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Moot Court Board Journal

THE GAVEL

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Models of Constitutionality

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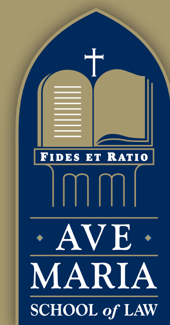

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LETTER FROM THE
President

Dear Reader:

I am pleased to present the efforts of the 2022-2023 Moot Court Board. Each student has put forth an excellent effort this year, and I hope you enjoy reading the following pages. This is a group of very talented and industrious students who understand the great opportunity presented by Moot Court Board membership. It has been a privilege to watch them earn recognition from professors, practicing attorneys, and judges.

Our members competed in ten competitions this year: our internal Robert H. Bork Memorial Moot Court Competition and nine external competitions nationwide. The internal competition is a special tradition on campus, and we are very grateful to the professors, alumni, and local attorneys who visited us to judge each round. Thank you to all student-advocates who diligently prepared arguments. The Board is especially grateful to our final round judges: Dean John M. Czarnetzky, The Honorable Shannon H. McFee of the Twentieth Judicial Circuit of Florida, and Senior District Judge John E. Steele of the U.S. District Court for the Middle District of Florida.

Our external teams were brilliant. We began the year with Ave's return to the Robert Orseck Moot Court Competition at the Florida Bar Annual Convention. We won the Best Brief Award and advanced to the semifinal round before falling to the team that would ultimately win the final. This spring, at the Robert F. Wagner, Sr., Labor and Employment Law Competition, our team's brief was in the top 20% of over forty briefs. Then we returned to the National Latino Law Students Association Moot Court Competition, and our team made it to semifinals, placing third overall. Every external team held their own against competitors from some of the most prestigious schools in the nation. I am incredibly proud the Board's excellent representation of our school.

To our faculty coaches this year, and especially to our faculty advisor, Professor Mark Bonner: we are immensely grateful for your expertise, care, and effort. Every student has evolved into a more skilled advocate as a result of your guidance.

To my fellow Executive Board members, Piero Sotomayor, Stephen Dwyer, Deborah Gedeon, Hannah Thies, and Matthew Keeton: thank you for your dedication to the Board this year. Each of you worked hard to make it a success, and it was a resounding one. Serving as President of the Ave Maria School of Law Moot Court Board has been the highest honor of my law school career.

Finally, to the incoming Board: you are an exceptional group, and I wish you the utmost success. *Ite, inflammate omnia!*

Sincerely,
Kelsey J. Grant
President, Ave Maria Law Moot Court Board

LETTER FROM THE
Editor

Dear Reader:

It's fair, I think, to say without citation that it is a common experience among first-year law students to carry with them idealistic notions of the way things should be and that some of those ideals are lost — or at the very least tempered — in exchange for a deeper understanding of the way things really are. I also think that it is a fair trade, because with it comes the tools required to pursue and affect actual change with regard to those things about which we are most passionate.

For the authors of the following articles, where such pursuits will lead remains to be seen, but while we are still here spotting issues, describing rules, providing analyses, and drawing conclusions based on the law as it is, we should take every opportunity to turn those lessons outward to the world around us: to spot the issues as we see them, describe the rules we believe to be just, provide analyses guided by our own insight, and draw conclusions based on the law as we believe it should be.

In that spirit, this year's theme is Models of Constitutionality, and each of our authors was asked to choose a law that he or she believes to be unjust, identify an alternative model law, and make an argument for why that law is more in line with core constitutional values. The goal in developing this theme was to give our authors free rein across a wide range of topics held together by only the thinnest thread of commonality, and as you will see, they did not disappoint. I cannot express in words how proud I am of my fellow Moot Court members — and how honored and humbled I am to count them among my peers — but I believe this collective work speaks for itself.

Thank you to our President Kelsey Grant, my fellow Vice Presidents on the Executive Board, and to every other member of the 2022-2023 Ave Maria Law Moot Court; and a very special thank you to Faculty Advisor Professor Mark H. Bonner, guest author Professor Jennifer Jenkins, and to every other professor and staff member whose guidance has carried us along the way.

May we never lose sight of those idealistic notions which are the gifts of our intellects, but instead, use the tools we've been given to refine them into our own humble gifts to the world because the law itself that we seek to practice is built upon such an idealistic notion that it should draw ever closer in the pursuit of justice. Just as the absence of such beliefs leads the law astray in its purpose, we cannot expect to discover our own purposes absent the beliefs we hold most dear.

Fides et Ratio,
Matthew Keeton
Editor-in-Chief, *The Gavel*

THE RECIDIVISM EXCEPTION

By Professor Jennifer Jenkins

Recidivist statutes punish people who commit prior offenses. Judges decide the applicability of many recidivist statutes using a preponderance of the evidence standard. However, I contend that the Sixth Amendment requires the government to prove the fact of a prior conviction to a jury beyond a reasonable doubt. This issue has never been squarely before the Supreme Court of the United States, but dicta suggests the permissibility of judicial determinations of such convictions.

The Sixth Amendment guarantees "[i]n all criminal prosecutions, . . . the right to a . . . trial, by . . . jury." The Supreme Court has held that the Sixth Amendment requires that any element of a crime be (1) "charged in the indictment [at the federal level; (2)] submitted to a jury, and [(3)] proven by the Government beyond a reasonable doubt."[1] In *McMillan v. Pennsylvania*, the Supreme Court introduced the concept that some facts affecting a sentence are not "elements" but rather are "sentencing factors" not subject to the same constitutional strictures as "elements."[2] In *In re Winship*, the Court held that the Due Process Clause of the Fourteenth Amendment protects an accused person "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[3] The case, however, did not address the questions of whether or when the government must treat a certain fact as an element of a crime as opposed to a sentencing factor. Five years later, in *Mullaney v. Wilbur*, the Court extended *In re Winship*'s strictures to not only the determination of guilt, but also to sentence length.[4] *Almendarez-Torres*[5] is considered the source of the recidivism exception to the rule that juries must decide facts that alter the minimum or maximum sentences authorized for crimes. The exception itself, however, is dicta: *Almendarez-Torres* did not concern a recidivist statute. Ironically, all the Justices in the *Almendarez-Torres* majority have since rejected such an exception.[6]

Almendarez-Torres was wrongly decided. In that case, the Court explained that recidivism is just a sentencing factor and not an element of a crime because "recidivism is a traditional . . . basis for . . . increasing an offender's sentence."[7] Justice Thomas later admitted to succumbing to this "chief error[] of *Almendarez-Torres.*"[8] To understand the meaning of the Sixth Amendment and its implications for recidivism, what matters more is whether recidivism "traditional[ly]" has been charged in indictments and decided by juries. The *Almendarez-Torres* dissenters pointed out that at common law, the fact of a prior conviction had to be charged in the same indictment as the underlying crime and submitted to the jury for determination.[9] As late as 1965, juries in all but eight states adjudicated prior offenses.[10]

Second, the Court's assertion proves too much. While recidivism may be a traditional basis for increasing a sentence, many other factors are as well. A judge is likely to increase a sentence if a crime is committed with a firearm or in the course of another felony, but that does not make "armed robbery and felony murder . . . sentencing enhancements rather than separate crimes."[11] Finally, any basis upon which *Almendarez-Torres* rested has been eroded. The Court relied most heavily on *McMillan v. Pennsylvania*, which has since been overruled.[12]

References:

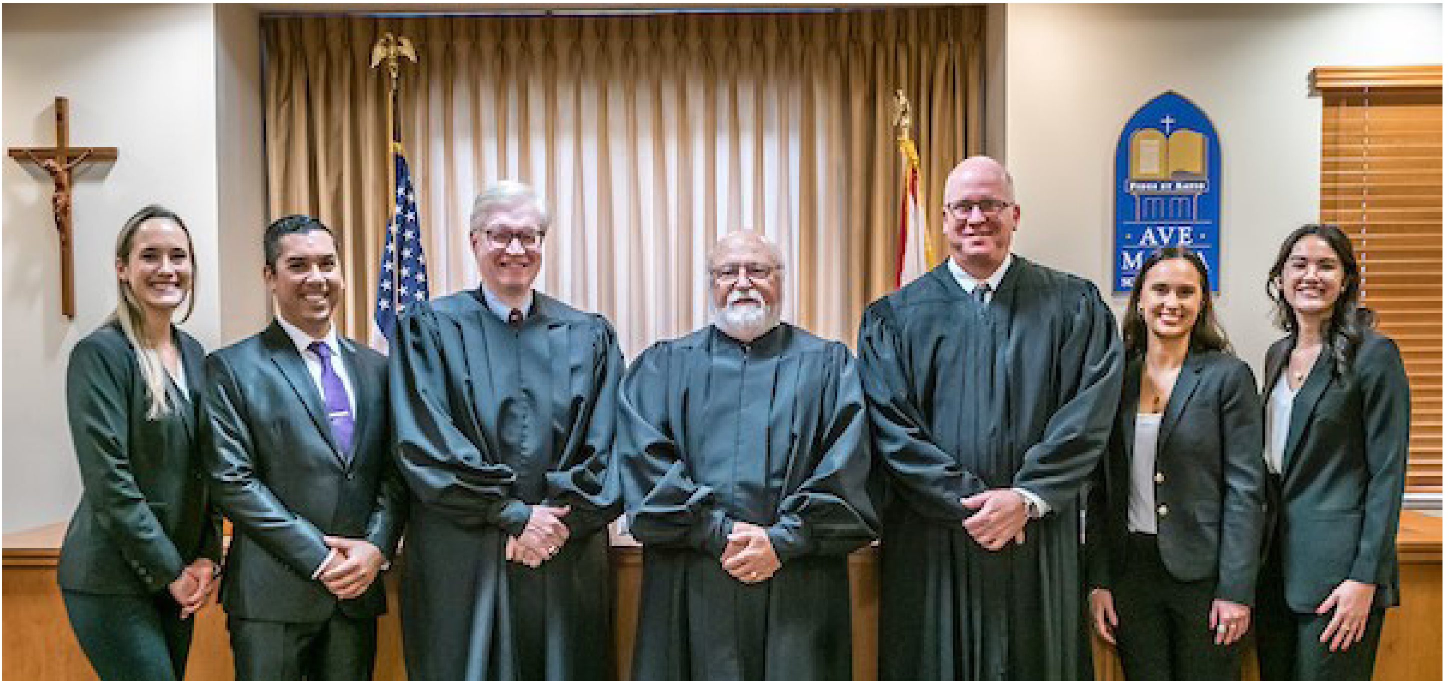
1 *Jones v. United States*, 526 U.S. 227, 232 (1999).
2 447 U.S. 79, 85-86 (1986).
3 397 U.S. 358, 364 (1970).
4 *See Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting) (citing Mullaney v. Wilbur, 421 U.S. 684, 698-99 (1975).
5 *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).
6 The *Almendarez-Torres* majority was comprised of Chief Justice Rehnquist and Justices Breyer, O'Connor, Kennedy, and Thomas. In *Jones v. United States*, Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Breyer explained that recidivism was not constitutionally significant in *Almendarez-Torres*. 526 U.S. 247, 269 (Kennedy, J., dissenting). Justice Thomas changed his mind in *Apprendi*, professing that "the fact of a prior conviction is an element under a recidivist statute." 530 U.S. 466 (2000).
7 *Almendarez-Torres*, 523 U.S. at 243.
8 *Id.* at 520.
9 *Id.* at 260.
10 *See* Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV 332, 333, 347 (1965).
11 *Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting).
12 *Alleyne v. United States*, 570 U.S. 99 (2013); see *United States v. Haymond*, 139 S. Ct. 2369, 2378, (2019) (recognizing Alleyne as overruling McMillan).

THANK YOU FROM THE 2022-2023 AMSL MOOT COURT

Thank you very much Professors Margaret Antonino, Antony Kolenc, Richard Myers, Mollie Murphy, Kirk Miller, Eric Fleetham, Patrick Gillen, Bruce Connolly, John Raudabaugh, and Dean Emeritus Eugene Milhizer. As a coach, your support of the Board is essential to its success and growth. We are forever in your debt.

Many thanks to Kris DelVecchio, a wealth of institutional knowledge and experience, an indispensable coordinator, as well as an extraordinarily kind heart; Ed Neebling, for audio/visual expertise possessed by none other; Dean Kaye Castro for the financial support to travel and spread the word of Ave's excellence; and Lisa Johnston, for creative direction and beautiful photography.

Robert H. Bork
MEMORIAL APPELLATE COMPETITION



Pictured from left to right: Samantha Murphy (2L), Matthew Mosher (2L), Dean Czarnetzky, Senior District Judge John Steele of the United States District Court for the Middle District of Florida, The Honorable Shannon H. McFee of the Twentieth Judicial Circuit of Florida, Josette Nelson (2L), Lauren-Hunter Gaudet (2L)

Lauren-Hunter Gaudet (2L), Josette Nelson (2L)

Matthew Mosher (2L), Samantha Murphy (2L)

EXTERNAL COMPETITION HIGHLIGHTS

ROBERT ORSECK MEMORIAL

Pictured from left to right: Justice Ricky Polston, Justice Jamie R. Grosshans, Justice John D. Couriel, Chief Justice Carlos G. Muniz, Justice Charles T. Canady, Kelsey Grant (3L), Brian Zingaretti (3L), Justice Jorge Labarga, Justice Alan Lawson

3Ls Kelsey Grant and Brian Zingaretti won Best Brief and advanced to the semifinal round. Their semifinal opponent, Stetson, went on to win the final.

NOTRE DAME NATIONAL APPELLATE ADVOCACY TOURNAMENT FOR RELIGIOUS FREEDOM

Peter Valone (3L), Christopher Aderhold (3L), Joshua Mireles (3L), Matthew Keeton (3L)

THE COLUMBUS SCHOOL OF LAW AT THE CATHOLIC UNIVERSITY OF AMERICA

Camilla Edwards (2L), Deborah Gedeon (3L), Anthony Altomari (3L)

UNIVERSITY OF CALIFORNIA LOS ANGELES CYBERSECURITY

Team 1 (pictured at far left): Zachary Lecius (3L), Davis Roddenberry (3L)

Team 2: Isabella Askar (2L), Tyler Bergerson (2L)

EXTERNAL COMPETITION HIGHLIGHTS

TEXAS YOUNG LAWYERS ASSOCIATION

Lauren-Hunter Gaudet (2L), Taylor Curley (3L)

NEW YORK CITY BAR

Isabella Askar (2L), Kelsey Grant (3L)

AMERICAN ASSOCIATION FOR JUSTICE

Piero Sotomayor (3L), Mark Bowers (3L), Andrew DiLeo (2L), Christopher Aderhold (3L)

ROBERT F. WAGNER NATIONAL LABOR AND EMPLOYMENT LAW

Brandis Godwin (2L), Kasondrea Thomas (2L).

Brandis and Kasi wrote an excellent brief, placing eighth out of forty teams.

NATIONAL LATINA/O LAW STUDENT ASSOCIATION

Shanna Mais (3L), Lisney Agramonte (2L). On March 16, 2023, Shanna Mais and Lisney Agramonte competed in Denver at NLLSA's 15th Annual Moot Court Competition. They advanced to the semifinals, beating William & Mary in the first round and Pace in the second round. They placed third overall.

IRVING R. KAUFMAN MEMORIAL SECURITIES LAW

Eva Thompson (2L), Sophie Raines (2L)

Follow Florida: A Look at Why Florida's Approach to Child Welfare Models Constitutionality

By Taylor Curley

The Adoptions and Safe Families Act of 1997 (ASFA) was signed into law by President Clinton with a goal of improving the child welfare system.[1] This legislation redefined when states are required to make reasonable efforts to reunite a parent and child after allegations of abandonment, abuse, or neglect.[2] Among other allowances, the ASFA authorizes states to bring an expedited Termination of Parental Rights Petition for a current child, when the parent has involuntarily lost their parental rights to a child in the past.[3] Accordingly, in these matters, the state will not have to make the requisite reasonable efforts to reunite the parent and current child before petitioning to sever their legal relationship.

The purpose of this law is to protect future children from parents who have previously been adjudicated unfit by a court of law.[4] Although the efforts of this legislation are noble and warranted, its lack of limiting language has opened the door for states to infringe upon parents' constitutional rights. For example, one of the most controversial states in this arena is Minnesota. In Minnesota, once the State brings an expedited Termination of Parental Rights Petition against a parent who involuntarily lost their rights to a child in the past, there is a presumption that the parent is palpably unfit due to the prior termination.[5] Therefore, at trial, the parent carries the burden of rebutting the presumption and proving they are fit to parent the current child. Requiring the parent to carry the burden instead of the state is a clear violation of the parent's due process rights considering the high risk of error and the substantial private interest of protecting the parent-child relationship.[6] The detrimental effects of this procedure are evidenced in several cases where parent's rights are improperly terminated, causing needless litigation in the appellate courts and indefinite instability for the children who have been unnecessarily stripped of a relationship with birth parents who are fit to raise them. [7]

Equally violative of a parent's constitutional rights, there is an additional group of states including Connecticut[8], Missouri[9], and Wisconsin[10] that only allow an expedited Termination of Parental Rights Petition to be brought based on a parent's prior involuntary termination, when the prior termination occurred within three (3) years. This procedure violates the Equal Protection clause.[11] Parents with involuntary terminations, regardless of the time the termination occurred, are similarly situated. This procedure opens the door for a parent with an involuntary termination less than three (3) years ago to be at risk of losing their parental rights to their current child but requires reasonable efforts for reunification of parent and child when the parent has an involuntary termination four (4) years ago. Although the states certainly have a legitimate interest in protecting children, their means of differentiating between the aforementioned scenarios are not rationally related to this interest. In order to accomplish this standard of review, we would have to assume that a child is no longer at risk with a parent previously proven to abandon, abuse, or neglect simply because the parent hit the three-year time bar. Not only is this atrocious public policy, but it is unrealistic, illogical, and unconstitutional.

This article concedes that states have a very strong interest in protecting children from unfit parents. Protecting America's children should always be of the utmost concern to the entire nation. However, this interest should not be unnecessarily met with means that violate the constitutional rights of parents, when there are models that have accomplished protecting both parent and child.

To illustrate, in Florida, the Supreme Court held in *Florida Department of Children and Families v. F.L.,* that when the State brings an expedited Termination of Parental Rights Petition based on a prior involuntary termination, the Constitution requires the State to carry the burden of proving substantial risk of harm to the *current child*.[12] Evidence of harm to a previous child, that led to an involuntary termination of parental rights, will not alone be sufficient to satisfy the State's burden.[13] The root of the Court's reasoning is found in *Padgett*, where the Florida Supreme Court opined that a termination of parental rights interferes with the fundamental, God-given liberty of parents to the care and custody of their children.[14] Accordingly, constitutional protections are mandated.[15] Presumptions of unfitness that the parent is required to rebut shall not be applied, and there is no absolute time bar for when previous terminations may be considered.[16] With this approach, Florida simultaneously protects the welfare of the child and the constitutional rights of the parents by adhering to a procedure aligned with both the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Therefore, this article proposes that the Adoptions and Safe Families Act of 1997 be amended to adopt a uniform solution nationwide, mirroring the model set in Florida. There is no question that The Adoptions and Safe Families Act is necessary legislation, and states should retain the power to bring expedited Termination of Parental rights Petitions when a parent has a prior involuntary termination. These expedited petitions are crucial to fast tracking the process of finding permanency for children who have been abandoned, abused, and neglected. However, by implementing Florida's model, the states will also be prohibited from weaponizing this power to override the protections the Constitution guarantees to parents.

Protecting the welfare of America's children and preserving the constitutional rights of our citizens are core, sacred, principles of our nation. One should not be sacrificed in the interest of furthering the other when it is attainable to achieve both. It is time our policy reflects that. It is time for the Adoptions and Safe Families Act of 1997 to be amended. It is time to follow Florida.

References:

1 Adoption and Safe Families Act, H.R. 867, 105th Cong. (1997).
2 *Id.*
3 *Id.*
4 Judge Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997*, 45 LA. B. J. 477, 478 (1999).
5 MINN. STAT. §260.012 (2020).
6 See Mathews v. Eldridge, 424 U.S. 319 (1976) (holding procedural due process

requires an evaluation of the weight of the private interest and the fairness and reliability of the current procedure in order to determine whether the procedure is adequate).

[7] Matter of Welfare of J. A. K., 907 N.W.2d 241, 243 (Minn. Ct. App. 2018).

[8] CONN. GEN. STAT. ANN. §17a-111b (2015).

[9] MO. REV. STAT. §211.447 (2017).

[10] WIS. STAT. ANN. §48.415 (2016).

[11] U.S. CONST. amend. XIV, § 1.

[12] Fla. Dep't Of Child. And Fams. v. F.L., 880 So. 2d 602, 609 (Fla. 2004).

[13] *Id.*

[14] Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 570 (Fla. 1991).

[15] *Id.*

[16] Fla. Dep't Of Child. And Fams., 880 So. 2d at 609-10.

The Land of Whoever: The Misunderstanding of the Fourteenth Amendment's Citizenship Clause

By Anthony Altomari

For the interest of the common good, should the law be selectively enforced? This question may seem rudimentary, and indeed, in its most basic form, there is only one sane answer. Most people would be disgruntled, however, to learn that the United States currently answers the question in the affirmative, allowing the offspring of illegal immigrants to become full-fledged U.S. citizens so long as they are born within our borders. This problem is significant, as more children are born to illegal immigrants in the U.S. every year than are born in all states besides California,[1] contributing to the $116 billion annual cost of illegal immigration to taxpayers[2].

The obvious, and indeed rational, response to this information is to question how such is allowed to occur. The answer lies in the first sentence of the Fourteenth Amendment, which reads "all persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the state wherein they reside."[3] Much of the debate surrounding birthright citizenship centers on the proper interpretation of the emphasized phrase. However, the answer is not evident from the face of the text. In order to under how the Clause should truly be applied, we must look outside our borders.

To understand the proper scope of the Citizenship Clause, it is imperative to view the text through the lens of its drafters. While the history of the Amendment's adoption is complex, there are several key factors to note. Firstly, the Fourteenth Amendment's language concerning citizenship was directly influenced by the Civil Rights Act of 1866, which defined citizens of the United States as "all persons born in the United States and not subject to any foreign power."[4] Secondly, according to the principal architect of the citizenship language, Senator Lyman Trumbull, the Clause was only to extend to those born within the borders who "owe[d] allegiance to the United States," positing that it would impractical to grant citizenship to the children of temporary residents.[5] Thirdly, historical application of the Citizenship Clause and its modern interpretation are disjointed, as all Native Americans born in the United States were not granted full citizenship until the passage of the Indian Citizenship Act of 1924.[6] If the Citizenship Clause granted full citizenship to *anyone* born in the United States, what purpose would such an act serve?

Deference to history demonstrates that the Citizenship Clause was never meant to grant complete citizenship to anyone whose parents happened to be in the right place at the right time, but only to those who, in some way, were subjects of the Untied States. Even the oft cited case in support of birthright citizenship, *Wong Kim Ark*, only granted the son of Chinese immigrants full U.S. citizenship because his parents were both *permanent* residents of the U.S. at the time of his birth.[7] The Clause, therefore, has been misapplied more often than not.

This begs the question: *how should the Citizenship Clause be applied?* Look no further than the nationality laws promulgated by the Chinese and French. Chinese law only grants citizenship to individuals born in Chine whose parents are not Chinese nationals if the parents are "stateless or of uncertain nationality and have settled in China."[8] Likewise, French law requires minors between 13 and 15 who are in France to non-French citizens to live in the country for at least 5 years before they can apply for citizenship, evincing a desire to become permanent French residents.[9] The laws of both China and France achieve what Sen. Trumbull and the 39th Congress sought when they ratified the Fourteenth Amendment: provide citizenship to those born in the U.S. who are not subject to a foreign power, and evince a desire to permanently reside in America.

Roughly 297,000 children born to illegal immigrants are granted full U.S. citizenship annually.[10] The issue birthright citizenship poses, therefore, is concrete, not conjecture. That is not to say such individuals should not become U.S. citizens. Many of them may be more appreciative and patriotic to the U.S. than large swaths of society today. Notwithstanding, the Citizenship Clause was not created to convey birthright citizenship, and its misinterpretation to do such is a grave constitutional grievance. It is on the Supreme Court to re-write the wrongs of the past and ensure that the Constitution is a standard, not a suggestion, something we all know they have no problem in doing.[11] ○

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[1] Stephen A. Camarota, Karen Zeigler, & Jason Richwine, *Births to Legal and Illegal Immigrants in the U.S.*, Center For Immigration Studies (Oct. 9, 2018), https://cis.org/Report/Births-Legal-and-Illegal-Immigrants-US.

[2] Matt O'Brian & Spencer Raley, *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, FAIR (Sept. 27, 2107), https://www.fairus.org/issue/publications-resources/fiscal-burden-illegal-immigration-united-states-taxpayers.

[3] U.S. Const. amend. XIV, § 1 (emphasis added).

[4] Civil Rights Act of 1866, 14 Stat. 27 (1866); see also Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 Conn. L. Rev. 1069, 1086 (2017).

[5] Amy Swearer, *Subject to the [Complete] Jurisdiction Thereof: Salvaging the Original Meaning of the Citizenship Clause*, 24 Tex. Rev. Law & Pol. 135, 151-52 (2019); see also Hans A. von Spakovsky, *Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment*, The Heritage Foundation (Oct. 30, 2018), https://www.heritage.org/immigration/commentary/birthright-citizenship-fundamental-misunderstanding-the-14th-amendment (the articled was originally published by Fox News in 2011).

[6] Indian Citizenship Act of 1924, Pub.L. 68–175, 43 Stat. 253 (1924).
[7] United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).
[8] Immigration Department Of The Government Of The Hong Kong Special Administrative Region Of The People's Republic Of China, *Nationality Law of the People's Republic of China*, Immigration Department Of The Government Of The Hong Kong Special Administrative Region Of The People's Republic Of China https://www.immd.gov.hk/eng/residents/immigration/chinese/law.html (last visited October 15, 2022).
[9] French Republic, *French nationality of a child born in France of foreign parents - Minor aged 13 to 15 years inclusive*, Service-Public.fr, https://www.service-public.fr/particuliers/vosdroits/F34708/0_1_0 (last visited October 15, 2022).
[10] *Supra* note 1.
[11] For a list of decisions overruled by the United States Supreme Court, see Constitution Annotated, *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, Constitution Annotated, https://constitution.congress.gov/resources/decisions-overruled/ (last visited October 15, 2022).

Forced Vaccination: Are Congressmen the New Doctors?

By Jamie Dasher

Pandemics and epidemics are commonplace in history.[1] Starting with the Plague of Justinian which occurred during the 500s, all the way until today with COVID-19 and all the other infectious pandemics in between, communities have treated pandemics very similarly.[2] In the early 1900s, smallpox was running rampant throughout the Northeast United States.[3] Cities like Cambridge developed vaccine orders, and citizens who refused to be vaccinated were fined five dollars.[4] The terror of smallpox led cities to shut down, in the same manner COVID-19 did, with places of mass gatherings forced to close to "stop the spread" and a Massachusetts constituent who did not want to be vaccinated due to a previous vaccine reaction, took his complaint against the Board of Health of Cambridge to fight the fine issued for refusing vaccination.[5] *Jacobson* appealed the decision to the Supreme Court, claiming the vaccination order violated his constitutional right protected by the Fourteenth Amendment of equal protection.[6] The Supreme Court decided that vaccination orders are constitutional because they protect "the safety of the general public."[7]

Currently, many states have enacted COVID-19 vaccination requirements for employment.[8] Mirroring the holding in *Jacobson*, the forced vaccination requirements have recently come back to life in response to the COVID-19 pandemic. They are similarly justified as necessary to "protect the safety of the general public."[9] Accordingly, many states have enacted COVID-19 vaccination requirements, specifically in the context of employment. For example, the state of New York has one of the nation's strictest COVID-19 vaccine requirements for employees.[10] Healthcare workers have been mandated in New York to be up to date on their vaccines.[11] The Department of Health for New York City also ordered all employees of the Board of Education to "submit proof of their COVID-19 vaccination by September 27, 2021," or face termination.[12] The city followed through with terminating employees who did not provide proof of vaccination or proof of a qualified exemption.[13] The Plaintiffs, the United Federation of Teachers, then brought a suit against the City of New York, alleging a violation of their due process rights.[14] The New York Supreme Court decided the Plaintiff's constitutional rights were not violated because "the balance of equities weighs in [the states'] favor."[15]

Additionally, the Secretary of Health and Human Services required facilities that receive Medicare or Medicaid funding to require their employees to be vaccinated against COVID-19 or provide a proper exemption.[16] The Secretary claimed workers being vaccinated was "necessary for the health and safety of individuals to whom care and services are furnished."[17] The Supreme Court recently decided in *Biden v. Missouri* that Congress has given the Secretary the power to "impose conditions of participation," requiring that the COVID-19 vaccine is no different from requiring proper procedures.[18]

On the other hand, Florida has some of the most relaxed COVID-19 policies in the nation.[19] Florida's Governor, Ron DeSantis, enacted legislation via House Bill 1B, which banned private and government employers from enacting vaccine mandates.[20] Governor DeSantis also enacted a fine for employers who violate the legislation protecting the individual's rights to make their own informed choice.[21] Additionally, the Governor signed an executive order banning vaccine passports and prohibiting businesses from requiring proof of vaccination for entry.[22]

The Constitutional rights afforded to United States citizens are of utmost importance and must be protected at all costs. Mandated vaccines are a constitutional violation sought to control the masses. The United States is a democracy with due process afforded to the citizens of this country under the Constitution, and mandated vaccines are the opposite of the fundamental principles upon which this country was founded on. Citizens should be able to make informed choices regarding their own health without interference by government officials who have no health science background and are not practitioners informing and providing care to patients. ○

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Mommy Mayhem: A Comparison of Michigan's and California's Gestational Surrogacy Laws

By Deborah Gedeon

Surrogacy is one of the many family law matters that have traditionally been reserved to the states.[1] Thus, surrogacy in the United States is regulated by a vast spectrum of laws.[2] This contrast is evident in the surrogacy laws of California and Michigan, which fall on the extreme ends of the spectrum. In Michigan, surrogacy agreements are void and unenforceable, and the state criminalizes commercial surrogacy agreements.[3] Conversely, the laws of California's Family Code provide that surrogacy agreements are valid and that the state legalizes commercial surrogacy.[4] California's contract-based approach to surrogacy is antithetical to American constitutional principles because it disregards the birth mothers' protected interest and it is contrary to public policy. Michigan's practice of incorporating the interests of all the parties involved into its surrogacy laws is more consistent with the Constitution.

To begin, a surrogacy agreement is an agreement between a surrogate, the birth mother, and the intended parents that provides that the birth mother will bear a child and, upon the child's birth, relinquish all rights to the child to the intended parents.[5] Surrogacy agreement disputes often arise when parties either seek performance or repudiation of the contract.[6] To resolve these disputes, courts must determine whether the parties' parental rights have been established and which party's rights should prevail.[7] This determination is based on the balancing of interests. First are the interests of the intended parents, which include the right to privacy and procreation.[8] States, such as California, have decided that the intended parents' right to procreate includes the right to enter surrogacy agreements to produce a child.[9] On the other hand, because relation to the child exists by virtue of bearing and birthing the child, the birth mother has an interest in a parent-child relationship with the child born pursuant to a surrogacy agreement[10]. The United States Supreme Court has held that both the right to procreate and the right to maintain a parent-child relationship are fundamental rights that must receive special consideration.[11]

In California, courts will generally enforce a surrogacy agreement if it complies with the requirements of Section 7962 of the state's family code.[12] In *Johnson v. Calvert*, the court held that a dispute regarding maternal rights was best resolved by focusing on the terms of the surrogacy agreement and the intent of the parties.[13] In that case, both the birth mother and the intended mother presented proof of maternity.[14] Since the agreement was valid under Section 7962, the court decided to base its decision on the contract rather than on a determination of the parties' fitness as parents or the best interests of the child.[15] The court enforced the contract and held that the interests of the intended mother prevailed based on its findings that the birth mother voluntarily entered the agreement and the parties intended for the birth mother to surrender her rights to the child.[16] In subsequent cases, California's courts have ruled in favor of intended parents based on similar reasoning.[17]

The terms of a surrogacy agreement should not be used as the sole basis to deprive a birth mother of her parental rights. In *Stanley,* the United States Supreme Court held that the parent-child relationship is a protected liberty interest and that the father was entitled to a determination of his unfitness as a parent before his parental rights were terminated.[18] The court held that the father could not be deprived of his parental rights based on a presumption that unwed fathers are unfit to parent children.[19] Just as an unwed father could not be deprived of his parental rights based on a mere presumption of his unfitness, a birth mother should not be deprived of her parental rights solely because of the terms of a contract. When a dispute arises, and a birth mother seeks a declaratory judgment of her parental rights, a court should, consistent with the holding in *Stanley*, grant her a hearing that determines her fitness as a parent instead of simply terminating her rights pursuant to the surrogacy agreement.

Michigan's approach to resolving surrogacy disputes is more consistent with the constitutional principles mentioned in *Stanley* because its courts incorporate the best interests of the child and the parties' parental fitness before terminating the birth mother's parental rights.[20] Michigan's surrogacy laws provide that when the terms of a surrogacy contract arise, the court will make its decision based on the best interests of the child.[21] The factors that define the best interests incorporate the parties' fitness to parent the child.[22] These include the parties' mental and emotional health, moral fitness, and the ability of the parties to provide affection, food, and medical care for the child.[23] Further, Michigan has incorporated significant public policy concerns into its laws regarding surrogacy agreements. In *Doe v. Attorney General*, the court reasoned Michigan's surrogacy laws are valid because the state's interest in making the agreements void is to prevent the treatment of babies as mere commodities, to act in the best interests of the child, to prevent the negative emotional repercussions, and to prevent the exploitation of the women who act as surrogate mothers.[24] Michigan laws indicate that the state recognizes that surrogacy agreements are much more significant than contracts for goods or services and, thus, require the state to consider more than the intent of the parties or the rights pursuant to the agreement.

Overall, Michigan's surrogacy laws are more constitutional than

California's because Michigan's model is more comprehensive regarding the fundamental rights of all parties and children involved in this complex family matter. ○

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"Advertise Here:" The State's Vested Interest in Regulating the Advertisement of Sexually Oriented Business

By Hannah Thies

Driving down the busy Dallas, Texas, highway, balancing a coffee in one hand, and attempting to dodge the fast moving traffic with the other, one need only look out the window, to be accosted by billboards: dozens of billboards. And what these billboards have to advertise is not always, let's say, "family friendly." Strip clubs, topless bars, sex-merchandising stores, adult book and film outlets, and the list goes on and on. One particularly provocative advertisement for "The Men's Club," proudly proclaims: "*Unlicensed* therapists on duty."[1] And Dallas isn't all that different from most metropolitan areas, in fact, the advertisement of these sexually oriented businesses, and their regulation, has been the source of a good deal of controversy in counties and cities all over the country as they have attempted to limit this form of "commercial speech," and have come up against the brick wall that is the First Amendment.[2]

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech. . . ."[3] In *Central Hudson Gas & Elec. Corp. v. Public Serv. Commission*, the Supreme Court determined that speech "proposing a commercial transaction," and "related to the economic interests of the speaker and its audience" are protected "commercial speech."[4] The Court further held that regulation of this "commercial speech" required the satisfaction of a four-part test, essentially a strict scrutiny approach, requiring the government to show that its interest in regulation is substantial and no more extensive than necessary to serve and advance that interest.[5] In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Supreme Court held that billboards are entitled to the same protections as verbal forms of commercial speech.[6] This application of strict scrutiny to commercial business advertising applies to *all* business, even that which is, again, less than "family friendly."[7] The scope and breadth of this short article is unable to exhaustively discuss the original intent of the framers in including a Right to Free Speech in the United States Constitution, nor the numerous ways that this "right" has seemingly spiraled into protection over anything and everything that seeks to convey a message. Despite this, it appears safe to say that, the protection of provocative billboards on public highways was likely not the intention of James Madison when he argued that the right to public opinion and discourse was a God-given right, essential for republican government.[8] The writers were forming a new system of government free from the tyrannical monarchy they were accustomed to: their intention was to protect political speech and controversial discourse, not strip clubs and topless bars.

The way that this has played out in application is really quite disastrous. City counsels and municipal governments seeking to clean up public streets and protect young eyes have had to contend with the gargantuan task of meeting a strict scrutiny approach, and this has been a largely unsuccessful fight.[9]

In April of 2022, the Supreme Court weighed in on billboard regulation in *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, finding that the City of Austin's ordinances regarding on-premises and off-premises signs were not subject to the strict scrutiny standard of the First Amendment, but *only* because the ordinance was content-neutral and "did not single out any topic or subject matter for deferential treatment."[10] Relying upon the precedent set by *Reed v. Town of Gilbert*, the Court concluded that the regulations were satisfactory so long as there was no distinction imposed for subject matter.[11] This is the exact issue that city counsels and municipal governments have come up against; a battle between public interest and "free speech." Under the current approach, there can be no regulation of sexually oriented business advertisement, unless there is a satisfaction of strict scrutiny, because sexually oriented businesses cannot be singled out or treated differently because of the nature of their message. It seems that in attempting to protect the First Amendment and apply its protections broadly, the Court has allowed the true purpose and meaning of the amendment to slip through the cracks.

The application of the First Amendment right to Free Speech to anything which "seeks to convey a message," regardless of what that

message may be, needs to be immediately reassessed by the Court, for it is a grievous misunderstanding of the actual purpose of the First Amendment, and weakens, cheapens, and misconstrues the true protections it offers. This approach to "commercial free speech," has gone so far as to encourage prostitutes and sex workers to argue that the First Amendment protects their right to advertise online.[12]

In *Terminiello v. Chicago*, Justice Douglas, writing for the majority, stated: "the function of free speech . . . is to invite dispute."[13] This holding was in line with the application of the First Amendment right to Free Speech as traditionally understood: a protection of political discourse – even if unpopular.[14] The application of the First Amendment should return to this original understanding.

The "freedoms" of the First Amendment have been applied in an over-broad and dangerous fashion. To argue that the original meaning and intent of the American people's right to protest, converse, publish, and openly campaign in a democratic government, now protects topless bars and sex merchandising stores' ability to publicly advertise on major highways is both preposterous and beneath a civilized republic. A swift return to tradition and decorum is necessary. ○

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A True Test: The Text, History, and Traditions of our Nation

By Andrew DiLeo

The Second Amendment of the United States Constitution has been the crux of disputes for years. The original text of the Second Amendment is rather brief, which is why it is so important for courts to have a precedented test to determine the intent of our Founding Fathers. Courts have previously used tests based on the tiers of scrutiny to determine the constitutionality of certain provisions of the right to bear arms. However, in the recent Supreme Court decision of *NYSRPA v. Bruen* (2022), the Court adopted a new test by shifting focus to the language of the text and analyzing the traditions and history of our nation.

For example, prior to NYSRPA, the Court in *Heller* was faced with plaintiffs who were trying to register semi-auto rifles that had large capacity magazines.[1] These applications were denied because the firearms were "prohibited assault weapons" and "did not implicate the core second amendment right".[2] In reaching its conclusion, the Court used a two-step approach to determine the constitutionality of the district's gun laws. First, it asked whether a particular provision impinged upon a right protected by the Second Amendment.[3] If it does, the Court will then determine whether the provision passes muster under the appropriate level of constitutional scrutiny.[4] The Court concluded the laws under review did infringe upon a Second Amendment right. However, after employing intermediate scrutiny, the Court opined that the regulation was substantially related to a compelling government interest and upheld the regulation.

In Justice Kavanaugh's dissent, he explains that handguns are constitutionally protected because they have not been *traditionally* banned and are in common use by law abiding citizens.[5] He also sheds light on how the Court in *Heller* and *McDonald* have left little doubt that the courts are to assess gun bans and regulations based on text, history and tradition.

In agreement with Justice Kavanaugh's dissent, the Court in *McDonald* points out that "historical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field".[6]

This idea of constitutional interpretation based on historical analysis is evident in *Kolbe v. Hogan*, a subsequent decision from *Heller*. Here, the court upheld a restriction because such weapons were "like" "M-16 rifles" inasmuch as they are "most useful in military service". This is a total distortion of the *Heller* standard. Opponents of the text, history and tradition test may claim that it will be hard to draw a line in denying certain provisions that really do support a confounding government interest. In the court's analysis, they reinforce the idea

that the rights in the Second Amendment are not unlimited.

The recent Supreme Court decision of *NYSRPA v. Bruen* has properly declined the two-part approach. This decision put an end to intermediate scrutiny and suggests that the government may not justify a regulation just because it promotes an important interest. Instead, the government must demonstrate that the regulation "is consistent with this Nation's historical tradition of firearm regulation".[7] The Court looks to history because "it has always been widely understood that the Second Amendment . . . codified a pre-existing right."[8] In support of this, the Court looked to several 19th century cases that interpreted the Second Amendment and found they universally support an individual right to keep and bear arms.[9]

All in all, the decision of *NYSRPA v. Bruen* is one that will set a reliable and practical precedent for interpreting the Second Amendment. The courts will no longer be asked to make different empirical judgments and can rely on a legitimate, more administrable test such as analyzing the text, history, and traditions of our nation.

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Constitutional Conservation: The Costs of Censorship Bills in America

By Sophie Raines

The First Amendment stands as a pillar of United States Constitution which grants citizens the right to speak and express themselves freely. The parameters outlined in the First Amendment prohibit the United States Congress from passing laws that limit the free exercise of religion, infringe on freedom of speech, infringe on freedom of press, limit the right to assemble peacefully, or limit the right to petition the government for a redress of grievances.[1] These protections extend to state governments, under the Fourteenth Amendment, specifically public universities and campuses.[2] Conceptually, Freedom of Speech is intentionally designed to protect various forms of speech, including academic and professional settings.[3] Throughout the existence of the First Amendment, the Supreme Court has a long history of vehemently upholding an institution's right to academic and professional freedom. [4]

Within academic and professional institutions there has been a shift in the regulation of communication which has been constitutionally contested. This is evidenced by a recent trend of legislation that either censors and prohibits communication or encourages and protects it.[5]

An exemplification of a censorship bill is the Individual Freedom Act, which is a bill that was introduced by the Governor of Florida, Ron DeSantis. The introduction of this law revises existing law and provides that subjecting an individual to specified concepts under certain circumstances constitutes as discrimination.[6] In looking at the expressed statutory language of the law; it explicitly states that an instructor is forbidden to teach a subject that "espouses, promotes, advances, inculcates, or compels" a student to form a belief that "members of one race, color national origin or sex are morally superior to another."[7] Violation of these provisions constitutes discrimination under this law. Looking at the language of the law, it does not innately ban freedom of speech. However, it seeks to restrict specific instructional material on topics regarding race, color, sex, or national origin. The effect of this law challenges the rights of lectures and students to speak about race, gender, sex, national origin through topics of systematic inequality and oppression.[8] Resulting in, a severe restriction on an ability to seek information empirically, discuss freely, and introduce their personal narratives, in a classroom discourse that pertains to race and the challenge of racism.

Conversely, there has been a trend in legislation where campuses across the nation have implemented laws that protect and encourage students and professors' ability to speak freely. The Campus Free Speech Protection Act, a body of legislation in Tennessee, which encourages open dialogue on public campuses.[9] The essence of this Act is to acknowledge an individual's fundamental right to the principles of free speech while also allowing an institution the opportunity to instill democratic values of academia through open discussion and free thought.[10] The rhetoric that supports this Act is placed in public policy, stating "it is not up to the institution to shield individuals from free speech.", but rather it is the responsibility of the institution to "value civility and mutual respect" and being "committed to providing an atmosphere that is conducive to speculation, experimentation, and creation by all students and faculty in their ability to freely inquire and study to gain new understanding."[11] This expressed language aligns with the ideas presented in the First Amendment because it guarantees an individual's right to freedom of expression. This shows that an institution should maintain the value of communication and exchange of ideologies to maintain a democratic educational experience.

While these two acts of legislation have created a dichotomy within the judicial sphere, the Supreme Court has made clear its stance in the interpretation of the First Amendment. The Court has upheld the freedom of communication stating, "it is well established that the Constitution protects the right to receive information and ideas… this right to receive information and ideas, regardless of their social worth, is fundamental to our free society."[12] Specifically, regarding the content of communication, the Court stated "under the Free Speech Clause, Laws that restrict speech based on [the] viewpoint it expresses are presumptively unconstitutional."[13] The Supreme Court has created precedent that upholds the design of the Constitution and supports the notion that a democratic society depends on liberal education which is wholly founded upon freedom of speech and expression.[14] In contrast, lawmakers in support of The Individual Freedom Act, are favor hindrance of classroom conduct

and expression on sexual and racial discourse.[15] Additionally, this impedes an educator's foundation in granting their student's accessible information about these particular academic principles of free discourse, open forums, and perspective seeking.

The Florida legislature's view of classroom discussion and conduct is an unrealistic approach with respect to how intersectional factors; sex, gender, and race are presented in educational environments. The Act suggests an idea that professors are engaging in communication through personal narratives to incite guilt within students.[16] However, these presented personal narratives and experiences are used by educators as a supplement to inform and educate on difficult topics of discussion. The viewpoint of Florida Lawmakers is not a modern, nor a realistic idea of how classrooms are conducted. It fails to incorporate how concepts are introduced in secondary education.

Irrespective of the intention of Florida lawmakers, the Individual Freedom Act encroaches on the rights protected under the First Amendment and goes against Supreme Court precedent. In application of the Supreme Court's holdings, the Individual Freedom Act has created an unrealistic and unconstitutional view of classroom conduct and discussion, by restricting the use of communication and expression of ideology and thought. Under Supreme Court precedent, the presented trend in legislation, should align with the values that are enforced in the Campus Free Speech Protection Act, which supports the Constitution and an individual's right to freely speak and express regardless of the topic. ○

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Legislation from the Bench: How the Redefining of Words is a Dangerous Precedent for Our Nation

By Christopher Aderhold

The Civil Rights Act of 1964 was signed into law to outlaw discrimination in the workplace on the basis of race, color, religion, sex, or national origin.[1] A landmark piece of legislation, there was no ambiguity about which classes of people it protected. To be clear, neither "sexual orientation" nor "gender identity" appears on that list.

Certainly, there were those that thought more classes of people should be protected. In fact, since the 1970s, several bills have been introduced in Congress to add "sexual orientation" to the list of those protected by the Civil Rights Act.[2] In recent years, bills have included "gender identity" as well.[3] However, these proposed amendments to the Civil Rights Act have always stalled at some point in the legislative process. Clearly, for the legislators striving to add these new categories of protected classes, the original legislative intent of the Civil Rights Act was indisputable. If additional protections relating to modern gender theory were to be included, the only hope was through the work of Congress. Article I of the Constitution of the United States reads, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[4] Congress is meant to legislate, while the judicial system at all levels is meant not to legislate, but instead to judge.

However, in 2020, more than five decades after the passage of the Civil Rights Act of 1964, the Supreme Court circumvented Congress to execute what our nations elected representative had not deemed to be in the best interest of the American people. Justice Neil Gorsuch penned the majority opinion of *Bostock v. Clayton County* – the controversial Supreme Court decision that expanded the protections of the Civil Rights Act of 1964. Nonetheless, "sexual orientation" and "gender identity" were not added to the aforementioned list of five classes of people. Instead, the Court decided to redefine the meaning of the words "sex" to include these two groups of people. The words of a law, Justice Antonin Scalia insisted, "mean what they conveyed to reasonable people at the time."[5] It's clear that the primary definition of "sex" from the 1960s, was "the division of living things into two groups, male and female, based on biology…"[6] Dissenting against Gorsuch's majority opinion, Justice Samuel Alito begins by describing, in a word, the motive of the majority: legislation.[7] He continued, "A more brazen abuse of our authority to interpret statutes is hard to recall."[8] The Supreme Court of the United States unfortunately has a long history of legislating from the bench. In fact, a couple years before Justice Gorsuch was added to the highest court in the land,

he wrote in his autobiography: "Virtually the entire anticanon of constitutional law we look back upon today with regret came about when judges chose to follow their own impulses rather than follow the Constitution's original meaning."[9]

Gorsuch scorned the Court's past abandonment of the originalist approach to the text of the Constitution. However, ironically, after the release of his book, Gorsuch chose to follow *his* own impulse. Rather than follow the original, unambiguous meaning of the text of Title VII of the Civil Rights Act of 1964, he and the majority opted instead to redefine a word. Gorsuch's majority opinion in *Bostock* held that "sex" did not merely mean biological male and female.[10] Rather, Gorsuch claims that the Civil Rights Act necessarily included outlawing discrimination against homosexuals and transgenders, as well.[11]

The difficulty with seeking truth today is that we seem to live in a binary world. If we stand up for one thing, it is assumed that we must hate the other. One can disdain the mistreatment of homosexuals and the discrimination against transgender people while at the very same time be committed to seeking truth in all things. This includes seeking truth even amidst those things that might seem trivial. If the meaning of words can change, how can we be a people of laws, a people of communication, a people of truth?

Bostock continues to be celebrated as a decision that enhanced the protections of the American people. Instead, it should serve as a reminder of the dangers of legislation from the bench. *Bostock* sets a dangerous precedence of the Court redefining the meaning of words in an effort to "provide an answer to a pressing social problem of the day."[12] Those that celebrate *Bostock* despite its dangerous precedence should beware; no one is immune to the dangers of judicial overreach. Regardless of which side of the aisle you find yourself, if the Court does not correct its egregious ways of legislating from the bench, it is only a matter of time before brazenly decided opinions will negatively impact your life. ○

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5 *Bostock* at 1755.
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10 *Bostock* at 1757.
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12 Neil Gorsuch, *Originalism Is Best Approach to the Constitution,* Time Magazine (Sep. 6, 2019, 8:00am) https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/.

Federal Tax: The Open Question of Constitutional Validity

By Brian Zingaretti

The United States Constitution established both the Congressional power to impose taxes and its respective methodology. Thus, a federal tax is valid when it falls within the Congressional taxing power and comports with the Constitutional bounds for collection. The federal estate tax is not congruent with these bounds and given the Supreme Court's recent inclination to strike down overreaching taxes as violative of the Constitution,[1] the federal estate tax appears ripe for review.

As pertinent background, Congress may impose two mutually exclusive categories of taxes: direct taxes and indirect taxes.[2] Direct taxes are imposed on a taxpayer or her property,[3] and are required to be apportioned[4] amongst the states based on census.[5] The latter category of taxes, indirect taxes, may take one of three forms: imposts, duties, and excise taxes.[6] For brevity, analysis regarding whether federal estate tax constitutes an impost[7] and duty[8] is omitted from this discussion, as it is clear that these indirect tax forms cannot be the proper characterization for a federal estate tax. The remaining indirect tax, excise tax, is "laid upon the manufacture, sale or consumption of commodities within the country[] upon licenses to pursue certain occupations, and upon [] *privileges [and] the requirement to pay such taxes involves the exercise of the privilege.*"

The Court in *New York Trust* first characterized the federal estate tax as an indirect tax, upholding its validity with minimal discussion.[10] Later decisions reasoned that the tax was not on the property itself, but rather an excise imposed on the privilege[11] of succeeding to property upon the death of the owner.[12] However, during the 1940s, the Supreme Court clarified that succession to property is not a *privilege*, but rather a *right* of statutory creation.[13] Even the Internal Revenue Service[14] recognizes this transfer as a right, describing the federal estate tax as "a tax on your *right* to transfer property at your death."[15] These judicial and administrative views regarding the federal estate tax insinuate two alternative conclusions: (1) that the transfer of a taxable estate[16] is a right, and the requirement to pay such taxes is not triggered upon transfer because no privilege was exercised;[17] or (2) the federal estate tax truly relates to the income associated with the property rather than the property itself.

The former approach dictates that the federal estate tax be characterized as a direct tax because a tax on a statutory right does not meet the definition of an indirect tax, thereby invalidating the tax absent apportionment. Under the latter approach, income tax jurisprudence is instructive.

When Congress first levied income tax in 1894, the Court struck down the tax as an unconstitutional direct tax.[18] In response, Congress expressly granted itself a seemingly plenary income taxing power vis-à-vis the 16th Amendment, which provides that "Congress shall have the power to lay and collect taxes on income[], from whatever

source derived, without apportionment among the several States."[19] However, in concluding that a shareholder's unrealized gains from stock issuances was not income, the Court in *Macomber* narrowed the definition of income to include "gain derived from capital, from labor, or from both combined."[20] This seemingly innocuous limitation is problematic because the transfer of property from a decedent to a beneficiary does not involve capital nor labor, and therefore the transfer does not constitute income to the beneficiary under the *Macomber* standard until the property is ultimately sold. Thus, the Congressional power to tax income derived from such a transfer under the authority of the 16th Amendment is – at best – premature.

In sum, as the two alternative premises underpinning the federal estate tax are slowly deteriorating, the imposition of the federal estate tax may soon become a question for the Court to reconsider.

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1. *See* Comptroller of Maryland v. Wynne (2015) (striking down a portion of Maryland's personal income tax as violative of the dormant commerce clause).
2. U.S. Const. Art. I, Sect. 2, Cl. 3; U.S. Const. amend 16; U.S. Const. Art. I, Sect. 8, Cl. 1.
3. Merriam-Webster Dictionary, Direct Tax, https://www.merriam-webster.com/dictionary/direct%20tax (last accessed Oct. 14, 2022).
4. *See also* Hylton v. United States, 3 U.S. 171, 174 (1797) (explaining apportionment through example: if Virginia and New York had equal populations and there was a direct tax on the 1,000 carriages in New York and the 100 carriages in Virginia, apportionment would require the tax rate in Virginia to be ten times higher than the tax rate of New York to comport with the Constitution).
5. U.S. Const. Art. I, Sect. 2, Cl. 3 (explaining that such taxes are laid in proportion to the census).
6. U.S. Const. Art. I, Sect. 8, Cl. 1.
7. Imposts are a tax on the importation of foreign goods entering the United States as well as foreign commercial activity occurring in the United States.
8. Duties are taxes imposed on the flow of goods manufactured in the United States that are exported from the country for sale internationally.
9. Flint v. Stone Tracy Co., 31 S. Ct. 342, 349 (1911).
10. New York Trust Co. v. Eisner, 256 U.S. 345 (1921).
11. *See* Jay Ruane, License Lawyers, License Rights Vs. Privileges, https://thelicenselawyers.com/laws-regulations-connecticut-lawyer/rights-privileges/#:~:text=A%20right%20is%20something%20that,available%20only%20to%20certain%20people. (last accessed Oct. 15, 2022) (explaining that a privilege is "something that can be given and taken away and is considered to be a special . . . opportunity that is available only to certain people" while a right is something that cannot be legally denied).
12. *See* e.g., Estate of Simpson, 43 Cal.2d 594 (Ca. 1954); Estate of Barter, 30 Cal.2d 549, 556 (Ca. 1947).
13. Irving Trust Co. v. Day, 314 U.S. 556, 564 (1942); *but see* Knowlton v. Moore, 178 U.S. 41, 41 (1900) (upholding the constitutionality of a succession tax on the recipients of property transmitted rather than on the estate of the decedent).
14. See Donaldson v. United States, 400 U.S. 517, 534 (1971) ("[w]e bear in mind that the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury . . . for the administration and enforcement of the internal revenue laws").
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17. Flint, *supra* note 9 at 349.
18. Pollock v. Farmers' Loan & Trust Co.
19. U.S. Const. amend 16.
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Stop the Steal… of Our Right to Vote: The Real Dangers of Voter Fraud in American Elections

By Lauren-Hunter Gaudet

When will Americans accept their *privilege* and *entitlement* to the constitutionally protected right to vote? Our votes are crucial in the democratic election process, but we are too distracted to admit it. Following the 2020 election, masses of disgruntled American voters asserted that voter fraud is the greatest evil ever known to strike the polls. This uproar was then weaponized by politicians as a tool to breed distrust in the democratic process of elections.[1]

The Voting Rights Act of 1965 (VRA), nevertheless, ensures Americans the right to vote in all elections without qualifications or prerequisites.[2] Florida's lawmakers are working to encroach on the general right to vote for the unworthy cause of voter fraud, but their efforts are unjustifiable considering the unconstitutionality and the other available, reasonable means by which the goal of defeating voter fraud is possible.

While about seventy percent of Republican voters still believe that the 2020 election was decided by fraud[3], countless studies and investigations show that "voter fraud is [so] sufficiently rare that it simply could not and does not happen at the rate even approaching that which would be required to 'rig' an election."[4] Yet, it is that firm belief that the polls are haunted by voter fraud that stimulates the proposals of so many laws that interfere with our free elections. In the first months of 2022, many states passed several laws that "could lead to tampering with how elections are run and how results are determined,"[5] plainly in disagreement with the VRA protections that were affirmed in *Shelby County v. Holder*.[6]

In Georgia, HB 1368 and HB 1015 create a board over Miller and Montgomery Counties, respectively, to oversee voter registration and election preparation and administration, and the board members are appointed by county commissioners.[7] Alabama, Kentucky, and Oklahoma criminalized the acceptance or use of private funding for election purposes, which creates a chilling effect from the common practice of using private funds and prevents the benefit of safe and secure elections that private funding offers.[8] These election interference laws open the door to partisanship by involving party-appointed positions, which negates the required fairness of democratic elections.

Similarly, Florida is eroding the vote of average citizens by distracting them with efforts against voter fraud and abusing their lack of sympathy for their neighbors. In August of 2022, Governor Ron DeSantis announced that the new Office of Election Crimes and Security arrested twenty Florida residents for illegally voting in the 2020 election.[9] Evidence and data do not dispute that some cases of voter fraud may exist, but, because the existence of voter fraud has been determined to not have the effect that some politicians claim

it does, the few cases do not justify the threat to the election process that efforts like Florida's create. However, the actual circumstances surrounding those arrests led even some of Florida's own government leaders to criticize the unit for exercising intimidation and suppression.[10] Florida's election crime unit opens the door to voter and election staff intimidation and the deterioration of the security and freedom of our democratic elections.

Additionally, Florida passed a highly challenged law which creates new conditions for the acceptance of voter registration applications, creates new requirements and rules for third-party voter registration, restricts access to mail voting, and limits access to and creates new requirements for drop box locations.[11] Although, in March of 2022, a federal district judge declared the law intentionally discriminatory and a needless infringement on Floridian's voting rights[12], in May of the same year, the appellate court allowed Florida to reinstate the voting restriction law because the election to with the district court's injunction applied was too soon approaching[13], and the matter has not since been revisited.

The alternative to Florida's voting restrictions is simple: proceed true to spirit of the Voting Rights Act of 1965. Florida, along with Georgia, Alabama, Kentucky, and Oklahoma, can follow the examples set by the voter-friendly states instead of establishing partisanship, deterring election staff and poll workers, and restricting access to voter registration. Arizona eliminated the waiting period in the voting restoration application process and encourages access to mail voting options in most cities[14]; Connecticut and New York made absentee voting more accessible; and Oregon expanded online voter registration.[15] Instead of creating an America where certain rights are only guaranteed to citizens of the lucky states, Florida and other states have the option to create expansive elections without sacrificing security and integrity, and Florida owes its citizens a duty to ensure accessible elections. ○

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A Stare Decisis Paradox: A Cautionary Comment on Dobbs v. Jackson Women's Health Organization

By Peter A. Valone

The 2022 term of the United States Supreme Court released many opinions that critics claim violated stare decisis,[1] the most blatant example being *Dobbs v. Jackson Women's Health Organization.*[2] Critics claim that even the "conservative bloc" of the Roberts Court abandoned its textualist constitutional jurisprudence and exploited judicial pragmatism as the Court "traded caution for raw power" to overturn *Roe v. Wade*.[3]

Regardless of which legal philosophy one takes, it is indisputable that the Supreme Court has abused its power by relying on judicial pragmatism, whether it was the Warren Court in *Griswold*,[4] the Burger Court in *Roe,*[5] or possibly the Roberts Court in *Dobbs*.[6] The question then becomes, what does it look like when the Supreme Court is remedying past constitutionally egregious decisions rather than exercising "raw judicial power"[7] itself? Arguably, it looks like *Dobbs v. Jackson Women's Health Organization*.

The *Dobbs* majority, and even the dissent—albeit unwittingly, illustrate that overturning half a century of precedent is faithful to stare decisis doctrine and remedies prior egregious judicial pragmatic decisions[8]–*Roe v. Wade* and *Casey*.[9] The Court's decision in *Dobbs* "applies longstanding stare decisis factors instead of applying [the dissent's "strange new version"[10]] of the doctrine that seems to apply only in abortion cases."[11]

Stare decisis is "the doctrine of precedent, under which a court *must* follow earlier judicial decisions when the same points arise again in litigation."[12] Both the majority and dissent in *Dobbs* highlight the "valuable ends" undergirding the sanctity of stare decisis.[13] However, loyal allegiance to stare decisis must not be conflated with that of blind allegiance to precedent, for the Court "has long recognized . . . that stare decisis is not an inexorable command,[14] and it is at its weakest when [the Court] interpret[s] the Constitution."[15] Failing to recognize this prudent nuance is to risk blindly following precedent into the dark atrocities of the past.

Since the infamous 1896 decision in *Plessy v. Ferguson*,[16] there has been a plethora of Supreme Court precedents overturned.[17] Those cases "provide a framework" by identifying factors the Court should consider when determining whether to overturn precedent.[18] By adhering to this framework,[19] the *Dobbs* majority found that faithfulness to traditional stare decisis doctrine required overturning the egregious precedent set by *Roe* and *Casey*.[20]

Under the banner of stare decisis, the *Dobbs* dissent heralds its contribution to "the actual and perceived integrity of the judicial process by ensuring that decisions are 'founded in the law *rather than in the proclivities of individuals*.'"[21] Through tortured logic, the *Dobbs* minority claims it is the majority's use of traditional stare decisis factors that undermine the integrity of the Court, not the minority's use of judicial pragmatism and living constitutionalism.[22]

Living constitutionalism is the view that "constitutional right[s] [are] defined largely by judicial *perceptions of current social mores*" and that the Constitution is a document that adapts "through altered judicial interpretations of its central textual provisions."[23] Thus, its rules and concepts are fluid and change *without* needing to be amended.[24] Further, "judicial pragmatism envisions judges as more than just rule *appliers*; pragmatist judges must sometimes be 'rule *makers*,'" especially when judges feel that there are "gaps in the law or glaring perversities in legislation."[25]

Historically problematic is that some pragmatist Justices view particular "gaps in the law"[26] to be more valuable than the lives of particular humans. Some Justices "perceive" extending the Fourteenth Amendment's protection of life to all humans as a "glaring perversit[y] in legislation"[27] if it means infringing upon the *autonomy* of a particular group of people and disabusing them of their reliance on a false 'right' of superiority.[28]

As touted by the dissent, the Court has long recognized that stare decisis restrains judicial hubris—new Justices disrespecting "the judgment of those who have grappled with important questions in the past" merely because they would decide it differently.[29] However, the *Dobbs* dissent commits an even more egregious act of hubris—affirming the precedent that certain humans are not entitled to their fundamental and unalienable right of life only because the Court held so previously.

While purportedly championing "the actual and perceived integrity of the judicial process," the minority resorts to fear-mongering[30] and preying on those ignorant of the words of not only *Dobbs* but of *Roe* itself. The *Roe* Court explicitly states, "The [issue of abortion] . . . is inherently different from marital intimacy, possession of obscene material, marriage, or procreation . . . with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, [and] *Skinner* were respectfully concerned."[31] Further, the *Roe* Court cites pages of a leading medical encyclopedia that state, "[i]n the human, an embryo is the developing individual" and the fetus, "the developing young in the human uterus."[32] Nevertheless, the *Dobbs* minority deceptively rattles off those same cases and constitutional issues, exaggerating their connection to abortion and claiming they risk being overturned.[33] Moreover, the *Dobbs* majority makes absolutely clear that the *Dobbs* decision *only* affects abortion "rights" since abortion inherently differs from the right to engage in homosexual sodomy and same-sex 'marriage.'[34] As aptly pointed out, both the *Roe* Court and "even the *Casey* plurality recognized 'abortion is a unique act' because it terminates 'life or potential life.'"[35] To state more particularly: At the heart of *Roe* and its progeny is the beating heart of a living fetus. At the core of *Roe* and *Casey* is the code of human DNA enshrined in an embryo's every cell emanating evidence of unique human life.

It is widely uncontested in the scientific community that a human zygote is a developing human being with its own distinct and unique human DNA from the moment of conception.[36] Nevertheless, like the *Casey* plurality and the *Roe* majority before it, the *Dobbs* dissent repeats the rationale of the antebellum *Dred Scott* Court—not all human beings are persons and, thus, not entitled to "the rights and privileges which the [Constitution] provides for and secures" to people.[37] Just as the *Prigg* Court declared black human beings were a "species of property,"[38] so does the *Dobbs* dissent declare fetal human beings. Just as the antebellum Court in *Prigg*, and *Dred Scott*, reduced black humans to mere chattel, giving absolute property rights over them to other humans,[39] so does the *Dobbs* dissent affirm giving absolute property rights over a living fetal human to her mother. Thus, through the very constitutional jurisprudence proclaimed to empower Justices to protect against the "legislative perversities" of the past, the dissent repeats its Orwellian paradox— "all [humans] are equal, but some [humans] are more equal than others."[40]

Stare decisis cannot be an inexorable command. It requires judicial restraint, not just when overturning precedent but even when used to *uphold* precedent. Living constitutionalism views constitutional rights as ever-changing, depending on a Justice's perception of the current whims of societal norms and mores. It allows Justices to look at other human beings and declare it constitutional to deny them fundamental and unalienable rights because their color or age does not comport with the current societal definition of persons.[41] Constitutionalism and judicial pragmatism are the opposite of judicial restraint. They are antithetical to stare decisis.

The vitriolic dissent in *Dobbs* illustrates the very abuses possible when the Court violates traditional stare decisis doctrine using living constitutionalism. Through blind allegiance to precedent and the hubris of judicial pragmatism, Justices become not the saviors of the Court but are transmuted to lowly Orwellian characters "walking on their hind legs"[42]—committing the same atrocities of the past, against which they purport to protect. O

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[21] *Id.* at 2320, 2334 (quoting *Payne*, 501 U.S. at 827).

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[23] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. UNIV. L. REV. 1243, 1259 (2019) (emphasis added).

[24] David A. Strauss, The Living Constitution, Oxford Univ. Press, 1 (2010).

[25] Doori Song, *Judicial Pragmatism: Strengths and Weaknesses in Common Law Adjudication, Legislative Interpretation, and Constitutional Interpretation*, 52 UIC J. Marshall L. Rev. 369, 371 (2019) (citing Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo L. Rev. 1, 19 (1996)) (emphasis added); *see also Id.* at 391 ("Judicial pragmatism is a judicial methodology known for its future-looking mode of analysis, empirically-based decision making, and openness to judicial activism.").

[26] *Id.*

[27] *Id.*

[28] *Dobbs*, 142 S.Ct. at 2342 (once "any notable reliance interests develop" even on a "terribly wrong" decision, it cannot be overturned unless facts and laws have changed); Id. ("Even though Plessy was wrong the day it was decided, . . . changed law and changed facts [is what] required Plessy's end.").

[29] *Dobbs*, 142 S.Ct. at 2262, 2333-34.

[30] *Id.* at 2261.

[31] *Roe*, 410 U.S. at 159; Dobbs, 142 S.Ct. at 2260 ("None of those cases involved the destruction of what Roe called 'potential life.'").

[32] *Roe*, 410 U.S. at 159 (citing Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965).

[33] *Dobbs*, 142 S.Ct. at 2319.

[34] *Id.* at 2277-78 ("[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."), *but see Id.* at 2301 (Thomas, J., concurring) ("I agree that '[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion.' For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence*, and *Obergefell*.").

[35] *Id.* at 2277 (citing Casey, 505 U.S. at 852; Roe, 410 U.S. at 159).

[36] *See* Steven A. Jacobs, Biologists' Consensus on '*When Life Begins*', 19 (2018); see also Dianne N. Irving, *When do human beings begin? scientific myths and scientific facts*, 19 Int'l J. Of Socio. And Soc. Pol'y 22, 23 (1999) ("[D]uring the process of fertilization, the sperm and the oocyte cease to exist as such, and a new . . . genetically unique, newly existing, individual, whole living human being (a single-cell embryonic human zygote) . . . is produced."); *See also, The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm, on the Judiciary, 97th Cong.*, 1st Sess. (1981) (Dr. Jerome LeJeune, prof. of genetics at the Univ. of Descartes in Paris, the discoverer of the chromosome pattern of Down syndrome, testified, "after fertilization has taken place a new human being has come into being."); *Id.* (Dr. Watson A. Bowes, Univ. of Colo. Med. School: "The beginning of a single human life is from a biological point of view a simple and straightforward matter—*the beginning is conception*. This straightforward biological fact should not be distorted to serve sociological, political, or economic goals.") (emphasis added); *Id.* (Prof. Hymie Gordon, Mayo Clinic: "By all the criteria of modern molecular biology, life is present from the moment of conception."), https://www.epm.org/resources/2010/Mar/8/scientists-attest-life-beginning-conception/.

[37] Dred Scott v. Sandford, 60 U.S. 393, 404-05 (1857) (declaring that black humans "are not included, and were not intended to be included under the word 'citizens' [or 'people'] in the Constitution."); see Roe, 410 U.S. at 158 (Declaring "the word 'person,' as used in the Fourteenth Amendment, does not include [fetal humans].").

[38] Prigg v. Pennsylvania, 41 U.S. 539, 611 (1842).

[39] *Id.* (declaring Constitutional that white slaveholders had "the complete right and title of ownership in their slaves, as property . . . .").

[40] George Orwell, Animal Farm: A Fairy Story, 134 (Signet Classics 2020) (1945).

[41] *Dred Scott*, 60 U.S. at 404-05 ("The question before us is, whether the class of persons described in the plea . . . compose a portion of this 'people' . . . ? We think they are not . . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings, . . . and, whether emancipated or not, . . . had no rights or privileges."); *see also* Id. (declaring that black humans "are not included, and were not intended to be included under the word 'citizens' [or 'people'] in the Constitution."); *Roe*, 410 U.S. at 158 (Declaring "the word 'person,' as used in the Fourteenth Amendment, does not include [fetal humans].").

[42] Orwell, *supra* note 40, at 133.

Roe, What is it Good For? Substantively Nothing.

By Matthew Keeton

Despite clarification in Justice Alito's majority opinion in *Dobbs v. Jackson Women's Health Org.* that the ruling is limited in scope to the issue of abortion,[1] the decision, along with Justice Thomas's concurrence, sent a shudder down the proverbial spine of the American left as it contemplated the vulnerability of its most beloved substantive due process cases. This fear is not unfounded, given Justice Thomas's waxing poetic that "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*,"[2] and it is on the back of that fear that H.R. 8404, the Respect For Marriage Act, was born.[3] But while legislators on both sides of the aisle have gotten unquantifiable and almost entirely unearned political mileage out of the Supreme Court's rulings at issue — casting themselves as champions of the Supreme Court decisions their voter bases like and garnering support through outrage over the decisions that they dislike — substantive due process as treated in *Roe v. Wade*[4] has proven more than anything to be a means for the Supreme Court to legislate from the bench and for Congress to engage in its favorite pastime: absolutely nothing.

Just as the debate over abortion has thus far proven intellectually irresolvable due to either side arguing on different planes — with pro-choice proponents advocating for the rights of the mother on one side and pro-life proponents advocating for the rights of the child on the other — so too has the judicial debate over substantive due process, in that one side has concerned itself with an objective definition of constitutionality[5] and the other with subjective morality[6] bolstered by judicial precedent.[7] In the face of such unbridgeable rifts in opinion, it would seem fortuitous that the U.S. Constitution requires that "[state] law[s] regulating abortion, like other health and welfare laws, [be] entitled to 'a strong presumption of validity … [and] must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[8]

That is not to say that the federal legislature does not have any legitimate authority over matters contemporarily seen to be rooted in substantive due process such as abortion, marriage, and contraception. With respect to marriage, for example, its authority over interstate commerce[9] could reasonably grant it the authority to decide "that a state must … give full faith and credit to a marriage that is lawfully performed in another state."[10] Lo and behold, that is exactly what they did in passing the Respect For Marriage Act[11] in December of last year. Just like that, legislators who support the homogenous marital protection established by *Obergefell*[12] managed to achieve just that without the need to abrogate the authority of the citizens of the several states. Accordingly, the Respect For Marriage Act stands not only as a bulwark around nontraditional marriage, but also as a testament to what can be accomplished when everyone does their jobs properly.

Left-leaning legislators seem determined to ride the substantive due process wagon as far as it will carry them, and it is only as the wheels begin to fall off that they feel compelled toward "substantive" action. As the Supreme Court decides to stay in its lane, federal legislators have suddenly found themselves with the apparently unenviable task of driving in theirs. Consequently, the outrage displayed by legislators[13] in the wake of having to take a meaningful stand amounts to little more than shaking their fists at the sky after decades of sitting on their hands. ○

References:

1 Dobbs v. Jackson Women's Health Org, 142 S. Ct. 2228, 2277-78 (2022) ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

2 *Id.* at 2301.

3 Pres. Joe Biden, Remarks by President Biden and Vice President Harris at Signing of H.R. 8404, the Respect for Marriage Act, (Dec. 13, 2022) ("Congress is acting because an extreme Supreme Court has stripped away the right important to millions of Americans that existed for half a century,") (https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/13/remarks-by-president-biden-and-vice-president-harris-at-signing-of-h-r-8404-the-respect-for-marriage-act/).

4 Roe v. Wade, 410 U.S. 113, 129 (1973) ("Appellant would discover this right [for a pregnant woman to choose to terminate her pregnancy] in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras,").

5 *Dobbs*, 142 S. Ct. at 2244-55 ("Constitutional analysis must begin with 'the language of the instrument,' … which offers a 'fixed standard' for ascertaining what our founding document means,"). Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2244–45 (2022) (quoting Gibbons v. Ogden, 9 Wheat. 1, 186-189 (1824).

6 *Dobbs*, 142 S. Ct. at 2320 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) ("We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once,").

7 *Id.* at 2333 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) ("By overruling *Roe, Casey,* and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons stare decisis, a principle central to the rule of law,").

8 *Id.* at 2284 (citing Heller v. Doe, 509 U.S. 312, 319) (1993).

9 US Const. Art. 1, § 8 ("The Congress shall have Power … To regulate Commerce … among the several States,").

10 Terry Price, Associate Teaching Professor at Univ. of Wash. School of Law, *Three Minute Legal Talks: The Respect For Marriage Act*, University Of Washington School Of Law (Dec. 13, 2022), https://www.law.uw.edu/news-events/news/2022/respect-for-marriage-act.

11 1 U.S.C.A. § 7 (2022) ("For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State,").

12 Obergefell v. Hodges, 576 U.S. 644, 681 (2015) ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character,").

13 *See, e.g.,* Kate Scanlon, '*Republican-Controlled' Supreme Court, Pelosi Says, Achieved 'Dark, Extreme Goal*, Washington Examiner (June 24, 2022), https://www.washingtonexaminer.com/news/house/pelosi-dobbs-supreme-court-roe-abortion ("Calling the decision 'disgraceful,' [then House Speaker Nancy] Pelosi said the 'Republican-controlled Supreme Court achieved their dark, extreme goal,'").

Bridging the Gap Between Past Vision and Present Reality: Balancing the Framers' Vision for the Second Amendment and Government Regulation

By Samantha Murphy

The Second Amendment of the United States Constitution proscribes that "the right of people to keep and bear arms, shall not be infringed."[1] This was incorporated through the Fourteenth Amendment, which explicitly provides that states cannot enforce any laws which "shall abridge the privileges or immunities of citizens of the United States."[2] Over the last decade, the Second Amendment has become a hot topic of litigation within the U.S. court systems, and, more recently, the Supreme Court found that New York's strict and long stand gun regulation law requiring a "special need for self-defense" to be unconstitutional.[3] The special need requirement created an impermissibly hard burden for an individual to pass and as noted by the Supreme Court, "living in an area noted for criminal activity" was not sufficient in the view of the New York legislature to satisfy this requirement.[4]

In *New York State Rifle & Pistol Ass'n,* 142 U.S. 2111 (2022), the Supreme Court was confronted with determining the validity of New York's licensing restriction for the public carry of firearms for self-defense.[5] Under review was the slew of restrictions the New York Penal Code implemented on one's ability to obtain a license to carry a firearm.[6] The more egregious requirements included "good moral character… having the essential character, temperament and judgment necessary to be entrusted with a weapon," disclosure of whether "he or she has suffered any mental illness," whether they have been "involuntarily committed" to a mental hygiene facility and a "special need for self- defense."[7] To show "good moral character" an applicant is asked to provide the contact information of romantic partners, and "four-character references" as well as supply a list of social media accounts from the "last three years to confirm the information regarding the applicant's character."[8] The constitutionality of having a "proper cause" requirement was questioned in *Kachaky v. Westchester,* 701 F. 3d 81 (2d Cir. 2012), where the plaintiff was denied a concealed carry license because he "failed to show facts demonstrating a need for self- defense distinguishable from that of the general public."[9] As stated by the Supreme Court in *District of Columbia v. Heller,* 544 U.S. 570 (2008), "self-defense is a central component of the Second Amendment."[10] Conversely, a minority of states, including New York, take a "may issue" approach, in which, even if the applicant satisfies all threshold requirements, they may still be denied their concealed carry licensee at the discretion of the issuing authority.[11] Compare New York's requirements to those of Florida; Florida's requirements consist of the individual needing to be 21 years of age with no felony convictions.[12] Florida law does not allow one to "open carry" a firearm but does make multiple exceptions to display their firearm to another as long as it is not in an "angry manner" and one exception being to display the gun in a need of self- defense.[13] Florida law and those alike apply constitutionally sound restrictions to implement the level of control needed over gun law to ensure safety, while still respecting our framers' vision for the U.S. citizens and their right to self- protection.[14] The Supreme Court's analysis in *N.Y. State Rifle & Pistol Ass'n* emphasized a great distaste for the "special needs requirements" as well as to the level of discretion authorities possess in denying one's right to carry even when all statutory requirements have been satisfied.[15] As a result of this Supreme Court decision finding this requirement to be unconstitutional, New York's Governor, has taken steps to sign into action a bill to reinforce these constitutionally unsound restrictions placed on the citizens of New York by enforcing "sensitive places" restrictions on where guns may be carried as well as making it a crime to conceal carry on private property unless the owner permits such action.[16]

The Florida licensing requirements are in uniform with the view of our framers because they take steps to ensure the protection of its citizens by enforcing restrictions, such as age and addiction while also ensuring rights remain intact and respected through efforts such as minimal restriction and requiring the issuance of a license when the requirements are met.[17] As opposed to New York's law which creates impermissibly high burdens for individuals to satisfy all licensing requirements while placing in the hands of the issuing authorities the full discretion over one's right to bear arms.[18] ○

References:

1 Kachaky v. Westchester, 701F.3d 81,86 (2d Cir. 2012) (Finding New York's proper cause requirement constitutional under the Second Amendment) (*overruled* by New York State Rifle & Pistol Ass'n v. Bruen.,142 U.S. 2111(2022)).
2 Fla. Stat. Ann.§790.06 (LexisNexis 2022).
3 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 U.S. 2111(2022).
4 *Id.* at 2123.
5 *Id.* at 2111.
6 N.Y. Penal Law §400.00 (Consol. 2022).
7 Penal Law §400.00.
8 Penal Law §400.00.
9 Kachaky, 701 F. 3d at 81.
10 District of Columbia v. Heller, 554 U.S. 570, 599 (2008).
11 N.Y. Penal Law §400.00 (Consol. 2022).
12 Fla. Stat. Ann. §790.06 (LexisNexis 2022).
13 Fla. Stat. Ann.§790.053(LexisNexis 2022).
14 *Id.*
15 Bruen,142 U.S. at 2111.
16 N.Y. Penal Law §400.00 (Consol. 2022).
17 Fla. Stat. Ann. §790.06 (LexisNexis 2022).
18 N.Y. Penal Law §400.00 (Consol. 2022).

Too Rich for Time And A Half?: Why the FLSA's overtime compensation laws apply to ALL daily rated workers, and how a 2023 SCOTUS decision may impact the Oil & Gas industry

By Tyler Bergerson

The Fair Labor Standards Act (FLSA) established a standard 40-hour workweek.[1] Consequently, for any additional time worked in a given week, employers are generally mandated to pay "time and a half" to employees for these extra hours.[2] However, recent appellate court cases have contemplated whether a daily rated employee could be too "highly compensated" to qualify for the FLSA's time and a half protection. Employers who pay employees through daily rates (ex: $100/hr.) could be immensely affected by this decision; in particular, the Oil & Gas industry, due to its prevalent usage of daily rated compensation schemes.[3]

In the 2022-2023 term, the United States Supreme Court (SCOTUS) is set to decide in Helix Energy Sols. Grp., Inc. v. Hewitt, 212 L. Ed. 2d 762, 142 S. Ct. 2674 (2022) whether a daily rated supervisor who earned over $200,000 annually is entitled to overtime compensation under the FLSA.[4] The main issue is whether the appellee (Mr. Hewitt's) daily rate qualified as payment on a salary basis.[5] In a 12-6 *en banc* decision, the Fifth Circuit held that Mr. Hewitt was not exempt, and was entitled to be paid overtime compensation, despite his above average income.[6] The court emphasized that "employees are not to be deprived of the benefits of the [FLSA] simply because they are well paid".[7] Here, the Fifth Circuit adopted the reasonable relationship test, which dictates that the statute's language be interpreted by its plain meaning; which would suggest that any employee paid on a daily rate is protected by the FLSA's time and a half requirement.[8]

Conversely, the test given by the First and Second Circuit Courts of Appeal attempts to infer an alternative meaning to the salary prong of the FLSA. These courts, along with the Appellant in *Helix* (a large energy employer), contend that extending overtime protections to "highly-paid" employees like the appellee (who earns, annually, over $200,000) goes beyond the FLSA's legislative intent.[9]

Between the Fifth Circuit's approach versus the First and Second Circuits, SCOTUS should side with the former. The Fifth Circuit's test, as seen in *Helix,* should set the national model for how courts interpret the FLSA's law on overtime compensation. Courts are to be bound by a statute's plain meaning, and any "legislative intent" concerns can and should be resolved by Congress. Not only has Congress never amended the text of the FLSA to categorically exempt highly paid employees from overtime, but they have gone as far as to reject efforts to make this change on several occasions.[10] Thus, even if we consider a legislative intent theory to be dispositive, Congressional intent on this issue would in no way suggest that Mr. Hewitt would not be entitled to overtime.

Nonetheless, the Fifth Circuit followed centuries of legal tradition; to contemplate the clear text of a document, and to forgo statutory gap filling, a role which is delegated for Congress vis a vis Article 1 of the U.S Constitution.[11] Here, Congress would merely have to amend the FLSA to abandon the current standing "salary basis test", which would make daily rated employers like Mr. Hewitt ineligible for overtime protections.[12] But their refusal to do so should be sufficient enough to prevent courts from writing in material changes to the statute, as this would be a textbook example of legislating from the bench. When they recently examined the FLSA, SCOTUS emphasized that "it should go without saying that we are governed by the text of the FLSA and its implementing regulations, not some unenumerated purpose."[13]

In addition to the legal aspects of this decision, it is wholly unjust to disincentivize Americans from working hard in order to earn a "high income" for themselves and their families. The public policy effect of making Mr. Hewitt exempt from overtime protections would go against the makeup of our longstanding culture of striving for the American Dream. Our country was founded on the idea that, with hard work and sound financial decisions, anyone has the ability to thrive and prosper, and a SCOTUS ruling to uphold the Fifth Circuit's decision would further instill this aspect of our culture. Employees working overtime is something we should applaud instead of frowning upon just because they earn an above average salary.

References:

1 *See*. 29 U.S.C. § 207(a).
2 29 U.S.C. § 207(a).
3 The National Law Review, https://www.natlawreview.com/article/daily-rate-workers-and-overtime-compensation-implications-supreme-court-s-upcoming (last visited December 6th, 2022).
4 The National Law Review, https://www.natlawreview.com/article/daily-rate-workers-and-overtime-compensation-implications-supreme-court-s-upcoming (last visited December 6th, 2022).
5 The National Law Review, https://www.natlawreview.com/article/daily-rate-workers-and-overtime-compensation-implications-supreme-court-s-upcoming (last visited December 6th, 2022).
6 Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289, 290 (5th Cir. 2021), cert. granted, 212 L. Ed. 2d 762, 142 S. Ct. 2674 (2022).
7 *Id.*
8 *Id.* at 24.
9 *Id.* at 20.
10 Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289, 290 (5th Cir. 2021), cert. granted, 212 L. Ed. 2d 762, 142 S. Ct. 2674 (2022).
11 *Id.*
12 *Id.*
13 Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142, 200 L. Ed. 2d 433 (2018).

Running on Florida Time: A Successful Model for Federalizing Congressional Term Limits

By Isabella Askar

Congress without term limits condones false incentives of career politicians wanting to remain popular in the public eye. There is thus a timeliness and importance attached to enforcing term limits on the Congressional level to ensure a healthy turnover rate, minimize gridlock, and ultimately offset an incumbent's advantage. Conversely, the state of Florida's consecutive model in particular serves as a successful model for Congress to follow because it places limitations solely on the number of consecutive years a legislator may be in office. Florida allows for a legislator in either chamber, that is the House or Senate, to remain in a seat for a maximum of eight years consecutively. After that point, a legislator may either step down or run for office in the other respective chamber.

Whereas it may be reasonably argued that term limits inhibit one's right to freely elect his or her legislator of choice, the consecutive model is distinguishable from a complete lifetime limit model, the latter of which instates limitations indefinitely after so many years. Alternatively, the consecutive model follows that, "after a set period of time (usually two years), the clock resets the limit," and once again the legislator may run and be elected accordingly.[1]

Florida is one of 10 states enforcing consecutive term limits.[2] Although the other nine states also have statutes with eight-year term limits, Florida overall, outside of just term limits, excels in terms of its economy, safety, weather, and travel. Furthermore, of these 10 states, only one of the 10, Nebraska, ranks higher than Florida on the U.S. News Best States Ranking list; however, Florida is the Sunshine State, and good weather is reason enough to rival any worthy opponent.[3] As previously mentioned, term limits in general may be deemed undemocratic for restricting one's right to elect whomever the voter finds electable regardless of the legislator's professional longevity. However, that is precisely why Florida's consecutive term limits achieve equitable balance, as they allow for eight-year re-elections followed by a break, to which thereafter, the legislator may run again.[4]

Conversely, the present case law does not favor term limits. The Supreme Court in *United States Term Limits v. Thornton* established that states do not possess the power to impose term limits on the Congressional level.[5] In this case, the state of Arkansas created an amendment instating term limits, however it was challenged, and the Supreme Court affirmed both the trial and Arkansas Supreme Court decision deeming term limits unconstitutional.[6] Justice John Paul Stevens in his majority opinion stated that term limitations at the federal level "would be contrary to the fundamental principle of our representative democracy," however, this logic should not be followed as it pertains to the equitable model of consecutive term limits.[7] Justice Clarence Thomas, dissenting, explained that allowing states the power to establish term limits is not unconstitutional because "the Constitution is simply silent on this question [and]… raises no bar to action by the States or the people."[8]

Fortunately, some of the recent pending legislation suggests that legislators are eager to institute term limitations. A Joint Resolution sponsored by South Carolinian Congressman Ralph Norman, for example, proposes a Constitutional amendment limiting the House of Representatives to three terms and Senators to two terms.[9] Pragmatically speaking, given the extent of these limitations coupled with the partisan co-sponsorship of the proposal, it is unlikely that such an amendment would get ratified; but if the proposed amendment followed the Florida consecutive model, it might be received with stronger support.

Therefore, Florida's approach to term limits is more equitable. Congressional term limits will allow for the return to public servants, not politicians, and restore much-needed integrity in the modern political landscape. O

References:

1. *The Term-Limited States*, National Conference Of State Legislatures (Nov. 12, 2020, 10:26 PM), https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx.
2. Fla. Stat. § 100.041 (2022).
3. U.S. News & World Report, https://www.usnews.com/news/best-states/rankings (last visited Sept. 21, 2022).
4. Fla. Stat. § 100.041 (2022).
5. U.S. Term Limits, Inc. V. Thornton, 514 U.S. 779, 115 S. Ct. 1842 (1995).
6. *Id.*
7. *Id.* at 783.
8. *Id.* at 845.
9. H.R.J. Res. 12, 117th Cong. (2021).

Let Them Eat Bacon: A Critique of California's Proposition 12

By Joshua Mireles

In 2018, the people of California voted to pass Proposition 12. Proposition 12 forbids the commercial sale of any pork in the state of California derived from a pig that "was confined at any time during the production cycle for said product in an enclosure that fails to comply with the following standards: (1) An enclosure shall allow the breeding pig to lie down, stand up, fully extend limbs, and turn around freely. (2) An enclosure shall provide a minimum of 24 square feet of usable floorspace per breeding pig..."[1] This restriction does not only apply to pork produced in the state of California, but also any pork that is shipped from out of state.

Shortly after this proposition passed, "[t]he National Pork Producers Council and the American Farm Bureau Federation... filed an action for declaratory and injunctive relief on the ground that Proposition 12 violates the dormant Commerce Clause."[2] The district court denied the plaintiff's claim, holding that there was not enough evidence to support a dormant Commerce Clause claim, and the Ninth Circuit affirmed. The issue now stands before the Supreme Court, as they granted cert in 2021.

Although the harms of factory farming are real and the goal of humane farming noble, this proposition is a constitutional cudgel where a more gentle, gradual approach is needed. This legislation is too harsh and sweeping to likely (1) pass constitutional muster in the Supreme Court and (2) mitigate the financial harm and hardship that such measures impose on pork producers in state and out of state.

The first danger of this Proposition is that it risks violating the dormant Commerce Clause. The central principle of the DCC is that it ensures that state laws do not interfere or preempt interstate commerce in a way that affects other states. Generally, the DCC has two general principles: "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."[3] In this case, the law seems to implicitly discriminate against out of state commerce *and* impose an undue burden of interstate commerce. This proposition seems to do both.

The facts of this case mirror the facts of *Hunt v. Washington State Apple Advert. Comm'n*, in which the state of North Carolina "required all closed containers of apples shipped into or sold in the State [of North Carolina] to display either the applicable USDA grade or none at all."[4] The Supreme Court ruled that this piece of legislation violated the DCC because it discriminated against distributors in other states, particularly Washington, which had its own established grading system. Even though the law was facially neutral and applied to both in-state producers and out of state producers, the Court observed that the restriction disproportionately affected the out-of-state producers, and imposed an undue burden on them to expend a large amount of resources to comply with North Carolina's unique restrictions.

Similarly, here, Proposition 12 favors the instate, California companies, which will necessarily have to follow the California protocol, and burdens any out of state competitors. Any out-of-state producer wanting to conduct business in California will have to adjust their entire farming process to comply with California's singular restrictions, simply to conduct commerce in the golden state. Like the Washington apple producers in *Hunt*, a pig farmer in Texas may have to upend and renovate his entire production line simply to maintain a line of business in California. Even though the Ninth Circuit dismissed the DCC claim, "the Ninth Circuit is relatively deferential to California's legislative decisions."[5] The Supreme Court's precedent suggests that Proposition 12 is unlikely to pass constitutional muster. However, the ruling is yet to be seen.

In addition to burdening interstate commerce, Proposition 12 also hinders the local, Californian farmers by reducing their margins, forcing them to spend more money to raise fewer pigs, a cost that inevitably passes on to the consumers.

Rather than imposing broad, sweeping legislative rulings that interfere with and restrict interstate commerce, the California legislature should have started with a gentler touch. They should have begun by patiently advocating for federal action, ensuring that their ideas are in step with the rest of the country. Forcing the rest of the country to comply with their bold legislative agenda in order to mitigate the economic repercussions in their own state reflects poorly on their policy decisions. Therefore, "advocating for robust federal legislation, which could provide uniform and meaningful improvements to the lives of animals across the nation, is the best solution."[6] ○

References:

1 Cal. Code Regs. tit. 3, § 1322.1.

2 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), cert. granted, 212 L. Ed. 2d 402, 142 S. Ct. 1413 (2022).

3 S. Dakota v. Wayfair, Inc., 201 L. Ed. 2d 403, 138 S. Ct. 2080, 2091 (2018).

4 Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 337 (1977).

5 Tanner Hendershot, *The United States of California: Ninth Circuit Tips the Dormant Commerce Clause Scales in Favor of the Golden State's Animal Welfare Legislation*, 49 Pepp. L. Rev. 469, 484–85 (2022).

6 *Id* at 531.

Letters of Protection: Have we gone too far?

By Shanna Mais

Addendum: At the time this article was written, House Bill 837, or Florida Tort Reform had not been enacted. The treatment of Letters of Protection has now changed due to the signing and enactment of this bill.

In the world of personal injury litigation, a recent phenomenon occurred that threatened the integrity of due process in this state. This highly controversial allowance granted Plaintiffs and their counsel the ability to contract their medical treatment and bills with providers with a promise of repayment upon settlement or a verdict. Coined as "Letters of Protection", these agreements raise both constitutional and ethical issues among lawyers and their clients.[1] Further, medical advisory boards have also begun vocalizing their concerns regarding these contracts.[2] House Bill 837, which was signed on March 24, 2023, corrected a grave constitutional monster.[3]

At the base level, the ethical implications surrounding Letters of Protection should not be ignored. Counsel for plaintiffs have been accused of violating our code of ethics as the outcome of these contracts often results in defendants paying two, three, or four times the amount of what the medical bills actually are.[4] The goal of personal injury litigation is to make a plaintiff whole, yet the inflation of these bills results in verdicts that are astronomical compared to other states in which these agreements are barred.[5]

Beyond this, attorneys have also felt that Letters of Protection have given medical providers an interest in the litigation of their patients, an interest which does not belong.[6] Both medical advisory boards, ethics committees, and attorneys have raised the issue of having these physicians, whose medical treatment is under a letter of protection, testify as an expert for the Plaintiff in trial.[7] As such, some Florida courts, through the decision in *Worley,* have come to recognize the introduction of these Letters, without divulging their actual amounts, in order to show possible bias of the Expert.[8] The post-*Worley* litigation, however, has grown into a tangled litigation monster and has limited further not only the ability for juries to be made aware of these agreements but for these agreements to even be discoverable.[9] House Bill 837 now requires actual amounts be disclosed via Fla. Stat. 768.0427 (3) as well as for those agreements to be known.[10]

Interestingly, Letters of Protection have been found to implicate attorney-client privilege.[11] As such, counsel is barred from asking about the relationship between the attorney and doctor as well as the Plaintiff and doctor.[12] Meaning, the jury is never made aware that these medical bills may not appear what they seem, nor are they aware of the possibility of an agreement between counsel and the physician to have these agreements with every patient who is in litigation.[13] Yet, while Florida courts have recognized this to be of great importance, in *Barnes*, the Supreme Court of Florida denied review and did not comment on the issue raised by the lower court.[14] Again, House Bill 837 destroyed the attorney-client privilege and now requires its disclosure to opposing counsel and the jury.[15]

The due process implication, and violation, is apparent when viewing Florida's system with the system of other states which do not allow for these agreements.[16] If the goal is to make the Plaintiff whole for the injury suffered, how then, can a Defendant be properly represented when they are barred from introducing these agreements to the jury? Clearly, they cannot. This issue was first discussed in *Boecher*, in which the court noted that fairness is undermined when interests are not made apparent to the jury.[17] However, as discussed above, Florida courts have paid little attention to this prior to Florida Tort Reform becoming an increasingly apparent issue.

Florida had the issue wholly wrong. States, such as Michigan, do not allow for these agreements.[18] While the purpose of these agreements was to originally circumvent insurance companies denying billing or payout to Plaintiffs, the monster Letters of Protection have become is something most of the country is unaware of.[19] Michigan, in a recent decision, found no constitutional right to these contracts and refused to recognize Letters of Protection.[20] Recognizing the potential damage which could be done, Michigan courts correctly decided to bar Letters of Protection.[21]

While Letters of Protection are a relatively recent concept, the impact it is having on litigation is becoming more and more apparent. Beyond the inflation of medical bills, possible physician interest in the litigation, and the possible constitutional implications, Letters of Protection also have the potential to threaten the average American citizen. Known as "phantom damages", Florida has seen an increase in damages awards for medical treatment a Plaintiff may have not even received.[22] Without the ability to discover or explain to a jury, public policy appears to be threatened as we are now seeing health care costs that are some of the highest in the country.[23] The ballooning, and sometimes fabrication of these bills, are having grave impacts upon this state and the economy.[24] Florida finds itself in a precarious position as it has created a litigation monster which appears out of control. As such, the new Tort Reform Bill sheds a hopeful light on the future of civil litigation in Florida. ○

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Copyright Laws for Musicians: Does the United States Fully Satisfy the Moral Rights Requirement for Membership to the Berne Convention Treaty?

By Brandis Godwin

The international Berne Convention Treaty originating in Berne, Switzerland, allows participants to ensure protection over the works of their citizens within the artistic industry.[1] To join, parties must satisfy certain minimum protective requirements in their respective countries.[2] One of the requirements, which is the focus of this writing, is to grant artistic citizens moral rights to their works.[3]

Under the Copyright Act of 1976, artists are granted copyright protections which allow them to obtain economic protections and benefits for their works.[4] This means that artists can sell their works and be compensated for the use and distribution of their intellectual property. However, the Berne Convention Treaty also requires countries to provide their artistic citizens with some form of moral rights, which are left to individual countries to create and enact.[5] Moral rights, as opposed to economic rights, are non-economic personalized rights and grant the artist with a right to authorship to their works.[6] Furthermore, moral rights give the artist power to decline their works being used in specific circumstances where the artist deems the usage objectionable. In other words, the concept of moral rights "springs from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved."[7] While there may be some copyright loopholes to solve or reconfigure, this article addresses why an extension of moral rights to musicians would be more constitutional for all artists in the industry.

Prior to the United States joining the Berne Convention treaty, there were no copyright interests or moral rights for artists. In 1948, four Russian Composers sued Twentieth Century-Fox for using their music in a film "The Iron Curtain," which plaintiffs asserted as "unsympathetic to their political ideology" and therefore, prejudicial to their reputations.[8] However, without any protective rights, their motion to enjoin the use of their music was denied, even though the film was objectionable to their political ideology.[9]

After the United States enacted the Copyright Act in 1976 and joined the Berne Convention Treaty in 1989, economic interests in artistic works were protected, but moral rights were not asserted to musical artists. In 2003, a singer and songwriter, Connie Francis, sued Universal Music Corporation (UMC) for violating her moral rights.[10] UMC had properly licensed Ms. Francis' music, which transferred rights to them for usage and provided compensation to Ms. Francis, complying with her protective economic rights under the Copyright Act.[11] UMC then used Ms. Francis' music in two films, "Jawbreaker" and "Postcards from America." These films portrayed scenes including the depiction of suicide, prostitution, and rape, which Ms. Francis found objectionable due to personal reasons.[12] In her past, Ms. Francis had been raped and tortured, which resulted in trauma and on-going mental impairments. The court, however, concluded that Ms. Francis had no moral rights under U.S. law because those rights did not extend to musicians within the artistic industry. As a result, Ms. Francis had no right to exclude her music from the motion-picture films.[13]

This leads us to question of whether the United States fully complies with the minimum protective standards required by the Berne Convention Treaty. While many countries in the European Union recognize moral rights for all artists, the United States has enacted a law that protects only "visual artists" in the industry. In Friedman v Zimmer, the United States rejected the plaintiff's violation of a moral rights assertion.[14] The Court stated that "Plaintiff has no moral rights under the U.S. Copyright Act, which recognizes moral rights only for works of visual art."[15] The court then acknowledged that the Plaintiff may assert those rights under French or German law regarding any infringement that may have occurred in France or Germany, but those rights would not be recognized in the United States.[16]

To comply with the Berne Convention Treaty moral rights requirement, the U.S. enacted the Visual Artists Rights Act (VARA) in 1990 within its Copyright Act.[17] While there are limitations within the Act, VARA provides those visual artists "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."[18] However, the statute only grants moral rights to visual artists with works such as paintings, drawings, prints, and sculptures., and therefore, does not extend to musicians.[19]

The Berne Convention Treaty requires each member to enact some form of moral rights to their artists, however, that discretion is left to each individual country. The U.S. enacted VARA to fulfill their moral rights requirement. Is it enough? Looking to countries such as Germany or France in the European Union who grant moral rights to all artistic members, it appears that musicians in the United States are not treated equally to "visual" artistic members. The United

States strives for equality, but evidently, the moral rights concept that resembles equality in an artistic world unfortunately does not reach musician protective rights. Therefore, in the interests of equality and fairness, Congress should enact some form of moral rights to musicians for all artists in the nation. ○

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The First Amendment Does Not Protect Bullying and Cyberbullying, or Does It?

By Eva Thompson

In the United States of America, one out of three students between the ages of twelve and seventeen are victims of cyberbullying each year, and fifty percent of children report an experience of cyberbullying at least once in their lifetime,[1] but there is currently no federal law that directly addresses bullying or cyberbullying.[2] Over the past two decades, it is apparent an increasing trend towards federal involvement in student protection exists through ratifications of various Acts, such as the Safe and Drug-Free Schools and Communities Act of 1994.[3] The United States Congress ratified this Act in 2002 to provide federal financial assistance in the form of state grants to improve local school districts and prevent violence.[4] Although this is an example of federal involvement in preventing violence and harassment in school settings, states still have the ultimate authority over bullying and cyberbullying laws.[5] For example, Alaska and Wisconsin do not explicitly reference cyberbullying in their respective state laws, and Montana has yet to enact a statute that specifically prohibits bullying.[6]

Opponents of Anti-Bullying Laws argue that freedom of speech is protected under the First Amendment,[7] and students are protected citizens because they have a fundamental right to voice their concerns, even if it is inflammatory. Opponents may erroneously rely on *Tinker v. Des Moines Indep. Sch. Dist.*,[8] a landmark decision that held public school students have First Amendment rights, and schools may not prohibit student speech because of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[9] However, this argument fails because the drafters of the Constitution did not intend for the First Amendment to protect against such unpopular forms of speech that consequently denote harassment, hate speech, and bullying towards students.

Although Florida and a majority of states have passed laws or policies that address cyberbullying in schools, many of these states do not protect specific groups, such as minorities or students with characteristics that are historically victims of bullying.[10] Most policies and provisions only address district policy requirements, consequences, staff training, and parent engagement regarding Anti-Bullying laws.[11] Staff training includes a provision for school districts to provide training for all staff to identify and properly respond to bullying.[12] Parent engagement encourages or requires school districts to involve parents in bullying prevention and response efforts.[13] These provisions are fundamental for the safety of students in early and upper education, and states should not have the discretion to ratify these policies. Congress must enact a federal statute that protects all students, of any religious background, ethnicity, or protected group from bullying and cyberbullying.

Overall, opponents may rely on outdated precedent to argue the First Amendment protects freedom of speech; and thus, the government cannot ratify federal laws or policies that speak to bullying and cyberbullying in school settings.[14] However, technology is at the foundation of today's society, and students have excess to a wide range of harassment and violence-based platforms.[15] Therefore, the United States Congress must evolve and enact statutes that directly address bullying and cyberbullying in schools because such acts are not protected under the First Amendment. A child's right to learn in a safe environment should be preserved by federal law. ○

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The PATRIOT Act Contrasted with the United Kingdom's Surveillance Practice

By Zachary Lecius

Since the inception of The PATRIOT Act in the wake of the September 11th attacks, it has been met with scrutiny on both sides of the political spectrum. While some believe it aides law enforcement and the like, others feel that it takes away certain enumerated Constitutional rights. As United States Senator Rand Paul once said, "How will we defend ourselves if the PATRIOT Act expires? Well, perhaps we could just rely on the Constitution and demonstrate exactly how traditional judicial warrants can gather all the info we need – and how bulk collection really hasn't worked.[1]"

The USA PATRIOT Act is an acronym that stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.[2] The Act was signed by President Bush on October 26, 2001, and sought to help law enforcement and the like effectively counter terrorism throughout the United States.[3] There has been no previous Act that has been passed with such speed as the PATRIOT Act. As stated previously, there were mixed feelings as to the effectiveness of the PATRIOT Act. While proponents of the Act argued that it effectively stopped terrorist attacks and cells, others have argued that it has stolen fundamental Constitutional rights. This article dives into the Constitutionality of the PATRIOT Act, and to contrast it with that of the United Kingdom's *Amended Surveillance Camera Code of Practice*.[4]

A controversial, yet reasonable, claim by those who believe the PATRIOT Act subverted Constitutional rights centers on the Act's effect on national security letters.[5] These letters gave the government broad power to issue subpoenas to institutes such as internet service providers and banks. Once these letters were issued it compelled the aforementioned institutes to divulge the private information of their clients to federal investigators.[6]

The problematic caveat was that the government did not have to seek a judge's prior written authorization before issuing national security letters, which also contained a gag order.[7] The gag order prevented an individual who was served with the gag order from discussing its contents with anyone. Naturally, one can see how this would not only violate a citizen's First Amendment right but also their Fourth Amendment right.

To exemplify this issue between one's First Amendment rights and the governments need, the use of national security letters arose in *John Doe, Inc. v. Mukasey*.[8] The Second Circuit applied the test reiterated in *Freedman v. Maryland* to state that the national security letters gag orders are unconstitutional and violate one's First Amendment rights.[9] In *Freedman*, the Court adopted a three-part test to "guard against impermissible censorship.[10]" The three procedural requirements are as follows: "(1) any restraint imposed prior to judicial review must be limited to a 'specific brief period'; (2) any further restraint prior to a final judicial determination must be limited to 'the shortest fixed period compatible with sound judicial resolution'; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government."[11] Therefore, when the Second Circuit applied the *Freedman* test to *Mukasey*, it determined that it was not narrowly tailored to qualify under the First Amendment.[12]

Furthermore, in *Doe. v. Gonzalez*, the court "suggested that the NSL could not withstand strict scrutiny unless some accommodations were available.[13]" Likewise, in *Doe v. Ashcroft*, the United States District Court for the Southern District of New York concluded that national security letters violate both an individual's First and Fourth Amendment rights.[14] On the Fourth Amendment issue, the court concluded that, by deterring one's ability to challenge its constitutionality, the national security letter, in and of itself, was a violation of the Fourth Amendment, even if the recipient had the opportunity to consult with their attorney.[15] Under the First Amendment challenge, the court concluded that § 2709, the portion that spoke to the nondisclosure section, was effectively both a prior restraint and a content-based restriction on speech.[16] Therefore, applying the strict scrutiny standard the court concluded that it was not narrowly tailored and sufficient to satisfy any compelling government interest[17].

While national security letters and other portions of the PATRIOT Act can dive into one's personal life, the United Kingdom has adopted the *Amended Surveillance Camera Code of Practice* to combat crime and terrorism without violating an individual's privacy rights.[18] The purpose of act is to use surveillance camera systems in public places to provide safety and security.[19] According to the United Kingdom's online published version of the *Amended Surveillance Camera Code of Practice*, the surveillance camera systems must have a specific, legitimate purpose to help resolve a timely issue or problem. The drafting of the *Amended Surveillance Camera Code of Practice*, therefore, seems to be drafted in a way that does not violate one's personal privacy any more than necessary.

In theory, the United Kingdom's act could be adopted in accordance with the Constitutional principles of the United States. While the PATRIOT Act was overreaching into one's personal life and gave broad power to the government, the *Amended Surveillance Camera Code of Practice* is limited in scope and does not go so forth to violate the privacy of the United Kingdom's citizens.

In conclusion, the PATRIOT Act was an unprecedented law that was quickly filed and enacted to secure the safety of citizens of the United States of America without the idea of the individualistic freedom. While there have been prior opinions based on the constitutionality of the PATRIOT Act, as society and technology evolve, there will

have to be legislative changes to protect United States citizens' rights, similar to the United Kingdom's provisional practice.

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Religious Freedom for Parents in Educating their Children

By Camilla Edwards

Constitutionally Problematic State "Blaine" Amendments

The government's most deadly weapon against parental rights[1] in school choice[2] is a state's constitutional "Blaine amendment." Blaine amendments are wounding the public education system.[3] The Supreme Court has found state's Blaine amendment to be unconstitutional in its discriminatory effect on the basis of religion.[4] The purpose and effect of discrimination against religion have been most predominately weaponized against schools of parental choice through state constitutional "Blaine Amendments," modeled after that which was proposed by Congressman James G. Blaine in 1875 to restrict public funding to "sectarian" schools.[5] Blaine Amendments are a product of religious discrimination against Catholics, implemented to exclude Catholics from the public education system.[6]

Blaine amendments require withholding generally available public benefits based on religious belief.[7] Underlying a "neutral" motive, the Blaine amendments are understood commonly to have been a pretext to discriminate against Catholics, prohibiting taxpayer funding towards "sectarian" schools.[8] Denying a generally available benefit solely on account of religious identity violates the Free Exercise Clause of the First Amendment, and the implicit liberty interests protected by the Fourteenth Amendment.[9] General welfare benefits excluded from religious classification or association, is presumptively unconstitutional.[10]

In the last decade, the courts have finally begun to challenge the constitutionality of state efforts to withhold otherwise available public benefits from religious organizations. In *Trinity Lutheran*, the Supreme Court held that the Free Exercise Clause does not permit the state to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[11] When the benefit is to a neutral educational function, aid to religious schools does not violate the Establishment Clause because the neutral use of funds is not depreciated by religious status.[12]

In 2022, the Supreme Court held that if a state offers a private tuition assistance program to its residents, it may not deprive the right to apply the tuition to religious schools.[13] Prior to this case, Maine had restricted private tuition funds from going to religious private schools, and only permitted funding to secular private schools. This is a landmark case in establishing what is constitutionally impermissible when it comes to states allocation of educational funding on a discriminatory basis against religion.

Model for Education Success: International Inspiration

The Netherlands have provided a model for true religious neutrality, equality, and private choice. The government covers 100% tuition for all students, regardless of the school chosen to attend. The Netherlands made education free for all citizens, in all schools, both public and private, religious and secular.[14] Unsurprisingly, over 70% of students attend private schools, the majority of which attend religious private schools.[15] The Netherlands is not alone in the government's willingness to allocate funds to educational institutions equally, not exclusively on the basis of "public" classification or exclusively "secular" identity.

The Australian government covers 50%-75% of private school costs for all students.[16] With half of the costs covered, over 33% of parents have chosen to send their children to private schools in Australia.[17] In Israel, the government covers 60%-100% of private schooling, enabling about 40% of the nation's students to be educated in a private school of parental choice.[18] By contrast, the United States government funds almost no private education, and only 10% of students are able to pursue a true private choice for financially burdensome education.[19]

Schools of choice for religious education may be made financially accessible through government funds and authorization upon revocation of unconstitutional Blaine amendments. Advancing programs based on secular identity is not neutral because it excludes any other options based on religious classification.

Bringing Religious Freedom and Equality Together Under Constitutional Protection

Parental school choice for religious education may be made financially accessible through government funds and authorization

upon revocation of unconstitutional Blaine amendments. State governments have recognized a need to provide aid to families for religious schools of their choice.[20] The substantial interest of the public has been reflected in a longstanding trend of programs created to aid religious education through state constitutional provisions and legislative action.[21] Religious education provisions from the government are constitutionally permissible—and further, with the correct interpretation of underlying principles presented, constitutionally required.

Religious private schools are constitutionally authorized to receive vouchers from the government.[22] The direction of funds from the government to the parents, rather than the school of choice, avoids triggering the Establishment Clause.[23] The Supreme Court has held that "[a] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the establishment clause."[24] The system of funding was found constitutional because it was "neutral" in its educational purpose, which aids "truly private choice" of school.[25] Thus, parents are the direct recipient of the government's funds, not any religious entity. The generally applicable government support for the neutral purpose of education empowers the choice of education to rest in the hands of the parents and may not be minimized due to any sincerely held religious beliefs. ○

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America Uncancelled: The Fight Between Cancel Culture and Freedom of Speech

By Lisney Agramonte

The Florida Constitution provides that "every person may speak, write, and publish sentiments on all subjects."[1] Likewise, the United States Constitution states that "congress shall make no law … abridging the freedom of speech."[2] Yet, cancel culture is undermining the rights and privileges that individuals are granted by the First Amendment and State Constitutions.

Cancel culture is the aggressive targeting of individuals or groups whose views are deemed unacceptable to destroy their reputation.[3] Even with the First Amendment and Florida's Constitution affording individuals Freedom of Speech, Florida's legislation is enabling cancel culture and infringing on the very rights afforded by the constitution.

As expressed by many, "cancelling" has become a prominent tool in contemporary debates which interferes with the philosophy of open political debate.[4] America cannot function as a democracy, let alone a society, when any expression deemed contradictory can potentially cause your career, business, or reputation to be derailed.

One of the most recent examples of the cancel culture phenomenon surrounds Florida's Governor DeSantis and his HB 1557, The Parental Rights in Education Bill, and Disney's public opposition.[5] Disney made a public announcement after the passing of the bill standing up for the rights and safety of the LGBTQ+ community in Florida and opposing discriminatory Florida legislation.[6] Prior to this incident, Disney had been granted concession from the Florida legislature and benefited from state tax breaks for bringing in thousands of jobs.[7] Governor DeSantis has proposed eliminating six special districts to revoke Disney's special privileges and tax breaks as retaliation against their opposition to his HB 1557 bill.[8] This backlash against Disney is a clear indicator of cancel culture because it condemns an entity for publicly expressing opposition to state legislation and sparking a debate on the constitutionality of the bill. This example of cancel culture demonstrates its ramifications of interfering with contemporary debates and democracy.

Disney is not the only entity or individual experiencing scrutiny in the public and is only another example of DeSantis publicly backlashing against businesses in Florida.[9] In the past, Governor DeSantis has blocked state funding for a Tampa Rays baseball facility for donating to a gun violence prevention program.[10] These are just some instances of how cancel culture is interfering with the philosophy of open political debates, with political leaders publicly retaliating against corporations for their differing political viewpoints.[11]

Florida's legislation goes against the very essence of the First Amendment and conflicts with Florida's freedom of speech by censoring the public from publishing its sentiments on all accounts.[12] On the other hand, California's legislation is more in line with the essence of the First Amendment.[13] In 2021, California passed SB 238, Diversity of Thought Act, extending the Unruh Civil Acts to include political affiliation as a protected class.[14] In California, the bill prevents employers, landlords, and banks from discriminating based on political ideology.[15]

Florida can take a page out of California's SB 238, Diversity of Thought Act, and craft a similar bill using California's as a blueprint to make political ideology a protected class in Florida. While California's bill focuses on landlords and employers, Florida can gear the bill towards political leaders and prevent retaliation against entities and individuals for expressing political opinions that don't align with their campaign.

The purpose of freedom of speech and democracy is to voice one's ideologies without worrying about backlash or repercussions.[16] Cancel culture is antithetical to the very essence of the Constitution, because its main thrust is viewpoint discrimination. Society should have the liberty to express unpopular opinions without ramifications of being cancelled; after all, the Constitution does afford all citizens that very right.

In sum, a modified version of the SB 238, Diversity of Thought Act, in Florida would prevent prominent leaders from retaliating against individuals for being a part of the "far-left woke agenda" as DeSantis said when he signed the Stop Woke Act.[17] Also, it would restore the philosophy of open political debates in Florida and pave the way for Uncanceled America. As Senator Melendez of California said, "free speech covers all speech, not just that with which you agree."[18]

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The Attack on the Second Amendment: Why We Have a Fundamental Right to Keep and Bear Arms

By Davis Roddenberry

The Second Amendment to the United States Constitution says in part, "the right of the people to keep and bear arms shall not be infringed." USCS Const. Amend. 2.[1] Furthermore, the Due Process Clause of the Fourteenth Amendment to the United States Constitution says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." USCS Const. Amend. 4.[2] In 2010, the Supreme Court, in McDonald v. City of Chicago, struck down Chicago's firearm laws that together essentially banned Chicago residents from possessing handguns in their homes. McDonald v. City of Chi., 561 U.S. 742, 750, (2010).[3] In doing so, the Court ultimately held that this Second Amendment right was "fundamental" and "applie[d] equally to the Federal Government and the States." Id at 791.[4]

With the recent Supreme Court ruling in N.Y. State Rifle & Pistol Ass'n v. Bruen, the Court extended its Second Amendment protections holding "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).[5] In that case, New York's law required gun owners to "obtain an unrestricted license" in order to conceal carry a handgun outside one's home for self-defense reasons. Id. at 2123.[6] Specifically, the law ordered applicants to show that "proper-cause existed" for issuing the license. Id.[7] This meant that the applicant had to "demonstrate a special need for self-protection distinguishable from that of the general community." Id.[8] Ultimately, the Court struck down New York's "proper-cause requirement" as violative of the Fourteenth Amendment. Id at 2156.[9]

The decision in N.Y. State Rifle & Pistol Ass'n was a win for gun owners as it relates to concealed carry. Now, the Court should further extend Second Amendment protections to states, such as New York and Florida, that do not recognize open carry. "Open Carry is the right to bear a firearm and visibly carry it in plain sight. Concealed carry is the practice of carrying a gun by hiding or concealing the weapon from the public eye." Marian Yaun, *What is The Difference Between Open Carry and Concealed Carry?*, Cedar Mill Fine Firearms (Aug. 20, 2021).[10]

New York and Florida both prohibit open carry. Florida's Statute 790.053 address the open carrying of weapons and says, "it is unlawful for any person to openly carry on or about his or her person any firearm. . ." FLA. STAT. § 790.053 (2022).[11] Meanwhile, New York prohibits open carry by omitting it from its codes. Furthermore, in response to the decision in N.Y. State Rifle & Pistol Ass'n, New York passed Senate Bill S51001. This Bill amended its penal code to include Section 265.01- E which makes it a crime to possess a "firearm, rifle or shotgun in a sensitive location." N.Y. Penal Law § 265.01-e.[12] This amendment goes far in prohibiting law abiding citizens' from exercising their second amendment rights directly in contrast to the Supreme Court's decision in N.Y. State Rifle & Pistol Ass'n. It does so by prohibiting these citizens from carrying a firearm in a long and excessive list of enumerated places. Id.[13] Included in this list is Times Square, one of the most visited and high foot-traffic destinations in America. Id.[14]

This prohibition on both open carry and the prohibition on any carry at all in sensitive locations like Times square creates a significant public safety risk and does not pass constitutional muster. While New York's amendment lists as many places as possible to prohibit firearm possession, the reality is that it is precisely places like Times Square that needs its' law-abiding citizens possessing firearms and preferably openly carrying them. Unfortunately, as we saw on 9/11, New York City could be a prime target for a terrorist attack. Therefore, it is places like Times Square where the risk of public safety is heightened, that the Second Amendment right to keep and bear arms applies the most. Open carry could serve as a deterrence to any terrorist threats, because criminals will see others visibly carrying their firearms and will realize that they could immediately be met with deadly force if they intend to inflict public harm. This concern goes away if the criminal knows that no one else is allowed to possess a firearm in that area.

In response to these concerns, places like New York and Florida should follow South Carolina in allowing the open carry of firearms. South Carolina Bill 3094 the so called "Open Carry with Training Act" amended its concealable weapons permit definition section to allow for open carry but does so in a responsible and prudent fashion. S.C. Code Ann. § 23-31-210.[15] This new legislation now allows law abiding South Carolina citizens to openly carry by obtaining a Concealable Weapons Permit. This permit application respects Second Amendment rights in a sensible fashion by including a firearm training requirement and background checks.

For these reasons, South Carolina's "Open Carry with Training Act" better protects our Constitutional rights. ○

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Gerrymandering: Partisan Manipulation of Congressional Districts

By Stephen Dwyer

In the United States, political parties will stop at nothing to gain an edge over their opponents. Gerrymandering is "the practice of dividing or arranging a territorial unit into election districts in a way that gives one party an unfair advantage in elections."[1] Gerrymandering is typically done by state legislatures, which have the power to redraw district boundaries after each census.[2] This has led to some districts being heavily gerrymandered in favor of the party in power, leading to a lack of fair representation for voters of the minority party.[3] One common way that parties use gerrymandering is by "packing" the opposing party's voters into a small number of districts, in order to limit their overall impact on the election.[4] This allows the party in power to win a larger number of districts with a smaller percentage of the overall vote.[5] Another common way that parties use gerrymandering is by "cracking" the opposing party's voters across multiple districts, in order to dilute their voting power.[6] This allows the party in power to win a large number of districts with a small majority of the vote in each district.[7] Partisan gerrymandering is an issue that arguably has constitutional implications, but the Supreme Court and American legislatures have failed to remedy.[8]

The legal history on gerrymandering in the United States is complex and ongoing. In the 1960s and 1970s, the Supreme Court of the United States began to address the issue of gerrymandering in a series of cases.[9] In 1967, the Court held in *Reynolds v. Sims* that both houses of a state legislature must be apportioned on a "one person, one vote" basis.[10] This ruling required that districts have roughly equal populations, but it did not address the issue of gerrymandering.[11] In 1986, the Court heard a case called *Davis v. Bandemer*, where the Court held that gerrymandering claims were justiciable (could be heard by the court) but did not set a standard for determining when a redistricting plan is an unconstitutional gerrymander.[12] In the 2018 case *Gill v. Whitford*, the Supreme Court held that the plaintiffs had not established a standard for determining when a redistricting plan is an unconstitutional gerrymander and sent the case back to the lower court.[13] In 2019, the Supreme Court heard two cases, *Rucho v. Common Cause* and *Lamone v. Benisek*, which focused on whether gerrymandering claims were justiciable, and whether the court could find a standard to determine when a redistricting plan is unconstitutional, the court ultimately held that the federal courts do not have the authority to decide on gerrymandering cases.[14] Currently, gerrymandering cases are being heard on a state level.[15]

Gerrymandering in the United States can lead to a number of problems, including:

1. Lack of fair representation: When district boundaries are manipulated to favor a particular party, voters of the minority party may not have their voices heard as effectively in the political process.[16]
2. Inefficient use of resources: Gerrymandered districts often have irregular shapes and can stretch across multiple communities, making it more difficult for representatives to serve their constituents effectively.[17]
3. Reduced competition: Gerrymandered districts can make it difficult for candidates from the minority party to win elections, leading to less competition and fewer choices for voters.[18]
4. Voter suppression: Gerrymandering can be used to dilute the voting power of minorities and other marginalized groups, suppressing their ability to influence the political process.[19]

Potential solutions to gerrymandering include:

1. Independent redistricting commissions: Some states have established independent commissions to handle the redistricting process, in order to reduce the potential for gerrymandering.[20]
2. Redistricting reform: Some states have passed laws to establish criteria for redistricting, such as compactness, continuity, and respect for political and geographic boundaries, in order to make the process fairer and more transparent.[21]
3. Proportional representation: Some countries use a proportional representation: Some countries use a proportional representation system to ensure that each party's representation is proportional to the number of votes they received, this makes it much harder to gerrymander.[22]
4. Legal action: The courts have been increasingly involved in redistricting cases, with some finding gerrymandered districts to be unconstitutional.[23]
5. Voter initiatives: Some states allow citizens to vote on redistricting reform through initiatives, this way citizens can put pressure on the government to reform the process.[24]

Other similarly situated countries, such as the United Kingdom and Canada, also have electoral district boundaries that are redrawn periodically.[25] However, the process is typically handled by independent commissions, rather than by the legislature, in order to reduce the potential for gerrymandering.[26] Additionally, some countries like Australia have a system of "fair representation" which uses a proportional representation system; this makes it much harder to gerrymander as it ensures that each party's representation is proportional to the number of votes they received.[27] In summary, gerrymandering is a practice that occurs in many countries, but the United States is unique in that the process of redistricting is often controlled by the state legislature which can be controlled by a political party, while, in other countries like UK and Canada, the process is typically handled by independent commissions in order to reduce the potential for gerrymandering.

Some states have passed laws to establish criteria for redistricting, such as compactness, continuity, and respect for political and geographic boundaries, while other states have established independent commissions to handle the districting process, to reduce the potential for gerrymandering. The legal future of gerrymandering in

the United States is uncertain, as it depends on a number of factors, including the outcome of ongoing legal cases, as well as potential future Supreme Court rulings. It is possible that Congress could pass a law to limit gerrymandering, but there is currently no consensus on how to do so and it would require support from both parties. ○

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Compensation for Mistreatment

By Piero Sotomayor

Despite the plain meaning of the Fourteenth Amendment, race classification in higher education continues to be a factor in a university's admission process.[1] In order to unpack this issue, it is important to understand how it was developed.

Whenever race is involved, The Supreme Court has imposed strict scrutiny review, which imposes the burden for universities to show: (1) a compelling interest in their racial classification practices, and (2) that such interest be narrowly tailored and necessary to promote their action.[2]

In 1978, the Supreme Court recognized "academic freedom, though not a specifically enumerated constitutional right [. . .] as a special concern of the First Amendment."[3] Such recognition was later echoed in 2003, where Justice O'Connor affirmed the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a niche in our constitutional tradition."[4] Such recognition, under the strict scrutiny analysis, provide universities with an accepted compelling interest in their ability to pick their student body. This interest still needs to be 'narrowly tailored and necessary', a component where The Supreme Court has found issues.

The Court in *Bakke* held that the university's "set-aside/quota" program was unconstitutional because it failed the narrowly tailored part of the strict scrutiny analysis.[5] The "set-aside/quota" program was not deemed necessary to further the compelling interest presented by the university.[6] In support of its reasoning, The Court used the Harvard College admissions program as an example, where race was only a factor in the admission of a student.[7] The Court held that a university could use race as a factor in university admissions, as long as it does not "insulate the individual from comparison with all other candidates for the available seats."[8]

In 2003, The Supreme Court was presented with this issue again. Here, the Court reaffirmed the "plus-factor" set forth in *Bakke* and, accepted the University of Michigan Law School's admissions program as constitutional because it used race only as a factor in their decision to admit students.[9] Further, Justice O'Connor echoed Justice Powell in denouncing the use of a "set-aside/quota" program and preferred a more flexible race-conscious program, commonly referred to as the "plus factor" admission process.[10]

While The Supreme Court reaffirmed its precedent set forth in *Bakke*, there was a subtle shift in affirmative action jurisprudence in *Grutter*.[11] The Supreme Court recognized the "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Accordingly, race-conscious admissions policies must be limited in time."[12] If The Supreme Court recognizes the explicit meaning of the 14th Amendment as such, how is affirmative action Constitutional? This 'limited in time'

argument shows the real motive from the Supreme Court behind affirmative action: racial balancing.[13]

It is uncontested that the United States has a dark history where racial mistreatment is front and center.[14] Such past acts have affected minorities across the nation leaving lasting impacts on their generational development in health, education, and wealth. Racial inequality is a real problem that certainty needs to be addressed; however, we must be weary on how it is to be rectified. The United States must resist the urge to formulate exceptions from past treatment over the clear language of its Constitution.[15] Using the 14th Amendment as a racial balancing mechanism has the potential to lead us into a slippery slope where compensation for mistreatment has the potential to be the new norm.[16]

Individuals in minority groups are resilient, resourceful, and more than capable to compete with anyone presented, regardless of their background. As a nation, we shall be weary of deviating from the plain meaning expressed in the 14th Amendment. If not careful, compensation for mistreatment will lead to positive injury.[17] ○

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A More Equitable Right to Counsel

By Kasondrea Thomas

The Sixth Amendment of the United States Constitution has been interpreted by the Supreme Court in *PA. v. Finley* that the right to court appointed counsel for indigent defendants only extends to the first appeal of right and no further.[1] The Court has rejected the suggestion to establish that right to counsel for discretionary appeals.[2] The Sixth Amendment states that a criminal defendant has the right "to have the assistance of counsel for his defense."[3] This ends at the direct appeal stage, and post-conviction relief is considered further removed from the criminal trial than a discretionary review. Post-conviction hearings are not part of the criminal proceeding and are considered civil in nature.[4] According to the Sixth Amendment, states have no obligation to supply assistance of counsel in post-conviction hearings. When a defendant does acquire counsel in the post-conviction stages, they bear the risk of all attorney errors made during their representation.[5] Even if a defendant does have an attorney, if that attorney is negligent or ineffective, the defendant cannot raise any ineffective assistance of counsel claims in post-conviction hearings. Attorney error is imputed to the defendant because they have no constitutional right to counsel.

In California, an indigent prisoner who has been sentenced to death for the conviction of a capital offense has a statutory right to a court appointed attorney in a habeas corpus hearing to help challenge the sentence of death.[6] California government code §68662 states the superior court that imposes a sentence of death must offer to appoint counsel to represent the prisoner for post-conviction proceedings unless the prisoner has waived this right or has been found to not be indigent.[7]

The *Douglas* court held that denying the right of counsel to indigents on first appeal amounted to unconstitutional discrimination against the poor in relation to the equal protection rights of the 14th amendment. This has the same effect in the post-conviction stage. When non-indigent prisoners have the advantage to hire competent counsel to provide collateral attacks on their conviction and indigent prisoners do not, this creates a severe disadvantage. Defendants sentenced to death also have special circumstances and obstacles that make self-representation nearly impossible. The District Court in *Murray v. Giarratano* noted that death row inmates need greater assistance in the post-conviction stage because they have a limited time to prepare their petitions. Their cases are more complex, and the sentence of death has emotional implications that can interfere with their ability to do legal work.[8] These issues do not afford death row prisoners meaningful access to the courts. "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel."[9] The court recognized in *Powell v. Alabama* that even the educated and intelligent require guidance in every step of the proceedings against him.[10]

Along with access to wealth, resources, and education, not allowing court appointed counsel in post-conviction cases also has a disparate impact on the Black community. Statistically, Black people make up the highest percentage of exonerations despite being a much smaller proportion of the general population.[11] There are multiple reasons for the higher representation of black defendants among those convicted of crimes of which they were innocent, from systemic racism, misconduct, mistaken eyewitness identification, and ineffective assistance of counsel.[12] Because so many Black people have become victims of wrongful convictions, they would represent the majority of defendants that would need counsel at a post-conviction hearing. That counsel being denied would impact the Black community more than any other. Half of all the defendants exonerated for the convictions of murder are African American, despite this group making up only 13% of the population. This makes Black defendants seven times more likely than white defendants to be wrongfully convicted.[13] Those who have the personal ability or can access counsel to help them overturn their convictions and be exonerated, spend an average of 14 or more years incarcerated before they are released.[14] Forty percent of defendants incarcerated for murder are Black, but Black defendants account for 50% of the exonerations for murder, including 53% of those who had capital sentences of death.[15] Therefore, Black defendants are disparately impacted by the Sixth Amendment's lack of court appointed counsel in post-conviction proceedings.

Under California's government code, African Americans who were wrongfully convicted of capital crimes would have access to post-conviction court appointed attorneys to help with habeas corpus hearings, unlike under the Sixth amendment which would leave them with either pro bono attorneys, or to represent themselves. According to a study published in the Proceedings of the National Academy of Sciences, "a conservative estimate of the proportion of false conviction among death sentences in the United States is 4.1%." These are the cases to which the California Code would apply. This shows that 4.1% of the defendants given death sentences were proven to be innocent. If the legislature or federal government would extend this right of court appointed counsel for post-conviction hearings the chances that innocent people would not be executed for crimes they did not commit would certainly increase. Giving every person access to the courts and an effective court appointed attorney for capital cases would ensure our adversarial justice system is working effectively and that only those truly guilty of capital offenses are executed. Wealth, race, and education should not determine a person's ability to receive justice and avoid being wrongfully executed. Therefore, California's statute better aligns with the protection of individual liberties that the Constitution promises.

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Discretion or Duty?

By Josette Nelson

In Contravention of Federal Statute, the DHS Memorandum on Guidance for Apprehension and Removal of Non-Citizens Violates the Immigration and Nationality Act by Terminating Protection Protocols.

Before the Supreme Court Decision in *Biden v. Texas*,[1] the Biden administration declared that it would suspend Migrant Protection Protocols (MPP).[2] Under MPP those arriving by land from countries contiguous to the United States were returned to that country pending their removal proceedings.[3] The DHS then officially terminated the MPP.[4] In June of 2022, a divided 5-4 Supreme Court, in *Biden v. Texas,* ruled that the Secretary of Homeland Security's memorandum revoking MPP was valid.[5] The Supreme Court opined that the Department of Homeland Security's (DHS) memorandum terminating MPP did not violate Federal Statute 8 U.S.C. § 1225(a)[6] of the Immigration and Nationality Act (INA).[7] This conclusion was based on the Court's[8] interpretation of Section 1225(a) as "discretionary," stating that the Attorney General *"may"* deport an alien as they await their removal hearing.[9]

However, before the divided Supreme Court decision, Texas's Fifth Circuit Appellate Court, in *Texas v. United States*,[10] accurately identified that the 'effects' of the new DHS memorandum violate 'non-discretionary' Federal Statutes 8 U.S.C. §§ 1226(c)(1), 1231(a)(2), 1231(a)(1)(A).[11] The language of the non-discretionary statute reads: "[t]he Attorney General *shall* take into custody, *shall* detain and *shall* remove aliens convicted of certain enumerated crimes and aliens who have been subject to final orders of removal."[12] The Appellate Court in *Texas* explained; although there is discretionary language as to the Attorney General's removal of immigrants awaiting trial under 8 U.S.C. § 1225(a), there are certain instances where removal and detainer are required.[13] The new protocols prescribed by the Secretary of Homeland Security make it nearly impossible for Migrants to be returned or detained under such circumstances.[14] Thus, based on the actual meaning and text of the Statute, the

interpretation in *Texas* is the correct evaluation of the law.[15]

The Effect of The Department of Homeland Security's Memorandum on Guidance for Apprehension and Removal of Non-Citizens is in Contrast with Federal Statute.

DHS's memorandum ordered new guidance for the "apprehension and removal of non-citizens," prioritizing "national security, public safety, and border security."[16] However, the District Court and Fifth Circuit Court of Appeals agreed that one of the key issues with the new guidance from DHS was the omission of "priority of enforcement on aliens" who committed certain "statutorily enumerated" crimes including, "final orders of removal, for [those] who trafficked controlled substances, participated in the commercialized sex industry, trafficked humans, and [were] convicted of certain firearm offenses."[17] This supports the assertion made by the Appellate Court, which posited that although there is discretionary language in 8 U.S.C. §1225[18] this is distinguished from 8 U.S.C. § 1231(a).[19] The Statute states that "[i]n general, except as otherwise provided in this section, when an alien is ordered removed, the Attorney General *shall* remove the alien from the United States within 90 days (in this section referred to as the 'removal period.')'"[20]

When determining whether there has been a violation of law, DHS guidelines state that "all facts and circumstances of the conduct in question, in their entirety, should be considered."[21] The Federal Appellate Court in *Texas* point out, these guidelines seem facially neutral, however, their effect directly contrasts with Federal Statute 8 U.S.C. §§ 1226(c)(1), 1231(a)(2), 1231(a)(1)(A).[22] Enforcing the law under the DHS guidelines would work in contrast with provisions in the Federal Statute, because removing aliens who committed "deportable crimes" would be unlikely since "far more detainers were rescinded under the new guidelines."[23] The effects of the final memorandum can be seen under the guidelines for Immigration and Customs Enforcement (ICE) which provide a "host of obstacles" to deporting non-citizens deemed a "threat to public safety."[24] The Fifth Circuit Court of Appeals described the provisions as "enforcement decisions which are rigorously reviewed" and effectively create a new forum for "redress" on the detainer of aliens committing deportable offenses.[25]

In pertinent part, these "regulatory actions" had "measurable effects on immigration enforcement."[26] This is supported based on research showing ICE agents in Texas rescinded "no more than a dozen criminal detainers" a year before implementation of the new guidelines.[27] However, following implementation of the DHS'S amended guidelines, detainers for 170 criminal aliens were rescinded in Texas, with "at least 17 failing to comply with parole."[28] The court further explains that the Supreme Court in *Demore*[29] held that even where "deportable criminal aliens" were screened individually, Congress feared that bonding them would "increase flight rates."[30]

Thus, the DHS Memorandum on guidelines for apprehension and removal of non-citizens violates the INA by terminating protection protocols because its effects are in direct contrast with Federal Statute since they create obstacles which lead to different forms of redress than those outlined in the non-discretionary Statute.[31] Moreover, the Supreme Court should follow the ameliorated analysis of the Statute enumerated in *Texas v. Biden.*[32] ○

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Drive Sober, Get Pulled Over: Medical Marijuana and Intoxicated Driving

By Mark Bowers

Imagine you are twenty-one years old. You legally drink a beer on the first day of the month. For the remainder of the month, you do not consume a single drop of alcohol. However, on the last day of the month, you are pulled over and charged with driving under the influence because you a single nanogram of alcohol remaining from the beer you consumed almost 30 days prior. Does this punishment fit the crime? Are you still impaired? The same "zero-tolerance" rationale for driving under the influence currently applies to legal medical marijuana patients who hold valid prescriptions for a serious medical condition under Pennsylvania law. The law places legal medical marijuana patients at risk for a driving under the influence charge every time they get behind the wheel, regardless of impairment or legal status as a patient.

The Eighth Amendment of the United States Constitution states,

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] At its core, the Supreme Court has interpreted the concept underlying to Eighth Amendment to, ". . . draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[2] While the face of the Amendment leaves the reader wanting for understanding what punishment is considered cruel and unusual, the Court has stated in rare cases, there can be a violation of the Eighth Amendment's prohibition on cruel and unusual punishments where the sentence imposed is disproportionate to the underlying conduct.[3] Pennsylvania's incarceration and heavy fines imposed for driving under the influence applied to legal medical marijuana patients is disproportionate because there is a high probability that the driver is not intoxicated, but has only failed a drug test due to the physiological thirty-day dissipation of marijuana through the human body.[4]

In 2016, the Pennsylvania Legislature passed the Medical Marijuana Act.[5] This Act legalized medical marijuana for patients qualified with a "serious medical condition," including cancer, HIV, ALS, Parkinson's disease, multiple sclerosis, epilepsy, intractable seizures, sickle cell anemia and glaucoma.[6]

However, under Pennsylvania's Controlled Substances Act, marijuana is still listed as a Schedule I controlled substance.[7] Accordingly, if the prosecution can be prove that the defendant had any amount of Schedule I substance in their body, they violate the driving under the influence statute.[8] More specifically, "any-amount" is defined as one nanogram.[9] In practice, anyone who fails a drug test for marijuana is subject to a DUI in Pennsylvania. This sentence is imposed without the need to show that a driver was actually impaired or intoxicated.[10]

The application of this statute to legal medical marijuana patients who only fail a drug test under state law should be prohibited by the Eighth Amendment because there exists a high probability that a driver is not impaired. This likelihood is due to a physiological consequence of marijuana; the substance can stay within one's body for over 30 days.[11] One could consume marijuana on the first day of the month, not consume anymore all month, then get pulled over on the last day of the month, and charged with a DUI. Therefore, the imposition of incarceration and fines violates a legal medical marijuana patient's Eighth Amendment right because of the legislature's intention to punish those who actually drive impaired. The sentence for driving under the influence applied to a driver who is not driving intoxicated is prohibited by the Eighth Amendment because the incarceration and fines are disproportionate to the underlying conduct, driving while not intoxicated. A patient who consumes proscribed marijuana for legitimate purposes is at risk for a DUI every time they step behind the wheel, regardless of whether they are actually intoxicated.

Recent court rulings in Pennsylvania have recognized the prevalence and use of medical marijuana throughout the state through different court holdings. First, Pennsylvania struck down its prohibition of people on probation or parole using medical marijuana.[12] Second, the Pennsylvania Supreme Court found that the smell of marijuana alone is not per-se probable cause to search a vehicle because the smell alone no longer is inherently illegal due to the large number of medical marijuana patients that exist within the state.[13] In accordance with these decisions, the Pennsylvania Senate introduced Bill 167, which would require "proof of actual impairment" for a DUI conviction with marijuana. Actual impairment in SB 167 is defined as, "impaired to a degree that the individual is unable to safely drive, operate or be in actual physical control of the vehicle." Senate Bill 167 would ensure medical marijuana patients have the same protections as patients proscribed Schedule II prescriptions because impairment by Schedule II prescriptions similarly require proof of actual impairment.

This new standard would ensure that the sentence imposed is proportional to the underlying conduct. Those who drive under the influence should be punished in a manner that would proportional to such a grievous offense. However, without a showing of actual impairment, incarceration for failing a drug test is disproportional to the underlying conduct as there exists a high probability the driver is not actually impaired due to marijuana staying in one's system for thirty days after use.

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The 2nd Amendment Right Should be a Right for Everyone

By Paolo Vilbon

The United States Constitution states "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1] This is the bed rock of gun regulations throughout the country. Some states abide by this, while others seek to limit this right so much that these limitations infringe on the right as a whole. This conflict between the Constitution and state law is exemplified in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[2] The *Bruen* case challenges New York's gun laws because New York's laws prevented law abiding citizens from obtaining licenses to carry because they could not satisfy the states proper cause requirement,

meaning that they had to show a special need to obtain gun licenses.[3] This litigation is in stark contrast with New York's comparator here, Texas. Had this same set of facts developed in Texas, Texas' new gun law states that "people who qualify under the law can carry a handgun in a public place in Texas without a license to carry."[4] To qualify, the legislature list six requirements:

1. Be at least 21 years old.
2. Not have a prior felony conviction as described in Texas Penal Code Section 46.04;
3. Not have a recent conviction for certain types of misdemeanors as described in Texas Penal Code Sections 46.02 and 46.04;
4. Not be subject to an unexpired protective order as described in Texas Penal Code Section 46.04;
5. Not be restricted from possessing a firearm under federal law as described in 18 United States Code Section 922(g);
6. Not be intoxicated, except in certain situations as described in Texas Penal Code Section 46.02(a-6).[5]

New York State's conceal carry gun law was so restrictive that the Court found it to be unconstitutional.[6] This decision only made clear the disconnect between certain laws and the letter of the Constitution. The Court has a long history of letting states tailor restrictions on the Second Amendment, but New York's unreasonable restrictions took matters too far.[7] In the wake of the *Bruen* decision, New York legislature has made some changes to their requirements; now, the applicant must be "deemed to have "good moral character" and sufficient mental competence—a determination based on an in-person interview, a written exam and character references—to be eligible for a concealed carry permit."[8] This standard is certainty less restrictive than before, but it also begs the questions of whether this falls under what the founders of the Constitution wanted for this great nation.

The model used in Texas is an example of what the founders intended because it is a bright-line test to see who falls under the category of those eligible to carry weapons and who does not.[9] Although New York has made some improvements to its once unconstitutional law, it does leave much to be desired compared to the examples set by other states, such as Texas. The new law leaves the determination of who receives these licenses in the hands of people who must gauge what good moral character is.[10] This is problematic because it does not create a uniform manner of enforcement. The connection their legislature attempts to make between good moral character and the ability for an individual to protect themselves in public escapes the train of reasoning. When given two options, one which seems to fall in line with the letter of the Constitution and the other option unjustly and unreasonably limits of one's rights, then the best option becomes self-evident. It is inevitable that this new law will also be challenged, and the Court will most likely reach the same conclusion for the reasons listed above.

The model used in Texas is superior to the model used in New York because it is the least intrusive means of securing one's gun rights. When drafting the Constitution, the Founding Fathers contemplated what the people of this great nation needed to protect themselves from oppression and tyranny. Through their firsthand experiences, they prioritized the right to bear arms second to the right of free speech because they did not want their descendants to suffer the same harms. Therefore, New York and other states with restrictive gun laws should adopt a model similar to that in Texas. It need not be identical, but it should, at the very least, fall in line with the Constitution. ○

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Locals Only: Senate Bill 102 is Florida's Answer to Affordable Housing Crisis

By Kelsey Grant

Any full-time resident of a coastal county knows that Southwest Floridians are feeling the squeeze of rising housing costs. Unique conditions have exacerbated that squeeze. Hurricane Ian was a Category 5 storm[1] that eliminated a lot of homes that residents may not be able to afford to rebuild.[2] Before that, our way of life here attracted blue state defectors escaping draconian COVID-19 restrictions that we never had in Florida, and they bought or rented a significant portion of existing homes.[3] They also fed a development boom of new builds.[4] Even if builders and developers can keep pace with demand, these market conditions mean costs, prices, and rents are higher, leaving middle-class, low-income, and very low-income residents without many options, pushing them inland and away from jobs near the coast.[5] Without these local residents, everyone suffers; they are "police, nurses, teachers, . . . skilled tradesmen, such as heavy equipment operators, steelworkers, concrete workers, carpenters, roofers[,] and electricians," and many more, like waitstaff, bartenders, and cooks.[6]

It's a statewide problem, so the state government is trying to fix it. In March, the Florida Senate passed Senate Bill 102, colloquially

the “Live Local Act.”[7] The main thrust of the bill is to provide incentives for developers to construct affordable housing units and mixed-use developments in areas zoned commercial and industrial.[8] This contrasts with bills in other states aimed at alleviating a lack of affordable housing which compel rather than incentivize. Some of those have been challenged as takings under the Fifth Amendment. To refresh, “[t]he Takings Clause of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V, prohibits state and federal governments from taking private property for public use without just compensation.[9] In California, for example, splitting up a lot to sell off a portion triggered a $40,000 fee, payable to the county, for affordable housing in lieu of designating a portion of the subdivided lot for affordable housing development.[10] This seemed contrary to the spirit of the Fifth Amendment, which is “to bar the government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole.”[11] The Supreme Court denied the petition for certiorari[12] in that case, but Justice Thomas signaled that the Supreme Court would be interested in taking an inclusionary zoning case to resolve some Fifth Amendment questions as they crop up more across the country.[13]

Florida’s SB 102, however, seems crafted to avoid a Fifth Amendment challenge. Like other laws in the South, such as New Orleans’ law providing “a density bonus . . . in exchange for reduced-rate units,” Florida’s is built on incentives as opposed to requiring private property owners to give the government anything.[14] Those incentives include exemptions from ad valorem taxes and exemptions from certain provisions in county and municipal Land Development Codes, like parking requirements and aforementioned density limits.[15]It also favors mixed-use developments, so residents have resources essentially next door.[16] The bill is not entirely without obligation, however; it creates statutory duties for counties and municipalities to publish lists of county-owned lands in suitable zones (read: commercial, industrial, or agricultural) for affordable housing.[17]

One major criticism of this bill is that its preemption of local regulations is unwise. It is within the state’s power to pre-empt local ordinances (as the bill reminds us with its frequent mention of home rule), though that conflicts somewhat with the spirit of comprehensive planning that has existed in Florida since at least the 1970s.[18] A few portions of the bill raise this issue. First, it overrides ordinances on parking and rezoning applications.[19] That will probably cause some problems – at best it will annoy neighbors; at worst it will result in disaster when affordable housing residents have insufficient parking spaces and must rely on public transit – which is perhaps not one of our region’s strengths yet and will probably be playing catch-up to the effects of SB 102. Additionally, the bill aims at commercial and industrial zoned areas for new affordable housing developments, but those areas are not always suitable for human habitation, which is why cities and municipalities zone them commercial and industrial.[20] And zoning is left to local governments because they know their areas best. On the one hand, it may be better to have affordable housing in a city than to not have it, but if you had to choose between living next to something like a concrete mixing plant or commuting (by bicycle, maybe) from a rural area, what would you choose?

All in all, SB 102 sounds like one of the better pieces of legislation aimed at the affordable housing crisis. The Florida Senate took the good portions of similar bills from other states and left out the ones that give “inclusionary zoning” a bad name. As SB 102 comes to fruition, it will be interesting to see how the locals respond. ○

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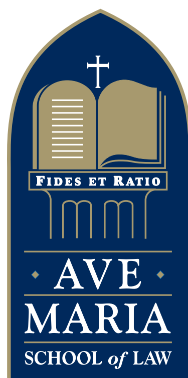

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