor Keating in federal district court seeking declaratory and injunctive relief rendering the law void as preempted by federal law.[9] The federal laws at issue were the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*; the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*; the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*; the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7101 *et seq.*, and the Postal Reorganization Act ("PRA"), 39 U.S.C. § 1201 *et seq.* Also at issue were federal enclaves within Oklahoma over which the United States has exclusive jurisdiction.[10] Three Oklahoma workers, who would have been forced to pay dues to keep their jobs if the court had struck down the law, intervened as defendants.[11] The court decided the case on cross-motions for summary judgment.

1. Compulsory Unionism Under the NLRA

The district court noted that the NLRA permits some forms of compulsory unionism. While the NLRA abolished the "closed shop," where union membership is a prerequisite to employment, the NLRA permits lesser forms of compulsion, such as requiring all employees in a bargaining unit to pay union dues.[12] However, Congress explicitly grants to states the authority to limit compulsory unionism. NLRA Section 14(b) provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.[13]

The district court explained: "As the plain language of section [14(b)] indicates, states are permitted to enact right-to-work laws which are at odds with federal laws authorizing union security agreements."[14]

The unions argued that NLRA Section 14(b) did not save the Right to Work law, because the law also attempted to regulate employees covered by the RLA, the CSRA, and the PRA, as well as employees working on exclusive federal enclaves.[15] The district court noted that determining whether a state law is in con-

flict with federal law requires "'a two-step process first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.'"[16] Applying the rule of statutory construction that laws are to be construed in such a way that they are not void by reason of preemption, the court held that the Right to Work law "does not apply to those individuals subject to the RLA, the CSRA, or the PRA," or employees on exclusive federal enclaves.[17] The unions' overly broad reading of the law's applicability was unreasonable. The court found that "it is simply not a reasonable construction to extend the scope of Oklahoma's right-to-work law to include those individuals subjected to regulation under the RLA, the CSRA, the PRA, and federal enclave jurisprudence."[18] These federal statutes therefore do not preempt the Right to Work law. The unions did not appeal this ruling of the district court.[19]

2. Hiring Halls and Dues Check-Off

The court next turned to the union's challenges to two specific subsections of the Right to Work law. The first, Subsection 1A(B)(5), prohibits a requirement that workers be "recommended, approved, referred, or cleared by or through a labor organization," an attempted ban of exclusive hiring halls. Governor Keating and the other defendants conceded that the NLRA permits exclusive hiring halls, as long as they do not discriminate against non-union members.[20] And defendants agreed that three United States Courts of Appeal have held that the NLRA does not permit states to ban exclusive union hiring halls.[21] The court, therefore, declared Subsection 1A(B)(5) to be "preempted by federal law as it is outside the grant of authority contained in section 164(b)."[22]

The second specific subsection at issue, Subsection 1A(C), provides:

> It shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization unless the employee has first authorized such deduction.

This provision is an attempt to regulate dues deductions ("check offs"). However, a provision of the NLRA already specifically regulates dues deductions. An employer may only deduct union dues from an employee if the employer has received written authorization from the employee.[23] And such authorizations shall not be irrevocable for more than one year.[24] The court found a conflict between Subsection 1A(C) and the NLRA's provision, because Subsection 1A(C) seemed to require that dues deduction authorizations be revocable at will, rather than allowing them to be irrevocable for up to one year.[25] Because of this conflict, the court held Subsection 1A(C) to be preempted by the NLRA.[26]

3. State Protection of the Rights to Join Unions and Not to Subsidize Them

The unions, in their motion for summary judgment and for the first time, attacked Subsections 1A(B)(1) and (B)(3) of the law as preempted by the NLRA. Perhaps because these challenges were not part of the original or amended complaint, the district court rather tersely rejected the unions' arguments as to Subsections 1A(B)(1) and (B)(3) in a footnote.[27]

Subsection 1A(B)(1) protects workers' rights to join and support unions.[28] The unions argued, ironically, that NLRA Section 14(b) only gave states the authority to prohibit conditioning employment on union membership, not the authority to protect the right to join or support a union.[29] The court rejected this argument because the U.S. Supreme Court had previously upheld Right to Work laws "which prohibit discrimination in employment based on both union membership and non-membership alike."[30]

Subsection 1A(B)(3) prohibits the requirement that employees pay any dues or fees to a union.[31] The unions argued that this provision is preempted by the NLRA because it attempts to regulate hiring hall fees.[32] The district court rejected this argument because Subsection 1A(B)(3) "clearly does not attempt to regulate any phase of the hiring process."[33] The unions did not appeal this ruling.

4. Severability

Having determined that two of the Right to Work law's provisions were preempted by the NLRA, the district court lastly addressed whether the preempted provisions were severable from the remaining valid provisions. The court correctly noted that severability is an issue of state law.[34] The Right to Work law does not contain a severability clause, but such a clause is not necessary under Oklahoma law.[35] Instead, a law's provisions are severable unless the valid provisions are dependent upon the invalid provisions, or the valid provisions cannot stand alone without the invalid provisions.[36] The court held that the valid provisions were not dependent on the invalid provisions, and that they could stand alone.[37]

In a passage that would become important on appeal, the court wrote:

> The core provisions of Oklahoma's right-to-work law can be found in subsections (B)(1) through (4), which ban union and agency shop provisions in collective bargaining agreements. These provisions are certainly capable of being carried out in the absence of subsections (B)(5) and (C), which deal with exclusive hiring halls and check-off arrangements.[38]

This formulation by the court was not entirely accurate. While Subsections 1A(B)(2) through (B)(4) of the law certainly do ban union and agency shop provisions in collective bargaining agreements, Subsection 1A(B)(1) does not. Subsection 1A(B)(1) bans prohibitions on joining and supporting unions. When the Tenth Circuit later held that Subsection 1A(B)(1) is in fact preempted,[39] the unions used the district court's inclusion of that subsection as a "core provision" to argue that the law should not be severed, and that the entire law was therefore invalid.

B. The Tenth Circuit's Opinion

The unions appealed only two aspects of the district court's decision: (1) the ruling that Subsection 1A(B)(1) is not preempted by the NLRA; and (2) that the preempted provisions of the law are severable from the remaining provisions.[40] The United States Court of Appeals for the Tenth Circuit agreed with the unions that Subsection 1A(B)(1) is preempted, and certified to the Oklahoma Supreme Court the question of whether the law is severable.[41]

1. State Protection of the Right to Join Unions

The Tenth Circuit began its discussion of preemption by noting that Subsection 1A(B)(1) and NLRA Sections 7 and 8 protect the same right: the right to join and support labor unions.[42] The question was whether NLRA Sections 7 and 8 preempt Subsection 1A(B)(1). The Tenth Circuit wrote that the Supreme Court in *Garner v. Teamsters Local Union 776*,[43] "made clear that the states could not adopt supplementary or alternative remedies to those set out in the NLRA."[44] Oklahoma's Right to Work law provided for criminal enforcement,[45] whereas the remedies provided under the NLRA for violations of NLRA Sections 7 and 8 are administrative in nature, *i.e.*, unfair labor practice proceedings before the National Labor Relations Board.[46]

The district court had relied "exclusively" on *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*[47] and its companion case, *American Federation of Labor v. American Sash & Door Co.*[48] [49] The Tenth Circuit distinguished those as equal protection cases that never addressed the preemption issue. Those cases therefore did not indicate that a state's protection of the right to join and support unions is not preempted.[50]

The defendants argued that *Lincoln Federal* and *American Sash* at least showed that, if a state chose to enact a Right to Work law, that state would also have to protect the right to join and support unions, to avoid raising equal protection problems. The Supreme Court wrote in *Lincoln Federal*:

> It is also argued that the state laws do not provide protection for union members equal to that provided for non-union members. But in identical language these states forbid employers to discriminate against union and non-union members. Nebraska and North Carolina thus command equal employment opportunities for both groups of workers.[51]

That the states protected both union members and nonmembers equally was a factor in upholding these Right to Work laws, according to the defendants.

The Tenth Circuit rejected this argument for two reasons. First, the court wrote: "The [Supreme] Court was not required to reach this ultimate question because the state schemes at issue in both cases provided mutuality of protection."[52] True enough, but the defendants had argued that the Supreme Court used the mutuality of protection as a factor in upholding the Right to Work laws.

Second, the Tenth Circuit pointed out that union members are not a protected class.[53] Therefore, the defendants had to show that it would be irrational for a state to protect nonmembers without protecting union members.[54] Given that the NLRA protects union member rights, the defendants could not make this showing.[55]

Therefore, the Tenth Circuit held that Subsection 1A(B)(1) of the Right to Work law is preempted by the NLRA.[56]

2. Severability

The Tenth Circuit decided to certify the issue of severability to the Oklahoma Supreme Court.[57] This decision probably saved the Right to Work law. During oral argument, Circuit Judges Seymour and Murphy

seemed inclined to hold that the law is not severable. No party filed a motion to certify the severability issue to the Oklahoma Supreme Court, although the intervening defendants' brief requested that the court do so if it was inclined to hold that the law was not severable—because severability is a state law issue. Circuit Judge Seymour asked each party's attorney at oral argument whether the severability issue should be certified to the Oklahoma Supreme Court, and the intervening defendants' attorney was the only one to answer in the affirmative.

IV. Severability: The Oklahoma Supreme Court Answers the Certified Questions

The Tenth Circuit certified the following questions:

> 1. Is severability analysis required in light of the preemption of article XXIII, § 1A(B)(1), § 1A(B)(5), § 1A(C), and § 1A(E) (insofar as it enforces § 1A(B)(1), § 1A(B)(5), § 1A(C)) as to workers covered by the NLRA, as opposed to the "invalidation" of those provisions?
>
> 2. If severability analysis is appropriate, are § 1A(B)(1), § 1A(B)(5), § 1A(C), and § 1A(E) (insofar as it enforces § 1A(B)(1), § 1A(B)(5), and § 1A(C)) severable from the non-preempted portions of § 1A?[58]

The wording of the first question was important, because it acknowledged that a provision of the Right to Work law could be preempted by the NLRA without being "invalid." The preempted provision could still apply to state and local government employees, for example, or to agricultural workers.[59]

In three opinions, the Oklahoma Supreme Court voted unanimously that the non-preempted portions of the Right to Work law are valid law despite the preempted portions.[60]

Six justices—the majority—held that severability analysis was unnecessary because the Right to Work law "contemplated that some of its provisions might be preempted by federal law."[61] The majority used the federal district court's holding that the Right to Work law did not apply to workers covered by the RLA, the CSRA, or the PRA, and applied that reasoning to provisions preempted by the NLRA.[62] Subsections 1A(B)(1), (B)(5), and (C) simply did not apply to workers covered by the NLRA. These subsections of the law still applied to state and local government workers, as well as agricultural workers, none of whom are under the NLRA.[63] In a separate concurrence, Justice Opala agreed that the Right to Work law had applications beyond NLRA-covered workers: "Drafters of the Oklahoma right-to-work amendment doubtless sought to regulate the window opened by [NLRA § 14(b)] as well as the federally unregulated field of labor-management relations within the state."[64]

The majority also relied on the principle of statutory construction that statutes are to be presumed valid, holding that this presumption also applies to constitutional amendments.[65] The unions failed to overcome that presumption. The majority did not buy the unions' argument that if the voters had known about the preempted provisions, they would have voted against it:

> Why would the people not approve a constitutional change that would protect workers from the involuntary payment of union dues simply because federal courts applying federal law might decide that some of its provisions would not apply to some but not all workers in clearly defined circumstances? We conclude that the possibility that the federal courts might hold that certain employees would not be subject to the right to work law cannot be assumed to be a factor which would have caused the people to vote against its passage.[66]

Pointing to the Tenth Circuit's Certified Question 1, the majority also asserted that "the federal courts in this matter have not declared any provision of the right to work law unconstitutional."[67] The majority concluded that "to hold the right to work amendment unconstitutional under the circumstances presented here would be to thwart the clearly expressed will of the people."[68]

Three of the justices concurred with the result but filed a separate opinion, written by Justice Summers, arguing that severability analysis was necessary—and that the law is severable.[69] Justice Summers disagreed with the majority's assertion that the preempted provisions were not held unconstitutional: "Preempted state law is struck down as unconstitutional—it violates the supremacy clause of the U.S. Constitution."[70] Justice Summers quoted *Crosby v. National Foreign Trade Council*[71]: "'[The state law] is preempted, and *its application* is unconstitutional, under the Supremacy Clause.'"[72] This disagreement

between Justice Summers and the majority is purely semantic, because both agreed that a law can be partially preempted and still be applicable aside from the preemption. Justice Summers wrote: "It is the *partial application* of state law that is preempted and thus unconstitutional."[73]

It was significant to Justice Summers that the entire Right to Work law did not apply to workers covered by the RLA, CSRA, and PRA, whereas only portions of the Right to Work law did not apply to workers covered by the NLRA. For this reason, he thought severability analysis was necessary to show that the preempted provisions are severable from the remaining provisions.[74] Nevertheless, Justice Summers found that the law is severable.[75]

Nothing in the Right to Work law indicated an attempt to overturn federal law.[76] Like the majority, Justice Summers noted the presumption of validity.[77] The lack of a severability clause does not create a presumption that the law is not severable.[78] The preempted provisions of the law did not interfere with the remaining provisions, and the non-preempted provisions are capable of enforcement without the preempted provisions.[79] Justice Summers concluded: "[T]he preempted portions are severable from the non-preempted portions. . . . The non-preempted parts of the Right to Work Amendment are the law of Oklahoma."[80]

Based on the Oklahoma Supreme Court's answers to the certified questions, the Tenth Circuit affirmed the district court's judgment that the Right to Work law is valid to the extent that it is not federally preempted.[81] The unions' attempt to kill the Right to Work law's prohibitions of compulsory unionism had failed. The unions had appealed only two issues to the Tenth Circuit: (1) whether Subsection 1A(B)(1) is preempted; and (2) whether the law is severable. The unions succeeded on the first. Whether severability is necessary, however, is a matter of state law, and when the Oklahoma Supreme Court answered that no severability analysis was needed to uphold the law, there was nowhere the unions could appeal that answer.

V. The State-Law Challenge to the Right to Work Law

In May 2003, an Oklahoma trades council quietly filed suit in Tulsa County District Court claiming that the Right to Work law violated Oklahoma's Constitution.[82] The lawsuit seemed to be collusive—the defendant was a unionized contractor who did not oppose agreeing to a compulsory unionism clause in his collective bargaining agreement, and the defendant's lawyer was a prominent Tulsa union lawyer. The attorney for the intervening defendants in *Keating* learned about the state court case when the trades council filed an amicus brief with the Tenth Circuit in *Keating* which noted in passing its lawsuit filed in Tulsa. One of the intervening defendants in *Keating*, Stephen Weese, quickly moved to intervene in the state case.

The trades council claimed that the Right to Work law violated the Oklahoma Bill of Rights, specifically the right to life, liberty and the pursuit of happiness,[83] as well as the right to due process of law.[84] The council also claimed that the law violated Oklahoma Constitution, article 24, § 1, which states that no proposed constitutional amendment submitted to the voters may embrace more than one general subject. Finally, the council claimed that the Right to Work law violated the rule against "special" laws.[85]

At first, without ruling on Weese's motion for intervention, the court erroneously granted the council summary judgment on the ground that the employer had not timely opposed the council's motion for summary judgment.[86] After the National Right to Work Legal Defense Foundation alerted the Oklahoma press to this outrageous development,[87] the court vacated its judgment and scheduled the motion for summary judgment for hearing.[88] In the meantime, Weese moved for summary judgment upholding the Right to Work provision and opposed the council's motion, and the court permitted Weese to intervene.

Ultimately, the Tulsa County District Court denied the trades council's motion for summary judgment and granted Weese's motion for summary judgment. After the court denied the council's motion for reconsideration, it appealed.[89] On December 16, 2003, the same day it issued its opinion in *Keating*, the Oklahoma Supreme Court issued its opinion affirming the district court's judgment.[90]

Relying on an Oklahoma Supreme Court decision that it is unconstitutional to require attorneys to represent indigent criminal defendants without adequate compensation,[91] the trades council argued that the Right to Work law violated the due process and equal protection clauses of Oklahoma's Constitution, because an exclusive bargaining agent is required to represent all workers in its bargaining unit, including nonmembers who decline to pay dues.[92] The Oklahoma Supreme Court responded that the due process and equal protection clauses in the state

constitution provide the same protections as are provided in the Fourteenth Amendment of the U.S. Constitution.[93] The court noted that the U.S. Supreme Court upheld state Right to Work laws against due process and equal protection challenges in *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*[94] and *American Federation of Labor v. American Sash & Door Co.*[95] Consequently, "the Council has no right to relief under the Oklahoma Constitution just as other unions making similar arguments were held by the U.S. Supreme Court to have no right to relief under the federal constitution."[96]

Moreover, the Oklahoma Supreme Court also held that, even if there were a conflict between the Right to Work provision and the due process and equal protection clauses of the state constitution, the newly enacted constitutional amendment would prevail over the old provision: "We fail to understand how an amendment to the Oklahoma Constitution could be found to violate that constitution."[97] The court applied this reasoning to all of the trades council's claims that the Right to Work constitutional amendment somehow violated the very constitution that it amended.[98]

Oklahoma Constitution, article.5, § 59 provides: "Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." The trades council argued that the Right to Work law violates this provision, because it applies only to unions, not all situations where membership in an organization is mandatory and dues are required, such as homeowner's associations, the Oklahoma Bar association, and the Oklahoma medical association. Rejecting this argument, too, the court held that the rule against special laws does not apply to constitutional amendments, only to statutes passed by the legislature.[99]

The council also argued that the Right to Work amendment embraced multiple subjects, in violation of Oklahoma Constitution, article 24, § 1. That section provides: "No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject . . . ." The court held that this constitutional provision does not apply to amendments that are already codified, like the Right to Work law, only to proposed amendments.[100] In any event, the court concluded that the Right to Work law did not embrace more than one general subject, because all of its provisions "relate to the regulation of union activity *vis a vis* workers employed or seeking employment in unionized workplaces."[101]

Finally, the court rejected the council's argument that the ballot title for the referendum "was so vague and confusing that the right to work amendment must be declared unconstitutional."[102] The court found "nothing about [the ballot title] that is either confusing or misleading."[103] Moreover, "a referendum approved by the people . . . will not be declared unconstitutional after the fact because of claimed deficiencies in the ballot title."[104]

VI. Lessons for Drafting Right to Work Laws

The most obvious lesson from Oklahoma's experience is that a Right to Work law should include a severability clause. Although *Keating* demonstrates that a severability clause is not necessary, and a lack of one does not presume legislative intent against severability,[105] including a severability clause leaves no doubt that the legislature intended that any preempted provisions are to be severed.

The second lesson is that a Right to Work law should include a clause that says something like: "None of the provisions in this Act apply where they would otherwise conflict with, or be preempted by, federal law." It is hard to imagine how unions could attack such a law as preempted.

In *Keating*, Justice Opala extrapolated the Oklahoma Right to Work law's drafters' intent from the law's silence concerning federal law:

> The drafters of Oklahoma's right-to-work amendment reasonably contemplated and expected the limiting effect of applicable federal law. This is evidenced by the absence of an express or implied intention to avoid conforming or tailoring the text to applicable federal law. . . . Because federal labor law is neither stagnant nor mummified in its present form, the drafters understood the outer boundaries of right-to-work amendment must be flexible to remain in conformity with present as well as future federal re-definitions. The restrictions imposed by the [federal] district court's pronouncement clearly articulate specific limitations on Oklahoma's right-to-work amendment while allowing the entire text of the amendment to stand available for application in conformity with extant federal law.[106]

An explicit submission to federal law within a Right to Work law would make clear that the legislators had no intention to avoid or subvert any federal

law. By disavowing any potential conflict with federal law, none of the Right to Work law's provisions could be preempted, and a severability analysis would be unnecessary.

Of course, inclusion of both recommended clauses would not be a guarantee against litigation. As *Pitts* demonstrates, unions and their lawyers are not shy about challenging new Right to Work laws on even the flimsiest of grounds.

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Footnotes

[1] Ala. Code §§ 25-7-30–35; Ariz. Const. art. XXV; Ariz. Rev. Stat. Ann. §§ 23-1301–1307; Ark. Const. amend. 34; Ark. Code Ann. §§ 11-3-301–304; Fla. Const. art. 1, § 6; Fla. Stat. Ann. § 447.17; Ga. Code Ann. §§ 34-6-20–28; Idaho Code §§ 44-2001–2009; Iowa Code Ann. §§ 731.1–731.8; Kan. Const. art. 15, § 12; Kan. Stat. Ann. § 44-831; La. Rev. Stat. Ann. §§ 23:981–987; Miss. Const. art. 7 § 198-A; Miss. Code Ann. § 71-1-47; Neb. Const. art. XV, §§ 13–15; Neb. Rev. Stat. §§ 48-217–219; Nev. Rev. Stat. §§ 613.230, 613.250–300; N.C. Gen. Stat. §§ 95-78–84; N.D. Cent. Code §§ 34.01.14–14.1; Okla. Const. art. XXIII, § 1A; S.C. Code Ann. §§ 41-7-10–90; S.D. Const. art. VI, § 2, S.D. Codified Laws §§ 60-8-3–8-8; Tenn. Code Ann. §§ 50-1-201–204; Tex. Codes Ann. tit. 3 §§ 101.003, .004, .052, .053, .102, .111, .121, .122, .124; Utah Code Ann. §§ 34-34-1–17; Va. Code Ann. §§ 40.1-58–69; Wyo. Stat. Ann. §§ 27-7-108–115.

[2] F.A. Hayek, The Constitution of Liberty 279 (1960).

[3] Kirk Shelley, *How Oklahoma Was Won*, Labor Watch, Apr. 2002, at 1, 3 (quoting Letter from Sen. Taylor to constituents posted on Okla. Democratic Party web site (2001) (on file with the National Institute of Labor Relations Research)). Senator Taylor's letter conceded that supporters of a Right to Work statute had "a majority" in both houses of the Oklahoma legislature.

[4] S.J. Res. 1, 48th Leg., 1st Sess. (Okla. 2001).

[5] Randy Krehbiel *et al.*, *Right to Work Becomes Newest Law*, Tulsa World, Sept. 26, 2001, at A1. Shelley, *supra* note 3, comprehensively describes the campaign.

[6] SQ 695 as it appeared on the ballot read:

> STATE QUESTION NO. 695
> LEGISLATIVE REFERENDUM NO. 322
>
> The measure adds a new section to the State Constitution. It adds Section 1A to Article 23. The measure defines the term "labor organization." "Labor organization" includes unions. That term also includes committees that represent employees.
>
> The measure bans new employment contracts that impose certain requirements to get or keep a job. The measure bans contracts that require joining or quitting a labor organization to get or keep a job. The measure bans contracts that require remaining in a labor organization to get or keep a job. The measure bans contracts that require the payment of dues to labor organizations to get or keep a job. The measure bans contracts that require other payments to labor organizations to get or keep a job. Employees would have to approve deductions from wages paid to labor organizations. The measure bans contracts that require labor organization approval of an employee to get or keep a job.
>
> The measure bans other employment contract requirements. Violation of this section is a misdemeanor.
>
> SHALL THE PROPOSAL BE APPROVED?
>
> FOR THE PROPOSAL - YES
> AGAINST THE PROPOSAL - NO

[7] Local 514, Transp. Workers Union v. Keating, 212 F. Supp. 2d 1319, 1322 (E.D. Okla. 2002), *aff'd*, 358 F.3d 743 (10th Cir. 2004).

[8] Article XXIII, Section 1A provides:

> Section 1A.
>
> A. As used in this section, "labor organization" means any organization of any kind, or agency or employee representation committee or union, that exists for the purpose, in whole or in part, of dealing with employers concerning wages, rates of pay, hours of work, other conditions of employment, or other forms of compensation.
>
> B. No person shall be required, as a condition of employment or continuation of employment, to:
>
> 1. Resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
>
> 2. Become or remain a member of a labor organization;
>
> 3. Pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization;
>
> 4. Pay to any charity or other third party, in lieu of such payments, any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization; or

> 5. Be recommended, approved, referred, or cleared by or through a labor organization.
>
> C. It shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization unless the employee has first authorized such deduction.
>
> D. The provisions of this section shall apply to all employment contracts entered into after the effective date of this section and shall apply to any renewal or extension of any existing contract.
>
> E. Any person who directly or indirectly violates any provision of this section shall be guilty of a misdemeanor.

[9] The district court declined to exercise supplemental jurisdiction over the unions' state constitutional claims. *Keating*, 212 F. Supp. 2d at 1321.

[10] The federal courts have held that state Right to Work laws do not apply on exclusive federal enclaves. *E.g.*, Lord v. Local 2088, Electrical Workers, 646 F.2d 1057 (5th Cir. 1981) (2-1 decision as to property ceded to federal government after enactment of Right to Work law).

[11] *Keating*, 212 F. Supp. 2d at 1321 n.3.

[12] *Id.* at 1323-24. Unions describe compulsory unionism as "union security." The permitted agreements are called "'union shops', where the employee is required to join the contracting union within a certain period after hire, and 'agency shops', where the employee is not required to join the union but must pay union dues. . . ." *Id*. at 1324. However, even in a so-called union shop, "an employee can satisfy the membership condition merely by paying to the union an amount equal to the union's initiation fees and dues," not actually joining the union. Marquez v. Screen Actors Guild, 525 U.S. 33, 37 (1998). Moreover, there are limits on the fee that can be exacted pursuant to forced unionism. The Supreme Court has held that the NLRA, like the RLA, "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" Communications Workers v. Beck, 487 U.S. 735, 762-63 (1988) (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

[13] 29 U.S.C. § 164(b).

[14] *Keating*, 212 F. Supp. 2d at 1324.

[15] *Id.*

[16] *Id.* at 1325 (quoting Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981)).

[17] *Id.*

[18] *Id.* at 1326.

[19] Local 514 Transp. Workers Union v. Keating, 358 F.3d 743, 756 n.14 (10th Cir. 2004).

[20] *See* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).

[21] *See* Laborers' Int'l Union Local 107 v. Kunco, Inc., 472 F.2d 456, 458-59 (8th Cir. 1973); NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768, 770-71 (9th Cir. 1965); NLRB v. Houston Chapter Ass'd Gen'l Contractors, 349 F.2d 449, 451 (5th Cir. 1965).

[22] *Keating*, 212 F. Supp. 2d at 1327

[23] 29 U.S.C. § 186(c)(4).

[24] *Id.*

[25] *Keating*, 212 F. Supp. 2d at 1327 (citing SeaPak v. Industrial Technical & Prof'l Employees, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971) (federal preemption if state attempts to make dues deduction authorizations revocable at will)).

[26] *Id*.

[27] *Id.* at 1327 n.6.

[28] Subsection 1A(B)(1) provides: "No person shall be required, as a condition of employment or continuation of employment, to . . . [r]esign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization."

[29] *Keating*, 212 F. Supp. 2d at 1328 n.6.

[30] *Id.* (citing Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)). Interestingly, twenty of the twenty-two state Right to Work laws protect the right to join and support labor unions as well as the right to refrain from doing so.

[31] Subsection 1A(B)(3) provides: "No person shall be required, as a condition of employment or continuation of employment, to . . . [p]ay any dues, fees, assessments, or other charges of any kind or amount to a labor organization."

[32] *Keating*, 212 F. Supp. 2d at 1328 n.6.

[33] *Id*.

[34] *Id.* at 1328 (citing Panhandle E. Pipeline Co. v. State of Okla. *ex. rel*. Comm'rs of the Land Office, 83 F.3d 1219, 1229 (10th Cir. 1996)).

[35] *Id.* (citing Ethics Comm'n v. Cullison, 850 P.2d 1069, 1077 (Okla. 1993)).

[36] *Id.* (citing Okla Stat. tit. 75, § 11a).

[37] *Id.* at 1329.

[38] *Id.*

[39] Local 514 Transp. Workers Union v. Keating, 358 F.3d 743, 754 (10th Cir. 2004).

[40] *Id*. at 745-46.

[41] *Id*. at 754-55.

[42] *Id.* at 751 (quoting 29 U.S.C. §§ 157, 158(a)(1).

[43] 346 U.S. 485 (1953).

[44] *Keating,* 358 F.3d at 751 *(*citing *Garner,* 346 U.S. at 498-99*)*

[45] Okla. Const. art. XXIII, § 1A(E).

[46] *Keating*, 358 F.3d at 751-52.

[47] 335 U.S. 525 (1949).

[48] 335 U.S. 538 (1949).

[49] *Keating*, 358 F.3d at 752.

[50] *Id.* at 753 ("It is readily apparent that the Court in *Lincoln Federal* and *American Sash* was focused on the very narrow question of whether the state provisions at issue violated the Equal Protection Clause of the Fourteenth Amendment. There is absolutely no discussion of the question of preemption and, hence, no indication that provisions like article XXIII, § 1A(B)(1) are not preempted by the NLRA.").

[51] 335 U.S. at 532.

[52] *Keating*, 358 F.3d at 754.

[53] *Id.* (citing City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 286 (1976)).

[54] *Id.*

[55] *Id.* (citing Alabama State Fed'n of Labor, Local Union No. 103 v. McAdory, 325 U.S. 450, 472 (1945) (state may exclude from regulation those it has reason to believe are already appropriately regulated by federal legislation)).

[56] *Id*. Significantly, the author of the opinion, Circuit Judge Murphy, had previously made clear that he construes the NLRA as having maximum preemptive force. Judge Murphy was the lone dissenter in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*), which held that a tribal council could enact a Right to Work law to govern its tribal lands, even though NLRA Section 14(b) does not mention Indian reservations. The majority reasoned that, because states were permitted to have Right to Work laws prior to the enactment of Section 14(b), states would have the authority to enact Right to Work laws if Section 14(b) did not exist. *Id*. at 1197-98. That Section 14(b) does not refer to Indian tribes, which are sovereigns on their tribal lands, does not thereby divest them of the authority to enact Right to Work laws. *Id*. at 1198. Judge Murphy vigorously disagreed. He argued that state Right to Work laws would be preempted by NLRA Section 8(a)(3) if Section 14(b) did not exist: "Congress intended to regulate union security agreements when it enacted § 8(a)(3) of the Taft-Hartley Act, restoring a small portion of that regulatory power only to states and territories when it enacted § 14(b)." *Id*. at 1208 (Murphy, J., dissenting).

[57] *Keating*, 358 F.3d at 755.

[58] *Id.*

[59] *See* 29 U.S.C. § 152(a) ("employer" does not include the states or their political subdivisions); § 152(b) ("employee" does not include agricultural workers).

[60] Local 514 Transp. Workers Union v. Keating, 83 P.3d 835 (Okla. 2003).

[61] *Id*. at 840-41.

[62] *Id.* at 838-39.

[63] *Id.* at 839.

[64] *Id*. at 842 (Opala, J., concurring); *see also id*. at 842 n.5 ("Oklahoma's right-to-work amendment has more than a single mission. It is intended to govern two different types of employment relationships (1) those that fall within the narrow window authorized by [§ 14(b)], and (2) those entirely unaffected by federal labor law.").

[65] *Id.* at 839.

[66] *Id.* at 840.

[67] *Id.*

[68] *Id.* at 841.

[69] *Id.* at 846-47 (Summers, J., concurring in result).

[70] *Id.* at 846.

[71] 530 U.S. 363, 388 (2000).

[72] *Keating*, 83 P.3d at 846 (emphasis altered).

[73] *Id.* at 847 (emphasis added); *see also id.* at 844 (Opala, J., concurring) ("[T]he district-court determination operates to condition or restrict the application of the provision instead of rendering it void.").

[74] *See id.* at 847-49.

[75] *Id.* at 849-51.

[76] *Id.* at 849.

[77] *Id.* at 849-850.

[78] *Id.* at 850 ("Mere legislative silence on the issue of severability may not control the presumption that legislative acts will be enforced to the extent they are valid.").

[79] *Id.* at 851.

[80] *Id.*

[81] *Keating*, 358 F.3d at 745.

[82] Eastern Okla. Bldg. & Constr. Trades Council v. Pitts, No. CJ-2003-3084 (Tulsa County Dist. Ct., filed May 13, 2003).

[83] Okla. Const. art. 2, § 2.

[84] *Id.* § 7. Oklahoma's due process protections contain an equal protection component. Eastern Okla. Bldg. & Constr. Trades Council v. Pitts, 82 P.3d 1008, 1012 (Okla. 2003) (citing Oklahoma Ass'n for Equitable Taxation v. Oklahoma City, 901 P.2d 800, 805 (Okla. 1995)).

[85] Okla. Const. art. 5, § 59.

[86] *Pitts*, Order filed June 26, 2003.

[87] National Right to Work Legal Defense Foundation News Release, *Tulsa Judge Declares Oklahoma's Right to Work Law Unconstitutional in Rigged Lawsuit* (June 27, 2003), *at* http://www.nrtw.org/b/nr.php3?id=231; *see*, *e.g.*, Randy Krehbiel, *Labor Ruling Likely Not Final Word*, Tulsa World, June 28, 2003, at A17.

[88] *Pitts*, Order filed June 30, 2003.

[89] Eastern Okla. Bldg. & Constr. Trades Council v. Pitts, 82 P.3d 1008, 1010 (Okla. 2003).

[90] *Id*.

[91] State v. Lynch, 796 P.2d 1150 (Okla. 1990).

[92] *Pitts*, 82 P.3d at 1013.

[93] *Id*. at 1012.

[94] 335 U.S. 525 (1949).

[95] 335 U.S. 538 (1949).

[96] *Pitts*, 82 P.3d at 1012.

[97] *Id.*

[98] *See*, *e.g.*, *id.* at 1013 ("Because we hold that any conflict between the right to work amendment and a provision in the original constitution would have to be resolved in favor of the most recent amendment, we could not reasonably hold that Okla. Const. art. 5, § 59 somehow trumps the more recently passed right to work amendment.")

[99] *Id.*

[100] *Id.* at 1014.

[101] *Id.*

[102] *Id.*

[103] *Id*.

[104] *Id*. at 1015.

[105] *See also* Electrical Workers Local 415 v. Hansen, 400 P.2d 531, 537-38 (Wyo. 1965) (3-1 decision) (preempted section of Wyoming's Right to Work law severable despite no "separability clause").

[106] *Keating*, 83 P.3d at 845-46 (Opala, J., concurring).

The Misfit Doctrine: Integrated Enterprise in the Title VII Context

*By Monica K. Loseman**

With increasing frequency Plaintiffs' attorneys, ever in seek of the deepest pocket, are relying on the integrated enterprise doctrine to join parent or affiliate companies as defendants in Title VII and other discrimination suits against their subsidiary or sister companies, alleging that the entities' "integrated" status makes them the plaintiff's joint employer. However, the integrated enterprise doctrine, a four-part analysis originally promulgated by the National Labor Relations Board, embodies a relatively lenient approach and cannot reasonably be relied upon to yield consistent and fair results under Title VII. Developed approximately forty years before Title VII was even adopted, the integrated enterprise doctrine is slowly being questioned and rejected by some courts in favor of alternative approaches tailored somewhat more precisely to serve the policy goals of Title VII.

As the Third Circuit recently noted, there is "surface appeal" to applying the integrated enterprise doctrine in the Title VII context, as both the National Labor Relations Act and Title VII generally address employer-employee relations.[1] But the similarities end there. The NLRA was intended to lend stability to industry and to protect the collective bargaining rights of employees. The NLRA has no concern with an individual's right to equal opportunity of employment, regardless of race, color, religion, sex or national origin. Title VII, on the other hand, is a statutory mechanism for imposing liability on employers based on discriminatory classifications or activities. The individual employment relationship and actions affecting that relationship are at the heart of a Title VII matter. External business decisions that leave the employment relationship unaffected are irrelevant for purposes of Title VII liability.

The integrated enterprise doctrine employs a far more expansive examination. It focuses not on the employee/employer relationship, but on the relationship between corporate entities. The four-factor analysis focuses on (1) whether the parent had centralized control of labor relations, (2) the extent of interrelation of operations between the parent and subsidiary, (3) the degree of common management, and (4) the degree of common ownership or financial control. These factors focus on the business operations of two separate entities and to what degree they are interrelated.

The integrated enterprise doctrine also leads the courts down the dubious path of questioning business decisions and corporate strategy. The notion of limited liability is the rule, not the exception, but the integrated enterprise doctrine threatens to reverse this order. Under the integrated enterprise doctrine, it is all too easy for a parent company to face liability for its subsidiary's alleged violations of Title VII despite proper respect for separate corporate forms. Without focusing the review on the relevant employer-employee relationship, the integrated enterprise analysis incorrectly focuses the court's attention on the propriety of certain business decisions.

The focus of any inquiry into parent liability under Title VII should focus on the parent's culpability: Did the parent corporation contribute to the alleged discrimination/harassment and seek to hide behind the corporate veil of presumptive limited liability? Any test or theory of liability that avoids this central question skirts the issue. The policy behind Title VII liability is to eliminate discriminating and harassing behavior based on protected classifications. If the parent entity the plaintiff seeks to hold liable exercised no control over the employment decisions affecting the plaintiff, imposing liability on that innocent parent does not serve Title VII's purpose. It serves only to dilute the presumption of limited liability and to improperly arm plaintiffs with another source of funds for settlement or actual verdict.[2] Absent some showing of the parent's own wrongful behavior, only the entity that actively participated in the employment relationship with the plaintiff should be held to be an "employer" under Title VII.

A Possible Trend of Rejection?

The U.S. Courts of Appeals for the Third and Seventh Circuits have rejected the integrated enterprise doctrine in recent Title VII cases.

In *Nesbit v. Gears Unlimited, Inc.* (Third Circuit),[3] the plaintiff alleged that her former employer discriminated against her based on her gender. Her employer, however, employed fewer than fifteen individuals and therefore fell outside the scope of Title VII. The plaintiff argued that for purposes of satisfying the fifteen employee minimum, her employer and a related entity should be considered an integrated enterprise, jointly employing more than fifteen individuals and thereby satisfying the minimum employee re-

quirement. Both entities were owned and managed, to some extent, by the individual who fired the plaintiff.

The Third Circuit analyzed the doctrine's history, comparing the doctrine's application in the NLRA context to the Title VII context and noting the divergent policy goals of the NLRA and Title VII. "If the company at issue satisfies the NLRB test, it will in many cases be required to submit to collective bargaining. . . . But if a defendant in a Title VII suit is deemed an 'employer' within the meaning of the statute, *it may be subject to liability*."[4] Moreover, the court noted that the policy goal of Title VII's fifteen-employee minimum requirement in particular was "to spare small companies the considerable expense of complying with the statute's many nuanced requirements."[5] The *Nesbit* court concluded that because the NLRA's scope and policy goals are more expansive than those of Title VII, application of the especially lenient four-factor test in the Title VII context is improper.

Though the *Nesbit* opinion focuses on the use of the doctrine to integrate two related enterprises for purposes of meeting the fifteen-employee minimum requirement, the court's opinion also likely forecloses use of the doctrine for purposes of imposing Title VII liability on a related entity. The language used throughout the opinion and the relatively broad focus of the court's subsequent inquiry suggest that the Third Circuit will not apply the four-part test for any purpose relating to a plaintiff's Title VII claim.[6]

The Seventh Circuit was the first court of appeals to reject use of the integrated enterprise doctrine in the Title VII context for any purpose, whether to meet the fifteen-employee minimum or to impose joint liability. In *Papa v. Katy Industries, Inc.*,[7] the Seventh Circuit considered two cases presenting a common question: whether to allow the plaintiffs to satisfy the minimum employee requirement by demonstrating that two related entities are integrated enterprises. Like the *Nesbit* court, the *Papa* court noted that the purpose behind the minimum employee requirement was to spare small companies the "crushing expense of mastering the intricacies of the antidiscrimination laws," and to preserve the viability of the small business.[8] This policy applies regardless of whether a small business is owned by an individual (wealthy or poor) or a corporation. The *Papa* court also noted how application of the four-factor test would only yield vague and unpredictable results, resulting in indecision where the four factors weighed equally on opposite sides of the scale, as often would be the case.[9]

In *Worth v. Tyer*,[10] the Seventh Circuit clarified the extent of its decision in *Papa v. Katy Industries, Inc.* The plaintiff argued that because the defendant employer met the minimum employee requirement independently, the integrated enterprise doctrine could still be used to impose Title VII liability on the related entities.[11] The plaintiff sought to use the doctrine to impose joint liability on an entity not party to or directly involved in the employee/employer relationship, even where her actual employer met the minimum statutory requirements. Nonetheless, the court made clear that its abrogation of the doctrine in *Papa v. Katy Industries, Inc.* applied equally to questions of related entity liability under Title VII.[12]

Other Circuit Courts Apply The Doctrine In Limited Context Or Modified Form

Other circuit courts have applied the doctrine cautiously, limiting the doctrine's application or changing the focus of the inquiry. All of the modified approaches, however, place special emphasis on the "control over labor" prong of the four-factor test, perhaps in an effort to focus the inquiry on the individual employment relationship rather than the corporate relationship between two related entities.

Though the Ninth Circuit has not rejected the test (and likely will not), in *Anderson v. Pacific Maritime Association*,[13] the court explicitly limited application of the doctrine "to judge the magnitude of interconnectivity for determining *statutory coverage*" and not liability.[14] The plaintiffs, employees of a member-entity of the Pacific Maritime Association, sought to hold the PMA directly liable for alleged racial harassment and the hostile work environment perpetrated by their employer, but the Ninth Circuit refused to apply the doctrine of integrated enterprises to hold the association liable for racial harassment allegedly perpetrated by some of its member corporations.[15]

Other courts, like the Fifth Circuit, have modified the four-part test in an effort to conform its application with the policy goals of Title VII. The Fifth Circuit places particular emphasis on the "control over labor" prong, emphasizing a critical question: "'What entity made the final decisions regarding employment matters related to the person claiming discrimination?'"[16] The Eleventh Circuit follows this same general approach, focusing the inquiry on the degree of control the corporate entity had over the action giving

rise to the Title VII claim.[17] This approach has been criticized for nullifying the effect of a *four*-part inquiry:[18] If the critical question relates only to what entity made the final decisions regarding the plaintiff's employment, what use are the other three factors? Moreover, how could the court hold anyone but the plaintiff's direct employer liable under a theory of corporate integration?

The Tenth Circuit requires the plaintiff to demonstrate that the parent controlled the day-to-day employment decisions of its subsidiary in order to satisfy the essential "control over labor" portion of the four-part test.[19] The Tenth Circuit, however, focuses its overall inquiry on whether there was an absence of an arm's-length relationship between the two corporate entities, lending some weight to the other three factors.[20] The Tenth Circuit has only applied the integrated enterprise test where the parties agreed to do so, or because, even under the test, the facts were clearly insufficient to support the imposition of liability on the parent company.[21]

The First Circuit has adopted the more "flexible" approach used by the Second Circuit. Those courts focus the integrated enterprise inquiry on the "control over labor" prong, "but only to the extent that the parent exerts 'an amount of participation that is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions.'"[22] The Sixth Circuit, though it has not explicitly adopted one interpretation or another, has generally cited decisions of the various circuit courts and determined that "control over labor relations is a central concern."[23] Other courts of appeals have applied the integrated enterprise test without modification.

The Third And Seventh Circuits' Alternative Approaches To The Single Employer Question

The Third and Seventh Circuits have proposed alternative approaches to the single employer question. They agree that two related entities should be considered a single employer where the entities have organized in an attempt to evade Title VII's statutory reach. They also agree that where the parent company directs the subsidiary to act in an unlawfully discriminatory or retaliatory manner, parent liability is appropriate. But each court reaches for a different approach based on the degree of interrelation to support an imposition of liability on the parent corporation or related entity.

The Third Circuit borrows from the bankruptcy context, employing the equitable remedy of substantive consolidation. Essentially, "the question is whether the 'eggs' – consisting of the ostensibly separate companies – are so scrambled that we decline to unscramble them." Though the circuit courts adopt varying approaches to the remedy of substantive consolidation in the bankruptcy context, the Third Circuit's approach for purposes of Title VII focuses on the degree of operational entanglement – "whether operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another."[24] The open-ended analysis includes the following considerations (1) the degree of unity between the entities with respect to ownership, management (both directors and officers), and business functions (*e.g.*, hiring and personnel matters), (2) whether they present themselves as a single company such that third parties deal with them as one unit, (3) whether a parent company covers the salaries, expenses, or losses of its subsidiary, and (4) whether one entity does business exclusively with the other."

Though the court emphasizes that such a showing is difficult to achieve, one wonders whether the inquiry is much of a change from the rejected doctrine. The questions are narrower and perhaps more concise, but the substantive consolidation analysis still bears little relation to the policy goals of Title VII. Moreover, the factors are admittedly open-ended and unweighted, and tend to encourage second-guessing of legitimate business decisions. Though the factors may lead to a different, somewhat improved analysis, it is unclear how substantive consolidation is any more relevant to the policy of prohibiting discrimination and harassment in the workplace than the rejected integrated enterprise doctrine. The court needs to take the analysis one step further to show some connection between the parent or related entity and the employment of the complaining individual.

The Seventh Circuit adopted an approach that requires the Title VII plaintiff to pierce the corporate veil to hold the parent or related entity responsible for the employing subsidiaries' actions. "[F]irst, there must be such unity of interest and ownership that the separate personalities . . . no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice."[25] The Seventh Circuit takes the inquiry one step further than the Third Circuit; the plaintiff must demonstrate that proper respect for the corporate form and its presumption of limited liability will result in fraud or injustice.

The Solution: A Better Tailored Approach

The Seventh Circuit's approach is the better one. Corporate entities that abuse the corporate form waive their right to a presumption of limited liability, but the plaintiff that seeks to impose liability on the parent company must demonstrate that the presumption is somehow onerous and would perpetrate a wrong or violate the policy of Title VII. Rather than focusing the inquiry solely on the relationship between two corporate entities, the test should require some relation to the employment relationship allegedly damaged as a result of discriminatory or harassing conduct. The plaintiff should have to demonstrate that the wrong is somehow related to her allegations of violation of Title VII. By better tailoring a joint employer analysis, the presumption of limited liability can be maintained in harmony with the policy goals of Title VII.

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Footnotes

[1] Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 85 (3d Cir. 2003), *cert. denied,* Nesbit v. Gears Unlimited, Inc., 124 S.Ct. 714 (2004).

[2] The statutory cap for compensatory and punitive damages is based on the total number of individuals employed by the offending entity. 42 U.S.C. § 1981a (b) (2003). A plaintiff can dramatically increase her settlement leverage by satisfying the upper statutory cap where she can apply the integrated enterprise doctrine to increase the aggregate number of employees.

[3] 347 F.3d 72.

[4] *Id.* at 85 (internal citation omitted) (emphasis added).

[5] *Id.*

[6] *See, e.g.*, *id.* ("Thus we deem there is little reason to refer to the NLRB's test in deciding whether two entities should together be considered an 'employer' for Title VII purposes.").

[7] 166 F.3d 937 (7th Cir. 1999).

[8] *Id.* at 940.

[9] *Id.* ("There is enough uncertainty about the standard to warrant a fresh look. This is especially appropriate because of the vagueness of three of the four factors (all but 'common ownership' and it, as we shall see, is useless); because, being unweighted, the four factors do not yield a decision when, as in the two cases before us, they point in opposite directions....").

[10] 276 F.3d 249 (7th Cir. 2001).

[11] The distinction is even more significant where the fifteen-employee minimum is considered a jurisdictional requirement. Where the minimum employee requirement is considered jurisdictional rather than an element of the claims or defenses to be proved at trial, the court must evaluate the merit of the jurisdictional argument on its own, weighing supporting evidence without deference to any party as required by Fed. R. Civ. P. 56. *See, e.g.*, *Nesbit,* 347 F.3d at 76-77. And given the uncertain nature of the four-factor test, such a factual inquiry would likely yield uncertain and inconsistent results.

[12] *Id.* at 260 ("[In *Papa v. Katy industries, Inc.*], [w]e stated that the 'integrated enterprise' test was too amorphous to be applied consistently. . . . Such inconsistencies made it difficult for a corporation to determine when it could be held liable for the actions of its affiliate. Therefore, we held that the 'integrated enterprise' test should be abrogated in Title VII cases.").

[13] 336 F.3d 924 (9th Cir. 2003).

[14] *Id.* at 928-29 (emphasis added).

[15] The plaintiffs voluntarily dismissed suit against their actual employers, instead pursuing their claims against the Union and PMA. The sole defendant considered on appeal was PMA.

[16] Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (*quoting* Odriozola v. Superior Cosmetic Distribs., *Inc.*, 531 F. Supp. 1070, 1076 (D.P.R.1982); *see also* Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 617 (5th Cir. 1999) (finding that the plaintiff's factual allegations concerning the integration of her employer and its parent were insufficient to establish parent liability where she failed to present evidence regarding the primary factor, whether the parent controlled the subsidiaries labor decisions).

[17] Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1998) (*citing McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987)).

[18] Romano v. U-Haul Int'l, 233 F.3d 655, 666 (1st Cir. 2000).

[19] Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993).

[20] Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999).

[21] For example, in *Knowlton*, the court applied the test only because the parties and the district court had done so: "Consequently, that test, *right or wrong*, controls this appeal." *Id.* (emphasis added). *See also* Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1070-71 (10th Cir. 1998).

[22] *Romano*, 233 F.3d at 666 (*quoting* Cook v. Arrowsmith Shelburne, *Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995)).

[23] Swallows v. Barnes & Noble Book Stores, 128 F.3d 990, 994 (6th Cir. 1997).

[24] *Nesbit*, 347 F.3d at 87.

[25] *Worth*, 276 F.3d at 260.

LITIGATION

THE MURKY POLITICS OF REMOVAL JURISDICTION

*BY BRIAN P. BROOKS**

Liberals often like substantive federal law. As compared with state legislatures whose interests they sometimes regard as parochial or even retrograde, liberals tend to favor the United States Congress as a forum for enacting what they view as progressive ideas into law. (Think of the drive for civil-rights legislation in the 1960s, or for gun-control or patients'-rights laws more recently.) Conservatives, by contrast, usually don't like federal law. From their standpoint, the federal structure enshrined in the Constitution protects individuals from a potentially tyrannical national government by limiting the scope of federal substantive law and respecting the primacy of state governments, which are obviously closer geographically (and often philosophically) to their citizens. Yet while liberals and conservatives disagree about the optimal scope of federal substantive law, there is one view they seem to share: a thoroughly skeptical view of federal jurisdiction – or, at least, federal ***removal*** jurisdiction, which is the subject of this essay.

Why this should be so is a murky question. One might imagine that liberals (or, more accurately, Democrats) dislike federal jurisdiction because of the influence of the national trial lawyers' organizations, which are understandably interested in keeping cases in state courts where elected judges tend to favor plaintiffs and jury verdicts tend to be large. The conservative viewpoint is harder to understand. The business community, a core conservative constituency, usually favors an expansive reading of the federal jurisdictional statutes as a way to remove cases to federal court, where the Article III protections tend to produce fairer and more consistent outcomes. And the rule of law virtues associated with judicial conservatism – predictability, strict observance of procedural rules, and the like – would seem to favor a more welcoming attitude to federal removal jurisdiction, even in cases where the substantive law being interpreted is state law. While the scope of federal jurisdiction is governed by statute (and is in that sense subject to strict interpretation), it is clear that the jurisdictional thinking of some generally conservative judges is colored to some extent by a "presumption" against federal jurisdiction. Such a presumption is not dictated by the same respect for state sovereignty that motivates the conservative preference for state substantive law, it is inconsistent with many of the procedural virtues judicial conservatives hold dear, and it should be reconsidered.

THE SUPPOSED "PRESUMPTION" AGAINST REMOVAL JURISDICTION

The federal statute governing removal jurisdiction provides simply that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."[1] Put differently, any case that the plaintiff could have filed in federal court in the first place may be removed to federal court by the defendant – at least according to the removal statute. But in practice, the assessment of federal jurisdiction on removal is quite different from the jurisdictional inquiry applied to cases originally filed in federal court. Generally speaking, a plaintiff is entitled to file an action in federal court by asserting a federal cause of action (no matter how baseless) or by alleging that the parties are citizens of different states and that the amount in controversy exceeds a certain amount (again, with little regard for the actual likelihood of recovering a jurisdictionally sufficient amount). Removing defendants are held to a far higher jurisdictional standard. While the precise articulation of removal analysis varies from judge to judge, the consistent theme in removal analysis is that there is a strong presumption against removal that a removing defendant must overcome in order to proceed in federal court.

The political connection between the major trial lawyers' organizations and the Democratic Party is intimately close,[2] and it therefore should come as no surprise that judges appointed by Democratic presidents tend to look for second-order arguments (presumptions and the like) that justify remanding cases to state court, the forum of choice for trial lawyers. A random sampling of five district judges from five different judicial districts, all appointed by President Clinton, reveals as much: every one of the judges in the sample has invoked a presumption against removal in order to justify declining jurisdiction over a removed action. In one telling opinion, for instance, a Clinton-appointed judge of the U.S. District Court for the Central District of California stated that the removing de-

fendant bore the burden of establishing the existence of facts sufficient to satisfy the requirements of original jurisdiction. According to this opinion, however, simply establishing the existence of original jurisdiction was not good enough to justify removal. Said the court:

> There is also a "strong presumption" against removal jurisdiction. Because courts must "strictly construe the removal statute against removal jurisdiction," "federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance."[3]

Opinions of other Clinton-appointed district judges in the random five-judge sample reveals similar examples of removal opinions in which the court's decision to remand an action to state court depended on the court's adoption of a presumption against removal (or, in the words of some of the judges, the adoption of a "beyond a reasonable doubt" standard for removal).[4]

It is more politically surprising that Republican judges would share their Democratic counterparts' enthusiasm for remanding cases to state court, given the relative preference of Republican constituencies, such as corporations, to litigate in federal court. Yet a random sample of five district judges appointed by President Reagan reveals a pattern identical to the sample of Clinton appointees: like their Democratic counterparts, every judge in the sample has invoked a presumption against removal in order to justify remanding a case to state court. As one Reagan appointee put it, removing defendants have a burden of overcoming the presumption against federal removal jurisdiction, a presumption that exists by virtue of the fact that federal courts are courts of limited jurisdiction. Except for certain specialized federal causes of action, the design of the federal system is to make the state courts the primary forum.[5]

The other Reagan appointees in the random sample similarly invoked presumptions or extraordinary "beyond a reasonable doubt" standards in order to decline jurisdiction over cases that at least arguably satisfied jurisdictional requirements on their face.[6]

There can be little doubt that the supposed "presumption" against removal jurisdiction imposes a jurisdictional double standard, requiring removed cases to meet a significantly higher jurisdictional standard than that required for cases originally filed in federal court. Hornbook law establishes, for example, that a plaintiff may invoke federal diversity jurisdiction merely by asserting that the amount in controversy exceeds the jurisdictional minimum. Only if it appears to a "legal certainty" that there is no possibility of recovering the asserted amount will the case be dismissed for lack of jurisdiction.[7] In other words, invocation of the federal courts' original jurisdiction requires virtually no showing other than a plaintiff's unvarnished allegation that jurisdictional requirements are satisfied. *Removal jurisdiction*, on the other hand, requires a substantial showing by the removing defendant in those courts that indulge a presumption against removal. Typically, such courts require the removing defendant to show by a preponderance of the evidence that jurisdictional requirements are met.[8] The notion set forth in the federal removal statute – that any case that originally could have been filed in federal court by the plaintiff may be removed to federal court by the defendant – is thus undermined by the adoption of judicially created presumptions and burdens of proof that favor original jurisdiction while severely constraining the exercise of removal jurisdiction.

The Anti-Removal Presumption In Practice

The seemingly bipartisan prejudice against removal jurisdiction has led to a number of anomalous or even bizarre jurisdictional rules in both the diversity and federal-question removal context. These rules are fairly clearly influenced by a presumption against removal jurisdiction, since nothing in the text of either the federal removal statute or the underlying diversity or federal-question jurisdictional statutes compels them.

Removals based on diversity jurisdiction are one area in which some federal courts have stretched far beyond the statutory text to embrace rules that limit removal jurisdiction. To qualify for diversity jurisdiction under the text of the federal diversity statute, an action need satisfy only two requirements: it must be between citizens of different states, and the "amount in controversy" must exceed $75,000.[9] Yet in the class-action arena (the area in which the pressure on defendants to remove is greatest, for reasons explained below), some federal courts have gone to great lengths to remand even class action matters in which the plaintiffs seek millions or even billions of dollars in damages – all based on an extrastatutory interpretation of the phrase "amount in controversy." Consider the fact, for example, that a number of courts have rejected removal jurisdiction over class actions between parties of diverse citizenship in which the plaintiffs seek millions of dollars in punitive damages, on the ground that calculating the amount in controversy requires

that the total punitive damages request be divided by the total number of class members.[10] Nothing in the text of the diversity-jurisdiction statute compels this narrow interpretation of diversity jurisdiction in the removal context. Moreover, such an interpretation is inconsistent with background legal principles, such as the fact that, for other jurisdictional purposes, courts are to disregard unnamed putative class members,[11] or that the punishment and deterrent purposes of punitive damages make them inherently collective in an important sense.[12] Other extrastatutory diversity-jurisdiction doctrines that arise almost exclusively in the removal context similarly result in the remand of cases that, on their face, seem to put a large amount in controversy: decisions remanding class actions where the plaintiffs seek a large amount in disgorgement, or where the cost to the defendant of complying with a requested injunction is large, come to mind.[13] In short, it is reasonably clear that a statutorily unjustified presumption against removal has had a substantive effect on the development of jurisdictional doctrine.

The apparent judicial prejudice against removals based on diversity jurisdiction has had far-reaching practical effects as well. Nearly every major issue that attracts the attention of the class-action plaintiffs' bar becomes the subject of multiple, overlapping lawsuits filed in multiple state-court jurisdictions.[14] Lawsuits filed against tobacco companies, gun manufacturers, health maintenance organizations, and others fit this pattern. Yet there is no established means of coordinating overlapping actions pending in various state-court systems. The only real opportunity for ensuring that major pieces of related litigation are resolved in a coordinated way is by invoking the procedures of the Judicial Panel on Multidistrict Litigation. But these procedures only cover actions pending in federal court. Thus, to the extent that presumptions against removal operate to bar nationwide class actions seeking multimillion dollar tort or contract remedies from federal court, they have effects that go far beyond simple jurisdictional doctrine, requiring defendants to fight simultaneous and identical legal battles on multiple fronts.

The substantive effects of the anti-removal presumption have been felt outside the diversity-jurisdiction context as well. Defendants seeking removal based on federal-question jurisdiction are equally familiar with the high bar many district judges set in considering removal petitions. Like the diversity-jurisdiction statute, the federal-question statute is straightforward, permitting federal courts to hear "all civil actions arising under the Constitution, laws, or treaties of the United States."[15] Yet ever since the famous feud between Justices Day and Holmes over their warring conceptions of the well-pleaded complaint rule,[16] some judges have assumed that federal questions – no matter how central to an action – cannot justify removal unless they were affirmatively pleaded by the plaintiff. As one provocative Supreme Court opinion put the point, a case cannot be removed on federal question grounds unless the federal issue is pleaded by the plaintiff (or at least is an element of the plaintiff's case in chief), "even if both parties concede that [a] federal defense is the only question truly at issue."[17]

In short, judges of both political persuasions have adopted narrow constructions of the federal jurisdictional statutes that are unique to the removal context. The results are that many tort and contract disputes of national economic significance are litigated in state courts despite the fact that they appear to qualify for federal jurisdiction under the plain words of the federal diversity statute, and that many important federal questions are decided by state courts even though in every ordinary sense they seem to "arise under" federal law.

The Political Explanation For Removal Presumptions

Without blindly accepting the Legal Realist notion that all law is politics,[18] it nonetheless would be foolish to imagine that politics plays no role in decisions about proper judicial forum, including removal decisions. On the liberal side, the political considerations associated with removal jurisdiction are fairly straightforward. There is little question that plaintiffs' lawyers overwhelmingly prefer to litigate in state court rather than federal court – and, indeed, in certain state courts rather than other state courts. As one recent study found, major lawsuits (such as class actions) are filed in certain state courts at rates approaching ten times the filing rate in the federal system. In tiny Madison County, Illinois, for example, there were 61.8 class action filings per million residents in 1999, as compared with 7.6 class action filings per million residents in the federal system.[19] To the extent that the plaintiffs' trial bar exerts disproportionate influence within the Democratic party, a relatively more skeptical view of removal jurisdiction among Democratic appointees (at least at the margins) is to be expected.

The reason why certain conservative judges indulge a presumption against removal jurisdiction is

more nuanced. The most common explanation given by judicial conservatives for applying presumptions against removal jurisdiction is that removal raises federalism concerns.[20] According to one analysis, an entire body of jurisdictional doctrine applicable only to removal jurisdiction – beginning with the well-pleaded complaint rule – arose out of a concern that removal of cases from state court to federal court posed a threat to comity in the federal system:

> The [Supreme] Court has justified the well-pleaded complaint rule and its variance from the apparent scope of statutory jurisdiction by several different policies. Originally the rule represented solely a concern with judicial management: the only cases properly before a federal court would be those which genuinely raise federal issues; a case that anticipates a federal issue ultimately may not raise such an issue; hence, such a case should not be filed originally in federal court. As a corollary to this policy, the Court specifically held that once a defendant in fact actually raises a federal issue, a case would then become removable to federal court. Later the Court's well-pleaded complaint rule embodied a second set of policies based on federalism – the promotion of comity and respect for state decisionmakers. This goal necessitated further reallocation of federal jurisdiction to state courts, because removal jurisdiction, though acceptable under a judicial management policy, would intrude on federalism values and thus be inconsistent with a doctrine based on those values.[21]

The federalism rationale for a presumption against removal jurisdiction has undoubtedly persuaded many members of the federal judiciary.[22]

The explanation for the federalism crisis supposedly caused by removal practice has never been particularly satisfactory. On the one hand, proponents of the federalism rationale for reining in removal practice appear to argue that it is inherently insulting to the states to permit litigants to take cases out of state courts and place them in the hands of federal judges for resolution. But at the same time, these same proponents argue that the rights of defendants that otherwise would remove cases to federal court are protected precisely because – practical or not – final state-court decisions are ultimately reviewable by the Supreme Court of the United States.[23] This argument belies the proposition that it is really federalism that justifies a presumption against removal jurisdiction; if the *final* arbiter of unremovable disputes is conceded to be the United States Supreme Court, then it cannot be anything in the Constitution's federal structure that demands that the *original* arbiter be a state court. Something else must be going on – but what?

In cases removed on diversity grounds, the *Erie* doctrine exists precisely to protect against the kind of federalism concern trumpeted by proponents of the anti-removal presumption. As one commentator has explained, the notion that "federalism concerns" require a federal court to aggressively decline jurisdiction in cases arising under state law makes little sense since "the premise of *Erie* is that the federal courts will strive to reach the same result as the state court on issues of state law."[24] Thus, even in a removed case, the decisions of state legislators and regulators are given authoritative effect. If anything, this requirement of federal-court fealty to substantive state law should strengthen, not weaken, the commitment to federalism embodied in a system in which the states are regarded as co-equal sovereigns. The fact that removal based on diversity jurisdiction has ancient roots in the Judiciary Act of 1789 underscores the point.[25]

The situation is somewhat different with respect to cases removed on federal-question grounds. Congress did not grant the lower federal courts jurisdiction to hear cases arising under federal law until 1875.[26] Nonetheless, it would be strange indeed to call it a "federalism" violation when a defendant asks that a case that turns on federal law be decided by a federal court. In a system of dual sovereignty, the United States is not superior to the individual states except as provided in the Constitution, but it clearly is a sovereign. That fact alone demonstrates that whatever case management issues arise from the removal of a case from state to federal court on federal-question grounds, they are not *federalism* issues.

So what is the political explanation for the presumption many federal judges employ to avoid exercising federal removal jurisdiction? On the liberal side, at least at the margins, the explanation is that core liberal constituencies prefer to litigate in state court. But on the conservative side, the explanation seems to lie in a strongly held but potentially misplaced concern about federalism – a concern that, as explained below, is outweighed by other, more directly applicable values of judicial conservatism.

Removal and Judicial Conservatism

While there is probably no universally acceptable definition of judicial conservatism, judicial conservatism at a minimum encompasses three basic ideas: (1) the idea of the rule of law – that claims should be decided based on what the law is, and not what any particular judge or litigants feels it should be; (2) the idea of procedural justice – that respect for universally acknowledged judicial procedures is a better guarantor of justice than appeals to substantive concepts that may be politically controversial; and (3) the idea of judicial neutrality – that judges should decide cases based on their merits, and not based on outside influences or preferences.

Judged against these criteria, the wisdom of a presumption against removal jurisdiction is suspect. Regardless of the underlying substantive law being applied, federal courts will always have an advantage over state courts when it comes to procedural justice, simply because procedural rules in the federal system are far more uniform and consistent than in the judicial systems of the 50 states. Indeed, the 2000 amendments to the Federal Rules of Civil Procedure were adopted in large part to eliminate inconsistencies in local federal court practice and to "establish a nationally uniform practice" for important procedural requirements like discovery.[27]

Federal courts also have the advantage over state courts in terms of judicial neutrality. Article III ensures as much; unlike judges in 38 or 39 states, federal judges are not elected, and cannot be fired except in extremely rare circumstances.

The issue of respect for the rule of law is less clear, since state courts unquestionably are populated by many highly qualified and talented judges. It is equally unquestionable, however, that the size of jury verdicts are far higher in the federal system than in the state system; that the willingness of state courts to certify cases for class-action treatment is far greater than that of federal courts; and that plaintiffs' lawyers, for whatever reason, strongly prefer the state-court forum.[28]

These considerations have begun to erode the bipartisan support for presumptions against removal. Over the past three years, several bills have been introduced in Congress (largely by Republicans, but with significant Democratic support) to expand federal removal jurisdiction by statute in certain circumstances.[29] Good an idea as that is, it should not be necessary. The federal statutes governing removal jurisdiction are generally simple and clear. The tendency of lawsuits involving large damages claims, and lawsuits involving important federal issues, to proceed in federal court has less to do with the federal jurisdictional statutes themselves than with judicial glosses on those statutes that are designed to impede removal to federal court. While all statutes ought to be construed strictly according to their terms, there is no strict constructionist justification for imposing a presumption that dictates reading a statute more narrowly than its terms otherwise would suggest. The politics of removal jurisdiction, while murky, are also in flux because of recent legislative moves to expand the availability of removal jurisdiction beyond what many judges currently permit. Judicial conservatives ought to recognize that availability already.

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Footnotes

[1] 28 U.S.C. § 1441(a).

[2] *See, e.g.,* Morton Kondracke, *Trial Lawyers as a Political Issue*, San Diego Union-Tribune, July 28, 2002, at G-2 (noting that 87 percent of the $1.8 million contributed by the Association of Trial Lawyers of American in the 2002 election cycle has gone to Democratic candidates; that 72 percent of the $44 million contributed by all legal organizations in the 2002 election cycle has gone to Democratic candidates; and that 69 percent of the $112 million in political donations made by lawyers during the 2000 election cycle went to Democrats).

[3] *Chesler/Perlmutter Prods., Inc. v. Fireworks Entertainment, Inc.*, 177 F. Supp. 2d 1050,1055 (C.D. Cal. 2001) (Collins, J.) (internal citations omitted).

[4] *See Sdregas v. Home Depot, Inc.*, 2002 U.S. Dist. LEXIS 12159, at 7 (E.D. Pa. April 4, 2002) (Kauffman, J.) (remanding case based on proposition that "all doubts should be resolved in favor of remand"); *Air Ion Devices, Inc. v. Air Ion, Inc.*, 2002 U.S. Dist. LEXIS 12456, at 2 (N.D. Cal. July 5, 2002) (Illston, J.) (remanding case and noting that "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal"); *Kizziee v. Health Care Workers Local 250*, 2001 U.S. Dist. LEXIS 13764, at *3 (N.D. Cal. Sept. 4, 2001) (Chesney, J.) (remanding case because "[a]ny doubt about the propriety of removal is resolved in favor of remand."); *First American Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 207 (D. Conn. 2000) (Chatigny, J.) (remanding case and noting that "[f]ederal courts construe the removal statute narrowly, resolving any doubts against removability.")

[5] *Horton v. Alliance Mortgage Co.*, 1998 U.S. Dist. LEXIS 22005, at 5 (N.D. Ala. April 28, 1998) (Acker, J.)

[6] *See Kansas v. Stovall*, 35 F. Supp. 2d 783, 785 (D. Kan. 1998) (Crow, J.) (remanding case and noting that "The burden of showing the propriety of removal always rests with the removing party. All

doubts about the propriety of removal are resolved in favor of remand.") (internal quotes and citations omitted); *Ford v. Murphy Oil U.S.A., Inc.*, 750 F. Supp. 766, 771 (E.D. La. 1990) (Feldman, J.) (remanding case because "the removing parties bear the burden of establishing their right to a federal forum; all doubts about the propriety of removal must be resolved in favor of remand."); *Meinders v. Refco Securities, Inc.*, 865 F. Supp. 721, 723 (D. Colo. 1994) (Babcock, J.) (remanding action and noting that "the burden of establishing federal jurisdiction based on a federal question rests with the party seeking removal of the action to district court. . . . Thus, to justify removal here, the defendants must establish federal jurisdiction *and* overcome the strict construction of the jurisdictional statute.") (internal citation omitted; emphasis added); *Hotaling v. Pacific Inst. for Research & Evaluation*, 1994 U.S. Dist. LEXIS 14740, at *3 (remanding case and noting that the "removal statute is strictly construed against removal jurisdiction and doubt is resolved in favor of remand").

[7] *St. Paul Indem. Corp. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

[8] *See, e.g., Lindsay v. American General Life & Accident Ins. Co.*, 133 F. Supp. 2d 1271, 1276 (N.D. Ala. 2001).

[9] 28 U.S.C. § 1332.

[10] *Compare Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1996) (affirming removal on diversity grounds based on aggregation of punitive damages claims) with *Crawford v. Hoffman La Roche Ltd.*, 267 F.3d 760, 765 (8th Cir. 2001) (reversing district court decision permitting removal based on aggregation of punitive damages claims).

[11] *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921).

[12] *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996).

[13] *See Aetna U.S. Healthcare, Inc. v. Hoechst A.g.*, 54 F. Supp. 2d 1042, 1049 (D. Kan. 1999) (remanding action despite request for large disgorgement award); *Sanchez v. Monumental Life Ins. Co.*, (9th Cir. 1996) (reversing district court decision denying remand because defendant had not proven cost of complying with sweeping injunction).

[14] *See Do Federal Class Actions Compete Against Overlapping State Class Actions in a Race to the Courthouse? Preliminary Results of a Study of Recent Multidistrict Proceedings*, 3 Class Action Watch 3 (2002).

[15] 28 U.S.C. § 1331.

[16] *Compare American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (Holmes, J.) (holding that well-pleaded complaint rule precluded removal of action based on federal defense, no matter how substantial) with *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (Day, J.) (affirming exercise of federal jurisdiction over state-law claims that necessarily required resolution of substantial federal questions).

[17] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987).

[18] *See, e.g.,* Jerome Frank, Law and the Modern Mind (1930).

[19] *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J. Law & Pub. Pol. 143, 163 (2001).

[20] *See, e.g., Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction.") (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)).

[21] Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1333 (1986).

[22] *See, e.g.,* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992).

[23] *See, e.g., Dema v. Illinois*, 546 F.2d 224, 226 (7th Cir. 1976) (invoking federalism principles and noting that litigants unhappy with ultimate state-court disposition could eventually seek review in U.S. Supreme Court); *New York v. Phillip Morris, Inc.*, 1998 U.S. Dist. LEXIS 4, at 13 n.6 (S.D.N.Y. Jan. 5, 1998) (remanding action to state court on federalism grounds because federal preemption issue was merely a defense, but noting that state courts' ultimate disposition of preemption issue could be reviewed by U.S. Supreme Court).

[24] Barry Friedman, *A Revisionist Theory of Abstention*, 88 Mich. L. Rev. 530, 581 (1989).

[25] *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (codified at 28 U.S.C. § 1441).

[26] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified at 28 U.S.C. § 1331).

[27] *See* Fed. R. Civ. P. 26, 2000 Advisory Committee Note.

[28] *See generally* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 421 (1992); Beisner & Miller, *supra* note 19, at 160-68.

[29] *See* Beisner & Miller, *supra* note 19, at 145.

Mississippi Sees Significant Improvements in Civil Justice Fairness and Predictability

*By David W. Clark**

Dramatic changes in Mississippi over the last two years will improve the state's civil justice system. These changes include the defeat of a notoriously pro-plaintiff state Supreme Court justice; decisions and rules changes from that court to eliminate or restrain the more unfair practices used against defendants; the election of a pro-tort reform Governor; and significant statutory tort reform from two special sessions of the legislature.

A. Changes from the Court

In November 2002, the voters soundly defeated a Mississippi Supreme Court justice who had been staunchly pro-plaintiff and anti-business, and a controversial and influential presence on the court. He was defeated by a respected defense lawyer, Jess Dickinson.

In January 2003, the Supreme Court adopted MRCP Rule 35, authorizing independent medical examinations for the first time in state court practice.[1] In May 2003, the Court amended MRE 702 (to make it identical to FRE 702) and tightened the requirements for expert witnesses and opinions, adopting the *Daubert* tests and gate-keeper function for the trial judge, discarding the more lenient *Frye* standard.[2]

In 2004, the state Supreme Court issued several significant decisions. In a series of decisions,[3] the court has effectively eliminated the abusive practice, allowed in the state's courts over the last several years, of joining hundreds or even thousands of plaintiffs in a single case in a selected county if only one of the plaintiffs lived there. This "mass joinder" procedure had stretched the requirements of Mississippi's joinder rule[4] to allow joinder of even "similar" claims or claims arising from the same "pattern of conduct."[5] This broad mass joinder of different claims was utilized by plaintiffs' counsel to reap large verdicts or extort exorbitant settlements by packing high-verdict, plaintiff-friendly counties with the claims of vast numbers of plaintiffs who had no connection to the county or even the state.

The state Supreme Court also issued a significant order in 2004, amending rules 20, 42, and 82 of the Mississippi Rules of Civil Procedure.[6] The court amended the comments to Rule 20 and 42 to reflect the atmosphere within the court against the practice of "mass joinder." The court amended Rule 82 by adding subpart (e), which recognized the doctrine of forum non-conveniens in state practice, allowing transfer of a case or claim to a more convenient county within the state. Along with the changes made to these rules, the Supreme Court sponsored a symposium, along with the Court of Appeals and Mississippi College School of Law, to explore the possibility of adopting a class action rule. Currently, Mississippi is one of only two or three states that did not adopt Rule 23 (or other class action procedure) as part of their rules of civil procedure.

The Mississippi Supreme Court's 2004 rulings, together with the reforms passed by the legislature in the 2004 special session on tort reform, should end this mass joinder practice.

The outrageous verdicts have slowed, if not ceased; while there had been a spate of enormous verdicts from 1995 through 2001, there were only two verdicts over $10 million in 2002, and none in 2003 or so far in 2004.

B. Changes from the Legislature

In an 83-day special session in late 2002, the legislature adopted several significant measures: 1) absolute limits (caps) on punitive damage awards, based upon the net worth of the defendant; 2) a limit on non-economic damages in medical malpractice cases; and 3) the repeal of the 15 percent penalty imposed upon defendants who appealed unsuccessfully.

The 2004 special legislative session—House Bill 13 was signed into law June 16—enacted even more significant reforms.[7] Now, for all actions filed on or after September 1, 2004:

1.Venue Reform

a.Each plaintiff must independently establish venue.
b.For medical providers, venue will be proper only where the alleged act or omission occurred.
c. The trial judge can change venue for convenience of the parties and witnesses (forum non-conveniens).

These reforms, following the Supreme Court's recent rulings noted above, are significant and address a major problem in the state's courts. Plaintiffs often seek to file lawsuits in places some plaintiffs' lawyers have called "magic jurisdictions"–the same places that the American Tort Reform Association has called "judicial hellholes." Frequently, plaintiffs' counsel have joined parties in lawsuits purely to fix (and keep) jurisdiction in state court and venue in certain counties. As noted, Mississippi's joinder and venue rules had allowed plaintiff's counsel to join hundreds or thousands of plaintiffs in the same case in such a "select" county.

Mississippi House Bill 13 ("HB 13"), adopted by the legislature on June 3, 2004, amends Mississippi law to prevent such forum manipulation and mass misjoinder. For the first time, HB 13 requires that venue must be proper for each plaintiff. The legislation reinforces and extends the Supreme Court's recent venue and joinder rulings.

The general rule is that a civil suit may be filed in the county where the defendant resides (in the case of a corporation, the county of its principal place of business) or in the county where a "substantial alleged act or omission occurred or where a substantial event that caused the injury occurred." If venue cannot be asserted against a nonresident defendant under the above criteria, the plaintiff may file in the county where he or she lives.

In medical negligence cases, venue is narrower; it will be proper only in the county where the alleged act or omission occurred, i.e., where the medical provider provided service.

If a claim would be more properly decided in another state, the trial court must dismiss the claim or action. If the claim would be more properly decided in another county within the state, the case must be transferred to the appropriate county. A case may not be dismissed until all defendants agree to waive the right to raise a statute of limitations defense in all other states in which the claim would not have been time-barred at the time the claim was filed in Mississippi. This will allow plaintiffs a fair opportunity to refile their cases in other states without fear that the statutes of limitations may expire on their claims while they are pending in Mississippi.

2. Non-Economic Damage Limitations

a. There is a $500,000 per plaintiff limit in medical malpractice cases.
b. There is a $1 million per plaintiff limit for all other cases.

Noneconomic damages cover nonmonetary losses, such as pain and suffering, inconvenience, physical impairment, disfigurement, mental anguish, injury to reputation, loss of society and companionship, loss of consortium, humiliation or embarrassment. In the lengthy special session in 2002, the legislature enacted changes to Mississippi's medical malpractice laws, including the establishment of a $500,000 cap on noneconomic damages.

HB 13 maintains the current medical malpractice cap at $500,000 per plaintiff, and extends a cap on noneconomic damages to other civil defendants. Under HB 13, noneconomic damages are capped at $1 million for any civil defendant (other than a health care liability defendant). The cap applies to any civil claim filed on or after September 1, 2004.

3. Innocent Seller Protection

a. Seller cannot be held liable unless it had control over design, testing, packaging or labeling of product, or had actual or constructive knowledge of the defect.
b. The provision (from 2002) that allowed a seller to be retained as a defendant even though "innocent," has been eliminated.

Mississippi law, as applied by the courts, currently allows plaintiffs to join and keep local product sellers (e.g., wholesalers, distributors, and retailers) in tort actions for the purpose of trying to defeat federal diversity-of-citizenship jurisdiction over claims that otherwise could be heard in federal court, or setting state court venue in a particular county. Mississippi has permitted innocent sellers to be indemnified by product manufacturers that are determined to be at fault. However, that approach created removal obstacles for primary target defendants seeking to have their cases heard in federal courts. Plaintiff lawyers could continue to name innocent sellers as pseudo-parties just to get Mississippi jurisdiction and venue in a "magic jurisdiction."

HB 13 insulates innocent sellers who are not actively negligent, but instead are mere conduits of a product. Under the bill, the seller of a product (other than a manufacturer) will not be liable unless the seller exercised substantial control over the harm-causing aspect of the product, the harm was caused by a

seller's alteration or modification of the product, the seller had actual knowledge of the defective condition at the time the product was sold, or the seller made an express warranty about the aspect of the product that caused the plaintiff's harm.

4. Punitive Damage Caps

a. The 2002 session enacted absolute caps on punitive awards, for cases filed after December 31, 2002.
b. The 2004 statute decreased the absolute limits on caps for all but the largest net worth defendants. The caps now range from a low of 2% of net worth for a defendant with a net worth of $50 million or less, to a top limit of $20 million for a defendant with net worth of $1 billion or more.

The U.S. Supreme Court has expressed concern that punitive damages are "skyrocketing" and have "run wild." Mississippi has been the site of a number of multimillion-dollar punitive damages awards, most coming since 1995. Many times, the cases have not received appellate review, either because the defendant could not afford to post the 125% supersedeas bond or the plaintiffs offered an enticing settlement (still exorbitant, and acceptable only in light of the outrageous verdict) that the defendant could not afford to pass up. In the cases in the last several years that have been appealed, the Mississippi Supreme Court has been applying the U.S. Supreme Court decisions that seek to place some reasonable limit on such awards.

As part of the special session in 2002, the legislature imposed "sliding caps" on punitive damages based on the net worth of the defendant. HB 13 lowers some of those caps. Now, punitive damages awards in Mississippi cannot exceed (in a single case):

· $20 million for a defendant with a net worth of $1 billion;
· $15 million for a defendant with a net worth between $750 million and $1 billion;
· $5 million for a defendant with a net worth of more than $500 million but not more than $750 million (new cap under HB 13 – reduced old cap by ½);
· $3.75 million for defendants between $100 million and $500 million (new cap under HB 13 – reduced old cap by ½);
· $2.5 million for defendants worth $50 million but not more than $100 million (new cap under HB 13 – reduced old cap by ½); or
· Two percent of the defendant's net worth for a defendant with a net worth of $50 million or less (new cap under HB 13 – reduced old cap by ½).

5. Premises Liability

Under HB 13, civil liability is abolished for premises owners for death or injury to independent contractors or their employees if the contractor knew or reasonably should have known of the danger that caused the harm.

6. Joint Liability Eliminated

a. Each defendant is responsible only for the damages it caused (allocated to it by jury).
b. Liability will be "several" only (unless defendants consciously and deliberately pursued a common plan or design to commit tortuous act).
c. There is no reallocation of fault assigned to an immune tort-feasor (one whose liability is limited by law).

Joint liability provides that if one defendant cannot satisfy its portion of a judgment, the remaining at-fault defendants may be required to pay the uncollectible share. In the 2002 special session, the legislature abolished joint liability for noneconomic damages. For economic damages, joint liability was abolished for any defendant found to be less than thirty percent at fault. Joint liability continued to apply to any defendant found to be thirty percent or more at fault, but only to the extent necessary for the claimant to recover fifty percent of his or her recoverable damages.

HB 13 abolishes joint and several liability for all defendants. Defendants are not responsible for any fault that the finder of fact allocated to an immune tortfeasor or a tortfeasor whose liability is limited by law.

7. Jury Service Revisions

HB 13 incorporated many provisions of the Jury Patriotism Act. The measure seeks to make jury service more "user friendly" and less of a financial burden by more clearly defining hardship exemptions and by establishing a fund to supplement or replace lost wages for jurors in civil cases who serve for more than ten days. The legislation seeks to encourage wider

jury participation by limiting exemptions from jury service. Jurors who fail to appear and obtain a postponement of jury service may be held in civil contempt of court and fined up to $500 or three days imprisonment, or both. In the alternative, the court may require the prospective juror to perform community service for a period no less than if the person would have completed jury service, and provide proof of completion of this community service to the court.

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Footnotes

[1] The court had omitted Rule 35 when it adopted the text of almost all of the other Federal Rules of Civil Procedure in 1982.

[2] Miss. Transportation Com. v. McLemore, 863 So.2d 31 (Miss.2003).

[3] Janssen Pharmaceutica, Inc. v. Armond., MS Sup. Ct., No. 2003-IA-OO398-SCT, February 19, 2004 ; Janssen Pharmaceutica, Inc. v. Grant., No. 2003-IA-00174-SCT, May 13, 2004 ; Janssen Pharmaceutica, Inc. v. Bailey, No. 2002-CA-00736-SCT, May 13, 2004; Harold's Auto Parts, Inc., et al. v. Flower Mangialardi, et al., No. 2004-IA-01308-SCT, August 26, 2004. (While *Armond* had suggested there might be an exception from the requirements of Rule 20 for "mature torts" such as asbestos claims, the court in *Harold's Auto Parts* made it clear there is no exception or exemption from the joinder requirements.)

[4] Mississippi's rule for joinder of parties, MRCP Rule 20, has the same language as FRCP Rule 20, allowing joinder of parties with claims "arising out of the same transaction or occurrence" and having "at least one common question of law or fact."

[5] American Bankers Ins. Co. v. Alexander, 818 So.2d 1073 (Miss. 2001).

[6] MS. Order 04-01, Order Amending Rule 20, 42, 82, and the Comments of the Rules of Civil Procedure, (Miss. 2004).

[7] The Governor in 2002 was Ronnie Musgrove. Musgrove was defeated in November 2003 by Haley Barbour, who had made tort reform a high-profile campaign issue. Governor Barbour strongly supported such reforms in the regular legislative session, and when nothing passed, he promptly called a special session to deal with the issue.

Professional Responsibility

Due Process and the Role of Legal Counsel in the War on Terror

Partial Transcript of a Panel from an April 15, 2004 Conference, "Waging the War on Terror in the Supreme Court"

Ronald Rotunda, Professor,
George Mason University

Kathleen Clark, Professor,
Washington University in St. Louis School of Law

Prof. Rotunda: Just a few words — just a little explanation here — I'm not representing the government. I don't agree with everything the government is doing. I'll just give my own views for what they're worth.

I start off with something this panel reminded me of when I was asked to speak here. Many years ago I was having tea in the Russian Tea Room at Hotel Leningrad when the city was called Leningrad. I was chatting with an East German. We talked about various things, and then I asked him, "What was the best time of your life?"

He said, "Oh, that's easy, when I was an American POW in World War II." He said, "They fed me. They clothed me. They kept me warm. They detained me in Utah. They taught me English. They gave me a certificate of English when I left at the end of the war." They gave him many things, but not a lawyer.

We captured hundreds of thousands of German and Japanese prisoners. None of them had lawyers until a few of them were prosecuted for war crimes. Only the war crimes defendants received counsel. We have now the POWs — really the "detainees" — in Cuba. I guess I'll call them POWs for short. They are not POWs under the definition of the Geneva Convention, but I will call them POWs so we do not have to argue about the point. After all, the POWs in World War II – and they really were POWs – had no right to counsel and no right to *habeas*.

The detainees are different than regular soldiers. Regular soldiers wear uniforms, carry guns openly, and do not pretend to surrender and then kill you. These Guantanamo detainees are really "unlawful combatants." They lose certain rights. We still can't torture them, for example, but they do lose rights. For example, real POWs have a right to be housed together and to cook their meals together. Can you imagine giving these people butcher knives and letting them congregate as a group?

These detainees might be compared to spies. Spies don't wear uniforms. They conceal their weapons. We might think of them as heroes if they're our spies. If we catch them on the other side, we have, under the laws of war, the right to execute them, whereas you cannot execute a POW who surrenders.

We invited Steve Gillers, a professor of NYU to come here, but he wasn't able to come, but I want to refer to an op-ed he wrote in the *New York Times* in December of 2001. He said, talking about these military tribunals, he said that the debate over President Bush's orders establishing these tribunals has missed an important fact. Defense lawyers will be unable to practice in these courts. Why? Because you must be a member of at least one state bar. Every state bar has ethics rules requiring competent representation for criminal defendants. Their lawyers, and I quote from Professor Giller's article, "may not lend their prestige and skills to a sham process that mocks the constitutional role in ensuring fair trials for their clients." Perhaps, Kathleen Clark can tell us whether she thinks that Steve Gillers was acting as a wee bit of hyperbole.

Let us turn to a quote from the Arab news of March 2, 2004 in response to the bombing in Spain, that said, "The U.S., on the other hand, initially rushed to blame the attack on Al Qaeda." By the way, this was March 12, before we found out that, in fact, they were involved. This article then said, "That has been their reaction to every attack everywhere in the world, a catch-all device for anything from this invasion of Iraq *to this increasing undermining of civil liberties at home*."

I think this is a hoot that the Saudi Arabian official newspaper is concerned about civil rights in the United States. God love them. It would be a little bit like Nazi Germany saying the Americans don't treat their Jewish Americans right.

I ran across another interesting article, from the *Sunday Telegraph* in London. I tried to find references to it in the United States. There was a brief reference in Fox News. I couldn't find it any place else. Headline: "'I had a good time in Guantanamo,' says inmate, released Afghan prisoner, 'good food, water, enjoyable life. They taught me to speak English. They treated us well. We had enough food. I didn't mind being detained. They took all my old clothes, and they gave me new clothes." In fact, they gave him a little party when he left, a send off, and urged him to continue his studies.

He said he was improperly detained in Guantanamo because he was just a farmer. The U.S. government says that he was captured while studying in an extremist mosque, captured while preparing to obtain weapons. The Department of Defense thought he was dangerous. The DOD processed him and concluded, after the year-and-a-half that he was there, that he no longer was a threat.

Was this shocking? Talk to the people imprisoned in World War II. Better yet, talk to the people imprisoned at the start of the Hundred Years War, because when did they get off? We're told that this is different than other wars. It's not declared. I guess this war is like the Korean War or the Vietnam War, both of which were not declared and had POWs. In fact, the U.S. Civil War was never declared, and it was the bloodiest war in our history.

We are told we don't know when the war on terrorism will end. On December 8, 1945, did we know when World War II would end? Did we even know who the victors would be? We certainly didn't know on December 8th. In fact, a year later it looked like we were going to be losing.

The United States still hasn't declared war, in an official sense, on Al Qaeda, but they declared war on us in 1996. Bin Laden issued what he said was a declaration of holy war against the United States. You can find it on the Bin Laden web posting. He used the phrase "declare war" and said the war would continue until all military forces withdraw from Saudi Arabia, stop the support of Israel, so on, and so forth. I suppose the war will continue until Bin Laden can drape the Statue of Liberty in a burqa.

The Government created these military tribunals to prosecute war crimes, and frankly, they do not have the same protections as the Article III courts. In fact, there are not even Article III judges who preside over them. The rules on hearsay are relaxed. The defendants do have protection of double jeopardy. They do have counsel, the right to call witnesses, etc.

We have to realize that the rules provided for the military tribunals for the people captured in the theater of war are much trickier than the rules that most of the rest of the world uses in their civil tribunals. For example, we don't have appeals by prosecutors, but all of Europe allows prosecutors to appeal a verdict of not guilty. Most of the rest of the world thinks our rules on hearsay, on double jeopardy, on the Fifth Amendment, on the presumption of innocence, are nuts, but we still keep those rules for these war crimes tribunals.

Other countries don't offer these protections at all. In fact, if the people we've captured that come from Qatar, Oman, Kuwait — are sent back to trial in their own country, they will find fewer protections than they will get in the United States military courts. These are roughly the same rules we had at the end of World War II. People with no sense of history have some kind of feeling these tribunals are somewhat unusual. They are not.

We have to realize that at the end of World War II, we had about 200 cases tried in Nuremberg before international war crimes tribunals. In addition, we had about 1,600 cases of German war crimes and Japanese war crimes tried by the American military tribunals without any international input. The French and the British tribunals tried an equal number — about 1,600 each — of war crimes under procedures that are about the same as we have today.

We do live in perilous times. We should be concerned about our civil liberties. Yet,we all know that we can talk about this quite openly. Anyone can criticize the war effort. People can file law suits on behalf of the detainees. Yet, there are those who have argued that one reason that the prisoners cannot get fair trials is that they are represented by military lawyers.

At the oral argument in the detainee cases to be heard by the U.S. Supreme Court, former Judge Gibbons, representing some of the detainees, will be facing off against Solicitor General Ted Olson. Olson argues that the American courts don't have the authority to second guess the status of foreign citizens who have been captured in the theater of war.

Gibbons called this position "frightening." Yet, throughout history, civil courts have not second guessed the status of foreign citizens captured in the theater of war. He's old enough to remember World War II. I'm old enough to read about it and old enough to remember the Korean War or the Vietnam War, all the wars we've had since then, declared and undeclared. In fact, no major country has declared war in an official way since World War II, but we know we've had all kinds of wars. The first Gulf War wasn't declared.

In all of our past conflicts, we've had military tribunals with defendants defended by military counsel. I think they'll do a very competent job for the people they're charged with defending. I think Commander Swift's vigorous defense counsel will show that. Yet we constantly hear the argument that the process is completely unfair and unconstitutional. Or, in the words of former Judge Gibbons, "frightening."

Two years ago, I wrote an article and examined the principle of monitoring detainees. Two major points about monitoring: first of all, there is actually case law. For example, Noriega was monitored. The court said that that's okay. The detainees are told they're going to be monitored. There is a Chinese wall or screen between the people doing the monitoring and the prosecution team. Noreiga was monitored, he was tried and convicted, and the conviction was upheld. There is nothing new under the sun, and monitoring of particularly dangerous prisoners is not new.

I have a different suggestion for what the Government could do if it found that it could relax the standards of monitoring. The Government might decide to forgo monitoring if the detainee hired an attorney who has security clearance and can be completely trusted. Most people don't realize this, but when Moussaoui was first indicted, one of the lawyers charged with representing him, picked by his mother, was the French attorney who was defending, and engaged to, Carlos the Jackal. They met in prison. I would have thought prison is not a good place to pick up women, but he was assigned this French woman and she picked him as her husband-to-be. If you're going to have the attorney for Carlos the Jackal representing you, I can't be shocked about the Government position that you should be monitored. The Government cannot trust Carlos the Jackel's "significant other."

Alternatively, a court might hire masters of the court to engage monitoring, rather than using employees of the Department of Justice or Department of Defense. These monitors might be retired FBI agents who know the language and know the code words, because the detainees are going to be talking in code. Or, the detainees might retain attorneys that have security clearance and who we know will be loyal to the United States.

There already is a fair amount of law in the lower courts and suggestions in the U.S. Supreme Court that support the constitutionality of monitoring. Maybe the opponents of monitoring are correct and the U.S. Supreme Court will some day hold that it is unconstitutional, but the case law now says it isn't. The proposition that we should monitor in necessary cases is reasonable. It is not a frivolous or shocking position, although the opponents are constantly crying wolf. The possibity of monitoring is not a taking away of our civil liberties. If we can't engage in monitoring, if the Court decides to change the law, the court will invalidate monitoring and the Government will obey the ruling. Such a situation will not prove that the Government is violating civil rights; it will merely show that the system works.

One other point on the question of detainees securing witnesses on their behalf. I think it was a mistake to try Moussaoui, the alleged 20th highjacker of 9-11-2001, in a civil court. In fact, I said this at the time. I normally don't try to give predictions, because of it provides evidence of my fallibility, but I did predict at the time that we try him in the military courts, because this is a military matter.

We should not be trying to manipulate or change the civil rules to prosecute these people. If you remember when the Afghan war first started, there was video tape of American soldiers in the dead of night going into Afghanistan to do what? To steal documents. Not to kill women and children, not to capture members of the Taliban, but to steal documents. We're not quite like our enemy.

These documents provided useful information about our enemy. Would these documents be admitted in a civil case in the United States? I doubt it. It would be difficult to prove the documents' authenticity and the chain of command. The fact that we obtained these document *without a search warrant* would affect their admissibility. And, of course, the military does not give *Miranda* warnings before it captures an enemy combatant.

Consequently, these types of cases should be tried as military cases, and leave the civil courts in the business of trying cases that are not related to the laws of war.

We certainly should be careful to protect our civil liberties. We have to have a proper perspective. There are those who object to fingerprinting aliens who enter our country. They wonder if the restrictions are necessary in this particular context. But, most Americans don't know that the lack of a fingerprint requirement—something that our foreign friends, as well as libertarians in this country are upset about enacting—was what enabled Khalid Sheikh Mohammad, who was a tactical mastermind of 9/11, to use an assumed name to get a visa to enter the United States in July, 2001. He was under U.S. indictment for other terrorist attacks, but we didn't have a fingerprint, so he just walked into our country. Now we require fingerprints. A Brazilian judge is all ticked off about that. He wants to have fingerprinting of American visitors to his country. God love him. I don't mind being fingerprinted. Thank you very much.

Prof. Clark: The title of our panel is "Due Process and the Role of Legal Counsel in the War on Terror." First, I'm going to talk about due process and what due process means in the context of sensitive or classified information, looking specifically at the application of that concept to the Moussaoui case. Second, I'll address the question of how the ethics rules apply to the military tribunals.

First of all, on the question of due process and sensitive or classified information: Forty years ago, the Supreme Court clarified, declared that due process requires that in any criminal proceeding, a defendant must have access to the exculpatory information that's in the possession of the government. It would be fundamentally unfair for the government to prosecute someone while withholding information that could help that defendant prove that he was innocent or show that he was less culpable in a way that would be relevant for punishment.

Fundamental fairness requires that the government turn over to the defendent exculpatory information. Sometimes that exculpatory information is classified. In other words, the Executive Branch has decided that the information is sensitive, perhaps because it reveals clandestine operations.

Arguably, separation of powers prevents federal judges from ordering the Executive Branch to declassify information. Many people accept that only the Executive Branch gets to decide what information it has to protect for national security, and therefore what information it will withhold from the public. In general, judges do not assert that they have such power to order the Executive Branch to release classified information.

Nonetheless, due process still requires that if the Executive Branch has exculpatory information that it refuses to declassify and release, the government cannot proceed with the prosecution. If the Executive Branch believes it cannot declassify exculpatory evidence, then a court must dismiss the charges. That is what happens in cases where the due process guarantee of fairness conflicts with the Executive Branch's need to keep classified information confidential.

The Classified Information Procedures Act, which was passed by Congress 25 some years ago, simply provides an orderly way of dealing with this issue. In that statute, Congress did not change the due process standard. In fact, Congress does not have the power to change what the due process clause requires.

How does this apply to Moussaoui? It's relevant to Moussaoui in an unusual way. In the Moussaoui case, the relevant classified information is not in the form of a document. Instead, the information is in the form of individuals who are in the custody of the United States. These are individuals who have been interrogated by United States intelligence officers. They have told those intelligence officers that Moussaoui, the alleged 20th hijacker, had nothing to do with September 11th.

The Ashcroft Justice Department has charged Moussaoui with being involved with September 11th. Moussaoui admits to being a member of Al Qaeda, but says that he was not involved in planning for September 11th, and did not even know about it. Three witnesses in U.S. custody have confirmed to their interrogators Moussaooui's version of these facts.

Whether Moussaoui was involved in September 11th or not makes an enormous difference. It will determine whether he will get life imprisonment for involvement in Al Qaeda, or death for involvement in the deaths that occurred on September 11th. The District Court judge looked at this situation and told the government, "If you do not make these witnesses available for Moussaoui, I will have to take some kind of action to defend his due process rights." The govern-

ment chose not to make the witnesses available.

The action the judge chose to take was not to dismiss all charges, but instead to dismiss that portion of the indictment related to September 11th. The government can proceed with charges that Moussaoui is part of Al Qaeda. But if the government refuses to make available those witnesses who could help him disprove the September 11th charges, then the government cannot charge him with September 11th. Without the September 11th-related charges, Moussaoui would no longer be death eligible.

The government appealed the District Court's decision to the Fourth Circuit. The case was argued in the beginning of December. And for five months now, the Fourth Circuit has not yet ruled.

The government has made a couple of different arguments here in the Moussaoui case. One argument was that anything these witnesses say would be classified. The judge's response was essentially that mere classification is not a good enough reason to deprive someone of his due process rights. The judge's conclusion is consistent with the Classified Information Procedures Act.

The second government argument is that the District Court does not have the power to compel the production of these witnesses because they are enemy aliens who are outside the United States. The District Court's response was essentially that it did not matter where these witnesses are located. She has power over the trial in her courtroom, and has an obligation to make sure that this defendant gets a fair trial in that courtroom. She has power over Executive Branch officials, and can tell them that if they're going to try Moussaoui for September 11th, they have to make the exculpatory information that they have in their possessiom available to him. That's the situation with Moussaoui.

Now, how is this relevant to Guantanamo? In Guantanamo, it appears that the prosecutors themselves will not even know the exculpatory information that is in the hands of other government officials, such as intelligence officers. It also appears that defendants will not be able to get access to exculpatory witnesses or other exculpatory information.

In fact, there are a number of provisions in the Military Commission orders and instructions that suggest that defendants are not even going to get access to any classified information at all. The government plans to try these defendants using information that the defendants will not be allowed to see.

Despite those rules, President Bush claims that these defendants will be given a full and fair trial. But one cannot get a fair trial if the government is withholding exculpatory information. It does not matter whether it is the prosecution that is withholding it, or the police force that is withholding it, or an intelligence agency that is withholding it. If the information is exculpatory, and if it is in the hands of the government, the government needs to turn it over to the defendant for the defendant to get a fair trial.

One last comment: The Defense Department seems to be asserting that the lawyers involved with these commissions are not bound by their state ethics rules requirement. There is a provision in Military Commission instruction Number 1, Section 4 asserting that the instructions themselves define the extent of these lawyers' professional responsibility. Compliance with the instructions is compliance with their professional responsibility.

Yet compliance with the military instructions may conflict with state ethics rules. Several years ago, when Congress passed the McDade Amendment, it indicated that federal government lawyers are bound by state ethics rules. If state ethics rules require either prosecutors or defense lawyers to take action that is prohibited by the Military Commission instructions, the Military Commission instructions claim that they trump the ethics rules. But Congress indicated otherwise in the McDade Amendment.

Prof. Rotunda: So you agree with Steve?

Prof. Clark: What I am saying is that it is not yet an issue. There may well be a conflict between what the ethics rules require and what the Defense Department requires. The Defense Department has asserted a kind of supremacy on this issue, but Congress has indicated that the state ethics rules have supremacy. So we will have to see what happens.

Thank you.

Religious Liberties

I, Plaintiff: A Chat with Joshua Davey

Conducted By Susanna Dokupil on May 21, 2004

The State of Washington's Promise Scholarship program thrust Joshua Davey into the legal spotlight as a college freshman. Washington grants Promise Scholarships to students who meet certain achievement and income criteria and attend an accredited in-state institution, but it denies otherwise-qualified students this award if they declare a major in theology. Davey received the Promise Scholarship, but upon his matriculation to Northwest College, he discovered that he had to give up his award because he intended to double major in Business Management and Pastoral Ministries (a major in theology). Davey sued state officials to recover his scholarship on the basis that the State's program violated his constitutional rights under the Free Exercise Clause, Establishment Clause, Free Speech Clause, and Equal Protection Clause. He claimed that the program discriminated against him on the basis of the religious perspective of his major. Unfortunately for Davey, the Supreme Court ruled against him last winter in Locke v. Davey*, No. 02-1315 (February 24, 2004). Susanna Dokupil caught up with Joshua Davey in a telephone interview shortly after he completed his final exams as a first-year student at Harvard Law School.*

SD: How did your finals go?

DAVEY: Pretty well, I think. I felt good about them. It's a little hard to tell how the grades will come back, but I'm glad to have those done with.

SD: Absolutely. Are you going to take the law review competition?

DAVEY: I won't be doing the law review competition, actually. I'm involved with another journal that I want to pursue.

SD: What journal?

DAVEY: *The Journal of Law & Public Policy*. I hope to be actively involved with that. And being married, I didn't want the commitment of the law review.

SD: Did you meet your wife at Northwest College?

DAVEY: We actually met in junior high school, and we got married after the first year of college.

SD: That's great. Did she go to the same college as you?

DAVEY: Yes, she did.

SD: What other activities have you been involved in at law school?

DAVEY: Well, I'm pretty involved with the Federalist Society and the *Journal of Law and Public Policy* — the Society for Law, Life and Religion, as well. I've been busy doing a lot of things in my case in response to media interviews, writing articles, and things of that sort.

SD: I imagine you would be the perfect person to write a case note.

DAVEY: Actually, I'm hoping to do that this summer, so it may be published in the JLPP next year.

SD: Excellent. What kind of law do you think you want to practice?

DAVEY: I think I'm interested in litigation, and it'll probably be a firm at first, and then perhaps religious liberties work down the road.

SD: Where are you working this summer?

DAVEY: I'll be working at the Becket Fund for Religious Liberty in Washington, DC. What I'm doing is part of a program through the Alliance Defense Fund, which always does religious litigation. It's called the Blackstone Fellowship, and we go to ADF headquarters for a couple weeks for training, and then I'll be at the Becket Fund for six weeks, and then a debrief at the ADF headquarters again. It's a great program. Five students from Harvard are doing that this summer.

SD: Do you want to do appellate work or trial work?

DAVEY: I think appellate work would be the most interesting down the road, but we'll see where my career takes me. So, there are a lot of doors open at this point.

SD: Are most of the students at Northwest College evangelical Christians?

DAVEY: Yes.

SD: What struck you most about the difference between the environment at Northwest versus Harvard?

DAVEY: Well, because Northwest is an evangelical Christian school, Christianity was pervasive throughout the school. It influenced the way the teachers taught, what you talked about in the classroom, going to chapel. The whole atmosphere was one of thinking about how to apply one's faith to one's life in whatever capacity that might be.

At Harvard, I don't think there's a lot of thought given to that. Those people who do have religious faith are left on their own, I think, in terms of how to figure out what that means, if anything, for the way they live their life and the way they pursue their career.

SD: Which environment do you think has strengthened your faith more?

DAVEY: Well, I think they both strengthened my faith in different ways because Northwest laid a foundation in a sense, and Harvard has allowed and continues to allow me to rework those aspects of the foundation, to question things that I maybe should be thinking about, to reason through and think through why I believe what I believe. In that sense, it really strengthens my faith, having to deal with a lot more diversity and a lot more hostility toward religious faith than I dealt with at Northwest.

SD: Had you thought much about your political orientation before law school?

DAVEY: Well, I had always sort of leaned conservative, and generally Republican before law school, and—well, before college; it had been based mostly upon moral concerns, and those are still huge concerns for me—but I think my political perspective has been broadened through the study of law, and to think about the way we do law and what law should mean and serious jurisprudence and those kinds of things. And those also have led me in a conservative direction. But those were kind of reinforcements I got from another angle.

SD: Tell me about the Four-Square denomination. I know that it's similar to Assemblies of God, but what are the basic tenets of that faith?

DAVEY: Basically, the Four-Square denomination arose out of the Pentecostal movement of the early 20th Century. It's very similar to Assemblies of God. It's a pretty typical evangelical Christian denomination, or a pretty typical Pentecostal denomination. They believe all the traditional tenets of Christianity, and it places an emphasis on the work of the Holy Spirit in church today, including the manifestations of that, which is healing or speaking in tongues or some of these other kinds of physical signs of the work of the Holy Spirit. That's what has historically categorized the Pentecostal movement.

SD: And Northwest is an Assemblies of God college?

DAVEY: That's correct.

SD: Now that you're in Boston, have you joined a church there?

DAVEY: Yes. We go to Park Street Church here in Boston.

SD: Since you started college intending to be a minister, how does that mesh with your study of law now?

DAVEY: Well, I think in a couple of ways. Many of the techniques, interestingly, of biblical interpretation I think are applicable to legal interpretation: focus on the intent of the author, what the message that's trying to be communicated is, some of those skills apply very much in law, as well as they do in biblical studies.

I also think that the reasons that I had wanted to pursue a career in ministry—that is, to live my faith out through my career, to help people, and to make a positive contribution to society through what I did with my life—are also applicable to a career in the law.

SD: Do you view being a lawyer as a religious calling?

DAVEY: I think I do. I think as a Christian, my faith does and has to influence everything that I do, and so it's really impossible for me to separate out completely a sort of secular life in the law from who I am as a Christian. I do think of it as a religious calling in that sense.

SD: Do you think you might go to seminary in the future?

DAVEY: I may. I did a degree in religion and philoso-

phy undergrad; my wife is in seminary now. So, who knows what will be in store for me down the road. There are no definite plans to do that at this point, though.

SD: How did you choose Jay Sekulow to represent you?

DAVEY: Well, I was familiar with his work, heard his program on the radio—he does a daily radio show where he discusses religious liberties issues and some cases that he's working on—and really his organization was the only one that I knew of at the time that did this sort of thing, and they were the first people I contacted, and they agreed to take the case so I didn't need to look further. But he was definitely a good decision and did a good job representing me.

SD: The Supreme Court focused on how you could have prepared for the ministry and studied business administration at two separate colleges and keep your Promise Scholarship. Now, how realistic was that?

DAVEY: It's not very realistic. It's an extremely inconvenient arrangement. Because I did not investigate it, I don't know if it would have been possible for me to arrange that. I'm sure it would have been very inconvenient, and as Justice Scalia pointed out in dissent, it really is depriving me of the primary benefit of the Promise Scholarship; that is, pursuing the degree I wanted at the college I wanted to study at. So, I think while the majority focused on the fact that it's theoretically possible, it really misses the point of what the scholarship is about, and what the discrimination in this case is about.

SD: How close was the nearest college to Northwest?

DAVEY: Let me think. The nearest large school was the University of Washington, which is across Lake Washington from Northwest, and maybe a 20- to 40-minute drive depending on traffic.

SD: Did you attend the oral argument in your case?

DAVEY: I did. I was at the oral argument in December.

SD: What did you think?

DAVEY: It was awe-inspiring to be there at the Court and see the Justices. It's the first time I'd been to an argument. I'd been to the Supreme Court before, but never to see an argument.

And then, it was also surreal because it was my case that they were talking about. I was sitting there in the gallery, and they're discussing me and my scholarship and everything. It was a fun experience. I enjoyed it, and it was good to be there and see an argument and to be a participant in the process. It was a lot of fun.

SD: Did you speculate about the vote on the case before it came out?

DAVEY: Well, I did. We were pretty confident, actually, leaving oral argument, based on *Zelman* and some other cases that various Justices had been a part of. We thought—we were fairly confident that we had four votes, of course, looking to O'Connor as sort of the swing vote, so we were a little disappointed when it came back 7-2. But I guess that's the way it goes sometimes.

SD: I don't think you were the only one who was surprised.

DAVEY: I think that is true. A lot of the media people I spoke with and other lawyers who do this kind of work were surprised by the outcome.

SD: Well, since you didn't keep the scholarship, what did you have to do to make up for the money you lost?

DAVEY: Making up for the money came in a couple of ways, you know, some additional student loans, a little more working outside of school than I had maybe thought I would do originally. Those two are the main ways I made up for it.

SD: And how did that impact your undergraduate experience?

DAVEY: It did force me to spend a little more time working, so that's a little less time studying and a little less time doing school activities and associating with people there at school, and a little more debt to pay back later on. So, it's definitely a negative thing. Of course, it didn't cause me to drop out of school or anything like that, so the impact was relatively minor but it was certainly significant to the tune of nearly $3,000.

SD: Did you know anybody else who received a Promise Scholarship who had to work during the school year like you did?

DAVEY: There was at least one other student that I know who was promised as scholarship-eligible, and who did have an outside job. I'm not sure what happened with his situation, whether or not he ended up changing his

major and continued to receive the scholarship or not. I also was told by the director of financial aid at Northwest that there, I think, were five students my year who were in my situation, having to make a decision either to change their major or to lose their scholarship. And I think most of them elected to change their major, but I'm not certain about that. I think there were three who I'm pretty sure did change their major. The other guy, I'm not certain about. And then there was me, who did not.

SD: The Court's opinion suggested that they thought that the burden on you was *de minimis*. Maybe they don't think $3,000 was a lot of money. Do you think that was a good way of approaching the —

DAVEY: I don't think that is. The $3,000 is pretty significant to any college student, and I'm not really sure how they can say that with a straight face because I think that is a pretty significant burden on the free exercise of religion.

SD: So, would you say that the Court is a bunch of wealthy elites out of touch with Middle America?

DAVEY: Well, out of touch is a good way of putting it. They may be wealthy elites. I'm not certain about that.

But I think insofar as the majority of America is religious, and the reactions of people that I've talked to just sort of on a popular level, were uniformly that the state's policy was quite unfair. I think as far as those things are true, then, yes, the Court's out of touch.

SD: Do you feel that their ruling in any way impacted what the statute was designed to do in terms of making college affordable for people who otherwise wouldn't be able to go? I mean, you obviously were still able to go to college, but do you think that there were other people who would not be able to go, if they had to give up that money?

DAVEY: There might be some. I think probably most of those students—the choice that many people are going to face is studying what they really want to study, theology, or studying some other state-approved program. Most of them may still be able to go to school, but they're not going to be able to study what they really want to study with the scholarship that they earned.

SD: Now that you've had a year of law school, what is your assessment of the opinion?

DAVEY: I dislike it both for its result and for its message, its jurisprudential philosophy. I think it's really out of sync with the rest of the Court's church and state jurisprudence as far as I understand it. The way they distinguish *Lukumi*, for example, which is hard to imagine how—here, I agree with Justice Scalia—how the withholding of a public benefit is really different from the imposition of a penalty, like you had in *Lukumi*. And they just glossed over that; [the Court] didn't even need to get into strict scrutiny at all. This emphasis on history, it seems like the Court is pulling that out because they want to find some justification to go against me, even though the weight of the precedent would be in my favor.

And also, there's just a complete lack—the failure of the Court to address the *Rosenberger* argument of a forum. Maybe they didn't think it was convincing at all, but it would have been nice to have something there in the way of the Court's assessment of the argument. But it was relegated to a footnote.

So, for all of those reasons, I thought the opinion was a bad opinion from a jurisprudential standpoint, as well as its outcome.

SD: So, even though you obviously disagree with the policy implications, you would also argue that the legal analysis rested on shaky ground?

DAVEY: I think it did.

SD: Could you reflect for me on the task of integrating faith and legal education?

DAVEY: It's a big task, and it's difficult to know how to do as an evangelical because there have been few evangelicals who have done it and done it well. So, for most evangelical Christians, we're looking at a lot of Catholic thinkers, who have long been much more successful in modeling this sort of integration of faith and the law. It's a task that reaches everything that we think about law and the way we think about law.

Like I mentioned before, I think the Christian faith should permeate everything that we think and do and should inform the way we do law, both from the policy angle and from sort of the methodology behind it, as well.

SD: So, what is the appropriate methodology?

DAVEY: I think from a methodological standpoint, you have to look at the textual analysis; you have to pay attention to the words of the law; the statutes of the Constitu-

tion; you have to look at original meaning behind all of those things when you're doing legal analysis.

SD: Is there anything else that you'd like to say to the world?

DAVEY: Just that I think that this case is important because I think the free exercise of religion is important. I think that this case seems to be another in a line of cases that really minimize that constitutional right in comparison with some other rights that may or may not be in the Constitution.

I think that fortunately the opinion is narrow enough that the main arena in which my case could have had really positive effects — namely, school vouchers — is more or less left where it was before *Davey*. After *Zelman*, of course, my case seemed to present the next logical question. [*Zelman* asks] is it constitutional for schools to include religious organizations in public benefits programs without violating the Establishment Clause. *Davey* asks: Must we then include them in order to avoid violating the Free Exercise Clause? Of course, my case says no to that, but you still see *Zelman* holding intact, where states are free to do this, the negative result of my case of course being that instead of a national Supreme Court precedent benefiting school vouchers, you have to fight it on a state-by-state level. Fortunately, I think the impact of my case in that regard is relatively minimal.

SD: A number of scholars would argue that your case, since it was narrowly written, isn't going to have much of an impact in that direction. Do you think that's probably right, or do you think that's wishful thinking?

DAVEY: That seems right to me. It depends on how the court interprets this language and how far they're willing to go with this principle, you know, of protecting the conscience of the taxpayers. Those two things, I think, are dangerous ideas. If the Court really keeps a tight rein on them, then I think things will be okay in that regard, but I think there are ideas that could be blown up way beyond what's ever envisioned in my case.

Editor's Note: On March 16, 2004, the Federalist Society's Religious Liberties Practice Group sponsored a program on the "Pledge Case," Elk Grove *v.* Newdow*, which was then pending before the United States Supreme Court. Michael Newdow, the noncustodial parent of a California public school student, argued that the school district's requirement that teachers lead an optional recitation of the Pledge of Allegience violated the Establishment Clause of the First Amendment.* Newdow *raised important questions about the constitutionality of ceremonial deism and the meaning of the Establishment Clause. It also highlighted sharp differences of opinion on the proper role of religion in American public life. The Court did not answer these questions, finding that Newdow lacked standing to bring the case. Six justices voted to overturn the Ninth Circuit's ruling, which had found the public school district's pledge recitation policy unconstitutional, on standing grounds. Justices Rehnquist, O'Connor, and Thomas, however, wrote concurring opinions that addressed the merits of the constitutional questions raised in the case, and argued, all for different reasons, that the Pledge of Allegience does not violate the Establishment Clause.*

We are pleased to print reactions to the Supreme Court's ruling authored by two of the March 16th event's panelists, Prof. Gerard V. Bradley of Notre Dame Law School, and Prof. Paul J. Griffiths of the University of Illinois at Chicago. It is likely that there will be another challenge to the Pledge, and the Federalist Society is pleased to continue discussion on this important issue.

GERARD V. BRADLEY

The *Newdow* case has gone away but the fuss about "under God" will not. Even if the Supreme Court said that Mr. Newdow lacked standing precisely to avoid the merits, at least four members – Scalia, Thomas, O'Connor, the Chief Justice – seem willing to tackle them. That is enough for *certiorari*. An appropriate plaintiff should not be hard to find.

When the Court finally does decide the issue, it is likely to turn upon the appeal of Justice O'Connor's opinion to those in the (as yet) officially-uncommitted-on-the-merits *Newdow* majority. Will any of the five vote to save "under God"? None is likely to join Justice Thomas in "rethinking the Establishment Clause" along federalism lines – despite the significant historical support for Thomas's view. None is likely to join any separate opinion by Justice Scalia, which opinion would almost certainly be too "pro-religion" for comfort. Justice Scalia said as long ago as 1993 (in the *Lamb's Chapel* case) that the Establishment Clause permits the government to promote religion, so long as no partiality to a particular church is shown. This reasoning would save the Pledge, but it will not attract any of the *Newdow* uncommitteds. Too radical: though correct as a reading of what the Establishment Clause originally was meant, it would roll back the law to pre-*Everson* (1947) days. Finally, the Chief Justice's *Newdow* opinion offers no real alternative to O'Connor's. Rehnquist said that "under God" is not a prayer, a religious exercise, or (most controversially) an endorsement of religion. Justice O'Connor said so, too. But she tells us *why*. The Chief Justice does not. Any route to agreement with Rehnquist goes through O'Connor. At least it should.

Although saving the Pledge from a declaration of unconstitutionality is an end worth our prayers, I think that O'Connor's effort to portray it as "ceremonial deism" fails. "Under God" endorses religion, and the Court should address the issue on that basis. If the phrase comports with the Constitution – as I think it does – it is because the Constitution does not prohibit governmental affirmations that "God" – a greater-than-human source of meaning and value – exists.

Justice O'Connor evidently wants to save the Pledge. And so she has to argue that when public school teachers prompt millions of kids to say each morning "one nation under God" they do not thereby endorse the idea that there is a God. For, in O'Connor's oft-repeated opinion, "endorsing" religion as such – even where there is no trace of coercion or of sect-partiality – violates the Constitution. Her position in *Newdow*, more exactly, is that "under God" belongs to the class of expressions she calls "ceremonial deism": "although these references speak the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes". The balance of her opinion argues in support of this characterization.

Note well: Justice O'Connor is *not* saying that "under God" conveys a secular message that the literal (i.e. religious) meaning of the phrase is not the meaning intended or understood. Such expressions are common enough. Someone who says "Good God!" at the ballpark communicates surprise or awe at a monstrous home run; he or she is not asserting anything about divine attributes, and everyone knows it. The exclamation "Holy Crap!" has nothing to do with the sacred. Usually, far from it.

This can be the case with expressions whose original meaning was entirely religious and which, for some people or in some contexts, still have that meaning. Our language and culture are suffused with Biblical allusions and symbols, including the symbol of the AMA (the caduceus, from the Book of Numbers); the phrase "handwriting on the wall" (from the Book of Daniel); and the phrase "apple of me eye" (one of God's OT descriptions of his Chosen People, Israel). No one now suspects an implicit endorsement of Judaism when these phrases are used, perhaps especially when they are used by public officials. Again, the religious idiom now conveys a secular message. At least arguably, even some pungent religious expressions, such as "God save the United States and this Honorable Court," have lost their religious meaning to secular function: "Court is beginning now; act accordingly."

Religious words/secular meaning. Justice O'Connor flirts with this route to non-endorsement by referring to "idiom" (suggesting style or form, not substance) and when she says "*[f]acially* religious references can serve....valuable purposes in public life." (emphasis added.) But Justice O'Connor nowhere in *Newdow* offers a secular meaning for "under God." Nowhere does she assert that the phrase *means* anything but what it says. So far considered, "under God" endorses religion.

In fact, Justice O'Connor's *Newdow* opinion takes a quite different path. She asserts that religious expressions can serve secular purposes and sometimes there is no other practical way to serve them. So long as the expression is itself not a prayer or form of worship or sect specific, she says, the Constitution is not offended. O'Connor does not say that "under God" has a secular meaning, but that it is a religious bridge to a secular objective. But how is this not an endorsement?

Justice O'Connor identifies two secular purposes for "under God." One is to "commemorate the role of religion in our history." The other is to "solemn[ize] public occasions." About the second she says: "such references can serve to solemnize an occasion *instead of* to invoke divine providence." (emphasis added.) O'Connor here likens the Pledge to "God Save this Honorable Court." But the comparison is not nearly sound. The Court opens with the solitary call of an employee; audience members (almost all adults) are not asked to join in. Besides, if California *had* required students to begin the day by saying: "God save this school and this state," the statute would have been invalidated by simple citation to the school prayer cases starting with *Engle*. If the Court's opening does not endorse religion it is only because by usage and custom and context everyone understands that it is a pious relic, a bit of inherited theater divorced from anyone's present intentions or spiritual aspirations. Not so the Pledge: it is by context and by design of those who require its recitation (by willing students) a genuine affirmation. The whole point (as Justice O'Connor recognizes) is to *change* students' beliefs – to make them more "patriotic".

What Justice O'Connor means – what she is really saying – is that 'such references can serve to solemnize an occasion *by* invoking divine providence". But such "invo[cations]," one would surely have thought, are unconstitutional endorsements of religion, as the Court (including O'Connor) has said many times.

Let's now look at the first secular purpose. Because of our history as a religious nation, Justice O'Connor says, "eradicating such references [as "under God"] would sever ties to [our] history..." Maybe, but even here she is either confused or backsliding. She illustrates her point by reference to a passage from the *Allegheny* case, where the Court was concerned not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Now,* the *Allegheny* Court meant, in present-day citizens, and not way back then, as O'Connor seems to suggest in *Newdow.*

It is indeed true that cultivation of a certain "idiom" (form or style of expression) might be necessary to gain effective access to the history of a family, church, or nation. One has to study ancient languages to really study the Bible. One needs familiarity with ancient Jewish custom and middle-eastern history to understand the New Testament, and some understanding of Greek philosophical concepts to really understand parts of it (the Gospel of John, for example).

Given our Christian pedigree, biblical literacy is probably necessary to understand our history and even features of our contemporary culture. But none of this would justify daily Bible recitation, in season and out, throughout the primary and secondary grades, led by teachers. The biblical content of American history justifies instead particular curricular undertakings, always carefully guarded by conditions to ward off the impression of endorsement.

The ritualistic and regular recitation of "under God" is *not* a bridge to our past; it is too curt and untutored for that. As Justice O'Connor says in *Newdow (*and here is the sentence fragment omitted above, as indicated by the ellipsis): it "ties" us to a "history" that "*sustains this Nation today."* The phrase serves, then, to place us in the company of our forbears in acknowledging that we are indeed "one nation under God." And so children are invited to affirm, each day, in California's public schools.

There is no honest way to analyze the Pledge save as an affirmation that we are indeed a nation "under God."

Paul J. Griffiths

The Supreme Court decided on 14 June that Michael A. Newdow lacked legal standing to challenge, on behalf of his daughter, a California school district's policy of optional daily recitation of the Pledge of Allegiance for its elementary-school children. The Court reversed the Ninth Circuit's decision that Newdow had standing, and that the school district's pledge-recitation policy amounted to religious indoctrination of his child, in violation of the First Amendment. The Court's decision thus restored the legality of pledge recitation; but by ruling that Newdow lacked standing to bring the suit in the first place, it sidestepped the substantive and much more interesting issue of whether the Pledge's "under God" clause violates the First Amendment's ban on religious establishment.

This is true, anyway, of the majority opinion written by Justice Stevens. Three justices (Rehnquist, O'Connor, Thomas), however, dissented from the ruling on the standing question while concurring on the principal effect of that ruling, which is to vacate the Ninth Circuit's ruling that state-sponsored pledge recitation is unconstitutional. And their opinions do discuss the constitutional question, though in profoundly incompatible ways.

Rehnquist, for example, agrees with the Court's reversal of the Ninth Circuit, but not with its reasons. He disagrees with the majority opinion's "novel" views on the standing question, but he is glad to see Pledge recitation reinstated because he takes it to be not a religious exercise but a patriotic one, and therefore not in violation of the First Amendment. The Pledge as a whole, he writes, "is a declaration of belief in allegiance and loyalty to the United States Flag and the Republic that it represents." The mention of God in the pledge doesn't change this, Rehnquist thinks. Rather, it simply acknowledges a historical fact about the nation--that elected and appointed representatives have often made appeals to God in its name. Use of the phrase, then, has no tendency to establish religion. O'Connor makes essentially the same point in her opinion, though for slightly different reasons. If religious language is used for secular purposes, she thinks, then it is constitutionally unproblematic. One such purpose "is to commemorate the role of religion in our history." This is what the reference to God does in the Pledge, and so it does not offend against the First Amendment. Essential to O'Connor's view is the claim that some apparently religious language has either no religious function, or such a minimal one that it presents no constitutional problem.

Common to O'Connor's and Rehnquist's view is the claim that the God mentioned in the Pledge is not the God of Abraham, Isaac, and Jacob, not the God who became incarnate in Jesus Christ, and not the God who inspired Mohammed. Rather, it is the god of ceremonial deism, a god whose only function is to solemnize national rituals, to burnish national pride to a bright sheen.

Justice Thomas has quite a different view. He notes, as he has before, that "our Establishment Clause jurisprudence is in hopeless disarray." He thinks that by the criteria in previous key Establishment Clause cases Pledge recitation is unconstitutional because it mandates a state-sponsored act in which belief in God is affirmed. Thomas, however, thinks Pledge recitation is still constitutional because he has a quite different view (a view shared by Justice Scalia, who recused himself from this case) of what does and does not place substantively religious state-sponsored acts in violation of the Establishment Clause. His view that the Establishment Clause should be read principally to protect the states against Congress, runs counter to the main trend of Establishment Clause jurisprudence during the last thirty years. Thomas' view of the Establishment Clause has little or nothing to do with individual rights of the sort addressed in the *Newdow* case. This, Thomas acknowledges, is not a view likely to find broad support on the Court. He adds to it, therefore, the claim that state-sponsored Pledge recitation does not infringe upon religious free exercise rights because it coerces no one.

Leaving aside the standing question (a question only lawyers could love), *Newdow* yields two families of opinion on the Court. The first says that state-sponsored pledge recitation is not a religious act and is therefore constitutional. The second says that state-sponsored pledge recitation is a religious act, but is constitutional so long as the states (rather than Congress) sponsor it, and so long as no one is coerced by it. These two families of views are doubly incompatible: first, about what does and does not count as a religious act; and second, about whether the Establishment Clause has principally to do with relations between Congress and the states. Neither disagreement is susceptible of easy resolution. The first because it is utterly unclear what should count as relevant to making such a decision: History? The beliefs and intentions of the majority of those saying the Pledge's words? The plain meaning of the words? Or what? The second because it rests upon fundamental differences in the theory of constitutional interpretation, differences that have not gone away in spite of decades of lively discussion of them.

It seems fair to say, however, that strict-constructionism of the Scalia/Thomas variety is likely to remain a minority interest on the Court, and that the kinds of argument offered by Rehnquist and O'Connor are likely to remain dominant. It's important to note a paradox about such arguments, however, since its presence is unlikely to permit the Court's current position to remain stable. The paradox is this: On the Rehnquist/O'Connor argument, the likelihood that pledge recitation is constitutional is in inverse proportion to the extent that it is religious. They think it not religious, and so they think it constitutional. But the vast majority of Americans (I suspect) who want pledge recitation to be constitutional do so because they want a religious exercise to be part of their children's school day. If this substantial majority pays attention to the reasons offered by the Court for pledge-recitation's constitutionality, they will have to conclude that on the Court's understanding of pledge-recitation, it is nothing more than blasphemy: an act of taking the Lord's name in vain, which in this case consists in making the name of God subservient to the nation's name. If the only way in which the Court can defend the Pledge's constitutionality is by interpreting it blasphemously, this view is likely to deepen still more the gulf between the majority of US citizens and our nation's judicial exercises. And that is not a happy situation.

"Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square"

June 8, 2004 Testimony of Richard W. Garnett, to the Subcomittee on the Constitution, Civil Rights & Property Rights, United States Senate Committee on the Judiciary*

I appreciate the opportunity to share with the Subcommittee some thoughts about the place of religion in civil society and – more particularly – about the protections that our Constitution guarantees to religious expression and activity in the public square.

These are issues of great importance to me as a scholar, a lawyer, a teacher, and a citizen. By way of background: I teach and write about the First Amendment at the Notre Dame Law School.[1] At Notre Dame, we invite and – we hope – inspire young lawyers to bring their values and religious faith to their studies, and then to carry them into their lives in the law. In our view, we cannot expect young lawyers to think deeply and well about law, justice, and the common good if we tell them to privatize their ideals, or to radically separate their fundamental moral commitments from their law practices. Therefore, we encourage our students to approach both their vocations in the law and their roles as citizens as *whole persons.* We challenge them to *integrate* their work, their beliefs, their values, and their activism. We urge them to avoid the temptation to "check their faith at the door" of their professional and public lives.

With respect to the matter before us today – *i.e.,* discrimination by government against religiously motivated expression and action – I begin with a fundamental, bedrock premise: As President Clinton put it, nearly ten years ago, "religious freedom is literally our first freedom."[2] In other words, the freedom of religion was *central* to our Founders' vision for America.[3] The Framers did not always agree about *precisely* what the "freedom of religion" meant, but they knew that it mattered.

We should remember, therefore, that the protections afforded to religious freedom in our constitutional text and tradition are neither accidents nor anomalies. They are not, as one scholar once claimed, an "aberration in a secular state."[4] Quite the contrary: In our traditions and laws, religious freedom is cherished as a basic human right and a non-negotiable aspect of human dignity. Our Constitution does not regard religious faith with grudging suspicion, or as a bizarre quirk or quaint relic. Rather, as my former colleague, Dean John Garvey, once observed, our laws protect the freedom of religion because "religion is important" and because, put simply, "the law thinks religion is a good thing."[5] In our traditions, faith is a gift, not a threat.

Now, from all this, it follows that our laws and constitutional doctrines should regard governmental restrictions upon religious expression – and *not* religious expression itself – with sober skepticism. In a free society like ours, the "[t]he calculus of religious liberty . . . is determined" not by the extent to which governments manage to confine religious expression to the privacy of homes and churches, but instead "by the measure of religiously motivated thought and action that is insulated from public authority."[6]

* * * * *

The law books, newspapers, weblogs, and talk shows are rich with stories of public officials who have neglected, or lost sight of, these fundamental premises of the American experiment. They have turned things upside down by treating citizens' public religious expression with suspicion, and even hostility, rather than with evenhandedness and respect.

I will mention here just a few examples, because I know you have heard and will hear about many more: Not long ago, Robert and Mildred Tong sought to participate in a local "buy a brick" program, designed to raise money for a new playground at their local park. They were told, however, by Chicago Park District officials that the message they submitted for their family brick – which included the words, "Jesus is the Cornerstone" – was *too religious* to be included.[7]

Another example: When several residents of Oak Park, Illinois, sought permission to use the Village Hall for a ceremony connected to the National Day of Prayer, their application was denied, even though the Hall was generally available to citizens and community groups for a wide range of activities, on the ground that the proposed ceremony was "religious," not a "civic program or activity," and would not "benefit the public as a whole."[8]

Finally: The School District in Scottsdale, Arizona had a general, community-service policy of permitting non-profit groups to distribute literature pro-

moting events and activities of interest to students, such as summer camps, art classes, sports leagues, and artistic performances. However, the District refused to distribute the brochure for one particular summer camp, citing the fact that the camp offered two courses on "Bible Heroes" and "Bible Tales."[9]

Now, the "good news" is that in these particular cases – and also in many others – courts of law eventually vindicated the basic constitutional rule that governments may not discriminate against "religious ideas [and] religious people."[10] What's more, although some government officials continue to misunderstand their obligations and authority with respect to private persons' religious expression, the United State Supreme Court continues to reaffirm that the Constitution neither requires nor permits state actors to single out private religious expression and activities for unfavorable or unequal treatment.[11] As Justice Scalia once put it, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[12]

And so, a question for this Committee is, why does state-sponsored discrimination against religious expression continue? What's the problem? I am confident that the public officials involved in these cases do not harbor ugly prejudices or deep hostility toward religious believers.[13] Nor do I believe that they are willfully neglecting their obligations under the Constitution. Instead, I am convinced that the officials in these cases – and also, unfortunately, too many well-meaning Americans today – fail to understand and appreciate the text, history, and purpose of the Religion Clauses of the First Amendment, in several important and related ways.

First, many public officials and citizens misunderstand the meaning of the phrase, "separation of church and state," and the place of this idea in our constitutional tradition. To be sure – as thinkers from St. Augustine to Pope Gregory VII to Roger Williams have taught us[14] – the "separation of church and state," properly understood, is an important component of religious freedom. That is, the *institutional and jurisdictional separation* of religious and political authority, the independence of religious communities from government oversight and control, respect for the freedom of individual conscience, government neutrality with respect to different religious traditions, and a strict rule against formal religious tests for public office – all these "separationist" features of our constitutional order have helped religious faith to thrive in America. Properly understood, the separation of church and state is not an anti-religious ideology, but a "means, a technique, [and] a policy to implement the principle of religious freedom."[15]

However, too many have confused Thomas Jefferson's "figure of speech"[16] about a "wall of separation between church and State" with a novel and unsound rule that would obligate public officials to scrub clean the public square of all "sectarian" residue.[17] Professor Kathleen Sullivan, for example, has argued forcefully and prominently that the First Amendment's Establishment Clause was designed not simply to end official sponsorship of churches but also to *affirmatively establish* a secular "civil order for the resolution of disputes."[18] This view of church-state separation is seriously mistaken. It is untrue to the vision of our Founders and to the text of our Constitution.[19] As John Courtney Murray lamented more than 50 years ago, arguments like this stand the First Amendment "on its head. And in that position it cannot but gurgle nonsense."[20]

In fact, our Constitution separates "church" and "state" not to confine religious belief or silence religious expression, but to *curb the ambitions and reach of governments*. In our laws, "Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are . . . limits on its authority and leaves the churches free to perform their work in society."[21]

Second, and relatedly, too many of us have forgotten that the First Amendment limits *government* conduct only. It has *nothing* to say about private action, other than to confirm that religious expression, exercise, and worship are worth protecting.[22] The First Amendment's Establishment Clause is not a *sword*, driving private religious expression from the marketplace of ideas; rather, the Clause constrains government, precisely to serve as a *shield*, and to protect religiously motivated speech and action. Judge McConnell captured the idea succinctly: "If a group of people get together and form a church, that is the free exercise of religion. If the government forms a church, that is an establishment of religion. One is protected; one is forbidden."[23]

Third, nothing in our political morality or constitutional traditions mandates or implies a duty of self-censorship by religious believers. Nothing in the First Amendment suggests that religious expression is somehow unwelcome or out of place in civil society and

public debate. And yet, many in America appear to share the view – expressed bluntly by one of our leading public intellectuals – that it is in "bad taste to bring religion into discussions of public policy."[24] On this view, as Stephen Carter memorably put it, religion is "like building model airplanes, just another hobby: something quiet, something trivial–not really a fit activity for intelligent . . . adults."[25]

Now, scholars are and have long been wrestling with the question of the appropriate place for religiously grounded arguments in public life. This is a rich and important conversation, but the bottom line is clear: Our Constitution does not demand a Naked Public Square,[26] nor does it tolerate efforts by government to create one. The Constitution imposes no "don't ask, don't tell" rule on religious believers presumptuous enough to venture into public life,[27] and the Establishment Clause imposes no special obligation on devout religious believers to "sterili[ze]" their speech before entering the public forum.[28] Active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and state that the Constitution is understood to require. For example, while reasonable and faithful Christians might think it is unwise, it is certainly not unconstitutional for Christian leaders to address political questions, or to remind politicians of the implications of what they profess.

What's more, and going beyond constitutional law for a moment, the political morality of liberal democracy, rightly understood, does not require self-censorship on the part of persons who are believers *and* citizens. In fact, it would seem more than a little bit *illiberal*, to assert the peculiar unsuitability for public discourse of one source–*i.e.,* religious faith–of morality, "values," and commitment.[29] To force religious believers to concede, as the price of admission to the political community, that "religious reasons are not good reasons for political action," is, as my colleague Paul Weithman has observed, to deny religious believers "full membership" in that community.[30]

True, some courts and officials have at times seemed more worried about the "divisiveness"[31] thought to attend public manifestations of religious commitment than about the threats posed to authentic religious freedom and pluralism by their own over-reactions.[32] And, as a result, their pronouncements have, in Chief Justice Rehnquist's words, at times seemed to "bristle[] with hostility to all things religious in public life."[33] The recent decision by Los Angeles County, bowing to the threat of a meritless law suit, to remove a tiny gold cross from the County Seal is a reminder that such regrettable over-reactions continue. We should remember, as Professor Jean Bethke Elshtain has warned, that "if we push too far the notion that, in order to be acceptable public fare, all religious claims . . . must be secularized, we wind up de-pluralizing our polity and endangering our democracy."[34]

Finally, many Americans misunderstand the significance of the Supreme Court's observation that, under our Constitution, "religion must be a private matter for the individual, the family, and the institutions of private choice[.]"[35] Clearly, few would disagree with the claim that "religion is private," if the claim is taken to refer to institutional disestablishment or an entirely appropriate respect on government's part for individual freedom of conscience and the autonomy of religious institutions. But this claim should *not* be taken to mean that religious expression and witness has no place in civil society or that religious faith does not speak to questions of public policy and the common good.

William James once quipped, "in this age of toleration, [no one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it[.]"[36] Sometimes, though, religious people are called *precisely* to "make a public nuisance" – and also to engage respectfully their fellow citizens in dialogue about how we should live and live together. Nothing in our constitutional text and traditions implies that religious citizens should not speak and act as though their faith had consequences for state and society. As Justice Thomas has insisted, it would be a "most bizarre" reading of the First Amendment that would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives."[37]

The Constitution protects our right to keep our faith private. However, it does not *require* us to privatize our faith before entering into the public square, or taking up the responsibilities of citizenship. Indeed, it would be highly – and unconstitutionally – presumptuous for government to instruct religious believers and communities as to the limited scope of religion's concerns.[38]

Here, it is worth bringing up a recent decision by the California Supreme Court, which recently ratified an effort by that State's legislature to confine, and to re-define, the religious mission of the Catholic

Church.[39] In the *Catholic Charities* case, the court upheld a provision that denies a "religious employer" exemption from the State's requirement that employers include contraception coverage in their prescription-drug-benefit programs to Catholic organizations that engage in activities other than worship and religious instruction or that hire and serve people other than co-religionists. Put simply, California has imposed on religious communities like the Catholic Church an ideology of radically privatized religion. As Justice Brown reminded her colleagues, though, many churches have "never envisioned a sharp divide between the Church and the world, the spiritual and the temporal, or religion and politics. For the Church, the internal spiritual life of its members and institutions must always move outward as a sign and instrument for the transformation of the larger society."[40]

As I have discussed elsewhere, sweeping mandates and narrow exemptions, like the ones at issue in the *Catholic Charities* case, pose grave threats to church autonomy and religious freedom.[41] They also rest – like the arguments of those who contend that religious expression is inappropriate in public settings, or about public-policy issues – on a misunderstanding of "private religion."

In the end, as Professor John Witte writes, "public religion must be as free as private religion. Not because the religious groups in these cases are really nonreligious. Not because their public activities are really nonsectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free *just because they are religious*."[42]

* * * * *

Thank you very much.

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Footnotes

[1] *See, e.g., Assimilation, Toleration, and the State's Interest in Religious Doctrine*, ___ U.C.L.A. L. Rev. ___ (2004) (forthcoming); *American Conversations With(in) Catholicism*, ___ Mich. L. Rev. ___ (2004) (forthcoming) (reviewing John T. McGreevy, Catholicism and American Freedom: A History (2003)); *The Theology of the Blaine Amendments*, 2 First. Amd. L. Rev. 45 (2003); *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 Notre Dame J. Ethics, L. & Pub. Pol'y 541 (2003); *The Right Questions About Schoo1 Choice: Education, Religious Freedom, and the Common Good*, 23 Cardozo L. Rev. 1281 (2002); *Sectarian Reflections on Lawyers' Ethics and Death-Row Volunteers*, 77 Notre Dame L. Rev. 795 (2002); *Common Schools and the Common Good: Reflections on the School-Choice Debate*, 75 St. John's Law Rev. 219 (2001); *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001); *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841 (2001); Brown's *Promise, Blaine's Legacy*, 17 Const. Comm. 651 (2000) (reviewing Joseph P. Viteritti, Choosing Equality: School Choice, The Constitution, and Civil Society (1999)); *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109 (2000); *Francis Bacon Takes On The Ghouls: The "First Principles" of Religious Freedom*, 3 Green Bag 2d 421 (2000) (reviewing John Witte Jr., Religion and the American Constitutional Experiment (2000)); *School Choice, The First Amendment, and Justice*, 4 Tex. Rev. L. & Pol. 301 (2000) (with Nicole Stelle Garnett).

[2] President William Jefferson Clinton, *Religious Liberty in America* (July 12, 1995). *See also, e.g.,* Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243 (2000).

[3] *See generally, e.g.,* John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties (2000); John T. Noonan, The Lustre of Our Country: The American Experience of Religious Freedom (1998).

[4] Suzanna Sherry, *Enlightening the Religion Clauses,* 7. J. Contemp. Legal Issues 473, 477 (1996).

[5] John H. Garvey, What Are Freedoms For? 42, 57 (1996). *See also* McConnell, *supra,* at 1265 ("Freedom of conscience mattered a great deal [to the Founders] because religion mattered a great deal.").

[6] Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 165 (1999).

[7] Tong v. Chicago Park District, ___ F. Supp. 2d ___, 2004 WL 943446 (D. Ill., April 29, 2004).

[8] DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001).

[9] Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003).

[10] Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment). *See also, e.g.,* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (noting the bedrock principle of First Amendment jurisprudence that the government "may not . . . impose special disabilities on the basis of religious views or religious status"); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (insisting that government "may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits").

[11] *See, e.g.,* Good News Bible Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). *See generally, e.g.,* Eugene Volokh, *Equal Treatment Is Not Establishment,* 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Ap-*

proach to Establishment Clause Litigation, 61 NOTRE DAME L. REV. 311 (1986).

[12] *Capitol Square,* 515 U.S. at 760 ("[G]overnment suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

[13] In the elite academy, on the other hand, an aggressive, anti-religious, and comprehensive brand of political liberalism is increasingly influential. For a discussion of this theory, and of the leading scholars who embrace it, see James Hitchcock, *The Enemies of Religious Liberty,* FIRST THINGS (February 2004). I have appended a copy of Professor Hitchcock's article to this statement.

[14] *See generally, e.g.,* John Witte, Jr., Book Review, *That Serpentine Wall of Separation,* 101 MICH. L. REV. 1869 (2003).

[15] John Courtney Murray, *Law or Prepossessions?,* 14 J. L. CONTEMP. PROBS. 23, 32 (1949).

[16] *See* McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech.").

[17] For a helpful reminder, by a leading scholar, that Jefferson's views on religion were far from widely accepted, either at the time of the Founding or for most of our history, see John Witte, Jr., *Publick Religion: Adams v. Jefferson,* FIRST THINGS (Feb. 2004). I have appended Professor Witte's article to my statement.

[18] Kathleen Sullivan, *Religion and Liberal Democracy,* 59 U. CHIC. L. REV. 195, 197 (1992).

[19] *See generally, e.g.,* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2000); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); GERALD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987). *See also, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting).

[20] John Courtney Murray, *Law or Prepossessions?,* 14 J. L. CONTEMP. PROBS. 23, 23 (1949).

[21] William Clancy, *Religion as a Source of Tension*, *in* RELIGION AND THE FREE SOCIETY 27-28 (1958). *Cf., e.g.,* Thomas C. Berg, *The Pledge of Allegiance and the Limited State,* 8 TEX. REV. L. & POL. 41, 76 (2003) (suggesting, among other things, that "Under God" in the Pledge "is a means for the state to declare that it is a limited institution that is subject to, and does not interfere with, higher commitments and norms"); McConnell, *Why Is Religious Liberty the "First Freedom," supra,* at 1244 ("The division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas.").

[22] *See, e.g.*, *Capitol Square,* 515 U.S. at 767 ("By its terms [the Establishment] Clause applies only to the words and acts of *government.* It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech[.]"); Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

[23] Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 184.

[24] Richard Rorty, *Religion as Conversation-Stopper,* 3 COMMON KNOWLEDGE 1, 2 (1994). *See also* William Marshall, *The Other Side of Religion,* 44 HASTINGS LAW JOURNAL 843, 844 (1993) (Religion and religious conviction, on the other hand, "are purely private matters that have no role or place" in the political arena).

[25] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 22(1993).

[26] *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1996).

[27] Jean Bethke Elshtain, *How Should We Talk?,* 49 Case WESTERN RES. L. REV. 741, 744 (1999) ("To tell religious believers to keep quiet, else they interfere with my rights simply by speaking out is an intolerant idea. It is, in effect, to tell folks that they can not really believe what they believe or be who they are: Don't ask. Don't tell.").

[28] *Good News Club v. Milford Central School,* 533 U.S. 98, 124 (2001) (Scalia, J., concurring). *See also, e.g.,* Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause,* 42 WILLIAM AND MARY LAW REVIEW 663 (2001).

[29] *See, e.g.,* Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation,* 1999 UTAH L. REV. 639, 654 n. 56 ("Some views–such as advocacy of slavery or cruelty–may be treated by a liberal society as beyond the pale. But to treat religious views, which have been, and are, entertained by a large majority of the people, including many people of eminent reasonableness and good sense, as within this category, is surely illiberal."); Nicholas Wolterstorff, *Audi on Religion, Politics, and Liberal Democracy*, *in* ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 147 (1997) ("[T]he ethic of the citizen in a liberal democracy imposes no restrictions on the reasons people offer in their discussion of political issues in the public square . . . . If the position adopted, and the manner in which it is acted upon, are compatible with the concept of liberal democracy, and if the discussion concerning the issue is conducted with civility, then citizens are free to offer and act on whatever reasons they find compelling."); Michael J. Sandel, *Political Liberalism,* 107 HARVARD LAW REVIEW 1765, 1772-73 (1994) ("Why must we 'bracket' . . . our moral and religious convictions, our conceptions of the good life? Why should we not base the principles of justice that govern the basic structure of society on our best understanding of the highest human ends?") (reviewing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

[30] Paul Weithman, *Religious Reasons and the Duties of Membership,* 35 WAKE FOREST L. REV. 511, 532 (2001).

[31] *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[32] *Cf. Good News Club,* 533 U.S. at 118 ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.").

[33] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).

[34] Jean Bethke Elshtain, *State-Imposed Secularism as a Potential Pitfall of Liberal Democracy* (Prague 2000).

[35] *Lemon,* 403 U.S. at 625.

[36] William James, The Will to Believe and Other Essays in Popular Philosophy xi (1897) (Dover ed. 1956).

[37] Mitchell v. Helms, 530 U.S. 793, 827-28 (2000) (plurality op.).

[38] *See generally, e.g*., Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001); Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of the Religion Clause Cases*, St. Louis U. L. J. 275 (1986).

[39] Catholic Charities of Sacramento, Inc. v. Superior Court, 10 Cal. Rptr. 3d 283 (2004).

[40] *Id*. at 573 (Brown, J., dissenting) (citing *K. Brady, Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 Villanova L. Rev. 156, 157 (2004)).

[41] Richard W. Garnett, *Confine and Conquer,* National Review Online (March 3, 2004). I have appended this essay to my statement.

[42] Witte, Religion and the American Constitutional Experiment, *supra,* at 237.

TELECOMMUNICATIONS

LISTENING TO VOIP

*BY JULIAN GEHMAN**

The current debate in Congress and at the FCC over regulating voice over Internet protocol ("VOIP") highlights the old saying: Fool me once, shame on you, fool me twice, shame on me. Government over-taxed and over-regulated the public telephone network. By contrast, the building blocks of VOIP — unregulated and unruly Internet, Internet protocol and computer operating system – flourished while they were off government's radar screen. VOIP won the battle for the market, due in large part to over-regulation of the public network. Now, government wants to over-tax and over-regulate VOIP. We should stop government from running VOIP into the ground.

Like other networks, the telephone network is tippy, with the result that the winner may eventually take all. Economists have identified the phenomenon of positive feedback, whereby success breeds greater success and eventually a given standard or product drives out competitors. This causes a market to tip, with the result that the winner takes all. Networks that have strong scale economies and a high degree of standardization are particularly prone to tipping.[1] For the time being, the traditional public switched telephone network ("PSTN" — what we think of when we think of telephones) co-exists along side the newer packet data networks. Nevertheless, economies of scale and standardization are driving the industry to a ubiquitous platform, namely an Internet protocol based packet network, over which travels voice, data, video and whatever else entrepreneurs develop. VOIP is the voice part of the ubiquitous platform; data is already here; and video will follow with broadband penetration and further technical development. The market tipped. The PSTN is slowly sliding off the tipped deck and eventually will join the Titanic at the bottom of the ocean.

Regulatory arbitrage helped to tip the market. Were the cherry picking economics of VOIP not so compelling, the huge market for voice telephony would have remained safely with the PSTN for many more years, or perhaps the market would have tipped a different way.[2] After all, the U.S. PSTN has been the envy of the world and arguably represents the largest, highest quality and most reliable physical network ever constructed. Viewed from that perspective, the PSTN should have set the standards for computers and the Internet, and not vice versa. However, government regulated, taxed and stifled the PSTN, causing it to stagnate and making it a fat target for arbitrage. Money talks, and businesses and consumers are walking to cheaper, more innovative telephony.

Telecommunications is one of the most heavily taxed industries in the United States.[3] Every government entity conceivable – at the federal, state and local level — has its hand in the pocket of telecom spending. The average effective rate of transaction taxes for telecommunications services is triple that for general businesses nationwide; the total number of taxes imposed on telecommunications companies is more than triple the number imposed on non-telecommunications vendors; and telecommunications companies must contend with significantly more transaction tax bases and taxing jurisdictions than other national companies.[4] Telephone billing is notoriously confused, with consumers puzzling over inscrutable surcharges and other line items, enterprise customers hiring auditors to make sense of telecommunications invoices, and telecommunications companies drowning in a sea of jurisdictions and tax bases.

Telecommunications is also one of the most heavily regulated industries in the United States. Much of telecom regulation hangs on from the antiquated 1887 law that formed the Interstate Commerce Commission to regulate railroads.[5] We got rid of the ICC, and deregulated rail, trucking and airlines, all with enormous increase in consumer welfare.[6] However, in telecommunications, unlike most other industrialized nations, the United States artificially separated local from long distance and erected a façade of LATAs and other bizarre regulatory constructs. The Telecommunications Act of 1996 was supposed to have deregulated telecommunications, but what a disappointment that turned out to be![7] Implementation of TA96 brought ever more regulation (including wholesale price regulation), a lot of litigation, and uncertainty that chills investment. Government's one-two punch of ruinous taxation and strangling economic regulation created an economic incentive to scuttle one of America's crown jewels, the PSTN. Enter VOIP, stage right.

While politicians fiddled with the PSTN, VOIP stole the march. VOIP evolved over the years and has gained commercial acceptance after several false starts. Its attractiveness rests on the standardization of computer operating systems, and the Internet and Internet protocol. These components developed and achieved wide acceptance, interoperability and standardization mostly free of government taxation and regulation. The government did not seriously intervene in computer operating systems (with its antitrust case against Microsoft) until after the market had tipped to the Windows operating system. Similarly, although the Department of Defense incubated early development of the Internet, bi-partisan government policy has been to forego taxation and economic regulation of the Internet in order to encourage its development and widespread acceptance.[8] These building blocks to VOIP developed in a messy way typical of the free market with many failed ventures. Nevertheless, this messiness was phenomenally successful, with the result that computer and Internet usage grew like kudzu and literally swarmed the insular, and highly regulated and taxed PSTN. Now, there seem to be more computers than telephones, and email seems to be almost more indispensable than a landline telephone. At some point, a critical mass of Internet protocol devices combined with the enormous margins available from regulatory arbitrage to produce the economic incentive to develop VOIP into a commercial product.

Now that VOIP has won, traffic eventually will migrate from traditional telephony to VOIP. Consequently, it is proposed that the same ruinous telephone taxation and regulation be transplanted on to VOIP in order to make up for the projected, reduced tax and surcharge revenues from the PSTN. There is something wrong with this picture: government wants to kill the VOIP goose laying golden eggs just as it did with the PSTN.

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Footnotes

[1] Carl Shapiro and Hal R. Varian, Information Rules, Harvard Business School Press (1999), 173-225.

[2] See, e.g., Ulysses Black, Voice Over IP, 2d ed., Prentiss Hall (2002), 4-6 (citing regulatory arbitrage as being responsible for making a profitable business case for VOIP). Profit margin that resulted from regulatory arbitrage during the service's unregulated days provided the economic incentive to develop VOIP to a carrier grade voice service. Once so developed, VOIP undoubtedly will displace the PSTN via the network tipping dynamic described above.

[3] See Telecommunications Task Force of the Council On State Taxation, 2001 State Study and Report on Telecommunications Taxation, Bureau of National Affairs Special Report, vol. 9 no. 2 (Feb. 22, 2002) ("COST Study"); Understanding Telecom Taxes: A Symposium, Progress and Freedom Foundation, Progress On Point, Release 7.8 (May 2000), 2, at http://www.pff.org/publications/communications/pop7.8telecomtaxessymposium.pdf (accessed Aug. 9, 2004) (citing statistics that one half of U.S. households pay at least 20% of the total bill for telecommunications taxes).

[4] COST Study, supra, n4. The COST Study estimates the average effective rate of transaction taxes for telecommunications services at 16.9%, compared to 6.0% for general businesses nationwide. Id., S-4. The COST Study may understate the case by underestimating the size of federal taxes and surcharges (COST Study attributes a 4% federal rate while federal universal service is approximately 9% and federal excise tax an additional 3%).

[5] Peyton L. Wynns, The Limits of Economic Regulation: The U.S. Experience, International Bureau Working Paper Series, IB Working Paper No. 2, Federal Communications Commission (June 2004), 3, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248597A1.pdf (accessed Aug. 9, 2004).

[6] Id. 3-10.

[7] See, e.g., Testimony of Raymond L. Gifford, President, The Progress & Freedom Foundation, U.S. Senate Committee on Commerce, Science, and Transportation "Telecommunications Policy: A Look Ahead" (April 28, 2004), 1-2, at http://www.pff.org/issues/communications/testimony/042804giffordtestimony.pdf (accessed Aug. 9, 2004) (terming the Telecommunications Act of 1996 a "qualified failure," qualified only because the act did not regulate wireless and cable, which have prospered under less regulation).

[8] Promoting Innovation and Competitiveness, President Bush's Technology Agenda, at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html (accessed Aug. 9, 2004); Jeri Clausing, Internet Study Stresses Self-Regulation, New York Times (Nov. 30, 1998) at http://www.nytimes.com/library/tech/98/11/biztech/articles/30net.html (accessed Aug. 9, 2004).

Book Reviews

Biz-War and the Out-of-Power Elite: The Progressive-Left Attack on the Corporation

by Jarol B. Manheim

*Reviewed by John D. Pickering**

Quick: Who is Joseph Mailman? Ever hear of the Tides Foundation? How about Shaman Pharmaceuticals? If you're concerned about the Left and its prospects, you need to know who these folks are.

Professor Manheim's book applies network-based models of organizational and social dynamics (you ought to see the charts!) to describe the Left's "social net" built over the last few decades as it relates to wealth, business and the corporation in the United States. Most conservatives are familiar with the Left's long march through the large charitable foundations (think Ford and Pew), but Manheim also emphasizes the growing presence of Leftist philanthrophy and other efforts to make mammon serve the "public interest." For example, there is the "anti-corporate campaign," a tool developed by labor unions to pressure employers for more pay and benefits, but put to use for more noble purposes by groups with words like "justice," "peace" and "equity" in their names. Think Nike and overseas sweatshops, one of Manheim's best examples. (Did you know that the AFL-CIO sent Jeff Ballinger to Indonesia for *four years* to interview workers and produce reports before the campaign went public?)

Where a campaign can't convince directly, the environment in which corporate decisions are made can be changed over time through the adoption (usually under pressure from self-proclaimed guardians of the public interest) of "codes of conduct" and the institutionalization of "correct" proxy voting by pension funds and other large institutional investors. Manheim notes the double bind implicit in the code of conduct – if you don't adopt it, you're an evil corporation; if you do adopt, you will inevitably fail to live up to it, setting you up for another anti-corporate campaign. He also details the eyebrow-raising consulting/police role played by Institutional Shareholder Services in the proxy voting context.

Then there's Joseph Mailman, the king of Biz-War, as Manheim demonstrates in his chart showing Mailman's links to five activist foundations (especially the Tides Foundation, a pioneer of "fiscal sponsorship" whereby tax-free dollars are used to fund politically oriented activity that would otherwise be taxable), five activist business organizations (e.g., Social Venture Network), eight environmental advocates and foundations (e.g., Rainforest Foundation), fourteen other policy and advocacy groups (e.g., Human Rights Watch, Chiapas Media Project), three educational projects, and a staggering twenty-five business ventures and relationships (e.g., Stoneyfield Farms [organic yogurt and ice cream], Calvert Social Venture Partners [socially responsible investing], Utne Reader, Pepi Co-Generation Company [biomass], Vegetarian Travel Guide, and Shaman Pharmaceuticals [which "specializes in developing new therapeutic drugs from the tropical rainforest" and, as if that weren't enough, doing so by "*using indigenous knowledge*"]).

Still skeptical? Try Manheim's picture of these networks in action in his revealing look at the Zapatista insurrection in Chiapas, Mexico in 1994. Then you'll understand why Subcomandante Marcos got such good press.

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SHAKEDOWN:

HOW CORPORATIONS, GOVERNMENT AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS

BY ROBERT A. LEVY

*REVIEWED BY MARK A. BEHRENS AND ANDREW W. CROUSE**

Cato Institute Senior Fellow Robert A. Levy's latest book, *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process*, is a provocative, bare knuckles assault on what Levy calls "government-sponsored extortion using the courts." Specifically, he argues that the tort trend of "regulation through litigation" and the U.S. Department of Justice's antitrust case against Microsoft illustrate how the tort and antitrust systems have become avenues for "exploitation" rather than justice. Levy's suggested fixes reflect his purest libertarian thinking and steadfast dedication to principles of federalism.

Part one of the two-part book, *Tort Law as Litigation Tyranny*, begins with an analysis of the state attorneys' general Medicaid recoupment lawsuits against the tobacco industry. Levy details how state attorneys general worked with private contingency fee lawyers to bring parallel cases in multiple jurisdictions in order to ratchet up pressure on the industry to settle. Levy also describes how some state courts and legislatures circumvented traditional tort law rules in order to facilitate recovery by the states.

For example, Levy illustrates how, "out of whole cloth," state governments were given an independent cause of action to recover Medicaid expenditures. States would not be subject to defenses based on smoker choice. States would not have to connect an individual's smoking with an individual's injury. General and often questionable data would supply that link. Further, states would not have to identify which particular manufacturer caused which particular injury. Levy shows how all of these fundamental tort rules were swept away.

Forced into "bet the industry" litigation, the tobacco companies entered into a multi-billion dollar settlement that also required changes in behavior, such as how the companies advertise and market their products. According to Levy, the settlement ushered in a new era in which tort law and the judicial process are being abused in order to achieve regulation and taxation of entire industries through un-Democratic means.

Levy pulls no punches in attacking the legitimacy of the tobacco litigation as *faux* legislation. He also questions whether the primary motivation for the litigation was the stated intention of discouraging youth smoking since only a fraction of the settlement money has been spent on anti-smoking programs; the rest has been directed into other areas of state budgets.

Levy also blasts the close relationship between the state attorneys general involved in the litigation and their wealthy personal injury lawyer partners. In the state tobacco lawsuits, many state attorneys general negotiated contingent fee contracts – behind closed doors – with hand-picked private personal injury lawyers. These contracts stipulated that in lieu of a flat or hourly fee, the private lawyers were guaranteed a percentage of any trial judgment or settlement amount. Some contingency fee personal injury lawyers have earned astronomical fees as a result, which Levy documents.

Shakedown debunks the legitimacy of the Medicaid recoupment suits, but Levy also raises questions about the Mulistate Master Settlement Agreement, which he believes resulted in a "tobacco cartel" in violation of the U.S. Constitution and antitrust law. Levy's view may not be widely held by others, but it does illustrate his independence and free market philosophy.

Levy goes on to show how the newly fashioned legal principles that were used to target the tobacco industry are now being used against other industries, such as gun makers, former lead paint manufacturers, and "big food." Through his analysis of each of these new targets, Levy fully develops what is perhaps the book's most compelling theme: well-financed personal injury lawyers are misusing the courts to regulate entire industries and rake in enormous fees.

Levy offers a number of remedies that would counter the new tort regime while remaining consistent with his "pure form" of federalism. Some of his proposed "fixes" are standard civil justice reform pro-

posals. These include state-based reforms to provide punitive damages defendants with protections similar to those of criminal defendants, such as a higher burden or proof standard and limits against "double jeopardy" through repetitive punishment; abolition of joint liability; and a model law developed by the American Legislative Exchange Council (ALEC) to subject government plaintiffs to the same legal rules applicable to a private claim by an injured party when the government sues to recover indirect economic losses related to the same injury. Other proposed state-based fixes are more controversial, such as banning contingency fee contracts between private lawyers and government entities. ALEC model legislation, for example, would continue to permit such contracts but require open and competitive bidding and legislative oversight to ensure the terms of the contract are fair to taxpayers.

Levy's two proposed federal solutions to the problem of "regulation through litigation" are less likely to generate enthusiasm among civil justice reformers. First, he would have Congress amend the rules that control state exercise of so-called "long-arm" jurisdiction over out-of-state businesses so that a defendant could avoid litigation in a hostile state by choosing not to do business there. The American Tort Reform Association calls Madison County, Illinois America's number one "judicial hellhole," but what manufacturer is likely to forego a market as large as Chicago, and the rest of the state, to avoid being sued in "Mad County?" Los Angeles County's Central Civil West Division is such a money-maker for plaintiffs' lawyers that they call it "the Bank." Still, what business is going to withdraw from the California market, one of the largest in the world, to avoid being sued in one Los Angeles "judicial hellhole?"

Levy himself recognizes that not all businesses can avoid a state's jurisdiction so he proposes another remedy: a federal choice-of-law rule that would allow a manufacturer to stamp products by state of sale and price them differently to allow for anticipated product liability verdicts. For various reasons, this reform also may have limited practical value.

In part two, *Antitrust Law as Corporate Welfare for Market Losers*, Levy deconstructs the Justice Department's case against Microsoft and argues for the repeal of the antitrust laws. Essentially, Levy argues that Microsoft's market-competitors persuaded the Justice Department to bring an unwarranted antitrust case against Microsoft "as a crutch … for the rigors of competition."

Using the Microsoft litigation as a platform, Levy systematically dismantles the rationale for antitrust law in both the economy of yesterday and the high-tech economy of today, suggesting that its only real use is to prop-up "market-losers." Levy is more successful in making the argument that antitrust law is inconsistent with the market forces driving the new high-tech economy than he is in proving that any invidious conduct was involved in the Justice Department's suit against Microsoft. His arguments for repealing the antitrust laws are unlikely to catch fire, but may stimulate debate regarding the applicability of the antitrust laws in the current economy.

In sum, Robert Levy's *Shakedown* book chronicles two of the biggest litigations of our era, the state attorneys general tobacco litigation and federal government's antitrust action against Microsoft. Levy presents a bold and compelling case that the tort and antitrust systems have been abused and turned into avenues for "exploitation" rather than justice. Levy's proposed fixes often are not "mainstream," but they are firmly rooted in his core principles of federalism, limited government, and free markets. Levy may well understand that shining a light on litigation abuse can have a curative effect. If that happens, Levy may help bring about changes regarding the way in which the tort and antitrust laws are being administered without ever having to compromise on his core values.

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Social Security and its Discontents:

Perspectives on Choice

Edited by Michael D. Tanner

*Reviewed by Jeffrey Ladik**

The "third rail" of politics, Social Security, is without doubt an extremely controversial political issue. Reforming Social Security, however, is not a complicated policy matter. *SOCIAL SECURITY and Its Discontents*, published by the CATO Institute, is an outstanding collection of seventeen erudite chapters that are written by thirteen notable scholars and policy professionals. Separated into five parts (Part I: The Crisis; Part II: Women, the Poor; and Minorities; Part III: Solving the Problem; Part IV: The Tough Questions; and Part V: The Public), the book exposes the numerous flaws, misconceptions, and harmful effects of the current Social Security system. Collectively, the book's chapters also provide policy and political guidance to enable reform. Edited by Michael Tanner, director of health and welfare studies at the CATO Institute and director of CATO's Project on Social Security Choice, *SOCIAL SECURITY and Its Discontents* is a must read for anyone concerned about the future (or lack thereof) of this irrational program.

Mr. Tanner's introduction is exceptionally written because it succinctly explains the critical content of each chapter, thereby allowing the reader to be immediately well versed on the repercussions of the Social Security system. Much to my chagrin, I must admit that before reading this book, I was unaware that workers do not have any legal right to Social Security benefits, despite paying into the system. Indeed, there is widespread belief that workers are contributing to their future retirement, but in fact they have no legal rights to any future benefits [*sic*].

Chapter four, entitled "Property Rights: The Hidden Issue of Social Security Reform," elaborately discusses the legal justification as to why workers do not have a property or contractual right to Social Security benefits. Written by Charles Rounds, Professor of Law at Suffolk University, the chapter cites two U.S. Supreme Court cases that establish the fact that the federal government is the only entity that has a property interest in Social Security. First, in 1937 the Court in *Helvering v. Davis*[1] upheld the constitutionality of the Social Security Act. In doing so, the Court deferred to Congress the ability to decide which welfare programs are part of the General Welfare Clause. Additionally, the Court explicitly stated that Social Security is not an insurance program. The Social Security tax goes into the treasury just like any other tax. Despite the "lock box" rhetoric, the receipts of Social Security are not segregated; indeed, they are commingled with all general assets. Then, out of general assets Congress authorizes benefit payments to persons deemed to be eligible. Second, in *Fleming v. Nestor*[2] the Court noted that termination of Social Security benefits is not a taking of property under the Fifth Amendment. Professor Rounds points out that the Court merely reaffirmed the intent of Congress that workers had no contractual rights to Social Security benefits, because in the original Social Security Act Congress reserved the "right to alter, amend, or repeal any provision." In fact, this happened when Congress raised the retirement age. Congress could also cut benefits, invoke cost-of-living adjustments, or conduct alternate means testing. In its current form, by 2018 the Social Security system *will* run a deficit, and the aforementioned options are well within Congress' authority. Other options might include raising taxes, cutting programs, or borrowing money. Simply put, Social Security is an unfunded liability.

A policy issue that has been around for some time but is beginning to gain political momentum is the privatization of the Social Security system. Presently, because Social Security benefits are not the property of workers, the money is not inheritable. When a worker dies their Social Security benefits are not part of his/her estate and the money remains with the federal government. Alternatively, under a private system this would not be the case. Private accounts would be the equivalent of IRA, 401(k), and Keogh accounts. Professor Rounds correctly notes that much of the opposition to individual accounts is the faulty premise that the current Social Security system is less risky than private capital markets. Chapter eleven, "Empowering Workers: The Privatization of Social Security in Chile," proves why this assertion is correct. José Piñera, president of the International Center for Pension Reform in Santiago, Chile, and co-chair of the CATO Project on Social Security Choice, incisively describes through his personal experience as Chile's minister of labor and social security how labor force participation, pension fund assets, and benefits have all grown because workers could opt out of the government-run pension system and put the former payroll tax in a privately managed personal retirement account. Interestingly, Chile's pension reforms were passed in 1980.

With specific regard to market volatility, John Zogby, president and CEO of Zogby International, notes in chapter seventeen "Public Opinion and Private Accounts: Measuring Risk and Confidence in Rethinking Social

Security," that a majority of people surveyed feel that "the Enron scandal shows that people need more choice and more control over their retirement savings, including allowing workers the option to invest part of their Social Security taxes in a personal retirement account." Most Americans have, justifiably, a basic desire to control their own money. Mr. Zogby also makes the valid point that younger voters, Republicans, and Independents could provide the groundswell support necessary for privatization. Younger workers, in particular, are extremely skeptical that they will receive "benefits" that match what was taken in taxes. This skepticism exists because as Nobel Prize recipient Milton Friedman writes in chapter fourteen "Speaking the Truth about Social Security Reform," "Social Security has become less and less attractive as the number of current recipients has grown relative to the number of workers paying taxes, an imbalance that will only get bigger" as the baby boomer generation retires. "This explains the widespread support for individual investment accounts."

Professor Rounds' analysis of property rights affects all workers, but the inability to pass property onto heirs disproportionately affects low-income workers, women, and minorities. Mr. Tanner, Jagadeesh Gokhale, a senior fellow at the CATO Institute, and Leanne Abdnor, national chairman of For Our Grandchildren, all address in detail in the aptly titled "Part II: Women, the Poor, and Minorities" the disparate impact the Social Security system has on these respective groups. In short, rather than helping the needy, the current system creates unnecessary obstacles for social mobility. For example, because low-income and minority demographics statistically have lower life expectancies, when a worker dies they are unable to pass their "benefits" to their heirs.

SOCIAL SECURITY and Its Discontents is a seminal body of work. It's potential to influence serious-minded policymakers is great, in large part because of the thoughtful input from professionals of diverse pedagogy; namely, economists, lawyers, and public relations professionals. The fact that so many experienced scholars have contributed to this book only adds to its credibility. Reforming Social Security has been and will continue to be a daunting and arduous task. *SOCIAL SECURITY and Its Discontents* demonstrates that politics and public relations are the only obstacles in the way of much needed reform. Privatization, which will benefit *all* citizens, can only occur if the American public sees Social Security for what it really is. This book brings us one step closer to that day.

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[1] *Helvering v. Davis*, 301 U.S. 619 (1937).

[2] *Flemming v. Nestor*, 363 U.S. 603 (1960).