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The Evolving Meaning of Free Speech for Sitting Judges and Practicing Lawyers

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I. Judges and Political Speech

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) the Supreme Court struck down a Minnesota canon of judicial conduct that prohibited a candidate for a judicial office from announcing his or her views on disputed legal or political issues. This so-called "announce clause" prohibited a judicial candidate from stating his or her views on any specific nonfanciful legal question within the province of the court for which the candidate was running, except in the context of discussing past decisions. (The clause prohibited even discussions of past decisions if the candidate took the view that he or she is not bound by the doctrine of *stare decisis*.) The Court held that the announce clause both prohibited speech based on its content and burdened a category of speech that is at the core of First Amendment freedoms—speech about the qualifications of candidates for public office. Applying the strict scrutiny test, the Court rejected the state's claim that the clause was justified by the state's interests in preserving the actual impartiality of the state judiciary and the state's interest in preserving the appearance of that impartiality. It was plain, the Court held, that the clause was not narrowly tailored to serve impartiality or its appearance in the traditional sense of the term, meaning the judge possessed no bias for or against either party to the proceeding. Far from being narrowly tailored to serve those interests, the Court remarked, the clause was barely tailored to serve impartiality at all, in that it did not restrict speech for or against particular parties, but rather speech for or against particular issues. The Court conceded that "impartiality" in a different sense—such as a lack of preconception in favor of or against a particular legal view—could well have been be an interest served by the announce clause. The Court held that the pursuit of this objective, however, could not possibly be a compelling state interest, since it is virtually impossible, and hardly desirable, to find a judge who does not have preconceptions about the law. The Court refused to reach the question of whether achieving impartiality in the sense of "openmindedness" was a compelling state interest because, as a means of pursuing this interest, the announce clause was so "woefully underinclusive" that the Court stated it did not believe it was adopted for that purpose. The Court noted that the practice of prohibiting speech by judicial candidates was neither ancient nor universal. No such prohibitions existed throughout the 19th and the first quarter of the 20th century, and in modern times they are not universal. Acknowledging that there was an obvious tension between Minnesota's Constitution, which requires judicial elections, and the announce clause, which placed most subjects of interest to the voters off limits, the Court held that the First Amendment does not permit Minnesota to leave the principle of elections in place while preventing candidates from discussing what the elections are about.

II. Attorneys and Extrajudicial Speech

The Supreme *Court in Gentile v. State Bar of Nevada*, 501 U.S. 1030 (991). considered a Nevada case in which an attorney was held to have violated a state supreme court rule ("Rule 177") prohibiting a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding. Dominic Gentile, the attorney, had held a press conference shortly after his client was indicted on criminal charges. Gentile read a prepared statement there and then responded to questions.

Approximately six months later Gentile's client was acquitted by a jury. The State Bar of Nevada filed a complaint against Gentile, alleging he had violated Nevada Supreme Court Rule 177. A hearing with the

Southern Nevada Disciplinary Board of the State Bar concluded that Gentile had violated the rule and recommended that he be privately reprimanded. The Nevada Supreme Court affirmed the decision after Gentile had waived the confidentiality of the disciplinary proceeding.

The result in the U.S. Supreme Court was somewhat confusing, because two Justices combined to author the opinion of the Court. Justice Kennedy announced the judgment of the Court and delivered the opinion of the Court with respect to parts III and IV of the holding, and Chief Justice Rehnquist delivered the opinion of the Court with respect to parts I and II.

Gentile had contended that the First Amendment required a stricter standard be adhered to than the "substantial likelihood of material prejudice" standard used by the state of Nevada in determining whether an attorney may be disciplined for his speech. He claimed there should be a finding of "actual prejudice or a substantial and imminent threat to fair trial" before such steps were taken.

Chief Justice Rehnquist, writing for the Court on this issue, referred to the history of court regulation of admission to the practice of law and the exercise of court authority to discipline and to disbar lawyers whose conduct departed from prescribed standards. He then considered the dilemma presented by the need for impartial jurors who know as little as possible about the case and the need to inform people about proceedings in the criminal justice system. Chief Justice Rehnquist pointed out that First Amendment protections of speech and press have been held to require a showing of "clear and present danger" that a malfunction in the criminal justice system will occur before the government may prohibit media speech or publication about a particular trial. He then addressed the question of whether a lawyer representing a defendant in a criminal case is entitled to the same standard before being disciplined for speaking publicly about the case, or whether a state may punish that sort of speech under a less exacting standard. Rehnquist distinguished between parties to litigation and strangers to it, and held that lawyers are not protected by the First Amendment to the same extent as persons of other professions, deeming the "substantial likelihood of material prejudice" standard a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the government interest in fair trials. Such a regulation is narrowly tailored, Rehnquist wrote, because it applies only to speech that is substantially likely to prejudice a trial; it is viewpoint-neutral; and it merely postpones an attorney's pronouncements until after the trial.

The Court also held, however, that the Nevada Supreme Court's interpretation of its Rule 177 was void for vagueness. Justice Kennedy wrote this part of the opinion for the Court, attacking the rule's safe harbor provision, rule 177(3). He explained that this section of the rule had misled Gentile into thinking that he could conduct the press conference without having to worry about violating the rule. The section provides that a lawyer "may state without elaboration … the general nature of the … defense." The Court held that this language was so vague it required lawyers attempting to abide by the rule to make their own interpretations of the rule. Kennedy pointed out that "general" and "elaboration" are both terms of degree with no settled usage in the interpretation of law, and that "[t]he lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated."

The Court held that the words Gentile used during the press conference indicated that he was unable to determine which remarks were acceptable, but that he had made an effort to do so. On numerous occasions during the press conference Gentile declined to answer reporters' questions seeking detailed comments, claiming that ethics prohibited him from elaborating. This demonstrated that Gentile had attempted to obey the rule and believed that his statements were protected by the safe harbor provision. The Court held that "[t]he fact Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary," concluding that "the Rule is so imprecise that discriminatory enforcement is a real possibility."

III. Lawyer Advertising and Marketing

Two competing models of lawyer advertising regulation exist in the United States, the "professionalism model" and the "consumer protection model." The professionalism model maintains tight controls on lawyer advertising, the consumer protection model is far more generous in granting lawyers freedom to advertise. Individual states may adopt one or the other model, or may adopt hybrids that adopt portions of both. Neither model may claim complete ascendancy at this time in debates over public policy, as there are strong social and economic policy arguments that support each of the two models. Similarly, neither model may claim to have captured modern First Amendment doctrine as applied to lawyer advertising.

The "professionalism model" is driven by the view that lawyer advertising should be strictly regulated in order to preserve the traditional values of practice as a learned profession. The professionalism model operates under the supposition that legal advertising should not do damage to the reputation of the legal profession or corrode public confidence in our system of justice. As Florida's Chief Justice Lewis lamented, "We often voice concern with regard to professionalism and the declining respect for the legal system, but we fail to follow our own words with corresponding action. In my view, a very significant contribution to this eroding respect can be traced directly to the shift from a professional model to an economic model, which includes progressively-escalating advertising gimmicks." *In re Amendments to The Rules Regulating The Florida Bar-Advertising*, 971 So. 2d 763 (Fla. 2007). (Lewis, C.J., concurring in part and dissenting in part).

While there are many eloquent articulations of the professionalism model, the greatest champion of this model in recent times was Justice Sandra Day O'Connor:

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 488–90 (O'Connor, J., dissenting).

The professionalism model seeks to enforce the highest aspirations and most cherished norms of the profession through mandatory restrictions that prevent lawyers from advertising in a manner that is not excessively commercial, aggressive, or undignified. States driven by the professionalism model will tend to allow only "minimalist" forms of advertising, stripped to basic objective information. The professionalism model tends to seek to bar lawyer advertising that is in bad taste, emphasizing that advertising for legal services is not like advertising for other commercial goods and services, and that undignified legal advertising undermines the rule of law. The professionalism model tends to emphasize the lack of public knowledge and sophistication regarding the practice of law, and the corresponding justification for a greater degree of paternalistic supervision of lawyer advertising. The professionalism model tends to grant greater discretion to bar authorities to regulate the profession, and will be less demanding in requiring concrete or objective data to justify regulatory methods, instead deferring to the common sense and experience of bar officials, and ultimately, state supreme courts.

The "consumer protection model" does not seek to uphold the dignity of the profession or public confidence in the legal system through mandatory restrictions. Rather, the consumer protection model tends to concentrate entirely on whether lawyer advertising is harmful to consumers in some direct and palpable sense.

Again, there are many eloquent statements of the values that animate the consumer protection model, but among the most eloquent are those of Justice Anthony Kennedy, a judicial foil of sorts to the views of Justice O'Connor. In the words of Justice Kennedy:

> It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," … the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients."[FN2]

Florida Bar v. Went For It, Inc., 515 U.S. 618, 644–45 (1995) (Kennedy, J., dissenting).

The consumer protection model tends to require that regulation be buttressed by concrete, objective data documenting the need for the regulation. In the absence of a showing that advertising is demonstrably harmful, the consumer protection model will leave it to the mechanisms of the open marketplace to govern advertising, rejecting paternalistic intervention. The consumer protection model will tend to leave matters, such as the protection of the dignity of the profession or confidence in the justice system, to informal peer pressure within the profession and the larger arena of public opinion and will not subject lawyers to discipline for advertising that is merely in bad taste or undignified. As stated in the Comment to the ABA Model Rules of Professional Conduct 7.2:

> Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services and lawful communication by electronic mail is permitted by this Rule.

The consumer protection model will tend to treat lawyer advertising as essentially the same as other forms of advertising, subject to the same level of First Amendment freedom that would exist for the advertising of other goods or services. The consumer protection model does not treat "commercialism" in law practice as an evil in itself, but tends to instead proceed from the premise that, realistically, the practice of law is, in part, a business. The consumer protection model is generally antagonistic to paternalism, and instead

assumes that consumers are relatively sophisticated about advertising, generally, and are able to absorb lawyer advertising without being duped or deceived. The consumer protection model actually tends to treat lawyer advertising as deserving of the highest levels of commercial speech protection, by emphasizing that advertising of legal services tends to facilitate access to the judicial system and heighten the awareness of members of the public of their legal rights.

It is imperative at this juncture to emphasize that one may deeply cherish the proud traditions of the legal profession, traditions that are emphatically aligned against the notion that making money is the be-all and end-all of lawyering, while at the same time running one's legal practice in a business-like manner. Those who embrace the consumer protection model of lawyer advertising ought not be chastised as less professional or honorable than those who adhere to the professionalism model. If there is nothing wrong with practicing law to make a profit, and assuredly there is not, the argument goes, it follows that there is nothing wrong with advertising one's legal practice to enhance that profit. This argument is a central assumption of modern First Amendment free speech jurisprudence, and a point absolutely critical to debates over lawyer advertising. Despite the stubborn persistence in some quarters of the legal profession of the view that there is something inherently unseemly or unworthy about lawyer advertising, because it places a lawyer's profit motive front and center before the public, contemporary American culture and contemporary American constitutional law are sternly aligned against this view.

Most lawyers temper the perfectly appropriate and quintessentially American motivation to earn income with a strong sense of civic and professional obligation to serve the public, the bar, and the legal system in various ways, large and small, that are not influenced by the "bottom line." Through pro bono publico engagements, service in civic and bar organizations, and countless other activities, lawyers act altruistically and generously, dedicating their training and skills to the public good. The motives to serve society and the ends of justice and to also earn a high income are not naturally antagonistic; they can and do peacefully coexist in the careers of many successful attorneys. So too, there is no natural or inherent antagonism between a choice to heavily advertise one's legal business and a choice to devote a significant part of one's professional life or one's income to supporting the public good.

Most fundamentally, there is no correlation between a lawyer's decision to advertise heavily and a lawyer's conduct of his or her law practice with utmost professionalism. To the contrary, the American faith in our entrepreneurial economy and the First Amendment faith in the marketplace of ideas both posit that these are entirely independent variables. Advertising is both honorable and constitutionally protected, and regulatory prejudice against lawyers who advertise is both bad public policy and unconstitutional. One may deeply cherish the proud traditions of the legal profession, traditions that are emphatically aligned against the notion that making money is the be-all and end-all of lawyering, while at the same time running one's legal practice in a business-like manner. Profit and professionalism are not mutually exclusive; indeed they are not even antagonistic. Nor are profit and altruism mutually exclusive.

IV. Where Is the Boundary Between Marketing and Political Commentary? Excerpts from the Draft of a Pending Petition for Certiorari in *Hunter v. Virginia State Bar, ex rel. Third District Committee*, -- S.E.2d --, 2013 WL 749494 (Va. 2013)

This Petition poses a First Amendment issue of the highest importance, on which lower courts are divided: May the government treat political speech as commercial speech, when the content of the message is entirely political but the motivation underlying the message is a mix of political motivation and commercial motivation?

While this case arises in the context of speech by a lawyer, and has profound implications for the regulation of the legal profession, the constitutional issues posed have vexed First Amendment jurisprudence for decades, and effect the much broader arena of expression by corporate, business, and professional speakers, who enter the marketplace of ideas and public debate with expression that would clearly be classified as political speech at the core of the First Amendment if judged by its content alone, but which government regulators seek to re-classify as advertising and commercial speech because commercial motivations are among the animating purposes of the expression. This Petition, in short, urges this Court to grant review for the purpose of bringing greater clarity to one of the most important "boundary disputes" in modern First Amendment law: the line that separates commercial speech from political speech.

The case arises from a Charge of Misconduct predicated on the content of a blog written by Mr. Hunter, entitled This Week in Richmond Criminal Defense. The blog is accessible to the general public through a link on a website maintained by Mr. Hunter's law firm, Hunter & Lipton, PC. The blog contains a variety of content relating to legal affairs and judicial decisions. Some of the blog entries involve Mr. Hunter's commentary on national legal events, such as a dispute involving former Attorney General Alberto Gonzales and United States Attorneys' Offices. Others describe legal decisions by state or federal courts in which Mr. Hunter was not a participating lawyer. The majority of entries, however, describe the basic facts and outcomes of cases in which Mr. Hunter served as criminal defense counsel for a criminal defendant, and in which Mr. Hunter obtained a favorable outcome for the defendant.

In the proceedings below the Bar maintained that Mr. Hunter's blog violated Virginia's Rules of Professional Conduct in two ways.

First, the Bar maintained, Mr. Hunter's blog violated Rule 1.6(a), which reads in pertinent part that: "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

It is not disputed that Mr. Hunter did not seek advance consultation and consent from his clients prior to discussing their cases on his blog. It is also not disputed that all of the content contained in the blogs regarding those cases was content revealed in open court on the public record. The Bar's position was not that Mr. Hunter revealed information protected by the attorney-client privilege, or information that any client requested be kept inviolate, but instead that the material, which included such information as the charges the client faced and the evidence produced at trial for and against the client, fell within the Rule's prohibition on disclosures "which would be embarrassing or would likely to be detrimental to the client."

The District Committee agreed with the Bar, and found Mr. Hunter in violation of Rule 1.6(a). In the Circuit Court Mr. Hunter argued that the First Amendment requires a bright-line principle that overrides Rule 1.6(a) with regard to all proceedings that transpire in an open session of any state or federal court. Mr. Hunter argued that he had a constitutional right to read the entire transcript of any such public trial, on a television program or on the Internet, and that lawyers have historically understood that there is no ethical constraint against their discussing what transpires in such public judicial proceedings, in books, articles, CLE programs, or in the mass media.

In its Memorandum Order the Circuit Court reversed the District Committee on this issue and ruled in favor of Mr. Hunter, stating: "The Court unanimously finds that the District Committee Determination as to Rule 1.6(a) is contrary to the law as it violates Respondent's rights under the First Amendment of the United States Constitution and therefore the charge is dismissed."

The Bar also maintained that Mr. Hunter's blog violated the lawyer advertising provisions of the Virginia Rules, specifically Rules 7.1(a)(4) and 7.2(a)(3). Those provisions state in pertinent part:

> RULE 7.1 Communications Concerning a Lawyer's Services
>
> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> . . . .
>
> (4) is likely to create an unjustified expectation about the results the lawyer can achieve, . . .
>
> RULE 7.2 Advertising
>
> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

The Bar maintained that Mr. Hunter's blog constituted "Communications Concerning a Lawyer's Services" and "Advertising" under the Rules, and "commercial speech" under the First Amendment. The Bar argued that under Rule 7.1 Mr. Hunter's blog was "false, fraudulent, misleading, or deceptive" in that it was "likely to create an unjustified expectation about the results the lawyer can achieve." The Bar argued that under Rule 7.2 Mr. Hunter's blog "advertises specific or cumulative case results," and therefore violated the rule unless it contained a disclaimer meeting the requirements of the Rule.

Mr. Hunter refused to accept the characterization of his blog as communication concerning his services, as advertising, or as commercial speech. He instead offered to place a clarification on his website as a disclaimer:

> *This Week in Richmond Criminal Defense is not an advertisement, it is a blog. The views and opinions expressed in this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case.*

Thus Mr. Hunter sought to alert any viewer that his blog was not advertising or commercial speech, and moreover, that his discussion of cases should not suggest similar outcomes in any other case.

The Bar, insisting that Mr. Hunter's speech was advertising and commercial speech, refused Mr. Hunter's offer, and proceeded against him. By this time Mr. Hunter had in fact affixed a disclaimer to his blog postings, in wording slightly modified from his original proposal to the Bar, and even clearer:

> *This Week in Richmond Criminal Defense is a blog written by Horace F. Hunter, founder and owner of Hunter and Lipton, PC. The blog contains articles written by him, which focus on issues relevant to the criminal justice system. To the extent that the articles discuss cases in which Horace F. Hunter was personally involved as counsel, they are not intended to predict a similar outcome in future cases.*

It was against this backdrop that the Charge of Misconduct on Rules 7.1(a)(4) and 7.2(a)(3) were litigated in the District Committee and the Circuit Court.

In the proceedings before the District Committee Mr. Hunter testified that he had multiple motivations in authoring his blog. One of his motivations was marketing. (DC Hearing at 111) The blog, he conceded, was a way of projecting a professional identity as a criminal defense lawyer, noting that "people want to know that you're more than just trying to sell them services. They want to know who you are and what you stand for." (DC Hearing at 111-12) Yet Mr. Hunter insisted in his testimony that he did not regard the blogs as "advertising" or as "soliciting business" in the normal sense of the term. To the contrary, his purpose was also political and ideological. He used the blog to offer broad critiques of the justice system, to comment on the specific facts and outcomes of cases (including many in which he participated as a lawyer and some in which he did not), and to generally advance a point-of-view that was edged toward the values touted by many criminal defense lawyers, such as the notion that persons are presumed innocent until proven guilty, and that not all criminal defendants are guilty, and not all are convicted—acquittals do happen. In Mr. Hunter's words:

> *[I]t's intended to combat in large part the public perceptions that is clearly on the side that people are guilty until they're proven innocent. There are shows out there like Nancy Grace and other things that you see and writings all the time, particularly on the Internet; soon as somebody's arrested, okay, they're automatically guilty. And one of the things we do is try to combat that public perception. Even when we're talking about cases that I've dealt with personally, generally there's a comment at the end of the article that says something to the effect of, this case again demonstrates that just because somebody is charged doesn't mean they're guilty. Or what this case represents is the fact that this should have never been a crime in the first place. . .*

When asked to elaborate on why he so steadfastly refused to acquiesce in the Bar's insistence that his blogs be labeled advertising, he stated that this would cheapen his message, turning material that he regarded as political and legal commentary into something that was entirely mercenary and profit-driven:

> *It cheapens the speech when I have to put in front of that, oh, by the way, this is for advertising purposes only. This isn't—you know, and it just takes some of the articles out of context. And I offered a disclaimer that I thought was appropriate based on what it is I was doing.*

Mr. Hunter and the Bar were sharply divided on the appropriate First Amendment treatment of the mixed motivations that drove Mr. Hunter's blogs.

From the beginning the Bar's position has been consistent, crystal clear, and unyielding. As articulated clearly and unequivocally by Bar Counsel in the District Committee hearing, any "discussion" by a Virginia lawyer of a lawyer's case results is inherently misleading in the absence of the disclaimers required by Rule 7.2: "But if your question is, Is any discussion of a lawyer's case results going to be deemed inherently misleading without a disclaimer? I think the answer to that would also be yes."

The Bar argued that Mr. Hunter's marketing motivation was enough to push the blogs over the constitutional edge, rendering them misleading unless accompanied by a disclaimer placing what the Bar saw as the advertising of "specific or cumulative case results" in the context required by Rule 7.2. The Bar argued

that the "insinuation" of public issues with commercial speech cannot immunize otherwise commercial speech from regulation.

Mr. Hunter, in contrast, relied heavily on the undisputed fact that none of the actual content of his blogs was "commercial." All of the content, rather, was classic political speech—speech describing the outcomes of public trials and commenting on those outcomes. Taking a position that was the mirror opposite of the Bar's, Mr. Hunter argued that a commercial motivation alone, particularly when that motivation was mixed with political and ideological motivations—could not turn otherwise political speech into commercial speech. Moreover, Mr. Hunter argued, to the extent that the Bar's position rested on the supposition that readers would mistake his speech for advertising, and would further be misled into false expectations by thinking that their case would turn out as the cases that were described, that concern was eliminated by Mr. Hunter's proffer of his own warning that his speech was not advertising, and his warning regarding the uniqueness of all cases and avoidance of expectations of similar results.

Mr. Hunter additionally argued that his blogs were not simple lists of "case results" as contemplated by the Rule—they were not naked recitations of verdicts—but rather narrative descriptions, often in considerable detail, of the evidence adduced in open trials, which itself would alert consumers that these were not proposals of commercial transactions, and ought not be understood as intended to raise expectations of similar outcomes in other specific cases. (DC Hearing at --)

The Supreme Court of Virginia in *Hunter v. Virginia State* Bar held, by a divided 5-2 vote, that Hunter's blogs were commercial speech, not political speech, and that the Virginia State Bar could thus regulate his blogs as lawyer advertising, imposing on Hunter the obligation to include an advertising disclaimer fully compliant with Virginia's lawyer advertising rule 7.2(a)(3). *Hunter* at *11.

The majority recognized Hunter's argument that he had multiple motivations for authoring his blog, "including marketing, creation of a community presence for his firm, combatting any public perception that defendants charged with crimes are guilty until proven innocent, and showing commitment to criminal law." *Id*. Even so, to the majority, it was only Hunter's marketing motivation that mattered. The majority reasoned that "when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech." *Id*. at *4. The majority held that all commercial speech is "advertising", claiming that while "not all advertising is necessarily commercial," "all commercial speech is necessarily advertising." *Id*. at *5.

In reaching the judgment that Hunter's blogs should be deemed advertising for First Amendment purposes, the majority pointed to a number of factors, all of which spoke to Hunter's economic motivation—a motivation Hunter himself has conceded was always one of his reasons for posting his blogs. The majority thus noted that Hunter predominantly described cases in which his client received a successful outcome, that his blogs were accessible through his firm's commercial website (though as the dissent pointed out, the blogs may also be accessed without going through the firm's website, through an ordinary Internet search), and that his blogs were not interactive. *Id*.

Using a divide-and-conquer analysis, the majority held that the content of his blogs that did not involve descriptions of Hunter's own prior successful cases did not redeem as "political" what the majority regarded as otherwise "commercial" speech:

> Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter's otherwise self-promotional blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech."

Id. at *6, *quoting Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474-75 (1989). As the majority saw it, Hunter had engaged in a ruse. His blogs did not present "situations and topics where the subject matter is inherently, inextricably intertwined," but rather "Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog." *Hunter*, at *6.

Having declared his blogs to be commercial advertising, the majority then went on to hold that Hunter must affix to all of his blog posts a commercial advertising disclaimer. Curiously, the majority did not find that Hunter's blogs were either untruthful, or inherently misleading, instead resting its judgment on the argument that Hunter's blogs had the "potential" to be misleading. *Id*. ("While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading.") The majority thus applied the four-part commercial speech test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) to determine whether the imposition of a commercial advertising disclaimer on Hunter's blogs was constitutionally justified.

Relying on what it regarded as the naiveté and lack of sophistication of the public, the majority reasoned that Hunter's blogs "could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter." *Id*. at *7. In reaching this conclusion, the majority did not respond to one of the core points Hunter had strenuously emphasized throughout the litigation, and in the Virginia Supreme Court, which was that Hunter had, on his own, communicated to the public clearly that they should not draw any such conclusions from his blogs. The majority thus did not explain why the imposition of a commercial advertising disclaimer could be justified under Central Hudson when Hunter's blogs clearly communicated to the public that his blogs were not advertising, but his opinions, and that "[t]o the extent that the articles discuss cases in which Horace F. Hunter was personally involved as counsel, they are not intended to predict a similar outcome in future cases." *Id.*

Justice Donald Lemons, joined by Justice Elizabeth A. McClanahan, dissented. Unlike the majority, Justice Lemons did not draw a clean line between the blogs that did not describe Hunter's own cases, and those that did, as if the cases involving Hunter's own prior cases were not also laden with political content. Justice Lemons thus observed:

> Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

Id. at *11 (Lemons, J., dissenting in part). In fundamental disagreement with the entire analytic structure employed by the majority, the dissenters reasoned that the twenty-two posts in which Hunter describes Virginia his own prior successful cases are not dependent on the eight posts in which he describes other legal events and issues to qualify the twenty-two posts as political speech, stating that the "twenty-two posts discussing criminal trials in Virginia are political speech in their own right, and are not dependent upon the content of the other eight posts. *Id*. at 12. In reasoning that discussion of his own prior cases constitute political speech, the dissenters thus reasoned that "[a's political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has exposed flaws in the criminal justice system." *Id*. The dissenters drove home this point with an example from one of Hunter's blogs:

> The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat "the public perception that is clearly on the side that people are guilty until

> they're proven innocent." For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an "example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

Id.

The dissenters also dismissed as unpersuasive the majority's discussion has to how Hunter's blogs may be accessed, emphasizing that members of the public could view Hunter's blogs either through a link from his law firm's website or directly through an Internet search engine, noting that this is commonplace for political and news commentary emanating from businesses and corporations on the Internet. *Id.* ("While going through the law firm's website is one way to access the blog, it is also possible to go directly to the blog without navigating through the firm's website.")

Most significantly, the dissenters argued that political nature of Hunter's blogs should be decided by the content of the blogs themselves, rather than the "portal" through which they are accessed, or the conceded fact that one of Hunter's motivations was economic. *Id.* ("Merely because an article may be accessed through a commercial portal does not change the content of the article.").

Turning then to the core question on which this Petition for Certiorari now rests, the dissenters argued that while this Court has never clearly resolved the issue, the arch of this Court's prior First Amendment decisions supports the view that Hunter's blogs should be deemed political speech:

> Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial.

Id.

Making Sense of Federal Preemption

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Making Sense of Federal Preemption

Since the seminal 1992 case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), federal preemption has been a rapidly evolving doctrine. It is currently one of the most hard-fought battles in products liability litigation. The fight continues today: in March, 2013, the Supreme Court heard oral arguments for the most recent case involving preemption of state law tort actions, *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 694 (2012). The *Bartlett* case highlights three key issues in preemption doctrine: (1) the "presumption against preemption" interpretive canon, (2) the scope of implied preemption, and (3) the degree of deference afforded to federal agencies.

Part I of this manuscript provides a background to *Bartlett* by outlining the major developments in preemption doctrine since *Cipollone*. Part II addresses the above three issues, which are left unresolved by prior cases, through a discussion of the arguments raised in the *Bartlett* briefs and oral argument. Finally, Part III draws out some of the differences in preemption analysis between state and federal courts.

I. Preemption in the Supreme Court

The starting point for preemption is the Supremacy Clause, under which federal law is "the supreme law of the land . . . anything in the . . . laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Following this constitutional command, the Court has developed two main strands of preemption doctrine: "express" preemption and "implied" preemption. Express preemption involves federal laws in which Congress's intent to displace state law is explicit in the language of the statute. Implied preemption is divided into "field" and "conflict" preemption, where in both types of cases courts must divine Congress's intent from a statute that is silent on the issue of preemption.

A. Express Preemption

In the face of statutory express preemption provisions, the Supreme Court has not always found state law claims to be preempted. The Court in *Cipollone* found the plaintiff's failure-to-warn claims preempted through its crucial holding that common law duties were a type of state law "requirement" forbidden under the Public Health Cigarette Smoking Act of 1969. 505 U.S. at 521. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court's interpretation of the FDCA's Medical Devices Amendments' (MDA) express preemption provision —which also preempted state law "requirements"— was "substantially informed" by an FDA regulation that cabined the provision's preemptive effect. *Id.* at 495. In that case, the majority concluded that the plaintiff's common law claims were not preempted by the MDA where the common law duties in that case were "parallel" to the federal requirements. *Id.*

The Court came to the opposite conclusion, however, in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). There, the Court dispensed with FDA's interpretation of the MDA and found the agency's reasoning "less than compelling." *Id.* at 329. The majority noted that state claims may not be preempted if they "parallel, rather than add to, federal requirements," but declined to address that argument because the plaintiffs failed to raise it below. *Id.* at 330. The "parallel requirements" exception to express preemption clauses was before the Court again in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), where the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not preempt the plaintiff's state law tort claims. Because the statutory language only prohibits state law labeling requirements that are "*in addition to or different from*" the requirements under FIFRA, state law labeling requirements were not preempted so long as they were "equivalent to, and consistent with, FIFRA's misbranding provisions." *Id.* at 447.

The "parallel requirements" exception to federal preemption is also relevant in implied preemption cases, including *Bartlett*: the plaintiff-respondent and one amicus brief in her support argue that the state law claims parallel the federal regulation against misbranding, and should therefore not be preempted.

B. Implied Preemption

The Court has found that federal statutes implicitly preempt state law in two types of cases. First, in cases where (1) "the scope of a statute indicates that Congress intended federal law to occupy a *field* exclusively," *Geier v. Am. Honda Motor. Co.*, 529 U.S. 861, 899 (2000), and (2) "when state law state law is in actual conflict with federal law," *id.*, such as when it is "impossible for a private party to comply with both federal and state law requirements," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

1. Field Preemption

Field preemption has been invoked in areas "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Put another way, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.*

The Court has hesitated to read field preemption into federal statutes. Products liability is not a field that has traditionally been occupied by federal regulations; recent cases have confirmed that parties typically do not even attempt to argue, for example, that FDA dominates the area of pharmaceutical drugs and medical devices.

The Court's most recent foray into field preemption, however, raises questions about the potential for field or "mini-field" preemption in drug cases as well. In *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), the Court held that plaintiff's design-defect and failure-to-warn claims fell within the "field of regulating locomotive equipment" occupied by the Locomotive Inspection Act. *Id.* at 1267. The majority reasoned that the failure-to-warn claims, like design-defect claims, are "directed at the equipment of locomotives," so that both claims were therefore preempted. *Id.* at 1268. As discussed below (see Part II.B), *Bartlett* will likely test the Court's adherence (or lack thereof) to distinct theories of failure-to-warn and design-defect products liability.

2. Conflict Preemption

This strand of implied preemption may invalidate state law actions that are either plainly irreconcilable with the federal statute ("impossibility" preemption) or when the enforcement of the state law or common law duty presents an impediment to the federal regulatory scheme ("obstacle" preemption).

a. Impossibility Preemption

Impossibility preemption addresses inevitable clashes between state and federal mandates. One prototypical example of such a scenario would be where "the federal orders forbade the picking and marketing of any avocado testing more than 7 percent oil, while the California test excluded from the State any avocado measuring less than 8 percent oil content." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

The 2009 case of *Wyeth v. Levine* illustrated the Court's approach to impossibility preemption—"a demanding defense"—as the majority refused to find impossibility preemption of the plaintiff's failure-to-

warn action against a brand-name manufacturer because the manufacturer could "unilaterally" strengthen its labeling through the FDA's Changes-Being-Effected (CBE) process. 555 U.S. 555, 573 (2009).

In *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011), the Court's latest word on impossibility preemption, the Court seemingly broadened its test for impossibility, by asking "whether the private party could *independently* do under federal law what state law requires of it." *Id.* at 2579. The Court held that impossibility preemption foreclosed the plaintiff's state law failure-to-warn claim against a generic drug manufacturer. *Id.* at 2577-78. The Court deferred to FDA's interpretation of the CBE regulations to conclude that the CBE provision (which allowed brand-name manufacturers in *Levine* to change their labels) was only available to generics when the manufacturer "changes its label to match an updated brand-name label or to follow the FDA's instructions." *Id.* at 2575. This conclusion rested on the basic statutory and regulatory requirements for generics that they must match their brand-name counterparts, thereby creating a "duty of sameness" for the labels of generic drugs. *Id.* at 2575, 2577. The Court reasoned that it was thus impossible for a generic manufacturer to both alter its label to comply with state law, and maintain the same label as brand-names, as required by the FDCA and FDA regulations.

Mensing creates the anomalous rule that failure-to-warn liability turns on the simple fact of whether the plaintiff happens to take a generic or brand-name drug. The Court noted this by stating, "[w]e acknowledge the unfortunate hand that federal drug regulation has dealt [the plaintiff]" as a result of a pharmacist prescribing a generic rather than a brand-name drug. *Id.* at 2577-78, 2581. The juxtaposition of *Levine* and *Mensing* "makes little sense" even to the majority here, but "it is not the Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre." *Id.* at 2581-82.

b. Obstacle Preemption

Obstacle preemption invalidates state laws that present an "obstacle to the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. A crucial question in this type of case is whether a federal law presents just a "floor," or a "floor" and a "ceiling" for state requirements. *Geier v. American Honda Motor Co.* is a seminal case in which the Court held that Honda's failure to install airbags, arguably the best safety technology available at the time, could not be the basis for the plaintiff's' design-defect claim. 529 U.S. at 886. The majority, per Justice Breyer, relied on DOT's authority to implement and interpret the National Traffic and Motor Vehicle Safety Act of 1966 and its comments accompanying Federal Motor Vehicle Safety Standard 208 (FMVSS 208) to conclude that the state tort action would stand as an obstacle to the accomplishment of the regulation's purpose. *Id.* The purpose of the statute, as explained by the Court, was to deliberately provide auto manufacturers with a "range of choices among different passive restraint devices . . . [that] would bring about a mix of different devices introduced gradually over time." *Id. Requiring* manufacturers to install airbags, as the design-defect claim would have done, would conflict with the objective to improve safety through "a gradually developing mix of alternative passive restraint devices." *Id.*

The Court came to the opposite conclusion in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), where the same regulation—FMVSS 208—was held to not preempt state claims that manufacturers should have installed lap-and-shoulder belts, instead of only lap belts, on rear inside seats. *Id.* at 1139-40. The regulation left auto manufacturers with a choice of these two types of belts, but the Court, again per Justice Breyer, did "not believe [] that choice is a significant regulatory objective." *Id.* at 1137. The agency's "contemporaneous explanation of its objectives, and the agency's current views" pulled the Court away from *Geier*'s preemptive conclusion; *Williamson* did not come at a time when new technology, such as airbags, were just being introduced to the market, which reduced the need for manufacturers' choice in passive restraint devices. *Id.* at 1136-40.

The most recent word on obstacle preemption came in *Wyeth v. Levine*. In addition to rejecting impossibility preemption, the Court refused to find that the state failure-to-warn claim stood "as an obstacle to the accomplishment of Congress' purposes in the FDCA." 555 U.S. at 581. Notably, Justice Thomas wrote a striking concurrence denouncing the Court's use of obstacle preemption. Starting from the premise that the Court must respect the delicate federalist balance between the states and the federal government, Justice Thomas stated unequivocally that he would no longer uphold obstacle preemption, a doctrine that, to his mind, gives too broad an effect to "judicially manufactured policies," and "facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' within federal law." *Id.* at 604. Two years after *Levine*, Justice Thomas penned the Court's opinion in *Mensing*, where the majority relied entirely on impossibility preemption to foreclose the plaintiff's failure-to-warn claim against a generic drug manufacturer. 131 S. Ct. at 2577-79.

Each of the above cases involves some degree of second-guessing an agency determination that a given product is safe for consumer use. But just how far can a plaintiff encroach upon an agency's territory? The Supreme Court provided a preliminary answer to this question in *Buckman Co. v. Plaintiff's Legal Committee*, 531 U.S. 341 (2001). In *Buckman*, the Court held that the MDA impliedly preempted the plaintiff's state law "fraud-on-the-agency" claim against a device manufacturer's regulatory consultant, where the consultant had allegedly made false statements to FDA in the process of obtaining approval for orthopedic bone screws. *Id.* at 343, 346. A unanimous Court refused to allow state law plaintiffs to "polic[e] fraud against federal agencies," reasoning that fraud-on-the-FDA" claims would: interfere with the delicate and flexible approach of FDA in policing fraud; increase the burdens on manufacturers facing potential liability in 50 tort regimes, and thereby discourage off-label use; and, out of a fear of submitting insufficient information, would create an incentive for manufacturers to submit a "deluge of information that [FDA] neither wants nor needs," thereby adding a burden to FDA and slowing the approval process. *Id.* at 347. Another key fact for the Court was that these claims existed "solely by virtue of FDCA disclosure requirements" rather than a breach of a state tort duty. *Id.* at 349-51.

Buckman was thus unlike *Lohr*, where the state claims were parallel requirements and premised on the manufacturer's failure to use reasonable care in production. The Court addressed a slight variation of *Buckman* in *Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008), but ultimately did not answer the question whether fraud-on-the-agency could be an element of a state tort claim. The plaintiffs brought state products liability claims in the face of a Michigan statute that provided immunity from products liability unless the plaintiff could prove that the manufacturer made misrepresentations to the federal agency—and the drug would not have been approved, or would have been withdrawn, if the information had been accurately submitted. The Court took the case, after the Sixth Circuit found preemption of the statute's exception in *Garcia v. Wyeth-Ayerst Laboratories*, 385 F.3d 961 (6th Cir. 2004), and the Second Circuit found no preemption in *Desiano v. Warner-Lambert Co.*, 467 F.3d 85 (2d Cir. 2006). The Supreme Court split 4-4 and issued a *per curiam* opinion affirming *Desiano. Warner-Lambert*, 552 U.S. 440.

II. Key Unresolved Issues

Argued in the Supreme Court on March 19, 2013, *Mutual Pharmaceutical Co., Inc. v. Bartlett* will be decided against the backdrop of these preemption precedents. At issue in *Bartlett* is a state law design-defect claim against a generic drug manufacturer, where the FDA has, like in *Levine* and *Mensing*, determined that the drug is "safe and effective." *Bartlett v. Mut. Pharm. Co., Inc.*, 678 F.3d 30, 34 (1st Cir. 2012). The Court faces at least three unresolved areas of preemption doctrine: the role of the "presumption against preemption," the scope of implied preemption, and the degree of deference that should be afforded to federal agencies in preemption cases.

A. The Presumption Against Preemption

The Supreme Court has typically invoked a "presumption against preemption" in areas that the states have traditionally occupied. This is because preemption cases implicate federalism and "respect for the constitutional role of the States as sovereign entities." *Geier*, 529 U.S. at 887. As famously stated in *Rice*, "we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. at 230.

In the recent *Mensing* case, however, the Court has seemed to stray from this baseline: the only discussion of the presumption was in the dissenting opinion by Justice Sotomayor. *Mensing*, 131 S. Ct. at 2586, 2591, 2593. Moreover, the *Mensing* plurality, per Justice Thomas, refuted the presumption by interpreting the Supremacy Clause such that "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Id.* at 2580. While this does not quite serve as a presumption *in favor of* preemption, *Mensing* illustrates that at least a plurality of the Court is pushing back against the traditional presumption against preemption.

Bartlett raises the same questions whether, and to what extent, courts should put a thumb on the scale in favor of state tort actions. The plaintiff-respondent, for one, leads her merits brief with the presumption as formulated in *Rice*. Two amicus briefs in her support advocate for even stronger versions of the presumption. The brief filed by Public Law Scholars states that "*Rice* requires not only a clear statement of Congress's intent in express preemption cases but also . . . a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." The Scholars buttress their use of the presumption against preemption through concerns of federalism: "preemption is the most critical piece of the Court's federalism doctrine in terms of preserving meaningful state autonomy." The amicus brief for the Council of State Governments likewise invokes the presumption by confronting the plurality in *Mensing*, and the view that the Supremacy Clause's *non obstante* provision suggests that courts should not struggle to reconcile state and federal laws. This brief acknowledges that the reasons for applying the presumption may be strongest in express preemption cases, but "the principle also has force in the implied preemption context"— so much so that the court should give the benefit of the doubt to state law when there is "any ambiguity about whether compliance with the laws of both sovereigns is impossible."

Defendant-petitioner Mutual and amici do not invoke the presumption. Mutual's merits brief addresses the issue in one instance: arguing (contrary to the First Circuit's interpretation) that *Levine* did not adopt "a general no-preemption rule." Mutual's reply brief, moreover, states that common law tort actions are not as deserving of the presumption as state statutory claims: "'tort law, applied by juries under a negligence or strict-liability standard, is *less* deserving of preservation' than state positive law."

Neither party explicitly invoked the presumption against preemption during oral argument before the Supreme Court.

B. The Scope of Implied Preemption

Following *Levine* and *Mensing*, the parties in *Bartlett* raise arguments for and against both impossibility and obstacle preemption.

1. Impossibility Preemption

On impossibility, the petitioner Mutual contends that "[t]his case is controlled by a straightforward application of [] *Mensing*." As *Mensing* explained, the Hatch-Waxman Act creates "an ongoing federal duty of sameness" for generic drug manufacturers such that they may not "deviat[e] in any material respect from their brand-name equivalents." According to Mutual, generic manufacturers thus may not unilaterally

change the composition (design) of their drugs without FDA approval, and therefore the Court should not draw any distinction between preemption of failure-to-warn claims (as in *Mensing*) and design-defect claims at stake here. It is thus impossible for Mutual to both abide by the requirements of the Hatch-Waxman Act, and simultaneously fulfill its state tort law duties.

Three amicus briefs pursue a separate line of argument to demonstrate that *Mensing* governs this case. They argue that the district court jury verdict, which followed comment *k* to section 402A of the Restatement (Second) of Torts, "shows the hybrid design-and-warning nature of New Hampshire design-defect law." Two briefs cite the recent *Kurns* decision for the proposition that failure-to-warn and design-defect claims are "inextricably intertwined." Thus, these amici argue that the label and design must be evaluated together, and because of the preemption rule from *Mensing*, generic pharmaceuticals should be given a "complete defense to design-defect liability."

The respondent counters that the jury verdict was not, in fact, premised upon the manufacturer's duty to warn. The brief's reasoning here relies on the somewhat unique procedural posture and litigating strategies in the case: Petitioner forfeited the comment *k* defense to section 402(A), with which it could have avoided liability for a defectively designed product if that product had come with an adequate warning. Because adequacy of the warning was never before the jury, the judgment could not have been based upon a failure-to-warn claim, and failure-to-warn and design-defect claims are distinct. And *Kurns*, respondent urges, does not apply because that case "addressed field preemption, not conflict preemption."

The parties in *Bartlett* also dispute the reasoning in the court below. The First Circuit recognized that Mutual cannot unilaterally change the design of its product, but reasoned that Mutual "certainly can choose not to make the drug at all." The main issue with the "stop-selling" argument is that the Eighth Circuit's decision in *Mensing*—reversed by the Supreme Court—relied on precisely the same idea: that a manufacturer could simply stop selling its product to avoid having to comply with state common law duties. The respondent addresses the "stop-selling" theory by downplaying the right of a manufacturer to sell in any particular market. The FDCA allows a manufacturer "not to make the drug at all," and "numerous manufacturers have voluntarily withdrawn their drugs from the market without violating any federal statute."

The stop-selling argument was raised at oral argument, when the Court attempted to draw a distinction between FDA approval granting *permission* to market a drug and an absolute *right* to market that drug. Petitioner noted, "when Federal law authorizes you to market a drug in interstate commerce by granting you the ANDA [abbreviated new drug application], that comes with it enormous protections." Justice Kagan, however, took issue with this statement: "[I]t's not enough for impossibility that State law penalizes what Federal law permits. And it seems as though what we have in the FDCA is a statute that authorizes, that says, you can sell this. But it doesn't say you must sell it, and it doesn't give you a right to sell it." Chief Justice Roberts merged the stop-selling argument with an argument that the strict liability/no fault standard is focused on compensation (as opposed to requiring a design change); he noted that preemption cases are concerned with states imposing on manufacturers a different duty than the federal government; "[t]hat's not what's going on in a strict liability regime . . . [W]e're saying if you do this, you're going to have to pay for the damage . . . you can just stop selling."

2. Obstacle Preemption

The obstacle preemption arguments advanced by the petitioner and amici take three basic forms: (1) tort liability under state common law undermines FDA's authority to determine that a drug is safe and effective; (2) state tort liability conflicts with the purposes of the Hatch-Waxman Act, which are to make generics quickly available and at a low cost; and (3) state jury verdicts subvert the FDA's authority to maintain the optimal federal balance of costs and benefits with respect to generic drugs.

First, petitioner and amici argue that the First Circuit's "stop-selling" theory undermines FDA's unique authority to determine the safety and marketability of a drug. The plaintiff's state tort suit "thwarts Congress's decision to vest FDA with authority to determine both when the scientific record is sufficient to permit the sale of drugs in interstate commerce and when that record requires that such products be withdrawn." This is essentially a "floor *and* ceiling" argument, as states should not be able to single-handedly take a product off the market when, in reality, FDA is the only body that has such power. One amicus brief also invokes *Buckman* for the proposition that just as state "fraud-on-the-agency" claims would interfere with the FDA's obligation to police fraud, state claims for defective design should be preempted because they would interfere with the FDA's obligation to determine the safety and effectiveness of drugs.

In response, the plaintiff-respondent argues that the FDCA creates only a floor for drug regulation. Bartlett's brief asserts that FDA has a "gatekeeping function" rather than exclusive authority to determine the safety and effectiveness of drugs. FDA is simply not equipped, according to amici, to "singlehandedly perform the Herculean job of monitoring the safety of every one of the 11,000 or so drugs on the market." These briefs emphasize the limited ability of FDA to police the pharmaceutical market; one brief notes that the agency is charged with monitoring the risks and benefits of drugs, "but not by itself." FDA's funding and resources, moreover, are simply not adequate for the task. FDA approval does not, therefore, represent "a singular moment of clarity about risks and benefits associated with a drug." Finally, amici argue that Congress has "repeatedly decline to preempt state law" with respect to prescription drugs, which is evidenced by the presence of an express preemption provision in the MDA, but the absence of such a provision in the FDCA.

Second, Mutual asserts that state tort claims interfere with the purpose and objectives of the Hatch-Waxman Act. Mutual uses the text and legislative history of the Act to state that the Act is "calibrated not only to *allow* interstate commercial sale of generic drugs that share a previously approved design, but to *ensure* that such drugs enter interstate commerce as often and early as possible." One amicus brief notes the cost savings to consumers as a result of generics ($1.07 trillion in the past decade); if the Court finds no preemption here, it would be "to the ultimate detriment of consumers and the nation's health care system." Moreover, the option of simply paying damages from state jury verdicts would still subvert the objectives of the Hatch-Waxman Act by raising prices.

Respondent refutes obstacle preemption by reframing the purpose of the Hatch-Waxman Act. This Act, according to respondent, was "designed to speed introduction of low-cost generic drugs to market," not immunize manufacturers from tort liability or "aim to maximize the sale of generic drugs in all circumstances at all costs." One brief, co-authored by one of the sponsors of the Hatch-Waxman Act, argues that the Act should not be seen as a departure from "75 years of history in which damages suits and federal drug approval have co-existed." About 80 percent of drug prescriptions in the country are filled with generics; so "if potential tort liability has posed an obstacle to achievement of the purposes of the Hatch-Waxman Amendments, it has gone unnoticed in the marketplace."

Third, the petitioner and amici contend that juries in state tort trials should not be allowed to second-guess FDA's expert determination. This is also a "floor and ceiling" argument, as the starting point in the parties' arguments is that FDA has struck a regulatory balance with respect to the "optimal" standards for evaluating generic drugs. The central concern is that by "allowing lay juries" to question or dismiss FDA's determination, state tort law "strikes at the heart of Congress's decision to vest such authority in FDA." Here, petitioner and amici borrow the line from *Riegel* that a jury "sees only the costs of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in Court."

To counter this point, the plaintiff-respondent and amici invoke the "parallel requirements" notion from express preemption cases to argue that state jury verdicts are consistent with federal regulation. This

tactic is based upon the Government's brief, which is careful to note that Congress does not occupy the field of drug regulation, but allows failure-to-warn claims against brand-name manufacturers as well as state law suits that "parallel" the FDCA's misbranding provision. Citing *Bates* and *Lohr*, the Government contends that "pure" design-defect claims, which would not take into account a drug's warning, would not be pre-empted if "new and scientifically significant evidence" rendered the product "misbranded" under federal law. The respondent latches onto the Government's misbranding theory of liability by noting that the jury had access to an unpublished Pharmacia Report that exposed the risks of Sulindac, while FDA did not have this information. In response, the petitioner contends that the government's misbranding tort is a contradiction because it takes into account a drug's warning, and would therefore be preempted by *Mensing*.

The amicus brief for the Public Law Scholars adds another argument in support of the respondent; it advocates for narrowing the scope of implied obstacle preemption. The starting point is *Rice*, which "speaks to both the severity of the conflict and the scope of relevant federal purposes." The Court should thus be required to find "an irreconcilable conflict;" a "hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." Therefore, the Court should take a narrower view of FDA's approval, such that it is only an "initial safety review" rather than an elimination of long-standing state causes of action.

C. Deference to Federal Agencies

A recurring issue in federal preemption cases is to what degree courts should defer to various types of agency determinations. Agency input may come in several forms, such as agency regulations, preambles to rules, or—as in *Bartlett*—litigating positions evidenced by amicus briefs and oral argument. In light of *Chevron*, *Skidmore*, *Auer*, and *Mead*, how much deference should courts afford agency statements on the preemptive effect of Congressional statutes and agency regulations? *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Auer v. Robbins*, 519 U.S. 542 (1997); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Bartlett comes directly in the wake of *Levine* and *Mensing*, both of which involved some level of deference to agency determinations. In *Levine*, the Court refused to afford deference to the FDA's 2006 Preamble to a labeling rule that asserted, "FDA approval under the [FDCA] . . . preempts conflicting or contrary State law." Citing *Mead* and *Skidmore*, the Court held that "FDA's 2006 preamble does not merit deference." 555 U.S. at 577. *Mensing* did not address this holding, but instead deferred to the agency's interpretation of its CBE regulation, namely that the CBE process was not available to generic drug manufacturers to unilaterally change their labels. 131 S. Ct. at 2575.

Turning to the parties' arguments in *Bartlett*, the petitioner Mutual nudges the Court toward *Chevron* deference by making reference to a "laundry list of cases where federal courts have refused under *Chevron* to second-guess FDA's expert decisions governing the approval of drugs for sale in interstate commerce." There is no discussion of the *Chevron* test (or *Skidmore*); instead, Mutual simply offers a short list of cases—none of them involving preemption— where the Court refused to second-guess an agency determination. Mutual also distinguishes the anti-preemption holding in *Levine* by asserting that its "core holding was merely that FDA's *regulatory preamble* did not preempt state law failure-to-warn claims; as the Court explained, that preamble was not 'a specific agency regulation bearing the force of law' and did 'not merit deference.'"

The plaintiff-respondent, on the other hand, jumps on the opportunity presented by *Levine* and argues in her brief that the Government's position on preemption merits no deference. With respect to *Chevron*, the argument for finding conflict preemption is "unpersuasive because FDA has never embod[ied] [that] determination[] in lawful specific regulations." The plaintiff-respondent also confronts *Skidmore* by noting

that FDA's positions on preemption of actions of drug manufacturers "has been schizophrenic at best." The Court, according to Bartlett, should not defer to the Government's position because it represents merely a "litigating position without providing the notice or opportunity for comment."

There was no explicit discussion of agency deference at oral argument, but the plaintiff-respondent twice urged the Court to look for notice-and-comment rulemaking before finding preemption of state law tort claims. In the first instance, Justice Alito questioned the respondent about whether the drug should never have been approved given the risks presented by Sulindac. Answering in the negative, the respondent emphasized that FDA has power to withdraw a drug from the market, but its decision not to do so in this case should not be given weight because "in response to the 2005 citizen petition and in a later memorandum, [FDA] never mentions [S]ulindac. So if you are to take any kind of regulatory preemption here, it surely has to be on the basis of a considered action that FDA takes after notice and comment rulemaking."

Second, the respondent addressed Justice Breyer's concerns about a jury making the determination about which drugs may be prescribed when, for example, a chemotherapy drug may have some risks, but also has significant benefits. Bartlett's lawyer argued:

> In the hard case [where there is a chemotherapy drug being considered by a jury], Justice Breyer, there is a mechanism for preemption. The FDA has to act. It has to act pursuant to notice and comment rulemaking. It has to identify which drugs it thinks would not be subject to these kinds of strict liability claims. But it hasn't done that here.
>
> All it's done is to say, we happen to have some evidence in our files, ergo preemption. Well, preemption doesn't work like that under the Supremacy Clause.

III. Preemption Analysis in State and Federal Courts

In recent years, *Mensing* and *Levine* have largely defined the landscape for preemption of pharmaceutical products liability. The Supreme Court's rulings in these cases have generally be applied uniformly, but with slight deviations along the three of the issues noted above: deference to federal agencies, the presumption against preemption, and the scope of implied preemption. This section begins with the deference questions because of my earlier work on agency influence in state and federal preemption cases.

A. Deference to Federal Agencies

Overall, federal courts have been more likely than state courts to consider FDA's preemption position in pharmaceuticals cases. The agency was more involved through amicus briefs in federal cases, and more likely in federal court to garner some deference for its 2006 Preamble. The Preamble has been an effective foil for state and federal attitudes toward agency deference, as some state courts showed a distinct hostility toward FDA's pro-preemption statement. In *Doherty v. Merck & Co., Inc.*, No. ATL-L-638-05-MT (N.J. Super. Ct. June 9, 2006), the New Jersey Superior Court had the following perspective:

> The preamble, as I see it, is a political statement by the FDA. The primary purpose of it is to criticize state courts and to set for that FDA's position that—not to criticize state courts so much as to set forth the FDA's position that they believe there should be federal preemption of all tort actions. . . . What the preamble is saying is the FDA should be the final word.

Id.

Contrast *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006), where the Eastern District of Pennsylvania was the first federal court to consider the effect of the 2006 Preamble. The court solicited an amicus brief from the agency, and acknowledged, "the FDA's view is critical to this Court's analysis because

Supreme Court precedent dictates that an agency's interpretation of the statute and regulations it administers is entitled to deference." *Id.* at 525. Concluding that the court must "afford significant deference" to FDA, the opinion determined that "based on deference alone, this Court would deem any state failure-to-warn claim impliedly preempted." *Id.* at 529.

In more recent federal and state cases, the 2006 Preamble has still been the center of attention for courts evaluating pharmaceutical preemption cases. The three state cases since 2007 that engaged in an analysis of deference explicitly declined to afford any weight to the Preamble. *See, e.g.*, *McDarby v. Merck & Co., Inc.*, 949 A.2d 223, 253-55 (N.J. 2008). Federal district courts, however, have ranged from to affording no deference to giving "significant deference" to the Preamble. *Compare Knipe v. SmithKline Beecham*, 583 F. Supp.2d 553, 572-76 (E.D. Pa. 2008), *with Sykes v. Glaxo-SmithKline*, 484 F.Supp.2d 289, 317 (E.D. Pa. 2007). On the lower end of this spectrum, courts have reasoned that the Preamble is advisory only, and therefore entitled to *Skidmore* deference at best. *See Kellogg v. Wyeth*, 612 F. Supp.2d 421, 433 (D. Vt. 2008). Two courts—in decisions prior to *Levine*—did give some weight to the Preamble. An Oklahoma district court, for example, suggested that the *Skidmore* factors—"plainly erroneous or inconsistent with the regulation," "thoroughness evident in [the agency's] consideration," and "the validity of its reasoning"—weighed in favor of affording *Skidmore* deference. *See, e.g.*, *Dobbs v. Wyeth Pharms.*, 530 F. Supp.2d 1275, 1289 (W.D. Okla. 2008).

B. The Presumption Against Preemption

The presumption against preemption has also featured in both federal and state cases. Of the approximately 100 pharmaceutical preemption cases in the past five years, roughly the same proportion of courts at the federal and state levels invoke this presumption: 25 percent for the state courts, and 27 percent for federal courts. At the state level, three state cases explicitly invoked the presumption as formulated in *Rice*. *See, e.g.*, *McKenney v. Purepac Pharm. Co.*, 83 Cal. Rptr.3d 810, 816 (2009). Federal courts have likewise used the threshold of a "clear and manifest purpose of Congress." *See, e.g.*, *In re Budeprion XL Marketing. & Sales Litig.*, 2010 WL 2135625 at *6 (E.D. Pa. May 26, 2010).

The difference between state and federal cases, however, is that two federal courts have cabined or refused to apply the presumption. In *Colacicco*, the Third Circuit "recognize[d] the applicability of the presumption against preemption, but note[d] the tension between such a presumption, which emphasizes the 'clear and manifest purpose of Congress' . . . and implied conflict preemption, which analyzes preemption in the absence of any explicit intent." 521 F.3d 253, 265 (2008). After discussing the application of presumption in several Supreme Court cases, the court held that it should apply, but with less force, in cases involving implied conflict preemption as opposed to field preemption. *Id.*

Going further than the Third Circuit, one federal court has refused to apply the presumption. The Southern District of Florida abandoned the presumption in cases involving implied preemption in *Masterson v. Apotex Corp.*, 2008 WL 3262690 (S.D. Fla. Aug. 7, 2008), and *Valerio ex rel. Valerio v. SmithKline Beecham Corp.*, 2008 WL 3286976 (S.D. Fla. Aug. 7, 2008), which were decided on the same day and used the same language:

> The Apotex Defendants assert, based upon this recent case law, as well as *Geier*, that in conflict preemption cases in an area of the law with a long-standing federal presence, there is no presumption against preemption. Plaintiffs argue that states have long legislated in the area of public safety. The *Colacicco* opinion appears to side with the Defendants' view as it stated that "[defendant's] argument that the presumption against preemption is inapplicable in the context of implied conflict preemption has more force."

> The Court hereby adopts this analysis as well, with the conclusion that the presumption against preemption is inapplicable in the context of implied conflict preemption.

Masterson, 2008 WL 3262690 at *2-3; *Valerio*, 2008 WL 3286976 at *5.

Both of these cases involved failure-to-warn claims against generic manufacturers. No state cases have refused to apply the presumption against preemption in this manner.

C. The Scope of Implied Preemption

Courts have applied *Mensing*'s bar on state law failure-to-warn claims against generic manufacturers nearly universally. Yet, a Nevada state court was unwilling to preempt the plaintiff's claim that the generic should have sent a "Dear Doctor letter" to health care professionals that is "consistent with and not contrary to" the drug's labeling. *Keck v. Endoscopy Ctr. of S. Nev., LLC*, 2011 WL 3921690 at *1 (Nev. Dist. Ct. Aug. 19, 2011).

Federal courts, on the other hand, have in some cases broadly applied *Mensing* to preclude several different types of claims against generic manufacturers. In *Demahy v. Schwartz Pharma, Inc.*, 702 F.3d 177 (5th Cir. 2012), for example, the Fifth Circuit held that *Mensing* foreclosed the plaintiff's failure-to-warn *and* design-defect claims. *Id.* at 186-87. But the Sixth Circuit, in *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578 (6th Cir. 2013), recently allowed a "failure-to-update" claim where the generic defendant failed to match its brand-name counterpart after FDA approved a new label for the brand-name manufacturer. The court refused to find impossibility or obstacle preemption, holding that "state laws that provide damages for inadequate warnings in violation of the federal duty of sameness do not conflict with federal drug policy, with respect to purposes-and-objectives preemption." *Id.* at 586. The court dismissed the defendant's argument that *Buckman* should impliedly preempt this claim by observing that the state action "is not even *premised* on violation of federal law, but rather on an independent state duty. . . . The federal duty of sameness is not a critical element . . . Her suit instead relies upon the adequacy of the warnings and the causation of her injuries." *Id.* at 586-87.

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Evolving Privacy Standards in the Age of New Surveillance Technologies

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Evolving Privacy Standards in the Age of New Surveillance Technologies

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Evolving Privacy Standards in the Age of New Surveillance Technologies

This outline is a complement to Professor Jane Kirtley's outline on privacy and technology issues. The issue of privacy in United States jurisprudence is multi-faceted, in part because while there are constitutional, statutory, and common law elements of privacy law, but there is not an overarching privacy legal framework in the United States. The complications in analyzing privacy interests are compounded by increasing technological capacity and certain elements of societal expectations.

This outline will address the constitutional implications of geo-location devices that track exact whereabouts, the use of personal cameras for videotaping police activity in public, and the use of civil discovery to reveal anonymous Internet users.

I. Constitutional Implications of Geo-Location Devices That Track Exact Whereabouts

The seminal case in which the U.S. Supreme Court upheld a person's expectation of privacy against the government's pervasive use of GPS-location devices is *United States v. Jones*, 132 S. Ct. 945 (2012).

The Facts. In *Jones*, the government agents installed, without a valid warrant, a GPS tracking device on the undercarriage of the Jeep belonging to Jones's wife while it was parked in a public parking lot. The government used the device over the next 28 days to track the vehicle's movements. By means of signals from multiple satellites, the device established the vehicle's location within 50-100 feet, and communicated that location by cellular phone to a government computer; relaying more than 2,000 pages of data over the 4-week period.

The district court largely denied the motion to suppress the data obtained through the GPS device on the ground that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." After a jury trial, where the government introduced the GPS-derived locational data, Jones was found guilty with conspiracy to distribute and possess with intent to distribute cocaine, and subsequently sentenced to life imprisonment.

The District of Columbia Court of Appeals reversed the conviction because of admission of evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. The U.S. Supreme Court granted certiorari and affirmed the appellate decision.

The Majority Opinion. The Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" for purposes of the Fourth Amendment's prohibition against unreasonable searches and seizures. 132 S. Ct. at 949. The Supreme Court explained that the government committed a common law tort of trespass by installing the GPS device because it "physically occupied private property for the purpose of obtaining information." *Id*.

Concurrences. Justice Sotomayor and Justice Alito filed concurring opinions, pointing out that the majority's application of the common law trespassory test would not resolve future cases in which the same monitoring information may be obtained without invading a person's physical property, for instance by means of GPS-enabled smartphones. In these future cases, courts would need to apply the reasonable-expectation-of-privacy test, while the societal norms are changing.

Justice Sotomayor warned that, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious,

and sexual associations. … The Government can store such records and efficiently mine them for information years into the future. … And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices…" The concurring Justices thus emphasized that the new monitoring technologies modify standards for "a reasonable societal expectation of privacy," which should be taken into consideration in future cases.

Civil Cases Citing *Jones*. The majority holding in *Jones*, as well as the two concurring opinions, get cited not only in criminal cases involving new surveillance technologies, but also in a number of civil cases. Examples are below:

Goodman v. HTC America, Inc., No. C11-1793MJP, 2012 WL 2412070 (W.D. Wash. June 26, 2012) – a district court upheld, against a motion to dismiss challenge, plaintiffs' claims for violation of the California Constitution's right to privacy, unfair trade practices, and unjust enrichment, where plaintiffs claimed that the weather applications on certain HTC smartphones transformed the phones into surreptitious tracking devices. Specifically, plaintiffs alleged that instead of transmitting coarse data about a person's location sufficient to provide accurate local weather information, defendants designed the AccuWeather application on the HRC EVO 3D and EVO 4G phones to transmit fine location data, accurate to identify a customer's location within a few feet. Plaintiffs alleged that this allowed defendants to track their movements, including where they live, work, dine, and shop, and to use this information to analyze the plaintiffs' behavior, build profiles about them, and sell this information to third parties.

Naperville Smart Meter Awareness v. City of Naperville, No. 11 C 9299, 2013 WL 1196580 (N.D. Ill. March 22, 2013) – a district court granted plaintiffs leave to amend their claims for violations of their due process rights under the Fourteenth Amendment, unreasonable search under the Fourth Amendment, and unlawful taking under the Fifth Amendment, where the plaintiffs claimed that they have been aggrieved by the mandatory installation of smart meters in their homes. A smart meter is a device that has the ability to collect aggregate, as well as detailed, measurements of a customer's electrical power usage and to communicate those measurements via wireless radio frequency to the electric utility provider. Among other things, plaintiffs alleged that the defendant city can ascertain many personal details of an individual's private life by means of smart meters.

The district court dismissed the plaintiff's claim for violation of privacy without prejudice, ruling that "plaintiffs have no reasonable expectation of privacy in the aggregate measurements of their electricity usage because they have consented to such aggregate measurements and they have not alleged that defendant is currently collecting more detailed information about their electricity usage beyond the aggregate measurements without their consent." Consequently, the district court left open the possibility that the plaintiffs may state a legally sufficient claim for privacy violations if they can show that the city used smart meters to collect "more detailed information" about the residents' electricity usage.

Montana State Fund v. Simms, 364 Mont. 14, 270 P.3d 64 (Mont. 2012) – the Montana Supreme Court affirmed an order granting the plaintiff Montana State Fund access to confidential criminal justice records showing a workers' compensation claimant engaging in physical activities in public, for purposes of reevaluation of his workers compensation award. The Court ruled that the claimant had no reasonable expectation of privacy in his movements in public because his actions "documented in the videos took place in public locations, and [the claimant] did not in any way attempt to conceal his identity or act so as to assert a private interest in his actions."

At the same time, one justice, filing a special concurrence, cited the Supreme Court's decision in *Jones* to state that he could not wholeheartedly embrace the statement that a person has no privacy expecta-

tion for what he or she does in plain view in public. The justice stated: "while a person cannot expect to preserve the same degree of privacy for himself or his affairs in public as he could expect at home, Montanans are not prepared to accept as reasonable State Fund's proposition that the government can track and record our every move throughout the day."

Future Questions. In the future, courts may have to grapple with the following unresolved questions:

- Does the aggregation of detailed information about an individual, which is otherwise public, create privacy concerns? What judicial test should apply in such cases?
- Is the reasonable expectation of privacy still the appropriate standard on which to base both the government standard and the private sector standard of privacy? Consistent with Justice Sotomayor's inquiry, will expectations diminish as technology increases, thus eviscerating any objective expectation?
- Is the delineation of home and its environs the right standard on which to base the concept of "being left alone"? If so, does publicly disclosing details about our home and its environs via social media or other vehicles eviscerate this distinction?

II. Using Personal Digital Cameras to Videotape Police in Public

A number of recent "privacy" cases involved instances when members of the public use their personal video cameras or cell phones to record police officers during the performance of their duties in public, such as during traffic stops, arrests, and other law enforcement activities. These cases usually are filed in state courts on charges of violation of state wiretapping/eavesdropping statutes, harassment, disturbance of the peace, and a variety of traffic/municipal ordinance violations. Additionally, individuals who get arrested for videotaping police activities may bring their lawsuits in state or federal courts, claiming violation of their rights under state and federal civil rights statues, plus violation of their First and Fourth Amendment rights under the U.S. Constitution.

In these instances, courts frequently are called to determine whether the actions of police officers are shielded from civil liability by the doctrine of qualified immunity. This issue turns on whether or not *the law* establishing the public's right to videotape such police activities, was "clearly established" at the time of videotaping.

Representative cases:

Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010) – the Third Circuit affirmed a district court order finding that police officers were protected by the doctrine of qualified immunity against charges of First Amendment violation where they arrested a person who video-taped police during a traffic stop. The Third Circuit ruled that the First Amendment right to videotape police during traffic stops was not clearly established in the Third Circuit at the time because traffic stops presented uniquely dangerous situations in which police required complete control. At the same time, the Third Circuit reversed the entry of summary judgment in favor of police on the plaintiff's Fourth Amendment claim (lack of probable cause for the arrest) on the ground that genuine issues of material fact remained as to whether it was reasonable for a police officer to believe that a non-consensual video-recording of a traffic stop amounted to a violation of the Pennsylvania wiretapping statute, where police had no expectation of privacy in performing its duties during the stop.

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) – the First Circuit affirmed a district court order denying police officers' motion to dismiss a civil rights complaint against them on the qualified immunity grounds. The case involved a passerby using his cell phone to video-record police performing an arrest at a public park

in Boston. The First Circuit ruled that the First Amendment right to video-record police officers as they carry out their public duties, in a public place, was clearly established in law. The First Circuit stressed that this case did not involve a situation where a person recording police actions interfered with the performance of the duties by the police; it was a peaceful recording of an arrest. The Court, however, noted that, in other circumstances, video-recording of police may be subject to reasonable time, place, and manner restrictions.

American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012) – this case involved a pre-enforcement action in which the ACLU sought a declaratory judgment and an injunction barring state police from enforcing Illinois eavesdropping statute against volunteers participating in the "police accountability program," *i.e.*, a plan to openly make audio-visual recordings of police officers performing their duties in public places. The Seventh Circuit reversed a district court order dismissing the ACLU's complaint and ordered the entry of a preliminary injunction on the ground that enforcement of the state eavesdropping statute under the circumstances would violate the First Amendment right to gather information about police activity. The Court ruled that the police officers' interest in "conversational privacy" was not implicated when police officers were performing their duties in public places and engaging in audible public communications. Further, the Seventh Circuit ruled that the statute did not constitute a reasonable time, place, and manner restriction because it restricted far more speech than necessary. Notably, Judge Posner wrote a dissenting opinion, stating that video-recording of police conversations would violate the tort of privacy, as where police interview witnesses or suspects, and thus would have a potential to impede police officers in the performance of their duties.

Ramos v. Flowers, 429 N.J. Super. 13, 56 A.3d 869 (N.J. App. Div. 2012) – in this case, police arrested a documentary filmmaker who was video-recording gang activities for a documentary about emergence of gangs in a New Jersey town. The New Jersey appellate division reversed a lower court order dismissing the filmmaker's civil rights complaint and also reversed a summary judgment order in police officers' favor. The Court ruled that the filmmaker's activities were protected by the free speech guarantees of the state and federal constitutions; the documentary was subject of public interest and was a form of investigative journalism. The Court also ruled that a reasonable police officer could not have believed that he had an absolute right to preclude the filmmaker from videotaping gang activities, thus barring a defense of qualified immunity.

Future Questions. In the future, courts may have to grapple with the questions, such as:

- whether a person has a First Amendment right to video- and audio-record police activities during his or her own arrest;
- what are the limitations of the First Amendment right to record police activities when such recording arguably interferes with the police performing its law enforcement functions;
- whether members of public have the First Amendment right to record police officers interviewing witnesses to a crime or suspects.

III. Use of Civil Discovery Rules to Obtain Identities of Anonymous Online Bloggers

In recent years, many state courts have confronted requests of plaintiffs in defamation actions to order non-party news organizations or Internet Service Providers to reveal identities of their online users who post anonymous commentary on their websites. These cases involve a careful balancing of the First Amendment interests of online bloggers in maintaining their anonymity, for fear that disclosure of their identities and exposure to lawsuits would chill public discourse on the Internet, with the interest of those aggrieved by defamatory statements to seek legal redress in courts. Different states adopted different legal

standards in determining when plaintiffs should be able to discover identity of online bloggers, and there has yet to be an opinion from the U.S. Supreme Court to settle this issue.

There are a number of procedural ways by which these disputes find their way to state courts. In some states, like Illinois, plaintiffs are able to seek pre-suit discovery of a defendant's identity. In other states, the aggrieved parties file defamation lawsuits against anonymous entities ("Does") and then seek non-party discovery from the news organizations or other entities that hosted the online discussion boards. In some cases, these discovery disputes may come to appellate courts on a writ of mandamus from trial court orders directing the disclosure of bloggers' identity.

The different procedural posture of the actions, as well as varying degrees of protections that states afford to anonymous speech, result in a range of legal approaches. As one court characterized, *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. Ct. App. 2007):

> The cases that have decided this issue range from placing an extremely light burden (indeed, virtually no burden at all) on the plaintiff, to requiring the plaintiff to tender proof of its allegations that would survive a summary judgment, or even more stringent requirements. … Thus, the question becomes the degree of actual proof that must be provided before the balance tips in favor of piercing the constitutional shield and disclosing the identity of the anonymous blogger.

IV. Dendrite-Cahill Tests

The New Jersey and Delaware appellate courts have developed two tests that many states apply to this day. In *Dendrite Int'l v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (2001), anonymous posters made defamatory comments about the financial state of Dendrite International on a Yahoo! message board following the release of its quarterly report. Dendrite sought an order to show cause why it should not be granted leave to conduct limited discovery to determine the true identities of the anonymous posters. The trial court allowed limited discovery to determine identities of two of the four posters. Dendrite appealed the order with respect to one of the posters for whom discovery was denied.

In making its decision, a New Jersey appellate court announced a four-part test that balanced the defendant's First Amendment rights with the plaintiff's reputation rights. In order to ascertain the identity of an anonymous online poster, the plaintiff must: (1) notify the anonymous poster via the website on which the comment was made that he is the subject of a subpoena or application for an order of disclosure and allow him time to oppose the application or subpoena; (2) identify the exact statements he believes to be defamatory; and (3) produce prima facie evidence to support every element of their cause of action before disclosure of the identity. If the plaintiff can satisfy all three of those factors, then the trial court must (4) "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

In *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005), the Delaware Supreme Court adopted, as modified, the *Dendrite* standard to protect political speech. In *Cahill*, a city council member sued four defendants who anonymously posted allegedly defamatory comments on a blog. In an effort to serve process on one of the bloggers, Cahill sought an order from a trial court to require the owner of the IP address to reveal the blogger's identity, and the anonymous blogger filed an emergency motion for a protective order. The Delaware Supreme Court reversed a trial court order compelling disclosure. In making its ruling, the court adopted a modified *Dendrite* standard consisting only of *Dendrite* requirements one and three: the plaintiff must make reasonable efforts to notify the defendant and must present enough evidence to withstand a summary judg-

ment motion. The Delaware court concluded that elements two and four were unnecessary because they were subsumed in that state's summary judgment standards.

The Ninth Circuit Court of Appeals, the only federal circuit court to consider this issue to-date, held that the trial court's adoption and application of the *Dendrite* or *Cahill* standards was not clearly erroneous. In *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), a marketing corporation sued its provider of business training materials for allegedly orchestrating an Internet smear campaign via anonymous postings disparaging the corporation. Applying the *Cahill* summary judgment standard, the trial court ordered disclosure of identities of three bloggers, and denied the request as to the remaining two bloggers. Subsequently, both parties filed writs of mandamus with the Ninth Circuit, challenging those aspects of the trial court order that were adverse to them.

The Ninth Circuit denied both parties' writs of mandamus, explaining that they failed to demonstrate an exceptional cause for mandamus relief. The Ninth Circuit stated: "This limit on our mandamus power is particularly salient in the discovery context because the courts of appeals cannot afford to become involved with the daily details of discovery." 661 F.3d at 1173. The Ninth Circuit noted that the *Cahill* summary judgment test applied by the trial court was "the strictest test" designed to protect the anonymous bloggers' free speech rights; and the fact that the trial court ordered disclosure of some bloggers' identity under this strict test shows that there was no clear error. At the same time, the Ninth Circuit cautioned that the heightened *Cahill* standard, developed in the context of political speech, may not apply in all contexts: "we suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes." *Id*. at 1177. Thus, the Ninth Circuit left open the possibility that a less stringent showing may be required in cases involving commercial speech or speech on purely private matters, not involving matters of public interest.

V. States Adopting the *Dendrite-Cahill* Approach

Indiana

For instance, in a recent seminal Indiana decision, *In re Indiana Newspapers, Inc*., 963 N.E.2d 534 (Ind. Ct. App. 2012), a former president of a civil organization brought a defamation action against an anonymous poster to an online news article, and filed a motion to compel a newspaper (The Indianapolis Star), a non-party, to disclose the identity of the poster. Without holding a hearing, a trial court issued an order compelling discovery. The Indianapolis Star appealed the trial court order based on the free speech guarantees of the federal and Indiana constitutions, and the Indiana Shield Law (that grants news organizations the privilege not to disclose in a legal proceeding the source of information obtained by them in their professional capacity).

The Indiana Court of Appeals ruled that the state Shield Law did not apply because the anonymous poster commented on the already-published news article, without providing any information in the course of the newsgathering process. Thus, the online poster was not "the source of any information procured or obtained in the course" of newsgathering. I.C. §34-46-4-2.

The Indiana court adopted the modified *Dendrite* test. The court explained that the *Dendrite* test drew "the most appropriate balance between protecting anonymous speech and preventing defamatory speech" by requiring a summary judgment standard and a balancing of interests. At the same time, the court held that a pure *Dendrite* test "is not workable in Indiana" because any proof of actual malice "would be impossible without identifying" the online blogger. Hence, the Indiana court modified the *Dendrite* standard by requiring plaintiffs to produce prima facie evidence to support only those elements of their cause of action

that are not dependent on the blogger's identity. In other words, *prima facie* evidence of actual malice is not required. The court remanded the action to the trial court with instructions to apply this modified version of the *Dendrite* test to the facts of the case to determine if the plaintiff satisfied the requirements for obtaining the blogger's identity.

Texas

In *In re Does 1-10*, 242 S.W.3d 805, 821 (Tex. Ct. App. 2007), a hospital brought a defamation action against ten anonymous defendants, alleging that they defamed the hospital and released confidential patient information on an Internet site. On a hospital's motion, a trial court ordered a third-party ISP to reveal the bloggers' identity to the hospital. The anonymous bloggers then filed a writ of mandamus in the appellate court asking for an order directing the trial court to withdraw its discovery order. The appellate court conditionally granted the writ of mandamus.

The appellate court ruled that the trial court erred as a matter of law by ordering discovery of the bloggers' identities under the federal Cable Communications Policy Act, 47 U.S.C. §551, which could not form an independent basis for ordering an ISP to reveal the identities of its users. Instead, the trial court should have analyzed the hospital's request within the framework of civil discovery rules. The Texas appellate court also adopted the *Cahill* summary judgment standard in determining when the online users' interest in anonymity should yield to the interest of plaintiffs in obtaining redress for allegedly defamatory statements. The appellate court remanded the matter to the trial court, instructing the trial court as follows: "the trial court should view the matter as if Doe 1 had filed a traditional motion for summary judgment establishing its defense by alleging that his identity was protected from disclosure by virtue of the First Amendment right of free speech. To obtain the requested discovery, the Hospital would then be required to produce evidence which would be sufficient to preclude the granting of a summary judgment."

New Jersey

See also Too Much Media, LLC v. Hale, 206 N.J. 209, 20 A.3d 364 (N.J. 2011) (affirming an order that denied a website operator's motion for a protective order to prevent disclosure of the identity of her confidential source, where the state Shield Law did not apply because online message boards were not similar to the traditional news outlets).

VI. Other States Apply Local Standards

Other states have rejected the *Dendrite-Cahill* tests in lieu of local rules of civil procedure.

Michigan

Thomas M. Cooley Law School v. Doe 1, 2013 WL 1363885 (Mich. App. Apr. 4, 2013) – Doe 1 created a website, owned by a California company, criticizing the Cooley law school and claiming, among other things that, the Cooley law school was 'without a doubt one of the three worst law schools in the United States." The law school petitioned a California state court to subpoena the website company for the identity of the anonymous blogger; the California state court issued a subpoena ordering the website company to produce the user's account information. Doe 1 then filed an action in a Michigan state court requesting that it quash the outstanding subpoena to the website company or, alternatively, issue a protective order limiting or restricting the law school's use or disclosure of the user's identifying information. The Michigan trial court denied the user's motion.

On appeal, a Michigan appellate court reversed the trial court order and remanded for reconsideration whether, under Michigan civil procedure rules, a protective order should issue. The appellate court held that the trial court erroneously adopted the foreign jurisdiction standards of *Dendrite* and *Cahill* because

"Michigan rules of civil procedure adequately protect Doe 1's constitutional interests." The appellate court explained that, as in *Dendrite* and *Cahill*, a Michigan plaintiff seeking discovery of the blogger's identity based on allegedly defamatory statements must allege the exact defamatory statements; has to survive an actual motion for summary disposition on its claims under MCR 2/116(C)(8), and a trial court may consider the weight of the defendant's First Amendment rights against the plaintiff's discovery request when determining whether to issue a protective order.

Illinois

In Illinois, people aggrieved by anonymous online commentary could seek to obtain the identity of an offending online blogger prior to filing their defamation lawsuit, by means of filing a petition for discovery under Illinois Supreme Court Rule 224, "Discovery Before Suit To Identify Responsible Persons Or Entities." In actions for discovery under Rule 224, the Illinois Appellate Court rejected the application of the heightened *Dendrite-Cahill* test and instead only required the plaintiffs seeking the identity of anonymous online users to plead sufficient facts to survive a motion to dismiss.

In *Maxon v. Ottawa Publishing Co.*, 402 Ill. App.3d 704 (3d Dist. 2010), the appellate court reversed a trial court order dismissing a petition for discovery of an Internet poster's identity, where the poster, in response to a news story, claimed that a local business bribed the city commissioners so that they pass an ordinance allowing the operation of bed-and-breakfasts in the city. The appellate court ruled that the trial court erroneously applied the *Dendrite-Cahill* test and in particular its requirement that a petitioner has to meet a summary judgment standard to receive discovery of a poster's identity. Instead, the appellate court ruled that when a Rule 224 petition concerns a cause of action for defamation, a petitioner has to show that his or her allegations are sufficient to withstand a section 2-615 motion to dismiss, testing the legal sufficiency of the complaint. The court explained: "Once the court has determined that the prima facie case has been met by the petitioner, he has made out a valid claim for damages and has a right to expect a remedy."

The *Maxon* holding has been applied in two subsequent opinions of the Illinois appellate court involving Rule 224 petitions for discovery of Internet bloggers' identity. In both cases, the appellate court reversed trial court orders granting Rule 224 petitions on the ground that the allegedly defamatory online comments were nothing more than expressions of opinion and thus non-actionable. In *Stone v. Paddock Publications, Inc.*, 2011 IL App. (1st) 093386, 961 N.E.2d 380 (1st Dist. 2011), a son of a female political candidate exchanged online comments with other bloggers on a local newspapers' website. One of the other bloggers made comments insinuating that the son engaged in promiscuous behavior. The trial court granted the mother's Rule 224 petition for discovery of the online blogger's identity ruling that the online statements were defamatory per se.

The appellate court reversed. The appellate court held that then mother's petition was legally insufficient to withstand a motion to dismiss because the allegedly defamatory statements were expressions of non-actionable opinion. The appellate court explained that the summary judgment standard adopted by Dendrite, Cahill, and other courts "cannot be harmonized with the specific procedural posture of a Rule 224 petition," which prohibits seeking any discovery pertaining to the merits of the petitioner's cause of action. The appellate court ruled that, nonetheless, the motion to dismiss standard adequately protected the rights of the anonymous online commentators because, to survive a motion to dismiss in Illinois, "a petitioner must allege specific facts supporting *each element of his cause of action* and the trial court will not admit conclusory allegations and conclusions of law that are not supported by specific facts." (Court's emphasis).

Likewise, in *Brompton Building, LLC v. Yelp!, Inc.,* 2013 WL 416185 (1st Dist. Jan. 31, 2013), the appellate court reversed the trial court order granting discovery of an Internet blogger's identity where the blog-

ger's negative comments about the management of her apartment building were "in the nature of opinions, not statements of fact."

Future Questions. In determining whether to order discovery of identity of online bloggers, courts in future cases would have to confront the following issues:

- Procedural posture: pre-suit discovery, non-party subpoenas, writs of mandamus
- whether a state Shield Law applies
- whether the online speech at issue is political, commercial, concerns matters of public interest or purely private interest
- whether a particular jurisdiction is a notice-pleading or fact-pleading jurisdiction, and what type of evidence, if any, a plaintiff would need to marshal in support of his or her defamation claims before discovery of identity is ordered;
- whether any showing of actual malice is required in cases involving political speech or speech on matters of public concern before discovery of identity is ordered

VII. Conclusion

The issues associated with privacy and technology are complicated combinations of Constitutional, statutory, and common law analysis coupled with increased technological capabilities and changing societal expectations. With that said, the concept of privacy (and particularly how it intersects with government access to information) will remain an important issue for courts to address in the 21st century.

Slippery Slopes and Uncharted Waters:

Privacy Torts and Access Issues in the Digital Age

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Slippery Slopes and Uncharted Waters: *Privacy Torts and Access Issues in the Digital Age*

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Slippery Slopes and Uncharted Waters:
Privacy Torts and Access Issues in the Digital Age

Although courts in the United States have recognized a common law right to privacy for more than 100 years, the exact parameters of what constitutes a legitimate expectation of privacy remain ill-defined. The advent of new technology raises new threats to the security of personal data. Hasty reactions to high profile privacy "breaches" can undermine freedom of the press and the public's right to know.

What follows is a necessarily selective review of some of the current issues in privacy law in the digital age. Representative cases from multiple jurisdictions describe recent interpretations of the torts of intrusion, publication of private facts, false light, and appropriation. (Intrusion will also be addressed in Mary Ellen Callahan's companion outline.) Legislative "solutions" to concerns arising from access to and dissemination of individuals' data, ranging from social media passwords to gun permits to "revenge porn," illustrate the difficulty of striking the appropriate balance between competing rights.

I. A Privacy Primer

A. *The Right to Privacy* was the seminal *Harvard Law Review* article authored by Warren and Brandeis in 1890 that first articulated the concept. http://www.estig.ipbeja.pt/~ac_direito/privacy.pdf

B. According to Prosser's *Restatement (Second) of Torts*, traditionally the torts of "intrusion on seclusion" and "publication of private facts" are distinct, although they can be related and can co-exist. Broadly speaking, "intrusion on seclusion" involves a breach of an individual's *physical* solitude. "Publication of private facts" involves dissemination of truthful, personally-identifiable information, the disclosure of which, without consent, violates the individual's right to be left alone, and does not involve "newsworthy" information. "False light" invasion of privacy involves the depiction of an individual in a way that is untrue, but, unlike in the tort of libel, not necessarily defamatory. The tort of "appropriation," also known as "right of publicity" or "misappropriation," involves using an individual's name or likeness for commercial purposes, without permission or compensation. The First Amendment protects such uses in connection with a newsworthy event.

Not all four torts are recognized in all U.S. jurisdictions. *See, e.g., Denver Pub. Co. v. Bueno*, 54 P.3d 893 (Colo. 2002) (declining to recognize the tort of false light, ruling that it substantially duplicates the tort of libel and threatens to chill speech on the Internet).

C. Much of the law governing the tort of publication of private facts is judge-made law, developed from myriad opinions which are often fact-driven. By contrast, intrusion on seclusion is often governed by statute, including federal and state laws governing interception of private communications and trespass. California's statutes and jurisprudence in these areas are vast and varied, and the state is often regarded as a privacy bellwether.

D. The Fourth Amendment to the U.S. Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It applies only to government actors or their agents. *See, e.g.*, Stone, "The Boston Bombing, The Right of Privacy, and Surveillance Cameras," *Huffington Post*, May 6, 2013. http://www.huffingtonpost.com/geoffrey-r-stone/the-boston-bombing-the-ri_b_3223871.html?utm_hp_ref=politics.

II. Selected Federal Legislation

A. The **Electronic Communications Privacy Act of 1986** and the **Stored Wire Electronic Communications Act**, 18 U.S.C. §§2510-22, updated the Federal Wiretap Act of 1968. Also known as the **Stored Communications Act** (SCA), this law protects wire, oral and electronic communications while those communications are being made, are in transit, or are stored on computers, from unauthorized interception and dissemination.

B**. Health Insurance Portability and Accountability Act (HIPAA) of 1996**, 42 U.S.C. §300gg, 29 U.S.C. §§11 81 *et seq*., and 42 U.S.C.§§1230d *et seq*., governs access to and release of personal health information contained as records held by "covered entities," typically health care providers.

C. **Children's Online Privacy Protection Act (COPPA) of 1998**, 15 U.S.C. §6501, regulated the online collection of personal information from children under the age of 13 by persons or entities subject to U.S. jurisdiction.

D. The **Computer Fraud and Abuse Act**, 18 U.S.C. §1030, criminalizes hacking into "protected" computers, which include those owned by the federal government, certain financial institutions, or those used in interstate and foreign commerce or to commit interstate crimes.

E. Many other laws governing access to personally-identifiable information held by governmental or private-sector entities, including the **Federal Freedom of Information Act**, 5 U.S.C. §552; the **Privacy Act**, 5 U.S.C. §552a; the **Driver's Privacy Protection Act**, §18 U.S.C. §§2721 *et seq*., the **Family Education Rights and Privacy Act (FERPA)**, 20 U.S.C. §§1232(g) *et seq*., and the **Video Privacy Protection Act of 1998**, 18 U.S.C. §2710. For a list of federal privacy-related statutes, *see* https://www.cdt.org/privacy/guide/protect/laws.php.

III. Some General Principles of Privacy and Access Law

A. As a general rule, information that is lawfully obtained from a governmental entity can be disseminated without criminal penalty or exposure to civil lawsuits. *See, e.g., Florida Star v B.J.F.*, 491 U.S. 524 (1989).

B. Journalists are subject to laws of general applicability (such as wiretap, hidden camera, or hidden microphone laws, as well as the laws of trespass), and the act of intercepting a protected communication can give rise to criminal and/or civil liability for intrusion on seclusion if the plaintiff had an objectively reasonable expectation of privacy in a private place, conversation, or matter, *and* if the intrusion occurred in a manner that was highly offensive to a reasonable person *and* the information disseminated does not concern a matter of legitimate public concern. *See, e.g., Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (Calif. 1998); *see also*, *Wilson v. Layne*, 526 U.S. 603 (1999).

C. The contents of a protected electronic communication provided to the news media without knowledge that it was illegally intercepted and that conveys information about a matter of public interest is protected from both civil and criminal sanctions. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

D. The federal Freedom of Information Act creates a presumption that records held by federal executive branch agencies are open to public access. The statute consists of nine exemptions, two of which are particularly relevant to this outline: Exemption 6, "personnel and medical files" and similar files, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and Exemption 7 (C), law enforcement records which, if disclosed, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The U.S. Supreme Court ruled in *Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 146 (1989), that "rap sheets" collected in the FBI's centralized computerized

criminal history database are exempt from disclosure, even though the original records would be publicly available at their source. The opinion by Justice Stevens coined the phrase "practical obscurity" to justify his reasoning that when government records are available only through laborious research conducted in scattered sources, the record subject has an expectation of privacy in the information.

E. All 50 states and the District of Columbia have open records laws governing state, county and municipal records. They vary in scope, although many are similar to the federal Freedom of Information Act. Most, if not all, include exemptions for personal privacy. Some states' laws extend to the judicial and legislative branches as well as the executive branch. A few states, such as Montana, in addition to statutory law, also enshrine the public's right to know (as well as the right to privacy) in the state Constitution. *See, e.g.*, Mont. Code Ann. tit 2, ch. 6, http://data.opi.mt.gov/bills/mca_toc/2_6_1.htm; Mont. Const. art. II, §§9, 10. http://courts.mt.gov/content/library/docs/72constit.pdf.

F. The digitization of government records and the increasingly ready access to them have prompted concerns about compromising personal privacy. Although many states responded by enacting new privacy exemptions to existing statutes, others have attempted to legislate subsequent use of information obtained from public sources. For example, several states and municipalities recently passed, or are considering, laws regulating prospective employers' inquiries into job applicants' criminal histories. These so-called "Ban the Box" initiatives typically limit such inquiries to qualified applicants who have been selected for an interview or who have received conditional offers of employment. Schmitt and Iyer, "Business Forum: 'Ban-the-box bill' advances in the Minnesota Senate," Minneapolis *Star Trib.*, May 5, 2013, http://www.startribune.com/business/206057161.html?refer=y.

Poquette, "Ban the Box Update: New Jersey, Minnesota Among Jurisdictions Considering Legislation," *Verifications Inc.*, March 22, 2013, http://www.verificationsinc.com/eng/whatwevelearned/complianceprofile.cfm?szID=170.

IV. Selected Recent Invasion of Privacy Cases

A. *Yath v. Fairview Clinics*, 767 N.W.2d 34 (Minn. Ct. App. 2009), holding that posting private medical information on a publicly accessible Web site satisfied the "publication" element of the **disclosure of private facts** tort. The case arose when a clinic employee discovered that an acquaintance had sought testing for a sexually-transmitted disease because she had a new sexual partner. The employee revealed the information on her MySpace page. Focusing on the method of publication rather than the number of actual viewers, the court likened the MySpace page to a newspaper with a small circulation, ruling that publication occurs "when the communication is made to the public at large, not to a large number of the public."

B. *Palkimas v. Bella*, 2012 WL 1048868 (D. Conn. 2012) involved a claim for public **disclosure of private facts** based on a letter written to the State's Attorneys Office by the state Department of Children and Families detailing domestic violence incidents. The court concluded that this was not a "public" disclosure because it was unlikely to reach the public at large and was not unreasonable.

C. Although the right to privacy (as distinguished from the right to publicity) has traditionally been regarded as personal to the individual and does not survive death, in *Catsouras v. California Highway Patrol*, 104 Cal. Rptr. 3d 352 (Cal. Ct. App. 2010), *op. modified* 2010 Cal. App. LEXIS 253 (Cal. Ct. App., March 1, 2010), the court ruled that the relatives of a young woman decapitated in an automobile accident have a **common law right of privacy** in photographic images of her taken by police at the accident scene and subsequently disseminated on the Internet. *Cf. Nat'l Archives and Records Admin. v. Favish*, 124 S.Ct. 1570 (2004).

D. *Allesi v. Loehn*, 76 So. 3d 1142 (La. 2011), and *Liberty Life Ins. Co. v. Myers*, 2011 U.S. Dist. LEXIS 84415 (D.Ariz. 2011). In *Allesi,* an accident victim's claim that the release of his medical records by his insurance company to that of the other driver in response to a subpoena in a separate case was dismissed, with the court ruling that the insurance company did not act unreasonably and that the records were provided by the plaintiff voluntarily and with no restrictions. In *Liberty Life*, the life insurer placed an advertisement in a newspaper seeking information about a missing person. After the company paid benefits, the plaintiff resurfaced, and the insurance company sued for the proceeds it had paid. Plaintiff then countersued for **intrusion upon seclusion**, **publication of private facts**, and **false light** invasion of privacy. All his claims were dismissed, with the court holding that the advertisement did not disclose private facts, but merely sought information from the public.

E. *In re Hulu Privacy Litigation*, 2012 WL 3282960 (N.D. Cal. 2012), a class action brought by users of Hulu's online video service who alleged that the company allowed an advertising firm to install persistent tracking cookies on their computers which they claimed wrongfully **disclosed their video viewing selections and personal identification information** to third parties including online advertising networks. The court clarified that the Video Privacy Protection Act extends beyond personal data linked to the physical rentals of video content, and also covers online video streaming services.

F. In *Jennings v. Jennings*, 401 S.C. 1 (2012), the South Carolina Supreme Court held that retaining an opened email is not an **invasion of privacy** because it does not constitute storing the file for backup protection under the Stored Communications Act (SCA). The plaintiff had sued his wife, his wife's daughter in law, and a private investigator for violations of the SCA after the daughter in law looked at his private emails sent to his girlfriend and stored in his Yahoo email account. All five justices concluded that the emails were not electronic communications protected by the statute, but differed in their reasoning. Focusing on statutory language referring to "backup protection," two justices found that the words suggested the existence of another copy of the emails, beyond the original stored on Yahoo. Absent evidence of additional copies, the emails would not be covered by the act. Two other justices suggested that the word "backup" was intended to cover files created by the Internet Service Provider for the ISP's purposes, not user generated content. A fifth justice agreed with that definition as well, but wrote separately for other reasons. The South Carolina court's decision is contrary to the ruling in a 2004 Ninth Circuit case, *Theofel v. Farey-Jones*, 359 F3d 1066 (9th Cir. 2004), which held that emails in storage on an ISP server are covered by the SCA because the ISP copy functions as backup for the user to reference at any time. The U.S. Supreme Court denied a petition for *certiorari* on April 15, 2013, sub nom. *Jennings v. Broome*.

G. In *Scott v. WorldStarHipHop, Inc*., 2012 WL 1592229 (S.D.N.Y. 2012), the court partially granted a motion to dismiss an action for copyright infringement and **appropriation** invasion of privacy after an individual recorded a fight in a college classroom involving plaintiff and uploaded it to a Web site, assigning all rights to the site. Although denying the motion to dismiss the copyright claim, the court dismissed the invasion of privacy claim because "it is settled that the use of a name or picture in the media in connection with a newsworthy event or matter of public interest is, as a matter of law, not a use for purposes of trade" and, perhaps more significantly, that "newsworthiness is to be broadly construed in order to advance the statutory and First Amendment purposes of uninhibited discussion of newsworthy topics."

H. Lionsgate Entertainment Corp. has reportedly filed a motion to strike a **right of publicity** complaint filed in Los Angeles County Superior Court by Gita Hall May, a model whose image appears in the opening credits of the television show "Mad Men." May claims that she consented only to the use of her image in a Revlon advertisement shot by noted photographer Richard Avedon in the 1950s, and that Lionsgate appropriated it for use in its opening credits without her consent. Lionsgate counters that May's image

appears for "slightly more than one second" and was materially altered and combined with other images to make "a creative work in its own right" that relates to a public issue and is therefore protected by the First Amendment. "'Mad Men' Lawsuit: Lionsgate Invokes 1st Amendment in Opening Credits Clash," *TheWrap TV*, April 23, 2013, http://www.thewrap.com/tv/print/87426.

V. State Statutory Privacy Initiatives: Social Networking and "Revenge Porn"

A. Legislation proposed in at least 21 states aims to protect employees from demands by their employers for access to the employees' social media pages. Currently, California, Delaware, Illinois, Maryland, Michigan and New Jersey have passed such laws, and a similar bill was introduced in Congress in 2013. H.R. 537, the "Social Networking Online Protection Act." http://beta.congress.gov/bill/113th-congress/house-bill/537/text.

Several lawsuits, including *Ehling v. Monmouth Ocean Hospital Service Corp.*, 2012 WL 1949668 (D.N.J. 2012), involve common law invasion of privacy claims based on employer access to social media pages by "coercing, strong-arming, or threatening" the employee. In *Ehling*, the court noted that social media exist in a gray area between sites that are open to the world and sites that are password-protected, which might create an expectation that no one will be able to view them, even if they are stored on a computer belonging to someone else. *Compare Sumien v. Careflite*, 2012 WL 2579525 (Tex. App. 2012), holding that the mere fact that an employer sees information on a social media site that the employee did not realize was accessible did not mean that the employer "intentionally intruded on his seclusion." *See also Coughlin v. Arlington*, 2100 U.S. Dist. LEXIS 146285 (D.Mass. 2011), holding that two school employees, fired because of their sexual relationship, could sue for public disclosure of private facts and infliction of emotional distress based on allegations that school officials accessed their personal email accounts and disseminated their private messages to the press.

On Sept. 7, 2012, the National Labor Relations Board (NLRB) issued its first decision involving an employer's social media policy. In *Costco Wholesale Corp. & UFCW Local 371*, 358 N.L.R.B. 106 (20120, the board found that several provisions of Costco's social media policy violated provisions of the National Labor Relations Act. Specifically, these included prohibitions on postings, made during times when employees were on employer's property, that might constitute "concerted activity," such as posts about work-related issues such as sick leave and workers' compensation, as well as content that could damage anyone's reputation. The NLRB has issued several memoranda on employer social media policies, finding that most policies it examined are overbroad, ambiguous, and could be interpreted to include conversations about working conditions or unionism.

Erin Eagan, Facebook's Chief Privacy Officer on Policy, wrote in a statement released March 23, 2012 that sharing or soliciting a Facebook password violates the social network's Statement of Rights and Responsibilities, and could lead to liability for employers if they view an applicant's personal information, observe that the applicant is a member of a protected group, and then choose not to hire the applicant.

B. In response to growing concerns about cyberbullying, K-12 schools have attempted to regulate and punish student online speech, even when it is published off-campus and created outside of school hours. Schools claim that their exercise of such authority is justified under U.S. Supreme Court precedent in *Tinker v. Des Moines Indpt. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), which permits public schools to regulate expressive activities only if they cause a material substantial or foreseeable disruption in the school environment. However, in 2011, the U.S. Court of Appeals for the Third Circuit ruled that the punishment of two students who had created online parodies of their school principals violated their First Amendment rights because the

schools had not demonstrated that the speech was sufficiently disruptive. *Layshock ex rel. v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *aff'd en banc*, *Layshock ex rel. v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011). *But see Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011). The U.S. Supreme Court denied *certiorari* in all three cases in January 2012.

C. The issue of whether K-12 schools may require students to disclose their social media passwords remains unresolved. A 12-year-old Minnesota student has sued her school district for violation of her First Amendment rights after she was punished for statements made on her Facebook page, and forced to reveal her social media passwords to a deputy sheriff and two school staffers. http://www.nydailynews.com/news/national/12-year-old-sues-school-district-punishing-facebook-posts-demanding-passwords-article-1.1037192.

Several states have enacted or are considering laws that would prohibit public and private universities from requiring students to disclose social media user names and passwords. *See, e.g.* Swatski, "New Jersey Social Media Bill Heads to the Governor," *At Work: Solutions for Employers & Employees*, March 27, 2013, http://www.pa-nj-employmentlaw.com/2013/03/new_jersey_social_media_bill_h.html; Stamm, "Social Media Passwords Protected for NJ, Del. Students," *NBC 10 Philadelphia*, Jan. 2, 2013, http://www.nbcphiladelphia.com/news/tech/Social-Media-Passwords-Protections-185426681.html; Salem, "California First to Endorse Comprehensive Social Media Privacy Law," *abcnews.go.com*, Dec. 27, 2012. http://abcnews.go.com/blogs/headlines/2012/12/california-first-to-endorse-comprehensive-social-media-privacy-law/.

D. The new phenomenon of "revenge porn" has prompted several states to enact or consider legislation to criminalize the practice of posting pornographic photographs with identifying information and without the subject's consent. New Jersey's law makes distribution of "revenge porn" a crime. http://www.nj-statute-info.com/getStatute.php?statute_id=1572 The Brevard County Sheriff's Office has proposed a bill to the Florida legislature that would make publication of such photographs or video through a computer or other electronic device a second- or third-degree felony, depending on the age of the victim. http://www.flsenate.gov/Session/Bill/2013/0946/BillText/Filed/PDF According to the web site BetaBeat, several women in Texas have brought a class-action lawsuit against a Texas-based revenge porn web site and its hosting company GoDaddy. Roy, "Proposed Florida Law Would Make Publishing Revenge Porn Without Victim's Consent a Third-Degree Felony," *BetaBeat*, March 8, 2013. http://betabeat.com/2013/03/proposed-florida-law-would-make-publishing-revenge-porn-without-victims-consent-a-third-degree-felony/.

VI. Use of Public Data Triggers Privacy Concerns

A. After the mass shooting at Sandy Hook Elementary School in December 2012, the *Journal News* of White Plains, NY, published a controversial map utilizing data including the home addresses of gun permit holders in two New York counties. The state legislature responded by passing a law permitting gun owners to demand that the information be kept secret. New York Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013. http://open.nysenate.gov/legislation/bill/s2230-2013.

B. Other lawmakers around the country have had similar reactions. The Sunlight Foundation reports that the majority of states do not treat this type of record as public, and as of Spring 2013, at least 11 other states are seeking to further limit public access to this type of record. Sibley and MacNeal, "Majority of states prohibit access to gun records," *Sunlight Found.*, Jan. 18, 2013. http://reporting.sunlightfoundation.com/2013/majority-states-and-counting-dont-allow-gun-records-be-public/.

C. Publications and websites that post mug shots of arrestees have become increasingly common. The photographs are publicly available under many state's open records laws. But proposed legislation introduced in Florida would require website operators to remove the names and personal information, as well

as the photographs, within 15 days of receipt of written notice that the individual has been acquitted or the charges dropped. Failure to do so would result in a fine, and would create a "presumption of defamation of character" after 45 days. http://public.lobbytools.com/index.cfm?type=bills&id=35933.

D. Sites such as Bustedmugshots.con, Justmugshots.com, and others have been sued in Lucas County (Ohio) Court of Common Pleas. Phil Kaplan, whose mug shot appeared on several websites after his arrest, claimed that when he contacted them asking that his photograph be removed, the websites demanded that he pay them hundreds of dollars. Using the state's right of publicity statute, Kaplan claims that his image is being used for commercial gain without his consent.

E. Compounding concerns about public access to government records, questions about the collection and security of personal data stored by government entities continue to arise. For example, in Minnesota, during the summer of 2012, a reporter for the Minneapolis *Star Tribune* revealed that law enforcement officers were using automated license plate readers to scan drivers' license plates. Some of the information was public under the state Data Practices Act, including the license plate number and the time, date and location where the image was captured. However, because the state had no law governing retention, policies varied widely between jurisdictions. Police received many requests for the data, and the *Star Tribune* subsequently published a map displaying the data obtained about the Minneapolis mayor's city-owned vehicle plates. http://www.startribune.com/newsgraphics/166561106.html.

The Minnesota Department of Administration ruled in March 2013 that the mayor's records would be reclassified as secret after the mayor requested it. Legislation was introduced to classify all license plate reader data as "confidential" or "nonpublic," with set document destruction dates.

Ironically, in the midst of the debate over the license plate reader data, a former police officer learned that officials at a range of state agencies had accessed her driver's license data hundreds of times between 2007 and 2011, with no business purpose. Access to driver's license data is restricted both by the federal Driver's Privacy Protection Act and under Minnesota state law. The state paid out more than $1 million in settlements to the former police officer. In a separate incident, John A. Hunt, a former officer with the Department of Natural Resources, allegedly made 11,747 searches for driver's license data while off-duty, and was sued civilly and also charged with several misdemeanors including unlawful use of data and unauthorized computer access. As a result, the state is considering bills that would require more security safeguards and increase the penalties for improper access. *See,* "Data breaches vs. common sense," St. Paul *Pioneer Press*, April 10, 2013, http://www.twincities.com/opinion/ci_22997617/minnesota-data-breaches-vs-common-sense-pioneer-press.

VII. Selected Recent FOI Cases – U.S. Supreme Court

A. *FCC v. AT&T*, 131 S.Ct. 1177 (2011). The high court ruled that corporations are not covered by the "personal privacy" exemption in the federal Freedom of Information Act, holding that AT&T could not prevent another organization from acquiring internal company records that the Federal Communications Commission had gathered during an investigation into AT&T's operations. Construing the statutory language, the Court concluded that the phrase "personal privacy" was clearly intended to apply to human beings, as distinguished from the word "person," rejecting AT&T's argument to the contrary. The opinion by Chief Justice Roberts observed that the two words have very different meanings, and that the word "personal" ordinarily refers to individuals. He concluded, "The protection in FOIA against disclosure on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally."

B. *Sorrell v. IMS Health*, 131 S.Ct. 2653 (2011). The Supreme Court struck down a Vermont statute that prohibited the sale of medical data obtained through a pharmaceutical marketing practice known as "detailing" (involving physician prescription records), finding that the statute failed to withstand First Amendment scrutiny because the restrictions imposed did not promote a substantial government interest. The case is expected to have significant impact on federal data privacy legislation, particularly "do-not-track" and data mining. For more information, *see* Kirtley, *Global Privacy and Advertising Developments*, in the course handbook for the Practising Law Institute's *Communications Law in the Digital Age 2012*.

C. *McBurney v. Young*, 2013 U.S. LEXIS 3317 (April 29, 2013). A unanimous court concluded that the Freedom of Information Act of the commonwealth of Virginia, which permits only its own citizens to file requests for access to government records under the public records statute, does not violate the fundamental rights protected by the Privileges and Immunities and Dormant Commerce clauses of the U.S. Constitution. The opinion by Justice Alito found that citizens from other states may obtain property records such as title documents, tax liens, and mortgage notices from court clerks' offices, and that many other types of documents that are classified as nonconfidential under Virginia law may be accessible online. "Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia," Alito wrote. Slip op. at 8.

VIII. Conclusion

The United States has no comprehensive privacy law. This brief summary of current issues in tort and statutory privacy can only skim the surface of a complex and rapidly-developing area of law.

Although privacy law frequently invokes an objective "reasonable person" standard, the concept of privacy is subjective, emotional and visceral. Rarely does "one size fits all" in privacy cases. Courts and legislators alike struggle to resolve competing values protecting the individual's right to control personal information and the right to speak – or, in the words of Justice Stevens in the *Reporters Committee* case, to find out "what their government is up to." Modern technological developments present both an opportunity and a challenge as new frontiers of personal privacy emerge, in situations that could never have been imagined by Warren and Brandeis when they first framed the concept of the "right to be let alone" in 1890.

One thing is certain: judges can anticipate that they will be faced with novel claims of privacy in the future. They are encouraged to remember fundamental principles of freedom of expression and freedom of information when considering these claims.

Judicial Takings:

After Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection *(2010)*

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Judicial Takings: *After* Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection *(2010)*

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LITTORAL RIGHTS UNDER THE TAKINGS DOCTRINE: THE CLASH BETWEEN THE *IUS NATURALE* AND *STOP THE BEACH RENOURISHMENT*

RICHARD A. EPSTEIN*

The recent decision of the United States Supreme Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[1] bristles with conceptual difficulties and practical ambiguities that cannot be easily avoided or easily answered. The major conceptual issue in *Stop the Beach Renourishment* is whether the Supreme Court should recognize "judicial takings" under the Takings Clause, which reads: "[N]or shall private property be taken for public use, without just compensation."[2] The textual claim for recognizing judicial takings is that the Takings Clause does not differentiate between various branches of government and thus covers the actions of the judiciary as well as those of the legislative and executive branches.[3]

Opponents of this doctrine often deride it as a constitutional oxymoron. By definition, state courts cannot take the very property rights that their former decisions have established. Given that this tension exists within any unitary judicial system, the doctrine of judicial takings can, in practice, only arise in a federalist system. At

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1. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).
2. U.S. CONST. amend. V.
3. For a defense of this view, see Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91, 94–96 (2011).

the state level, there is no reason to expect that any state court will strike down the common-law rights that it has just announced. Even if a court disagreed with its past decisions, the more modest way to approach the problem is to overturn the prior law as part of the evolution of common-law rights.[4] Similarly, in the highly restrictive domain of federal common law,[5] the Supreme Court cannot be expected to invalidate its judicial decisions under the Takings Clause. The problem, therefore, can only arise in practice as it did in *Stop the Beach Renourishment*—in a federal system, when a federal court invalidates the decision of the state supreme court, which is therefore rendered less than supreme in the articulation of its own doctrine. To many, this kind of interaction represents the antithesis to the divided system of rights under our federalist system.[6]

Notwithstanding these powerful objections, there is a sensible, albeit restricted, place for the doctrine of judicial takings under federal constitutional law. That approach makes little sense when property rights in a positivist tradition are thought to be manifestations of state power. It has far more attraction, however, within the natural law system, in which judges are rightly seen as custodians of a customary system of property rights that were created by common practice long before there were any courts to enforce the rules in question. Those conditions hold, as I shall show, in connection with water law where the so-called *ius naturale*[7] was regarded by all courts as the traditional lodestone by which these questions were measured.[8] Under that view, it is wrong to think of water law as if it were "judge-made" law when, historically, it was derived from a system of decentralized customary law whose basic norms had been firmly entrenched long before the appearance of a centralized judicial system.

It is therefore appropriate to hold courts responsible for keeping to the main contours of water law in making their judicial decisions. *Stop the Beach Renourishment* thus offered a much needed way to

4. For stress on this theme, see Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 107–08 (2011).

5. *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943) (holding that "[t]he rights and duties of the United States . . . are governed by federal rather than local law").

6. *See* Dogan & Young, *supra* note 4, at 108–10.

7. *See infra* Part III.

8. Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, LINCOLN INSTITUTE (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719688 [hereinafter Epstein, *Playing by Different Rules*].

address the actions of state courts whose decisions have strayed too far—and for no good reason—from these customary standards. Ironically, the difficulties in *Stop the Beach Renourishment* did not lie with the particulars of the Beach and Shore Preservation Act (Preservation Act),[9] which represents a surprisingly sensible environmental scheme. Instead, the target of judicial wrath should have been Florida's earlier case law that twisted every known principle of water law by treating man-made diversions from a lake or a river as though they were "avulsions," or major natural events that alter the flow of water without any human intervention.[10] Put simply, the polar opposites in any system of tortious responsibility for individual action are acts of God and deliberate creations of harm by an individual. In a remarkable tour-de-force, Justice Scalia's analysis of Florida's statutory scheme failed to distinguish between these two kinds of acts. The weakness in his decision, consequently, did not relate to his general analysis of judicial takings, but to his uncritical treatment of the Florida case of *Martin v. Busch*[11] (which authorized the uncompensated diversion) as the legitimate starting point for the analysis, instead of treating that decision as the proper object of wrath in any judicial takings analysis. Once the law of littoral rights is correctly sorted out, the Preservation Act should be regarded, presumptively, as a taking of littoral rights. But these takings may not require any explicit cash compensation because the key provisions of the Preservation Act may provide full in-kind compensation in three separate forms: the protection of the beach on the landward side of the wall, the creation of the view easement, and the creation of the access easement, which together could easily exceed the value of any possible accretions on the seaward side of the wall.

In order to make out this case, I shall proceed as follows. In Part I, I shall outline the general features of Florida's water law both before and after passage of the Preservation Act. In Part II, I shall put the rules of property law in context, dealing in turn with land, water, and the beach that lies between them as a matter of both common and customary law. In Part III, I shall examine the role of the *ius naturale* (the natural law) in the origin and formation of property law, under both the common and Roman law systems. In that section, I shall outline the historical distinction between alluvion, or gradual changes,

9. 1961 Fla. Laws ch. 61–246, *amended by*, FLA. STAT. §§ 161.011–161.45 (2007).
10. For discussion, see *infra* Part IV.B.
11. Martin v. Busch, 112 So. 274 (Fla. 1927).

and avulsion, or radical changes, and explain the strong efficiency characteristics of the classical rules as they apply to property owners of both riparian and littoral interests. In part IV, I turn to the question of judicial takings and defend that doctrine in order to explore how the basic rules were misapplied in connection with the Florida statutory scheme. In part V, I turn to the larger question of when the doctrine of judicial takings should be applied in other cases and conclude that its application should be limited to those circumstances in which the decided cases make a radical break from well-established common-law patterns that systematically work for the advantage of the state or some identifiable private faction. A short conclusion speculates on the reasons for the abject breakdown of private law conceptions of property rights in the Supreme Court.

I. THE SHAPE OF FLORIDA LAW

Traditionally, Florida law distinguishes between riparian rights, which govern those who own land adjacent to a river, and littoral rights, which govern those who own land bordering a lake or an ocean.[12] In general, both types of rights are generally established as a matter of common law—a proposition that is quickly freighted with much meaning. The littoral rights at issue in *Stop the Beach Renourishment* include the ability of individuals to gain access to the beach from their own property and to have the right of an unobstructed view over the beach to the water beyond.[13] That delineation of rights necessarily limits the rights of the public and the state over the beach. As a common-law matter, neither the state nor any private party could build along the beach a wall that blocked off access to the water from abutting landowners.[14] The situation only becomes more complicated because the interface between public and private rights necessarily varies as the beach itself moves in response to all sorts of natural elements. Left to its own devices, nature can wipe out some littoral property if the water level rises, or it can lead to a major expansion of beachfront property if the water level falls, so

12. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2598 n.1 (2010) ("Many cases and statutes use 'riparian' to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby 'riparian' means abutting a river or stream and 'littoral' means abutting an ocean, sea, or lake.").

13. *See id.* at 2600 (". . . (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact.").

14. *See id.* at 2594 ("Littoral land owners have, *inter alia*, rights to have access to the water . . . .").

that more land becomes fit for vegetation and other forms of use.

The movement of the beach is necessarily a source of uncertainty for the people who own adjacent property, and the question is what, if anything, the state should do to eliminate that uncertainty and the reduction in land value that it normally generates. In Florida's case, the solution was to pass the Preservation Act,[15] the purpose of which was to fight nature and to stabilize the beachfront by adding sand and other support to the beach to prevent erosion. In effect, the statutory scheme established an "erosion control line" at the point where the private upland became a public beach.[16] It then took efforts on the seaward side of that line to shore up the beach, while taking steps to preserve the littoral owner's access to the beach and views of the ocean.[17] The decision to construct the needed barriers was, of necessity, a collective one because the investments in these erosion-control devices will work only if done on sections of the beach that are more extensive than the boundary lines of each individual plot of land. On beachfront sites, these lots tend to be narrow and deep in order to maximize the two elements of value that the Preservation Act strove to preserve. The collective good that is provided by erosion control, however, might not have equal value for all beach owners, some of whom may prefer to take the risk of erosion in order to preserve the option to acquire new lands as the beach goes out to sea.[18]

The constitutional challenges presented by the scheme of beachfront control are profound because they involve the intersection of two separate tasks. The first is to get a clear grasp of the property rights regime that operated in Florida prior to the advent of the Preservation Act.[19] These rights were, for the most part, not defined by statute but by some system of common-law adjudication, the status of which is always hard to pin down. *Stop the Beach Renourishment* therefore spent a good deal of time sorting out the set of property rights to which the Takings Clause applied. That task is no mean feat given that the beach lies at the intersection of land and water, which are subject to radically different property rights regimes. The touchstone for the former tends to be exclusive rights in single

15. 1961 Fla. Laws ch. 61–246, *amended by*, FLA. STAT. §§ 161.011–161.45 (2007).
16. *See* FLA. STAT. § 161.191; *see also* § 161.151(3) (defining "erosion control line").
17. *See* FLA. STAT. § 161.141.
18. For discussion of the valuation questions, see *infra* Part IV.B.
19. FLA. STAT. §§ 161.011–161.45 (2007).

persons, while the touchstone for the latter is common and shared rights by large (and often different) groups of individuals.[20] Only if these common-law property rights have constitutional status does the takings inquiry make sense. If littoral rights were just a creature of the state, such that they could be created or cancelled at will, then the entire structure of littoral rights, indeed all property rights, would come tumbling down.[21] No longer would the function of the state be to preserve and defend an independent set of property rights. Instead, it could create or displace any system of entitlements, whether on land or water, by a simple assertion of collective political will, thereby undermining one of the central features of any sound system of rights—the stability of expectations.[22]

Once the definition of littoral rights is fixed, the next question is how the federal constitutional protection should apply to this form of private property. This inquiry is not one-dimensional and is typically understood in connection with other forms of government action, both federal and state, to involve at least four interlocking inquiries.[23] First, whether the state action has taken private property in light of the difficulty of defining beachfront rights to begin with. Second, whether that taking is for a public use. Third, whether just compensation has been provided for the property so taken. And fourth, whether there is some police power justification that allows the state to regulate without the payment of compensation. Justice Scalia thought that the entire case could be disposed of by accepting two related propositions, which had a Job-like quality.[24] In his view,

20. For a discussion of these points, see Epstein, *Playing by Different Rules*, *supra* note 8. For a comprehensive overview of the Roman and English origins of water law, see JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW (2006).

21. *See, e.g.*, United States v. Fuller, 409 U.S. 488, 493 (1973) (holding that the government did not owe compensation for grazing rights appurtenant to private land subject to condemnation when these rights were cancellable at will without cause). This issue is quite different from those raised in the companion case of *Almota Farmers Elev. & Whse. Co. v. United States*, 409 U.S. 470 (1973), in which the government owed compensation to a tenant whose improvements had value after the expiration of the current term of the lease. The interference with advantageous relations caused a loss of those residual values. It is one thing for the government to exercise its own right to terminate a relationship. It is quite another thing for it to disrupt the valuable relationships between two private parties and offer only meager compensation at best.

22. *See* Epstein, *Playing by Different Rules*, *supra* note 8, at 6–10 (discussing the status of collective property rights).

23. For an extended treatment of this issue, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter TAKINGS] (developing the comprehensive four-part test referred to in the text).

24. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2595

the law gaveth by insisting that the Constitution applies to takings by the judiciary as much as it applies to takings by the legislature or the executive.[25] But thereafter, the law tooketh away when the supposed "avulsive" conduct of the state did not take away any rights that were part of the package of littoral rights involved in this case. I agree with him on the first point, but think that his analysis of both the underlying property rights and the Takings Clause is incorrect. Quite simply, in his view, the proposed state action was not a taking at all insofar as it did not interfere with prior expectations, so that there were no property rights to which the Takings Clause could attach.[26] I do not think the Florida cases that he cites are sufficient to support that contention, and believe that property rights were indeed taken. Because the Florida scheme, unlike so many others, supplies return compensation in the form of both erosion protection and the preservation of view and access, it is an open question of fact, best resolved on remand, as to whether the bundle of rights supplied is equal to or greater in value than the access and view rights that were disrupted by the Preservation Act.[27]

II: THE PROPERTY LAW CONTEXT

A. Land, Water, and Beaches

It is well understood that two major branches of property law deal with water and land and that these areas of law are governed by quite different principles. The gist of the distinction is that property rights in land start with the notion of a relatively coherent body of rights in a determinate thing, which can be measured in three dimensions: space, time, and incidents of ownership. The first of these is space. The general view follows the Roman maxim, *cuius est solum eius est usque ad coelum usque ad inferos*,[28] such that whosoever owns land owns from the heavens above to the depths of the earth below. Under that view, all air and mineral rights belong to the surface owner, who can use or dispose of them as he sees fit. Next, property must be organized along the dimension of time. In addition to the fee simple,

(2010).

25. *See id.* at 2601 ("The Takings Clause . . . is not addressed to the action of a specific branch or branches.").

26. *See id.* at 2615.

27. *See infra* Part IV.B.

28. Meaning, "for whoever owns the soil, it is theirs up to Heaven and down to Hell."

property can be divided into life estates and remainders, so that different people can hold sequential interests in the same asset at different pre-appointed times.[29] And finally, property in land can be divided by the incidents of ownership, including possession, use, and disposition. The strong consensus with respect to property in land is to favor a set of exclusive rights so that a single owner is in a position to deal with the property to the exclusion of everyone else.[30] This basic position is qualified in a number of ways, but these modifications, with reciprocal easements between neighbors, are sufficiently limited so that they do not undermine the basic overall conception.[31]

Property rights in water start from the opposite direction. Whether we think of rivers and streams on the one hand or lakes and oceans on the other, property rights tend to be held in common so that large numbers of individuals have access to a body of water in different ways, but over which no one person has exclusive rights.[32] Quite simply, the property arrangements that are most conducive to the efficient use of land are wholly inappropriate for water. At the same time, however, the complexity of water rights is such that no single system of shared or common use makes sense for all the places in which water is used. Variation across systems is a given and it is these differences that have to be accommodated in connection with the constitutional protection of property rights. In this regard, the received wisdom is that the state defines the rights that the Takings Clause then protects under a set of constitutional tests and standards that are decidedly a matter of federal common law.[33]

The beach, of course, lies at the crossroads between land and water. In most cases, the size of a beach tends to be relatively

29. For the standard account of future interests, see THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (1984); for its evolution, see A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986).

30. As in Blackstone's oft-stated dictum of real property: "That sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2, discussed in Epstein, *Playing by Different Rules*, *supra* note 8, at 51–52. For the overemphasis of exclusivity in the bundle of rights, see *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and also, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

31. For a discussion of implicit in-kind compensation in this connection, see TAKINGS, *supra* note 23.

32. For the relationship between private and common property, see Richard A. Epstein, *On the Optimal Mix of Common and Private Property*, 11 SOC. PHIL. & POL. 17 (1994).

33. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010).

constant, but its location can shift back and forth as a result of climatic changes, both large and small. The basic logic of beach formation is easy enough to understand. Water runs back and forth over land. On the ocean, the beach is extensive in low tide and is far less so in high tide. As the water rushes back and forth, no vegetation can take root, so the beach is sand and rock. But, the vegetation creeps down to the high-water line. If some exogenous shock pushes the water higher up, the vegetation dies and a new beach establishes itself. If the water level drops, the vegetation pushes outward and the beach retreats seaward. With rivers and lakes the mechanism for movement of the banks or beach could be somewhat different. It is quite easy to see how the changes from the spring melt to the summer drought can change the size of a river, and how the constant forces of nature can easily change the direction of its flow. The boundaries of beachfront property therefore raise profound issues that do not arise with respect to most plots of land.

B. Customary Rights and Common Law

The key challenge to state property law is to find a set of mechanisms to mediate the different regimes for land and water that come together on the beach. These problems are very old and the solutions to them were customary long before any state legislature could address the matter at hand. The practices involved, though, were not local customs, which necessarily vary from place to place to fit Blackstone's definition of "particular customs, or laws, which affect only the inhabitants of particular districts."[34] These local customs are of immense importance. Their distinctive features, however, often present serious problems of proof, which are discussed at length in David Bederman's excellent article on the subject.[35] It was well understood that these particular customs could vary freely across districts, without any evident rhyme or reason.[36]

Those local customary rights, however, are *not* what are referred to in dealing with the general rules that govern the intersection of public and private rights at the beach. The principles involved in

34. 1 WILLIAM BLACKSTONE, COMMENTARIES *74.

35. David Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

36. *See* 1 BLACKSTONE, *supra* note 34 ("[P]articular counties, cities, towns, manors, and lordships were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large.").

dealing with these nationwide or universal practices were far broader and did not depend on specific proof of particular practices, over a long period of time, in a given locale, by a specific set of persons. In dealing with these practices, Blackstone looked to "general customs; which are the universal rule of the whole kingdom,"[37] for which no individualized proof of custom was required.

There is a substantial glitch, however, in this effort to paint a seamless web between local customs and the common law, which did not pass unnoticed. Judge Buller wrote: "How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom."[38] The key question is whether it is possible in principle to overcome that perceived gap. The task is not easy. With respect to particular customs, virtually every case requires particular proof of the practice dating back a long time, which often enmeshes a case in such difficult issues as to the geographical extent of the supposed custom, the individuals who are bound and benefited by it, and the countless issues of dedication and prescription.[39] Answering these questions requires a court to establish appropriate burdens of proof on each of these matters of material fact. The general common law labors under none of these limitations. Any custom that is universal does not have any limited geographical extent, but applies anywhere and everywhere. Since it is said to be universal, there is no need to find some magic start date by which time the custom must have been solidified. The clear implication is that cut-offs of this variety no longer matter.

37. *Id.* at 66.

38. Fitch v. Rawling, 2 H. Bl. 393, 398, 126 Eng. Rep. 614, 617–18 (C.P. 1795) (Buller, J.), discussed in Bederman, *supra* note 35. Bederman also cites *Earl of Coventry v. Willes*, 12 W.R. 127, 128 (Q.B. 1863), which asserted a custom that the public was entitled to view a horse race from its perch on a private manor. The ground given to reject that claim was that "the rights possessed by the Queen's subjects generally are part of the general law of the land, and not the customs of a particular place." The truth, however, is that even if one treated, in line with Blackstone's remark, the common law as a supercustom, this claim was in its very formation so particularistic that it would have to be rejected on its individual merits in the absence of any per se rule.

39. *See* Bederman, *supra* note 35, at 1414. Prescription usually refers to situations where a particular individual obtains some easement over the land of another. Dedication usually refers to the situation where the public at large gains a similar right. With easements, the various elements of continuous and open use have to be satisfied by one person. With dedication, the public is a shifting group of individuals, so that extensive use by a fluctuating class of individuals allows the benefits to go to members of the public who have never entered the property at all.

Yet, there has to be a flip side to the problem. The requirements for proving a local custom are onerous, which makes sense given the observable variations at that level. But there is no reason to impose similarly strict requirements on universal customs, whose powerful common features generate a dominant solution that, as an empirical matter, no one is really prepared to contest. The durability of the practice is its strongest calling card. If everyone does it this way, why quarrel even if you do not understand how the common practice is put together? To the modern functionalist mind, this slavish devotion to tradition is, if anything, a source of condemnation. But for most traditional writers, the reference to universal custom slipped imperceptibly into another mode of address that seems archaic and stilted to the modern era. The broad notion of universal practice is treated as part of the *ius naturale*, or those rights given and defined in accordance with nature. This natural law strand makes no appearance whatsoever in any of the opinions of the Supreme Court in *Stop The Beach Renourishment*,[40] which is itself quiet testimony to the extent that the natural law thinking of earlier ages has fallen into disrepute.

III: PROPERTY AND THE *IUS NATURALE*

Historically, matters were quite different from the way that they appeared to the Supreme Court. There is little doubt that the entire body of law that related to the intersection of land and water was treated as part of the *ius naturale*.[41] The centrality of this concept is evident from the opening passages in both Gaius's and Justinian's Institutes, which pick up on the same theme. Thus, for Gaius, the lay of the land is set out in the opening passage of his Institutes:

> All peoples who are ruled by laws and customs partly make use of their own ius, and partly have recourse to those which are common to all men; for what every people establishes as ius is their own and is called the ius civile, just as the ius of their own city; and what natural reason establishes among all men and is observed by all peoples alike, is called the ius gentium, as being the ius which all nations employ. Therefore the Roman people partly make use of their own ius, and partly avail themselves of that common to all men, which matters we shall explain separately in their proper

40. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).

41. *See* GETZLER, *supra* note 20, at 65–71, 129–40 (describing Roman law and the "substantive nature of water rights" and the "triumph of natural-right analysis" in riparian doctrine respectively).

place.[42]

In dealing with this passage, it is important to note several points. The first is the appeal to natural reason—although *naturalis ratio* is better translated as the reason of nature—which suggests that a transcendent justification for law does not depend on the vagaries of local customs. Cognitive skills and deductive argument seem to suffice. It is equally important to note that, by referring to reason, the natural lawyers denied that these rules were established in an arbitrary fashion by judicial decisions. Instead, they were thought to be the result of a process of reason that allows these rules to be "common to all men."[43] On this view of the world, general reason, not the peculiar dictates of the Florida Supreme Court, is the source of law. Thus, the reason of nature should instruct the Florida Supreme Court on how to deal with these issues.

Accepting this view of the subject, as it was surely accepted at the time of the Founding,[44] Justice Scalia cannot just dismiss the claims for compensation raised in *Stop the Beach Renourishment* solely on the ground that the Florida cases (which he over-reads in any event) are dispositive to the problem at hand. Indeed, the very treatises to which he refers stress time and again that the rules with respect to alluvion and avulsion are governed by the natural law and not by any form of local custom.[45] The 1904 Farnham treatise, for example, contains

42. G. INST. 1.1. The parallel passages in Justinian are found in J. INST. 1.2.1. The Latin for the law of nations is *ius gentium*, and for law the Latin is *ius*. Thus, the Latin of the quoted passage reads:

[I. De iure civili et naturali.] 1. Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. Quae singula qualia sint, suis locis proponemus.

43. *See* G. INST. I.1.

44. The tradition is most evident in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Self-evidence is yet another variation on universal custom. Note that natural rights play little role in the United States Constitution, which is a compact between states, but the logic was evident in state constitutions of the time. *See, e.g.*, MASS. CONST. of 1780 art. I ("All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.").

45. *See* HENRY PHILIP FARNHAM, LAW OF WATER AND WATER RIGHTS 324 (1904) ("When it is determined that a separate parcel of land is accretion or alluvion, it is the property

references to rights that are *jure naturae*, by the right of nature.[46] "The right to future alluvial formation or batture is a vested right, inherent in the property itself, and forming an essential attribute of it, resulting from natural law in consequence of the local situation of the land."[47] Elsewhere, that same treatise says, in criticism of some state-law cases, that "the stream is created by nature, and man has no right to destroy it."[48] Instructively, that treatise also states that the state has never attempted to avoid its obligation to provide compensation when it so interfered with water rights "to dispose of the land in front of its grantees of shore land because 'the attempt to make such grants is calculated to render titles uncertain, and derogate from the value of natural boundaries, like streams and bodies of water.'"[49] The appeal to natural law was likewise made in Lewis's treatise, where he quotes at length from the decision of the House of Lords on the question of "whether a riparian proprietor on the banks of a tidal navigable river had any rights or natural easements similar to those which belong to a riparian proprietor upon a non-tidal stream."[50] In ways that differ from the modern American law on the navigation servitude, that question was answered in the affirmative so that the riparian rights survived. The Lord Selborne squarely rested his decision on natural law by noting that "[t]he rights of a riparian proprietor, so far as they relate to any natural stream, exist *jurae naturae*, because his land has, by nature, the advantage of being washed by the stream . . . ."[51]

This extensive reliance on the natural law dates back to Roman times, where the laws of alluvion and avulsion were part of the natural law as defined by Gaius and Justinian in their respective Institutes. These classical texts, moreover, do not at any point treat these forms of property as though they are owned by the state. Rather the term is that they are "public," which refers to a system that guarantees all persons open access, not to a system of state-owned properties like public buildings and amphitheaters.[52] In this regard, it is instructive to

of the owner of the bank to which it forms, the same as though it had always existed there. This is the rule recognized by the law of nations.").

46. *Id.* at 111, 280, 294.

47. *Id.* at 330 n.8. Batture refers to "deposits along the shore of the Mississippi river." *Id.* at 330.

48. *Id.* at 613.

49. *Id.* at 316 (quoting Hardin v. Jordan, 140 U.S. 371, 381 (1891)).

50. JOHN LEWIS, LAW OF EMINENT DOMAIN 89 (Chicago: Callaghan & Co., 1888).

51. *Id.* at 90 (quoting Lyon v. Fishmongers Co., 1 App. Cas. 662, 682 (1876)).

52. For the difference, see J. INST. 2.1.1–3, contrasting the sea and the shore, which are open to all, with those things that are said to belong to the corporate body, like theaters and

quote from Gaius to see how the matter was perceived.

> (70) Land acquired by us through alluvion also becomes ours under the same law. This is held to take place when a river, by degrees, makes additions of soil to our land in such a way that we cannot estimate the amount added at any one moment of time; and this is what is commonly stated to be an addition made by alluvion, which is added so gradually as to escape our sight.[53]
>
> (71) Therefore, if the river should carry away a part of your land and bring it to mine, that part will still continue to be yours.[54]
>
> (72) But, if an island rises in the middle of a river, it is the common property of those who possess land on both sides of the stream; but if it is not in the middle of the river, it will belong to those who have land on the nearest bank of the stream.[55]

There is a lot that can be learned from these simple passages. Let us start with alluvion, move on to *occupatio* and *accessio*, and then turn to avulsion, which is only addressed in Justinian, who found (correctly) that Gaius was incomplete on this point.

A. Alluvion

First, in the key passage, "the same law" refers to the law of nature, which Gaius had elaborated on in preceding sections of his Institutes that were devoted to showing how the natural laws on occupation allowed individuals to take title to land, wild animals, and chattels, each with its own peculiar variations, based of course on the nature of the type of property acquired.[56] Since these rules are part of the law of nature, there is no mention here of any particular source of law or any particular custom that creates the rights in question. There is, however, the clear implication that the rules are followed by just about everyone, so that one test of their rationality is their commonality and durability. It is not a formal justification of *why* the rules make sense, but an instructive test that can be applied to indicate that they do work well. The constant shift between natural reason and rules common to all men makes sense.

racecourses. The key point is that rights of exclusion make perfectly good sense for the latter, where the rights to exclude are functional, but they make no sense with the former.

53. G. INST. 2.70.

54. *Id.* at 2.71.

55. *Id.* at 2.72.

56. *See id.* at 2.66–69 (describing property rules over animals and land). For the parallel passages in Justinian, see J. INST. 2.2.1–19.

This is doubly true in this context because, with respect to the natural modes for the acquisition of property, no formal devices (such as the Roman *mancipatio*—a formal conveyance obsolete by the time of Justinian)[57] are needed to explain how title is obtained. The want of formality is what tends to distinguish the natural law from the civil law. Thus, the natural law will posit marriage as a natural relationship, but then leave the ceremonies for marriage to the civil law. Similar rules apply with respect to contracts and conveyance. There is, accordingly, far less reason to expect any local variation in the natural modes of acquisition.

Second, Gaius explains that the rules on alluvion apply to those incremental adjustments to ownership that are too small to "estimate" at any point in time.[58] He offers no systematic argument on behalf of that critical proposition. Rather, in line with the work by most natural law theorists, both he and Justinian tend to rely on dogmatic assertions of the way things are without offering any detailed explanation of why they remain that way.[59] It does not follow, however, that we cannot find any explanation for the rules in question that makes sense, in our time as well as in theirs.

With respect to alluvion, the explanations draw from a useful mix of common sense and basic economic theory. On the former issue, boundary disputes in ancient times were, if anything, far more important than they are today, where it is possible to describe land by metes and bounds and to protect any land title by state action. The easiest way to define boundaries is to say that "my plot runs down to the river," which is just the way that everyone, everywhere, describes the situation in ordinary speech. Hence, it is easy to see the customary ways in which the norm was established.

That everyday statement also contains the seeds of profound economic wisdom. As a practical matter, that sentence should not be rendered false if the river bank itself moves by small increments that can barely be observed. It adds to the stability of possession that these random perturbations of a given equilibrium point do nothing to alter the ownership of the land. The opposite position could easily result in having the same point on the earth's surface count as the boundary line between two riparians even if it moves to the middle of the river.

57. For a description of how *mancipatio* worked, see G. INST. 1.119. These rules also applied for the conveyance of land, slaves, and certain herd animals. *Id.* at 1.120.

58. G. INST. 2.70.

59. *See, e.g.*, G. INST. 2.70–78; J. INST. 2.1.20–25.

The constant geographical position could separate the former riparian from the river by a sliver of land too small to be viable economically. Clearly, two riparians are better than one, or perhaps even none. This is not one of those situations where fine calipers are needed to measure the gains or losses from choosing the right rule for a situation that is defined by topology, not politics. The alluvion rule is universal precisely because of the winning combination of sensible property rights and low administrative costs.

B. Occupatio *and* Accessio

The Roman law of *occupatio* involves the natural modes of acquisition of things that were previously unowned. The law of *accessio* arises when two things owned by separate individuals are to some extent combined into a single whole, which thereafter gives rise to the question of whether to undo the union, divide the ownership, or pay compensation to one side for the loss of its rights.[60] Those rules do not work well with respect to an island that arises in the middle of the stream, belonging to either or both riparians depending on its exact location. The key point is not how those disputes are likely to be resolved. Rather, it is that the creation of the new land does not create any claim for the "state," which is nowhere mentioned in this account of how ownership rights are assigned. Essentially, it gets rid of the rule of first possession that normally applies to unoccupied land and limits the universe of potential takers for the land to the riparians on both sides of the river, conceivably more than one on each side.

Clearly these rules have to be modified to some extent to deal with littoral lands, where there is only one shore and not two banks. The modifications in question, however, should not go to the question of incremental changes by the beach because the same considerations at work in the riparian context carry over with equal force in this context. Access to the ocean is the critical variable and there is no reason for it to be disturbed by these incremental movements in the shore. To be sure, these are often more extreme in many locations than are movements in the banks of the river, but the size of the variance does not look to be the decisive feature, except to this extent: If the movement of the ocean boundary is so extreme that an entire plot of land is wiped out, the abutting land now becomes riparian

60. For the basic rules, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1976); for the explanation of how and why these works work, see RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 67–70 (1995).

land, subject to the same rules on alluvion. If the land that washed away is somehow magically restored in anything like its original form within a short period of time, the new littoral owner could perhaps be demoted again to inland status. A question of this sort, however, is not likely to generate anything close to the same consensus as the original basic rule that allows a riparian or littoral owner to maintain his access to a river or lake in the face of any small fluctuations of the location of the river, stream, ocean, or lake.

The position of riparian and littoral owners also differs with respect to the case of new land. For littoral owners, new land could arise at an extensive distance from the shore, so that recognizing the littoral owner's presumptive claim to that distant land seems far weaker than the comparable claims of riparians for an island that emerges in the middle of the river. In light of these physical realities, the rule changes such that the ownership of the island, according to Justinian, belongs to the first party to occupy the land.[61] But he does not follow the general rules governing ownership of land islands that lie within rivers, which is, as he notes, the much more common occurrence.[62] In these cases, there is little benefit from letting a third party gain access to small slivers of property that are more efficiently divided between the two riparian owners. One vital point, however, is the common feature of both these rules. The state does not enjoy any greater rights in the littoral context than it does in the riparian one. Any new island is fair game for any taker. It does not in any way, shape, or form become the property of the state. Nor need it, because the first possession rule does not require any state office for its implementation, in sharp contrast to a land or patent registry, which is necessarily a creature of the state.

Thus far I have not discussed the short passage in Gaius's Institutes, Book II, Section 71, which deals with land that has been dislocated from its original perch and carried downstream.[63] That

61. J. INST. 2.1.22.

62. *Id.* ("When an island is formed in the sea, which rarely happens, it is the property of the first occupant; for before occupation, it belongs to no one. But when an island is formed in a river, which frequently happens, if it is placed in the middle of it, it belongs in common to those who possess the lands near the banks on each side of the river, in proportion to the extent of each man's estate adjoining the banks. But, if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. If a river divides itself and afterwards unites again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before."). Note that Justinian offers the correct solution to the problem of the divided river.

63. G. INST. 2.71.

passage is clarified by the slightly longer discussion in Justinian, which notes that the removed soil remains the property of its original owner so long as it is in a free (i.e., unattached) state. Quite simply, the Roman rules (and ours) do not think that the movement of one thing onto the land of another by natural forces is sufficient to transfer ownership. Usually, a voluntary transaction is required. Thus, no one would think that a roof uprooted by a storm would become the property of the person on whose land it eventually landed. That roof would remain the property of the owner, who might be required to bear the costs of its removal if he wished to reclaim ownership. The distinctive feature with respect to land is that the rules on ownership change when it is no longer possible to simply return the thing to its original owner.[64] Thus, Justinian provides that "[i]f, however, it remains for long united to your neighbor's land, and the trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbor's estate."[65]

This rule makes eminently good sense for two reasons. First, the process of taking root is not instantaneous, such that once the trees take root it is quite sensible to apply some inchoate notion of an individual waiver or statute of limitation to bar the action for return. Second, the return of the property makes no sense because it would necessarily result in a diminution of property value, which, from an ex ante perspective, does not work to the advantage of any riparian. To be sure, it might well be possible to introduce some notion of compensation for the additional land, but that would be exceedingly difficult to determine. In addition, compensation would not serve any useful social function in this context. The land in question was taken by forces of nature, so that these cases do not raise the serious moral hazard associated with the taking of land (for public purposes, we hope) by government parties. In those circumstances, an explicit price mechanism via a just compensation requirement makes perfectly good sense as a constraint on government appetites to acquire land

64. *Id.*

65. J. INST. 2.1.21. The parallel to the rules of *accessio*, which govern the combination of one thing out of the inputs of two people, cannot be overlooked. *See* G. INST. 2.72–79 (treating these natural modes of acquisition just after the discussion of riparian rights); *see also* J. INST. 2.1.25–34, (treating natural modes of acquisition just after the discussion of riparian rights). Note that in Gaius, the discussion of natural modes of acquisition takes place after the discussion of the formal modes of conveyancing, which to the modern mind is out of chronological sequence since acquisition normally precedes transfer. The order is reversed, surely consciously, in Justinian because the abolition of *mancipatio* made it easier to take the two topics in their natural sequence.

for public projects. In these cases, however, the land movement is done by no human agency, so that the simple prompt request to allow for the return of the detached bit of land is sufficient to deal with any potential source of individual misconduct.

C. Avulsion

The situation once again shifts with avulsion. In the case of rivers, the rapid shift in location is not amenable to the solution that is used in the alluvion cases. The extent of the shift is not possible to calculate in the land and could easily cover extensive territory, so that the new course of the river runs through the land of individuals who were not riparians when the river was on its previous course. In these cases, the only sensible rule is the one adopted by Justinian:

> 23. If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent that their respective estates adjoin the banks. The new bed follows the condition of the river, that is, it becomes public. And, if, after some time, the river returns to its former channel, the new bed again becomes the property of those who possess the lands contiguous to its banks.[66]

Once again, Justinian gets it exactly right. It is pointless to think that the old riparians could claim that status with respect to lands that they never owned. Hence, the sensible solution is to treat, by operation of law, the new set of riparians as owners of the land as it runs down its new course. The abandonment of the old riverbed then raises the question of ownership, and here the Romans took the correct position that the land was divided between the two adjacent parties.[67] In taking that view they necessarily rejected the view that the newly dried land could be taken by the first possessor. Smart. What possible use is there in a long thin strip of land under separate ownership? The automatic rule leads to reduced uncertainty and cleaner property lines. By taking this position, Justinian necessarily rejected, yet again, the view that the state could make any special claim to this property, especially because the rules were developed before the advent of the state.

66. J. INST. 2.1.23.
67. *See id.*

D. Littoral Rights

The same problem cannot arise for littoral rights, but variations on the theme can. For example, if a violent storm cuts off some portion of an owner's land from the remainder, there is no reason why he should not continue to own what he did before, while the new channel is public water just as it would have been if nothing were there. Likewise, if the waters inundate the land so that it disappears under public waters, the land is lost to its original owners. In dealing with the problem of inundation from rivers, Justinian again takes the correct position that once the waters retreat into the natural channel, the land reverts to its original owner. The solution is less clear when the oceans or lake wipe out littoral land (or even inland parcels), only to restore some fraction of it years later. It may well be that, at that latter point in time, the better solution is for the new littoral owner to extend his land out to where the previous owners had held title. It is just too costly to figure out what to do with the original owner when only a tiny slice of his land resurfaces from the waters. But for these purposes, these details—on which honest differences of opinion can arise—do not matter. The two points that do emerge are these: First, the rules on alluvion and avulsion apply only to natural events, for there is no mention of any form of human intervention in any of the quoted passages from Gaius or Justinian.[68] The standard modern definitions of avulsion reflect just that settled understanding: "The removal of land from one real property and its deposit on the property of another, by the sudden action of nature (e.g., water or volcano)."[69] Second, somewhat more narrowly, "[a] sudden removal of land caused by change in a river's course or by flood."[70] The restriction to actions by nature is critical because once human interaction is introduced the question of incentives for good and bad behavior becomes the linchpin for the overall analysis.

Similarly, the rules in question at no time allow the changes in natural topography to create a state interest in the land in question. Rather, at all points the applicable phrase is that the rivers, lakes, and oceans are *publici juris*, dealing with the right of the public to access these waters. The challenge in modern law is to apply this body of law to those cases in which state action is responsible—whether for good

68. G. INST. 2.66–79; J. INST. 2.2.1–34.

69. *Avulsion Definition*, DUHAIME.ORG, http://www.duhaime.org (last visited Apr. 15, 2011).

70. BLACK'S LAW DICTIONARY 157 (9th ed. 2009).

reason or bad—for the change in the flow of rivers, lakes, or oceans. It is just these issues that come into play in *Stop the Beach Renourishment*, in which Justice Scalia acutely senses that he is about to fall off an intellectual cliff. He is dead on the money when he talks about the role of a doctrine of judicial takings. Once he turns to the particulars of the case before him, however, he barrels down the wrong track to a judicial train wreck.

IV. JUDICIAL TAKINGS AND ITS MISAPPLICATION IN *STOP THE BEACH RENOURISHMENT*

A. The Takings Clause and Judicial Action

In dealing with *Stop the Beach Renourishment*, there is much to be said for Justice Scalia's initial proposition that the Takings Clause of the Constitution applies to judicial as well as legislative action.[71] He puts the point well when he writes:

> There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.[72]

In effect, Justice Scalia combines two powerful positions of constitutional interpretation applicable in this case.[73] The first is a close textual reading, which does not in this instance reference the source of the taking, but rather uses the passive voice, making it broad enough to cover all branches of government. The second approach is more functional: If the legislature and the executive can be stopped, why not the courts? Judicial decree (with an intended sense of

71. For the earlier articulation of the point, see the concurring opinion of Justice Stewart in *Hughes v. Washington*, 389 U.S. 290, 294–98 (1967). For an extended discussion, see Bederman, *supra* note 35, at 1436–38. *See also* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1463 (1990).

72. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010). I ignore here the extensive dialogue between Justices Scalia, Kennedy, and Breyer on this doctrine, which is analyzed in Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199, 1203–10 (2009); Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

73. For further development, see RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS (2008).

arbitrariness) and legislative fiat are cut from the same cloth. That same approach was taken in connection with the First Amendment guarantee of freedom of speech in *New York Times Co. v. Sullivan*.[74] That case upended huge bodies of the state common law of defamation on constitutional grounds, even though the First Amendment applies explicitly only to acts of Congress.[75] Yet, the Supreme Court, speaking through Justice William J. Brennan, resisted any invitation to apply it only to state statutes and not to state common-law rules.[76]

Justice Scalia's position on judicial takings is especially strong in light of the previous discussion, where it was assumed that the creation of these rights in the first instance did not follow from any judicial decision whatsoever, but from the long-standing common understanding of how alluvial and avulsive changes impacted the riparian or littoral rights.[77] Thus, if the consequences of alluvion were clear, any judicial decision that altered the initial balance should be regarded as a taking of private property. At that point the state must supply compensation unless it can offer some police power justification for its action. This is indeed the constant theme of the earlier treatises, which note that while the rights of riparian owners might be at the "mercy" of the English Parliament, they were strongly protected against expropriation by federal or state action.[78]

The power of vested rights has been recognized with various kinds of local customs. It should apply with equal force to the universal rules on alluvion and the like, which had complete traction long before they were announced or ratified in any judicial opinion. In this regard, Hawaiian customary law, expertly analyzed by Professor Bederman, is especially dense and offers a good laboratory to test the general problem of judicial takings.[79] The key point is that this basic principle works in both directions, such that a claim of private ownership by occupation should be rejected in the face of a custom that treats transitional beach land as common property. Bederman

74. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

75. *See* U.S. CONST. amend I ("*Congress* shall make no law . . . ." (emphasis added)).

76. *New York Times Co.*, 376 U.S. at 265.

77. *See supra* Part III.

78. *See* FARNHAM, *supra* note 45, at 613 (using the term to state that even where property rights are completely at the "mercy of Parliament, a local body supplying its district with water has no power other than that given by statute to alter the flow of the water of a stream, although the alteration causes no sensible damage to riparian proprietors").

79. Bederman, *supra* note 35, at 1426–34.

points first to *In re Ashford*,[80] in which the littoral owner sought to register title to the land located between the vegetation line and the high-water mark—the dry beach, which in Hawaiian goes under the name "me ke kai." Yet the tradition on this issue ran clearly in the opposite direction, so that this effort at private encroachment was squelched, as it should have been. The universal rule is that private occupation is not allowed for any form of property that is held in common, lest the commons disintegrate by noncooperative forms of individual behavior. At most, there are sensible practices that allow for temporary use of the beach as a refuge from storm, but none that allow permanent occupation.[81]

By the same token, an aggressive (mis)interpretation of custom should not be allowed to trump established property rights. The way in which this transformation can be undertaken is revealed in a discussion of three cases dealing with a profit à prendre, that is, a right to gather sticks and other small objects from the land over which another individual holds legal title.[82] As with many local customs, the peculiarities of geography matter, for a custom like this one could never develop with respect to lands that did not offer these opportunities for collection. In dealing with these issues, the dimension of the custom is key.[83] In *Kalipi v. Hawaiian Trust Co.*,[84] the court began by noting that "traditional gathering rights do not accrue to persons, such as the Plaintiff, who do not live within the ahupuaa in which such rights are sought to be asserted."[85] From this it was an easy leap to the proposition that these individuals, at the least, could not use their claims to the custom to block any development that a landowner might otherwise make of his property.[86] The people who benefited were those individuals who lived in a given ahupuaa, which is a portion of the island that is defined by the valley that starts at the top of the mountain and works itself down to the seashore.

As stated in this fashion, the local custom seems to coexist with the general common-law system of property rights, which was

80. In re Ashford, 440 P.2d 76 (Haw. 1968), discussed in Bederman, *supra* note 35, at 1428.
81. *See* J. INST. 2.1.5, (the correct translation of the Latin is "hut," not "cottage").
82. *See* Bederman, *supra* note 35, at 1417–25.
83. For the basic discussion, see Bederman, *supra* note 35, at 1426–35, from which this narrative is drawn.
84. Kalipi v. Hawaiian Trust Co., 656 P.2d 745 (Haw. 1982).
85. *Id.* at 752.
86. *Id.*

incorporated explicitly into the Hawaiian Constitution of 1892.[87] Put in this form, the reconciliation makes good sense. These ahupuaas are of exceptional importance in Hawaiian water law. Water coming down mountainsides does not easily lend itself to distribution under a riparian system, as there are no rivers with banks. These ahupuaas define the class of individuals who are eligible to use that water, which is essential to avoid the risks of overconsumption that are always posed by any scarce resource.[88] In effect, the localization of the custom prevents an excessive surcharge on the common resource, in much the way that limiting the right to withdraw water from the river is limited to riparians for riparian use only.

By the same token, the rule has the right relationship between the profit à prendre and development rights. When land is in its idle state, the right to collect twigs and branches is of little or no inconvenience to anyone, so the custom grew up to exploit that possible source of gain. The genius of the custom is that it is never generates permanent title by prescription so that landowners are not put in the position of having to take unnecessary steps to exclude others when such actions are both expensive and counterproductive. This situation is not unprecedented in the law, for the strategy of allowing the use right while tolling the statute of limitations parallels the legal treatment to the coming of the nuisance doctrine at common law. In that setting, a person whose property is next to vacant land can make extensive use of his own property until the neighbor chooses to build, at which time the statute of limitations starts to run.[89] That configuration of rights accomplishes two objectives. First, it allows the maximum extraction of value from both parcels of land combined. Second, it prevents the statute of limitations from running until an actual conflict emerges, thereby reducing the possibilities of litigation. For courts to switch the rule around in the Hawaiian context is a great mistake. It takes the trivial rights of gathering that were traditionally subordinate to development and turns them into superior rights that may now be

87. *See* 1892 Haw. Sess. Laws ch. 57, 5 (codified as amended at HAW. REV. STAT. (1994)) ("The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage.").

88. *See* Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985). This decision inserted state ownership where it was not needed. *Id*. at 1475. This decision, however, has not been generally approved. *See* Bederman, *supra* note 35, at 1438.

89. *See generally* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY AND THE COMMON GOOD (1998).

used to block development projects of vastly greater value. This approach gives any landowner a strong incentive to block the development of any custom at all. In contrast, the rule that allows members of the larger community a set of "fill in" rights, lasting until development starts, permits an interim use to add value to the land in ways that do not prejudice the long-term position of the landowner. The older custom is therefore efficient in the way that newly articulated judge-made rule is not. To be sure, it is always possible for any developer to try to buy back rights to development. Yet, given the inchoate group that possesses these rights, the ability to buy back the rights, in the context of a holdout, is a slim possibility.

The original sensible treatment in *Kalipi* was undercut in *Pele Defense Fund v. Paty*.[90] There the court refused to limit gathering rights to those within the ahupuaa because the claimants introduced affidavit evidence indicating that these gathering rights extended to others on the island. The evidence used was far weaker than what would be needed to satisfy Blackstone's exacting standard for proving a local custom.[91] The much more dramatic switch took place in *Public Access Shoreline Hawaii [PASH] v. Hawai'i County Planning Commission*,[92] insofar as it inverted the relationship between the local custom and the common-law development rights by treating the profit à prendre (often held by a broad and diffuse group of individuals) as sufficient to block future development.[93] At this point it is difficult to disagree with the assessment of Bederman when he writes:

> It is one thing (as has already been suggested) to use custom in a parcel-by-parcel examination of community rights and interests. It is quite another to use custom as a means of rewriting the jurisdiction's general property law, and, with one stroke of the judicial brush, to declare public easements in the entirety of the state's beaches.[94]

It is, of course, not likely that any state court that has introduced such mayhem with development rights will invalidate its own judicial

90. Pele Defense Fund v. Paty, 837 P.2d 1247 (Haw. 1992).

91. *Id.* at 1222.

92. Public Access Shoreline Haw. [PASH] v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246 (Haw. 1995), criticized in Bederman, *supra* note 35, at 1431–35.

93. *See PASH* at 1272 ("Thus, to the extent feasible, we hold that the HPC must protect the reasonable exercise of customary or traditional rights that are established by PASH on remand.").

94. Bederman, *supra* note 35, at 1441.

decision on constitutional grounds. Certainly, the federal courts cannot review a state-law decision on state-law constitutional grounds, but it makes good sense with respect to these general rights to treat judicial nullification of established customs as a taking under state law, which is subject to federal reexamination, just as Justice Scalia held in *Stop the Beach Renourishment*.[95] That point is especially true in connection with the *ius naturale* where there are no local uncertainties that interfere with the understanding of the underlying rights. There are a number of judicial decisions and articles that take this position.[96] The question is whether it was applied correctly to the Florida situation in *Stop the Beach Renourishment.* The answer to that question is unfortunately not, as the next section explains.

B. The Misunderstanding of Judicial Takings in Stop the Beach Renourishment

However strong Justice Scalia's decision is on the grand question of judicial takings, it misfires in understanding how the argument should proceed in the context of this particular case. His decision starts with the view that it is the holdings of earlier Florida decisions that establish the background norm against which the claim of a judicial taking must be made.[97] Justice Scalia's point reflected the way in which the case had evolved in the Florida courts. The State had argued that there could be no judicial takings because under Florida law, the littoral owner did not enjoy any protected access to the water in the first place, so that there was nothing left to take. In dealing with this challenge, Justice Scalia makes no mention of the *ius naturale* in relation to these cases. Nor does he make any effort to ask whether the Florida decisions he examines are sound. The only question that he brings himself to address is whether these earlier cases—none of which are discussed in the proceedings below—gave the State a leg up in dealing with this question.[98]

Right off the bat, it is clear that he misapprehends how these rules on littoral rights should work. After his long discussion on judicial takings, he continues as follows:

95. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2609–10 (2010).

96. *See* Somin, *supra* note 3.

97. *Stop the Beach Renourishment*, 130 S. Ct. at 2611–12.

98. *Id.*

> Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. . . . Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. . . . The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not. In *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line to become dry land, that land continued to belong to the State. . . .
>
> Thus, Florida law as it stood before the decision below [in this case] allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership.[99]

It is instructive to compare this outlook to the treatment of the same subject under the *ius naturale*. *Martin v. Busch*[100] is the only case that need be examined to illustrate the legal chasm. *Martin* does not explain why the state should have ownership of the land it drained. If the earlier conceptions of natural law applied, that land would be a *res nullius* or owned by the owner of the littoral lands,[101] thereby avoiding the risk that the state could profit handsomely from its own conduct. The critical question, however, is whether the draining of the lake should be regarded as a taking of the property rights of the littoral owner. In order to answer that question, the proper approach is to put the matter this way: Suppose that the drainage in question had been worked by a private party to the detriment of the owner of the littoral land, whose property values were diminished by virtue of the loss of view on the one hand and access to the lake on the other. It is perfectly clear that anyone who dams up a river so that it does not flow by the property of a lower riparian has committed a major tort in every jurisdiction that deals with the subject. By the same token, it is hard to see how the littoral owners on a lake would have no ability to enjoin that kind of action when done by a private party, especially one who intends to occupy the land for his own use and benefit.

99. *Id.* at 2611 (citations omitted).
100. Martin v. Busch, 112 So. 274 (Fla. 1927).
101. *See* G. INST. 2.72.

The question then is: What difference does it make that the state does the taking? In this context, we do not have to trouble ourselves with the difference between cases that involve beaches and those that only involve land that is far removed. In each case, the only difference between the state and the ordinary private party is that the former cannot be enjoined while the latter can, so long as the taking is for a public use.[102] The point of this test is to prevent the kind of dangerous political arbitrage whereby those individuals who would have to buy rights in the private context now expend energies before legislatures and planning bodies to obtain political cover that allows them to acquire these rights for nothing at all.[103] In this situation, it would be odd to say that the regulation in question is needed to prevent some abuse by the littoral landowners. It is not as though they have committed any form of common-law nuisance that their neighbors could have enjoined by right. Put bluntly, it is a case in which the state has no credible police power justification for its action.

At this stage in the argument, one can concede that emptying a lake counts as a public purpose, under any test one prepares to announce. The only question, therefore, is whether there is a duty to pay compensation. The reason for the just compensation requirement of the Takings Clause is to make sure that the coercive power of the state, which cannot be enjoined, is only used to transfer property from lower to higher-valued uses.[104] Forcing the state to supply compensation is the only possible way to rein in the political factions that would otherwise consume legislative and administrative branches. In some instances, it is possible to find that general statutes of uniform application create a form of in-kind compensation that dispenses with the need for cash payments between the parties. Thus, in the case of reciprocal easements that, on net, benefit each person subject to the general ordinance, the right way to think about the problem is to treat the loss of the right to build (say to the edge of a lot line) as the taking of property for which full compensation is rendered by the imposition of a like restriction on a neighbor. There is no need to belabor the intricacies of that formulation here. It is sufficient to note that none of the littoral owners in *Martin* received any sort of benefit from the draining of the lake that offset their loss

102. *See* TAKINGS, *supra* note 23, at 332–33.

103. For an expanded account of this theme, see Epstein, *Playing by Different Rules*, *supra* note 8.

104. *See* EPSTEIN, SUPREME NEGLECT, *supra* note 73, at 89–93.

of traditional littoral rights.[105] The decision therefore represents a howling intellectual blunder that is wholly inconsistent with the general pro-property rights vision that rests with the *ius naturale*. Why this decision should be regarded as the baseline against which the claim is measured is an unexplained mystery. Recall that Justice Scalia did say that "judicial decrees" were no better than "legislative fiat."[106] If there was ever a case that was a sheer judicial decree in need of constitutional amputation, *Martin* is it.

Nonetheless, Justice Scalia shrinks away from applying that *coup de grace.* At one point, he invokes his own oft-quoted statement from *Lucas v. South Carolina Coastal Council*[107] that government action depriving a property owner of all "economically beneficial use of his land" is not a taking if the restriction "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[108] But he never closes the loop to note that whatever one wants to say about *Martin*, it does not reach that status. There is no legal support, even in the misguided *Martin* decision, to support the view that the drainage of an inland lake should be regarded as an avulsion for which no compensation was in fact awarded. He is in fact queasy about that conclusion when he writes:

> The result under Florida law may seem counterintuitive. After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion. State-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction, and *Martin* suggests, if it does not indeed hold, the contrary.[109]

"Counterintuitive!?" A better word is horrendous. Justice Scalia's reading of *Martin* violates every known reading of the *ius naturale* against which it should be tested. It makes far more sense in this context to knock out a malign state-court decision than it does to follow it slavishly, even though it is bankrupt on the very points that

105. Martin v. Busch, 112 So. 274 (Fla. 1927).

106. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.").

107. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

108. *Id.* at 1029.

109. *Stop the Beach Renourishment*, 130 S. Ct. at 2612.

are at issue. The matter here is not one of those fine points on which learned judges could differ in their opinion. It is just a howling mistake that Justice Scalia follows.

How, then, should he have proceeded? The sensible way is to see whether *Stop the Beach Renourishment* can be distinguished from the earlier decision in *Martin*. That exercise requires that the Supreme Court spend less time on the abstract question of whether there can be a judicial taking and more time looking at the statute itself. In this case, moreover, the differences matter. Justice Scalia held that this particular "avulsion" should be treated like a natural event, even though government agents engineered it from top to bottom. It is instructive that even *Martin* did not contain the word avulsion in its decisions. The consequence was that the state owned the land outright and in fee simple. By the logic in question, there would be nothing wrong with the state, in its role as owner of private property, deciding to exclude all others, including the former littoral owners, from the property and from building a wonderful high rise that would block the view of those same littoral owners. After all, if no property rights are taken, the state can act just like any other property owner.

It is worth noting that the Florida legislature did not entertain such grotesque ambitions for its scheme. To Justice Scalia, it could not matter at all that the statute took explicit steps to preserve rights of both access and view over the land that was subject to the state's intervention in the case. The reason his approach is wrong, though, is that these both matter a lot. Recall that compensation for a statutory scheme could come in cash or in kind.[110] In this case, the limitations that the state imposed on itself offer huge in-kind benefits to the former littoral owners who are now guaranteed the two key incidents of ownership normally associated with littoral land.[111] The key question, therefore, is the extent to which these furnish the needed in-kind benefits. In principle, it looks as though access and view from a distance are not as valuable as those benefits one had as a littoral owner. The picture is incomplete, however, because the creation of the erosion line offers a protection to littoral owners that may well tip the balance in favor of just compensation. Furthermore, the littoral owner loses any rights to expansion of his or her land that come with alluvion.

110. *See* EPSTEIN, SUPREME NEGLECT, *supra* note 73, at 49–50.
111. 1961 Fla. Laws ch. 61–246, *amended by*, FLA. STAT. §§ 161.011–161.45 (2007).

In deciding whether any landowner is hurt by this statutory intervention, four factors have to be put into the mix: (1) the loss of accretion, which has to be set against (2) the protection of land on the landward side of the barricade, (3) the preservation of easement of access, and (4) that of the easement of view. The appropriate disposition of the case, therefore, is to remand to the lower court to see how the four factors net out. On remand, the obvious difficulty is that all these owners may not be similarly situated so that some individuals are left better off than others. The best way to deal with that complication is to start with a typical landowner and see which way the balance cuts. Thereafter, each individual landowner could introduce evidence to indicate that his position is worse or more vulnerable than those of his neighbors. The State could introduce evidence on the other side. My own guess is that the State will fare fairly well under this calculation, which shows ironically that a careful combination of the right definition of property rights with the correct eminent-domain analysis can lead you to the right place.

V. JUDICIAL TAKINGS WRIT LARGE

Thus far I have argued that the application of the doctrine to judicial takings should curb actions such as those taken by the Florida Supreme Court in cases like *Martin v. Busch*. One serious objection to adopting a doctrine of judicial takings is that it might lead to the unfortunate state of affairs where every switch in state common-law rules could lead to a federal constitutional challenge.[112] To be sure, the possibility of that extravagant reading cannot be dismissed on a priori grounds. But, by the same token, it is important to stress just how narrow a rule is needed in order to pick off cases like *Martin* without granting federal courts the position of a council of revision on steroids over state laws.

Ironically, the best way to understand the appropriate balance is to generalize from the distinction between alluvion and avulsion. The Supreme Court should only intervene in those cases that look like avulsions—radical deviations from established practice that are made without rhyme or reason. In this case, the transformation was complete. The standard rules of avulsion never allowed for man-made changes.[113] The moral hazard from such a rule was too great. That

112. *See, e.g.*, Dogan & Young, *supra* note 4.
113. *See supra* notes 68, 69, and accompanying text.

certainly applies in *Martin*, where state intervention resulted in giving the state uncontrolled fee ownership of the lakebed. The striking feature about the case was that it equated a situation where there was no moral hazard—avulsion—with those cases where the risk of moral hazard is greatest—deliberate state action from which the government profits and littoral owners lose.

This last observation offers some clue as to how best to attack the question of judicial takings. Begin with those cases where the risks of misbehavior are greatest. That approach is taken with respect to political action, and one line of cases where that is undoubtedly true involves the situation where the government has an interest in the outcome of the case. Nearly 50 years ago, Professor Joseph Sax faced just this question in seeking to work out what he thought to be appropriate limits for the takings doctrine by asking such questions as whether the abolition of the privity rule in product liability cases, or the defense of charitable immunity more generally, should count as takings.[114] From his perspective, the correct answer to both these queries is sharply in the negative because he thinks that the critical distinction in this area is that between arbitral and entrepreneurial rules:

> The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.[115]

It is worth examining both the uses and limitations of this distinction. On one side, it makes sense to cast a suspicious eye on government activities that enhance the government's position, as took place in *Martin*.[116] Here, the case falls securely on the less problematic side of the line and compensation could be paid to those parties hurt by this particular rule, given that in each case the dollars owed are triggered not just by the passage of legislation, but by the concrete decision to drain a particular site. The difficulties, however, emerge on the other side. The traditional accounts of the police power did not

114. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 51 (1964).
115. *Id.* at 63.
116. *See* Martin v. Busch, 112 So. 274 (Fla. 1927) (where the state is awarded ownership of the land it has drained).

extend to any and all efforts in which the government sought to adjudicate disputes between private parties. Rather, it extended only to those cases in which the government sought by appropriate means to advance the "health, safety, morals, or general welfare," of the population, which is far narrower, but which receives no mention in the Sax account.[117]

The consequences of this distinction are substantial. Using this definition of police power, decisions like *Lochner v. New York*[118] suddenly become credible when it can be shown that the decision to impose a ten-hour maximum work-day statute was intended to benefit unionized bakers at the expense of their non-union opponents. At this point, the statute was declared an illegal labor statute and struck down accordingly. Now let us suppose, as I believe, that the earlier decision in *Lochner* was far sounder than the subsequent judicial decisions that spelled its demise. The next question is: Should the United States Supreme Court act differently on this matter if the ten-hour work day was declared to be state policy by a judicial decision that equally upset the ordinary common-law rules on freedom of contract? I see no reason to accept the distinction. To writers like Professor Sax, the point hardly matters because they would never allow a legislature to strike down this sort of law. But if the freedom of contract is allowed to regain its status as a real constitutional principle, the issue of judicial takings has to be faced. In this regard, moreover, it is instructive to note that both the abolition of the privity rule and of charitable immunity are suspect precisely because in each case the rule was applied in such a fashion that blocked any effort to contract away from the rule.[119] That issue is one that far transcends this discussion, but suffice it to say that if the legislative version of the action passes constitutional muster, then the judicial version passes muster as well. The modern rational basis test as it applies to a wide range of property and contract regulations does not raise this question today.

117. *See* Sax, *supra* note 114.

118. Lochner v. New York, 198 U.S. 45 (1905).

119. For products liability, see *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (blocking the use of disclaimers as unconscionable in implied warranty actions brought by nonpurchasers of the product), and *President & Dirs. of Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942) (Rutledge, J.). I explore the boundaries between tort and contract on these questions in Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, Article 6, 3 J. TORT LAW (2010) (defending charitable immunity in consensual, but not in stranger, cases).

Yet, in principle, surely it should. To return to Sax's formulation, it is always risky to use the pronoun "its" as a way to describe government action.[120] As a brute fact of nature, all actual decisions are made by either individuals or groups of individuals. There is therefore a real risk that one side in any partisan battle can seize the power of the state and turn it to its end. Thus, the situation in cases like *Stop the Beach Renourishment* would hardly improve if the lakebed were given to some designated private developer once the water was removed from it. It is therefore incumbent as a matter of first principle to look at the major forms of redistribution that judicial decisions can work between private parties. At this juncture, the old line between alluvion and avulsion helps show the way. If the doctrinal changes introduced by judicial decisions are incremental and do not unfairly favor one class of actors over another, they should normally be allowed to pass. Thus, a change in the parol evidence rule to allow in more or less evidence does not put the judicial thumb on the side of either landlords or tenants. The rule may be wise or foolish, but the sensible response is to let it pass because there is no obvious tilt in its application. Indeed, from the ex ante perspective, there is reason to hope that the new change leaves all parties better off.

In those cases where there is an abrupt change that works in one direction, however, a much closer level of scrutiny ought to apply. This should be the case, for example, when a well-established statute of limitations opened up in ways that benefit only one side, which was the case with respect to those many statutes that lift the protection of the statute of limitations on lapsed cases in such hot-button areas as criminal prosecution of child abuse.[121] The same logic should apply to lifting the statute of limitation by legislation for civil actions brought by private parties. I see no reason why that result should differ if the state court decided to lift the statute of limitations of its own motion. So understood, it seems that the proper scope of the judicial takings doctrine is dependent on the ability to mirror the decisions used to evaluate legislative or executive decisions achieving the same end. In both contexts, every effort should be made to avoid interfering on small adjustments that have no clear distributional consequences. It is

120. For an illustration of the dangers, see *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988), where customary tribal claims over public lands were dismissed on the ground that the government could do what it wanted with "what is, after all, its land."

121. *See, e.g.*, Stogner v. California, 539 U.S. 607, 632–33 (2003) (striking down by a five-to-four vote under the Ex Post Facto Clause to the United States Constitution a state statute that removed the protection of the statute of limitations for criminal prosecutions of child abuse).

not, in my view, sufficient to invoke the doctrine of judicial takings to show that the case law on a difficult point such as the scope of the fair use privilege in copyright should trigger the application of this doctrine, if only because there is no secure natural law basis that undergirds the creation of that elusive privilege. What is really needed, therefore, is a massive affront to established doctrine of the sort found in *Stop the Beach Renourishment*.

VI. WHY THE BREAKDOWN OF PROPERTY RIGHTS?

At this point, the question arises: How it is possible to get such poorly reasoned decisions like *Stop the Beach Renourishment* in the Supreme Court? In this instance, it is hard to attribute the serious mistakes in the case to any ideological division. Even if the usual conservative/liberal split arises on the question of whether judicial takings are cognizable in federal court under the Takings Clause, there is nothing about the outcome or analysis of the case that shows Justice Scalia to be an ardent defender of the property rights to which, in the end, he attaches no real weight. In this instance, I think that there are two chronic modern mistakes that lead to the result. First, the Supreme Court has an unnecessary level of nominalism in dealing with the definition and enforcement of property rights. Second, the Court has no real appreciation of how a systematic theory of takings works except in the most simple of contexts. I have discussed this issue exhaustively elsewhere,[122] and thus will only hit the high points here.

To see why, it is instructive to discuss for a moment two cases that Justice Scalia cited without discussion for the apparently innocent proposition that "state law defines property interests, including property rights in navigable waters and the lands underneath them."[123] The two cases, *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*[124] and *United States v. Cress*,[125] in fact, represent quite a difference in world views. *St. Anthony Falls* involved two operators of dams and sluices for the use of the water within a navigable river for their own power plants.[126] The state of Minnesota, by legislation,

122. *See* Epstein, *Playing by Different Rules*, *supra* note 8.

123. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010) (citations omitted).

124. St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349 (1917).

125. United States v. Cress, 243 U.S. 316 (1917).

126. *St. Anthony*, 168 U.S. at 353.

authorized another company to divert the water from the Mississippi for use in its business, to the detriment of the defendant below.[127] The United States Supreme Court denied the two plaintiffs any injunctive relief, holding, in effect, that the state had within its power the ability to define property rights as it saw fit within a navigable river so that the takings claim was out of place.[128] Under the approach that I developed in this article, that decision is wrong, given that the government is not entitled to order, without compensation, any diversion that a private party could not commit by itself.

Cress involves actions by the federal government and thus necessarily had to deal with actions that were authorized under the Commerce Clause with respect to the operation of an interstate river.[129] In dealing with this issue, Justice Mahlon Pitney took the view that I defend here and refused to allow the recognition of the navigation easement to snuff out the property rights of ordinary riparians, whether they are located on a navigable or nonnavigable river.[130] That decision was, for all intents and purposes, overruled in Justice Robert Jackson's highly influential but ultimately facile decision in *United States v. Willow River Power Co.*,[131] which was explicit in its view that the state has untrammeled power to define property rights in navigable and nonnavigable rivers and thus is allowed to engage in works on a navigable river that removed from an upper riparian, in this instance, on a nonnavigable river, the right to its head of water.[132] The decision rested on the key assumption that property rights were highly malleable. In Justice Jackson's view, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."[133] But what is needed here is not a stirring declaration of the limits of private property rights, but a concrete explanation of exactly how to determine which economic interests are property rights and which are not, which Justice Jackson never supplied. Needless to say, the *ius*

127. *Id.* at 354.
128. *Id.* at 367.
129. *See Cress*, 243 U.S. at 319 (where the states' authority to establish property laws is subject to Congress's authority to regulate navigable streams for the purpose of commerce).
130. *See id.* at 321.
131. United States v. Willow River Power Co., 324 U.S. 499 (1945).
132. *See id.* at 511.
133. *Id.* at 502.

naturale did not figure in any of these calculations and reflections.

In effect, *Willow River* rejects the two premises that make *Cress* the only intelligent modern decision dealing with navigation easements. First, *Cress* refuses to allow either legislatures or states to just define away property rights that fall comfortably within the existing categories.[134] The contagion quickly spread beyond these water law cases. It is no coincidence, for example, that Professor Sax, in dealing with a wide range of government regulations, quoted just this passage in his effort to insulate all sorts of changes in the law governing private relationships from constitutional oversight.[135] In his view, the decision stood for the proposition that any "mere diminution" in value should be the source of compensation from the state.[136] But that is not the point of contention here. In all private settings the standard rule is that competitive injury is not actionable, even—make that especially—for "established firms" that are unaccustomed to competition.[137] Nor is it any surprise that Justice Jackson's dictum was extended to land-regulation cases. Indeed, in his ill-conceived decision in *Penn Central Transportation Co. v. City of New York*,[138] Justice William Brennan relied on just that decision to rule that the vested air rights under New York state law did not have any weight in supporting a requirement of compensation for a landmark-preservation law that prevented the construction of a tower over Grand Central Station.[139] Does anyone think that a judicial declaration that it is no longer possible to create or protect air rights in New York does not count as a judicial taking?

All these cases make a common error. Use of the words "private property" in the Takings Clause is clear evidence that the Framers did not regard the institution as subject for degradation by legislation or judicial administration. They were all firmly in the natural law camp and none of them, as was common at the time, thought that there was any deep cleavage between the dictates of natural law and the general welfare of the public at large. The modern legal realism simply disregards those conceptions. If, as I have argued here, the institutions of property that were battered yet again in *Stop the Beach*

134. *Cress*, 243 U.S. at 329.
135. *See* Sax, *supra* note 114, at 51.
136. *Id.*
137. For a discussion of how this plays out, see Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. J. L. & LIBERTY 1 (2008).
138. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978).
139. *See id.* at 136.

Renourishment have real firmness and highly desirable social properties, then the legal nominalism of the United States Supreme Court comes at a high price. The newly indefinite property rights open the way to political intrigue that leads to extensive dissipation of social wealth in pointless factional intrigue. At this point, we can only wonder: Why does it matter if the Supreme Court labors hard to establish a doctrine of judicial taking if it mangles its application in the cases that matter most? It is hard to write intelligently about the constitutional protection of private property without a deep and accurate knowledge of the subject—an expertise that is not in great supply in the United States Supreme Court.

America's 51 Constitutions

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America's 51 Constitutions

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America's 51 Constitutions

I. Presentation

Precisely because America's fifty state constitutions so strongly resemble America's fifty-first—federal—Constitution, the interesting respects in which the states diverge from the federal model provide plausible versions and visions of potential federal reform.

To fully appreciate the role that state constitutions have played and will probably continue to play in shaping the American constitutional imagination, we need to take a quick peek at the fifty terse—and sometimes not so terse—texts that collectively comprise America's other major experiment in written constitutionalism.

WHEN WE DO, a striking pattern emerges: Across a large number of large issues, virtually all state constitutions have converged on a single distinct model of government. When it comes to at least ten fundamental constitutional features, virtually every state for the last half century has resembled every other state and the federal model, too. As to these features, there is a distinctly American Way, with elements that differ dramatically from those at work in various prominent foreign constitutions. Here, then, are ten basic features of American constitutionalism:

- *First*, a written constitution adopted and amendable by some expression of popular sovereignty above and beyond enactment by an ordinary legislative majority. (Beyond America's shores, Britain and Israel, among others, are notable contrasts.)
- *Second*, a bill of rights, which is typically textually separate from the rest of the document. The fifty-one American bills of rights also overlap a great deal in their language and substantive coverage, generally including freedom of expression and religion; the right to keep and bear arms; protections against unreasonable searches and seizures; procedural rights of criminal defendants; and safeguards of jury trial. (Great Britain and Australia, by contrast, have traditionally lacked strongly entrenched bills of rights.)
- *Third*, a bicameral legislature (except in Nebraska), with fixed rather than variable legislative terms. (Compare the modern British Westminster model with a functionally unicameral legislature and with traditions obliging early elections when the party in power loses a parliamentary vote of no confidence. In some foreign jurisdictions, the party in power may also call an early "snap" election on its own motion, merely to solidify its current political advantage.)
- *Fourth*, a legislative lower house typically composed entirely of representatives from equally populous single-member districts, each of which picks its representative via majority rule or plurality rule. (A minority of states do have multimember districts in the lower state house) All geographic districts are redrawn at least once a decade to maintain equal population. Unlike the proportional-representation systems in place in countries such as Germany and New Zealand, no jurisdiction-wide vote-tallying system exists to ensure that the number of legislative seats held by a political party closely tracks the overall percentage of party votes across the entire jurisdiction. Unlike multiparty regimes that operate in many other leading democracies, each American legislature is dominated by two main political parties—indeed, the same two parties across the continent, with minor variations.
- *Fifth*, a strong presidential/gubernatorial system with a one-person chief executive elected independently of the legislature, at fixed terms, wielding powers of pardon, appointment, and

non-absolute veto. (By contrast, in classic parliamentary systems in places such as Britain, the legislature chooses the chief executive, who has no formal veto power and serves only so long as she continues to command a legislative majority. Even in some strong presidential systems abroad—for example, the French system—the president lacks a muscular veto.)

- *Sixth*, an executive understudy (vice president/lieutenant governor) explicitly provided for in the constitution (with a few notable state exceptions), who automatically takes over when the chief executive is disabled, dies, or resigns. While this understudy usually has few other powers of his own, he does enjoy a fixed term of office coextensive with the chief executive, and is not simply appointable and removable at will by the chief executive or by the legislature. Rather, the understudy is typically elected by the people at the same time they elect the chief executive. (Here, too, parliamentary models abroad structure things very differently, with no constitutionally designated second-in-command, and no fixed terms or independence from parliament for executive understudies.)
- *Seventh*, a universal understanding that the constitution is judicially-enforceable law capable of being invoked in ordinary courtrooms, even between two private litigants in lawsuits in which the government is not formally a party. (By contrast, many modern European systems feature an official "Constitutional Court" in which constitutional issues are often treated differently from ordinary legal questions arising in ordinary private litigation.)
- *Eighth*, a system blending judicial independence and accountability in a distinctive way. Although judges, once chosen, may not simply be fired at will by the executive or the legislature, the process of selecting and promoting judges is highly political. Judges do not generally appoint other judges, nor is promotion to a higher court based strictly on seniority or on one's reputation among fellow judges (unlike the German and French systems in which the judiciary is much more self-regulating, and closer to a bureaucratic civil service).
- *Ninth*, a common-law style of adjudication featuring judicial precedent as an important source of law. (Here, the civil-law system of France presents an obvious contrast.)
- *Tenth*, juries, which comprise a prominent feature of both civil and criminal litigation. (Again, not so in a place such as France.)

WHAT FOLLOWS FROM THIS STRIKING PATTERN? Not any strong claim that every state must slavishly adhere to this Basic American Model in every respect as a matter of federal constitutional law. It would be silly, for example, to think that Nebraska is under any constitutional obligation to repudiate its unicameral tradition. But in a less rigidly legal and more sociological sense, this Basic American Model defines the boundaries of realistic constitutional reform in America. Proposed federal amendments based on state variations *within* the Basic American Model described above are much more likely to be taken seriously than amendment proposals outside this Basic American Model—proposals that are apt to be viewed as "foreign," "alien" or "un-American."[1]

Examples of "alien" concepts include early "snap" elections or no-confidence elections for legislatures as a whole (as opposed to individual recall elections); multiparty regimes; cumulative voting or other proportional-representation systems for anything other than local elections; parliamentary systems involving legislative selection of chief executive officers; and civil-service models of self-appointing and self-perpetuating judiciaries. While in the abstract there may much to commend some or all of these concepts, none of them will likely take America by storm any time soon.

By contrast, certain proposals to amend the federal Constitution will be taken seriously if comparable proposals have already been adopted and road tested at the state level. In fact, most of the federal amendments that have thus far succeeded were copycats or adaptations of pre-existing state constitutional texts or practices. Thus, the federal Bill of Rights tracked various state antecedent documents; the Reconstruction Amendments borrowed from the best constitutional practices of various enlightened free states; Woman Suffrage won at the continental level only after prevailing in many state constitutions; and so on.

Even before any formal amendments to the Philadelphia Constitution took shape, the Philadelphia document itself obviously built upon state constitutional templates. The basic structure of the Philadelphia plan—a written "Constitution" with a bicameral legislature and three branches of government—distilled the essence of extant state constitutions. On detail after detail, the Philadelphia framers in effect began by canvassing state constitutional practices and then eventually opted for what they considered the best state practice. Thus, in their decision to put the federal Constitution to a special ratification vote of the people—a vote that would ideally encompass an especially broad electorate—the framers copied the models of the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784. The idea of a federal census borrowed from the Pennsylvania Constitution of 1776 and the New York Constitution of 1777. The elimination of property qualifications for federal public servants likewise borrowed from Pennsylvania, as did provisions providing that all federal lawmakers would be compensated from the public fisc. The broad outlines of federal executive power combined the best of the Massachusetts and New York Constitutions. Various elements of federal judicial independence drew upon several state constitutional antecedents, as did Article III's basic commitment to jury trial. In short, America's federal constitutional project has tightly intertwined with her state constitutions from day one.

Notably, the framers' biggest blunder—their fateful mistake to give slave states a large bonus in all future House and presidential elections, via the three-fifths clause—occurred precisely because this was an issue where no guidance could be drawn from the state experience. None of the states with large slave populations had yet devised a general formula for apportioning slaves in legislative (or executive) elections. Lacking any helpful state templates or good data from actual state practice, the Philadelphia delegates in effect plucked the number three-fifths from the nearest hat they could find. Alas, this hat had been tailored to fit a very different problem—how much each state under the Confederation should pay into continental coffers, an issue utterly irrelevant to the question of how many seats each state under the new Constitution should properly claim in a proportionate House or in a newfangled electoral college.

WITHIN THE BASIC AMERICAN MODEL DESCRIBED ABOVE—indeed, amazingly enough, within *each* of the ten observed similarities across American constitutions—there are important variances between the federal Constitution on the one hand and certain widespread state practices on the other.

Let us, then, revisit our ten basic elements, note the interesting variances between state and federal constitutionalism, and use these differences to generate a check-list of basic questions for further academic research and political discourse—the kinds of questions that serious scholars and statesmen should ask themselves as they ponder possible state or federal constitutional amendment. In general, whenever a variance exists between state and federal constitutional practice, Americans should ask ourselves whether states should change to fit the federal model more closely; whether the federal Constitution should instead be amended to fit the contrary state practice; or whether, if we are already living in the best of all possible constitutional worlds, there might well be reasons why the two levels of American constitutions should differ.

• First, written state constitutions are typically much longer and more clearly amendable by direct majoritarian popular action (via initiative or referendum) than their federal counterpart. Most state constitutions interweave amendatory textual additions and deletions directly into the prior constitutional text, rather

than appending amendments as sequential post-scripts in federal fashion. Also, many states have periodically promulgated entirely new constitutions wholly superseding their predecessor documents.[2]

These differences raise interesting questions for possible legal reform: Are state constitutions too easy to amend by direct popular action? Or is the federal Constitution too hard to amend? Or perhaps the system of majoritarian state amendment and supermajoritarian federal amendment is just right as is: Precisely because the federal Constitution sets the basic ground rules that states cannot violate, state amendments are already constrained by a stable framework of fundamental freedom, and frequent state amendment is not as great a threat to liberty—especially given that it is easier for state dissenters to move to a sister state than for national dissenters to move to a foreign country. The lower thresholds for state constitutional amendments also enables states to function as effective laboratories of constitutional experimentation, with successful experiments offering useful guidance to sister states and, eventually, would-be reformers of the federal Constitution.

Even if the general difficulty level of federal constitutional amendment is about right, Article V of the federal Constitution gives unequally sized states equal weight both in the Senate (which effectively operates as a veto-gate alongside the House in proposing amendments) and in the ratification process. States, by contrast, generally do not feature gross malapportionment in their amendment process. Should Article V itself be changed by revising the structure of the Senate and by weighting states by population in the ratification process? Or perhaps by providing for a national popular ratification referendum with a supermajority requirement for adoption, thereby bringing Article V into closer alignment with state amendment procedures? (But even if such an amendment of the federal amendment rules were widely conceded to be fairer than the current Article V system, wouldn't small states always be able to block an amendment amendment out of pure self-interest?)

- *Second*, state constitutions are conventionally viewed as having more explicit "positive" and "social" rights, such as the right to education. Given this fact, should the federal Constitution be construed to protect more "positive" rights? Or has the state experience shown that courts (and other governmental enforcers) do a rather bad job of protecting such rights?[3]

- *Third*, many states have term limits for legislators and also allow voters to "recall" individual lawmakers (making state legislators' terms slightly less fixed, formally). Some states also have direct-democracy processes of initiative and referendum that enable voters to supplant or supplement the legislature in the enactment of certain kinds of statutes.[4]

Has the state experience with recalls and with statutory initiatives and referenda been a happy one worthy of federal emulation, or a mistake that states should repudiate? (Note that emulation might well require considerable federal oversight of direct-lawmaking elections to ensure uniformity of suffrage rules and voting procedures across the various states.) Should states abandon term limits for state legislators? Or should the federal Constitution be amended to provide for term limits? (If so, how could members of Congress ever be induced to support such a Congress-limiting amendment under Article V?)

The current asymmetry between state and federal lawmakers might give Congress "repeat player" advantages in the state-federal tug of war, and also a stronger position vis-à-vis a powerful president. On one view, because the president is so much stronger than state governors, we need a more experienced group of federal legislators to counterbalance him than is needed at the state level. Thus, one argument for the status quo might be that it leads to a strong federal government that is not overly tilted toward the president.

- *Fourth*, under the Supreme Court's landmark ruling in *Reynolds v. Sims*, no state is allowed to malapportion either branch of its legislature on the model of the U.S. Senate. Thus, no state can have an

upper house in which each county has an equal number of seats, regardless of population. If the deep principle of *Reynolds v. Sims* is right—if states should not be allowed to malapportion their senates by giving unequally populated counties equal seats—then is the basic apportionment principle of the United States Senate a vicious one? Or is federalism the answer to the seeming discrepancy? Some would say yes: Federalism is the answer, and counties are not the same as states in an inherently federal system. Others would counter that giving Wyoming and California equal representation may benefit some political interest groups (at the expense of other groups), but does little to protect states qua states. On this view, the federal Constitution should be changed to reduce Senate malapportionment—say, by giving each state at least one senator and capping even the largest state at eight senators. Such a scheme would keep the Senate at roughly its present size and would respect the existence of states qua states, while dramatically reducing the current degree of malapportionment. (But could small states ever be induced to agree to such a federal amendment?)[5]

• *Fifth*, each state chief executive is elected by direct popular vote rather than by something akin to the federal electoral college. Some state governors are subject to popular recall. State governors have no strong foreign affairs powers. Most important, virtually no state has a strongly "unitary" executive. Almost every state, for example, has an attorney general elected separately from the governor rather than appointed by him. Many states feature a wide variety of cabinet-like positions elected by the people rather than handpicked (and removable) by the governor. In these respects, state governors seem much weaker than presidents. On the other hand, almost all state governors now enjoy a line-item veto when presented with spending bills.[6]

These differences should prompt reformers to ask a range of questions: If the federal electoral college is so good, why does no state (or foreign country, for that matter) closely follow it? Here, examination of state constitutions helps us see with distinctive clarity a good candidate for federal constitutional reform. Might a popular recall system be a useful additional check on presidential power? Also, can state experience with line-item vetoes inform the federal debate over the proper allocation of power between Congress and the president? Finally, even if (for reasons explained in Chapter 9) the 1978 federal independent counsel statute was plainly unconstitutional, should we formally amend the federal Constitution to permit such a device, which has worked well at the state level? If we do so, should we adopt special rules about investigations that affect foreign policy? Or instead, should we try to develop informal traditions of independence within the Justice Department? [7]

In connection with the proposed Hatch Amendment,* it is also worth mentioning that naturalized citizens are virtually everywhere eligible to serve as governors—as dramatized by California's Arnold Schwarzenegger and Michigan's Jennifer Granholm. While skeptics of the Hatch Amendment correctly note that governors are not directly involved in foreign affairs, surely senators and cabinet secretaries are involved in these matters, and as noted earlier, naturalized Americans have served in these posts ever since the days of George Washington.

• *Sixth*, many states allow voters to vote separately for governor and lieutenant governor, but at the federal level, voters have generally been denied the option to split their ticket by voting for Party A for president and Party B for vice president. Also, in many states, when the governor leaves the jurisdiction, her powers automatically devolve upon the lieutenant until she returns.

A few obvious law-reform questions: Is the current federal practice of selecting a vice president as a mere adjunct to the president—without allowing ticket-splitting—a sensible way of conferring legitimacy on the person who, if tragedy strikes, may need to be the national leader? Conversely, should state rules automatically conferring power on the lieutenant governor whenever the governor leaves the state be abandoned?

The lack of a federal counterpart (combined with the fact that many state constitutions omit this categorical rule) might suggest that this rule is of doubtful utility.[9]

• *Seventh*, several state supreme courts can issue "advisory" opinions directly to the legislature before a law is passed or a private lawsuit crystallizes; the United States Supreme Court cannot. Doesn't the state experience show that these opinions are sometimes useful and rarely harmful? In light of this experience, should federal courts be allowed to render anticipatory opinions, before a proposed law has been adopted by Congress (or, indeed, by a state legislature)? Would the federal Constitution need to be amended here, or just reinterpreted?[10]

• *Eighth*, state judges typically lack life tenure, and many must come directly before the general electorate at the time of initial appointment, or in a later retention context—sometimes in contested elections featuring full-blown media campaigns and explicit party endorsements.[11]

These large differences between state and federal practice should prompt us to wonder whether federal judges enjoy too much independence, or whether state judges enjoy too little. Perhaps both are true, and the best model would give judges more than they get in various states but less than they get under the federal Constitution. Imagine for example a system in which judges are appointed for fixed eighteen-year nonrenewable terms.

• Ninth, state court precedents misconstruing state constitutions are easier to overturn by state constitutional amendments. With this fact in view, we see all the more clearly why the United States Supreme Court must remain open to reconsider its own previous constitutional rulings that are alleged to be in error, given the special difficulty of using the federal amendment process to correct the Court's misrulings.

• Tenth, many states have done away with grand juries; and a few have moved away from a unanimity requirement in criminal cases. But why shouldn't states be required to use grand juries, just as they are required to honor virtually all the other guarantees of the Bill of Rights via the Fourteenth Amendment? If the argument is that the grand jury has truly outlived its usefulness, then should the federal Constitution be amended to relieve the federal government of this "nuisance"? Also, a good case can be made that state experiments with nonunanimous criminal juries should be emulated by the federal government, and that this reform may properly occur (as was argued in the preceding chapter) by federal statute, with no need for a formal constitutional amendment.[12]

SEVERAL OF THE IMAGINABLE federal constitutional amendments suggested by the pattern of America's current state constitutions would reduce the power of individuals and institutions who today have the ability to block constitutional amendments, should they so choose. As a matter of realpolitik, why would these veto-wielders ever allow these amendments to pass, even if these individuals and institutions were convinced of the genuine justice and wisdom of such amendments in principle?

For example, why would voters or legislators in Wyoming ever vote to reduce the Senate's malapportionment given that the existing rules favor Wyoming? Why would a United States senator from Wyoming ever sign his own electoral death warrant? Or why would Congressmen ever support an amendment to limit congressional terms? In short, how could certain justice-seeking amendments ever escape the powerful gravitational force of an arguably unjust status quo?

To answer these far-reaching questions about America's future, let us turn, one last time, to America's past for guidance.

"to . . . secure the Blessings of Liberty to . . .our Posterity"

Justice-seeking reformers can ultimately prevail in time, using time—in particular using the key device of a long time-delay between the vote on a visionary amendment and the effective start date of such an

amendment. Americans are accustomed to laws (the Bush tax cuts, for example) that automatically lapse—that "sunset"—after a certain time period. Henceforth, we need to envision a different species of rules that should properly go into effect—that should "sunrise"—only after a substantial time delay.

For ordinary elections, long time-delays would make no sense: It would be an Alice-in-Wonderland world if we voted today, by democratic procedures, for lawmakers whose terms of office would start in, say, twenty or forty years. And the idea of long time-delays for most ordinary statutes is likewise odd. But constitutional law often operates on a different timeline than ordinary statutory law, and for certain kinds of constitutional amendments—especially amendments that aim to establish the most just and fair decision procedures—long time-delays make a great deal of sense.

It is hard for a single generation to decide all issues of fair procedure for itself. Who decides which procedures are the best? Who decides who decides? By what vote? Who decides *that* question? And by what vote? And so on. There is in principle an infinite regress problem if a democracy is truly to bootstrap itself off the ground. If ever there were a proper role for the "dead hand of the past"—the fixing of certain ground rules by Generation 1 for the benefit of Generation 2—it is in the setting of fair decisional procedures, precisely because Generation 2 cannot easily do this for itself. And the setting forth of fair decisional procedures is, of course, one of the basic aims of the American Constitution.[13]

Once Americans understand that in adopting certain constitutional amendments, they are setting up fair procedures not so much for themselves as for their unborn grandchildren and great-grandchildren, they should be more likely to focus on what is truly right rather than what is in their own current interest. If Jefferson Smith is a senator from Wyoming, it may well run hard against his current self-interest to vote for an amendment that will mean one senator from Wyoming rather than two—unless the amendment has a decades-long time-delay clause. But if the amendment does have such a distant-sunrise clause, it cannot hurt Smith personally, because he will be gone before the sunrise. So perhaps Smith will then be somewhat more likely to concentrate on whether the amendment is truly fair. He may focus on the fact that his own grandchildren and great-grandchildren might not be Wyoming residents. Indeed, they may be more likely to be Californians. Why should Smith favor his Wyoming posterity over his California posterity? Ideally, Smith should favor neither and should instead consider what is truly fair and just—behind what the famous twentieth-century philosopher John Rawls called a "veil of ignorance" shielding Smith from biased considerations of personal self-interest.[14]

Such generational veils of ignorance were powerfully and self-consciously at work at the Founding itself. For example, George Mason argued at Philadelphia that the rich should care about the poor because the posterity of the rich would one day come to fill even the lowest social ranks: "We ought to attend to the rights of every class of the people. He had often wondered at the indifference of the superior classes of society to this dictate of humanity & policy, considering that however affluent their circumstances, or elevated their situations, might be, the course of a few years, not only might but certainly would, distribute their posterity throughout the lowest classes of Society. Every selfish motive therefore, every family attachment, ought to recommend such a system of policy as would provide no less carefully for the rights and happiness of the lowest than of the highest orders of Citizens."[15]

In a similar philosophical spirit, Gouverneur Morris urged his fellow Philadelphia delegates to rise above parochialism because they or their posterity would one day likely inhabit other states. Other leading lights—including James Wilson, James Madison, and Alexander Hamilton—voiced related thoughts in the summer of 1787, explicitly imagining themselves to be representatives of a wide posterity across time and space.[16]

What was true at America's Founding moment has likewise been true of amending moments in American history. Indeed, from one point of view the "Founders" themselves were amenders, who were, after all, modifying their own pre-existing legal system in proposing the Constitution itself.

A close look at the original Constitution and its amendments reveals clever albeit too-rare use of the sunrise device to overcome immediate entrenched interests and injustices and thereby achieve a more disinterested and just future state of affairs. While the Deep South refused to give up the power to import trans-Atlantic slaves for the first twenty years of the new Constitution's operations, this region was willing to allow precisely such importations to be banned by Congress beginning in 1808—and forevermore. Had the framers been equally clever in the use of sunrise rules on other slavery- related issues—for example, had the original Constitution prohibited slavery in all Western territory after 1808 or prohibited three-fifths apportionment credit for all slaves after 1808—perhaps Americans might have ultimately ended slavery without the unspeakable carnage of the Civil War. In the mid-twentieth century, Americans adopted a new amendment limiting presidents to two terms, but did so in a way that did not deprive any current or past president of perpetual re-eligibility.

Various states in the Founding era likewise used sunrise rules to achieve the gradual abolition of slavery itself. Under these rules, existing slaves would not be liberated—but eventually their future children would walk free. In this way, the arc of history, though long, bent toward justice.

In the same spirit, today's amendment-minded Americans should imagine ourselves to be virtual representatives of our twenty-second-century posterity, tasked with the awesome challenge of framing just rules for that society even though we will never live to see the brighter day that we aim to bequeath. If it makes sense for modern American constitutionalists to attend to words written and deeds done centuries ago to form a more perfect union, then it also makes sense for us to struggle to envision and help birth a still-more-perfect union centuries hence. Much of American history remains to be written and much of American constitutional law remains to be framed.

Endnotes

[1] To put the point in the language of Professor Bobbitt, certain amendment proposals are likely to be seen as "un-ethical" in the sense that they run strongly counter to the "ethos" of the American people as expressed in the mass of state constitutions. See generally Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982), 93-177.

[2] See page xxx note xxx. See generally John J. Dinan, *The American State Constitutional Tradition* (2009), 30-31, 55-63.

[3] Ibid., 184-221.

[4] Ibid., 94-96.

[5] Some might wonder whether such an amendment is even permissible. Article V, which lays down general rules for constitutional amendment, explicitly provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Formally, this proviso does not prohibit our envisioned amendment, but merely requires that every state "Consent" to such an amendment—presumably during the ratification process, in which all 50 states (rather than the usual 38) would need to say yes. In reality, however, it would be almost impossible to achieve unanimity among the states for our envisioned amendment—or almost any proposed amendment on any topic, for that matter. Under the Articles of Confederation, whose amendment clause required unanimity among the thirteen extant states, unanimity was never achieved. Indeed, the Articles failed precisely because the amendment bar was set too high, inducing reformers to abandon the Confederation altogether in favor of the Philadelphia Constitution, whose ratification required only nine states to say yes, see Chapter 2, pages xxx-xxx.

But wait. Read at face value, the Article V unanimity proviso turns out to be an easily outflanked Maginot Line. The proviso's words do not apply to an amendment that preserves the Senate's existing apportionment while transferring virtually all current Senate powers to a newly created, more proportionately representative, entity. In response, it might be thought that unwritten constitutional principles—the spirit of the proviso—should bar any such outflanking. But several substantial "spiritual" principles argue otherwise. First, while small states are lawfully entitled to what they were able to bargain for/extort in 1787-88, it is doubtful that they are entitled to any more. On this view; a deal is a deal, and the Article V proviso deal means exactly what it says and not one ounce more. Second, the Article V proviso is a remnant of the failed Articles of Confederation system, and that very failure provides a strong cautionary note against reading the proviso broadly. Third, a proper account of the Constitution's spirit must factor in the enhanced nationalism of post-Founding deeds and texts—especially the Reconstruction Amendments and the egalitarian ideology underlying *Reynolds v. Sims* and its progeny. Fourth, the Constitution has in fact already been amended at least once, using ordinary (38-state) amendment rules, in a way that drained some power from the Senate in favor of a more proportionately representative entity. (For details, see Amar, *ACAB*, at 589 &n.13.) Fifth, once we move past the clear (but easily outflanked) words of the proviso, there is no comparably clear line separating special amendments that require 50-state approval from ordinary amendments that require 38-state approval. Finally, small states are well protected by the ordinary rules of Article V, in which Wyoming counts equally with California in both the existing Senate and the ratification process. In a world where two-thirds of the Senate as currently composed and three-fourths of the states actually adopted our envisioned amendment in the ordinary way, wouldn't this fact itself be decisive evidence of America's spirit?

Regardless of one's ultimate position on the theoretical questions raised by the Article V proviso, one point should be clear to all: Proper constitutional interpretation here pivots not only on the Constitution's explicit words, but on a sensitive interpretation of America's unwritten Constitution, based on implicit principles, past amendment practices and protocols, bedrock ideas from the Warren Court era, and so on.

[6] Dinan, *The American State Constitutional Tradition*, 98, 122-23. Note also that in roughly one quarter of the states, the legislature needs less than a two-thirds vote to override a gubernatorial veto, ibid., 113. And note further the distinctive gubernatorial election rules in Mississippi, see note xxx.

[7] Although the federal independent counsel statute ill fit the architecture of the federal Constitution, it initially seemed not "foreign" but natural, because it resembled schemes that had worked in various state constitutions that seemed at first almost identical to the federal model. In fact, however, these constitutions are different in

key respects, and so piecemeal borrowing here was a big mistake. See Akhil Reed Amar, "Scandalized," *The New Republic*, Oct. 11, 1999.

*[This amendment, discussed earlier in the book, has been proposed by Senator Orrin Hatch, and would make various naturalized citizens eligible for the presidency. Ed.]

[9] See Basile S. Uddo, "'Who's In Charge?': The Louisiana Governor's Power to Act in Absentia," *Loyola LR* 29 (1983): 1.

[10] For more details on the sources of the federal ban on advisory opinions, see page xxx note xxx.

[11] Dinan, *The American State Constitutional Tradition*, 98.

[12] For one possible argument against incorporation of the grand-jury right, see Chapter 4 page xxx n*.

[13] Cf. Jed Rubenfeld, *Freedom and Time* (2001).

[14] See generally John Rawls, *A Theory of Justice* (1971). See also Lawrence G. Sager, *Justice in Plainclothes* (2004), 8-9, 161-93.

[15] *Farrand's Records*, 1: 49 (punctuation altered).

[16] Ibid., 529, 531 (Gouverneur Morris, claiming that "he came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race" and urging fellow delegates to rise above parochialism because they or their posterity would one day likely live elsewhere); 405, 413 (Wilson, noting likely impact of Convention on the entire planet and distant, "multiplied posterity"); see also ibid., 2:125 (Wilson: "We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment."). For similar musings of James Madison and Alexander Hamilton, see ibid., 1: 421-224.