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THE MORE THINGS CHANGE, THE MORE THINGS STAY THE SAME: A PRACTITIONER'S GUIDE TO RECENT CHANGES TO WYOMING'S EMINENT DOMAIN ACT

*Matt Micheli and Mike Smith**

I. INTRODUCTION

In 2007, the Wyoming Legislature passed the first extensive amendments to the Wyoming Eminent Domain Act[1] since the Act's adoption twenty-six years ago. Shortly after the Act itself was passed, one commentator stated:

> Impetus for the extensive changes came from increased use of eminent domain proceedings by public utilities and energy related industries, a void in the Wyoming eminent domain law perceived by landowners as allowing abuse of eminent domain by nongovernmental entities, and accelerating market values of land, making one-time payments for compensation less satisfactory.[2]

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* Mr. Micheli is an associate with Holland & Hart, LLP in their Cheyenne office. He specializes in oil and gas development and land use disputes. Mr. Micheli received his B.A. from the University of Wyoming and his juris doctorate from Brigham Young University. Mr. Smith was also an associate with Holland & Hart, LLP, practicing in Cheyenne until December of 2007, and is now Director of Regulatory Affairs at Questar Market Resources. Mr. Smith received his B.A. and juris doctorate from the University of Wyoming. Both Mr. Micheli and Mr. Smith participated in the legislative process that resulted in the changes to the eminent domain laws discussed herein on behalf of entities with the authority to condemn under the statutes. The opinions expressed here are solely those of the authors and not those of particular clients, corporations or entities.

[1] WYO. STAT. ANN. § 1-26-501 (2007).

[2] Rodney Lang, Comment, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure*, 18 LAND & WATER L. REV. 739, 739 (1983) (internal citations omitted).

While much has changed in Wyoming over the last quarter-century, the justifications for changing the laws governing eminent domain have remained relatively constant. And while many of the specific statutory requirements under the Act have changed significantly under the 2007 amendments, the law will not change how the vast majority of companies and public entities that exercise the responsibility of eminent domain conduct themselves in negotiations with landowners. Nevertheless, it is vitally important that practitioners make themselves aware of the new changes prior to initiating negotiations with property owners for possession of property, or resorting to filing a condemnation action to seek a court's help in gaining such possession. This article will attempt to set forth the general legal framework and standards governing condemnation cases as developed through case law over the years, and to describe within that context the specific changes made to the Wyoming Eminent Domain Act in 2007.

II. PRE-CONDEMNATION ACCESS

Sections 506, 507 and 508 govern pre-condemnation access, a process whereby a company or entity with condemnation authority can gain access to properties to conduct "surveys, examinations, photographs, tests, soundings, borings and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to condemn. . . ."[3] Under the law prior to the 2007 amendments, a condemnor only had to make a reasonable effort to gain permissive access to the property, and show those efforts were obstructed or denied, in order to qualify for an order from a court granting such access.[4] The new law is much more prescriptive. Now when a condemnor requests access from the landowner, the notice requesting access must specify the particular activities to be undertaken, must explain the proposed use and potential recipients of the data collected during the activities, and must give the landowner at least fifteen days to grant written authorization for the activities prior to initiating court action.[5] While the prior statute always directed that the authorized activities be accomplished without inflicting substantial injury, the new statute specifies that a condemnor must not inflict substantial injury "to land, crops, improvements, livestock or current business operations."[6] Finally, the 2007 amendments added a new subsection:

> (d) Subject to applicable confidentiality restrictions under federal or state law, the results of survey information acquired from the property sought related to threatened and endangered

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[3] WYO. STAT. ANN. § 1-26-506(a) (2007).

[4] WYO. STAT. ANN. § 1-26-507(a) (2005).

[5] WYO. STAT. ANN. § 1-26-506(a)(i) (2007).

[6] WYO. STAT. ANN. § 1-26-506(a)(iii) (2007).

> species, cultural resources and archeological resources shall be made available to the condemnee upon request.[7]

The changes to Section 506, in addition to ensuring landowners have a set amount of time to respond to a request for access before facing a court action, are centered around providing more information to landowners pre- and post-access. The agriculture industry is especially interested in ensuring information collected during surveys is provided to the landowner. This concern is rooted in the fact that the federal government forces many project developers to survey for threatened and endangered species and cultural resources prior to construction. The presence of such species or resources could not only impact the ability of the project developer to move forward, but significantly impact the landowner's current operations. To the extent possible, the legislature sought to ensure the landowner has access to such information on an equal footing with project proponents and the federal government.

III. GENERAL LEGAL STANDARDS GOVERNING CONDEMNATION

A. Wyo. Stat. Ann. § 1-26-504—Requirements to Exercise Eminent Domain

While Wyoming Statute § 1-26-504(a) was not altered by the recent changes to the Eminent Domain Act, its requirements remain at the heart of the right to condemn under Wyoming law. Understanding these requirements and their application is the first step in prosecuting or defending a condemnation action. Wyoming statutes require a condemnor to prove the following three elements before the court awards condemnation:

> (i) The public interest and necessity require the project or the use of eminent domain is authorized in the Wyoming Constitution;
>
> (ii) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
>
> (iii) The property sought to be acquired is necessary for the project.[8]

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[7] WYO. STAT. ANN. § 1-26-506(d) (2007).

[8] WYO. STAT. ANN. § 1-26-504(a) (2007).

1. *If the Condemnation is Authorized By the Wyoming Constitution, the Condemnor Does Not Need to Establish Public Interest or Necessity*

If the right to condemn is grounded in the Wyoming Constitution, the condemnor is not required to show public interest and necessity as set out in the statutes. The Wyoming Constitution authorizes the use of eminent domain for "private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes."[9] Important to Wyoming's mineral industry, the Wyoming Supreme Court has ruled in *Coronado Oil Co. v. Grieves*,[10] that "mining" includes development and production of oil and gas. When the Wyoming Constitution authorizes a specific right of condemnation, there is no need to show "public interest or necessity."[11] If condemning for one of these purposes, a condemnor has satisfied the first statutory requirement for condemnation.

2. *Other Rights of Condemnation Granted By the Statutes*

In addition to the rights in the Constitution, the Wyoming Legislature recognized certain projects and important developments could not come to fruition without a right of condemnation. To meet this need, the legislature provided limited entities with the statutory right to condemn private property. These include, for example, pipeline companies, railroad companies, transmission lines, county and local governments, etc.[12]

3. *Public Interest and Necessity Under Wyoming Law*

When the right to condemn is based on a statutory grant, the condemnor must meet the first requirement of 504(a) and show the condemnation serves the public interest and necessity. "[The Wyoming Supreme] Court has ascribed a broad meaning to the phrase 'public interest and necessity,' and that is consistent with the overall tenor of Wyoming's eminent domain statutes."[13] A condemnor is not required to establish an absolute public necessity. Rather,

> [w]hen a condemnor seeks to establish the requirement of necessity in an eminent domain proceeding, it need only show a reasonable necessity for the project. As explained by one court, the term 'necessity,' when used in the context of an eminent

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[9] WYO. CONST. art. 1, § 32.

[10] Coronado Oil Co. v. Grieves, 603 P.2d 406, 412 (Wyo. 1979).

[11] *See* WYO. STAT. ANN. § 1-26-504(a)(i) (2007).

[12] *See* WYO. STAT.ANN. §§ 1-26-801-815 (2007).

[13] Bridle Bit Ranch Co. v. Basin Electric Power Coop., 118 P.3d 996, 1014 (Wyo. 2005).

> domain proceeding, means 'reasonably convenient or useful to the public.'[14]

It is not essential that the entire community, or even a considerable portion thereof, directly enjoys or participates in the project for the use to be considered a public use.[15] A taking of private land can be upheld if there is some benefit to the public from the taking.[16]

Recently, there has been some concern over whether the right of condemnation should extend to private pipeline, transmission line, or railroad companies to transport Wyoming's natural resources to other states. For decades, Wyoming has specifically acknowledged that condemnation in aid of mineral development is in the public interest: "We are not unaware of the great public interest in and imminent need for energy. While at the time of adoption of the constitution the concern was one of developing the economy and settlement of the state, the urgency has now become one of survival."[17] The need to develop natural resources and transport them to market is undeniably in the public interest. The public need for energy is beyond dispute. The public necessity of getting raw materials to markets and manufacturing plants is more evident now than ever. In addition, the end consumer of these products receives goods necessary to our society. We need electricity, heating fuels, and gasoline to function. These products require transportation from their source to the markets. Finally, producers, royalty owners, governments, schools, service companies and employees, and taxpayers in Wyoming all benefit from the construction and completion of these projects.

The Wyoming Supreme Court has also ruled that the trial courts cannot evaluate whether one alternative considered by a condemnor is better than another, stating:

> The language of W.S. 1-26-504(a)(i) *does not permit the district court to balance the competing interests.* Once the [condemnor] presents evidence that the project will [be in the public interest], it has met its burden as to that particular determination. The burden then shifts to those opposing the condemnation to present evidence of bad faith or abuse of discretion.[18]

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[14] Board of County Com'rs of Johnson County v. Atter, 734 P.2d 549, 553 (Wyo. 1987).

[15] Associated Enterprises, Inc. v. Toltec Watershed Imp. Dist., 656 P.2d 1144, 1148 (Wyo. 1983).

[16] *Id.* at 1149.

[17] Coronado Oil Co. v. Grieves, 603 P.2d 406, 411 (Wyo. 1979).

[18] Town of Wheatland v. Bellis Farms, Inc., 806 P.2d 281, 284 (Wyo. 1991) (emphasis added).

Thus, a landowner cannot argue that one or another of the alternative routes or methods of transportation would be better than the chosen route.[19] Once a condemnor demonstrates a public interest, a landowner must try to overcome the condemnation by introducing evidence of the condemnor's alleged bad faith or abuse of discretion.[20]

4. The Location and Development of the Project Must Be Most Compatible With Greatest Public Good and Least Private Injury

To comply with Wyo. Stat. § 1-26-504(a)(ii), the condemnor must introduce evidence that it has planned and located the project in a manner most compatible with the greatest public good and the least private injury.[21] The use of the word "most" requires that the condemnor plan and/or locate the project with these requirements in mind.[22] However, because the State delegated the power of eminent domain to the condemnor, it enjoys wide discretion over the final plans and actual condemnation.[23] To establish this element, the condemnor must demonstrate that it considered multiple factors and designed and developed a project with the "greatest public good and least private harm" requirement in mind.[24]

Once the condemnor makes the showing that it considered those factors in developing the project, the burden shifts to the landowner to prove that the condemnor acted in bad faith or abused its discretion.[25] The landowner is not allowed to present evidence as to the merits of the alternatives considered by the condemnor. He is limited to evidence that demonstrates the condemnor acted in bad faith or abused its discretion.[26]

5. The Proposed Easements Must Be Necessary For the Project

Finally, the condemnor must show that the easements to be condemned are necessary to the project.[27] When determining whether the property is "necessary" a court must determine whether the property is "reasonably convenient or useful"

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[19] *Id.*

[20] *Id.*

[21] Conner v. Board of County Com'rs of Natrona County, 2002 WY 148, ¶ 121, 54 P.3d 1274, 1282 (Wyo. 2002).

[22] *Town of Wheatland*, 806 P.2d at 283.

[23] *See Bridle Bit*, 118 P.3d at 1015.

[24] *See id.*

[25] *Id.* at 1014-15.

[26] *See id.* at 1014.

[27] WYO. STAT. ANN. § 1-26-504(a)(iii) (2007).

to the project.[28] To establish this element, the condemnor must put on evidence that the land sought to be condemned is "reasonably convenient" to the project. Once again, "there is necessarily left largely to the [condemnor's] discretion the location and area of land to be taken."[29]

The process of establishing the right to condemn under Wyo. Stat. § 1-26-504(a)(iii) should be the same as §§ 1-26-504(a)(i) and 504(a)(ii) discussed above.[30] The condemnor must first present prima facie evidence that the easement is necessary or "reasonably convenient" for the development of the pipeline project. Once the condemnor meets this standard, the burden shifts to the landowner to show bad faith or abuse of discretion.[31] Again, the landowner is limited to introducing evidence showing bad faith or abuse of discretion.[32]

B. Changes to Section 504—New Wyo. Stat. Ann. § 1-26-504(c)

The only change to Section 504 as it existed prior to 2007 is directed solely at public entities.[33] The amendment attempts to ensure that private property owners receive early and meaningful notice and opportunity to be heard when public entities are in the planning stages of projects that may impact private property:

> (c) When a public entity determines that there is a reasonable probability of locating a particular public project on specifically identifiable private property and that the project is expected to be completed within two (2) years of that determination, the public entity shall provide written notice of the intention to consider the location and construction of the project to the owner as shown on the records of the county assessor. The notice shall include a description of the public interest and necessity of the proposed project. The public entity shall provide an opportunity for the private property owners to consult and confer with representatives of the public entity regarding the project.

From a practical standpoint, public entities should be careful to include impacted landowners in discussions of a project at the earliest possible time. Such an approach not only will ensure compliance with the new law, but it is good policy and can help avoid problems down the road by showing the proper respect for constituents possibly impacted by a project. Nevertheless, there are circumstances

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[28] *Conner*, 54 P.3d at 1282.

[29] *Bridle Bit*, 118 P.3d at 1015.

[30] *See Town of Wheatland*, 806 P.2d at 284.

[31] *Id.*

[32] *Id.*

[33] "'Public entity' means the state of Wyoming and its agencies, municipalities, counties, school districts, political subdivisions and special districts." WYO. STAT. ANN. § 1-26-502(a)(v) (2007).

when notice too early in the planning process is not advisable, and might only serve to alarm a host of landowners about a project that may never prove to be feasible. The new language in Section 504 attempts to balance those competing concerns, but in doing so presents a host of possible problems for public entities that may lead to increased litigation. For instance, when has an entity determined there is a "reasonable probability" of locating a project on "specifically identifiable private property?" Must a public entity notify all landowners possibly impacted if a project is likely to go forward, but the entity is considering several different locations, or can the entity wait until it has chosen the particular site before providing notice? What if a public entity determines to develop and construct a project on a particular parcel, but the project will not be completed for five years? The bottom line is landowners have a new line of attack for discovery and trial in arguing the public entity did not provide notice in a timely manner, and public entities and their lawyers need to be cognizant of the potential pitfalls in failing to engage landowners as early as possible.

C. Wyo. Stat. Ann. § 1-26-509—Good Faith Negotiations

In addition to the statutory elements imposed by Wyo. Stat. Ann. § 1-26-504, the condemnor must show it made "reasonable and diligent efforts to acquire property by good faith negotiation."[34] The condemnor will introduce evidence to show that its negotiations conform to the following provisions outlined in Wyo. Stat. Ann. § 1-26-509(b):

> (i) Any element of valuation or damages recognized by law as relevant to the amount of just compensation payable for the property;
>
> (ii) The extent term or nature of the property interest or other right to be acquired;
>
> (iii) The quantity, location or boundary of the property;
>
> (iv) The acquisition, removal, relocation or disposition of improvements upon the property and of personal property not sought to be taken;
>
> (v) The date of proposed entry and physical dispossession;
>
> (vi) The time and method of payment of agreed compensation or other amounts authorized by law; and

[34] WYO. STAT. ANN. § 1-26-509(a) (2007); *see also* WYO. STAT. ANN. § 1-26-510(a) (2007).

> (vii) Any other terms or conditions deemed appropriate by either of the parties.[35]

Wyoming courts have never expressly described what is necessary in order for negotiations to be considered "good faith negotiations." However, in *Bridle Bit*,[36] the Wyoming Supreme Court upheld the district court's determination that the prerequisite good-faith negotiations had occurred and cited to *6 Nichols on Eminent Domain*[37] to support its decision. This treatise claims "the negotiation requirement is generally held to have been satisfied when they have proceeded sufficiently to demonstrate that agreement is impossible."[38] Similarly, Colorado courts have determined, "lengthy face-to-face negotiations are not required. The making of a reasonable offer to purchase in good faith by letter and allowing the property owner time to respond is sufficient."[39] "If the property owner remains silent or rejects the offer without making an acceptable counter-offer, a condemnation action may be instituted."[40]

D. The Good Faith Road Map—New Wyo. Stat. Ann. §§ 1-26-509 (c) through (h)

The heart of the changes made in 2007 are found in Section 509. While the Wyoming courts have not set forth what qualifies as "good faith" negotiations, the legislature has now stepped in, and with the 2007 amendments has set forth in detail the minimum steps and timeline a condemnor must follow prior to filing for condemnation. From the authors' experience, most of the requirements are nothing new to the vast majority of entities with the power of condemnation. But for the first time in Wyoming, the statutes themselves set forth for landowner and condemnor alike the road map for what constitutes good faith.

Subsections 509 (c) and (d) require that initial written notice, and offer of settlement, be sent certified mail at least ninety days prior to commencement of a condemnation action. The initial notice and offer must include:

> — a description of the proposed project, the land to be condemned, plan of work, operations and facilities in a manner sufficient to enable the condemnee to evaluate the effect of the project on the landowner's use of the land;

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[35] WYO. STAT. ANN. § 1-26-509(b) (2007).

[36] *Bridle Bit*, 118 P.3d at 1016.

[37] 6 Nichols on Eminent Domain, § 24.14.

[38] *Id.*

[39] City of Thornton v. Farmers Reservoir & Irrigation Co., 575 P.2d 382, 392 (Colo. 1978).

[40] *Id.*

— contact information for condemnor, including name, address, telephone and facsimile numbers;

— a description of the property sought;

— an offer to walk the land with condemnee within the sixty five days allotted for condemnee to respond to the settlement offer;

— a discussion of planned reclamation;

— an estimate of the fair market value of the property and its basis;

— an offer to acquire the property and sixty five days for condemnee to respond;

— notice that the condemnee is under no obligation to accept the initial written offer, but that if he fails to at least respond to the offer, he waives his right to object to the condemnor's good faith;

— notice that both parties have an obligation to negotiate in good faith; that if negotiations fail formal legal proceedings may be initiated;

— a statement that the condemnee has a right to consult an attorney, appraiser or other person during the process.

Under the new statute, once an initial written offer is made to a landowner, the landowner has sixty five days to respond to that offer.[41] For the first time, the good faith requirement runs to the landowner as well as the condemnor.[42] If a landowner fails to respond within the sixty five days, the landowner waives the right to object to the good faith of the condemnor.[43] If the landowner makes a written counter-offer within the sixty five days, a condemnor must respond in writing to the counter-offer.[44] In addition to the initial written offer which must be sent at least ninety days prior to filing a condemnation action, the condemnor must send a notice of final offer at least fifteen days prior to filing the action.[45]

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[41] WYO. STAT. ANN. § 1-26-509(c)(iii)(E) (2007).

[42] WYO. STAT. ANN. § 1-26-509(f) (2007): "A condemnee shall make reasonable and diligent efforts to negotiate in good faith with the condemnor including a timely written response to the written offer identified in subparagraph (c)(iii)(E) of this section, specifying areas of disagreement."

[43] *See* WYO. STAT. ANN. §§ 1-26-509(c)(iii)(F) (2007) and 1-26-510(a) (2007).

[44] WYO. STAT. ANN. § 1-26-509(c)(iv) (2007).

[45] WYO. STAT. ANN. § 1-26-509(e) (2007).

The Legislature also included a significant attorneys' fees provision in Section 509. If a court finds a condemnor failed to negotiate in good faith by failing to comply with the requirements of Section 509, or that the project was not planned or located in a manner most compatible with the greatest public good and the least private injury, or that the property sought was not necessary for the project, then the condemnor must reimburse the landowner for all reasonable litigation expenses.[46]

E. Wyo. Stat. Ann. § 1-26-510

As stated earlier, this section was amended to state that "[a] condemnee may not object to the good faith of the condemnor if the condemnee has failed to respond to an initial written offer as provided in W.S. 1-26-509(c)(iii)(E) and the condemnor has met the requirements of W.S. 1-26-509(c).

F. Wyo. Stat. Ann. § 1-26-511

Section 511 allows for exceptions to the general requirement that a condemnor negotiate in good faith with the landowner prior to filing a condemnation action. The 2007 amendments further restricted the exceptions. Previously, a condemnor could avoid the good faith requirement when "due to conditions not caused by or under the control of the condemnor, there is a compelling need to avoid the delay in commencing the action which compliance would require."[47] Now the compelling need to avoid delay in commencing the action must be "due to an emergency affecting public health or safety. . . ."[48]

IV. WYO. STAT. ANN. § 1-26-704— COMPENSATION AND FAIR MARKET VALUE

One of the most difficult questions surrounding condemnation in general and condemnation under the changes to the Wyoming Eminent Domain Act relate to the amount of compensation that should be paid to the landowner. Everyone should agree the landowner must be made whole. How to make the landowner whole, however, is more complicated than it may seem. While the landowner is entitled to payment for any and all damages he receives, he should not receive a windfall from the action that, in the end, will be born by the populace as a whole. On the other hand, there can be hidden damages or damages that are difficult to calculate that should be awarded to the landowner. The United States Supreme Court determined that when computing compensation in an eminent domain

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[46] WYO. STAT. ANN. § 1-26-509(g) (2007).

[47] WYO. STAT. ANN. § 1-26-511(a)(iii) (2007).

[48] WYO. STAT. ANN. § 1-26-511(a)(iii) (2007).

case "the owner is to be put in as good as position pecuniarily as if the property had never been taken."[49]

The changes made in Section 704 dealing with fair market value will undoubtedly spur the most litigation and raise the most questions in application. The language added to this section may allow in limited instances the use of comparable arms-length transactions on same or similar parcels to be used to help determine fair market value, and attempts to ensure the terms of such comparable agreements are kept confidential if required by the prior agreement:

> 704(a)(iii) The determination of fair market value shall use generally accepted appraisal techniques and may include:
>
> (A) The value determined by appraisal of the property performed by a certified appraiser;
>
> (B) The price paid for other comparable easements or leases of comparable type, size and location on the same or similar property;
>
> (C) Values paid for transactions of comparable type, size and location by other companies in arms length transactions for comparable transactions on the same or similar property.
>
> 704(d) In determining fair market value under this section, no terms or conditions of an agreement containing a confidentiality provision shall be required to be disclosed unless the release of such information is compelled by lawful discovery, upon a finding that the information sought is relevant to a claim or defense of any party in the eminent domain action. The court shall ensure that any such information required to be disclosed remains confidential. The provision of this subsection shall not apply if the information is contained in a document recorded in the county clerk's office or has otherwise been made public.

These changes raise the question of whether a court should consider prices paid to other landowners for similar easements as a basis for compensation. When the changes to the Act are read in context and with the requirements of the U.S. Constitution, the Wyoming Constitution, and the law governing compensation, the changes should help make the landowner "whole" and place the landowner in the same position as if the property had never been taken. The Act accomplishes this by only allowing appraisers to consider transactions with a willing seller and

[49] U.S. v. Miller, 317 U.S. 369, 373 (1943).

a willing buyer; following the mandates of the Wyoming Constitution that the landowner receives "just compensation;" not allowing appraisers to consider value added to the property resulting from the project itself; and requiring in the context of a partial taking, that the appraisers only consider the value of the entire parcel before and the value of the entire parcel after the taking. These four principles set out in the Act should guide courts so that the landowner is the same "position pecuniarily as if the property had never been taken."[50]

A. The New Provisions of the Wyoming Eminent Domain Act Require the Appraisers to Rely Only on Arm's Length Transactions

In order the make the landowner "whole," the provisions added to the Wyoming Eminent Domain Act in Section 1-26-704(a)(iii) now require that the appraiser rely on "generally accepted appraisal techniques" in determining fair market value: "the determination of fair market value *shall* use generally accepted appraisal techniques."[51] The Wyoming Supreme Court has been clear that "[w]here the legislature uses the word 'shall,' this Court accepts the provision as mandatory and has no right to make the law contrary to what the legislature prescribed."[52] Therefore, under this statute—any determination of fair market value must be based on generally accepted appraisal techniques.

The statute then uses permissive language to describe what "*may*" be considered to determine the fair market value. "Generally, the verb 'may' when used in a statute makes that statute directory instead of mandatory."[53] Thus, the second part of Wyo. Stat. § 1-26-704 (a)(iii) provides for direction for the type of things that may be considered.

When interpreting these provisions, a court must "begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection."[54] The court is required to "construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in pari materia."[55] Under these principles, the only way to read the "shall" mandatory language and the "may" directory language is that a court is always required to use generally accepted techniques to determine fair market value and "may" examine the items listed in Wyo. Stat. § 1-26-704 (a)(iii)(A-C), so long as the use of those items complies with the generally accepted appraisal techniques. Any other reading would nullify the "shall" component of that statute.

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[50] *Id.* at 373.

[51] WYO. STAT. ANN. § 1-26-704(a)(iii) (2007) (emphasis added).

[52] Stutzman v. Office of Wyo. State Eng'r, 130 P.3d 470, 475 (Wyo. 2006).

[53] In Interest of MKM, 792 P.2d 1369, 1373 (Wyo. 1990).

[54] Sponsel v. Park County, 126 P.3d 105, 108 (Wyo. 2006).

[55] *Id.*

B. Generally Accepted Appraisal Techniques Require an Arm's Length Transaction With a Willing Seller and Willing Buyer

According to the Dictionary of Real Estate Appraisal, market value means:

> the most probable price, as of a specific date, in cash or in terms equivalent to cash or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self interest, and assuming that neither is under undue duress.[56]

In 1993, the Appraisal Institute Special Task Force on Value Definition put forward the following definition of market value:

> The most probable price which a specified interest in real property is likely to bring under all of the following conditions:
>
> Consummation of a sale occurs on a specified date;
>
> an open and competitive market exists for the property interest appraised;
>
> the buyer and seller are each acting prudently and knowledgeably;
>
> the price is not affected by undue stimulus;
>
> the buyer and seller are typically motivated. . . .[57]

The International Valuation Standards Committee defines market value for the purpose of international standards as follows:

> Market value is the estimated amount for which property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.[58]

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[56] THE DICTIONARY OF REAL ESTATE APPRAISAL 177 (4th ed. 2002).

[57] *Id.*

[58] *Id.* at 177 (*International Valuation Standards 2001,* London, International Valuations Standards Committee, 2001, 92). Cited in THE DICTIONARY OF REAL ESTATE APPRAISALS.

Courts have long recognized that standard appraisal techniques include a transaction with a willing buyer and a willing seller. For instance, the United States Supreme Court has determined that under proper appraisal methods "it is usually said that the market value is what a willing buyer would pay in cash to a willing seller."[59] Wyoming courts have likewise been clear that standard appraisal techniques require that there be a willing seller and a willing buyer.[60] "The price fixed by a reluctant owner, not a willing seller, hardly meets the test for evidence of market value which requires a willing seller."[61] Similarly, a price paid by a compelled purchaser, where the property was a necessary piece of a larger project, cannot be used as the basis for fair market value.[62]

With the types of cases where condemnation is available, by definition, the property sought is "necessary" for the overall project. In these situations, the project proponent has three choices, it can pay whatever amount the landowner requests, drop the project, or proceed with condemnation.[63] The proponent of the project does not have the option of buying a different piece of property to complete the project and therefore he is not a "willing buyer." The price paid in this type of situation is an amount to avoid litigation and to insure that the project is completed. Because the proponent is not a willing buyer, the price does not reflect the value of the land and under "generally accepted appraisal techniques," these values should not be considered when calculating the fair market value. The same applies to a landowner that is not a willing seller but has sold its property under the threat of condemnation. Landowners in this situation could sell for less than they would otherwise receive because they wish to avoid the hassle and expense of condemnation proceedings. These types of transactions cannot be considered in the valuation stage of condemnation.

It is clear that "generally accepted appraisal techniques" require that there be a willing seller and willing buyer in order to determine the fair market value of the property. The "*shall* use generally accepted appraisal techniques" language is mandatory. An appraisal is valid only if it complies with this section and only considers arms-length transactions or transactions that comply with the valuation standards. The use of the term "may" then has to mean that the appraiser can use the "price paid for other comparable easements or leases of comparable type, size and location on the same or similar property" only if that transaction complies with the generally accepted appraisal techniques, *i.e.,* sold without undue influence, compulsion, or undue duress. Thus, sales where the property sought

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[59] *Miller*, 317 U.S. at 374.

[60] Coronado Oil Co. v. Grieves, 642 P.2d 423, 432-40 (Wyo. 1982) [hereinafter *Coronado II*].

[61] *Id.* at 434.

[62] *Id.* at 440.

[63] *See id.*

was necessary for a larger project or where the property was purchased under the threat of condemnation cannot be considered as part of the valuation hearing.

C. The Wyoming Constitution Requires That Appraisers Only Consider Arm's Length Transactions

As stated above, the express language of the Wyoming Eminent Domain Act requires the court only consider arm's length transactions and not consider settlement agreements or agreements where the buyer or seller were compelled to purchase or sell the property. Additionally, the Wyoming Constitution supports such a result. Under the Wyoming Constitution, a landowner is entitled to "just compensation." The just compensation standard contained in the Wyoming Constitution has been firmly defined and established to require the landowner receive a value based on the value of the land itself and not an amount paid as a settlement to avoid litigation or insure that the project is timely completed.

When a statute has more than one possible interpretation, courts must adopt the interpretation that will allow the statute to be applied within the confines of constitutional requirements.[64] "[I]t is the duty of the court to so interpret the legislative intent as to harmonize the provisions of the act with the constitution, if this can be done reasonably."[65]

The Wyoming Constitution sets forth the requirements for payments when property is taken through eminent domain. Wyoming Constitution art. 1 § 32 states:

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without *due compensation.*"

The next provision of the Wyoming Constitution declares: "Private property shall not be taken or damaged for public or private use without *just compensation*."[66]

Thus, under the Wyoming Constitution, condemnors have a right to condemn, contingent on paying "due compensation" or "just compensation." In *Coronado Oil Co. v. Grieves*,[67] the Wyoming Supreme Court commented

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[64] *See* Brown v. Clark, 34 P.2d 17, 21-22 (Wyo. 1934).

[65] *Id.*

[66] WYO. CONST. art. 1, § 33 (emphasis added).

[67] *Coronado II*, 642 P.2d at 432.

that "the only purpose of the trial was to determine 'due compensation' or 'just compensation' for the taking of an interest in the land of its owners" under the Wyoming Constitution.

With this limited analysis in mind, the Wyoming Supreme Court made the following statements regarding the "just compensation" element of the Wyoming Constitution:

— "The price fixed by a reluctant owner, not a willing seller, hardly meets the test for evidence of market value which requires a willing seller."[68]

— "A witness must base his opinion upon market value, and market value alone. Witnesses who are not familiar with market values, or who insist on applying some other test of value than that which the courts have agreed upon as the proper one, should be excluded from the stand."[69]

— "It must be the result of the uncontrolled bargaining of a vendor willing but not obliged to sell with a purchaser willing but not obliged to buy. Western Production had no recourse but to pay the demanded price or resort to condemnation. It was obliged to buy. That is not a willing-seller, willing-buyer atmosphere within the rule. It is an agreement reached under threat of condemnation."[70]

— "There was other evidence suggesting some sort of an interest in production was paid by some oil companies. It appears that oil companies are under a compulsion to meet the landowners' demands, proceed by condemnation in the fashion selected by Coronado in this case, or not have a road. Such evidence is inadmissible to prove fair market value and is in itself prejudicial and grounds for reversal."[71]

— "The rights of an owner to recover *just compensation* are not to be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation, at least where

[68] *Id.* at 434.

[69] *Id.* at 437.

[70] *Id.* at 440.

[71] *Id.*

> rights-of-way across another's land are necessary. In *Colorado Interstate*, supra, it was the need for a pipeline easement that also created a disproportionate award."[72]

Under the identical language in the U.S. Constitution, the United States Supreme Court determined, "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good as position pecuniarily as he would have occupied if his property had not been taken."[73] The Supreme Court then ruled that "as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purpose. These elements must be disregarded by the fact finding body in arriving at the 'fair' market value." The Court concluded, "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gains to the taker. . . . [I]ts special value to the condemnor as distinguished from others who may or may not possess the power of condemn, must be excluded as an element of market value."[74]

The Wyoming Constitution grants certain groups a right to condemn if they pay "just compensation." Just compensation has been defined to mean an arm's length transaction and cannot "be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation, at least where rights-of-way across another's land are necessary."[75] The landowner is entitled to be made whole, but cannot receive more "than indemnity for his loss." The valuation and compensation cannot include the unique value to the taker or the value that the taker offers or pays in order to avoid litigation, complete the project, or achieve good will with the landowners. To read the statute to allow these types of transactions into evidence would take away a constitutional right and would therefore make the statute unconstitutional. The court should only consider transactions that comply with the general appraisal techniques, constitute true arm's length transactions, and that are not influenced by undue considerations or compulsions. Any other reading would make the Wyoming Eminent Domain Act unconstitutional.

D. The Wyoming Eminent Domain Act Does Not Allow Appraisers to Consider Value the Project Added to the Property

In addition to the plain language of Wyoming Statute § 1-26-704 and the requirements of the Wyoming Constitution, reading the entire valuation statutes

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

[73] *Miller*, 317 U.S. at 373.

[74] *Id.* at 375.

[75] *Coronado II*, 642 P.2d at 440.

together shows that valuation cannot consider the increase in value the project brings to the property.

Wyoming Statute § 1-26-705 states:

> The fair market value of the property taken, or the entire property if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by: (i) the proposed improvement or project.

Therefore, in order to determine "just compensation" as required by the Wyoming Constitution and put the landowner in the same position as if the condemnation never occurred, the Wyoming statutes dictate that a jury cannot consider value that has been added to the property because of the project.

In applying a similar analysis, the Texas Supreme Court determined that in an easement situation, it is improper to value the easement that is being taken based on what other similar easements have sold for.[76] The court determined that "in determining fair market value, the project enhancement rule provides that the factfinder may not consider any enhancement to the value of the landowners property that results from the taking itself."[77] In this case, the landowner argued that the "highest and best use" of the land was a pipeline corridor. The landowner then tried to use the value paid for a similar easement as the value that should be recovered in a condemnation action. The Texas Supreme Court determined that but/for the pipeline project, there would not be a pipeline easement, and therefore, the value of the easement only came about because of the project. The court then determined that "[t]o compensate a landowner for a value attributable to the condemnation project itself, however, would place the landowner in a better position than he would have enjoyed had there been no condemnation."[78] The value recoverable in condemnation could not include a value that was added to the land because of the project.[79]

To put the landowner in the same position he would have been in without the condemnation action, the court cannot include value added to the property by the project. A value that can only be achieved by the completion of the project should not be considered.

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[76] *See* Exxon Mobil Co. v. Zwah, 88 S.W.3d 623 (Tex. 2002).

[77] *Id.* at 627.

[78] *Id.* at 628.

[79] *Id.*

E. Compensation for a Partial Taking is the Value of the Whole Parcel of Land Before the Taking Less the Value of the Whole Parcel of Land After the Taking

Wyoming Statute § 1-26-702 requires that when there is a partial taking of the property, the proper way to value the taking is by considering the value of the entire parcel before the taking and the value of the entire parcel after the taking. If properly done, this evaluation takes into account all damages received by the landowner. As such, adding damages to this calculation or calculating damages under a separate method would likely result in a windfall for the landowner and a double recovery in violation of the "just compensation" standards of the Wyoming Constitution.

The Wyoming Supreme Court has determined that in an easement situation, the valuation statutes mean the landowner should recover the difference in the value of his property before the taking and the value of the property after the taking.[80] "If properly done, the before and after valuation appraisals should capture and reflect any severance damages. For this reason, the severance damage clause of the eminent domain compensation formula is, at best, superfluous."[81] The court continued:

> It is incorrect to think of 'severance damage' as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately before the taking and the market value of the remainder immediately after the taking. In the case of a partial taking, if the 'before and after' measure of compensation is properly submitted to the jury [or in the present case, considered by the commission], there is no occasion for the lawyers or the trial court to talk about 'severance damage' as such, *and indeed it may be confusing to do so. The matter is taken care of automatically in the 'before and after' submission.*[82]

The compensation awarded must put the landowner in the same position pecuniarily as if the property had never been taken.[83] The "before and after" test is the best, most comprehensive formula to achieve that result. After a partial taking, the remainder of the land has to have value. The landowner is entitled to recover the difference in value from his property before the partial taking and the

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[80] *See* State Highway Comm'n v. Scrivner, 641 P.2d 735, 738 (Wyo. 1982).

[81] Mayland v. Flitner, 28 P.3d 838, 851(Wyo. 2001).

[82] *Id.* at 851-52 (emphasis in original).

[83] *Miller*, 317 U.S. at 373 (1943).

value of his property after the taking. Under this scenario, the landowner owns an asset. He is compensated for any depreciation that the condemnation and related construction activity causes to that asset. This formula insures that he will be in the same position pecuniarily, before and after the project.

F. Practical Consideration Require That Appraisers Only Consider Arm's Length Transactions

In addition to the legal arguments set out above, practical considerations dictate that a court not consider the price paid as settlements to purchase necessary easements. First, these values artificially increase the value of lands. Already land speculators are buying up easement rights with the hope that they can force pipelines, transmission lines and railroads to use the negotiated settlement values that have been paid in limited circumstances as a floor for negotiations for a specific projects. If these speculators can recover the price paid in settlement agreements in other actions as compensation in a condemnation action, they then speculate that they can force condemnors to pay an added premium to settle cases with them. That added premium paid then becomes the floor for the next condemnation action and the condemnor will have to pay yet another premium to avoid litigation. The endless process results in a death spiral with prices continually increasing.

Allowing these other agreements into a condemnation valuation hearing will ultimately result in a loss to landowners, especially landowners who are willing to work with condemnors. In the past, condemnors, especially private companies, have been willing to pay extra to landowners in order to move the project along quickly, encourage good landowner relations, and avoid costs associated with litigation. If a company feels like those agreements will be allowed into court and used to value property taken in a condemnation action, it no longer has the ability to reward cooperative landowners. The only way to stop the death spiral discussed above is to not pay anyone a premium to settle and cooperate. The courts would, in effect, be tying the condemnors' hands and preventing them from making a deal. This would discourage settlements and encourage litigation.

To understand how this process works, we have to first understand that these agreements are settlement agreements. As stated above, by definition, the property sought in the condemnation action is necessary for the project. The condemnor does not have a choice to purchase a separate piece of property. It can either pay the demands, stop the project, or go to litigation. In this situation, condemnors are generally willing to pay a bonus to move the project along and avoid litigation. However, if that bonus can later be used against them, the companies will not have the ability or desire to pay that bonus.

For an illustration, we should look at a medical malpractice case. If two parties entered into a settlement agreement to avoid a medical malpractice lawsuit, that

settlement is confidential.[84] A court would never consider allowing a settlement of one case to be presented to the jury in order for the jury to determine what a plaintiff should recover in a different case.[85] That is because the plaintiff is entitled to recover the sum of money to make him "whole" and not an amount of money that some other insurance company paid in a different case to avoid litigation. This is one of the most time honored principles of damage valuation in American Jurisprudence.[86] If, on the other hand, an insurance company knew that any payment it made as a settlement in one case would be later presented to a jury as evidence for damage valuation, the insurance company would not be willing to offer a premium to settle cases. A change in the policy would have a chilling effect on settlement and actually hurt plaintiffs who want to settle cases outside of litigation. This same analysis and conclusions apply to condemnation cases.[87] The compensation for a landowner should not "be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation."[88]

"[T]he evidence of an offer to compromise is irrelevant since it may be motivated by a desire for peace, rather than any concession of weakness."[89] "The most important purpose of the rule, however, . . . is the promotion of dispute settlement."[90] Payments made to settle claims have very little to do with making the landowner "whole" or putting the landowner in the same position he would have been in had the project never happened. If these types of settlement agreements are allowed into condemnation cases, the net impact will be that condemnors will know that any payments made will be used against them in court. Condemnors, therefore, will no longer have the ability to pay a premium to settle cases outside of litigation. This policy will hurt courts, it will hurt entities trying to condemn, but most of all it will hurt landowners who want to cooperate with the condemnation authority and avoid litigation.

V. ADDITIONAL CHANGES TO THE ACT

A. Wyo. Stat. Ann. § 1-26- 714—Reclamation

Section 714 is entirely new and affirmatively states that a condemnor is responsible for the reclamation and restoration of the land condemned, and "shall return the property and improvements to the condition existing prior to the condemnation to the extent that reasonably can be accomplished."

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[84] Wyo. R. Evid. 408 (1978).

[85] *Id.*

[86] *Id.*

[87] *Coronado II*, 642 P.2d at 440.

[88] *Id.*

[89] Hursh Agency, Inc. v. Wigwam Homes, Inc., 664 P.2d 27, 36 (Wyo. 1983).

[90] *Id.*

B. Wyo. Stat. Ann. § 1-26-801(c) and (d)—Kelo Fix

A description of the infamous *Kelo* decision by the United States Supreme Court is beyond the scope of this article.[91] The uproar the decision caused throughout the nation is well-documented. The changes to Section 801 are designed to prevent a similar case in Wyoming. Subsection (c) ensures that a public entity may not take private property for the purpose of transferring the property to another private individual or entity, except in the case of protecting the public health and safety. Subsection (d) sets forth a rebuttable presumption that if a public entity acquires property in fee simple and fails to make substantial use of the property for ten years, then that the property is to be returned to the previous owner upon repayment of the amount originally received for the property in the condemnation action.

VI. CONCLUSION

The changes made to the Wyoming Eminent Domain Act provide significant benefits to both the entity using the power of condemnation and a landowner faced with condemnation. In addition to "fixing" a possible *Kelo* situation, the changes provide an outline for good faith negotiations, protections for information gained through surveys, and clarification for reclamation standards. The determination of fair market value should help to make landowners "whole" and only consider true arm's length transactions.

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[91] Kelo v. New London, 545 U.S. 469 (2005).

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HICKS V. DOWD: THE END OF PERPETUITY?

*C. Timothy Lindstrom**

I. INTRODUCTION

This article examines the improper[1] termination or modification of conservation easements. It does so by (i) examining the termination of a conservation easement by Johnson County, Wyoming, dealt with in the recent Wyoming case of *Hicks v. Dowd*,[2] which is a case of first impression in the United States; (ii) overviewing the common and statutory law pertaining to conservation easements in the United States and in Wyoming, including existing common and statutory law restraints on improper easement termination or modification; (iii) reviewing the doctrine of *cy pres* and its possible application to, and implications for, conservation easements; (iv) reconsidering the *Hicks* case in the light of existing common and statutory law remedies for improper easement termination, and in the light of the *cy pres* doctrine; and (v) comparing the results, and making a recommendation for an alternative to application of the *cy pres* doctrine to conservation easements.

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* C. Timothy Lindstrom holds degrees in law and planning from the University of Virginia. He taught zoning and planning law at the University of Virginia School of Architecture from 1979 until 1998. He was in private law practice in Charlottesville until 1989 when he became staff attorney to the Piedmont Environmental Council where he served until 1998. He has written and lectured extensively on topics of planning law and the law (including tax law) relating to conservation easements. He helped author the American Farm and Ranch Protection Act, which increased the federal tax incentives for the donation of conservation easements, and he lead a successful seven-year, nationwide legislative effort for its enactment. He also worked extensively with the Virginia General Assembly regarding zoning legislation and helped to draft new Virginia laws increasing the tax incentives in Virginia for the donation of conservation easements.

[1] For purposes of this article, the "improper" termination or modification of a conservation easement is intended to refer to those terminations or modifications that confer a net financial benefit on a private person or entity and/or fail to meaningfully advance land conservation on the protected property or some other property in the vicinity of the protected property.

[2] Hicks v. Dowd, 157 P.3d 914, 2007 WY 74 (Wyo. 2007).

While the *Hicks* decision may be one of first impression, it comes at a time of increasingly intense debate nationally among academics and practitioners regarding whether, and how, a conservation easement could (or should) be terminated or modified.[3] The rapid growth of land protected by private land trusts[4] in Wyoming through the use of conservation easements[5] makes it likely that the termination and modification of conservation easements will become a legal issue confronted increasingly by practitioners. This is particularly true given the aging of conservation easements and the turnover in ownership of lands subject to conservation easements.[6]

> As the cache of conservation easements in this country continues to grow, and as those easements, the vast majority of which are perpetual, begin to age, it will become increasingly important to determine whether, when, and how easements that no longer accomplish their intended conservation purposes can be modified or terminated.[7]

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[3] Easement termination is a rare occurrence. Easement modification (amendment) is a relatively common occurrence, as discussed *infra*, at notes 70–97 (and accompanying text). There are, generally speaking, many justifiable and important reasons for easement modification. However, easement termination is a different matter.

[4] A "land trust" is typically a not-for-profit corporation recognized as a public charity (a "publicly supported organization") under §501(c)(3) of the Internal Revenue Code of 1986, as amended, whose purpose is land conservation. As described, a land trust is a qualified "holder" of conservation easements under WYO. STAT. ANN. § 34-1-201(b)(ii)(B) (2007) as follows:

> 'Holder' means:
>
> (A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or
>
> (B) A charitable corporation, charitable association or charitable trust, a primary purpose or power of which includes retaining or protecting the natural, scenic or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological or cultural aspects of real property.

[5] According to the "2005 National Land Trust Census" prepared by the Land Trust Alliance (a national umbrella organization for land trusts), the number of acres protected by land trusts (*excluding* land protected by government agencies) in Wyoming increased by 159% between 2000 and 2005, to a total acreage protected privately in 2005 of 105,760 acres, of which 49,358 acres were protected by conservation easements. The total number of acres protected by private land trusts nationally in 2005 was reported by the census to be 11,890,109 of which 6,245,969 acres were protected by conservation easements. 2005 National Land Trust Census, published by the Land Trust Alliance.

[6] For example, the first conservation easement in Wyoming was granted in 1978 to The Nature Conservancy on a several hundred-acre tract of land along Wyoming Highway 22 in Teton County. The land subject to this easement has changed hands twice since 1978 and is now again on the market.

[7] Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HAV'D ENVT'L L. REV., 422, 424 (2005).

Using the *Hicks* case as a starting point, it is the general purpose of this article to provide a legal, factual, and practical basis for the future evaluation of conservation easement termination and modification.

II. *Hicks v. Dowd*

A. *Factual Background*

On August 6, 2002, the Board of County Commissioners of Johnson County, Wyoming ("Board") adopted "Resolution 257."[8] Resolution 257 authorized the Board to execute a quit-claim deed to Fred and Linda Dowd, owners of an approximately 1,043-acre ranch (referred to by the Court, and in this article, as the "Meadowood Ranch") lying along Clear Creek outside of the Town of Buffalo, in Johnson County.[9] The deed did two things. It conveyed a one-acre parcel of land ("One-Acre Tract") adjoining Meadowood Ranch to the Dowds, and it released a conservation easement ("Meadowood Easement") over the Ranch held by the Johnson County Scenic Preserve Trust ("Trust").[10] This Resolution and the actions taken pursuant to the Resolution appear unique in the United States.[11]

The Meadowood Easement had been granted to the Board in 1993 by an instrument titled "Deed of Conservation Easement and Quitclaim Deed." The grantor of the Meadowood Easement was the Lowham Limited Partnership. The Meadowood Easement followed a format used in Wyoming prior to the enactment of the Wyoming Uniform Conservation Easement Act (the "WYUCEA") in 2005.[12] The format was one in which a parcel of land (in this case the One-Acre Tract) was conveyed in fee to the prospective easement holder followed by the conveyance of the conservation easement, which was conveyed as an appurtenance to the fee parcel.[13] The reason for this format was the lack of formal enabling authority for conservation easements in Wyoming, see footnote, *infra* and related text.[14]

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[8] Hicks v. Dowd, 157 P.3d 914, 917, 2007 WY 74, ¶9 (Wyo. 2007).

[9] *Id.* at 915, 917.

[10] *Id.* at 917.

[11] No reported cases can be found in which a conservation easement was terminated voluntarily by the holder without payment of valuable consideration (although the Dowds contended that the indemnification provided by them as part of the conveyance and termination was valuable consideration).

[12] Wyo. Stat. Ann. §§ 34-1-201-207 (2007).

[13] For example, paragraph 10 of the Deed and Easement provided: "**Appurtenant**. The Easement granted herein is appurtenant to the real estate, described above at note 3 (and accompanying text), conveyed to Grantee contemporaneously with the conveyance of this Easement."

[14] *See also* Michael R. Eitel, *Wyoming's Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature,* 4 Wyo. L. Rev. 57 (2004); C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements,* 5 Wyo. L. Rev. 1 (2005), for descriptions of Wyoming's method of conservation easement conveyance prior to enactment of the WYUCEA.

The Meadowood Easement was intended to protect the natural resources of Meadowood Ranch.[15] The parties to the Meadowood Easement expressly intended its provisions to apply to the Ranch in perpetuity.[16] Among other prohibited activities, the Meadowood Easement prohibited mining and the removal of minerals from the Ranch.[17] In the event that Johnson County as Grantee could not carry out the purposes of the Meadowood Easement, the Meadowood Easement provided that it could be assigned pursuant to the doctrine of *cy pres*.[18] Furthermore, if, due to "unforeseeable circumstances," a court determined that the continuation of the Meadowood Easement was impossible and could not be "reformed" to substantially accomplish its purposes, then the Meadowood Easment provided that, with the approval of a court, "may transfer their respective interests in the Ranch" provided that any proceeds were distributed as provided for in the Treasury Regulations governing conservation easements.[19]

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[15] The purpose of the Easement conveyed by the Deed and Easement was described in paragraph 1 of the Deed and Easement as follows: "**Purpose**. It is the purpose of this Easement to preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch."

[16] Paragraph 5 of the "Background" of the Easement expressed Johnson County's intention to carry out the intentions of the Grantor in perpetuity as follows:

> The Grantee has the resources to carry out its responsibilities hereunder, intends, by acceptance of the grant made hereby, forever to honor the intentions of the Grantor stated herein to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the Ranch, and further intends to enforce the terms of this instrument.

The Easement further provided in paragraph 10 of the "Conveyance of Conservation Easement" as follows: "This Easement shall be a burden upon and shall run with the Ranch in perpetuity and shall bind the Grantor and its successors and assigns forever."

[17] Paragraph 5 of the "Conveyance of Conservation Easement" provided:

> **Prohibited Uses and Practices**. The following uses and practices are inconsistent with the purposes of this Easement and shall be prohibited upon or within the Ranch:
>
> . . .
>
> (d) The filling, excavating, dredging, mining or drilling, removal of minerals, hydrocarbons, and other materials on or below the surface of the land . . . .

[18] Paragraph 9(a) of the "Conveyance of Conservation Easement" provided:

> **Assignment of Grantee's Interests**. (a) . . . If Grantee dissolves, becomes insolvent, ceases to exist as a 'qualified organization,' or for any other reason becomes unable to enforce effectively the conservation purposes of this Easement then Grantee shall be required to assign its interest in the Easement to a 'qualified organization,' and if such Grantee is unable to so transfer the Easement, the Easement shall be transferred to such 'qualified organization' as a court of competent jurisdiction applying the doctrine of *cy pres*, or analogous principles shall determine.

For a description of the doctrine of *cy pres* see *infra* notes 146–70 (and accompanying text).

[19] Paragraph 9(b) of the "Conveyance of Conservation Easement" provided:

> (b) The Grantor wishes to express again its intent that this Easement be maintained in perpetuity for the purposes expressed herein. However, if due to unforeseeable

Six years after contributing the Meadowood Easement, the Lowham Limited Partnership conveyed Meadowood Ranch to Fred and Linda Dowd.[20] The conveyance provided that it was

> Subject to all prior easements, reservations, restrictions and exceptions of record, including but not limited to that certain Deed of Conservation Easement and Quitclaim Deed granted by the Board of County Commissioners of Johnson County, Wyoming by instrument recorded December 29, 1993 in Book 86A-41 of Miscellaneous, Page 672, of the Johnson County, Wyoming records.[21]

According to the Appellees' Brief filed with the Wyoming Supreme Court in the *Hicks* case, Paul Lowham assured the Dowds at the time of the sale of the Ranch that "there would be no mineral activity on the ranch and that Lowham had a study done which showed that the probability of surface disturbing mineral activities were so remote as to be negligible."[22] Such a study would typically be done as part of the "due diligence" prior to the conveyance of a conservation easement to insure that the easement complied with federal tax code provisions governing the deductibility of conservation easement contributions.[23] Nevertheless, at the time of the conveyance of the conservation easement (and the conveyance to the Dowds) Northwest Energy held title to the subsurface minerals on the Ranch.[24]

On April 15, 1997, prior to the conveyance to the Dowds, the Meadowood Easement was assigned by the Board to the Trust. The Trust was established pursuant to Resolution 145 adopted by the Commissioners and effective

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> circumstances a final binding non-appealable judicial determination is made that continuation of this Easement is impossible, or if such determination renders the continuation of the Easement impossible (e.g. pursuant to a condemnation proceeding), and if a judicial determination is made that the Easement cannot be so reformed as to accomplish substantial compliance with the purposes of this Easement, then Grantor and Grantee, with the approval of the Court, may agree to transfer their respective interests in the Ranch, provided that Grantee shall be entitled to such proceeds from the transfer as provided for in Treasury regulation section 1.170A-14(g)(6)(ii), as amended, to the extent that regulation applies to this transaction.

Note how closely this provision of the Meadowood Easement follows the operation of the doctrine of *cy pres* cited, *infra* note 154.

[20] *Hicks,* 157 P.3d at 915–17, 2007 WY 74, at ¶9.

[21] Warranty Deed filed in the Johnson County, Wyoming records 2/2/99 in Book 87A, beginning at page 293.

[22] Brief of Appellees, page 62, filed with the Wyoming Supreme Court in Appeal No. 06-02.

[23] *See* 26 C.F.R. §1.170A-14(g)(4)(ii) (2007).

[24] Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment filed in Civil Action No. 2003-0057, at 17.

December 21, 1993.[25] According to Paul Lowham, the Trust had been initiated by him with Johnson County in 1993 for the express purpose of holding the Meadowood Easement. However, the Trust was not ready by the end of 1993 and so the Meadowood Easement was conveyed directly to Johnson County which, under federal tax law, was qualified to hold deductible conservation easements.[26] According to Lowham, the Trust did not actually achieve its tax-exempt status under § 501(c)(3) of the Internal Revenue Code (the "Code") (such status is required for a non-governmental organization to hold deductible conservation easements) until 1997.[27]

In 2001 coal bed methane development was proposed on the Ranch[28] by Northwest Energy. In June of 2002 the Dowds requested that the Board terminate the Meadowood Easement on the grounds that "coal bed methane development was unpreventable, unanticipated, and inconsistent with" the Meadowood Easement. The Dowds proposed to the County that they buy[29] back the One-Acre Tract and the Meadowood Easement.[30] As of August 6, 2002, when the Board terminated the Meadowood Easement, Northwest Energy had two wells located on the Ranch occupying slightly less than one acre.[31]

As previously described, in response to the Dowd's request the Board adopted Resolution 257,[32] pursuant to which it re-conveyed the One-Acre Tract to the

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[25] *Hicks*, 157 P.3d at 916, 2007 WY 74, at ¶6.

[26] *See* 26 C.F.R. § 1.170A-14(c)(i) (recognizing governmental agencies as qualified to hold deductible conservation easements).

[27] Affidavit of Paul Lowham filed in Civil Action No. 2003-0057 (*Hicks v. Dowd*).

[28] *Hicks,* 157 P.3d at 916–17, 2007 WY 74, at ¶8.

[29] There is no evidence, however, that Dowds paid anything other than the $10.00 consideration represented in the deed and the indemnification they offered to the County.

[30] *Hicks,* 157 P.3d at 917, 2007 WY 74, at ¶8.

[31] Affidavit of Kenneth M. Quinn, General Manager of Northwest Energy, filed in Civil Action No. 2003-0057 (*Hicks v. Dowd*).

[32] The Resolution stated, in pertinent part, as follows:

> WHEREAS, the mining, drilling or removal of minerals or hydrocarbons on or below the surface of the Surface Lands was to be prohibited by the Conservation Easement (Conservation Easement Paragraph 5(d), and
>
> WHEREAS, the mineral rights associated with the Surface Lands were severed from the Surface Lands prior to grant of the Conservation Easement to the Board and therefore the mineral rights and associated access rights ("Dominant Mineral Rights") were not and are not subject to the Conservation Easement, and
>
> WHEREAS, coalbed methane development was unknown, unforeseen and unanticipated on the Surface Lands at the time the Conservation Easement was conveyed to the Board in 1993, and
>
> WHEREAS, due to changes in technology, unforeseen coalbed methane development, incident to the Dominant Mineral Rights, has occurred and is occurring on the Surface Lands, and

Dowds and terminated the Meadowood Easement in exchange for the Dowd's agreement to indemnify the Board.[33]

B. Procedural Background

On July 14, 2003, ten months after the Board's action, Robert Hicks, *et al*, filed Civil Action No. 2003-0057 in the District Court for the Fourth Judicial District, Johnson County (the "District Court"), naming the Dowds and the Board as defendants. The suit alleged (1) that the Board's violation of the Wyoming Public Meetings Act on grounds that the Board's action was not preceded by the required public notice, which violation allegedly rendered the conveyance to the Dowds void; (2) that termination of the Meadowood Easement could only occur after a judicial determination that continuation of the Meadowood Easement was impossible, failing which the conveyance to the Dowds allegedly breached the Meadowood Easement; (3) that the Board breached its fiduciary duty to only transfer its assets for "a reasonable and prudent sum of money;" and (4) that the Meadowood Easement required payment of a specified percentage of the proceeds of any sale of the Ranch in the event that the Meadowood Easement was extinguished.[34]

The remedies sought by Hicks included (1) a declaration that the conveyance was void; (2) issuance of a writ of mandamus directing the Board to rescind the conveyance; (3) judgment against the Trust equal to the fair market value of the One-Acre Tract and the value of the Meadowood Easement; and (4) imposition of a constructive trust upon Meadowood Ranch to secure the value of the Meadowood Easement, such value to be as determined pursuant to § 1.170A-14(g)(6)(ii) of the Treasury Regulations (the "Regulations") (governing distribution of proceeds of the sale of land subject to a conservation easement in the event of termination of the easement).[35]

> WHEREAS, the coalbed methane development, which is not subject to the Conservation Easement, is and will be in the future inconsistent with the purposes of the Conservation Easement, makes enforcement of the Conservation Easement impossible as to the coalbed methane development and exposes the Board to liability under the terms of the Conservation Easement, and
>
> WHEREAS, Fred L. Dowd and Linda S. Dowd have agreed to indemnify and hold harmless the Board and the County from all liability, claims and causes of action, including reasonable costs and attorneys fees, that arise out of or by virtue of transfer of the One Acre Tract and Conservation Easement to them . . . .

[33] *Hicks,* 157 P.3d at 917, 2007 WY 74, at ¶9.

[34] "Complaint for Declaratory Judgment, Mandamus Relief, Breach of Fiduciary Duties and Constructive Trust" filed by Hicks, *et al*, in Civil Action No. 2003-0057 (*Hicks v. Dowd)*.

[35] *Id.*

Defendants' answers alleged that plaintiffs lacked standing to bring the suit. Defendants soon thereafter filed a Motion for Summary Judgment.[36] Plaintiffs responded with their own Motion for Summary Judgment, arguing, among other things that they had standing "because this matter involves issues of substantial public interest and importance."[37]

On April 14, 2004, the district court denied both Motions and ruled as follows: (1) that the conservation easement was transferred to a charitable trust; (2) that under W.S. § 4-10-103, a beneficiary of such a trust would include any person with a present or future beneficial interest in the trust, including all Wyoming citizens, of which Robert Hicks was one; (3) that under Title 4 of the Wyoming Statutes, district courts have exclusive jurisdiction concerning the administration of charitable trusts and that no appeal is required by the Wyoming Administrative Procedures Act before seeking judicial resolution of controversies concerning charitable trusts; (4) that W.S. § 4-10-110 recognizes that the Wyoming Attorney General has the right to act as a beneficiary with respect to charitable trusts; (5) that there was no violation of the Wyoming Open Meetings Act; and (6) that the propriety of the County's transfer of the One-Acre Tract and termination of the Meadowood Easement is an issue for resolution by the district court.[38]

The district court ordered the parties to notify the Wyoming Attorney General of the suit and seek his assistance.[39] The Attorney General responded that

> The Attorney General's Office does not need to intervene in this matter. The issues are squarely before the Court and the interests of the public, as beneficiaries of the conservation easement at issue here, are being represented by arguments of counsel on all sides.[40]

After the case was set for trial, Dowds filed an additional Motion to Dismiss the remaining claims in the suit for lack of subject matter jurisdiction on grounds that the plaintiffs had failed to file a petition for review of agency action under Wyoming Rule of Appellate Procedure ("W.R.A.P.") 12. In a telephonic hearing the district court agreed with the Dowds and subsequently entered an order dismissing plaintiffs' remaining claims. The district court's order essentially reversed its earlier ruling and found that the conveyance to the Dowds by the

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[36] *Hicks,* 157 P.3d at 917, 2007 WY 74, at ¶13.

[37] *Id.*

[38] "Order Denying Motions for Summary Judgment" entered in Civil Action 2003-0057 (*Hicks v. Dowd*), April 12, 2004.

[39] *Id.*

[40] *See Hicks,* 157 P.3d at 918, 2007 WY 74, at ¶15 (quoting from letter of Wyoming Attorney General Pat Crank dated May 3, 2004).

County was "agency action," any challenge to which was governed by W.R.A.P. 12 requiring filing of an appeal within thirty days of the action. The district court found that the plaintiffs' failure to timely file the appeal deprived it of any jurisdiction in the case.[41] Plaintiffs appealed the district court's decision to the Wyoming Supreme Court and the decision was rendered May 9, 2007.

C. The Supreme Court Ruling

The Wyoming Supreme Court upheld the district court's ruling dismissing the action, but rejected the district court's decision that it lacked jurisdiction because plaintiffs failed to timely file an appeal under W.R.A.P. 12.[42] In essence, the Supreme Court's ruling boiled down to the following: (1) Because neither party challenged the district court's finding that the Trust was a charitable trust, the Supreme Court accepted that the Trust was a charitable trust and that Appellant's action was one to enforce the Trust[43]; (2) applying charitable trust rules, and based upon its review of common law and the Wyoming Uniform Trust Code relating to charitable trusts, the Court found that plaintiffs lacked standing to enforce the charitable trust created by conveyance of the Meadowood Easement;[44] and (3) because the Attorney General's determination not to participate in the suit was based upon the district court's ruling that plaintiffs did have standing, the Supreme Court invited the Attorney General to reassess his position not to participate in the case.[45]

Given the national controversy over conservation easement termination and modification, it seems likely that someone, somewhere, will misconstrue this decision as (1) applying the charitable trust doctrine as a matter of law governing all conservation easements in Wyoming, and/or (2) sanctioning the termination of conservation easements in Wyoming.

The decision really does neither. First, as a matter of Wyoming law "unspecified errors will not be considered" by the Wyoming Supreme Court on appeal.[46] Therefore, because neither party challenged the district court's determination that the Trust was a charitable trust and that Trust actions were governed by charitable trust rules, the Supreme Court merely accepted the district court's determination regarding these important legal principles as the law of the case. How the Supreme

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[41] "Order Dismissing Remaining Claims for Lack of Subject Matter Jurisdiction" entered in Civil Action 2003-0057 (*Hicks v. Dowd*) October 11, 2005.

[42] *Hicks,* 157 P.3d at 918–19, 2007 WY 74, at ¶17.

[43] *See id.* at 919; "Given the district court's unchallenged finding, we must agree that the Scenic Preserve Trust is a charitable trust."

[44] *Id.* at 919.

[45] *Id.* at 921.

[46] *See generally* Alleman v. Alleman, 319 P.2d 871, 873, 78 Wyo. 135, 142 (Wyo. 1958); Chicago, B. & Q. R. Co, et al, v. Lapman, 104 P. 533, 536, 18 Wyo. 106 (Wyo. 1909).

Court might rule had the Trust's status as a charitable trust been challenged is unknown. However, had the Supreme Court found the district court's ruling on these points clearly erroneous, it could have addressed that part of the district court's ruling even if the matter had not been raised on appeal. [47]

Furthermore, the Court could easily have disposed of the case by affirming the district court's dismissal for lack of jurisdiction under W.R.A.P. 12. This would have eliminated any need to address the charitable trust doctrine or its application in the case. Instead, the Supreme Court chose to decide the case on the basis of who has standing to enforce a charitable trust, an issue to which it addressed the bulk of its decision.[48] It would seem doubtful that the Supreme Court would have devoted such attention to the charitable trust doctrine if it felt that the application of the doctrine was inappropriate.

Second, the Supreme Court disposed of the case on a technical basis common to many environmental cases: lack of standing. Such a ruling says nothing about how the Supreme Court felt about the termination of the Meadowood Easement. In fact, the Supreme Court's deliberate invitation to the Attorney General could be construed evidence that the Supreme Court would like the opportunity to address the termination issue directly.[49]

D. Conclusion

While the Supreme Court's ruling in *Hicks* may not itself be of great significance nationally, or even in Wyoming, it raises some issues (along with a hint of how those issues may be addressed by the Court in the future) central to conservation

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[47] Note that the Wyoming Court does not appear to have specifically stated whether failure by the parties to raise the application of the charitable trust doctrine as an issue on appeal barred the Court from reviewing the matter, or simply excused the Court from doing so. This distinction is an important one. Were the Court to follow the rule in Texas that "[u]nless the trial court's findings are challenged by a point of error on appeal, they are binding upon the appellate court" *Wade v. Anderson*, 602 S.W. 2d 347, 349 (1980), then its acceptance of the district court's ruling regarding application of the charitable trust doctrine would be without significance. However, if the court were to follow the rule in Alaska that even though not raised on appeal, "plain error" (i.e. the error affects substantive rights and is "obviously prejudicial") may be addressed on appeal, *Matter of L.A.M.*, 777 P.2d 1057, 1059 (1986), then the court's acceptance of the district court's ruling regarding the charitable trust doctrine may be a significant signal that the court accepts the application of the charitable trust doctrine to conservation easements. Should the Attorney General elect to pursue Johnson County's actions further the court may have a chance to clear the air on this point.

[48] Four pages of this thirteen-page ruling were devoted to the issue of standing to enforce a charitable trust, *see supra* note 2, pages 8–11.

[49] While they may rue the termination of the Meadowood Ranch conservation easement, easement holders throughout Wyoming should breathe a sigh of relief that the Supreme Court did not rule that any and every Wyoming citizen has standing to challenge how these holders deal with conservation easements.

easements. This article will next briefly examine the legal context within which conservation easements exist. An understanding of this context provides a basis for considering improper termination and modification of conservation easements.

III. LEGAL CONTEXT

A. The Nature of Conservation Easements

"Conservation easements do not fit easily into any previously existing category of property interests . . . ."[50] Perhaps the best conclusion is that, given the existence of statutory provisions for conservation easements in virtually all 50 states,[51] conservation easements are creatures of statute and their attributes, limitations, and applications are all governed by the statutes that authorize them. "The statutory conservation easement prevalent today arguably is an entirely new type of property interest that does not fit into the traditional categories of easement, real covenant, and equitable servitude."[52]

However, even though conservation easements are now creatures of statute, they have a common-law history dating back to the late 1800s.[53] Conservation easements were not used extensively until after the 1930s.[54] Furthermore, when the Meadowood Easement was granted Wyoming had not yet enacted the WYUCEA, so common law controlled that conveyance.[55]

Finally, the Uniform Conservation Easement Act ("UCEA") itself provides in § 2(a):[56] "[e]xcept as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements." Thus, the common law of easements is the statutory frame of reference for conservation

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[50] Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions,* 40 HASTINGS L.J. 1187, 1190 (1989); *see also* Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation,* 28 SEATTLE U. L. Rev. 883, 891 (2005).

[51] Wyoming was one of the last states in the nation to enact enabling legislation authorizing conservation easements.

[52] Blackie, *supra* note 50, at 1194.

[53] *Id.* at 1191. The first "land trust" was created in 1891 through the efforts of Charles Eliot. It became known as the "Trustees of Reservations of Massachusetts;" J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States,* 39 URB. LAW. 19, 32-33 (2007).

[54] Engel, *supra* note 53, at 36.

[55] Note; however, that the WYUCEA (WYO. STAT. ANN. § 34-1-205(b) (2007)) applies retroactively to the Meadowood Easement: "This article shall apply to any interest created before its effective date if it would have been enforceable had it been created after the effective date of this article unless retroactive application contravenes the constitution or laws of this state or the United States."

[56] WYO. STAT. ANN. § 34-1-202(a) (2007).

easements. Common-law easements fit into a somewhat confused category of non-possessory property interests generally known as "servitudes." A recent Wyoming case, borrowing heavily from the Restatement (Third) of Property, provides some important definitions and distinctions:

> (1) A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land.
>
> (a) Running with the land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs.
>
> (b) A right that runs with land is called a "benefit" and the interest in land with which it runs may be called the "benefited" or "dominant" estate.
>
> (c) An obligation that runs with land is called a "burden" and the interest in land with which it runs may be called the "burdened" or "servient" estate. Restatement (Third) of Prop.: Servitudes § 1.1(1) (2000 & Cum. Supp. 2006).
>
> A 'servitude' is a general category that includes a variety of non-possessory interests in land, including easements . . . *Id.* § 1.1(2). An easement is defined as 'an interest in land which entitles the easement holder to a limited use or enjoyment over another person's property.' *Hasvold v. Park County Sch. Dist. No. 6*, 2002 WY 65, ¶ 13, 45 P.3d 635, 638 (Wyo. 2002) (quoting *Mueller v. Hoblyn*, 887 P.2d 500, 504 (Wyo. 1994)).
>
> [E]asements may be appurtenant to a dominant estate or held in gross. 25 Am.Jur.2d Easements and Licenses §§ 3, 8, 9; 28A C.J.S. Easements §§ 9-11. An 'appurtenant' non-possessory interest in land 'means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.' Restatement (Third) of Prop.: Servitudes § 1.5(1). An interest is 'in gross,' however, when the right 'is not tied to ownership or occupancy of a particular unit or parcel of land.' *Id.* § 1.5(2).

> Finally, we note that 'An easement is normally irrevocable. Easements . . . can be revoked only if the right to revoke is expressly reserved and properly exercised.' *Id.* § 2.2 cmt. h.[57]

Given the foregoing definitions, a conservation easement appears to be a "servitude," as it is "a legal device that creates a right or an obligation that runs with land or an interest in land."[58] However, is it an "easement" ("an interest in land which entitles the easement holder to a limited use or enjoyment over another person's property"[59]) or is it something else, such as a restrictive covenant or an equitable servitude, neither of which are considered "interests in land" but contractual rights.[60]

A conservation easement, in contrast to a traditional easement, imposes a "negative" burden on the use of land rather than conferring on the holder a "limited use or enjoyment" over land. "A traditional easement allows the holder to make some use of the servient owner's land, while a restrictive covenant restricts the servient owner's use of his land."[61] At common law "negative easements" were only recognized for four distinct purposes, none of which included the general protection of open space or natural resources.[62]

Also in contrast to the traditional easement, a conservation easement is "in gross." An easement in gross benefits its holder whether or not the holder owns or possesses other land. There is a servient estate, but no dominant estate. Hence, an easement in gross may be described as an irrevocable personal interest in the land of another.[63] Historically, the type of restriction on land imposed by a conservation easement could only be achieved by a covenant.[64] "Traditionally, an easement was an interest in property while a covenant was merely a promise respecting the use of land."[65] As can be seen from the foregoing discussion, a conservation easement has characteristics found in a number of different common law interests.

However, the drafters of the UCEA chose to put conservation easements into that class of interests known as "easements." The National Conference of

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[57] Seven Lakes Development Company, LLC v. Maxon, 144 P.3d 1239, 1245, 2006 WY 136 (Wyo. 2006).

[58] *Id.* at 1245.

[59] *Id.*

[60] Blackie, *supra* note 50, at 1197.

[61] Blackie, *supra* note 50, at 1199.

[62] *Id.* ("At common law there could only be four types of negative easements: easements for light, air, support of buildings, and flow of artificial streams.").

[63] James W. Ely, Jr. and Jon W. Bruce, THE LAW OF EASEMENTS AND INTERESTS IN LAND § 2.2 (2007).

[64] Blackie, *supra* note 50, at 1199.

[65] *Id.* at 1197.

Commissioners on Uniform State Laws ("NCCUSL"), which drafted the UCEA, chose deliberately to classify conservation easements as

> The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests . . . . The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as 'easements.' Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.[66]

Thus, while there has been, and will continue to be, much academic analysis of the nature and origin of conservation easements under the common law,[67] for all practical intents and purposes today, they can be considered "easements."[68] Both the UCEA and the WYUCEA apply retroactively to such "interests" provided that such interests would have been enforceable under them had they been created after its enactment.[69]

Therefore, as a matter of law in Wyoming, and in most states that have enacted some form of the UCEA, whatever a conservation easement might

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[66] UNIF. CONSERVATION EASEMENT ACT, Introduction (1981).

[67] *See, e.g.*, Blackie*, supra* note 50; Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements,* 63 TEX. L. REV. 433 (1984).

[68] From a practical standpoint perhaps the most critical question is how the federal tax law considers conservation easements. For its part, the Regulations have created a very large tent within which to include deductible interests, granting deductions to "perpetual conservation restrictions" (26 C.F.R. § 1.170A-14(a)(i)(2) (2007)), defined by the Regulations as follows:

> A 'perpetual conservation restriction' is a restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude). For purposes of this section, the terms easement, conservation restriction, and perpetual conservation restriction have the same meaning.

[69] UCEA, *supra* note 66, at § 5(b); WYO. STAT. ANN. § 34-1-205(b) (2007).

have been considered prior to the WYUCEA, it is now considered an interest in property within that class of interests known as an "easement," regardless of the date the conservation easement was created. Thus, the Meadowood Easement is to be considered an "easement" for all purposes under Wyoming law. This leads to the question of how the class of interests known as easements may be terminated or modified.

B. Termination and Modification of Easements

There is no developed body of law regarding the termination or modification of conservation easements. As noted previously, the UCEA, including Wyoming's version thereof, provides that conservation easements may be modified or terminated in the same manner as other easements.[70] The UCEA and the WYUCEA both provide that they do ". . . not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[71] Therefore, this article will next examine the common law governing the termination of traditional easements because the UCEA and WYUCES apply this body of law to the termination of conservation easements.

According to *The Law of Easements and Interests in Land*[72] there are at least fourteen principal means by which traditional easements may be terminated[73] of which the following, at least, would appear applicable to conservation easements:

1. Express Limitations

At common law easements can be terminated based upon an express limitation included in the terms of the easement.[74] "Term easements," which are recognized under the UCEA and WYUCEA, include express termination dates. For example, a conservation easement could expressly provide that it terminates on the twentieth year after its execution. Or it could provide that it terminates on, for example, December 31, 2020. Either constitutes an easement with an express limitation. While term easements are enforceable, the inclusion of such a

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[70] UCEA, *supra* note 66, at § 2; WYO. STAT. ANN. § 34-1-202(a) (2007).

[71] UCEA, *supra* note 66, at § 3(b); WYO. STAT. ANN. § 34-1-203(b) (2007).

[72] Ely & Bruce, *supra* note 63.

[73] Ely & Bruce, *supra* note 63, Chapter 10 "Termination of Easements," lists the following general categories: express limitations; inherent limitations (including cessation of purpose and end of necessity); destruction of the dominant and/or servient estate; death of the holder of an easement in gross; release; abandonment (including abandonment by nonuse and abandonment by the affirmative action of the holder); termination by estoppel; termination by prescription; merger; sale of the servient parcel to a *bona fide* purchaser without notice; tax sale of the servient parcel; mortgage sale of the servient parcel; and condemnation.

[74] Ely & Bruce, *supra* note 63, at § 10.2.

provision in a conservation easement will disqualify that easement for federal tax benefits because those benefits depend upon easements being perpetual.[75]

2. *Inherent Limitations—Cessation of Purpose*

Common law easements are considered to contain the inherent limitation that, if the purpose of the easement no longer exists, the easement terminates.[76] Thus, if an easement exists to provide access to a public road, and the road is abandoned and removed, the easement would terminate. A conservation easement for the limited purpose of protecting habitat for the black-footed ferret, for example, would be considered to contain an inherent limitation causing it to terminate in the event of the extinction of the ferret.

3. *Intentional Release*

At common law when the holder of an easement released that easement to the owner of the parcel servient to the easement, it was considered terminated. By the same token, if the owner of the easement and the owner of the servient estate were to agree to a modification of the easement, it would be considered modified.[77]

One caveat to the argument that the holder of an easement (in the case of an easement in gross) or the owner of the dominant parcel (in the case of an easement appurtenant) and the owner of the servient parcel can agree to the termination of an easement is the common law rule that a release is only effective as to those with an ownership interest in the easement who agree to the release.[78] This rule would also appear applicable to easement modifications.

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[75] S*upra* note 68.

[76] Ely & Bruce, *supra* note 63, describes this limit in § 10.8 as follows:

> An easement created to serve a particular purpose ends when the underlying purpose no longer exists. This cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose.
>
> Inquiry in cessation of purpose cases begins with determining the particular purpose of the easement in question. A provision in the easement instrument often indicates the parties' intent in this regard. When an easement purpose provision is ambiguous, courts examine the surrounding circumstances to ascertain the parties' intent and tend to favor the grantee with a broad interpretation. Next, one must decide whether the contemplated purpose still exists. If not, the easement is considered to have expired." (citations omitted).

[77] *See, e.g.,* Ely & Bruce, *supra* note 63, at § 10.20.

[78] Ely & Bruce, *supra* note 63, at § 10.17: "When two or more parties hold interests in the dominant estate, a release executed by one interest holder is binding solely on that party. Likewise, when an easement benefits two or more estates, a release granted by one dominant owner does not affect the rights of the owners of the other dominant estates." (footnotes omitted).

Typical conservation easements provide little, if any, documentary basis for finding that there are any parties to the easement other than the holder of the easement and the owner of the parcel servient to the easement. The terms of the typical easement, and expressions of the intentions of the parties rarely, if ever, indicate that either party intended anyone other than the grantee named in the easement to have an interest in, or right of control over, the easement. With respect to conservation easements granted as appurtenant easements, as is the case with most Wyoming conservation easements, there is even less doubt that the grantee is the sole owner of the easement because the grantee of the easement is almost always the sole owner of a dominant parcel for the benefit of which the conservation easement has been granted.

In the author's experience[79] landowners contemplating the contribution of a conservation easement are quite interested in the philosophy and operation of the prospective holder of their conservation easements and, to the extent it is possible, will "shop around" for that organization whose philosophy and operation most closely fit their own goals for the future of their property. Landowners are, in effect, inviting a land trust or government agency, to become a "partner" in the ownership and management of their land by granting a conservation easement and landowners are normally very particular about who this partner is and how it will be to deal with them in the future. Given this understandable concern by landowners, it is hard to imagine that easement donors intend to grant the future ownership and control of a conservation easement over their land to other than the original grantee.

4. Estoppel

Where the owner of a servient parcel takes actions that are inconsistent with terms of an easement and the holder of the easement knowingly allows that action to take place, the easement owner may be estopped, on equitable principles, from later objecting to the servient owner's actions.[80] However, in the Massachusetts case of *Weston Forest & Trail Association v. Fishman*, 849 N.E.2d 916 (Mass. App. Ct. 2006), the Massachusetts Appellate Court rejected a claim that a conservation easement was no longer valid based on estoppel, laches and waiver theories, because the court determined that such theories do not apply where there is a potential loss of public rights and benefits involved.

Courts may be unlikely to allow termination or modification of a conservation easement on the grounds of estoppel if they view conservation easements as being

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[79] The author represents and has represented a number of land trusts and landowners with respect to the conveyance of conservation easements over the past fifteen years and has, himself, granted conservation easements on farms in Michigan and Virginia.

[80] Ely & Bruce, *supra* note 63, at § 10.21.

for the benefit of the public at large.[81] However, suppose that a land trust held a conservation easement that prohibited any construction on the servient parcel and that the land trust knowingly ignored the construction of a new house on the servient parcel but later sought removal of the house after it was completed. It seems unlikely in such a case that a court would require removal of the house, or even the payment of substantial damages by the landowner to the land trust. In such a case it seems probable the court would apply equitable estoppel to protect the landowner.

5. *Termination by Merger*

Merger occurs when the owner of a dominant parcel acquires the servient parcel, or *vice versa,* so that both the dominant and servient parcels come into common ownership. In such a case the easement is considered to "merge" into the fee ownership and disappear.[82] Merger also applies to easements in gross.[83] It would appear that a conservation easement could merge with the fee that is subject to the easement if a land trust acquired both the easement and the servient parcel. However, where the common owner of the dominant and servient interests owns one interest as a trustee, for example, the interests may not merge.[84] If a land trust is considered to hold a conservation easement in trust for the public[85] this rule would appear to preclude the possibility that the easement could be terminated by merger.

6. *Tax Sale*

Taxing authorities typically have an inchoate lien on land for the payment of delinquent taxes, whenever that delinquency occurs. Unless a tax lien is expressly subordinated to a conservation easement (which is unheard of), a sale of land to pay delinquent taxes may extinguish the easement.[86] Taxing authority varies greatly from state to state and the effect of a tax sale on a conservation easement is beyond the scope of this article.

7. *Mortgage Sale*

An easement will be terminated by the sale of the servient parcel pursuant to a prior mortgage.[87] Unless the holder of a mortgage existing at the time of

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[81] *Id.* "Courts are reluctant to extinguish public easements by estoppel. Indeed, in some jurisdictions, the extinguishment-by-estoppel doctrine apparently cannot be employed to terminate public rights-of-way." *Id.*

[82] Ely & Bruce, *supra* note 63, at § 2.27.

[83] *Id.*

[84] *Id.*

[85] *E.g.,* McLaughlin, *supra* note 7.

[86] *See* Ely & Bruce, *supra* note 63.

[87] Ely & Bruce, *supra* note 63, at § 10:41.

conveyance of a conservation easement agrees to subordinate its interest to the easement, a future default in payment of the sum secured by the mortgage can result in a mortgage sale in which the property is sold free of the conservation easement. For this reason federal tax law requires that outstanding mortgages be subordinated to any conservation easement for which a tax deduction is sought.[88]

8. Condemnation

A privately held easement may be terminated directly by an exercise of eminent domain. In addition, if the parcel servient to an easement is condemned the easement over that parcel will also terminate.[89] Conservation easements held by private conservation organizations are private property and, as such, are subject to condemnation by governmental agencies, and others invested with the power of condemnation, such as utilities. Conservation easements held by public agencies are not subject to condemnation; however, other circumstances may lead to the termination of such easements.[90] In addition, and more frequently, land subject to a conservation easement is subject to condemnation and the future use of the property after such condemnation is likely to be such as to eliminate the purpose for the conservation easement, leading to its *de facto* termination, or termination by judicial decree.

9. Easement Termination and Modification in Wyoming

Prior to enactment of the WYUCEA in 2005, Wyoming had no statutory provision for conservation easements. Until then a conservation easement in Wyoming, like any other easement, needed to meet the following requirements:

> An 'easement' is an interest in land which entitles the easement holder to a limited use or enjoyment over another person's property. RESTATEMENT OF PROPERTY § 450(a) (1944). *See also* BLACK'S LAW DICTIONARY 509 (6th ed. 1990). This court has recognized that an easement has five essential qualities: first, an easement is incorporeal or without material nature; second, an easement is imposed upon corporeal property, not the owner of the property; third, an easement confers no right to participate in the profits arising from the property; fourth, an easement is

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[88] 26 C.F.R. § 1.170A-14(g)(2) (2007).

[89] Ely & Bruce, *supra* note 63, at § 10.42.

[90] *E.g.*, a conservation easement held by a local government is not subject to the federal power of condemnation, and *vice versa*. However, if the Federal Highway Administration decides to construct a road through such an easement it will likely have sufficient leverage with the locality to induce it to terminate the easement in favor of the highway project. Localities are creatures of the state; therefore it is axiomatic that the state has power to over-ride a locally held conservation easement.

> imposed for the benefit of corporeal property and; *fifth, there must be two distinct estates, the dominant estate, the one to which the right belongs, and the servient estate, the one upon which the obligation is imposed.* Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 543 (Wyo.1988) (quoting Day v. Buckeye Water Conservation & Drainage Dist., 28 Ariz. 466, 237 P. 636, 640 (1925)).[91]

It is clear from the traditional easement cases in Wyoming[92] that a traditional easement in Wyoming, absent some statutory authority, requires both a servient and dominant parcel. For this reason, prior to enactment of the WYUCEA, most conservation easements in Wyoming were created as appurtenant easements.[93] The WYUCEA eliminates, for conservation easements, the traditional requirements applicable for the creation of easements, including the requirement for a dominant and servient parcel.[94] However, the WYUCEA, which has retroactive application, also provides that conservation easements are to be terminated or modified in the same manner as other easements.[95] Therefore, although the **creation** of conservation easements in Wyoming has been freed from compliance with common law rules by the WYUCEA; **modification or termination** of conservation easements continues to be governed by the common law.

Under the common law the parties to an easement (the holder of the easement or owner of the dominant parcel, and the owner of the servient parcel) have the right to "release" the easement back to the owner of the servient parcel.[96] An easement may also be terminated when the purpose of the easement can no longer be fulfilled under the common law principles applicable to the termination of easements for "cessation of purpose."[97] In the absence of case law to the contrary, it is presumed these principles apply to traditional easements, and therefore to conservation easements, in Wyoming.

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[91] Mueller v. Hoblyn, 887 P.2d 500, 504 (Wyo. 1994); Seven Lakes Development Company, LLC v. Maxon, 144 P.3d 1239, 1245 (Wyo. 2006) (emphasis added).

[92] "Traditional" refers to easements as recognized at common law.

[93] This was done by having the prospective easement grantor first convey a small parcel of land in fee to the prospective holder of the conservation easement. Once the fee parcel was conveyed the grantor then (typically in a contemporaneous transaction) conveyed the conservation easement, which was conveyed expressly for the benefit of and appurtenant to the fee parcel. This was the approach taken by the Lowham Limited Partnership in creating the Meadowood Easement.

[94] WYO. STAT. ANN. § 34-1-204 (2007).

[95] WYO. STAT. ANN. § 34-1-202(a) (2007).

[96] *See* the discussion of "release," *supra* text accompanying note 77. Note that neither of the parties to the *Hicks* suit, and neither of the courts considering the suit, appeared to consider this line of reasoning which clearly suggests that, in this case of first impression, no one was thinking of the conservation easement in the common law terms that seem dictated by the nature of the Meadowood Easement and the terms of the Act.

[97] *See* the discussion of "cessation of purpose," *supra* note 76.

B. Tax Code Restrictions on the Right to Terminate or Modify Conservation Easements

Thus far, this article has examined the common law as it pertains to conservation easements, and the termination or modification of such easements. However federal tax law is another body of law that is highly relevant, increasingly vigorous, and that governs the administration of a great many conservation easements throughout the United States.

1. Mandatory Conservation Easement Provisions

Federal tax law applies in several ways to conservation easements. First, in order for a conservation easement to be eligible for federal tax benefits (and many state tax benefits), the easement must comply with § 170(h) of the Code and § 1.170A-14 of the Regulations. These rules expressly address the termination and modification of deductible conservation easements and, in so doing, tie the hands of the grantor of the conservation easement; the grantor's successors in ownership of the land that is subject to the easement; and the holder of the easement. There are several ways in which the tax law does this:

> a. Deductible conservation easements must be "in perpetuity."[98]
>
> b. Deductible conservation easements can only be held by a "qualified organization."[99]
>
> c. Deductible conservation easements must *require* that, in the event the holder of the easement goes out of existence, or decides to transfer the easement, the holder must transfer the easement to another "qualified organization" that agrees, in writing, to carry out the conservation purposes of the easement.[100]

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[98] *See* 26 C.F.R. § 1.170A-14(g)(6)(2) (2007). Neither the Code nor Regulations provide for or contemplate that, deductible conservation easements can be amended or voluntarily terminated except by a court due to changed circumstances. Nevertheless, it is clear that conservation easements are amended and, as evidenced by *Hicks*, even voluntarily terminated on rare occasion.

[99] 26 C.F.R. § 1.170A-14(c) (2007). A qualified organization is either a governmental agency, or a public charity recognized under 26 U.S.C.A § 501(c)(3), and meeting the public support test of 26 U.S.C.A. § 509(a), or is an organization described in 26 U.S.C.A. § 170(b)(1)(A)(vi). In any case, and significantly, the agency or organization must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions." Perhaps one of the most practical questions raised by the *Hicks* case is whether it should be assumed that a government agency, or creature of such an agency, should automatically be considered to have the commitment to protect the conservation purposes required by the tax law.

[100] C.F.R. § 1.1.70A-14(c)(2) (2007).

> d. Deductible conservation easements must *require* that, in the event of a termination of the easement for any reason, proceeds from the sale of the underlying property must be shared between the owner of that property and the holder of the easement in proportion to the value of the easement and value of the parcel servient to the easement.[101]

Subject to the three-year statute of limitations limiting audits of non-fraudulent returns (*see, e.g.* Steven J. Small, *The Federal Tax Law of Conservation Easements*, p. 16-4.03) these requirements must be met by the terms of every deductible conservation easement and thereby become binding on the parties to the easement. Of course, as *Hicks* vividly demonstrates, even though a conservation easement meets all of these requirements, that will not prevent the parties from ignoring these requirements and terminating or modifying an easement as they see fit. However, there are external constraints on the parties as well.

2. The "Tax Benefit Rule"

For a landowner who contributes a conservation easement, receives a tax deduction, and later is a party to the modification or termination of the easement in a manner that is personally financially beneficial, the "tax benefit rule" requires "recovery" of the amount of income tax benefit generated by the deduction.[102] However, where an easement termination or modification benefits a taxpayer other than the original donor, as in the *Hicks* case, the tax benefit rule has no application.

3. Limitations Imposed on Public Charities

Some of the most potent tax rules are those prohibiting an organization exempt from tax under § 501(c)(3) of the Code (known as "public charities") from engaging in "excess benefit transactions." Recall that in order to hold a tax deductible conservation easement the easement holder must be a "qualified organization."[103] There are two categories of qualified organizations: (i) governmental agencies; and (ii) public charities recognized as exempt from taxation pursuant to § 501(c)(3) of the Code.[104] Public charities, for purposes of holding conservation easements, may be further classified as purely private organizations, or as government-affiliated organizations (such as the Johnson County Scenic Preserve Trust).[105]

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[101] C.F.R. § 1.170A-14(g)(6)(ii) (2007).

[102] Nash v. U.S., 398 U.S. 1, 3 (1970) (describing the requirements of § 111 of the Internal Revenue Code).

[103] 26 U.S.C.A. § 170(h)(3) (2007).

[104] *Id.*

[105] *See* Instructions to Form 990, Items A and B under "General Instructions," and Rev. Proc. 95-48, *infra* note 110.

Public charity status provides two significant benefits to an organization. First, such status relieves the organization from liability for the payment of income tax on its earnings. Second, contributions made to a public charity by taxpayers are deductible from the taxpayer's income for federal taxation purposes. These benefits are fundamental to maintaining public charity status, which is central to the survival of private land trusts.

The description of the type of organization that qualifies as a public charity is found in Code § 501(c)(3) and provides the basis for the restrictions imposed upon the operation of public charities:

> Corporations, and any community chest, fund, or foundation, ***organized and operated exclusively*** for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, ***no part of the net earnings of which inures to the benefit of any private shareholder or individual***, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[106]

The requirement that a public charity "be organized and operated exclusively" for charitable purposes, and the requirement that none of the net earnings of such an organization "inure to the benefit of any private shareholder or individual," significantly affect the ability of private land trusts to terminate or modify conservation easements.[107] The first of these two requirements is sometimes described as the prohibition against "private benefit" and applies to all transactions in which a public charity engages. The second requirement is often referred to as the prohibition against "private inurement" and applies specifically to transactions between a public charity and an "insider." More generally, these two requirements are referred to as the prohibition against "excess benefit transactions;" however, as described *infra*, the effect of the excess benefit rule only applies to transactions involving insiders.

The constraints imposed on public charities by Code § 501(c)(3) do not apply to government agencies, like Johnson County, which are qualified to

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[106] 26 U.S.C.A. § 501(c)(3) (2007) (emphasis added).

[107] *See* the discussion of "excess benefit transactions," *infra* notes 129-34 (and accompanying text).

hold deductible conservation easements without regard to Code § 501(c)(3). In addition, government-affiliated public charities, such as the Johnson County Scenic Preserve Trust, while technically subject to the same limitations and penalties as purely private land trusts, are distinct from private land trusts in several significant ways: (i) they are generally not dependent upon donor generated funds for their operations; (ii) they are controlled by a government agency; and (iii) they are exempt from the reporting requirements that apply to other public charities.[108]

The distinction between conservation easement holders that are purely private land trusts; those that are government-affiliated land trusts; and those that are government agencies; are significant because they affect the application and effectiveness of federal restrictions. A typical private land trust must depend upon public support (and approbation) for its continued existence. Indeed, a land trust that is qualified to hold deductible conservation easements must derive at least one-third of its support from the general public.[109] In addition, it is required to report, in detail, its activities on an annual basis to the IRS on Form 990. Form 990, as of 2006, requires any exempt organization that holds conservation easements to attach a special schedule detailing its management of the easements that it holds.[110]

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[108] Rev. Proc. 95-48 (1995). This discretionary ruling by the Secretary of the Treasury exempts government-affiliated organizations, such as land trusts set up and controlled by a locality (e.g. the Johnson County Scenic Preserve Trust) from filing Form 990, an information return required to be filed annually by most exempt organizations to insure their continued qualification under § 501(c)(3), among other things.

[109] *Supra* note 99.

[110] Form 990, Schedule A, line 3c asks: "Did the organization receive or hold an easement for conservation purposes, including easements to preserve open space, the environment, historic land areas or historic structures? If "Yes," attach a detailed statement."

The Instructions to Form 990, Schedule A, line 3c are as follows:

> Answer 'Yes' if the organization received or held one or more conservation easements during the year. In general, an *easement* is an interest in the land of another. A *conservation easement* is an interest in the land of another for purposes that include environmental protection; the preservation of open space; or the preservation of property for history, education, or recreation purposes. For more information see Notice 2004-41, 2004-28 I.R.B 31.
>
> ***Attached Schedule.*** If 'Yes,' the organization must attach a schedule that includes the following information.
>
> 1. The number of easements held at the beginning of the year, the acreage of these easements and the number of states where the easements are located.
>
> 2. The number of easements and the acreage of these easements that the organization received or acquired during the year.
>
> ***3. The number of easements modified, sold, transferred, released, or terminated during the year and the acreage of these easements. For each easement, explain the reason for the modification, sale, transfer, release or termination. Also, identify the recipient (if any), and show if the recipient was a qualified organization (as defined in section 170(h)(3) and the related regulations at the time of transfer).***

A government-affiliated land trust, although it may be qualified as a public charity under Code § 501(c)(3) and be subject to the restrictions on its activities imposed by that law, is not required to report its activities annually on Form 990, and is typically not reliant on donor contributions or public support in general. A government agency that holds conservation easements is not subject to the provisions of Code § 501(c)(3) or the excess benefit rules; it does not depend upon donor support, and it may have many agendas in addition to, or in conflict with, the careful management and enforcement of the conservation easements that it holds.

4. Prohibition on "Excess Benefit Transactions"

As noted previously, the definition of "exempt organization" provided by Code § 501(c)(3) excludes from exempt status organizations "any part of the net earnings of which inures to the benefit of any private shareholder or individual."[111] Transactions in which an exempt organization allows such benefits to accrue to a private shareholder or individual are known as "excess benefit transactions" and are expressly prohibited by federal law.[112] Transactions violating this prohibition confer "private inurement" and are sometimes referred to as "private inurement transactions."

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4. Show the number of easements held for each of the following categories:

a. Easements on buildings or structures;

b. Easements that encumber a golf course or portions of a golf course;

c. Easements within or adjacent to residential developments and housing subdivisions, including easements related to the development of property; and

d. Conservation easements that were acquired in a transaction described under *Purchase of Real Property from Charitable Organizations* in Notice 2004-41 and if the organization acquired any such easements during the year.

5. The number of easements and the acreage of these easements that were monitored by physical inspection or other means during the tax year.

6. Total staff hours and a list of expenses devoted to (legal fees, portion of staff salaries, etc.) incurred for monitoring and enforcing new or existing easements during the tax year.

7. Identify all easement on buildings or structures acquired after August 17, 2006, and show if each easement meets the requirements of section 170(h)(4)(B). (emphasis added).

[111] 26 U.S.C.A. § 501(c)(3) (2007).

[112] 26 U.S.C.A. § 4958 (2007).

The Code defines excess benefit transaction, and excess benefit, as follows:

> **(1) Excess benefit transaction**
>
> **(A) In general.** The term 'excess benefit transaction' means any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit. For purposes of the preceding sentence, an economic benefit shall not be treated as consideration for the performance of services unless such organization clearly indicated its intent to so treat such benefit.
>
> **(B) Excess benefit.** The term 'excess benefit' means the excess referred to in subparagraph (A).[113]

The class of persons covered by the prohibition against excess benefit transactions are referred to by the Code as "disqualified persons," and often as "insiders," and includes:

> Any person who was in a position to exercise substantial influence over the affairs of an organization at any time during the five-year period ending on the date of a transaction is a disqualified person with respect to that transaction. The spouse, ancestors, siblings, children, grandchildren, and great grandchildren of such a person (and the spouses of his or her siblings and descendants) are also disqualified persons. A 35% controlled entity (a corporation, partnership or trust 35% owned by disqualified persons) is also a disqualified person.[114]

A "substantial contributor" is included within the class of "disqualified persons." The rules governing excess benefit transactions incorporate the definition of "substantial contributor" that applies to private foundations:[115]

> the term 'substantial contributor' means any person who contributed or bequeathed an aggregate amount of more than $5,000 to the private foundation, if such amount is more than 2 percent of the total contributions and bequests received

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[113] 26 U.S.C. § 4958(c)(1) (2006).

[114] 9 MERTENS LAW OF FEDERAL INCOME TAXATION § 34:254. (citations omitted).

[115] 26 C.F.R. § 53.4958-3(e)(2)(ii) (2007).

> by the foundation before the close of the taxable year of the foundation in which the contribution or bequest is received by the foundation from such person. In the case of a trust, the term 'substantial contributor' also means the creator of the trust.[116]

The amount of contributions considered in determining whether a person is a "substantial contributor," for purposes of determining whether such person is a disqualified person, are contributions made in the tax year of the transaction plus the four preceding years.[117] In other words, a contributor is a substantial contributor if his or her contributions over a five year period aggregate more than 2% of the donee's total contributions **and** exceed $5,000.

Given the value attributable to many conservation easements for the donor's tax deduction purposes, it is likely that many conservation easement contributors, even if they contribute nothing else to an organization, fall within the category of "substantial contributor." This assumes, however, that an easement contribution is, or should be, valued in the same manner as the contribution of other property or cash. However, a conservation easement has no real fair market value because there is no "market" for conservation easements once they have been contributed. In fact, a conservation easement in the hands of the holder represents a liability to the holder.[118]

There is no guidance with respect to how a conservation easement contribution would be valued by the IRS for purposes of determining whether the contributor of such an easement was a "substantial contributor" by reason of such contribution. However, the real question is whether such a contribution places the contributor in a position to have substantial influence over the holder of the easement. The answer to this question "depends upon all relevant facts and circumstances."[119] Suffice it to say that there are respectable arguments to be made on both sides of the question.

The penalty for an individual who engages in an excess benefit transaction with a public charity is two-fold: the individual is subject to an excise tax in the amount of 25% of the excess benefit[120] **and** the individual must "correct" the transaction.[121] Correction of the transaction requires the beneficiary of the transaction to restore the benefit received. In other words, the beneficiary of an

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[116] 26 U.S.C.A. § 507(d)(2)(A) (2007).

[117] 26 C.F.R. § 53.4958-3(e)(2)(ii) (2007), incorporating the definition of "substantial contributor" provided by 26 U.S.C.A. § 507(d)(2)(A) (2007).

[118] For example, the liability for the costs of monitoring and enforcing the easement in perpetuity.

[119] 26 C.F.R. § 53.4958-3(e)(1) (2007).

[120] 26 U.S.C. § 4958(a)(1) (2006).

[121] 26 C.F.R. § 53.4958-7 (2007).

excess benefit transaction must give back the benefit, plus a 25% excise tax on the amount of the benefit. If the transaction is not corrected and the excise tax is not paid within the "correction period"[122] a penalty in the amount of 200% of the excess benefit is imposed on the individual.[123]

Managers of an exempt organization knowingly engaging in an excess benefit transaction are also subject to an excise tax of 10% of the excess benefit, not to exceed $20,000.[124] Furthermore, the IRS has the authority to revoke the exempt status of an organization that engages in an excess benefit transaction,[125] and the Regulations make clear that the excise tax provisions do not replace the other requirements for qualifying for and maintaining exempt status.[126] Revocation of public charity status is the death knell for most public charities; consequently the excess benefit rules provide a strong incentive to public charities not to engage in excess benefit transactions; provided that these rules are understood.

There is no distinction made in the Code or Regulations between assets acquired by a deductible contribution, or otherwise, with respect to application of the excess benefit rules, or the requirement that assets be used exclusively for charitable purposes, *infra*. Thus, the improper termination or modification of a conservation easement, regardless of whether the easement was acquired by contribution, purchase, or exaction, and whether the grantor of the easement enjoyed any tax benefits for the conveyance of the easement, is subject to the excess benefit prohibition.

5. *Prohibition Against Conferring Private Benefit*

In addition to the prohibition against "excess benefit transactions" involving "disqualified persons," the tax code also requires that exempt organizations be "organized and operated exclusively" for charitable purposes.[127] This rule is sometimes referred to as the prohibition against "private benefit" to distinguish it from the prohibition against "private inurement."

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[122] *Id.*

[123] 26 C.F.R. § 53.4958-1(c)(2)(i) (2007).

[124] 26 U.S.C.A. §§ 4958(a)(2) and (d)(2) (2007).

[125] Ferguson v. Centura Health Corp., 358 F. Supp. 2d 1014, 1017 (D. Colo. 2004). *See also,* Universal Life Church v. United States, 128 F.3d 1294, 1298 (9th Cir. 1997), where the 9th Circuit Court stated:

> when the IRS revokes the tax exempt status of organizations which do not meet the 501(c)(3) requirements, it serves a public trust function in assuring the public that 501(c)(3) tax exempt status is conferred and retained only by organizations engaged in appropriately charitable functions . . . .

[126] 26 C.F.R. § 53.4958-8(a) (2007).

[127] *Supra* note 107.

> **(c) Operational test—(1) Primary activities.** An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.[128]

Among other things, this requirement says that an exempt organization may not engage in the equivalent of an excess benefit transaction with anyone, regardless of whether they fall within the definition of "disqualified person." This is because engaging in the equivalent of an excess benefit transaction[129] with someone who is not an insider still involves the use of assets of the organization in a manner that confers a private, rather than a public, benefit, thereby violating the requirement that the organization be operated **exclusively** for public purposes. The requirement that assets be used exclusively for charitable purposes constitutes a prohibition on transactions that confer a "private benefit."

The requirement that an exempt organization be operated exclusively for charitable purposes is viewed by the courts as imposing an additional requirement on charities that their activities confer no more than an "incidental" private benefit, regardless of whether or not the beneficiaries are "disqualified persons."[130] The exempt organization engaging in the equivalent of an excess benefit transaction, but with a person who is not a disqualified person, runs the risk of losing its exempt status.

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[128] 26 C.F.R. § 1.501(c) (2007).

[129] "Equivalent" but not "identical" because an excess benefit transaction, by definition, must involve a disqualified person.

[130] *American Campaign Academy, supra* at 1068, 1069:

> Petitioner misconstrues the overlapping characteristics of the private benefit and private inurement prohibitions. We have consistently recognized that while the prohibitions against private inurement and private benefits share common and often overlapping elements, Church of Ethereal Joy v. Commissioner, 83 T.C. 20, 21 (1984), Goldsboro Art League, Inc. v. Commissioner, 75 T.C. 337, 345 n.10 (1980), the two are distinct requirements which must independently be satisfied. Canada v. Commissioner, 82 T.C. 973, 981 (1984); Aid to Artisans, Inc. v. Commissioner, 71 T.C. at 215.
>
> The absence of private inurement of earnings to the benefit of a private shareholder or individual does not, however, establish that the organization is operated exclusively for exempt purposes. Therefore, while the private inurement prohibition may arguably be subsumed within the private benefit analysis of the operational test, the reverse is not true. Accordingly, when the Court concludes that no prohibited inurement of earnings exists, it cannot stop there but must inquire further and determine whether a prohibited private benefit is conferred. *See* Aid to Artisans, Inc. v. Commissioner, 71 T.C. at 215; Retired Teachers Legal Fund v. Commissioner, 78 T.C. 280, 287 (1982).

However, revocation of status is the **only** sanction available to the IRS in dealing with transactions that confer impermissible "private benefit" as opposed to "private inurement."[131] Excess benefit transactions are limited to "disqualified persons" as defined in the law. Because not all persons are "disqualified persons," it is possible for someone who is not a disqualified person to engage in the equivalent of an excess benefit transaction with a public charity without incurring any penalty,[132] but exposing the charity to loss of its exempt status.

The IRS has been reluctant in the past to invoke what is the ultimate punishment for a public charity: revocation of charity status. This is one reason why Congress created an intermediate punishment in the form of excise tax penalties for excess benefit transactions.[133] Furthermore, the rule that "no more than an insubstantial part" of an exempt organization's activities be for other than its exempt purposes is a situational, and far less precise standard than the prohibition against excess benefit transactions, for which the law provides an exact measurement.[134] For example, an organization with $100 million in assets could, presumably, engage in private benefit transactions valued in the millions and still consider those transactions to be an "insubstantial part" of its assets. On the other hand, for an organization whose assets are valued at $100,000, very few private benefit transactions would be considered "insubstantial."

For these reasons, the improper termination or modification of conservation easements involving persons other than disqualified persons is less likely to be deterred than such actions involving disqualified persons.

6. Organizational Requirements for Public Charities

In order to qualify as a public charity under Code § 501(c)(3) an entity must be "organized . . . exclusively for . . ." charitable purposes.[135] This requirement mandates that the organizing documentation[136] of such an entity strictly limit the activities of the entity to those that are consistent with the purposes which qualify the organization for public charity status, and that such documentation

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[131] "Private inurement" applies exclusively to the benefits generated to disqualified persons from excess benefit transactions.

[132] The exception would be if the transaction constitutes recovery of an item with respect to which the person previously received a "tax benefit" as provided in 28 U.S.C.A. § 111 (2007).

[133] MERTENS LAW OF FEDERAL INCOME TAXATION, *supra* note 114.

[134] 26 C.F.R. § 53.4968-1(b) (2007) provides:

> An excess benefit is the amount by which the value of the economic benefit provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person exceeds the value of the consideration (including the performance of services) received for providing such benefit.

[135] *Supra* note 107.

[136] For example articles of incorporation, articles of organization, etc. and by-laws.

does not permit activities that extend beyond such purposes.[137] Assuming that a land trust[138] has complied with this requirement (organizations seeking exempt status are required to submit copies of organizational documents to the IRS for purposes of determining compliance[139]) any action to improperly terminate or modify a conservation easement would be *ultra vires* and potentially voidable or, arguably, illegal and void.[140] Arguably, transactions involving either private benefit or private inurement are a violation of federal law and are, therefore, "illegal."

In Wyoming the Supreme Court has applied the doctrine of *ultra vires* to set aside a non-profit corporation's transfer to an irrevocable trust of funds required by the corporation's by-laws to be used for operational expenses, where the irrevocable trust did not so limit use of the funds.[141] However, Wyoming law also provides that no act of a non-profit corporation will be declared *ultra vires*

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[137] 26 C.F.R. § 1.501(c)(1)(b) (2007).

[138] Whether purely private, or a government-affiliated land trust.

[139] See IRS Form 1023 and the accompanying instructions.

[140] The following citation provides the general basis for these statements:

> Generally, '*ultra vires* acts' by a corporation are acts beyond the scope of express or implied powers conferred upon the corporation by the corporate charter or articles of incorporation and the laws in the state of incorporation. It has also been said that an act of a corporation is *ultra vires*, or beyond its power, when the act is outside the objects for which the corporation is created, as defined in the law of its organization.
>
> 19 C.J.S. *Corporations* § 673 (citations omitted).
>
> It is generally recognized that a corporation cannot enter into, or bind itself by, a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature, within its constitutional power, has declared will not be performed.
>
> 18B AM. JUR. *Corporations* § 1734 (citation omitted).
>
> However, the terms 'ultra vires' and 'illegality' represent distinct ideas. An illegal act of a corporation is one expressly prohibited by statute or against public policy and, thus, a corporate act may be *ultra vires* without being illegal.
>
> As a general rule, corporate transactions and contracts which are illegal, as distinguished from merely ultra vires, are void and cannot support an action nor become enforceable by performance, ratification, or estoppel.
>
> The doctrine of *ultra vires* has no application if a private corporation makes a contract which is prohibited by statute; for instance, even though an *ultra vires* contract may become enforceable once it is partially executed or through estoppel, no contract rights arise if the corporation engages in a prohibited act. Conversely, if there is no prohibitory statute, which invalidates the transaction at issue, the transaction is merely *ultra vires*, and statutes limiting the defense are applicable.
>
> 19 C.J.S. *Corporations* § 674.

[141] Jewish Cmty. Ass'n of Casper v. Cmty. First Nat'l Bank, 6 P.3d 1264, 1267 (Wyo. 2000).

where a third party has acquired rights as a result of the act.[142] Furthermore, it is generally the case that courts do not favor *ultra vires* as a means of challenging corporate actions, and that state statutes increasingly prevent the assertion of *ultra vires* in a manner that would disrupt the legitimate expectations of third parties.[143] However, there is a distinction between actions that are *ultra vires* and those that are illegal.[144] The latter are not "voidable" but "void."

Arguably, the improper termination of a conservation easement is not only an *ultra vires* action by the land trust, and therefore voidable, but is also illegal under the terms of the Code and, therefore, void and unenforceable, and outside of the third party protection afforded by the Wyoming statute.

7. Requirements Imposed on "Qualified Organizations"

In addition to the foregoing constraints, all organizations "qualified" to hold deductible conservation easements are required to "have a commitment to protect the conservation purposes of the donation."[145] This requirement would appear to prohibit a qualified easement holder from improperly terminating or modifying a conservation easement. To date, the IRS has not argued that improper easement termination or modification by a land trust disqualifies it as a holder of deductible easements. However, the provision appears to provide a legitimate basis for the IRS to do so.

C. Summary

The foregoing are some of the principal common law and statutory provisions that currently govern the creation, termination and modification of conservation easements. These rules constitute substantial remedies and disincentives to the improper termination or modification of conservation easements. The next section describes and discusses an alternative, or at least supplemental, approach to controlling the improper termination or modification of conservation easements: the charitable trust doctrine. The charitable trust doctrine, more commonly the doctrine of *cy pres*, has recently been advocated as a needed new control on improper easement termination and modification.

IV. CONSERVATION EASEMENTS AND THE DOCTRINE OF CY PRES

A. The Doctrine of Cy Pres Described

In recent years application of the doctrine of "*cy pres*" to conservation easements has been advocated. An argument has been prominently made that

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[142] WYO. STAT. ANN. § 17-19-304 (2007).

[143] 19 C.J.S. *Corporations* § 676.

[144] *Supra* note 140.

[145] 26 C.F.R. § 1.170A-14(c)(1) (2007).

a conservation easement donor makes a "*cy pres*" bargain with the public. The bargain is described as one in which the donor of a perpetual conservation easement is allowed to exercise "dead hand control" over his or her land through the imposition of the easement in exchange for which privilege the donor is deemed to have agreed that the easement may be modified or terminated to meet future unforeseen circumstances according to the rules of the doctrine of *cy pres*.[146] This argument has not gone without criticism.[147]

A number of authorities have also recently given support to the application of the *cy pres* doctrine to conservation easements. The drafters of the Uniform Trust Code ("UTC") state that "the creation and transfer of an easement for conservation or preservation purposes will frequently create a charitable trust."[148] The Restatement (Third) of Property also recommends that a form of *cy pres* be applied to conservation easements.[149] As recently as February 2007 the Executive Committee of the NCCUSL amended the comments to the UCEA to advocate application of the charitable trust doctrine to conservation easement modification and termination.[150]

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[146] McLaughlin, *supra* note 7, at 459.

[147] For example, *see* Andrew C. Dana, *Conservation Easement Terminations, Property Rights, and the Public Interest,* draft prepared for "Advanced Legal Roundtable on Extinguishment of Conservation Easements" (2005), Land Trust Alliance National Rally, Madison Wisconsin, October 15, 2005 (cited with permission and copy in author's files) [hereafter *Conservation Easement Terminations*]; *see also* Andrew C. Dana, *Conservation Easement Amendments: A View from the Field* (2006) *available at* www.learningcenter/lta.org (copy in author's files).

[148] *See* comment to UTC § 4, paragraph 5. The complete paragraph states:

> Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value.

Note that the drafters provide no foundation for the statement that creation and transfer of conservation easements frequently create a charitable trust; the author found no basis for such a conclusive statement in the research undertaken in preparation for this article.

[149] RESTATEMENT (THIRD) OF PROPERTY § 7.11 (2000).

[150] UCEA § 3, comment, was amended by adding the following:

> The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was

The Regulations contemplate that a deductible conservation easement can be judicially extinguished in the event of an "unexpected change in circumstances" that "make impossible or impractical the continued use of the property for conservation purposes" and dictates the manner in which proceeds resulting from such an extinguishment must be used, unless state law provides differently. [151]

In the *Hicks* case, the Meadowood Easement not only incorporated[152] the provisions required by the Regulations[153] it also required application of the doctrine of *cy pres* to locate a new holder in the event that the original easement holder ceased to exist.[154] Clearly, at least one party to the Easement had *cy pres* in mind in executing the conveyance. Relying on the Wyoming case of *Town of Cody v. Buffalo Bill Memorial Association,*[155] the district court in the *Hicks* case applied the charitable trust doctrine to the termination of the Meadowood Easement and, the application of the doctrine being challenged on appeal to the Supreme Court of Wyoming by neither party, that Court adopted the doctrine as the rule of the case.

> beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and state law of adopting states as it relates to the enforcement of charitable trust should apply to conservation easements.
>
> Thus, while Section 2(a) [of the UCEA] provides that a conservation easement may be modified or terminated 'in the same manner as other easements,' the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding. [Referencing McLaughlin, *supra* note 7 and *infra* note 194.].

[151] 26 C.F.R. § 1.170A-14(g)(6)(i) (2007) provides:

> If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

26 C.F.R. §1.170A-14(g)(6)(ii) (2007) sets forth a formula for reimbursing a land trust if a conservation easement is terminated, but specifically recognizes that State law may direct that proceeds be applied in a manner other than the formula contained in the Treasury Regulations.

[152] The Deed and Easement § 9(b).

[153] 26 C.F.R. § 1.170A-14(c)(2) (2007).

[154] The Deed and Easement § 9(a).

[155] Town of Cody v. Buffalo Bill Memorial Ass'n, 196 P.2d 369 (Wyo. 1948).

The doctrine of *cy pres* has been described as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[156]
>
> The term '*cy pres*' is taken from the Norman French phrase '*cy pres* comme possible' meaning 'as near as possible,' or 'as near as may be.'
>
> *[C]y pres* is applicable in situations where: (1) property is given in trust for a particular charitable purpose; (2) it is, or becomes, impossible, impracticable, or illegal to carry out such purpose; and (3) the settlor manifested a more general intention to devote the property to charitable purpose.
>
> The doctrine of *cy pres* is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor when that intent cannot be effectuated to the letter of the donor's directions or specifications.[157]

However, the doctrine of *cy pres* applies to the law governing charitable trusts,[158] which makes the doctrine part of the law of trusts. Conservation easements are governed by the law pertaining to easements,[159] which is property law.

An additional hurdle to application of the *cy pres* doctrine to conservation easements is the requirement of trust law that a trust exist, i.e. that someone entrusts certain property to another, as trustee, to hold for the benefit of another;[160] **and** that the person creating the trust **intends** that the creation of the trust to be

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[156] RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

[157] 88 AM. JUR. PROOF OF FACTS 3D 469 § 2 (2007). (citations omitted).

[158] *Id.* at § 5.

[159] UCEA § 2.

[160] *See, e.g.,* Scotti's Drive In Restaurants, Inc. v. Mile High Dart In Corp., 526 P.2d 1193, 1196 (Wyo. 1974).

for "general charitable purposes" as opposed to specific and limited charitable purposes.[161] However, the courts generally favor a finding of general charitable purpose, and a specific and limited purpose will only be found when the evidence is "clear, definite, and unambiguous."[162] Furthermore, the *Restatement (Third) of Trusts* favors finding of a general charitable purpose.[163]

Construing a conservation easement as containing a general charitable purpose is dealt with at length in "*Rethinking the Perpetual Nature of Conservation Easements.*"[164] Finally, the UTC, enacted in Wyoming, provides for application of the doctrine of *cy pres* in any case where the specific purpose of a charitable trust cannot be accomplished.[165] The comment to the UTC suggests that this provision supersedes the traditional requirement that a charitable trust express a general charitable purpose to be subject to *cy pres*:

> Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.[166]

An even bigger hurdle to finding that the conveyance of a conservation easement creates a charitable trust is the requirement that for a trust to exist there must be a clear intention on the part of the putative settlor to create a trust. The UTC provides:

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[161] *See, e.g.,* 88 AM. JUR. PROOF OF FACTS 3D 469 § 16 (2007):

> The courts have repeatedly stated that *cy pres* can be applied only where the donor had a general charitable purpose and not where the gift was intended for a particular purpose only. The ultimate question is whether the donor would have preferred that his gift or bequest be applied to a like charitable purpose in the event that his original scheme did not work or would have instead desired that the funds be diverted to private use. (citation omitted).

[162] *Id.*

[163] RESTATEMENT (THIRD) OF TRUSTS § 67, comment b states:

> Contrary intention of settlor. Just as it is against the policy of the trust law to permit wasteful or seriously inefficient use of resources dedicated to charity, trust law also favors an interpretation that would sustain a charitable trust and avoid the return of the trust property to the settlor or successors in interest. *See* § 28, Comment a. Accordingly, when the particular purpose of a charitable trust fails, in whole or in part, the rule of this Section makes the *cy pres* power applicable (thus presuming the existence of what is often called a general charitable purpose) *unless the terms of the trust (defined in § 4) express a contrary intention* (emphasis added).

[164] McLaughlin, *supra* note 7, at 480.

[165] UTC § 413(a); WYO. STAT. ANN. § 4-10-414(a) (2007).

[166] UTC § 413(a), comment.

> (a) A trust is created **only if**:
>
> (2) the settlor indicates an intention to create the trust;[167]

As noted, *supra* notes 146-47 (and accompanying text), some have argued that the grantor of a conservation easement makes a *cy pres* bargain with the public that allows the grantor to control the use of land in future generations through the terms of the easement.[168] However, it is likely that most conservation easement donors would be surprised to learn that they have made a bargain with anyone but the organization or agency to which they granted the easement.

> Unless landowners manifest a clear and unambiguous intention to convey restricted rights (as opposed to limited rights) in land through their conservation easement donations, there is no legal or equitable basis to conclude that the donors struck a *cy pres* bargain with the public, triggering equitable review by the courts when easement terminations arise.[169]

Negotiation of the terms of most conservation easements are the exclusive province of the landowner granting the easement and the prospective holder of the easement (with the IRS being an invisible third-party).[170] Many easement donors are quite particular about who holds their conservation easement, and insert provisions that restrict the manner in which an easement may be transferred in the future. The notion that the conservation easement that they have negotiated with a specific land trust constitutes a trust the beneficiaries of which are the general public would be startling to many easement donors.

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[167] UTC § 402(a)(2); WYO. STAT. ANN. § 4-10-403(a)(2) (2007) (emphasis added). The comment to UTC § 402(a)(2) states:

> [S]ubsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. *See* RESTATEMENT (THIRD) OF TRUSTS Section 13 (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered.

[168] *See* McLaughlin, *supra* note 7, at 430.

[169] Dana, *supra* note 147, at 15.

[170] Where grant funds have been used in purchasing a conservation easement the grantor of the funds may also require that certain provisions be included in the grant to insure protection of its interest in the use of the funds. Of course in purchased easement situations, the application of the charitable trust doctrine becomes even more complicated because the easement was not created with exclusively charitable intentions so the existence of the "general charitable intent" necessary to create a charitable trust in a conservation easement is even more dubious.

Nevertheless, it seems clear that **if** a court chooses to apply the doctrine of *cy pres* to a conservation easement, there is likely to be sufficient legal basis for it to do so. On the other hand, given the actual fact easement donors are likely to deed their easement contribution to constitute a charitable trust for the public at large, courts may find it equally justifiable to find that charitable trust principles and the *cy pres* doctrine should not apply to the contribution of conservation easements. The important question therefore is whether application of the *cy pres* doctrine to conservation easements is needed, or prudent, in the long run.

To evaluate this question requires consideration of several issues. First, how serious is the problem of improper termination or modification of conservation easements? Second, is there a demonstrated lack of remedies for and disincentives to engaging in improper easement termination or modification? Third, is the doctrine of *cy pres* a suitable alternative, or addition to, existing remedies?

This article takes the position that there is scant evidence of a current serious problem of improper easement termination or modification in the United States today, and that the existing remedies and disincentives are adequate, or at least have not yet proven inadequate, to deal with the problem. The author relies on dearth of evidence to support a contrary position on these two points in making them. This leaves the question of whether the doctrine of *cy pres* is an appropriate alternative, or supplement on to the law governing conservation easements; which is a question that will be examined next.

B. Implications of the Application of Cy Pres to Conservation Easements

1. Elimination of Land Trust Authority to Modify or Terminate Conservation Easements

One of the most profound consequences of applying the doctrine of *cy pres* to conservation easements is that such application denies the holder of the easement the right to terminate or modify a conservation easement on their own. The Wyoming Supreme Court in the *Town of Cody* case[171] quotes favorably from 2 *Bogert,*[172] *Trusts and Trustees* § 435 as follows:

> In the absence of special provisions in the trust instrument, *the trustees have no power of their own motion to decide that it has become impossible or inexpedient to carry out the trust as originally planned and then to substitute another scheme.* If the trustees feel

[171] *Town of Cody,* 196 P.2d at 378.

[172] Ronald Chester, George Gleason Bogert & George Taylor Bogert, THE LAW OF TRUSTS AND TRUSTEES (3d ed. 2005).

> that an emergency of this type has arisen, they should bring the situation to the attention of the court and ask for instructions. (emphasis added).

King and Fairfax also note: "if the easement is in fact a charitable trust, neither the land trust nor the fee holder, but only the court can modify a CE purpose."[173] Taking control over the modification, in particular, of conservation easements would represent an enormous change from current land trust practice and from the expectations of most easement grantors and holders.[174]

2. *Expansion of Standing to Enforce Conservation Easements*

At common law the only person with standing to enforce an easement was the holder of the easement. The owner of the servient parcel would also have standing to prevent abuse of the easement, and to seek termination or modification under one or more of the rules described immediately following. Application of the *cy pres* doctrine could expand standing to enforce conservation easements considerably beyond the holder of the easement and owner of the parcel servient to the easement.[175] In considering this possible expansion of standing, it must be borne in mind that standing to enforce is, essentially, standing to "second guess"

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[173] Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65,110 (2006).

[174] While voluntary termination of a conservation easement is a very rare event, modification of conservation easements occurs frequently enough that the Land Trust Alliance is developing a formal policy to guide the nation's land trusts in the practice. Many land trusts around the country have themselves adopted formal internal policies governing the modification of conservation easements. The subject of easement modification is the subject of frequent lectures for landowners, attorneys and land trust professionals around the country.

> Most conservation easement amendment policies that have been adopted by land trusts permit amendments under the following circumstances:
>
> - To correct clerical or scriveners' errors in original drafting;
> - To fulfill prior agreements specified in the conservation easement;
> - To clarify an ambiguities [sic] in the conservation easement;
> - To address condemnation proceedings by a public agency; and
> - To add restrictions that strengthen the resource protection of the easement.

Dana, *supra* note 147, at 4.

[175] *See supra* note 155 for an example of the extent to which the Wyoming Supreme Court has permitted standing to enforce a public trust. However, standing to enforce charitable trusts traditionally has been quite restricted by the courts; *see, e.g.,* Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?,* 42 REAL PROP. PROB. & TR. J. 245, 247 (2007): The general rule in charitable trust law, subject to a few notable exceptions, is that all parties except the state attorney general are prohibited from bringing suit to enforce the terms of a charitable gift. (citation omitted). However, Weisbrod acknowledges that, in response to pressure from donors, courts are beginning to expand standing. *Id.; see also* McLaughlin, *infra* note 194, at 1080 (regarding limited standing).

the decisions of a land trust and landowner that result in the termination, or **any** modification, of a conservation easement.

Cases have found that standing under the *cy pres* doctrine is sufficiently broad to include the attorney general of the state in which the trust is established; designated or ascertained beneficiaries of the trust; and, **in some cases, donors to or founders of, the trust in question, but typically not mere taxpayers or members of the public who may enjoy the benefits of the trust**.[176]

The UTC recognizes the attorney general as having "the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state by notifying the trustee by written notice."[177] The UTC, and its Wyoming counterpart, also recognizes the settlor of a charitable trust as having standing to enforce the trust.[178] "Settlor" includes not only the creator of the trust, but anyone contributing to the trust.[179] Thus, as applied to a land trust, the founders of the land trust would have standing to invoke *cy pres* as well as anyone contributing to the trust, at least for purposes of enforcing the trust with respect to that contribution.

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[176] *Supra* note 157, at § 8. Recall that the district court, in its initial ruling in *Hicks* (later abandoned), held that **anyone** who was a citizen of Wyoming had standing to seek to enforce the Scenic Preserve Trust in that case. *Supra* note 38. Such an expansion was rejected by the Wyoming Supreme Court in *Hicks*, 157 P.3d 914, 920 (Wyo. 2007) (citing Mitchellville Cmty. Ctr., Inc. v. Vos (*In re* Clement Trust), 679 N.W.2d 31, 37 (Iowa 2004)):

> It is well established that persons are not entitled to sue [to enforce a charitable trust] if their only benefit from enforcement of the trust is that shared by other members of the public. The community's interest in the enforcement of a charitable trust must be vindicated by the attorney general.

[177] UTC § 110(d); WYO. STAT. ANN. § 4-10-110(d) (2007). Note: notification of the trustee is only found in the Wyoming law.

[178] UTC § 405(c); WYO. STAT. ANN. § 4-10-406(c) (2007).

[179] UTC § 103; WYO. STAT. ANN. § 4-10-103 (2007). In reading the comments to the UTC it is not clear that the drafters were considering the consequences of applying *cy pres* to conservation easements:

> The definition of 'settlor' (paragraph (15)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the 'settlor' is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the 'settlor' by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument.

Typically, a land trust is organized by incorporators, who may, or may not, have any functional interest in the land trust (e.g., an incorporator may be an attorney hired to form the corporation that becomes the land trust). More likely, the initial officers and directors would be a closer equivalent of a typical trust settlor, but it is not clear that these people actually "created" the land trust. Furthermore, it is at least arguable that a significant contributor early in the history of a land trust has standing to invoke *cy pres*, not only with respect to the original contribution, but also with respect to assets that may have resulted from the contribution. Application of the doctrine of *cy pres* to a land trust, according to the provisions of the UTC, would significantly expand standing to invoke *cy pres* to enforce a conservation easement.

The Wyoming Supreme Court in *Hicks* comprehensively explored the question of who has standing to enforce a charitable trust. The Court reviewed a number of authorities, including *The Law of Trusts and Trustees*,[180] which the Court cited favorably for the following proposition with respect to standing to enforce a charitable trust:

> Recently, the common law standing rule has expanded. '[A]s public attention to laxity in the enforcement by the Attorney General increases, courts have begun to expand standing to enforce charitable trusts' to others. Chester, et al., *The Law of Trusts and Trustees,* § 411, at 2. Generally, that power has been extended to individuals with a fiduciary interest (trustees, former and subsequent trustees, or subtrustees); to specially interested beneficiaries; and to the settlors and their successors. *Id.,* at § 412–415; *see also* Forest Guardians v. Powell, 24 P3d 803, 808 (N.M.App. 2001).[181]

Following this line of reasoning, possible persons with standing to invoke *cy pres* to enforce a conservation easement would include (i) the attorney general, (ii) the settlors of the land trust; (iii) the successors of the settlors (including the original officers and board members and their successors in a land trust); (iv) trustees past, (v) present and (vi) future (virtually, all board members of land trusts); and (vii) "specially interested" beneficiaries (a new class).

The Wyoming Court concluded that a "qualified beneficiary" "means a beneficiary who is currently entitled to distributions of income or principal from the trust or has a vested remainder interest in the residuary of the trust which is not subject to divestment."[182] The Court also concluded that the term

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[180] Chester, Bogert & Bogert, *supra* note 172.

[181] *Hicks*, 157 P.3d at 920.

[182] *Id.* at 921 (citing WYO. STAT. ANN. § 4-10-110(d)(xv) (2007)).

"qualified beneficiary" was analogous to the common-law concept of "specially interested."[183] In both cases, the concept limits the standing of beneficiaries of a charitable trust to beneficiaries who have been singled out by the trust, either as individuals, or as a class of persons, to receive a benefit different from that available to the public at large.[184] The typical conservation easement does not single out individuals, or classes of individuals, as beneficiaries. While neighbors may derive a special benefit from the protection of adjoining land, it would be hard to consider them as having been intentionally granted a special benefit from a conservation easement.

A typical charitable trust does not impose a burden on real property, other than by outright ownership when full fee title has been passed to the trustee, or perhaps by holding a traditional easement over real property as an appurtenance to real property that it owns outright. Therefore, it is not clear whether the owner of a parcel of land servient to a conservation easement has any standing under the doctrine of *cy pres*. Such a person would certainly seem to have a "special interest" in the charitable trust to which his or her land is subject. However, the sense of "qualified" or "special" as described above speaks only to **benefits** derived from a charitable trust. The owner of a parcel servient to a conservation easement typically does not derive a "benefit" from the conservation easement; the restrictions imposed on his or her use of the land sound much more like a **detriment**.

Under the common law applicable to easements the owner of the servient parcel clearly has standing in matters pertaining to the easement to which his property is subject. Presuming that the *cy pres* doctrine , if applied, would not replace, but only supplements, the common law governing conservation easements, application of the doctrine should leave intact the servient parcel owner's standing under common law property principles with respect to the conservation easement to which his or her parcel is subject. Where neighbors contemporaneously convey conservation easements on their adjoining properties each might be considered a "qualified beneficiary" by reason of having a "special interest" in the easement on the others' property.[185]

In any event, it is clear that applying the doctrine of *cy pres* expands significantly the number of persons with standing to enforce a conservation easement. This, in turn, will complicate the enforcement of conservation easements because enforcement may involve multiple parties and the attendant increase in the time and cost of litigation. The foregoing discussion suggests that applying the *cy pres* doctrine to conservation easements may open standing to challenge decisions

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[183] *Hicks*, 157 P.3d at 921.

[184] RESTATEMENT (THIRD) OF TRUSTS § 28, comment c.

[185] Note that if these easements were conveyed pursuant to an agreement between the neighbors the tax deductibility of the conveyances would be suspect.

to modify or terminate a conservation easement to (i) the attorney general, (ii) the grantor of the easement, (iii) the grantor's successors, (iv) the founders of the holder of the easement (including officers and board members) and their successors, (v) anyone who can demonstrate a "special interest" in enforcement of the easement and, (vi) under the original common law applicable to easements, the owner of the parcel servient to the conservation easement.

3. Changing the Criteria for Modification and Termination of Conservation Easements

In addition to changing the authority of the holder of a conservation easement to modify or terminate the easement as it sees fit (taking into account the constraints on such decisions imposed by common law and statutory law described *supra* beginning at note 70); and vesting standing to challenge easement modifications or terminations in a potentially broad range of new persons; application of the *cy pres* doctrine to conservation easements would also alter the criteria for the modification or termination of a conservation easement.

The UTC does not spell out the criteria for application of the doctrine of *cy pres* other than to state: "the court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes."[186] *The Restatement (Third) of Trusts* describes the circumstances which trigger application of the doctrine as those in which carrying out the purpose of the trust becomes (1) unlawful; (2) impossible; (3) impractical; (4) or wasteful.[187] A more expansive view of circumstances justifying application of *cy pres* is provided by *Am. Jur. Proof of Facts*:

> The *cy pres* doctrine cannot be invoked until it is clearly established that the directions of the donor cannot, or cannot beneficially, be carried into effect. (citation omitted) . . . A purpose becomes impracticable when the application of property to such purpose would not accomplish the general charitable intention of the settlor.[188]

As easements, conservation easements have been seen primarily as two-party contracts[189] in which modifications could cover a broad range of issues. Such issues include the correction of technical errors in the easement document; clarification

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[186] UTC § 414(a)(iii); WYO. STAT. ANN. § 4-10-415(a)(iii) (2007).

[187] RESTATEMENT (THIRD) OF TRUSTS § 67.

[188] 88 AM. JUR. PROOF OF FACTS 3D 469 § 10 (2007) (citations omitted).

[189] Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates,* 46 NAT. RESOURCES J. 65, 85 (2006).

of ambiguities; tightening of restrictions; expansion of the area covered by the easement[190]; relocation or modification of reserved development rights; increase in reserved rights in exchange for increased conservation on the easement parcel or another parcel; and modifications to reflect changes in the law, or to improve enforcement and management of the easement.

The doctrines of *cy pres* and *administrative deviation* or *equitable deviation*[191] would preclude most of these amendments because these doctrines only permit revisions in the substantive or administrative terms of a charitable trust in the event of **an unforeseen change in circumstances** that make **unlawful, impossible, or impractical**[192] achieving the purpose of the trust.[193] Few typical conservation easement amendments could meet any of these criteria, although a leading advocate of application of the *cy pres* doctrine suggests that it would be appropriate to imply a reserved right in all conservation easements to amend the easement for most of the purposes listed in the preceding paragraph.[194] How this

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[190] In the author's opinion, placing additional acreage under conservation easement should be done by conveyance of a new conservation easement rather than amendment of an existing one because expanding an easement requires conveyance of an interest in the previously unburdened property, and typical amendment provisions lack the necessary terminology to constitute a conveyance. Nevertheless, many organizations expand existing conservation easement by amendment of an existing easement.

[191] A doctrine parallel to *cy pres* in which a court may permit deviation from the **administrative terms** of a charitable trust if, due to unforeseen circumstances, adherence to such terms would frustrate the accomplishment of the purpose of the trust. *See* McLaughlin, *supra* note 7, at 433; *see also* 88 AM. JUR. PROOF OF FACTS 3D 469 § 7 (2007).

[192] 88 AM. JUR. PROOF OF FACTS 3D 469 § 7 (2007).

[193] McLaughlin, *supra* note 7, at 435-36, describes the effect of the application of the doctrine of *cy pres* as follows:

> Except to the extent granted the power in the deed of conveyance, the holder of a donated easement should not be permitted to agree with the owner of the encumbered land to modify or terminate the easement unless and until: (i) compliance with one or more of the administrative terms of the easement threatens to defeat or substantially impair the conservation purposes of the easement, and a court applies the doctrine of administrative deviation to authorize the modification or deletion of such term or terms, or (ii) the charitable purpose of the easement has become impossible or impracticable due to changed conditions, and a court applies the doctrine of *cy pres* to authorize either a change in the conservation purpose for which the encumbered land is protected, or the extinguishment of the easement, the sale of the land, and the use of the proceeds attributable to the easement to accomplish the donor's specified conservation purpose or purposes in some other manner or location.

In other words, if the easement grantor is well-enough represented to provide an amendment clause in his or her conservation easement, the easement will be exempt from the doctrine of *cy pres*; otherwise not. One has to wonder; if application of the doctrine is so crucial to the proper management of conservation easements having a clever lawyer should exempt a grantor from its application.

[194] Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: The Myrtle Grove Controversy,* 40 UNIVERSITY OF RICHMOND LAW REVIEW 1031, 1075 (2006).

implied reserved right to amend conservation easements would be reconciled in actual practice with the *cy pres* doctrines, is hard to predict, or even understand, being as it is the modification of what is so far legal theory with yet another theory.

4. Increased Costs

Finally, applying the doctrine of *cy pres* to easement terminations and modifications will significantly increase the time, money, and effort involved in such actions over that involved under current common law practices.[195]

5. Summary[196]

To summarize: application of the doctrine of *cy pres* to conservation easements can reasonably be expected to have the following consequences:

> 1. It will eliminate the authority of easement holders to modify or terminate conservation easements.
>
> 2. It may significantly expand the number of persons with standing to invoke *cy pres* in decisions to modify or terminate conservation easements (standing to **prevent** modification or termination and, presumably, standing to **initiate** modification or termination).
>
> 3. It will impose a new and restrictive set of criteria on the justifications for easement modification or termination precluding most of the easement amendments that are typical today.
>
> 4. It will dramatically increase the time, money and costs of easement termination and modification.

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[195] Dana, *supra* note 147, at 16, provides several elaborate examples and concludes: "[t]he transactions costs that are associated with any administrative deviation or *cy pres* proceedings, whether simple or complex, are likely to be significant." In at least one suit with which the author is familiar seeking to enforce a conservation easement in Wyoming (settled out of court), the attorney's fees for the land trust involved exceeded $260,000 for pre-trial expenses alone. That case involved three years of pre-trial work and never went to trial. It is not known how much was expended in legal fees and court costs in the *Hicks* case. It is known that the suit was filed in 2003, not decided by the district court until 2005, and not decided by the Supreme Court until 2007.

[196] For an extensive analysis of the potential problems associated with the application of the doctrine of *cy pres* to conservation easements. *See* Dana, *supra* note 147.

V. *HICKS V. DOWD* REVISITED

The termination of the Meadowood Easement may appear to some as a "poster child" example of the need for application of the doctrine of *cy pres* to conservation easements. As of the time of this writing, whether the Wyoming Attorney General will respond to the Supreme Court's invitation to enforce the Meadowood Easement is purely a matter of speculation, and seems increasingly unlikely as time passes. However, it may be instructive to consider the *Hicks* case in the context of the common law and then in the context of the *cy pres* doctrine.

A. Application of Existing Remedies

As discussed, *supra*, the common law of easements is, by statute in Wyoming, applicable to easement modifications or terminations.[197] Applying common law principles to the *Hicks* case suggests that Johnson County and the Dowds may have been within their rights to terminate the Meadowood Easement, because the common law clearly allows the holder of an easement (Johnson County, in this case) to "release" the easement back to the owner of the servient parcel (the Dowds).[198] The parties, arguably, also had a right to terminate the Meadowood Easement under the common law principles applicable to the termination of easements due to "cessation of purpose"[199] because of the unforeseen development of coalbed methane on the Ranch, and its alleged effect upon the purpose of the Meadowood Easement.[200]

One caveat to the argument that the parties to the Meadowood Easement could, between them, release that Easement is that, at common law, a release is only effective as to those with an ownership interest in the dominant estate who agree to the release.[201] However, unless the courts found that the Meadowood Easement had been granted to, or expressly for, the benefit of others in addition to Johnson County, the release should be within the rights of the County and

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[197] WYO. STAT. ANN. § 34-1-202(a) (2007); *See also* text accompanying *supra* note 95.

[198] *See* the discussion of "release," *supra* note 77 and text accompanying note 77. Note that neither of the parties to the *Hicks* suit, (and neither of the courts considering the suit) appeared to consider this line of reasoning which clearly suggests that, in this case of first impression, no one was thinking of the conservation easement in the common law terms that seem dictated by the nature of the Easement and the terms of the Act.

[199] *See* the discussion of "cessation of purpose," *supra* note 76 and text accompanying note 76.

[200] *See* Resolution 247, *supra* note 32:

> WHEREAS, the coalbed methane development, which is not subject to the Conservation Easement, is and will be in the future inconsistent with the purposes of the Conservation Easement, makes enforcement of the Conservation Easement impossible as to the coalbed methane development and exposes the Board to liability under the terms of the Conservation Easement.

[201] *Supra* note 78.

the Dowds.[202] An argument to the contrary would be that the release of the Meadowood Easement by the Trust was *ultra vires* and/or against public policy (see the discussion of *ultra vires*, *supra* notes 140-44 and accompanying text), keeping in mind that the Trust was a corporation governed by its own organizational documents and technically separate from Johnson County.

Had the release of the Meadowood Easement been to "disqualified persons" the transaction would be an "excess benefit transaction" within the meaning of the Internal Revenue Code. If the transaction were an excess benefit transaction the Dowds could reasonably expect to be required to "correct" the transaction by conveying to the Trust a conservation easement comparable to the Meadowood Easement, and re-conveying the One-Acre Tract to the Trust. In addition, the Dowds would be facing an excise tax in an amount equal to 25% of the value of the Meadowood Easement and the One-Acre Tract.[203] In addition, the trustees of the Trust might expect to pay up to $20,000 each in excise taxes. This assumes that it is determined that the value of the Dowd's agreement "to indemnify and hold harmless the Board and the County from all liability, claims and causes of action, including reasonable costs and attorneys fees, that arise out of or by virtue of transfer of the One Acre Tract and Conservation Easement to them"[204] was less valuable than the financial benefit conferred on the Dowds by release of the Meadowood Easement and conveyance of the One-Acre Tract.[205]

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[202] Of course, this was the finding implicit in the district court's ruling that the Scenic Preserve Trust was a charitable trust and the action was one to enforce that Trust. This position does not take into account constitutional, legal, or moral constraints on the County as a result of its governmental status.

[203] In certain cases where an excess benefit transaction is "corrected" the excise tax may be abated. 26 C.F.R. § 53.4958-1(c)(2)(iii) (2007).

[204] *Supra* note 32.

[205] Releasing restrictions on the future development and subdivision of the 1,043-acre Meadowood Ranch conferred an unequivocal and substantial benefit to the Dowds. In this case we do not know that value was. We do know that the Lowham Limited Partnership obtained an independent valuation of the Meadowood Easement at the time of the conveyance to the County, indicating that the value of the easement was $1,266,000; and we know that the Partnership claimed a federal tax deduction for the easement. Presumably, six years later the value of the Meadowood Easement would be the same as or greater than it was when contributed. It is true that by terminating the Meadowood Easement the County averted liability, whatever that may have been, from holding an interest in land on which coalbed methane operations were likely to occur. Regardless of how likely it is that merely holding a conservation easement exposes the holder to liability for activity on the servient parcel, whatever the value of this benefit to the County might have been, it clearly was not consideration provided by the Dowds for the benefit the Dowds received, and therefore does not enter into the excess benefit evaluation. What the value of being indemnified and held harmless from challenges to the release of the Meadowood Easement itself might be is hard to measure, although the Dowd's agreement in this regard does constitute for the termination of the easement. It is not known whether the Dowds covered the County's legal fees and expenses in defending the *Hicks* suit pursuant to the indemnification agreement.

However, the Dowds do not appear to be "disqualified persons." They did not make the contribution of the Meadowood Easement to the County or the Trust; the Lowham Partnership did that. Even if the deductible value of the Meadowood Easement were considered as the contribution value for purposes of determining whether the grantor was a substantial contributor, and therefore a disqualified person, the contribution would not be attributable to the Dowds. Assuming that the Dowds were not disqualified persons for some other reason (and given the government-affiliated nature of the Trust, it is doubtful that the Dowds were substantial contributors, board members, officers, etc.) being owner of land servient to a Trust-held conservation easement does not by itself make them disqualified persons. Furthermore, as the Dowds were not the contributors of the Meadowood Easement and did not, therefore, claim a tax deduction with respect to the contribution, they will not be subject to the tax benefit rule.[206]

The only potential penalty under existing common or statutory law would appear to be the potential for revocation of the Trust's exempt status. However, as the Trust is a government-affiliated organization, even if this extraordinary remedy were to be used by the IRS, it is unlikely to be of significant consequence to Johnson County which can always create and fund an equivalent organization. Furthermore, the requirement for disclosure of easement terminations and modifications on Form 990 did not apply to the year in which the Trust terminated the Easement and, because the Trust is exempt from filing Form 990 as a government-affiliated organization, even if the requirement did apply in the year of the termination, it would not apply to the Trust. Therefore, except for the notoriety of the *Hicks* case itself, there is no reason why the IRS would learn of the termination of the Meadowood Easement.

For the foregoing reasons it does not appear that, under the existing common law or statutory rules applicable to conservation easements, there is likely to be **any** consequence seriously adverse to either the County or the landowner as a result of the termination of the Meadowood Easement. Assuming that the termination of the Meadowood Easement was improper, there is no penalty for the action, no deterrence to similar actions by the Trust or the County in the future, and no disincentive to others. Such results lend considerable weight to the argument that there is a need for the application of the doctrine of *cy pres,* or some other mechanism of public oversight, for a discussion of some legislative and administrative alternatives to *cy pres*), for conservation easement terminations.

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[206] Nash v. U.S., 398 U.S. 1, 3 (1970). Because the Lowham Partnership did not enjoy the benefit of the easement release, it is not subject to this rule either.

B. Application of the Doctrine of Cy Pres

Now let us consider how the doctrine of *cy pres* would affect the termination of the Meadowood Easement. There are two important threshold issues before actual application of *cy pres* can occur: the court must determine that a charitable trust exists, which depends upon the intention of the putative settlor; second, someone with standing must bring an action to enforce the charitable trust.

Considering the standing issue first; granted that the doctrine of *cy pres* may expand standing rather significantly over that existing with respect to enforcement of a traditional easement, it is still problematic, as discovered by Mr. Hicks, the plaintiff in the *Hicks* case. In principle, the issue of whether or not a charitable trust was created seems more of a challenge with respect to conservation easements. A court must find a clear intention on the part of the grantor of a conservation easement (the "settlor" of the charitable trust, if there is any) to create a trust. A charitable trust depends upon the existence of a contribution from the settlor to another person who agrees to hold that contribution for the benefit of one or more other persons. If, instead of contributing a conservation easement, the settlor had given land outright to a land trust, with restrictions on the future use of that land, the first condition to finding creation of a charitable trust would exist: a restricted gift. However, the donor of a conservation easement merely grants a land trust the right to enforce restrictions on the future use of land, not a fee interest subject to restrictions. The restrictions themselves are the gift.

> For a charitable trust to arise with respect to donated property, including conservation easements, the gift of property must be 'restricted.' [Citation omitted.] *Therefore, if a gift of a conservation easement does not constitute a restricted gift of a partial interest in real property, a charitable trust does not arise, either explicitly or as a matter of law.* In such circumstances, there is no legal justification for grafting charitable trust common law principles on to conservation easements created pursuant to statute.[207]

A large part of the problem of determining whether the contribution of a conservation easement constitutes the creation of a charitable trust goes back to the elusive nature of a conservation easement itself. It is not property that can, in any normal sense of the word, be "used." Therefore, the notion of restricting the use of a conservation easement, i.e. restricting the use of a restriction, seems perverse. However, a conservation easement certainly represents a right held by a land trust. Clearly, the grantor of that right, or set of rights, intends that the rights

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[207] Andrew Dana, *Conservation Easements: A View from the Field*, p. 7, published by the Land Trust Alliance on LTA Net.org (http://www.ltanet.org/objects/view.acs?object_id=18640) (2006) (emphasis in original).

be used in a certain way (i.e. according to the typically elaborate provisions of the easement document) and for the benefit of the public (if any intent to gain tax benefits is part of the donor's motivation). Following this line of thinking, a court could find that a conservation easement is granted subject to the "restriction" that the terms of the easement be enforced in perpetuity for the benefit of the public. This would seem to be the essence of the requirements of the Code for deductible easements and consistent with the terms of most easements. Such intent also constitutes the essence of what it takes to create a charitable trust. Of course, these "restrictions" are not imposed on the donation unilaterally by the donor. They are required by federal tax law. Accordingly, one can argue about whether the donor really made a classic restricted charitable gift, imposing the donor's own preferences and restrictions on the land trust, or whether the donor simply sought to follow the requirements of the tax code to be eligible to claim a charitable donation.

If these threshold issues can be successfully addressed, application of the doctrine of *cy pres* itself involves three steps.[208] The first step involves a judicial determination that the conservation purposes of the conservation easement are unlawful, impractical, or impossible due to unforeseen changed conditions.[209]

In *Hicks*, the unforeseen circumstance was coalbed methane development. Arguably, based upon the geological report prepared for the Lowham Partnership indicating that "the probability of mining on the property was so remote as to be negligible"[210] coalbed methane development was unforeseeable despite the fact that minerals were owned separately from the surface at the time that the Meadowood Easement was conveyed.

Whether coalbed methane development rendered the conservation purposes "unlawful, impractical, impossible, or wasteful" is less clear. The "Purpose" defined in the Meadowood Easement was to: "preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch."[211] Coalbed methane development certainly doesn't render the conservation purposes of the Easement unlawful. It also would not appear that such development makes the conservation purposes wasteful.[212] Whether coalbed methane made achieving the purpose of the Meadowood Easement impractical or

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[208] McLaughlin, *supra* note 7, at 464. The three-stop process described above is an adaptation of McLaughlin's.

[209] *See supra* note 193 and accompanying text.

[210] Brief of Appellees Dowd at 7, Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007).

[211] Meadowood Easement, ¶ 1, p. 2.

[212] This raises an interesting question. If the Meadowood Easement were able to prevent coalbed methane development on the Ranch, and that development was determined to be highly valuable economically, could a court, applying the doctrine of *cy pres*, determine that the purpose of the Meadowood Easement to keep the land open was "wasteful" and therefore a ground upon which the easement could be terminated, or at least modified to allow the development? These kinds of questions are the kinds that make application of *cy pres* both intriguing and unsettling.

impossible would require a substantial and complicated factual inquiry into the nature, extent, duration and likelihood of such development. Arguably, many of the conservation purposes, e.g. protection of the agricultural and habitat uses of the Ranch, could still be achieved in spite of coalbed methane development. A good argument could be made that termination of the Meadowood Easement so early in the development process was premature as it would be impossible, with just over one acre of land disturbed by such development,[213] to ascertain the true extent or permanence of damage to the values which it is the purpose of the Easement to protect.[214]

The question of impossibility or impracticality will be determined as a function of how a court weighs the conflicting variables involved. The district court had several alternatives under *cy pres*. It could have determined that coalbed methane did not make impossible or impractical the conservation purposes of the Meadowood Easement and set aside the termination. The district court could have determined that coalbed methane development made impossible enforcement of the Meadowood Easement's prohibition against mining and mineral extraction[215] and simply directed modification of the Easement to remove that specific prohibition.[216] Or, the district court could have determined that the conservation purposes of the Meadowood Easement could no longer be achieved and uphold the termination. The Meadowood Easement also contained the standard "severance" clause (paragraph 12(b)) allowing valid portions of the Easement to stand while others could be invalidated. This provision also provided the parties and the court an alternative to the termination of the entire interest. If the district court determined that the conservation purposes of the Meadowood Easement had become impossible or impractical due to coalbed methane development its next step under the doctrine would be to determine whether or not the contributor of the Meadowood Easement, the Lowham Partnership, had a "general charitable intent" in conveying the Easement, or a limited or specific intent.[217]

As noted *supra* courts are reluctant to find a lack of general charitable intent in determining whether or not to apply *cy pres*. The UTC, applicable in Wyoming, provides that unless expressly stated to the contrary, a general charitable intent will

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[213] Affidavit of Kenneth M. Quinn, *supra* note 31, at page 4. The affidavit also states that the area disturbed was 0.79 acres.

[214] As noted *id*, at the time of the release of the Meadowood Easement around one acre of the Ranch had been disturbed by coalbed methane development.

[215] Meadowood Easement, ¶ 5(d), p. 6.

[216] Such an action would be so narrow in scope as to belie the argument that coalbed methane development made impossible or impractical achieving the conservation purposes, in which case *cy pres* would appear to have no application. However, the parallel doctrine of administrative deviation, *supra* note 191, could apply for the narrow purpose of eliminating a prohibition that could no longer be administered (although, the mineral rights having been severed prior to conveyance the Meadowood Easement, that provision could never have been administered).

[217] *Supra* note 161, and accompanying text.

be implied in the creation of any charitable trust.[218] Finally, when a landowner contributes a conservation easement pursuant to the requirements of the Code, he or she must include a provision in the easement that insures that, in the event that the easement is terminated for any reason in the future, the holder of the easement is entitled to a percentage of the sales proceeds of the underlying property equal to the value of the easement.[219] Unless state law provides otherwise (which it does not in Wyoming), these proceeds are required to be used in a manner "consistent with the conservation purposes" of the easement.[220] This provides a fairly solid basis for finding that the contribution of a conservation easement evidences a "general charitable intent" on the part of the donor. Here again, however, it may be argued that the donor only intended to comply with federal tax law in order to obtain a charitable deduction, rather than having the broader charitable intent necessary to create a trust.

Assuming that the district court found a general charitable intent, coupled with its determination that coalbed methane development made impossible or impractical achieving the purposes of the Meadowood Easement, the district court could apply *cy pres* to either modify the Meadowood Easement so that it continued to serve a conservation purpose, or the district court could authorize sale of the Ranch and direct that the portion of the proceeds attributable to the Meadowood Easement, calculated as required in the Easement, be turned over to the Trust for use consistent with the purposes of the Easement, as provided for therein.[221]

The number of variables involved in the *Hicks* case (the multiple and comprehensive conservation purposes of the Meadowood Easement; the extent and character of the Ranch itself; the relatively speculative impact of coal bed methane development on the Ranch and conservation values protected by the Meadowood Easement), and the extensive discretion of the district court in the application of *cy pres* to those variables, makes the results of the application of *cy pres* to the *Hicks* case unpredictable. However, it is clear that *cy pres* provides remedies that do not exist under existing common and statutory law, given the particular facts of the case that preclude application of these common and statutory law remedies.

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[218] UTC § 405(b), WYO. STAT. ANN. § 4-10-406(b) (2007).

[219] 26 C.F.R. § 1.170A-14(g)(6)(ii) (2007).

[220] 26 C.F.R. § 1.170A-14(g)(6)(i) (2007).

[221] Presumably, the district court would be guided, if not bound, by the contractual agreement of the parties to the Meadowood Easement with respect to the use of proceeds in the event the Meadowood Easement is terminated and the Ranch sold, as required by the Code. This raises the question of what happens if the owner of the land servient to the easement does not chose to sell that land. Could a court enforce a partition of the land between the servient parcel and the easement by requiring a sale and division of the proceeds, or would it impose a constructive trust on the land as requested in the *Hicks* case?

VI. The Need for New Remedies

The central question raised by the *Hicks* case, and the prospect of future improper easement terminations and modifications, is whether an additional tool, such as the doctrine of *cy pres*, is needed. *Hicks* is a case where the application of *cy pres* could have made a difference. Given the outstanding invitation by the Wyoming Supreme Court to the Attorney General, it still may play a role, however unpredictable a role it may be.

However, certain facts of the *Hicks* case make it less than an ideal example for testing the efficacy of existing common law and statutory remedies in discouraging improper easement termination or modification. First, the *Hicks* case involved an easement held by a government-affiliated land trust. That close affiliation is underscored by the County Board's occasional failure to recognize the Trust as an independent entity.[222] Second, the Dowds were not the original grantors of the Meadowood Easement. Third, the Dowds do not appear to be "disqualified persons," so that the conveyance of the One-Acre Tract and termination of the Meadowood Easement do not invoke the prohibition against "excess benefit transactions." For these reasons, the significant disincentives to improper easement termination or modification under existing common and statutory law were largely irrelevant.

Had the holder of the Meadowood Easement been a private land trust dependent upon direct public support, managed by people whose primary purpose was land conservation, and whose existence depended upon its continued exempt status, as is typically the case of private land trusts; had the Dowds been "disqualified persons" making the transaction an "excess benefit transaction" in which the beneficiary of the transaction was potentially liable for the "correction" of the transaction and payment of a 25% excise tax on the excess benefit as well as the possibility of, in effect, returning the tax benefits received as a result of the easement deduction, the outcome of the termination would likely be quite different.

Thus, in a case where improper easement termination or modification constitutes an "excess benefit transaction" it is likely that the existing tax penalties are both adequate and compelling remedies and disincentives to improper actions. Furthermore, where the easement holder is a private land trust required to report easement termination and modifications annually to the IRS on Form 990, and

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[222] There seemed to be confusion as to who exactly held the Meadowood Easement. The Easement was granted directly to the Board in 1993. In 1997 the Board conveyed the Easement to the Trust. In 2002 the Board, in Resolution 245, acknowledged receipt of the Easement and One-Acre Tract but failed to note the conveyance to the Trust. The Resolution authorized the Board, not the Trust (although it technically held the Easement), to convey the One-Acre Tract and release the Easement to the Dowds, in exchange for the Dowds agreement to indemnify and hold-harmless the Board and County from liability for these actions.

heavily dependent upon its exempt status and the goodwill of its contributors for its continued existence, improper easement termination or modification raises risks that should deter all but the most clueless land trusts from such activity.

Assuming knowledge[223] of these very real consequences on the part of land trusts and owners of land servient to conservation easements; given the heightened scrutiny of easement transactions by the IRS;[224] and given the dearth of evidence of improper easement termination or modification to date, there is every reason to believe that the existing penalties for improper easement termination or modification will prove sufficient deterrents to improper actions in the kinds of cases to which they apply: private land trusts dealing with disqualified persons. This covers a vast number of conservation easements in the United States.

Given the intensive educational efforts directed at private land trusts; the dearth of evidence of improper easement terminations or modifications; the new reporting requirements imposed on private land trusts by Form 990; and the dramatically increased scrutiny of the IRS, it would seem premature, at best, to encourage across-the-board application of the doctrine of *cy pres* to conservation easements. This is not to say that *cy pres* might not be an appropriate remedy in certain cases, including *Hicks*; provided that it can be applied without opening up the entire field of conservation easement administration to *cy pres*. However, before introducing the *cy pres* doctrine the field of property law that is the foundation of conservation easements, careful consideration of some of the short-comings of *cy pres* in the context of conservation easements should be considered.[225]

As discussed, *supra* at notes 171–90 (and accompanying text), application of the doctrine of *cy pres* to conservation easements is likely to have the following consequences: (1) It will eliminate the discretion of land trusts to terminate or modify easements; (2) it may significantly expand the number and types of persons who may intervene in decisions to modify or terminate easements; (3) it will

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[223] Knowledge of consequences is the key to compliance. Education of land trusts and landowners is, therefore, a crucial element in preventing improper easement termination and modification. The national effort being mounted by the Land Trust Alliance, and others, to insure that private land trusts are aware of the consequences of improper easement termination and modification, and to establish a national certification program for land trusts, will play an important role in making the consequences of improper easement termination or modification effective.

[224] The IRS reports having over 500 conservation easements under audit, or pre-audit, and most of the land trusts in Colorado are themselves being audited due to the Colorado tax credit.

[225] These shortcomings have been addressed by one of the chief proponents of application of the doctrine of *cy pres* who has devoted considerable thought to mitigating these shortcomings; McLaughlin, *supra* note 7. However, the kinds of analysis, balancing of factors, and insight required by McLaughlin's suggested mitigations assumes a judiciary far more knowledgeable, patient, and sympathetic to nuance, and with substantial time to devote to application of the doctrine, than is likely to be the case. As an academic matter it is certainly possible to think one's way around the logical pitfalls of application of the doctrine. However, the reality is that these pitfalls are far more likely to be fallen into than avoided in the actual application of the doctrine.

significantly constrain the circumstances in which easements may be terminated or modified, and dramatically reduce the types of modifications that can be considered; and (4) it will significantly increase the time, resources, and money that must be invested in undertaking easement terminations or modifications by land trusts, landowners, and courts.

Addressing these consequences in order:

(1) Application of *cy pres* to conservation easements does not simply create a new remedy for correcting improper easement terminations or modifications; it imposes an entire new process on the administration of conservation easements, whether that administration is improper or not. **Every** modification and termination will be subject to the process because no termination or modification that has not been judicially sanctioned will be valid.

It has been suggested that the right to undertake proper easement modifications (and presumably terminations) should be considered to be "implied" in the easement itself.[226] However, if *cy pres* is applied to conservation easements, it requires a significant leap of faith to assume that the application will be so discriminating as to imply authority for certain types of amendments, but not others. Furthermore, whether or not authority is "implied" for certain modifications, for example, is unlikely to be so crystal clear that either landowners or land trusts can simply assume that such authority is implied, particularly given the cast of characters granted standing by the doctrine to second-guess their assumptions. Once the application of *cy pres* to conservation easements becomes accepted, it would be reasonable to assume that mere "due diligence" would strongly suggest judicial review of every significant easement modification of whatever nature, and every termination.

It is overly sanguine to assume that imposition of this new burden on easement modifications, at least, will not discourage landowners from contributing conservation easements in the future. While it is unlikely that most easement donors make the contribution assuming that some day they will need to terminate the easement, it is unrealistic to assume that they believe they have created the perfect document that will not require revision with experience.

Most conservation easement donors understand that they must give up the unilateral right to revise a conservation easement in order for the contribution of the easement to qualify for a tax deduction. However, it has been reasonable for landowners to assume that reasonable requests for easement modification will be favorably considered by land trusts, and that land trusts have the authority to make such modifications. The assumption is given foundation by the LTA's own *Standards and Practices* manual which provides guidance to the nation's land trusts

[226] McLaughlin, *supra* note 195, at 1075.

with respect to easement amendments, and the Tax Court case of *Strasburg v. C.I.R.* (T.C. Memo. 2000-94 (2000)) in which that Court recognized an easement amendment which added land to an existing easement.

It is unreasonable to assume that landowners will take the same comfort from application of a doctrine that says that only if the purpose of their conservation easement has become impractical or impossible to accomplish can a modification be considered and then only through a judicial process that may involve participation by the attorney general, former land trust board members and the original easement donor, for example.

(2) Assuming that opening up standing to "enforce" a conservation easement to the attorney general, as well as others, is a positive change fails to recognize that such persons may argue **for** the termination or modification of a conservation easement, not just **against** such termination or modification. What is to prevent a development-minded attorney general from filing suit seeking to apply *cy pres* to terminate an easement in a case where a developer seeks to construct, say, a new shopping center on easement land that the developer argues will strengthen the tax base and reduce unemployment?[227] What is to prevent a judge, whose background is in commercial real estate law, from agreeing with the attorney general (and likely the owner of the land servient to the easement) that continuing to enforce the easement constitutes a "waste" that justifies termination of the easement under *cy pres*; or that the increased value of the easement property for the shopping center represents a "changed circumstance" making accomplishment of the purposes of the easement "impractical?" What is to keep the judge from agreeing that the value of the easement, in such a case, is based upon the agricultural value of the land, instead of its development value, therefore allowing only a pittance of compensation to go to the land trust?[228] In such cases application of *cy pres* could actually undermine the integrity of conservation easements.

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[227] *See* Dana, *supra* note 147, at 20 (Many state attorney general offices have far higher priorities than overseeing conservation easements, and many do not have staff sufficient to represent the interest of the public in such proceedings. One state attorney general asked the author why it was safe to assume that an attorney general would necessarily be favorably inclined to land protection and not actively opposed in a *cy pres* proceeding and why, therefore, the precedent should be set in the first place.).

[228] *See* Dana, *supra* note 147, at 18, 20:

> The broad equitable powers of judges to amend conservation easements for widely divergent reasons in similar circumstances will not lead to predictability and stability in conservation easement amendment law. Instead, the result is more likely to be a patchwork of decisions based on each judges' predilections and preferences, or the parties' practical settlement of controversies before a judicial decision is reached. (Footnote omitted). The lack of predictability and reliability that is inherent to charitable trust proceedings may result in profound social demoralization costs, as the public, conservation easement donors, and easement holders find that conservation easement enforcement decisions turn on individual judges' idiosyncrasies, not on a set of clearly defined criteria that are designed to protect the interest of all parties.

While it has rightly been said that opening up standing to every citizen to bring a *cy pres* action would expose charities to "unnecessary litigation"[229] limiting standing to trust settlors, the attorney general, or qualified beneficiaries,[230] does not preclude "unnecessary litigation" and puts land trusts in the potential position of having to look over their shoulders for challenges from past board members, officers, easement contributors, and the attorney general, all of whom may have agendas disruptive to the proper administration of conservation easements.

(3) While it may be appropriate to limit easement terminations to cases in which the purposes of a conservation easement, due to unforeseen circumstances, have become impractical or impossible to accomplish,[231] such a limitation imposed upon easement modifications, unless the existence of "implied powers," *supra*, is assumed, could preclude many salutary and reasonable easement modifications, **even after a judicial review**, simply because the preconditions for the application of *cy pres* are absent.[232] Of course, under the guise of *cy pres* a court may assume authority to do a number of things, whether or not they are consistent with the theory of *cy pres*. Whether the flexibility thus derived from an equitable proceeding should be more a source of comfort than concern will be more dependent upon the judge assigned to the case than the theory of the doctrine itself.

(4) As anyone who has engaged in litigation of any complexity can testify, it is costly and time consuming. Imposing these costs on land trusts in the interest of preventing improper easement termination or modification, particularly given the dearth of evidence of such improper actions, is difficult to justify. Land trusts today are struggling to put together sufficient funds to enforce the conservation easements that they hold in case of violation. To impose substantial additional costs on the administration of easements will divert assets that may be needed for enforcement and normal protection and stewardship functions, again weakening, rather than strengthening, the integrity of conservation easements.

> By necessity, judges are generalists; they are not experts, for example, at understanding the diffuse benefits provided by ecosystem services, or wildlife habitat, or open-space land protection. Understanding foregone short-term economic opportunities (lost revenues, lost jobs, etc.) is much easier—and provides a more expeditious basis on which to make decisions—than understanding the value to society of protecting habitat for butterflies. Complicated, time-consuming arguments, based on extensive scientific testimony, that the purposes of a conservation easement *have not* become impossible or impracticable are unlikely to be well received by many judges, with crowded criminal and civil dockets.

[229] Chester, Bogert & Bogert, *supra* note 172.

[230] Hicks v. Dowd, 157 P.3d 914, 921-22 (Wyo. 2007). S*ee also* discussion at § B-2, *supra*.

[231] Which still leaves open the question of whether and when it is appropriate to terminate a conservation easement because its purpose has become "wasteful."

[232] One of the arguments for applying the doctrine of *cy pres* is to justify the "dead hand control" allegedly imposed on land use decisions by conservation easements. *See* McLaughlin, *supra* note 7, at 459. Ironically, application of *cy pres* to conservation easements, rather than making easements more flexible, may make them more rigid. *See,* Dana, *supra* note 147, at 23.

A land trust cannot avoid litigation costs simply by refusing to consider any easement terminations or modifications. With sufficient incentive any number of persons with standing under the doctrine could institute a *cy pres* proceeding to pursue a termination or modification. In such a case, the land trust could save money by simply declining to participate actively; although this would not be consistent with its obligation to enforce its easements or necessarily with the interests of conservation.

In considering litigation costs, it would be well to recognize that the doctrine of *cy pres* may represent a sword in the hands of landowners and developers, not just a shield for conservation interests. As the value of development potential tied up by conservation easements increases in the future, the incentive for landowners (and contract purchasers from landowners, who would also presumably stand in the shoes of the landowner for purposes of standing) to institute *cy pres* actions to modify or terminate conservation easements, will increase. In the hands of a well-financed legal team the doctrine of *cy pres* could be stood on its head and used equally well to obtain desired modifications or terminations as to prevent them. The mere cost of defending such suits may compel settlements that are not in the best interests of conservation.

For all of these reasons appropriating the doctrine of *cy pres* to conservation easements appears a risky proposition. Furthermore, the doctrine cannot reach (assuming its application remains limited to charitable contributions of easements) a great many conservation easements that are sold for fair value, are exacted as part of development approvals by localities, or conveyed as mitigation under state or federal laws. Such easements represent an increasing body of land conservation and the issues relating to the termination or modification of these easements are not significantly different from those relating to contributed easements.

VII. RECOMMENDATION

It is suggested here that, rather than grafting a body of law developed with respect to an entirely different type of transaction, the creation of a charitable trust, certain modifications be made to the existing law applicable to improper easement modification or termination more effective. Two such changes would go far to avoid the results seen in the *Hicks* case, and would extend current remedies to most conservation easement modifications and terminations, whether or not the easements were charitably contributed.

First, the definition of "disqualified persons" that currently restricts application of the prohibition against "excess benefit transactions" to "insiders" should be eliminated and the prohibition should be extended to anyone engaging in transactions resulting in either private inurement or private benefit. Given the current congressional focus on conservation easements, this revision of the law could be limited to transactions involving conservation easements.

Second, governmental agencies and government-affiliated agencies, at least with respect to conservation easements held by them, should be considered the same as any other "qualified organization" within the meaning of section 170(h)(3) of the Code for purposes of applying the excess benefit transaction prohibition, and penalties, or such agencies and affiliated organizations should no longer be considered "qualified organizations" for purposes holding conservation easements.

Making these changes will effectively provide remedies for the improper modification or termination of virtually all conservation easements, whether they were granted with charitable intent or not. This is because the excess benefit prohibitions would apply whether or not an easement was granted out of charitable motives.

The additional virtue of the two preceding suggestions is that these changes, once enacted, would automatically apply uniformly throughout the United States, whereas the doctrine of *cy pres* is a common law concept that must be developed and applied state-by-state with the possibility of little consistency or predictability. It will take many years for application of the doctrine of *cy pres* to make its way into the laws of most states, whereas revising application of the excess benefit prohibition can be done by an act of Congress (not guaranteed to be quicker, it is conceded).

VIII. Conclusion

It is conceded that current common and statutory law applicable to conservation easements does not provide a comprehensive response to improper easement terminations or modifications. However, it is the conclusion of this article that incorporating the doctrine of *cy pres* is an inappropriate response to what thus far has been so minor a problem as to be nearly theoretical. Under current circumstances, it makes sense to allow recent changes in reporting requirements for private land trusts and landowners to have time to take effect, and for the current vigorous efforts of the IRS to investigate easement transactions to have a chance to educate both the land trust community and the IRS. Furthermore, serious consideration should be given to expanding the reach of the prohibition against excess benefit transactions instead of extending the doctrine of *cy pres* to conservation easements. The penalties for violating that prohibition are compelling and directly address what will be the principal motivation for improper easement termination or modification in the future: financial gain. Finally, expanding an existing and effective penalty on improper transactions will be far less disruptive of the important and constructive relationship between land trusts and landowners, far less intrusive into proper easement administration, and far less likely to discourage future easement contributions, than injecting an entirely new and additional process into existing easement administration.

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REINSTATING WYOMING'S JOINT & SEVERAL LIABILITY PARADIGM: PROTECTING WYOMING'S WORKFORCE, THEIR FAMILIES AND THE WYOMING WORKER'S COMPENSATION FUND FROM UNCOMPENSATED INJURIES AND DEATHS

John R. Vincent and Jessica Rutzick***

Riverton sits within the exterior boundaries of the Wind River Indian Reservation. That places my law office in a unique situation. Depending on the specific facts of each case involving oil and gas field injuries, the outcomes of similarly situated clients can be vastly different depending on the location of where they sustained their injuries.

Riverton's unique geographic location leaves me filing personal injury suits under two different legal paradigms—Wyoming law and Tribal law. Justice in Fremont County may depend on where you get hurt. Inherent in my town's life is the fact that we all have close friends and/or family members who have been

*John R. Vincent, Creighton University, J.D. 1974; Montana State University B.A. 1971. Fremont County (Secretary-Treasurer, 1979–1980; President, 1980–1981), Nebraska State and American Bar Associations; Wyoming State Bar (Member: Insurance and Endorsements Committee, 1989–1990; Civil Pattern Jury Instruction Committee, 1990–1998; Chairman, 1992; Member, Legislative and Law Reform Committee, 2001 and 2002); Wind River Bar Association American Judicature Society; Wyoming Trial Lawyers Association (Member, Board of Directors, 1988–1994). Phi Alpha Delta. Listed in: Best Lawyers in America and Bar Register of Preeminent Lawyers. Executive Director of the Montana Coal Council, 1976. Member, Riverton City Council, 1979–1982. Member, Wyoming Indian Affairs Council, 1993–1995. Member, Board of Directors, Wyoming National Bank. Mayor, City of Riverton, 2003.

**Jessica Rutzick, University of Washington School of Law, J.D. 1996; University of Wisconsin, Madison, B.S. 1992. Board of Directors, Wyoming Trial Lawyers Association 2002–present; National Institute for Trial Advocacy College 2002; Wyoming, Minnesota and Idaho State Bar Associations.

gravely injured or killed working in oil and gas fields located on and off the Wind River Indian Reservation. Work related injuries on tribally owned minerals are much more likely to be adequately compensated, as compared to injuries on non-tribal leased land.

This is not an insignificant problem. Wyoming has the highest rate of work-place fatalities in the nation. According to Bruce Hinchey, president of the Petroleum Association of Wyoming, this dubious distinction does not surprise him. "You have to consider that most of the jobs that we're talking about are jobs in mining and the oil and gas sector in which there are a lot of heavy equipment, and different things associated with it," Hinchey said. "Other states with more manufacturing and tech jobs don't have that kind of risk."[1] Given the gargantuan wealth that oil field workers and miners have generated for this state, their employers, and big oil companies, it is surprising that our state laws make it all but impossible for them or their families to sue or to recover compensation for frightful and life-long workplace injuries and deaths. Wyoming's Workers' Compensation system also places the injured workman and his family at a significant disadvantage.[2]

The purpose of this article is to shed light on our current system, which does not adequately protect our workers;[3] and to propose the reinstatement of Wyoming's previous law, which would appropriately place the risk of terrible workplace injuries and deaths on the shoulders of those that *should* bear that risk—the oil and gas industry, and their large out-of-state insurers.

The following case histories are representative of the clients I have represented over the last twenty-five years:[4]

CASE HISTORY 1: MARY

This afternoon I met with a long-time neighbor and mother of two boys. Her oldest son was killed in an automobile accident three years ago. Mary came to me seeking help. Her youngest son, John, was killed while working for a drilling company as a roughneck in the oil fields and had provided significant financial support to Mary and his niece and nephew. John had not claimed either Mary or his niece and nephew as dependents on his income tax returns. Because Mary

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[1] Kathleen Miller, *Labor Union: Wyo. Has Highest Rate of Job Fatalities in U.S.,* CASPER STAR TRIBUNE, April 26, 2007.

[2] *See* George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Worker's Compensation Legislation, 1986-1997*, 33 LWLR 489 (1998).

[3] Dustin Bleizeffer, *Mining Industry Wants Immunity on Workplace Deaths*, CASPER STAR TRIBUNE, June 23, 2007; Casper Star Tribune Editorial, *Don't Immunize Mine Managers From Lawsuits*.

[4] These case histories are not actual clients, but serve as realistic and accurate examples of the joint and several legal paradigm.

worked at a convenience store and earned some income, she is unable to establish John provided substantially all of her financial support at the time he was killed on the rig. John's employer had entered into a drilling contract with a major oil and gas company. According to the terms of the contract, the drilling company was an "independent contractor."[5]

John was killed last month at work due to the negligence of a co-employee, commonly known as a "toolpusher," and a representative of the oil company, commonly known as a "company man." It was heart-wrenching for me to hear the heartbreak in Mary's voice, but much more saddening was to have to tell her that she will receive no justice for her son's death. Even though John died because of his employer's poor safety practices, she cannot sue his employer, the drilling company who entered the contract with the major oil and gas company to drill the well.[6]

Under Wyoming's Worker's Compensation system, neither she nor the children John was helping to support can receive the meager benefits otherwise available in a work-related death. That is because Wyoming's Worker's Compensation system only compensates spouses, parents who receive substantially all of their financial support from the deceased worker at the time of the worker's death, and dependent children.[7] Worker's Compensation benefits are not available to surviving parents

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[5] An independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work." Combined Ins. Co. of America v. Sinclair, 584 P.2d 1034, 1043 (Wyo.1978) (quoting Lichty v. Model Homes, 211 P.2d 958, 967 (Wyo.1949)).

[6] WYO. STAT. ANN. § 27-14-104 (2007) provides:

> Exclusive remedy as to employer; nonliability of co-employees; no relief from liability; rights as to delinquent or noncontributing employer. The rights and remedies provided in this act for an employee including any joint employee, and his dependents for injuries incurred in extrahazardous employments are in lieu of all other rights and remedies against any employer and any joint employer making contributions required by this act, or their employees acting within the scope of their employment unless the employees intentionally act to cause physical harm or injury to the injured employee, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

[7] WYO. STAT. ANN. § 27-14-403(d) (2007) provides:

> If an injured employee entitled to receive or receiving an award under paragraph (a)(ii), (iii) or (iv) of this section dies due to causes other than the work related injury, the balance of the award shall be paid:
>
> (i) To the surviving spouse;
>
> (ii) If there is no surviving spouse or if the spouse remarries or dies, the balance of the award shall be paid to the surviving dependent children of the employee. Each surviving dependent child shall receive a share of the award in the proportion that the number of months from the death or remarriage until the child attains the age of majority, or if the child is physically or mentally incapacitated until the child attains the age of twenty-one (21) years, bears to the total number of months until all children will attain these ages;

unless they receive substantially all of their financial support from their deceased child.[8] The only benefit Mary will receive is a $10,000 burial payment and a letter from the Governor saying the state is sorry about her son's death.[9]

Mary explained that the people that caused John's death were the drilling contractor's toolpusher and the operator's company man. I told Mary she cannot sue co-employees unless the co-employee "intentionally acted to cause physical harm or injury to the John."[10]

Even if Mary could seek compensation from John's co-employee, the insurance that may otherwise cover the co-employee's liability may not be available because intentional and expected activities are typically excluded from coverage.[11]These insurance companies will also argue they do not have to provide insurance coverage because John was killed at work by a fellow employee, which also precludes coverage.[12]

Mary also wanted to sue the oil and gas company for her economic damages resulting from John's death. Tears welled up in her eyes when I explained that was not a readily available option. According to Wyoming law, "the employer of an

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(iii) If there is no surviving spouse or if the spouse remarries or dies and there are no dependent children or the children have attained the age of majority or twenty-one (21) if physically or mentally incapacitated, or die, the balance of the award shall be paid to a surviving parent of the employee if the parent received substantially all of his financial support from the employee at the time of injury. If two (2) remaining parents of the employee who received substantially all of their financial support from the employee at the time of the injury survive the employee, the balance of the award shall be divided equally between the two (2) parents;

(iv) Payment of the award shall cease:

(A) If there is no surviving spouse, dependent children or dependent parents;

(B) Upon remarriage or death of a spouse and there are no dependent children or dependent parents;

(C) Upon the death of a dependent child as to payments to that child; and

(D) Upon the death of a dependent parent as to payments to that parent.

[8] *Id.*

[9] WYO. STAT. ANN. § 27-14-403(e) (2007).

[10] WYO. STAT. ANN. § 27-14-104 (2007).

[11] The Wyoming Supreme Court has defined "willful and wanton" misconduct as having essentially the same legal effect as the statutory language "intentionally act to cause physical harm or injury" found in Wyo. Stat. § 27-14-104(a). Willful and wanton misconduct is the *intentional* doing of an act, or an *intentional* failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another. *See,* Bertagnolli v. Louderback, 2003 WY 50, ¶ 15, 67 P.3d 627, 632 (Wyo. 2003).

[12] Whether this exclusion applies may depend on whether the policy has a "severability of interest clause." Barnette v. Hartford Ins. Group, 653 P.2d 1375 (Wyo. 1982); Page v. Mountain West Farm Bureau Mut. Ins. Co., 2 P.3d 506 (Wyo. 2000); Rodabaugh v. Continental Cas. Co., 62 F.3d 1429 (Table), 1995 WL 471082 (C.A.10 (Wyo.)) Unpublished Disposition.

independent contractor is not liable for physical harm caused to another by an act or omission of the alleged independent drilling contractor or his servants."[13] "Two limited exceptions to non-liability have been recognized [by the Wyoming Supreme Court]: (1) [if] a workplace owner/employer (operator) exercises a controlling and pervasive role over the independent contractor's work; or (2) [the] owner (operator) assumes affirmative safety duties."[14]

The first exception does not apply unless the owner/employer (operator) has the right to control the details of the work.[15]

> The owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract-including the right to inspect, the right to stop the work, the right to make suggestions or recommendations as to details of the work, the right to prescribe alterations or deviations in the work-without changing the relationship from that of owner and independent contractor or the duties arising from that relationship.[16]

The second exception is equally difficult to establish.[17]

Beginning in 1912,[18] our Supreme Court has been called upon to determine the factors indicating the status of independent contractors. In 1986 and 1987, the Court announced its decisions recognizing the two exceptions noted above.[19] Since then, with the exception of *Jones v. Chevron*,[20] the Supreme Court has refused to apply either exception. Following the Supreme Court's lead, Wyoming's federal court has changed its view announced in *Capellen v. Cooper Industries, Inc. et al.*

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[13] Hittel v. WOTCO, INC., 996 P.2d 673, 676 (Wyo. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 409 (1965)); Hill v. Pacific Power & Light Co., 765 P.2d 1348, 1349 (Wyo.1988); *see also*, Noonan v. Texaco, Inc., 713 P.2d 160, 164-67 (Wyo.1986).

[14] Franks v. Independent Production Co., Inc., 96 P.3d 484, 489 (Wyo. 2004); *see also*, *Hittel,* 996 P.2d at 676; Jones v. Chevron, 718 P.2d 890, 896 (Wyo.1986).

[15] *Noonan*, 713 P.2d at 164.

[16] *Id.* at 165; Stockwell v. Parker Drilling Co., Inc., 733 P.2d 1029, 1033; Ramsey v. Pacific Power & Light, 792 P.2d 1385, 1388 (Wyo. 1990); Cornelius v. Powder River Energy Corp., Inc., 2007 WY 30 ¶13, 152 P.3d 387, 391 (Wyo. 2007).

[17] *See, e.g.,* Abraham v. Andrews Trucking Co., 893 P.2d 1156, 1157-58 (Wyo. 1995); *Franks*, 96 P.3d at 491.

[18] Acme Cement Plaster Co. v. Westman, 122 P. 89 (Wyo. 1912).

[19] *Noonan,* 713 P.2d 160, 166; *Jones,* 718 P.2d 890, 893-94; Stockwell v. Parker Drilling Co., Inc., 733 P.2d 1029, 1033 (Wyo. 1987).

[20] *Jones*, 718 P.2d at 896.

and *Hull v. Chevron*.[21] Now both the Supreme Court and the federal court have rendered either exception, for all intents and purposes, meaningless.[22]

Since 1986, the Shoshone and Arapahoe Tribal Court located on the Wind River Indian Reservation at Ft. Washakie, Wyoming, has continued to adhere to the holding expressed in *Capellen* and the authorities relied upon in that opinion. That holding recognizes that a duty may be created if the operator retains the right to direct the manner of the independent contractor's performance or assumes affirmative safety duties. Additionally, the applicable federal oil and gas lease and relevant regulations create a duty on the part of the operator, which is owed to all employees, including the employees of an independent contractor.[23]

Wyoming's retreat from a system of law which provided an injured worker and his family with some modest method to obtain redress for his injuries or death has now resulted in virtual immunity for operator negligence and reckless disregard for the safety of Wyoming's citizens. This departure is now so complete that the district courts have rendered opinions in which they acknowledge the Supreme Court's disinclination to find operator liability. The district courts view this trend to be so conclusive that in a recent case decided in Fremont County, the district court noted:

> Well established Wyoming law provides that an operator, such as Ultra, is not obligated to protect the employees of an independent contract, such as Cyclone, from hazards that are incidental to or a part of the work the contractor was hired to perform. In essence, the operator owes no duty of care to the independent contractor's employees.
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> . . .
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> While it is clear that Wyoming oil and gas drilling industry can be a potentially dangerous line of work, it is equally clear that the Wyoming Supreme Court has repeatedly rejected efforts

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[21] Capellen v. Cooper Industries, Inc. *et al.*, U.S. District Court for the District of Wyoming, C88-0030J (federal regulation calling for lessee to have due regard for the health and safety of employees creates a duty on operator owed to all employees, including independent contractors); Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 589-90 (10th Cir. 1987).

[22] Dow v. Louisiana Land & Exploration Co., 77 F.3d 342, 344-45 (10th Cir. 1996); *Franks*, 96 P.3d at 490-91; *Cornelius*, 152 P.3d at 391; *Jones*, 718 P.2d at 895; Hjelle v. Mid-State Consultants, Inc., 394 F.3d 873, 877-79 (10th Cir. 2005); *Abraham*, 893 P.2d at 1157-58; *Hill*, 765 P.2d at 1348.

[23] Capellen v. Cooper Industries, Inc. *et al.*, U.S. District Court for the District of Wyoming, C88-0030J, Order on Motion for Summary Judgment (citing *Hull*, 812 F.2d at 589-90); Marathon Oil Co. v. Johnston, Court of Appeal of the Wind River Indian Reservation, Case No. AP-04-003, Judgment and Opinion of the Court of Appeals (April 6, 2006) (quoting *Jones*, 718 P.2d 890 (Wyo. 1986)).

> to hold operators liable in cases very similar to the facts of this case. While the Court is sympathetic to family of Mr. Fried and respects the efforts of their attorneys, the law is clear and this Court must follow it.[24]

In *Fried v. Ultra Resources, Inc.*, the terms of the day-work drilling contract provided unequivocally as follows:

> IN CONSIDERATION of the mutual promises, conditions and agreements herein contained, and the specifications and special conditions set forth in Exhibit "A" and Exhibit "B" attached hereto and made a part hereof (the "Contract"), *Operator engages Contractor as an independent contractor* to drill the hereinafter designated well or wells in search of oil or gas *on a Daywork Basis*. (emphasis supplied).
>
> For purposes hereof, the term "Daywork" or "Daywork Basis" means the *Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and control of Operator* (inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations). (emphasis supplied).

Moreover, Ultra had initiated its safety pay program in which it offered monetary payment to the contractor's employees based upon safe work practices and work longevity and referred to API recommended practices. Contractual terms are ordinarily accorded great significance in determining the parties' relationship. Thus, the notion that a conflict between unambiguous contract terms and conflicting witness testimony does not create a jury issue is, at best, troublesome.

The Wyoming Supreme Court's rule is so entrenched that the issue of fact between the unambiguous contract language and witness testimony was overlooked in order to permit entry of summary judgment holding the operator owed no duty of care to employees working on the operator's location. This flies in the face of well established law calling for the application of the parties' contract to determine their relationship.[25]

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[24] Fried v. Ultra Resources, Inc., Ninth Judicial District Civil Action No. 35045 (Nov. 5, 2007).

[25] "While it is true that a contract is not conclusive evidence of the status of the relationship between parties, it is a strong indication of the intended association." *Noonan,* 713 P.2d at 165.

Moreover, the district court would not allow a trial on the material questions of control, assumption of safety duties, and whether the operator had a duty of care described the API standards. These API standards have been recognized by the industry's experts as intended to protect the health and safety of both operator and contract employees. Nevertheless, the district court declined to adopt the API standards as an independent standard of care.

Pronouncements of the Wyoming Supreme Court under either exception have accordingly made it virtually impossible for an injured oil field worker or his family to prevail in a civil suit. These decisions are so one-sided that district courts will now abide by the Supreme Court's direction to effectively provide immunity for all oil company operators, no matter the facts and circumstances leading to the roughneck's death or injury.

Since 1986, most of the reported cases brought by employees of independent contractors against the oil companies were dismissed in summary judgment. This trend, in the guise of a Rule 56 proceeding, strikes at the heart of our constitutional right to a jury trial and the aversion to legislative or judicial immunity from suit.[26] This trend is based on the epitome of a legal fiction grounded in the belief that a workman or his family is justly compensated by our workers' compensation system for serious injury or death or that oil and gas operators who make billions of dollars drilling and operating oil and gas fields in our state do not control operations or the people working on their locations. We in Wyoming have created a legal fiction to provide the oil company operator immunity at the expense of our workers and our jury system.

The Shoshone and Arapahoe Tribal Court has refused to follow this misguided course. In the recent case of *Johnston v. Marathon*, the Shoshone and Arapahoe Tribal Court of Appeals upheld the notion that:

> If the work is done on the employer's own land, he will be required to exercise reasonable care to prevent activities or conditions which are dangerous to those outside of it or to those who enter it as invitees. In all of these cases, he is liable for his personal negligence, rather than that of the contractor.[27]

In Wyoming's court system, Mary and her two grandchildren will have to live on social security and food stamps now. Their future was eclipsed by the brilliant oil boom and Wyoming's disparate legal system.

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[26] WYO. CONST. art. I, § 9.

[27] Judgment and Opinion of the Court, Marathon Oil Co. v. Johnston, 33 ILR 6095 (2006) (quoting Jones v. Chevron U.S.A., Inc., 718 P.2d 890, 893-94 (Wyo. 1986)).

Had John been killed at work on an oil and gas lease owned by the Arapahoe or Shoshone Tribe, a completely different and more just result would be available to Mary and to John's niece and nephew. That is because the Shoshone and Arapahoe Tribal Law and Order Code still recognizes the common law rule of joint and several liability and contribution among joint tortfeasors.[28] While the wrongful death statute is the same in Tribal Court as in Wyoming,[29] Wyoming Worker's Compensation and independent contractor laws, combined with the repeal of joint and several liability, create an incongruity. Oil and gas development has progressed on the Wind River Reservation at the same pace as in the State of Wyoming. However, the Tribes' legal system has clearly not impeded mineral and economic development on the Reservation.

This article does not ask for any "new-fangled" laws. Rather, we are suggesting that the legislature reinstate Wyoming's joint and several liability and independent contractor laws that were in place prior to 1986. We are also suggesting legislative enactments which provide a real opportunity for injured workmen and their families to have a fair chance of redress in our court system.

The Shoshone and Arapahoe Tribal Law and Order Code is identical to Wyoming's previous statute pre-1986. While Wyoming's legislature fell prey to an onslaught of calls for tort reform, the Shoshone and Arapahoe Tribal Councils kept their Law and Order Code in tact and did not repeal either joint and several liability or contribution among joint tortfeasors. Over twenty years of experience with Wyoming's contributory fault statute and its Worker's Compensation scheme reveals that this current system is broken and the pre-1986 paradigm worked far better to protect Wyoming's workforce and Wyoming's Worker's Compensation Fund.

All agree that the benefits received under Wyoming's Worker's Compensation system are wholly inadequate.[30] As one journalist explained:

> Each state's legislature determines exactly how much immunity employers get, and courts weigh in, too. Utah's Legislature passed a law last year providing wider immunity for employers, for example. In Wyoming, for decades the Legislature has favored

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[28] Law and Order Code of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming, § 14-1-3 (1986).

[29] Law and Order Code, § Ch. 10; WYO. STAT. ANN. § 1-38-101 (2007).

[30] A prominent attorney who defends companies in personal injury suits stated the program does not come close to providing compensation that injured workers need. He recalled a worker who received only $16,000 for losing a leg and noted that a widow of a killed worker can expect only about $100,000. Dustin Bleizeffer, *Mining Industry Wants Immunity On Workplace Deaths*, CASPER STAR TRIBUNE, June 23, 2007.

> employers, but every so often the state Supreme Court pushes back a bit for the workers. Once in a while, lawyers get traction and win siz[e]able pots of money for victims and their families, but it happens rarely.[31]

Had John been killed on Tribal lands, those responsible for John's death would have to compensate Mary for this tremendous loss, such as his lost wages and the loss of John's care, comfort, and society. The outcome is significantly different under Wyoming's laws.

In Tribal court and under Wyoming's preceding system of joint and several liability and contribution, the imputed duty is a mixed question of fact and law. Thus, the jury is permitted to determine whether the mineral operator assumed affirmative safety duties, retained control over the work site, or deviated from industry standards.

Mary can sue the oil company for John's death. In that case, the oil company may seek contribution and/or indemnity from the contractor drilling company. Under this system, the oil company is at risk to justly compensate survivors of work-related injuries and deaths. After all, these workers are responsible for performing the dangerous work leading to production of valuable minerals for the oil and gas companies. The oil companies are in the best position to protect against and to absorb the terrible costs associated with workplace injuries and deaths.

Within the joint and several paradigm, the oil company may include other "actors" on the verdict form for the purpose of apportioning fault. However, so long as the defendant oil company's negligence is greater than the negligence attributed to John, Mary may recover the whole amount of the judgment (less John's share of the negligence) from the oil company. The oil company must then sue the contractor under the contribution act or under the indemnity provisions of the drilling contract, which typically contain such clauses. In this fashion, the oil company may recover any amount it pays in excess of its proportionate share of liability. Because Mary must pay the Worker's Compensation lien, she has not received a double recovery and the wrongdoers are required to pay for all damage suffered by Mary, not a sum awarded under the Worker's Compensation system, which all concur is grossly inadequate.

In Wyoming's current system, Mary cannot recover the percentage of fault that may be attributed to the drilling contractor because of the Worker's Compensation immunity law. Furthermore, the oil company is absolved from any liability or obligation to pay for that part of the judgment attributed to the

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[31] Ray Ring, *Disposable Workers of Oil and Gas Fields*, HIGH COUNTRY NEWS, April 2, 2007.

fault of the immune contractor. This means that this tremendous risk of injury and death is placed on the shoulders of Wyoming's working people rather than on the companies that reap huge profits from the oil and gas industry.

It has been observed that:

> Other aspects of state laws also appear to be rigged against accident victims and their families, making it all but impossible for them to sue even in the face of apparently extraordinary management negligence. At times, the industry and the whole government system treat tenaciously loyal workers as if they were as disposable as a broken drill bit. The victims' own character traits—from stoicism to lack of formal education to a tendency to use alcohol or drugs or both—often set them up to take the hit.[32]

Over the years this significant difference between the state and tribal systems has resulted in vastly disparate outcomes for my clients.

Consider the following verdict of $500,000, with John being found 10% at fault, the drilling subcontractor 40% and the oil company 50% at fault. In Tribal Court, Mary would receive $450,000, less the $10,000 repayable to the Wyoming Workers' Compensation Division for John's burial costs—$440,000 total before attorney's fees and costs. However, under Wyoming law, Mary would only receive $250,000—50% of the verdict which is attributable to the oil company's negligence.

The Wyoming Supreme Court has held that this outcome is justifiable because Worker's Compensation benefits are supposed to be available.[33] The rub is that the benefits are grossly insufficient *and* they are not equally available to survivors, depending only on the arbitrary familial circumstances of the killed employee. Despite the fact that Mary is not eligible for Worker's Compensation benefits covering John's life, she will nevertheless be obligated to repay the $10,000 burial benefit in full to the Wyoming Worker's Compensation Division, leaving her with a recovery of $240,000 in state court. Thus, neither Mary nor John's niece and nephew will be compensated by Worker's Compensation at all. This illogical outcome is not justifiable under this rationale. After accounting for attorney's fees and costs, Mary will be left with a fraction of what she would recover in Tribal Court.

Adding insult to injury is the fact that insurance companies for the drilling and oil companies, may offer to settle under W.R.C.P. 68 for a pittance thereby

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[32] *See* Ring, *supra* note 31, at 9.

[33] *See, e.g., Franks,* 93 P.3d at 495.

threatening Mary's lawyer and Mary for recovery of the costs and attorney's fees if the case is dismissed in summary judgment or they don't recover that offer at trial.

	Gross Verdict	Recovery From Oil & Gas Co.	Recovery From Contractor	Worker's Comp. Division Benefits Paid	W.C. Reimbursement	Mary's Net Recovery (before atty fees and costs)
Tribal Court	$500,000	$450,000	$0	$10,000	$10,000	$440,000
WY State Court	$500,000	$250,000	$0	$10,000	$10,000	$240,000

CASE STUDY #2: MELISSA

Talking to Mary about this capricious outcome, I am reminded of another client who lost her husband to the oil fields. This client, Melissa, had three young children and a husband, who was earning $80,000 a year as a driller, with hope of becoming a drilling superintendent for one of Wyoming's many successful drilling companies. Melissa's husband, Eric, was killed on a rig 100 miles from their home. At the time of his death, Eric was thirty-eight years old and had a bright future in the oil and gas industry. Melissa was a stay-at-home mother.

Melissa received $130,000 for Eric's death from the Worker's Compensation system, payable at the rate of two-thirds of the statewide average monthly wage, over a period of five years,[34] even though an economist calculated Eric's future earning potential at a present value of $600,000. As of October 2007, two-thirds of the average statewide monthly wage is $2,108.00.[35]

Assuming Melissa received a verdict in the amount of $600,000, the ultimate recovery for both Melissa and the Worker's Compensation Fund would be vastly different, depending on which court issued the verdict. Eric was ten percent at fault, his employer was forty percent, and the oil and gas company was fifty percent at fault.

In Tribal Court, Melissa would receive ninety percent or $540,000. She would have to reimburse the Wyoming Worker's Compensation Division in full—$130,000.[36] The oil company would collect the subcontractor's forty percent through its indemnity provision or the contribution law.

[34] "For those employees whose actual monthly earnings are greater than or equal to the statewide average monthly wage, the award shall be two-thirds (2/3) of the employee's actual monthly earnings, but the award shall be capped at and shall not exceed the statewide average monthly wage." WYO. STAT. ANN. § 27-14-403(c)(iii) (2007).

[35] State of Wyoming Department of Employment, Statewide Average Monthly Wage Table, http://wydoe.state.wy.us/doe (2007).

[36] WYO. STAT. ANN. § 27-14-105(a) (2007).

In Wyoming court, under the existing comparative fault statute, Melissa's gross recovery would only be $300,000, representing just the oil company's fifty percent share of the negligence. Melissa has to reimburse the Worker's Compensation Division one-third of her gross recovery, or $100,000.[37] Melissa would receive $200,000 and the Worker's Compensation Division is not fully reimbursed the full $130,000 of benefits.

Notably, the funds Wyoming recovers are achieved *only* because of the risk Melissa and her attorney took in bringing suit. Yet the Worker's Compensation Division does not fully recognize that Melissa incurred attorney's fees and costs to recover the funds on its behalf. The Division's current policy forces Melissa to bear this cost individually for the benefit of the State's fund. This is the case even though the Division is authorized by statute to accept less than the State's claim for reimbursement. The current policy is to permit only a seven percent reduction in the lien amount to reflect the cost and expenses Melissa and her attorney incurred to recover money for the State of Wyoming.[38] The State's refusal to employ the prior policy to reduce the lien by one-third to reflect Mary's attorney's fees and costs is more troubling when one considers that the State of Wyoming has several statutory vehicles enabling it to sue those who cause employee injuries for reimbursement of the wage and medical benefits the State provides.[39]

Even more disturbing to Melissa is that the ultimate beneficiary of the recovery of the $100,000 to the Division is the drilling contractor itself because the company's rating is improved when their Worker's Compensation account is reimbursed.[40]

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[37] WYO. STAT. ANN. § 27-14-105(a) (2007).

[38] WYO. STAT. ANN. § 27-14-105(b) provides in pertinent part:

> If there is a settlement, compromise or release entered into by the parties in claims against a person other than the employer, the attorney general representing the director shall be made a party in all such negotiations for settlement, compromise or release. The attorney general and the director, for purposes of facilitating compromise and settlement, may in a proper case authorize acceptance by the state of less than the state's claim for reimbursement. The proceeds of any judgment, settlement, compromise or release are encumbered by a continuing lien in favor of the state to the extent of the total amount of the state's claim for reimbursement under this section and for all current and future benefits under this act. The lien shall remain in effect until the state is paid. . . .

[39] WYO. STAT. ANN. § 27-14-105(b), (c), (e), (g) (2007).

[40] WYO. STAT. ANN. § 27-14-105(a) (2007).

	Gross Verdict	Recovery From Oil & Gas Co.	Recovery From Contractor	Worker's Comp. Division Benefits Paid	W.C. Reimbursement	Melissa's Net Recovery (before atty fees and costs)
Tribal Court Remedy	$600,000	$540,000	$0	$130,000	$130,000	$410,000
WY State Court Remedy	$600,000	$300,000	$0	$130,000	$100,000	$200,000

In Wyoming, a single parent needs to earn almost three times the minimum wage just to provide the basic necessities for herself and her children. In 2002, the most recent year for which this data is available, child care expenditures alone for employed mothers with child care costs average $412 per month.[41] Thus, Melissa would need to earn at the very least a living wage of $2,472 per month, or $15.45 per hour per forty-hour work week. The average annual earnings for women across the State are $21,217. (Compare that to the average annual wage for men as $38,393).[42]

Melissa will have a fraction of the net $200,000 after the costs incurred in bringing suit. This paltry amount of funds will do little to keep Melissa above poverty level. Unless Melissa can secure a job earning over $2,500 per month, her family will exist at the poverty level. Unfortunately, there are very few job opportunities for Wyoming women to earn this amount of money.[43]

CASE HISTORY #3: JIM

This disparity is equally obvious in cases of serious injury, not just workplace deaths. In another of my cases, my client, Jim, was severely injured in an explosion on a drilling rig. Jim was blown from the rig floor when fluids escaping from the well bore ignited and exploded. He suffered life-long debilitating injuries caused by embedded hydrogen sulfide gas and blunt force trauma to many areas of his body including his back, legs, and abdomen.

Jim's medical expenses totaled $300,000 and he was totally disabled. Wyoming Worker's Compensation Division paid Jim's medical expenses and provided total permanent disability benefits of $130,000. Jim was forty-five years old with two

[41] Dona Playton & Stacey L. Obrecht, *High Times in Wyoming: Reflecting the State's Values by Eliminating Barriers and Creating Opportunities for Women in the Equality State*, 7 WYOMING L. REV. 295 (2007).

[42] Sylvia D. Jones, *Wyoming Labor Force Trends*, The Wyoming Department of Employment, Research and Planning, Vol. 44 No. 4 (2007).

[43] *See* Playton & Obrecht, *supra* note 41, at 13.

college-age children. His wife works as a teacher's aid and earns $15,000 per year. The expert economist considered Jim's income of $110,000 per year and concluded that the present value of his economic losses was $2,000,000 plus the past and future medical expenses. Once again, assume Jim was ten percent at fault, the toolpusher forty percent, and the company man fifty percent at fault for Jim's injuries.

In Tribal court, Jim received a verdict of $1,000,000. He received the full amount of the verdict from the oil company less ten percent, or $900,000. Although the Worker's Compensation Statute permits a larger reduction, the Division will only reduce its lien by seven percent. Thus, Jim will have to reimburse Worker's Compensation Division $430,000 reduced by seven percent, leaving him with a recovery (before attorneys fees and costs) of $500,100.[44]

In Wyoming state court, under the same circumstances, Jim would only receive a gross recovery of $500,000. He would then have to reimburse Worker's Compensation in the amount of $166,666, less seven percent, or $155,500. Jim's recovery, before attorney's fees and costs, would be $154,999. In other words, a difference of over $155,000.

The average price of existing housing in Wyoming has risen to over $130,000 and the average monthly rent for a two bedroom dwelling exceeds $520 per month.[45] The difference between the recoveries in State and Tribal courts reflects the cost of a modest home in which Jim could live and modify to accommodate his disability.

	Gross Verdict	**Recovery From Oil & Gas Co.**	**Recovery From Contractor**	**Worker's Comp. Division Benefits Paid**	**W.C. Reimbursement**	**Jim's Net Recovery (before atty fees and costs)**
Tribal Court Remedy	$1,000,000	$900,000	$0	$430,000	$430,000	$500,100
WY State Court Remedy	$1,000,000	$500,000	$0	$430,000	$155,500	$344,500

In Wyoming we have long recognized the need to treat our neighbors fairly. We appreciate the wonderful opportunities the oil and gas industry has provided to our children and our communities. We have also recognized that these opportunities are not free.

[44] $399,900 is paid to the Worker's Compensation Fund.

[45] *See* Playton & Obrecht, *supra* note 41, at 13.

With the latest oil and gas boom, Wyoming passed a version of the surface owner accommodation act to mitigate against the harsh effects of the mineral dominant estate theory. The legislature amended the law of eminent domain to put surface estate owners (farmers, ranchers, and other private property owners) on a more even playing field in disputes with oil companies over pipeline and road easements. Wyoming has taken steps to protect its incredible natural resources, such as the Wyoming Range, from further oil and gas development. We even protect bears, wolves, deer, sage grouse, and other wildlife from harm arising from oil and gas development. The legislature has provided additional funding to the eight counties most impacted by oil and gas activities and the State has gone to great lengths to provide equal educational opportunities to our children.

CONCLUSION

It is time now to follow the lead of our neighbors on the Wind River Indian Reservation and our other Western neighbors, Montana, South Dakota, Texas, New Mexico, Alaska, and Nebraska, as well as over half of the states in the Union.[46] We must reinstate a system of laws that puts our injured Wyoming workers and their survivors on an equal playing field with the huge multinational oil and gas producers and insurance companies. It is time to reinstate the law of joint and several liability.

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[46] *See, e.g.,* NEB. REV. ST. § 25-21,185.10 (2006) (Nebraska); M.C.L.A. 600.2957 (1996) (Michigan); I.C.A. § 668.4 (1997) (Iowa); N. M. S. A. 1978, § 41-3-2 (1987) (New Mexico); C.G.S.A. § 52-572o (1984) (Connecticut); 735 ILCS 5/2-1117 (2003) (Illinois); N.H. REV. STAT. § 507:7-e (1990) (New Hampshire); West's RCWA 4.22.070 (1993) (Washington); V.A.M.S. 537.067 (2005) (Missouri); W.S.A. 895.045 (2006) (Wisconsin); MISS. CODE ANN. § 85-5-7 (2004) (Mississippi); McKinney's CPLR § 1602 (1986) (New York); SDCL § 15-8-1 (2007) (South Dakota); 14 M.R.S.A. § 156 (1999) (Maine); MCA 27-1-703 (2007) (Montana); other states with joint and several liability include Minnesota, Texas, Hawaii, Alaska, California, Pennsylvania, South Carolina, Arkansas, West Virginia, Massachusetts, Indiana, and North Carolina.

Comment

Wyoming's "Outlaw" Juvenile Justice Act

*Jeremy Kisling**

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I. Introduction

Consider the following situations: The first involves Ashley, a thirteen-year-old girl who went out one night with her friends. They vandalized a local museum, throwing paint on the walls of a restored historical building and breaking windows. Afterward, Ashley got in a fight. The police detained Ashley, and contacted her parents with a request they pick her up. She eventually went to juvenile court. During adjudication, the judge learned Ashley had been physically abused, diagnosed with clinical depression, and was rarely supervised by her parents. She had also been in trouble with the law before. The judge ordered Ashley to help clean up the damage to the museum and attend counseling and anger management classes through a local mental health agency. No fine was

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* Candidate for J.D., University of Wyoming, 2008. B.S. University of Wyoming 2005. I would like to my wife, Alicia, for all her encouragement and patience. I would also like to thank Bill Matonte for providing background information.

assessed and her actions are not available for public perusal. The state expended $100,000 in supervision, counseling and other support services for Ashley, and her family received therapeutic intervention to resolve family issues. Ashley was properly medicated and her anger problems were addressed. By the time she was eighteen years old, Ashley was enrolled in college. Because of the juvenile court's intervention, she functions as a productive member of society. Over her lifetime, Ashley's contributions to the state coffers by being educated and employed may offset the expenditures made toward her rehabilitation. This is particularly encouraging in light of the possibility that Ashley could have continued her criminal behavior as an adult, further draining the state's resources.

The last situation involves John, a fifteen-year-old attending high school in Wyoming. He received a ticket for stealing a key to one of the doors in the school. He signed the ticket promising to appear in court with a parent. Approximately one month later, John was called out of science class, placed in handcuffs, taken to the juvenile detention center in Casper, and deloused. When picking John up at the jail, his father learned John had been arrested on a bench warrant for failure to appear. Had his parents been aware of the mandatory appearance at the time John was cited, they would have assured his appearance in court. The municipal court heard John's case, fined him $160 and ordered him to perform thirty-two hours of community service. There was no effort to adjudicate him as a juvenile. Because he was tried in an adult court, his adoption and behavioral issues stemming from his pre-adoption childhood were not considered. He was given a punitive sentence which may not have been in the best interests of John or society.

What is the difference in the treatment of these juveniles under these hypothetical scenarios? Could the state have helped John? Did he need the same types of services that Ashley received? The answers are all yes, but Juvenile Justice does not work that way in Wyoming. The different outcomes are possible under the Wyoming Juvenile Justice Act since Wyoming often deals with juveniles in a manner similar to the way John was adjudicated.

This comment examines Wyoming's Juvenile Justice Act (Act), and explores one case that illuminates the failures, illegalities, and inconsistencies of the Act. *D.D. v. City of Casper, Wyo.* contains facts similar to those mentioned in the second scenario. A sixteen-year-old boy, D.D., was cited for stealing a key worth less than twenty dollars.[1] Approximately one month later he was pulled from his high

[1] Brief of Appellant at 2, D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A (Dec. 4, 2005). This case was tried in municipal court, and the actual name of the juvenile is in the decision letter. Out of respect for the parties and the comment author's belief that this case should have been adjudicated in a juvenile court, the initials D.D. have been used to protect the name of the individual.

school class, placed in handcuffs and taken to jail.[2] At the jail he was deloused and then his parents were notified of his arrest.[3]

In Wyoming, juveniles are split into two groups by the jurisdictional provisions in the Act.[4] Comprising one group are those who commit delinquent acts under the age of thirteen over which the juvenile courts have exclusive jurisdiction.[5] The other group is made up of juveniles ages thirteen to eighteen who commit delinquent acts over whom the juvenile court has concurrent jurisdiction.[6] The broad granting of concurrent jurisdiction in the Act that allows absolute prosecutorial discretion violates the due process and equal protection rights of Wyoming juveniles.[7] The majority of Wyoming juveniles in Natrona County never get the opportunity to appear in juvenile court where the rehabilitative nature would be extended to all of them.[8] D.D., a male youth tried in Natrona County Municipal Court, did not get this opportunity.[9]

Case law and statutes suggest juveniles have a right to be adjudicated in juvenile court.[10] By granting concurrent jurisdiction over juveniles ages thirteen to eighteen, the Act allows unchecked, absolute prosecutorial discretion to decide if a juvenile's case is heard in juvenile court.[11] Natrona County adjudicated ninety percent of juveniles as adults in 2004.[12] Under the Wyoming Rational Basis Test, broad granting of concurrent jurisdiction violates juveniles' constitutional rights to due process and equal protection.[13]

This is not a unique occurrence. According to the ruling in *D.D.* achieving judicial efficiency is the crux of the argument in support of this disparate treatment.[14] Investing state time and money in juveniles who commit minor

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[2] *Id.*

[3] Anthony Lane, *A Missing Key*, CASPER STAR TRIBUNE, Aug. 28, 2006, at A1 and A11.

[4] WYO. STAT. ANN. § 14-6-203 (a)-(d) (2007).

[5] *Id.* at § 14-6-203(d).

[6] *Id.* at § 14-6-203(c) (2007).

[7] *See* discussion *infra* Part III.D.

[8] *See infra* note 31 and accompanying text.

[9] D.D.v. City of Casper, Wyo., Seventh Judicial Dist., Criminal Action No. 16885-A (Dec. 4, 2005).

[10] *See* discussion *infra* Part III.B.

[11] *See infra* notes 161-65 and accompanying text (citing Kelley v. Kaiser, 992 F.2d 1509, 1511 (10th Cir. 1993)).

[12] Wyoming Survey and Analysis Center, Youth Case Processing in the State of Wyoming: An Analysis of Four Counties Report to the Wyoming Department of Family Services, 12-13 (2004), *available at* http://www.uwyo.edu/wysac/CrimJustice/JuvenileCourtProcessing/docs/DFS%20Final%20Report.pdf (last visited Nov. 10, 2007) [hereinafter WYSAC].

[13] *See* Discussion *infra* Part III.F.

[14] *D.D.*, Criminal Action No. 16885-A at 11.

crimes is not important according to the ruling in *D.D.*[15] Applied to D.D., it was more efficient to adjudicate him in circuit court, impose a fine and/or community service, and send him on his way without ever delving into whether or not there were underlying circumstances contributing to his actions.[16] In contrast, juvenile offenders rehabilitated by early interventions may not become societal burdens as adults.

Juveniles are tried and convicted of non-violent misdemeanor crimes every day in Wyoming. Statistics show the vast majority of them, at least in four Wyoming counties, are tried or adjudicated in an adult court, not subject to the rehabilitative nature of an almost non-existent juvenile justice system in Wyoming.[17] This comment examines *D.D.* to address the right and duty of parents to appear with their child in court and the right of a juvenile to have the opportunity to be heard in court. Further, this comment addresses a juvenile's right to due process, Wyoming's constitutional problems by granting concurrent jurisdiction in juvenile cases (including the constitutionality of a prosecutor's absolute discretion concerning juveniles), and touches on Wyoming's Rational Basis Test for constitutionality of current juvenile justice statutes in Wyoming. This comment exposes confusion in the statutes and advocates legislative changes to provide clear criterion so juvenile justice will be consistently applied throughout the state.

II. BACKGROUND

A. *Evolution of Juvenile Justice*

Juveniles were first recognized as "different" from adults in the eyes of the justice system in the 1700s.[18] As a result, social transformations began when minors were no longer perceived as "miniature adults" but were viewed as having different needs.[19] However, not until 1899 in Cook County, Illinois, was the first juvenile justice court established.[20] The Cook County Juvenile Court was based on the premise that more thought should be put into rehabilitating and preventing crimes in young offenders.[21] This rehabilitative ideal promoted the

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[15] *Id.*

[16] *Id.*

[17] *See infra* note 31.

[18] Howard N. Snyder, and Melissa Sickmund, *Juvenile Offenders and Victims: 2006 Report,* Washington DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 94 (2006), *available at* http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf.

[19] *Id.*

[20] *Id.*

[21] *Id.*

belief that modification of human behavior was possible.[22] As the public perceived a surge in juvenile criminal activity early in the twentieth century, legislation was enacted across the country to deal with young offenders.[23] The federal standards for juvenile justice are found in the Juvenile Justice and Delinquency Prevention Act (hereafter "JJDPA").[24] Wyoming was the last state to enact a juvenile code in 1945.[25]

B. Findings of the National Center for Juvenile Justice and the Wyoming Survey and Analysis Center Report

The goals of juvenile justice systems have generally been to rehabilitate, aid, and guide youthful offenders into becoming law-abiding citizens.[26] Wyoming, however, amended the original guide to include an emphasis on punishment and "law and order."[27] The National Center for Juvenile Justice (NCJJ), in conjunction with the Wyoming Survey and Analysis Center (WYSAC), published a study in 2004 that found numerous problems with the Act.[28] Specifically, the NCJJ stated the "purpose clause is an amalgam of contradictory and competing concerns that have created conflict over how to respond to the best interests of the child and protect the community." [29]

The report also found no other state restricts access for juveniles to juvenile court or favors processing juvenile offenders as adults.[30] Additionally, the majority of court activity in Wyoming addressing criminal behavior of minors occurred in adult courts in the study counties.[31] The findings also noted police officers and sheriff deputies "essentially control the gate into the justice system for many juvenile offenders."[32] For the most part, these same officers also decide which

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[22] Marygold S.Melli, *Symposium: Juvenile Justice Reform: Introduction: Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 376-77 (1996) (citing Francis A. Allen, *The Border Land of Criminal Justice* 26 (1964)).

[23] Allan B. Korpela, Annotation, *Expungement of Juvenile Court Records,* 71 A.L.R. 3d 753 (1976).

[24] The JJDPA is codified at 42 U.S.C. § 5633 (approved 2007).

[25] Wyoming State Advisory Council on Juvenile Justice, *Annual Report to the Governor*, Jan. 3, 2003.

[26] Snyder & Sickmund, *supra* note 18, at 94.

[27] *Id.* at 97-99.

[28] WYSAC, *supra* note 12, at 12-13.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 12 (citing 70% in Teton County, 85% in Sweetwater County, 93% in Sheridan County, and 97% in Natrona County).

[32] *Id.*

cases to forward to the county attorney who considers whether or not to prosecute in juvenile court.[33]

The report found concurrent jurisdiction can result "in the co-occurring involvement of a juvenile in more than one court at the same time."[34] As a result, "[t]his phenomenon can foster a number of problems, not the least of which include conflicts between the different courts' expectations and orders, duplication of effort, and public confusion over which court takes precedence."[35] Even though Wyoming's concurrent jurisdiction issue was not the focal point of the study, interviews of various judges throughout Wyoming conducted for the purpose of the report, confirmed it is an issue.[36] The report indicated:

> Despite current and prior efforts by the Department of Family Services (DFS) and the Wyoming State Advisory Council on Juvenile Justice (SACJJ) to provide direction for the state, these bodies are not balanced by the collective vision of a statewide body of judges who are full time juvenile law specialists or juvenile and domestic relations law specialists.[37]

It also recognized "[c]oncurrent jurisdiction . . . prevents consistent policy concerning its use, and interferes with efforts to plan for separate juvenile detention resources, all of which contribute to overuse [of concurrent jurisdiction]."[38] Among other problems, the report concluded "[j]udicial leadership is a requisite for both dependency and delinquency court improvement. A fractured court system that places concurrent jurisdiction for the criminal and non-criminal behavior of minors in three different courts presents obstacles for nurturing statewide juvenile justice leadership among the judiciary."[39]

Although not an exhaustive list of the problems found in the Act, the WYSAC report provides an official study of the areas addressed in this comment including: prosecutors' absolute discretion, concurrent jurisdiction, the high rate of juveniles adjudicated in adult courts, and the difference in Wyoming's law and philosophy to first subject juveniles to adult courts rather than initially trying them in a juvenile court.[40]

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[33] *Id.*

[34] WYSAC, *supra* note 12, at 12.

[35] *Id.* at 12-13.

[36] *Id.* at 13.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] WYO. STAT. ANN. § 14-6-201 et. seq. (Juvenile Justice Act) (2007), *See also* WYSAC, *supra* note 12.

Viewing juveniles one-dimensionally is not sufficient to diagnose or treat juvenile criminal offenders.[41] Social, biological, cognitive, and psychological factors must be considered when examining them.[42] As a result, the treatment of youth offenders is multi-dimensional.[43] The centralized goal of juvenile justice is to rehabilitate and individualize juvenile offenders.[44] In theory, the Act has that goal at heart; in reality, the majority of juvenile offenders in Wyoming are never given the opportunity to be adjudicated in a juvenile court that treats them multi-dimensionally.[45]

D.D. was tried in Natrona County where the overwhelming majority of juveniles (ninety-seven percent) were tried in adult courts.[46] As a practical matter, over one-half of the juvenile offenses in Natrona County were traffic offenses, cases not appropriate for juvenile adjudication.[47] However, there remain a large number of offenses that are proper for juvenile adjudication. Among these WYSAC mentioned alcohol, property, drug and other offenses.[48] Further complicating matters, Wyoming lacks a single-entry policy where children are screened to determine the appropriate court jurisdiction.[49] This comment does not advocate that the ninety-seven percent of juveniles adjudicated in adult courts in Natrona County required juvenile court adjudication. It also does not address the need for a centralized screening process to determine whether adult court or the rehabilitative approach of juvenile court is appropriate.[50] Clearly some form of single point of entry or evaluation of juveniles is needed.[51] Sample discussions of the reasons for such use can be found in the OJJDP's *Juvenile Justice Bulletin*.[52]

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[41] Charles Billikas, *Article: The Ideal Juvenile Rehabilitation Program: an Integrated System,* 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 411, 412-13 (Summer 1995).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 411.

[45] *See supra*, note 31 and accompanying text.

[46] *Supra* note 9, and accompanying text; *see supra* note 31.

[47] WYSAC, *supra* note 12, at 49-50.

[48] *Id.* at 48-50.

[49] *Id.* at 14 (citing John M. Burman, *Juvenile Injustice in Wyoming*, 4 WYO. LAW REV. 669 (2004) and the discussion of having a single entry policy to address which juveniles need to go into a juvenile court setting).

[50] WYSAC, *supra* note 12, at 14-15. (discussing the centralized screening process and a gatekeeper need in Wyoming). This is not the central focus of this comment, but simple traffic offenses may not need to be adjudicated in an adult court. This constitutes over one-half of the 97% of juvenile cases tried in adult courts in Natrona County. *Id.* However, there is still a need for a centralized "gatekeeper or screening process to decide in which court a juvenile is adjudicated." *Id.*

[51] Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, *Conceptual Elements, Single Point of Entry* (March 2000) *available at* http://www.ncjrs.gov/html/ojjdp/jjbul2000_03_6/pag3.html.

[52] *Id.*

Though these matters are not the central focus of this comment, their practical considerations should be kept in mind throughout the reading of this comment.

The four-county study conducted by WYSAC concluded the majority of juvenile offenders in the state are indeed tried in adult courts.[53] Because of the many problems of the Act, one of which is the broad granting of concurrent jurisdiction over juveniles, there is little opportunity for Wyoming juveniles to assert their right to be adjudicated in a juvenile court where rehabilitation is the key focus.[54] The factors discussed in the Act emphasizing rehabilitation and differential treatment of juveniles are not utilized when a juvenile is adjudicated in an adult court system.[55]

C. Problems with Juvenile Justice in Wyoming

This comment focuses on children who have committed delinquent acts, meaning acts that would have been crimes if committed by an adult.[56] Currently, Wyoming's direction in regard to the juvenile justice system can be found in the WYSAC Report. WYSAC recommended the goal of the state's juvenile justice system be moved from emphasizing punishment to rehabilitating children and serving families.[57] WYSAC further recognized that Wyoming is currently the only state that has failed to comply with the JJDPA of 2002.[58]

1. Concurrent Jurisdiction

Ironically, Wyoming's non-compliance is not a new issue. The state has been non-compliant with the JJDPA since 1981.[59] In fact, Wyoming holds the "dubious distinction of being the only state not in substantial compliance with the [JJDPA]."[60] University of Wyoming College of Law Professor John M.

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[53] WYSAC, *supra* note 12, at 48. (A breakdown of the numbers in Natrona County reflects 97% of Juveniles being adjudicated in adult court. The following was established in the report: municipal court (in Casper) handled 72% of juvenile cases; circuit court presided over 23% of juvenile cases in the City of Casper; an additional 2% of the juveniles in Natrona County were adjudicated in municipal or circuit courts in the two small towns of Edgerton and Evansville. Further numbers by category can be viewed on pps. 48–50.).

[54] *See* discussion *infra* Part III.D.

[55] *See* discussion *infra* Part III.B.

[56] *See* Juvenile Justice Act, WYO. STAT. ANN. §§ 14-6-201 to 252 (2007).

[57] Wyoming State Advisory Council on Juvenile Justice, U.S. Department of Justice, *Council on Juvenile Justice Annual Report 2006*, (2007) *available at* http://www.wyjuvenilejustice.com/PDF/2006%20Annual%20report%20(2).pdf.

[58] WYSAC, *supra* note 12, at 8–9.

[59] Donna Sheen, *Professional Responsibilities Towards Children in Trouble with the Law,* 5 WYO. L. REV. 483, 484 (2005).

[60] *Id.* at 485.

Burman previously identified many shortcomings of the Juvenile Justice Act in Wyoming on a broad spectrum.[61] The broad granting of concurrent jurisdiction in juvenile cases is the primary problem.[62] *Kent v. United States* addressed exclusive jurisdiction, and stressed the right of juveniles to appear in juvenile court prior to an appearance in adult court.[63] *United States v. Bilbo* emphasized the necessity of a transfer hearing prior to a juvenile being adjudicated as an adult.[64]

Wyoming statutes are confusing since it grants concurrent jurisdiction in all cases except status offenses.[65] A subsequent section of the statute states juvenile courts "have exclusive jurisdiction in all cases, other than status offenses, in which a minor who has not attained the age of thirteen (13) years is alleged to have committed a felony or a misdemeanor punishable by imprisonment for more than six (6) months."[66] Only felonies or misdemeanors punishable by more than six months in jail are subject to exclusive juvenile jurisdiction.[67] A large gap exists between felonies and "all other cases" in allowing concurrent jurisdiction for "all other" crimes committed by a minor.[68] Concurrent jurisdiction allows all delinquent acts except felonies to be dealt with in an adult court without the rehabilitation available through a juvenile court.[69]

Black's Law Dictionary defines concurrent jurisdiction as, "[j]urisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action."[70] Localized concurrent jurisdiction gives prosecutors, as litigants, the ability to choose in which court a child is adjudicated.[71] This violates the JJDPA policy proscribing a sound and sealed system that allows for the delivery of the rehabilitative goals of juvenile justice.[72] This legal "loophole" in the Act subverts the entire goal of the juvenile justice system.[73]

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[61] John M. Burman, *Juvenile Injustice in Wyoming*, 4 WYO. LAW REV. 669, 671-72 (2004).

[62] Sheen, *supra* note 59, at 485.

[63] Kent v. U.S., 383 U.S. 541, 560-61 (1966).

[64] U.S. v. Bilbo, 19 F.3d 912, 915-17 (5th Cir. 1994).

[65] WYO. STAT. ANN. § 14-6-201(a) (xxiii) (2007). "Status offense means any offense which, if committed by an adult, would not constitute an act punishable as a criminal offense by the laws of this state or violation of a municipal ordinance . . . ." *Id.*

[66] *Id.* § 14-6-203(d).

[67] *Id.* § 14-6-203.

[68] *Id.*

[69] *See infra* notes 188-194 and accompanying text.

[70] BLACK'S LAW DICTIONARY 868 (8th ed. 2004).

[71] *See infra* notes 161-165 and accompanying text.

[72] *See* 42 U.S.C. 5602 et. seq. (2006).

[73] Burman, *supra* note 61, at 669.

2. *Prosecutorial Discretion*

The vast majority of juvenile cases in Wyoming, except felonies, are subject to adjudication wherever the prosecutor or a law enforcement officer chooses to bring the charges.[74] The Natrona County District Court and the Wyoming Supreme Court have held prosecutorial absolute discretion constitutional.[75] In 1984, the Wyoming Supreme Court held constitutional a prosecutor's choice whether a juvenile should be brought as an adult in district court or addressed in juvenile court.[76] Granting decision making authority to prosecutors removes jurisdiction from the hands of the judges and, in turn, creates numerous problems.[77]

Police officers also decide in which court a juvenile appears when issuing a citation.[78] The Wyoming Supreme Court's determination that prosecutorial discretion is constitutional is contrary to the ideals of juvenile justice and does not comport with the rest of the country in addressing juvenile justice.[79] Case law established by the U.S. Supreme Court indicates Wyoming's process is contrary to the due process and fairness afforded to juveniles.[80] *In re Gault* requires notice to parents prior to a hearing and further sets forth the requirements needed for notice to satisfy due process.[81]

3. *Confusion in Wyoming Statutes*

In the words of a Wyoming District Court Judge, "Wyoming juvenile justice statutes are confusing and disorganized in the area of children. . . . Wyoming statutes concerning juveniles need to be clarified and more options need to be available for judges when adjudicating juveniles."[82] The joint study by WYSAC and NCJJ also cite confusion in the Wyoming statutes.[83] The report found "the overarching problem in Wyoming [is the] lack of clear standards in statutes and policies relating to juvenile justice issues."[84] Generalizing that all districts apply the statutes incorrectly is erroneous because of the inconsistency and lack of guidance

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[74] *See infra* notes 161-165 and accompanying text.

[75] Jahnke v. State, 692 P.2d 911, 929 (Wyo. 1984).

[76] *Id.*

[77] *See* discussion *infra* Part III.E.

[78] WYSAC, *supra* note 12, at 12.

[79] *See* discussion *infra* Part III.E.

[80] *In re* Gault, 387 U.S. 1, 33-34 (1967).

[81] *Id.* at 33-34.

[82] Email from a Wyoming District Court Judge, (Mar. 1, 2007) (On file with author, Judge to remain anonymous).

[83] Burman, *supra* note 61, at 685.

[84] *Id.* (citing Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence,* 24 CRIME & JUST. 189, 189 (1998)).

in the act.[85] Juvenile justice is not consistently or fairly applied in Wyoming.[86] The higher rational basis test articulated in *Johnson v. State Hearing Examiner's Office*, when applied to juvenile justice statutes in Wyoming, renders the statutes unconstitutional.[87]

Ironically, the Act specifically states one of its purposes is "[t]o provide a simple judicial procedure through which the provisions of this act are executed and enforced and in which the parties are assured a fair and timely hearing and their constitutional and other legal rights recognized and enforced."[88] The statutes are not simple and the contradictions within them prompt questions of whether the Act is constitutional and fair to the juveniles in the state who are not convicted of felonies or status offense crimes.[89] The Wyoming State Advisory Council on Juvenile Justice contends Wyoming has taken the rehabilitative stance in dealing with juveniles.[90] Wyoming does not treat the majority of juveniles consistent with the goals of the Act according to the analysis of the court in *D.D.*[91]

D. *Facts of* D.D. v. City of Casper, Wyoming

On October 5, 2005, Casper police cited D.D., a sixteen-year-old male, with petit larceny.[92] The boy signed the citation and agreed to appear in court on October 28, 2005.[93] The citation stated he needed to bring a parent with him, but D.D. ignored the ticket and missed his court date.[94] On November 1, 2005, the court issued a bench warrant for D.D.'s arrest.[95] Approximately one month later, D.D. was called out of class, placed in handcuffs, and transported to the

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[85] WYSAC, *supra* note 12, at 12-13. The WYSAC Report only focused on four counties and there is no known statistical data on other counties in Wyoming. *Id.* Generalizing that all counties are not correctly applying the Act is beyond the scope of current available statistical information. *Id.*

[86] WYSAC *supra* note 12, at 12.

[87] *See* discussion *infra* Part III.F. (citing Johnson v. State Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992)).

[88] WYO. STAT. ANN. §14-6-201(c) (iv) (2007).

[89] *See* discussion *infra* Part III.C.

[90] Wyoming State Advisory Council on Juvenile Justice, *Annual Report to the Governor.* Jan. 3, 2003. (Philosophy of juvenile court vs. criminal court: It has long been recognized (over 100 years) that there are inherent differences between adult and juvenile offenders. This is why Juvenile Codes have been enacted in every state beginning with Illinois in 1899 and ending with Wyoming's juvenile code in 1945. The Wyoming Juvenile Code differs from the penal code with its emphasis on rehabilitating the juvenile offender and his family, while holding him/her responsible and accountable and protecting the community. . . .).

[91] *See infra* notes 159-162 and accompanying text.

[92] D.D. v. City of Casper, Wyo., Seventh Judicial Dist. Criminal Action No. 16885-A, 2 (Dec. 4, 2005).

[93] *Id.*

[94] *Id.*

[95] *Id.*

Natrona County Juvenile Detention Center.[96] He was treated with lice killer and placed in jail clothing.[97] After an indeterminate period of time D.D. was released to his father.[98] Ultimately the City of Casper Municipal Court found D.D. guilty of stealing a key worth less than $20 dollars and ordered him to pay $160 in fines or perform thirty-two hours of community service.[99] D.D.'s parents were not notified of the ticket until after D.D. was arrested and processed at the Juvenile Detention Center.[100] On appeal, D.D. raised *inter alia*, the questions of whether or not his arrest fell within the Wyoming Juvenile Justice statutory structure, whether his arrest was constitutional for him or his parents, and whether all of his due process rights were correctly applied.[101] On appeal, the Natrona County District Court ruled the arrest constitutional and valid.[102]

III. THE ANALYSIS

A. *The Right and Duty of a Parent to Appear with Their Child in a Juvenile Delinquency Proceeding*

D.D.'s parents were not made aware of his citation, an issue of legitimate concern. Wyoming Statute § 14-2-205(a) states it is the responsibility of "one (1) or both parents [to appear when] the minor is required to appear and is alleged to have committed a criminal offense or to have violated a municipal ordinance."[103] Parents have the opportunity to address the court.[104] If a parent fails to appear when served with an order, he or she may be held in contempt.[105] Parents may also be liable for property damage committed by their child.[106] More pointedly, the definition section of the Act defines parties to include "the child, his parents, guardian or custodian, the state of Wyoming and any other person made a party by an order to appear, or named by the juvenile court."[107] Because D.D's case was in municipal court and not juvenile court, the Natrona County District Court

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[96] Brief of Appellant at 7, D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A (Dec. 4, 2005).

[97] *Id.*

[98] *Id.*

[99] Anthony Lane, *A Missing Key*, CASPER STAR TRIBUNE, Aug. 28, 2006, at A1 and A11.

[100] *Id.*

[101] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 1 (Dec. 4, 2005).

[102] *Id.*

[103] WYO. STAT. ANN. § 14-2-205(a) (2007).

[104] *Id.*

[105] *Id.* at §14-2-205(c), (d).

[106] *Id.* at § 14-2-203.

[107] *Id.* at § 14-6-201(a)(xviii).

held the juvenile justice statutes did not apply.[108] Had D.D. been adjudicated in juvenile court, the position this comment supports, his parents would have been required parties and their presence would have been mandatory under the Act.[109]

Parents are unable to perform their statutory duties to appear with their child if they are not notified of a citation.[110] The district court in *D.D.* dismissed this argument on the basis that Wyo. Stat. Ann. § 14-2-205(c) does not require parents to appear in municipal courts.[111] Further, *D.D.* "provides no authority for the proposition that the parents of a child who is suspected of criminal or delinquent conduct must be notified of an investigation into this conduct."[112] However, these assertions do not align with a juvenile's right to be subjected to a juvenile court, or a parent's rights and duties according to the definitions and ideals of the Act.[113]

In re Gault specifically addressed parents' rights to be made aware of an initial hearing or notification that their child is to be taken into custody, and held notice given at an initial hearing is not timely.[114] The U.S. Supreme Court further addressed the issue of notification to parents stating, "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'"[115] The Court analyzed timeliness of notice to a juvenile's parents as a requirement that must be met particularly when a "youth's freedom and his parents' right to his custody are at stake. . . ."[116] D.D.'s freedom became an issue when he was taken into custody.[117]

The Natrona County District Court dismissed any argument about notification of pending charges against a juvenile by a municipal court "[s]ince there is no indication that the officer knew who the parents were or where they lived, this was the best [the officer] could do."[118] The court further explained that

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[108] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 1 (Dec. 4, 2005).

[109] *Id.*

[110] WYO. STAT. ANN. §14-2-205 (2007).

[111] *D.D.*, Criminal Action No. 16885-A at 7.

[112] *Id.* at 8.

[113] WYO. STAT. ANN. § 14-6-201(c) et. seq. (2007).

[114] *In re* Gault, 387 U.S. 1, 33-34 (1967).

[115] *Id.* at 34.

[116] *Id.*

[117] Brief of Appellant at 7, D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A (Dec. 4, 2005).

[118] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 7 (Dec. 4, 2005).

the officer satisfied any notice requirement when "the officer issuing the citation attempted to notify the parents when he noted on the citation that [D.D.] must appear with one parent."[119] This is directly contrary to the U.S. Supreme Court's holding in *In re Gault*.[120] *In re Gault* stated:

> Notice at [an initial hearing on the merits] is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child *and his parents* or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation.[121]

The requirement of notice in *In re Gault* is notice be given prior to a hearing.[122] D.D.'s parents never received proper notice.[123] The Natrona County District Court in *D.D.* found notification of the parents after incarceration sufficient, and that he was only incarcerated for a few hours.[124] Adequate notice to satisfy due process requirements as described in *In re Gault* was not afforded D.D.'s parents.[125]

Further due process rights of notice to a juvenile's parents were examined in the Mississippi case *Sharpe, a Minor, et al. v. State*.[126] This case addressed due process rights and held that although a warrant may be issued, the parents should be notified.[127] Keeping in mind the limitations of comparing Wyoming State Statutes with those of another state, *Sharpe* provides a good example of how juveniles should be handled in accordance with the principles of notice set forth in *In re Gault. Sharpe* stated:

> Usually a summons is issued to the child. Most statutes provide also for a *summons or notice to the parent or other custodian, requiring him to produce the child before the court at a time*

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[119] *Id.*

[120] *In re* Gault, 387 U.S. at 34.

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

[122] *Id.*

[123] *See* Lane, *supra* note 100.

[124] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 7-8 (Dec. 4, 2005).

[125] *In re* Gault, 387 U.S. at 34 (discussing the application of due process as a requirement of adequate notice in a criminal context) (internal citations omitted).

[126] Sharpe, a Minor, et al. v. State, 127 So. 2d 865 (Miss. 1961).

[127] *Id.* at 870.

> *specified therein.* In some instances a warrant may be issued for the purpose of securing the child's presence before the court.[128]

The Act is not explicit about notice to parents. It merely states that any person taking a child into custody shall, "as soon as possible notify the child's parent, guardian or custodian."[129] In the case of *D.D.*, notice could have been given well in advance of a bench warrant and arrest. The Act does not align with the constitutional due process right of notice for a parent discussed in *In re Gault.*[130]

B. The Right of a Juvenile to be in Juvenile Court

According to the Natrona County District Court's decision letter in *D.D.,* no presumed elevated Constitutional right for a juvenile to be adjudicated in juvenile court exists.[131] The "challenged statute is presumed constitutional and appellant carries the heavy burden of proving [it] unconstitutional by clear and exact proof beyond a reasonable doubt."[132]

United States v. Bilbo addressed the origin of a juvenile action.[133] A juvenile action should not begin in adult court, but in juvenile court.[134] The process by which a juvenile encounters an adult court is through transfer, and although not binding on Wyoming courts, *Bilbo* supported the transfer of a minor to an adult court *so long as the decision for such a transfer is tempered in a way that affords a juvenile justice system to exist.*[135] Wyoming's Juvenile Justice System exists in statute, but no separate court deals solely with juveniles.

In *Bilbo*, the Texas Appellate Court found the guidelines for a juvenile to be transferred to an adult court were met.[136] *Bilbo* dealt with a federal jurisdictional matter so the factors of 18 U.S.C. §5032 were used in determining whether the juvenile should have been transferred.[137] The *Bilbo* court also acknowledged the

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[128] *Id.* at 869 (emphasis added).

[129] WYO. STAT. ANN. § 14-6-206 (b) (2007).

[130] *Compare supra* note 124 *with supra* notes 120-122 and accompanying text (showing that the district court found notice to D.D. constitutional, but *In re Gault* has set an expectation for notice).

[131] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 12 (Dec. 4, 2005).

[132] *Id.* at 4.

[133] U.S. v. Bilbo, 19 F.3d 912, 915 (5th Cir. 1994).

[134] *Id.*

[135] *Id.* at 916 (emphasis added).

[136] *Id.*

[137] *Id.* at 913. The factors considered were: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment

decision to transfer a juvenile to trial as an adult, at least on the federal level, was within the sound discretion of the trial court.[138] In Wyoming, the decision is not made by a judge or a trial court in reference to misdemeanors and status offenses, but by a prosecutor or the police officer issuing a ticket.[139] There is no standard guiding a prosecutor's decision about the court in which to adjudicate a juvenile.[140]

The *D.D.* decision contends the Act does not apply, and all cases do not need to be issued from a juvenile court since this would be contrary to "the plain provisions of the statutes allowing concurrent jurisdiction."[141] The interpretation is a juvenile over the age of twelve has no right to be treated as a juvenile at any time, and that concurrent jurisdiction allows a prosecutor to decide whether a juvenile should be submitted to juvenile jurisdiction where rehabilitation is the key or charged as an adult contrary to the goals of the Act.[142]

C. The Right of Juveniles to Due Process

The right to due process is a fundamental right under the U.S. Constitution where "[n]o 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."[143] Accordingly, a child in juvenile court should be afforded certain rights collectively called due process rights.[144] The law is unclear on whether due process should extend to a child in a juvenile court, or whether being subject to adult courts satisfies due process protections, but *Kent* held that certain due process rights should be afforded to juveniles.[145] The Supreme Court in *Kent* stated a Juvenile Court Act:

> [C]onfers upon the child a right to avail himself of that court's 'exclusive' jurisdiction. As the court of appeals has said, '[I]t is implicit in [the Juvenile Court] scheme that non-criminal

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efforts and the juvenile's response to such efforts; [and] the availability of programs designed to treat the juvenile's behavioral problems. *Id.*

[138] *Id.* at 915.

[139] *See* discussion *infra* Part III.E.

[140] *Id.*

[141] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 7 (Dec. 4, 2005).

[142] *Id.* at 4 (citing Misenheimer v. State, P.3d 273, 276 (Wyo. 2001)).

[143] U.S. CONST. amend. XIV, §1.

[144] National Council of Juvenile and Family Court Judges (NCJFCJ), *Juvenile Delinquency Guidelines; Improving Court Practice in Juvenile Delinquency Cases,* at 12 (Spring 2005) (referring to *In re* Gault).

[145] Kent v. U.S., 383 U.S. 541, 560-61 (1966).

> treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases.[146]

Kent addressed exclusive jurisdiction of a juvenile court rather than concurrent jurisdiction; however, it stressed that juveniles should have an opportunity to first be subjected to the jurisdiction of juvenile court systems.[147] The opposite is true in Wyoming.[148] More frequently a juvenile begins and ends in an adult court, with the minority of cases originating in juvenile courts.[149] In Wyoming, the goal of the Act is consistent with the ruling in *Kent*.[150] The Wyoming Juvenile Justice Act states in pertinent part:

> (c) This act shall be construed to effectuate the following public purposes:
>
> (i) To provide for the best interests of the child and the protection of the public and public safety;
>
> (ii) Consistent with the best interests of the child and the protection of the public and public safety:
>
> (A) To promote the concept of punishment for criminal acts while recognizing and distinguishing the behavior of children who have been victimized or have disabilities, such as serious mental illness that requires treatment or children with a cognitive impairment that requires services;
>
> (B) To remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
>
> (C) To provide treatment, training and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct, reduces recidivism and helps children to become functioning and contributing adults.

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[146] *Id.* (citing Harling v. U.S, 295 F.2d 161, 164-65 (1961)).

[147] *Id.*

[148] *See* discussion *supra* Part III.B.

[149] *Id.*

[150] *Compare Kent,* 383 U.S. at 560-61, *with* WYO. STAT. ANN. § 14-6-201(c)(vi) (2007) (the goal of the Act is consistent with the decision in *Kent* that adult court should be the minority and that a minor should be afforded the right to juvenile court first).

> (iii) To provide for the care, the protection and the wholesome moral, mental and physical development of children within the community whenever possible using the least restrictive and most appropriate interventions;
>
> (iv) To be flexible and innovative and encourage coordination at the community level to reduce the commission of unlawful acts by children;
>
> (v) To achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to ensure that individual needs will control placement and provide the child the care that should be provided by parents; and
>
> (vi) To provide a simple judicial procedure through which the provisions of this act are executed and enforced and in which the parties are assured a fair and timely hearing and their constitutional and other legal rights recognized and enforced.[151]

Wyoming Statute Annotated § 14-16-201 (c)(ii)(A) would have applied in *D.D.* in a juvenile court, but the municipal court never examined these factors.[152] Wyoming Statute Annotated § 14-16-201 (c)(ii)(C) of the Act would also have been applicable had the information regarding D.D.'s background been heard by the court.[153] Treatment or rehabilitation may have been more effective than a fine and community service. The adult court in which D.D. was tried used a punitive remedy rather than a rehabilitative approach.[154]

The next portion of the statute stresses care should be provided with the least restrictive and most appropriate interventions.[155] While D.D.'s outcome may not have been restrictive, the various factors delineated for consideration in the Act were not measured in determining the most appropriate intervention since D.D. was never given the opportunity to go through a juvenile court proceeding.[156] Flexibility and innovation are encouraged in dealing with juveniles to reduce the

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[151] WYO. STAT. ANN. §14-6-201 (2007).

[152] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 8 (Dec. 4, 2005).

[153] *Id*. The district court found D.D.'s personal history to be of questionable relevance. *Id*.

[154] *Id.* at 11. The district court found that minor crimes were not worthy of Juvenile Court Adjudication. *Id*.

[155] WYO. STAT. ANN. § 14-6-201 (c) (iii) (2007).

[156] *D.D.*, Criminal Action No. 16885-A at 2.

commission of unlawful acts by children.[157] A fine and community service is neither flexible nor innovative. Had D.D. struggled with learning disabilities, behavioral impairments, or other problems, the problems could have been addressed as part of the rehabilitative process in a juvenile court.[158] The Act recognizes these factors as important when dealing with juvenile delinquency cases.[159] The Natrona County District Court disregarded them by stating that D.D.'s personal history was of questionable relevance, was not part of the record, and would not be considered in the appellate decision.[160]

The goals of the Act are effectively undercut by the broad granting of concurrent jurisdiction as the majority of juveniles in many Wyoming counties are never given the opportunity to be subject to the Juvenile Justice Act statutes.[161] Wyoming effectively makes juvenile justice the exception and adult criminal treatment the rule.[162] Case law nationwide does not stop here, however, as there is further support that the Act be viewed as a priority for minors, and adult criminal justice systems as the secondary venue for juvenile offenders.[163] Closer to home, the Tenth Circuit Court of Appeals recognized the importance of a juvenile's right to be adjudicated in a juvenile court and how critical the decision to permit adult prosecution of a juvenile.[164] The Tenth Circuit pointed to the authority of juvenile courts, not the prosecutor, in transferring or certifying a case involving a juvenile to adult courts.[165] In *Kelley v. Kaiser*, the Tenth Circuit found the conviction of a juvenile tried in an adult court need not be set aside if the juvenile would have ended up in adult court anyway.[166]

Additional case law stresses the importance of treating juvenile and adult court proceedings differently.[167] "These strict safeguards, however, are wholly inappropriate for the flexible and informal procedures of the Juvenile Court which are essential to its *parens patriae* function."[168] "To avoid impairment of this

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[157] WYO. STAT. ANN. §14-6-201(c)(iv) (2007).

[158] *Id.* at § 14-6-20-201(c)(ii)(A) .

[159] *Id.*

[160] *D.D.,* Criminal Action No. 16885-A at 8.

[161] *See* WYSAC, *supra* note 12, at 12.

[162] *Id.*

[163] *See Kent,* 383 U.S. at 560-61; Green v. Reynolds, 57 F.3d 956, 960 (10th Cir. 1995); Kelley v. Kaiser, 992 F.2d 1509, 1511 (10th Cir. 1993).

[164] *Green*, 57 F.3d at 960.

[165] *Kelley*, 992 F.2d at 1511.

[166] *Id.*

[167] Harling v. U.S., 295 F.2d 161, 164 (D.C. Cir. 1961) (citing U.S. v. Dickerson, 271 F.2d 487, 491 (D.C. Cir. 1959)). *See also* BLACK'S LAW DICTIONARY 868 (8th ed. 2004) (definition of *parens patriae*, "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.").

[168] *Harling*, 295 F.2d at 164.

function, the juvenile proceeding must be insulated from the adult proceeding."[169] Wyoming does not insulate the majority of juvenile delinquents from adult proceedings; rather it freely exposes juveniles to adult courts.[170] The key to ensure juveniles a right to juvenile proceedings is to have them begin in juvenile court.[171] Juveniles should have the right to juvenile adjudication unless transferred by a judge for adjudication in an adult court.[172]

Though Wyoming stresses the importance of treating juveniles differently, there is no certainty a juvenile will have the opportunity to enter a juvenile court system because of concurrent jurisdiction.[173] The authority of the prosecuting attorney to decide in which court a juvenile should be tried was held constitutional by the Wyoming Supreme Court in 1984.[174] This holding undercuts the goals of rehabilitation set out in the Act.[175] Very few juvenile delinquency cases are ever brought before a juvenile court.[176] The statute states:

> No court other than the district court shall order the transfer of a case to juvenile court. At any time after a proceeding over which the juvenile court has concurrent jurisdiction is commenced in municipal or circuit court, the judge of the court in which the proceeding is commenced may on the court's own motion, or on the motion of any party, suspend further proceedings and refer the case to the office of the district attorney to determine whether a petition should be filed in the juvenile court to commence a proceeding under this act. If a petition is filed under this act, the original proceeding commenced in the municipal or circuit court shall be dismissed. *If the district attorney determines not to file a petition under this act, the district attorney shall immediately notify the municipal or circuit court and the proceeding commenced in that court may continue*.[177]

Authority for venue in Wyoming is ultimately up to the district attorney or a law enforcement officer issuing a ticket, and there is no authority for a judge to transfer a case from their adult court into a juvenile court unless the prosecuting

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[169] *Id.* (citing U.S. v. Dickerson, 271 F.2d 487, 491 (D.C. Cir. 1959)).

[170] WYSAC, *supra* notes 12, at 12.

[171] *Kent*, 383 U.S. 541, 560-61 (1966).

[172] *See generally* WYSAC, *supra* note 12.

[173] *See* discussion Part III.C.

[174] Jahnke v. State, 692 P.2d 911, 929 (Wyo. 1984).

[175] WYO. STAT. ANN. § 14-6-201 et. seq. (2007) (the juvenile justice act and the goals set out in the statute).

[176] *See* WYSAC, *supra* note 12, at 11-12 and accompanying text.

[177] WYO. STAT. ANN. § 14-6-237(h) (2007) (emphasis added).

attorney is willing to file a petition under the Act.[178] A motion can be made, but the ultimate decision rests with the district attorney.[179] Statistically, this procedure rarely occurs in Wyoming, and the majority of all juvenile delinquent cases are heard in courts other than juvenile court.[180]

The Natrona County District Court in *D.D.* stated the statute must be viewed in favor of constitutionality, and a statute violates equal protection if it encourages arbitrary and erratic arrests and convictions.[181] The court's standard of review was, "where a statute or a governmental action affects a fundamental interest . . . [t]he court uses a strict scrutiny test to determine if statute or governmental action is necessary to achieve a compelling state interest."[182] Juveniles should have a fundamental interest and right to be subject to juvenile court systems.[183] The law is silent on this issue so far as juvenile justice is concerned; however, the analysis above establishes that the right to juvenile adjudication is more than just an ordinary interest or right.[184]

> A juvenile's right to due process was set forth by the U.S. Supreme Court in *In re Gault*:
>
> [W]ith respect to such waiver proceedings that while 'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the *hearing must measure up to the essentials of due process and fair treatment*.' We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.[185]

The most elementary definition of due process can be found in Black's Law Dictionary: "The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the

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[178] *Id.*

[179] *Id.*

[180] WYSAC, *supra* note 12, at 12.

[181] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 4 (Dec. 4, 2005) (citing Moe v. State, 110 P.3d 1206, 1210 (Wyo. 2005)).

[182] *D.D.*, Criminal Action No. 16885-A, at 4 (citing Misenheimer v. State, 27 P.3d 273, 276 (Wyo. 2001)).

[183] *In re* Gault, 387 U.S. 1, 30-31 (1967).

[184] *Id.* at 30.

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

case."[186] United States case law requires juveniles have a right to juvenile courts to be assured their right to due process.[187] Wyoming case law is silent on this issue.

D. Concurrent Jurisdiction is Unconstitutional

It is unconstitutional for the Act to grant concurrent jurisdiction.[188] The Wyoming Juvenile Justice statute plainly state, "[e]xcept as provided in subsection (d) of this section, the juvenile court has concurrent jurisdiction in all cases, other than status offenses, in which a minor is alleged to have committed a criminal offense or to have violated a municipal ordinance."[189] The exception to concurrent jurisdiction is, "[t]he juvenile court has exclusive jurisdiction in all cases, other than status offenses, in which a minor who has not attained the age of thirteen (13) years is alleged to have committed a felony or a misdemeanor punishable by imprisonment for more than six (6) months."[190]

Wyoming Juvenile Justice Statutes are inconsistent and confusing.[191] Immediately following the sections granting juvenile courts exclusive jurisdiction over juveniles charged with a felony or misdemeanor punishable by up to six months in jail or those juveniles under the age of thirteen, the Act allows any other actions to be originally commenced in a non-juvenile court in spite of the fact a juvenile is involved in the proceedings.[192] Although consistent with the idea of statutory concurrent jurisdiction, granting concurrent jurisdiction is not consistent with the goal of the Act.[193] When the majority of juveniles are tried in adult courts rather than under the juvenile justice statutes, concurrent jurisdiction is self-defeating since the majority of juveniles are not afforded the right to be treated as juveniles in the eyes of the court.[194]

In *D.D.,* the Natrona County District Court erred by deciding the Juvenile Justice Act "allows detention to occur upon the issuance of *any* court order, and it

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[186] BLACK'S LAW DICTIONARY 868 (8th ed. 2004).

[187] *Infra* note 252 (discussing the Wyoming rational basis test and the constitutionality of Wyoming's Juvenile Justice Act). *See generally* Johnson v. State Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992).

[188] *Johnson*, 838 P.2d at 160-61.

[189] WYO. STAT. ANN. §14-6-203(c) (2007).

[190] *Id.* at §14-6-203(d).

[191] *Id.* at §§ 14-6-203(c)-(f).

[192] *Id.* at §§ 14-6-203 (e),(f).

[193] The goal of the Act is "to provide treatment, training and *rehabilitation* that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct, reduces recidivism and helps children to become functioning and contributing adults." WYO. STAT. ANN. § 14-6-201(c)(ii)(C) (2007) (emphasis added).

[194] *See* discussion *supra* Part III.D.

is not restricted to an order issued from juvenile court."[195] Further error occurred when the Natrona County District Court concluded the plain reading of the statute results in concluding the word "'court' is an adjective modifying the word 'order.'"[196] The Natrona County District Court ruled that if the court accepted the argument of the appellant, a juvenile could not be taken into custody without an order from a juvenile court, and "[e]ither an inferior court would have no means to compel attendance of a minor who was accused of a misdemeanor or all cases would have to be processed through juvenile court. The latter is contrary to the plain provisions of the statute allowing concurrent jurisdiction. . . . "[197] This statement is misleading. The juvenile justice system should be the primary court to deal with juveniles, and the adult court should be the exception.[198]

Further, the Natrona County District Court misinterpreted the Act's definition of "court." Appellant's Brief argued the Act's definition of the word "court" meant, "the juvenile court established by Wyo. Stat. § 5-8-101."[199] To adopt the plain meaning of a statute without viewing the statute in its entirety and taking judicial notice of the definition of the word "court" as prescribed by statute is erroneous.[200] The statute contradicts itself by allowing concurrent jurisdiction and then defining the word "court" to mean juvenile court.[201] A child cannot be detained without a court order, but the statute does not specify which court.[202] The Act defines court as the juvenile court, but the district court interpreted the word court to mean any court.[203] The district court was in error when it ruled contrary to this definition.[204]

The Tenth Circuit has reinforced the idea that transferring a juvenile from juvenile court to adult court is an extremely important decision, and any such transfer should not be taken lightly.[205] The Tenth Circuit emphasized the importance of the transfer process when it stated, "there is no place in our system of law for reaching a result of such tremendous consequences without

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[195] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 7 (Dec. 4, 2005) (emphasis supplied).

[196] *Id.*

[197] *Id.*

[198] *Kent*, 383 U.S. 541, 556 (1966).

[199] WYO. STAT. ANN. § 14-6-201(a)(vii) (2007). *See also* Brief of Appellant at 7, D.D. v. City of Casper, Wyo., No. 16885-A (Wyo. 7th Jud. Dist. Ct. Dec. 4, 2006).

[200] WYO. STAT. ANN. § 14-6-201 et. seq. (2007).

[201] *See id.*

[202] *Id.*

[203] *D.D.*, Criminal Action No. 16885-A at 7.

[204] *Compare id. with* the definition of "court" under WYO. STAT. ANN. § 14-6-201(a)(vii) (2007).

[205] Green v. Reynolds, 57 F.3d 956, 960 (10th Cir. 1995).

ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[206] Yet Wyoming's current system does not allow juveniles the opportunity to first go before a juvenile court because of concurrent jurisdiction.[207] Wyoming's concurrent jurisdiction is counter-intuitive to the ideals set forth in the Act and the law established in the Tenth Circuit and the U.S. Supreme Court.[208]

The U.S. Supreme Court held in *In re Gault* that juveniles in hearings must be afforded due process and fair treatment.[209] However, Wyoming, through concurrent jurisdiction, allows a prosecutor or police officer to make the decision of where a juvenile is adjudicated.[210] There is no check on the decision-making authority of the prosecutor.[211]

More disturbing in the case of *D.D.*, the citation issued by a police officer determined the court in which he was subjected.[212] There was never an opportunity for him to be adjudicated in a juvenile court.[213] Had the decision been up to a judge, judicial review would have provided a safeguard to the decision-making process.[214] To allow a prosecutor or law enforcement officer to decide in which court a juvenile is adjudicated undercuts the idea of fair treatment of juveniles set forth by the U.S. Supreme Court.[215]

The U.S. Supreme Court has held that prior to a transfer to an adult court a juvenile "must be granted a hearing which satisfies *due process* standards."[216] The Natrona County Municipal Court violated D.D.'s due process rights when no hearing was held to determine whether he should have been tried as a juvenile or an adult.[217] On appeal, the Natrona County District Court found D.D. was

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[206] Kent v. U.S., 383 U.S. 541, 554 (1966).

[207] *See* discussion *supra* Part III.D.

[208] *Contrast Kent,* 383 U.S. at 556 (the rights of a child to avail himself to a juvenile courts exclusive jurisdiction), *Green*, 57 F.3d at 960 (citing *Kent,* 383 U.S. at 554) and

WYO. STAT. ANN. §14-6-201 (2007) (the goals of the Act) *with* discussion *infra* Part III.F.

[209] *In re* Gault, 387 U.S. 1, 41 (1967).

[210] *See* discussion *Infra* Part III.E.

[211] *See* discussion *Infra* Part III.E.

[212] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 2 (Dec. 4, 2005).

[213] *Supra* notes 92-102 and accompanying text (note at no time were juvenile court actions instituted).

[214] *See* discussion *infra* part III.E.

[215] *See generally*, Maggie Krell, *VIEWPOINTS ON PROPOSITION 21: Think Before You Transfer: An Assessment of the Automatic Transfer of Juveniles to the Criminal Court*, 5 UC DAVIS J. JUV. L. & POL'Y 39 (2000) (citing Kent v. U.S., 383 U.S. 541 (1966) and *In re* Gault, 387 U.S. 1 (1967)).

[216] *In re* Gault, 387 U.S. at 41(emphasis supplied).

[217] *See* discussion *supra* Part III.D.

granted all due process rights guaranteed him under both the Wyoming and U.S. Constitutions.[218] Additionally, "[t]he Court [found] *Gault* inapposite."[219] Wyoming does not allow the U.S. Supreme Court to reign.[220] The Act in Wyoming has not evolved to a point that it can stand up to U.S. Supreme Court due process scrutiny as there is no such hearing to certify many juveniles, and no requirement that a prosecutor justify the reasons for bringing a case involving a juvenile into municipal, circuit, or even district court.[221]

Kent and *Gault* are cases in which the U.S. Supreme Court has ruled on juveniles and due process.[222] As a result, the cases should be applicable to a juvenile in a court system and are dispositive in determining whether or not due process has been preserved.[223]

Wyoming is different than many states in that the juvenile justice system has undergone few changes in the last quarter of a century.[224] This is illustrated by the fact that the U.S. Supreme Court has ruled on the transfer of juveniles, yet Wyoming continues to allow concurrent jurisdiction in many cases.[225] Even though there are many options in juvenile courts to focus on rehabilitation, Wyoming does not have the statutory framework to allow the juvenile justice system to function so that the tremendous consequence of being transferred can be considered.[226]

Little case law exists on municipal or circuit court juvenile misdemeanor appeals in Wyoming. At the risk of introducing logic, the reason juvenile justice has never risen to the attention of the Wyoming Supreme Court or the legislature may be that paying a $160 dollar ticket is certainly cheaper than hiring an attorney to conduct an appeal. By remaining under the judicial radar, and without judicial activism and legislative action, this problem will not be addressed. Wyoming is behind every other state so far as juvenile justice is concerned, and will continue to stay that way as long as the majority of lawmakers and the judiciary are

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[218] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 1 (Dec. 4, 2005).

[219] *Id.* at 8–9.

[220] *Compare D.D.*, Criminal Action No. 16885-A at 8-9 *with* WYO. STAT. ANN. § 14-6-201 Et. seq. (2007).

[221] *See* discussion *supra* Part III.D.

[222] *Id.*

[223] *Id.*

[224] Burman, *supra* note 61, at 671-72 (citing Edward J. Latessa et al., *Beyond Correctional Quackery-Professionalism and the Possibility of Effective Treatment*, 66 SEP. FED. PROB. 43, 44 (September 2002) (describing changes in juvenile justice system being implemented)).

[225] WYO. STAT. ANN. § 14-6-203(d) (2006).

[226] No separate juvenile court exists in Wyoming which is just devoted to juvenile matters in Wyoming, rather adult district courts transform into juvenile courts when the need arises.

content to fall short of national expectations.[227] The articulated goal of the Act, that rehabilitation should be of utmost importance, is correct.[228] Yet as long as concurrent jurisdiction is statutorily allowed, the goal will never be met.

E. Unconstitutionality of Prosecutors' Absolute Discretion Concerning Juveniles and Law Enforcement Officers' Role in Determining Juveniles' Court of Adjudication

A prosecutor is a member of the executive branch of government while also serving as an officer of the court.[229] As a member of the executive branch, prosecutors have the authority to decide whether or not to file charges and prosecute a case.[230] Wyoming's system has expanded the prosecutor's choice of whether or not to prosecute a crime to include deciding where a juvenile should be adjudicated.[231] This unchecked power to determine in which court a juvenile should be adjudicated prohibits access to the opportunities afforded in juvenile court.[232] A prosecutor need not justify why a juvenile is subjected to adult court and there is no ceremony for a transfer from juvenile court to adult court because a transfer is not required.

The Wyoming Constitution provides for separation of powers.[233] The Wyoming Supreme Court upheld the constitutionality of prosecutor discretion to decide in which court a juvenile should be adjudicated in 1984.[234] This provision goes against the due process ideals of the U.S. Supreme Court's decision in *Kent.*[235] In fact, the determination should be made by a judge and the legislature should mandate this change in Wyoming statutes.[236] A prosecutor's role as part of the executive branch is to "take care that the laws be faithfully executed."[237] The execution of the law is very different than determining in which court a juvenile matter should be heard.[238] It remains the obligation of the court to assure due

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[227] Sheen, *supra* note 59, at 484-85.

[228] WYO. STAT. ANN. § 14-2-201 (c)(ii)(C) (2007) ("to provide treatment, training, rehabilitation . . .")

[229] *Petition of Padget*, 678 P.2d 870, 871 (Wyo. 1984) (citing People v. Dist. Court in and for County of Larimer, 527 P.2d 50, 52 (1974)).

[230] *Petition of Padget*, 678 P.2d 870, 871 (Wyo. 1984) (citing People v. Dist. Court in and for County of Larimer, 527 P.2d 50, 52 (1974)).

[231] *See* discussion *supra* Part III.E.

[232] WYSAC, *supra* note 12, at 13.

[233] WYO. CONST. Art. 2, § 1.

[234] Jahnke v. State, 692 P.2d 911, 929 (Wyo. 1984).

[235] *See supra* notes 163-176 and accompanying text.

[236] *See* discussion *supra* Part III.E.

[237] *Petition of Padget*, 678 P.2d at 871 (citing WYO. CONST. Art. 4, §4) (addressing the duties of the executive branch).

[238] *Contrast id. with infra* notes 242-246 and accompanying text.

process of law and the constitution are upheld.[239] The Wyoming Constitution states the Supreme Court shall have "general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law."[240] Accordingly, the Wyoming Supreme Court has a duty to protect the integrity of the various courts and prohibit dealing lightly with proceedings in the lower courts.[241]

The Wyoming Supreme Court has the liberty to decide a case where the ends of justice require scrutiny on a right as fundamental as constitutional due process.[242] It must also recognize a constitutional right to due process.[243] For justice to be served, juveniles should be entitled to a transfer hearing consistent with due process and fairness.[244] Yet, this power over the court system in choosing the jurisdiction of juveniles as articulated in the Wyoming Constitution is handed to the executive branch by the legislature.[245] The legislature laid out an intricate system for addressing juvenile delinquency with a focus of establishing a juvenile court that is geared toward rehabilitation.[246] The only opportunity for a juvenile over the age of twelve charged with a misdemeanor to go through juvenile court is if a prosecutor, a member of the executive branch, chooses to file a petition there.[247] When an officer issues a citation to a minor, this determination is made by a law enforcement officer and no opportunity exists to be adjudicated in a juvenile court.[248]

F. A Non-Reviewable System and the Wyoming Rational Basis Test

In *D.D.*, the Natrona County District Court applied the federal rational basis standard in establishing that juvenile justice statutes are constitutional and do not violate equal protection.[249] However, more pertinent authority is found in Wyoming case law in *Johnson v. State Hearing Examiner's Office*. *Johnson* discussed the constitutionality of alcohol offenses and the ability of the legislature to pass laws taking away the drivers' licenses of minors when they are caught with alcohol.[250]

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[239] *Petition of Padget*, 678 P.2d 870, 871 (Wyo. 1984).

[240] WYO. CONST. Art. 5, § 2.

[241] Allen v. Allen, 550 P.2d 1137, 1142 (Wyo. 1976).

[242] *Id.*

[243] *Id.*

[244] Green v. Reynolds, 57 F.3d 956, 960-61(10th Cir. 1995).

[245] WYO. CONST. Art. 5, § 29.

[246] WYO. STAT. ANN. §§ 16-4-201 et. Seq. (2007).

[247] *Id.* at §§ 16-4-201 to -252 (2007).

[248] *See* for example the citation issued to *D.D.* as addressed *supra* note 92 (citing *D.D.* with petit larceny).

[249] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 11 (Dec. 4, 2005).

[250] Johnson v. State Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992).

It held a higher scrutiny level than the federal rational basis standard should be applied when examining due process for juveniles.[251] In *Johnson*, the court first recognized that the Wyoming statute divided juveniles into three separate groups for purposes of punishment.[252] Similarly, the Act also divides juveniles into separate groups when determining which court has what type of jurisdiction in a delinquency case.[253] The Wyoming Rational Basis Test established in *Johnson* should have been the authority to which the Natrona County District Court looked in making its determination in *D.D.*[254]

The Act grants protection to all juveniles convicted of a felony or misdemeanor if they are under the age of thirteen, yet other juveniles are not afforded the same equality.[255] In *Johnson*, the court found the age differences of juveniles indicating separate treatment could be held to constitutional scrutiny in light of Wyoming's Constitution.[256] In *D.D.*, the Natrona County District Court stated children are all similarly situated within the context of Wyo. Stat. § 14-3-105 because they fall within the definition of child.[257] However, the Natrona County District Court also found enough differences in the way the statute treated juveniles to require a constitutional analysis of the level of scrutiny to determine if there was unequal

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[251] *Id.* The Wyoming Rational Basis Test established in *Johnson* allows a higher level of scrutiny than that required by the federal constitution. It effectively puts a higher burden on constitutional scrutiny than that of Federal rational basis, and allows for a stricter scrutiny when there is a class of people that are being discriminated against. In effect The Wyoming Rational Base test allows strict scrutiny of constitutional rights when there is a legislatively defined class that may not fit within the definition for a suspect class under federal law. The prongs of the Wyoming Rational Basis Test are: 1) What class is harmed by the legislation and has that group been subjected to a "tradition of disfavor" by our laws?; 2) What is the public purpose that is being served by the law?; 3) What is the characteristic of the disadvantaged class that justifies the disparate treatment?; and 4) How are the characteristics used to distinguish people for such disparate treatment relevant to the purpose that the challenged laws purportedly intend to serve? *See generally* Johnson v. State Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992).

[252] *Johnson*, 838 P.2d at 160-61 (treating those of different ages differently in punishment when caught underage with alcohol).

[253] The Wyoming Juvenile Justice Statute states, "Juvenile court has exclusive jurisdiction in all cases, other than status offenses, in which a minor who has not attained the age of thirteen (13) years is alleged to have committed a felony or a misdemeanor punishable by imprisonment for more than six (6) months." The statute then continues, "Except as provided in subsection (d) of this section, the juvenile court has concurrent jurisdiction in all cases, other than status offenses, in which a minor is alleged to have committed a criminal offense or to have violated a municipal ordinance." WYO. STAT. ANN. § 14-6-203(c), (d) (2006). This statute obviously divides juveniles into at least two classes that are subject to disparate treatment.

[254] *See* discussion *supra* Part III.F.

[255] *Supra* notes 178-180 and accompanying text.

[256] *Johnson*, 838 P.2d at 164-70.

[257] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 10 (Dec. 4, 2005); WYO. STAT. ANN. § 14-6-201(a)(iii) (2007) (defines a child as an individual under the age of majority).

treatment thus a violation of D.D.'s right to equal protection.[258] The Natrona County District Court commented that age was not a protected class and cited a 2001 Wyoming Supreme Court Case, *Misenheimer v. State.*[259] *Misenheimer* cites a U.S. Supreme Court Case, *Massachusetts Board of Retirement v. Murgia,* to conclude that age was not considered a class for purposes of elevating the level of scrutiny to strict scrutiny.[260] Alternatively, *Johnson* addressed statutes that created unfair age classifications and disparate treatment and is the more applicable case to address the constitutional question in *D.D.*

After relying upon *Misenheimer*, the Natrona County District Court continued its analysis to determine if Wyo. Stat. Ann. § 14-6-203 was rationally related to a legitimate state objective.[261] The Wyoming Rational Basis Test provides for higher constitutional scrutiny.[262] According to *Johnson,* a statute that uses age to separate groups that are treated disparately allows heightened scrutiny.[263] Strict scrutiny is not needed to establish an argument that the Act is unconstitutional; rather using the Wyoming Rational Basis Test articulated in *Johnson* does so.[264]

The *Johnson* decision established state laws must first be examined in light of their corresponding state constitution because federal constitutional questions should be avoided when legitimately possible.[265] Further, state constitutions "may be more protective of individual liberties" than federal protections.[266] *Johnson* then addressed the equality of all members of the human race.[267] *Johnson* recognized that while the federal equal protection test of strict scrutiny is designed to protect against the distinction of race and color referred to in the Fifteenth Amendment,

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[258] *D.D.,* Criminal Action No. 16885-A at 10-11.

[259] *Id.* at 11 (citing Misenheimer v. State, 27 P.3d 273, 282 (citing Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 314-15 (1976))).

[260] Mass. Board of Retirement v. Murgia, 427 U.S. 307, 314-15 (1976). *Misenheimer* is a case involving indecent acts with a minor, and does not analyze statutes differentiating arbitrary age groups. *Id.*

[261] *D.D.*, Criminal Action No. 16885-A at 11.

[262] Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 164 (Wyo. 1992).

[263] *Id.* at 160 (discussing that the statute concerning alcohol and driver's license suspension was invalid as it offended the protections guaranteed within the state Bill of Rights included in the Wyoming Constitution).

[264] *Id.* at 166-67.

[265] *Id.* at 164 (citing Employment Sec. Com'n of Wyo. v.W. Gas Processors, Ltd., 786 P.2d 866, 873 (Wyo. 1990)).

[266] *Johnson*, 838 P.2d at 164 (citing Cheyenne Airport Bd. v, Rogers, 707 P.2d 717, 726 (Wyo. 1985) (internal citations omitted)).

[267] WYO. CONST. Art. 1, § 2. ("In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.") *see generally* Johnson v. State Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992).

the test fails to protect equally against distinctions that are not specifically referred to in the Fifteenth Amendment.[268] The *Johnson* court made the distinction that the Wyoming Constitution requires laws affecting rights and privileges be without distinction of race, color, sex or "any circumstance or condition whatsoever other than individual incompetency."[269]

Additionally, the court pointed to *Sanchez v. State* to address the constitutional language, finding the language should be read "so that each word or phrase has meaning and no part is superfluous."[270] Case law in Wyoming establishes that the Wyoming Constitution is "construed to protect people against legal discrimination more robustly than does the federal constitution" in equal protection cases.[271] Further, the state constitution, even at the lowest traditional scrutiny level, empowers courts to scrutinize classification legislation more carefully than a court can under federal doctrine.[272] In other words, Wyoming appellate courts can look at the constitutionality of classification legislation even more carefully than what is allowed under the federal minimum scrutiny test.[273] The Natrona County District Court in *D.D.* did not use this higher level of scrutiny in its analysis.

The finding in *D.D.* is consistent with the idea that the person attacking the constitutionality of a statute has the burden to prove that statute unconstitutional.[274] In *D.D.,* the Natrona County District Court departed from that reasoning and discounted the different groups established by the juvenile justice statute when it stated, "[t]here is no inherent right to be prosecuted as a juvenile; it is a privilege granted by the legislature, and the legislature can restrict or qualify the privilege as it sees fit as long as no arbitrary or discriminatory classification is implicated."[275] The Natrona County District Court held that D.D. and other juveniles under the jurisdiction of juvenile court are similarly situated within the context of Wyo. Stat. §14-3-105 because they come within the definition of "child."[276] This reference to the definition of "child" is found in the statute prohibiting immoral or indecent acts with a child and has no relevance to the Act's disparate treatment

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[268] *Johnson,* 838 P.2d at 164-65 *(*citing City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985)).

[269] *Johnson*, 838 P.2d at 164-65; WYO. CONST. Art. 1, § 3.

[270] *Johnson*, 838 P.2d at 165 (quoting Sanchez v. State*,* 751 P.2d 1300, 1305 (Wyo. 1988)).

[271] *Johnson*, 838 P.2d at 165.

[272] *Id.* (quoting Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation,* XXI LAND & WATER L. REV. 527, 553 (1986)).

[273] *Johnson*, 838 P.2d at 165.

[274] *Compare Johnson,* 838 P.2d at 165 (citing Baskin v. State ex rel. Workers Compensation Div., 722 P.2d 151, 155 (Wyo. 1986)) *with* D.D. v. City of Casper, Wyo.*,* Seventh Judicial District Criminal Action No. 16885-A, 10 (Dec. 4, 2005) (citing Ellett v. State, 883 P.2d 940, 944 (Wyo. 1994)).

[275] *D.D.*, Criminal Action No. 16885-A at 10.

[276] *Id.*

and different jurisdictional qualifications of the two groups of children identified in the Act.[277]

The Natrona County District Court in *D.D.* correctly asserted that substantial changes in the Act are best addressed through legislative action.[278] Nevertheless, it remains the obligation of appellate courts to ensure that individuals' rights to equal protection and due process are not infringed upon by legislation.[279] The Natrona County District Court cited *Hansen v. State*, a case closely on point, to emphasize that there is no constitutional right to be tried as an adult.[280] However, the decision in *Hansen* was based upon the assumption that there was no arbitrary classification.[281] The Act and *D.D.* can be distinguished from *Hansen* since there exists an arbitrary age classification within the Act.[282] One key distinction in *Hansen*, a consolidated case involving two juveniles, is one of the juveniles was given the opportunity to have a hearing to determine whether he should be tried in adult court using the factors of Wyo. Stat. Ann. § 14-6-237, and the other had his original action commenced in a juvenile court.[283]

Additionally, both individuals in *Hansen* were accused of violent felony crimes and fell within the first group of the juvenile justice statutes that allows exclusive jurisdiction.[284] In contrast, D.D. fell into the other classification in the juvenile justice statutes that allows concurrent jurisdiction, and he did not have a right to any type of transfer hearing or juvenile action.[285] This is a critical difference when examining *D.D.* Because *Johnson* contained two age classifications that were given disparate treatment, it provides a more accurate rule to determine the constitutionality of the Wyoming juvenile justice statutes.[286] The fact remains that the jurisdictional piece of the statute is inconsistent with the public purpose of the Act as stated in Wyo. Stat. Ann. §14-6-201(c).[287]

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[277] WYO. STAT. ANN. § 14-6-201(a)(iii) (2007).

[278] *D.D.*, Criminal Action No. 16885-A at 14.

[279] *See* discussion *supra* Part III.E.

[280] *D.D.*, Criminal Action No. 16885-A at 12 (citing Hansen v. State, 904 P.2d 811, 818 (Wyo. 1995)).

[281] *Hansen,* 904 P.2d at 817-18 .

[282] *Infra* note 294 and accompanying text.

[283] *Hansen,* 904 P.2d at 814-15.

[284] WYO. STAT. ANN. § 14-6-203(d) (2007) ("the juvenile court has exclusive jurisdiction . . . .").

[285] *Id.* at § 14-6-203(c) ("the juvenile court has concurrent jurisdiction . . . .").

[286] Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 166 (Wyo. 1992).

[287] WYO. STAT. ANN. § 14-6-201(c) (2007) states:

> The Act is construed to effectuate the following public purposes (in part)(i): To provide for the best interests of the child and the protection of the public and public safety; (ii)(A)To promote the concept of punishment for criminal acts while recognizing and distinguishing the behavior of children who have been victimized

The *Johnson* court used a heightened minimum scrutiny test long articulated by Justice Stevens, and asked four questions when confronted with an equal protection issue.[288] The Natrona County District Court in *D.D.* incorrectly answered the question of whether the jurisdiction laid out in the Act was rationally related to a legitimate state objective.[289] The court then commented the state has a legitimate interest in assuring the reservation of state resources for treatment and physical evaluations for only those who need and will benefit from them.[290] Thereafter, the court concluded the statute logically stands to reason that the differences in treatment between major crimes and minor crimes bear a rational relationship to the objective of conservation of public resources and a reasonable method of obtaining it.[291] The correct analysis would have applied the Wyoming Rational Basis Test and the court should have answered the questions asked in *Johnson*: 1) What class is harmed by the legislation and has that group been subjected to a "tradition of disfavor" by our laws?; 2) What is the public purpose that is being served by the law?; 3) What is the characteristic of the disadvantaged class that justifies the disparate treatment?; and 4) How are the characteristics used to distinguish people for such disparate treatment relevant to the purpose that the challenged laws purportedly intend to serve?[292]

The answer to the first question of what class is harmed by the legislation is the Act creates age groups with disparate treatment based on age. Juveniles over the age of thirteen charged with minor offenses are denied the same opportunities for treatment and rehabilitation as those under the age of thirteen who have been charged with a crime that may have a six month incarceration period. The Natrona County District Court found in *D.D.* the state had a legitimate interest to prevent individuals over the age of thirteen charged with minor offenses from accessing rehabilitative resources because of the need to reserve them for those who need and will benefit from them.[293] This defies logic since a court would not know who needs services unless the factors that the Natrona County District Court found to be irrelevant were considered. The factors are not considered in adult proceedings, yet the Natrona County District Court ruled that the state has

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> or have disabilities, such as serious mental illness that requires treatment; (iii)(B) To remove. . . the taint of criminality from children committing certain unlawful acts;(ii)(C) and, to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct, reduces recidivism and helps children become functioning and contributing adults.

[288] *Johnson*, 838 P.2d at 166-67.

[289] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A, 11 (Dec. 4, 2005).

[290] *Id.*

[291] *Id.*

[292] *Johnson*, 838 P.2d at 166-67.

[293] *D.D.*, Criminal Action No. 16885-A at 11.

a legitimate interest in deciding who to help.[294] These factors must be considered in juvenile court settings to establish where the resources should be used.[295]

Second, the governmental purpose served by the classification is unclear. The Act's purpose is extremely clear that rehabilitation is a goal, but allowing exclusive jurisdiction for juvenile adjudication to one group and not others is not addressed.[296] The Natrona County District Court in *D.D.* found judicial efficiency was one reason for the classification.[297]

The third question in *Johnson* asks for identification of the characteristic of the group justifying disparate treatment.[298] The analysis compared the disparate treatment of those between nineteen and twenty-one years of age with those who were older than twenty-one years of age.[299] The argument asserted the difference revolved around the degree of independence each class possessed.[300] The classification of a statute allowing a driver's license to be suspended based upon one group being more dependent was found to be no more than conjecture.[301] The Wyoming Supreme Court has found conjecture not enough for a statute to categorize individuals stating, "any claim that the restriction of the law bears a reasonable relation to a public interest must rest not on conjecture but must be supported by something of substance."[302]

Fourth, the Wyoming Supreme Court in *Johnson* dismissed the state's assumption that those younger than nineteen are less independent than those who are nineteen or twenty years old, and determined the state would still have to show the relevance of the characteristic to the restriction.[303] By the same token, the assumption in *D.D.* was anyone under thirteen years of age is more susceptible to rehabilitation, hence exclusive jurisdiction is appropriate.[304] Alternatively a

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[294] *Id.*

[295] *Id.* The court found that the history of D.D. was of questionable relevance, yet in order to be considered the proceedings should be in a juvenile court setting where the history and factors for rehabilitation are considered. *Id.*

[296] *Supra* notes 141-44 and accompanying text.

[297] *D.D.*, Criminal Action No. 16885-A at 11.

[298] Johnson v. State Hearing Examiner's Office, 838 P.2d 158,166-67 (Wyo. 1992).

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.* at 167 (quoting Nehring v. Russell, 582 P.2d 67, 76-77 (Wyo. 1978)). *Additionally*, BLACK'S LAW DICTIONARY defines "conjecture as", "[a] guess; supposition; surmise." BLACK'S LAW DICTIONARY 868 (8th ed. 2004).

[303] *Johnson*, 838 P.2d at 167.

[304] D.D. v. City of Casper, Wyo., Seventh Judicial District Criminal Action No. 16885-A at 10-11 (Dec. 4, 2005) (accepting there was no protected class and that minor crimes do not merit juvenile treatment).

fourteen-year-old would not have the same rehabilitative nature. It appears state resources should not be used for fourteen to seventeen-year-olds to rehabilitate them into law abiding, contributing adults. The Natrona County District Court addressed this when it stated there is no need for juvenile treatment for minor crimes, and the state has a legitimate interest to assure state resources are only used for those that will benefit from them.[305] There is no substance to this assertion; rather this decision is based on conjecture.

Nationwide studies conducted by the Department of Justice show that family arrangements and other factors contribute to higher offense rates for offender at seventeen years of age; therefore, it would be reasonable to allow juveniles thirteen and older juvenile court adjudication where all "factors" could be considered in utilizing a rehabilitative approach to reduce recidivism.[306] The nationwide study revealed the high percentage of recidivism in juvenile offenders around the age of sixteen or seventeen.[307] Perhaps mandatory adjudication in a juvenile court could turn the tide in this trend. Numerous statistics in the nationwide study bolster a conclusion that dealing with juveniles in a rehabilitative way may prevent future adult offenses.[308] This outcome rests on substance rather than conjecture as required by *Johnson*.[309]

In light of statistical information and the discussion regarding juvenile treatment for thirteen to eighteen-year-olds, it is reasonable to infer a right exists to the environment a juvenile court provides. *Johnson* asserted that even if there is a legitimate assumption by the state to distinguish groups by age, the state is still required to show the relevance of these age specific distinctions.[310] The statute states only those juvenile delinquents under the age of thirteen have the right to exclusive jurisdiction by the juvenile court. Statistical data supports juveniles up to the age of eighteen benefitting from adjudication in the juvenile court system.[311] The division between juveniles under the age of thirteen and those over thirteen is counter-productive and counter-intuitive. The differentiation does not comport with the goals of the Act.[312] Using the *Johnson* minimum scrutiny analysis, the differentiation between groups does not pose a special threat to the government's legitimate interest and therefore is unconstitutional.[313]

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[305] *Id.* at 11.

[306] Snyder & Sickmund, *supra* note 18 at 72.

[307] *Id.* (discussing family background as one factor in Juvenile Offenders).

[308] *Id.*

[309] *Id.* at 71.

[310] Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 167 (Wyo. 1992).

[311] Snyder & Sickmund, *supra* note 18, at 72.

[312] *See* WYO. STAT. ANN. § 14-6-201 et. seq. (2007).

[313] *Johnson*, 838 P.2d at 166-67.

The *Johnson* court found that the controlling statute violated equal protection.[314] Under the four-question analysis, there is strong support the age division in the Act violates equal protection and due process of those individuals who do not have the right to juvenile justice court unless a prosecutor chooses to adjudicate them in a juvenile justice system.

IV. CONCLUSION

Wyoming's Juvenile Justice Act is flawed and change is needed. Parents have a duty to appear with their child in a juvenile delinquency proceeding and are parties in a juvenile matter. In *D.D.*, the parents were not made aware that their child had committed a crime until he had been arrested on a bench warrant. This forced D.D.'s parents to violate the Wyoming Statute that states it is the responsibility of "one (1) or both parents to appear . . . when the minor is required to appear and is alleged to have committed a criminal offense or to have violated a municipal ordinance."[315] *In re Gault* provides the authority to assure this does not occur.

Juveniles have a right to juvenile adjudication. The appropriate means to command the appearance of a juvenile in adult court is through transfer from juvenile court to adult court. The discretion on whether or not to transfer a juvenile should rest with the judge, not a prosecutor or law enforcement officer.

Due process is a fundamental right that must be afforded to all juveniles in Wyoming as articulated by *Kent* and *In re Gault*. D.D. did not have an opportunity to benefit from the rehabilitative nature of juvenile court when the discretion was left to the police officer who required D.D. to appear in municipal court. Similarly, absolute discretion granted to prosecutors to determine the court of adjudication for juveniles is problematic. This discretion has been found constitutional by the Wyoming Supreme Court, but applying the Wyoming Rational Basis Test reveals that the present Act is unconstitutional and violates juveniles' rights to due process and equal protection.

Concurrent jurisdiction in the statute separates juveniles into two different groups, one of which is afforded the absolute right to be adjudicated in a juvenile court, and the other that is seldom afforded the rehabilitative nature of the Juvenile Justice Act Statutes. Concurrent jurisdiction is self-defeating and does not support the goals of the Act to treat juveniles in a rehabilitative way. The Tenth Circuit emphasized the importance of preventing a juvenile from adjudication in an adult court "without ceremony—without hearing, without effective assistance of

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[314] *Id.* at 180-81 (discussing that the statute deprived plaintiffs of equal protection or due process in violation of the Wyoming Constitution); *See* WYO. CONST. Art. 1, § 2 "Equality of all." *Id.*

[315] WYO. STAT. ANN. § 14-2-205(A) (2007).

counsel, without a statement of reasons." Concurrent jurisdiction allows absolute prosecutorial discretion. In some instances, officers choose the court where a juvenile will be adjudicated. This is unconstitutional and does not comply with the purposes of the Act.

The responsibility to correct these constitutional breaches may lie with the legislature, but Wyoming Courts should also acknowledge the unconstitutionality of the Act. With ninety-seven percent of juvenile offenders being adjudicated in adult courts, in Natrona County, it is apparent that Wyoming's Juvenile Justice Act fails the majority of them. The *D.D.* decision is an example where the court system failed a juvenile, a failure that happens far too frequently. Wyoming's Juvenile Justice Act is illegal and unconstitutional. The Wyoming Legislature and Wyoming Courts must closely examine Wyoming's "Outlaw" Juvenile Justice Act when addressing youthful offenders, and make the necessary changes to ensure that juveniles' rights are preserved.

CASE NOTE

FAMILY LAW—The Wrong Side of the Coin–Policy, Permanency and the Problem of Legal Orphans in Wyoming: *In re A.D., D.D., K.D. v. Wyoming Department of Family Services*, 151 P.3d 1102 (Wyo. 2007).

*Megan K. Holbrook**

Introduction

In January of 2003, the Department of Family Services (DFS) removed C.L. and C.D.'s three minor children, D.D., K.D., and A.D. from their care.[1] DFS removed the children based on allegations of physical abuse by their father and neglect.[2] Upon inspection, DFS also found the home in a filthy and unsafe condition.[3] Both the mother and father admitted to neglecting their children, and the District Court of Platte County adjudicated the case accordingly, removing the children from the home.[4] In July of 2003, DFS returned the three children to the care of their biological parents for a trial home placement.[5] This attempt to reunify the family ended two months later.[6] DFS, once again, removed the children from their parents, based upon new allegations of physical abuse and neglect.[7] Following the second removal, the children remained in DFS' custody and did not return to their biological parents' care.[8]

After DFS took custody of their children, the parents became uncooperative.[9] The children's mother acted openly hostile towards the caseworker assigned to their family.[10] The parents also neglected to maintain consistent employment, support their children, or keep a suitable home.[11] The children's father was incarcerated during the children's stay in foster care.[12] Thus, DFS attempted to assist the children's mother with the goal of reuniting them with their mother

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*Candidate for J.D., University of Wyoming, 2009. I would like to thank Professor Johanna Bond and Professor Tawnya Plumb for their help and encouragement, and my friends and family for their support during this project.

[1] AD, DD, KD v. Wyo. Dep't. of Family Servs., 151 P.3d 1102,1103 (2007).

[2] *Id.* Only the father was found to have physically abused the children. *Id.*

[3] *Id.*

[4] *Id.* at 1104.

[5] *Id.*

[6] *AD*, 151 P.3d at 1104.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *AD*, 151 P.3d at 1104.

[12] *Id.*

permanently.[13] The mother, however, did not comply with DFS' requirements, and in July of 2004 DFS filed a petition to terminate both parents' parental rights, citing a lack of progress in reunifying the family.[14]

The Platte County District Court held an initial hearing on the termination petition in the spring of 2005.[15] At this hearing, the court terminated the father's rights.[16] Nevertheless, the court ruled that DFS had not shown, by clear and convincing evidence, that placing the children in their mother's care seriously jeopardized their health and safety.[17] Further, the court determined that DFS did not carry its burden by proving that the mother was unfit to have custody of her children.[18] The district court, therefore, ordered a hearing continuation in six months.[19] The court also required DFS to retain custody of the children while making additional efforts to rehabilitate their mother.[20] The court told the mother she had one final chance to meet DFS' reunification requirements, and ordered her to cooperate fully with DFS.[21]

Subsequently, DFS and the mother agreed to a case plan.[22] The plan outlined several objectives and tasks for the mother, including that she achieve emotional stability, provide for her children, maintain a stable and safe home environment, live a drug- and alcohol-free lifestyle, attend weekly visitations with her children, and arrange telephone visits with them.[23] In November of 2005, the district court held a second hearing to consider DFS' termination petition.[24] The evidence presented at this hearing established that the mother performed many of the tasks set forth in the case plan.[25] Nevertheless, because she had changed residences three times and changed jobs once, her therapist, the children's therapist, and the DFS caseworker testified that she had not demonstrated a sufficiently stable lifestyle to regain custody of her children.[26] As a result, none of them recommended

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *AD*, 151 P.3d at 1104.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *AD*, 151 P.3d at 1104.

[22] *Id.* A case plan lays out goals for a parent to complete to be better equipped to care for his or her children; such as living a drug and alcohol free lifestyle, attending therapy sessions, finding suitable housing, finding steady employment, etc. *Id.*

[23] *Id.* at 1105.

[24] *Id.*

[25] *Id.*

[26] *AD,* 151 P.3d at 1105.

reunification.[27] The district court terminated the mother's parental rights at this hearing, reasoning that the children needed permanency in their lives and the extended period of foster care did nothing to advance this goal.[28] Following the district court's decision, the mother filed an appeal with the Wyoming Supreme Court.[29]

When the Wyoming Supreme Court reviewed the case in February 2007, the three children were already adolescents at fourteen, thirteen and ten years old.[30] The Wyoming Supreme Court emphasized that the right to associate with one's family is fundamental, and therefore the courts must strictly scrutinize petitions to terminate a parent's rights to his or her children.[31] Because of this fundamental right, an agency, such as DFS, must present clear and convincing evidence to warrant a termination of parental rights.[32] The district court, in its ruling, found clear and convincing evidence to terminate the mother's parental rights.[33] Wyoming statutory provisions state the court may terminate the parent-child legal relationship if clear and convincing evidence establishes the child's parent has abused or neglected the child, reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family, and the child's health and safety are in jeopardy if he or she remains with or returns to the parent.[34] Additionally, the court may terminate the parent-child legal relationship if the state of Wyoming has cared for the child or children in question for fifteen of the most recent twenty-two months, and there is a showing that the parent is unfit to have custody and control of the child.[35] After a review of the district court's decision, the Wyoming Supreme Court affirmed and granted DFS' petition by permanently terminating CL's parental rights.[36]

This case note looks to relevant case law and statutory history in Wyoming to describe the current approach to termination of parental rights.[37] Then, this

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1112 (Hill, J., dissenting).

[31] *AD*, 151 P.3d at 1105 (quoting SLB v. JEO, 136 P.3d 797, 799-800 (Wyo. 2006) (quoting SLJ v. Dep't of Family Servs., 104 P.3d 74, 79-80 (Wyo. 2005))).

[32] *AD,* 151 P.3d at 1105 (citing SLJ v. Dep't. of Family Servs., 104 P.3d 74, 79-80 (Wyo. 2005)). Clear and convincing evidence denotes proof that would persuade a trier of fact that the contention's truth is highly probable. *Id.*

[33] *See AD*, 151 P.3d at 1105. The district court made its decision pursuant to the provisions in WYO. STAT. ANN. §§ 14-2-309(a)(iii), (v) (2007). *Id.*

[34] WYO. STAT. ANN. § 14-2-309(a)(iii) (2007).

[35] *Id.* at § 14-2-309(a)(v).

[36] *AD*, 151 P.3d at 1103.

[37] *See infra* notes 43-104 and accompanying text for a discussion on Wyoming case law and statutory history regarding termination of parental rights.

note offers an analysis of the court's ruling in *In re AD*.[38] It also examines other jurisdictions' statutory requirements in termination of parental rights proceedings, and analyzes the differences between those jurisdictions' termination statutes and Wyoming's current statute.[39] This note also considers the problems that arise in Wyoming regarding the court's reliance on case plans, which are not currently required by Wyoming's termination statute.[40] From there, this note examines the problem of legal orphans.[41] Finally, this note advances suggestions as to how Wyoming courts and family services can work to improve the role the court plays in deciding the fate of older children who are left in the custody of the state after termination of parental rights.[42]

BACKGROUND

Prior to 1955, no statutes existed in Wyoming that conferred power on the courts to sever the legal parent-child relationship.[43] Not until the late 1950s did the Wyoming Legislature enact the first statute to give a court this power.[44] At the time, this was a progressive piece of legislation.[45] Wyoming was one of few states to enact such a law.[46] Before the statute's existence, there was neither common law nor statutory law allowing the state or petitioners in adoption proceedings to obtain permanent custody of an abused or neglected child without first getting the consent of the biological parents.[47] Wyoming's new law provided for a possible severance of all parental rights when an unfit parent's behavior threatened a child's welfare.[48]

The Wyoming Supreme Court decided the first case concerning the new termination statute in 1967.[49] The county attorney of Sheridan County filed a

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[38] *See infra* notes 105–125 and accompanying text for a discussion of the Wyoming Supreme Court's ruling in *In re AD*.

[39] *See infra* notes 133–160 and accompanying text for an analysis of Wyoming's statutory requirements regarding termination of parental rights.

[40] *See infra* notes 161–178 and accompanying text for a discussion of the Wyoming Supreme Court's reliance on the case plan.

[41] *See infra* notes 217–249 for a discussion of legal orphans.

[42] *See infra* notes 250–269.

[43] Sidney L. Moller, Note, *Termination of Parental Rights: Establishing Standards for the Wyoming Law*: In the Matter of Parental Rights to X, Y and Z, DS v. Dept. of Public Assistance & Social Services, 16 LAND & WATER L. REV. 295, 296-97 (1981).

[44] WYO. COMP. STAT. § 58-701 (Supp. 1957).

[45] Robert A. Hufsmith, Note, *Termination of Parental Rights,* 13 WYO. L. J. 185, 185 (1958).

[46] *Id.*

[47] *Id.* at 186.

[48] *Id.*

[49] *In re* Shreve, 432 P.2d 271 (Wyo. 1967).

petition to terminate Dona Shreve's parental rights to her five children.[50] The county attorney alleged that Dona Shreve was unfit to have care and control of her children because she abused and neglected them.[51] As petitioner, the county attorney asked the court to terminate the mother's rights, and to find a suitable permanent guardian for the children.[52] The trial court terminated the mother's rights citing neglect, and named the Sheridan County Department of Public Welfare as the children's guardian.[53] Shreve appealed, arguing that the State's evidence against her was insufficient to support the trial court's decision to terminate her rights.[54] Ultimately, the Wyoming Supreme Court simply relied on the lower court's assertions, and ruled the mother neglected her children.[55] Thus, the Supreme Court affirmed the lower court's decision.[56]

The second case that the state supreme court decided based on the statute's provisions occurred in 1976.[57] The case involved the deputy county and prosecuting attorney, who petitioned to terminate the parental rights of mentally retarded parents of an infant child.[58] At the first hearing, the district court found the parents to be unfit because they unintentionally neglected their baby.[59] The trial court also found the parents unable to comprehend the situation and their actions.[60] Because of the parents' mental inability to understand, the court determined the neglect would likely continue.[61] The court ultimately ruled that the child's welfare took precedence over the parents' rights and terminated the parental rights.[62]

On appeal, the parents noted that the burden of proof lies with the State in a termination of parental rights proceeding.[63] This burden, they argued, should be one of clear and satisfactory evidence.[64] The parents argued that the State did

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[50] *Id.* at 271-72.

[51] *Id* at 272.

[52] *Id.* Shreve's sister-in-law, brother-in-law, and mother all filed offers to accept custody of the children. *Id.*

[53] *Id.*

[54] *Shreve,* 432 P.2d at 272.

[55] *Id.* at 272-73.

[56] *Id.* at 273.

[57] *In re* CM, 556 P.2d 514 (Wyo. 1976).

[58] *Id.* at 515.

[59] *Id.*

[60] *Id.*

[61] *CM*, 556 P.2d at 515.

[62] *Id.*

[63] *Id.* at 516.

[64] *Id.*

not carry that burden, and the court should adjust the standard of proof to one of clear and convincing evidence.[65] The Wyoming Supreme Court noted the statute's silence as to the burden of proof, but dismissed the parents' contention that the court should designate the burden as "clear and convincing" or "clear and satisfactory" instead of a "preponderance of the evidence."[66] Ultimately, the supreme court found no error in the lower court's ruling, and upheld its decision to terminate parental rights.[67]

Two years later, the Wyoming Supreme Court handed down a landmark decision that addressed evidentiary standards, the importance of strict scrutiny in termination of parental rights proceedings, and the policy of finding permanency for the children involved in such proceedings.[68] The Sheridan County Attorney petitioned the Sheridan County District Court to terminate the parental rights of mother to a three-year-old child, X, based on allegations of neglect.[69] The county attorney also petitioned the court to terminate the mother's rights to her twin children Y and Z.[70] The district court awarded custody of all three children to the State Department of Public Assistance and Social Services, and stated that it would review its decision within one year.[71]

One year later, the mother requested that the district court review its prior decision.[72] The court granted this request, and, upon that review, the court permanently terminated the mother's parental rights.[73] The mother appealed the district court's decision to the Wyoming Supreme Court.[74] She set out to prove that her situation had changed for the better.[75] She also claimed the State could not, and had not shown she had neglected X, and that she was fit to care for her child.[76] The mother's main contention on appeal was that the evidence presented

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[65] *Id.* By raising the evidentiary standard to "clear and convincing," the court acknowledged that parents have a fundamental right to raise their own children and therefore made it harder to terminate parental rights without strong evidence that the child would be endangered by staying with his or her natural parents. *Id.*

[66] *CM*, 556 P.2d at 518.

[67] *Id.* at 519.

[68] *In re* X, Y and Z, 607 P.2d 911 (Wyo. 1980).

[69] *Id.* at 913.

[70] *Id.*

[71] *Id.* at 914.

[72] *Id.*

[73] *X*, 607 P.2d at 914.

[74] *Id.* Y and Z had serious health issues, and the mother chose not to seek reconsideration of the court's decision regarding them. *Id.*

[75] *Id.* at 920-22.

[76] *Id.*

at the original trial was not sufficient to justify the district court's termination of her rights.[77]

The Wyoming Supreme Court noted that in *In re C.M.* and *In re Shreve*, the plaintiffs raised the issue of the evidentiary standard courts should use when parents are accused of abuse or neglect.[78] In both cases, the court declined to define the standard.[79] The fact that the legislature failed to define the terms "neglect" and "abuse" disturbed the court.[80] Thus, the court decided to establish standards to guide courts in future decisions regarding claims of parental abuse or neglect.[81]

The court determined that it must always apply the most rigorous scrutiny possible in reviewing claims to terminate parental rights.[82] The court further acknowledged parents' fundamental right to raise their own children.[83] Thus, a court must only make the decision to terminate parental rights when there is clear and unequivocal evidence, established by close scrutiny that a child's well-being is in jeopardy because of a parent's neglect or abuse.[84] Ultimately, the court reversed the lower court's decision and returned X to his mother's custody.[85] In reviewing the evidence presented at trial, the court made a distinction between an occasionally messy home and an excessively and continuously unkempt home that creates fire and sanitary risks.[86] The court also emphasized that most parents fall short of perfection in many ways when it comes to raising their children.[87] Thus, the court noted, the issue was not whether foster parents could do a better job than the natural parents, but whether the natural parent has actually neglected a child to the extent that would justify separating parent and child permanently.[88]

Following its determination that clear and convincing evidence is appropriate in termination proceedings, the Supreme Court reprimanded the lower court's actions.[89] The court criticized the lower court for taking the child away from his mother while allowing reconsideration a year later, and ruled that the statute does

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[77] *X*, 607 P.2d at 914.

[78] *Id.* at 917.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *X*, 607 P.2d at 918.

[83] *Id.* at 919.

[84] *Id.*

[85] *Id.* at 923.

[86] *Id.* at 922.

[87] *X*, 607 P.2d at 922.

[88] *Id.*

[89] *See id.* at 921-22.

not allow a judge to keep a child's future uncertain.[90] The supreme court also admonished the district court for forcing X to adjust to two different foster care homes while his mother waited for reconsideration.[91] By making a non-decision, amounting to a temporary order concerning the child's fate, the lower court not only prevented X from living with his mother, but also effectively prevented X's possible adoption.[92]

In 1981, the Wyoming Legislature repealed the then-existing termination of parental-rights statute, and replaced it with the current statute.[93] This current statutory version essentially codified the *In re X* decision.[94] In response to the holding in that case, the new statute explicitly provided specific definitions for abuse and neglect.[95] The new statute also set the standard of proof required for termination.[96] The earlier statute did not specify the standard of proof in termination cases, leaving courts with the burden to decide the standard of proof to accept in each case.[97]

The new statute explicitly requires "clear and convincing" proof that a child's health and well-being are in jeopardy by remaining with the natural parents in order to terminate a parent's rights.[98] The new standard eliminates the court's need to determine the standard of proof on a case-by-case basis, but does not go so far as to require proof beyond a reasonable doubt.[99] The statute also adopted the *In re X* court's emphasis on parental rights by omitting language referring to "best interests of the child."[100] Even if someone else does a better job raising the child in question, this is not reason enough to remove him or her from the child's natural parents.[101] Rather, according to the statute, the child must be in a situation dangerous enough to jeopardize his or her well-being before the court may take the child away from his or her parents permanently.[102] Thus, the Wyoming courts and

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[90] *Id.* at 916.

[91] *Id.*

[92] *X*, 607 P.2d at 916.

[93] WYO. STAT. ANN. § 14-2-309 (2007). The current version of the statute specifically requires an evidentiary standard of clear and convincing evidence in termination cases. *Id.*

[94] *See* Becky Klempt, Comment, *Family Law—Wyoming's New Termination of Parental Rights Statute*, 17 LAND & WATER L. REV. 621, 622 (1982).

[95] *Id.* at 623-24 (explaining the new statute cross-references to another section of Title 14, where the definitions are found).This eliminates the need for courts to speculate as to the legislature's intent concerning these definitions. *Id.*

[96] *Id.* at 624.

[97] *Id.*

[98] WYO. STAT. ANN. § 14-2-309(a) (2007).

[99] Klempt, *supra* note 94, at 624-25.

[100] *Id.* at 627.

[101] *Id.* at 626.

[102] WYO. STAT. ANN. § 14-2-309(a)(iii) (2007).

legislature followed the United States Supreme Court's holding that the parents' right to raise their own children, free from State interference, is fundamental.[103] The court will separate children from their natural parents only if their continued health and well-being is actually in serious jeopardy from the parents' actions.[104]

PRINCIPAL CASE

After its review of the district court's ruling, the Wyoming Supreme Court handed down the *In re AD* decision in February of 2007.[105] Justice Kite wrote the majority opinion, joined by Justices Voigt and Burke.[106] Justice Hill filed a dissenting opinion which Justice Golden joined.[107] C.L., the mother and petitioner, asked the Wyoming Supreme Court to reverse the decision made by the Platte County District Court to terminate her parental rights to her three children.[108] C.L. argued primarily that the evidence presented by DFS was insufficient to separate her permanently from her children.[109] The Wyoming Supreme Court's opinion began with a statement of recognition that the right to associate with one's family is a fundamental one, and that the court is bound to apply nothing short of the strictest, most rigorous scrutiny to the evidence when deciding a termination of parental rights case.[110] In its opinion, the Wyoming Supreme Court examined the evidence pertaining to the mother's fitness and the evidence concerning the health and safety of the children as interrelated.[111]

The mother argued the district court erred by failing to recognize her compliance with the case plan, and the court should have measured her fitness to care for her children by her situation at the time of the second hearing.[112] She complied with almost all of the objectives set forth in the case plan, and had made significant efforts to rehabilitate herself.[113] Nevertheless, the Wyoming Supreme Court ultimately decided the district court's ruling promoted the children's interest in a safe and stable home, outweighing the mother's rights as a parent.[114]

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[103] *X,* 607 P.2d at 918, (citing Stanley v. Illinois, 405 U.S. 645 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969)).

[104] *X,* 607 P.2d at 919.

[105] AD, DD, KD v. Wyo. Dep't. of Family Servs., 151 P.3d 1102,1103 (2007).

[106] *Id.*

[107] *Id.* at 1110.

[108] *Id.* at 1105.

[109] *Id.* at 1106.

[110] *AD*, 151 P.3d at 1106*; see also SLB,* 136 P.3d at 799-800; TF v. Dep't of Family Servs., 120 P.3d 992, 1000 (Wyo. 2005).

[111] *AD*, 151 P.3d at 1106.

[112] *Id.* at 1108.

[113] *Id.* at 1108-10.

[114] *Id.* at 1110.

In his dissent, Justice Hill focused on the fact that the record did not contain clear and convincing evidence justifying termination of the mother's parental rights.[115] Justice Hill's dissent reasoned the mother complied as well as the court could reasonably have expected.[116] The dissent also noted that many of the mother's failings with respect to the case plan were completely reasonable.[117] The Wyoming Supreme Court's majority opinion faulted her for losing one of her part-time jobs, but she lost it because she left work to avoid missing a visit with her children.[118] The case plan also required her to maintain full-time employment so she could support her children, but again the court criticized her because her full-time employment status would prevent her from spending time with her children.[119] She progressed enough in her work with a therapist to only need sessions twice a month.[120] Nevertheless, the court chastised her for not seeing the therapist every week.[121]

Thus, as the dissent pointed out, the court based its conclusion that the mother was unfit only on evidence of those minor, reasonable failings.[122] The dissent also noted the district court and DFS took the position that any hint of failure to live up with the case plan after six months would result in the termination of the mother's parental rights.[123] Additionally, DFS took the stance that if the children ended up back with their mother, it would refuse to continue to work with the family.[124] In conclusion, the dissent argued that the majority refused to consider the totality of the mother's circumstances in ruling on her case.[125]

ANALYSIS

The Wyoming Supreme Court erred by upholding the lower court's decision to terminate C.L.'s parental rights.[126] Instead, it should have returned the children

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[115] *Id.* (Hill, J., dissenting).

[116] *AD,* 151 P.3d at 1111 (Hill, J., dissenting). At the time of the first petition to terminate both the father's and the mother's rights, the district court found there was not sufficient evidence to support terminating the mother's rights, nor was there evidence that living with her would jeopardize her children. *Id.* Following the court's determination that she neglected her children, it ordered DFS to continue rehabilitation efforts with the mother. *Id.* While the mother was not able to comply 100% with the case plan, the court conceded that her efforts were, to a vast extent, successful. *Id.*

[117] *Id.* at 1111-12 (Hill, J., dissenting).

[118] *Id.* at 1111 (Hill, J., dissenting).

[119] *Id.* (Hill, J., dissenting).

[120] *Id.* at 1111-12. (Hill, J., dissenting). This was according to the therapist herself. *Id.*

[121] *AD,* 151 P.3d at 1111-12 (Hill, J., dissenting).

[122] *Id.* at 1112 (Hill, J., dissenting).

[123] *Id.* (Hill, J., dissenting).

[124] *Id.* (Hill, J., dissenting).

[125] *See id.* at 1111-12 (Hill, J., dissenting).

[126] *See AD,* 151 P.3d. at 1110.

to their mother's care, with continued support and resources from DFS.[127] This would ideally result in the family's successful reunification and rehabilitation, and promote the family's long-term solidity.[128] The analysis examines the specific role of DFS and multi-disciplinary teams in termination proceedings.[129] It focuses on the current statute governing termination of parental rights in Wyoming, then looks closely at the court's consideration of the case plan and the obstacles the mother faced in attempting full compliance with its terms.[130] The analysis then looks to Wyoming's lack of adherence to the requirements if the Adoption and Safe Families Act (ASFA), and the problem of judicially created orphans as a result.[131] Finally, it examines permanency planning, especially for older children, in termination proceedings, in other jurisdictions, and advance suggestions as to how Wyoming may follow such examples to improve the lot of older children and adolescents whose parents' rights are legally terminated.[132]

Department of Family Services and Multi-Disciplinary Teams

In Wyoming, statutes govern the Department of Family Services and its role in termination of parental rights proceedings.[133] As the state youth services authority, the law charges DFS with the responsibility to "work with children and families in order to encourage the resolution of intrafamily problems through counseling and other services."[134] According to the statute, DFS shall "work on reuniting youth with their families in cases where the child has been placed out of the home and where additional work needs to be done in order for the youth to be reintegrated into the family."[135]

Despite the authority DFS possesses that allows it to intervene in families, DFS social workers do not recommend or control placement decisions concerning children in termination proceedings.[136] Instead, according to another Wyoming statute, the court must appoint a multi-disciplinary team (MDT) to make recommendations in child-protection cases, including termination of

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[127] *Id.* at 1112 (Hill, J., dissenting).

[128] *Id.* (Hill, J., dissenting).

[129] *See infra* notes 133-143 for a discussion of DFS and MDTs in termination proceedings.

[130] *See infra* notes 144-160 for an analysis of Wyoming's statute governing termination of parental rights.

[131] *See infra* notes 179-249, discussing Wyoming's lack of adherence to ASFA and an analysis of the problem of legal orphans created by terminations.

[132] *See infra* notes 250-269 for a discussion of more successful procedures in other jurisdictions and how Wyoming can move forward.

[133] WYO. STAT. ANN. § 9-2-2101 (2007). This statute defines DFS' duties and responsibilities.

[134] WYO. STAT. ANN. § 9-2-2101(e)(ii) (2007).

[135] WYO. STAT. ANN. § 9-2-2101 (e)(iii) (2007).

[136] Tony Lewis, *The State's Challenge For Children in Custody*, 24-DEC WYO. LAW. 24, 24 (2001).

parental rights proceedings.[137] By and large, the courts tend to follow MDT's recommendations concerning a child's long-term placement.[138] The MDT does not have the authority to termination parental rights, but instead makes a recommendation to the court regarding the child's case.[139] Along with its recommendations, the MDT must also submit a case plan for the child and family in question.[140] If the MDT recommends termination of parental rights, then the court may order DFS to begin termination proceedings.[141] Failure to put together an MDT to make a recommendation may result in the court refusing to terminate parental rights.[142] DFS' own analysis of whether this current process is effective indicates that there is a lack of consistent standards statewide, and that there is a need to develop consistent operation and standards for MDTs.[143]

Statutory Provisions

The court erred in considering the case plan that DFS submitted in its ultimate ruling regarding C.L.'s children, and failed to properly adhere to the provisions of Wyoming Statute §14-2-309, which governs termination of parental rights.[144] The statute makes no specific mention of case plans nor does it explicitly require

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[137] WYO. STAT. ANN. § 14-3-427(b) (2007). The MDT must include the child's parent, parents, or guardian, a representative of the school district who has direct knowledge of the child, a representative from DFS, the child's mental health professional if one exists, the district attorney, the child's attorney or guardian ad litem, a volunteer lay advocate if appointed by the court, and the foster parent. *Id.* at § 14-3-427(c).

[138] Lewis, *supra* note 136, at 24-25.

[139] *See In re* HP, 93 P.3d 982, 982 (Wyo. 2004).

[140] WYO. STAT. ANN. § 14-3-427(n) (2007).

[141] *See* Lewis, *supra* note 136, at 24-25.

[142] *See In re* FM, 163 P.3d 844, 844 (Wyo. 2007).

[143] Lewis, *supra* note 136, at 24-25.

[144] WYO. STAT. ANN. § 14-2-309 (2007). This statute states:

> (a) The parent-child legal relationship may be terminated if any one (1) or more of the following facts is established by clear and convincing evidence:
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> > (i) The child has been left in the care of another person without provision for the child's support and without communication from the absent parent for a period of at least one (1) year. In making the above determination, the court may disregard occasional contributions, or incidental contacts and communications;
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> > (ii) The child has been abandoned with no means of identification for at least three (3) months and efforts to locate the parent have been unsuccessful;
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> > (iii) The child has been abused or neglected by the parent and reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family or the family has refused rehabilitative treatment, and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent;

their use in termination proceedings.[145] The court made an erroneous decision to terminate the mother's parental rights based on a failure to comply 100% with the case plan.[146]

Wyoming precedent, expressly discussing termination of parental rights, states that under the rule requiring the court to strictly construe the statute, the court must not consider any ground not specifically included in the statute as a basis for terminating a parent's legal relationship with his or her children.[147] The

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(iv) The parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child;

(v) The child has been in foster care under the responsibility of the state of Wyoming for fifteen (15) of the most recent twenty-two (22) months, and a showing that the parent is unfit to have custody and control of the child;

(vi) The child is abandoned at less than one (1) year of age and has been abandoned for at least six (6) months;

(vii) The child was relinquished to a safe haven provider in accordance with W.S. 14-11-101 through 14-11-109, and neither parent has affirmatively sought the return of the child within three (3) months from the date of relinquishment.

(b) Proof by clear and convincing evidence that the parent has been convicted of any of the following crimes may constitute grounds that the parent is unfit to have custody or control of any child and may be grounds for terminating the parent-child relationship as to any child with no requirement that reasonable efforts be made to reunify the family:

(i) Murder or voluntary manslaughter of another child of the parent or aiding and abetting, attempting, conspiring to commit or soliciting such a crime; or

(ii) Commission of a felony assault which results in serious bodily injury to a child of the parent. As used in this paragraph "serious bodily injury" means as defined by W.S. 6-1-104.

(c) Notwithstanding any other provision of this section, evidence that reasonable efforts have been made to preserve and reunify the family is not required in any case in which the court determines by clear and convincing evidence that:

(i) The parental rights of the parent to any other child have been terminated involuntarily;

(ii) The parent abandoned, chronically abused, tortured or sexually abused the child; or

(iii) Other aggravating circumstances exist indicating that there is little likelihood that services to the family will result in successful reunification.

[145] WYO. STAT. ANN. § 14-2-309 (2007).

[146] *See id.*

[147] *See In re* SCN, 659 P.2d 568, 572 (Wyo. 1983).

case plan was a part of DFS' overall attempt to help the mother.[148] DFS created the case plan in an attempt to ensure that the mother would be better equipped to care for her children; however, a case plan is not a specific requirement within the termination of parental rights statute.[149] The court, therefore, inappropriately considered the extent of the mother's compliance with the case plan as a basis to terminate her parental rights.[150] Other jurisdictions have explicitly included case plans in termination of parental rights statues, which the parent or parents must comply with to regain or keep custody of their children.[151] The Adoption Assistance and Child Welfare Act also includes a provision for the court to consider a case plan as part of the process of rehabilitation in a termination proceeding.[152] In such jurisdictions a case plan serves as an officially sanctioned and regulated measuring stick to determine the probability of a successful long-term reunification.[153]

Despite the lack of statutory authorization to rely solely on the case plan, the Wyoming Supreme Court reasoned that if there had been total and complete compliance with the case plan, the mother would have been fit to regain custody of her children.[154] Conversely, if the mother lacked total and complete compliance, the Supreme Court would have considered this an establishment of clear and convincing evidence that the mother was unfit.[155] Wyoming's current termination statute omits any definite mention of case plans; therefore, courts should only use them as a tool to measure progress and gauge a parent's desire as well as genuine efforts to make the changes deemed necessary.[156] Thus, the court should only consider noncompliance with the case plan as a complete bar to eventual reunification if such noncompliance plainly demonstrates a parent's blatant disinterest or significant inability to make efforts to regain custody of his or her children; as opposed to enforcing a case plan that amounts to a serious of hoops through which a parent must jump, and imposes unrealistic goals on people living below middle-class status.[157] In this case, the evidence showed that the mother complied to a great extent with the case plan requirements, demonstrating her sincere desire to reunite with her children.[158] Moreover, there was no evidence

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[148] *See* WYO. STAT. ANN. § 9-2-2101 (2007) (defining DFS' duties towards families it becomes involved with).

[149] WYO. STAT. ANN. § 14-2-309 (2007).

[150] *See In re* SCN, 659 P.2d at 572.

[151] *See, e.g.,* MINN. STAT. ANN. §§ 260C.301(5)(i), (ii) (2007).

[152] Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(E)(16) (1997).

[153] *See, e.g.*, MINN. STAT. ANN. §§ 260C.301(5)(i), (ii); 42 U.S.C. § 675(5)(E)(ii) (2007).

[154] *AD*, 151 P.3d at 1109.

[155] *Id.* at 1110.

[156] *See SCN*, 658 P.2d at 572.

[157] *See* J. Bohl, *"Those Privileged Long Recognized": Termination of Parental Rights Law, the Family Right to Integrity, and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 357 (1994).

[158] *AD*, 151 P.3d at 1111 (Hill, J., dissenting).

showing her disinterest in making the efforts necessary to reunite with her children.[159] Nevertheless, the court dismissed her efforts to comply with the case plan.[160]

Case Plan Consideration

It was unreasonable for the court to fault the mother for her shortcomings in this case because complete compliance with the plan was not possible.[161] Her failures regarding the case plan were a result of her efforts to comply with other requirements.[162] For example, she lost one of her jobs because she left early, which taken on its own could be an irresponsible decision.[163] She chose to leave work, however, because she was unwilling to miss visitation with her children that had just been set on a new schedule.[164] The case plan required her to arrive on time to every scheduled visit with her children.[165] Rather than risk missing the visit, she chose to leave work early.[166] Unfortunately, that choice ultimately caused the loss of the job.[167]

Additionally, the case plan required that the mother attain emotional stability and mental health.[168] Other courts have held that a parent's emotional stability is only one factor that affects a child's well-being, and not the most important one.[169] Additionally, the same court held it determinative when a mental health professional endorsed the parent.[170] The Supreme Court failed to consider that the mother completed a number of therapy sessions, and had progressed in therapy so much that her therapist felt it beneficial to reduce her sessions.[171] The court should have recognized this significant progress, and committed to the family by ordering her to continue in therapy and followed up with her case after returning her children to her care.[172]

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[159] *Id.* at 1110-11 (Hill, J., dissenting).

[160] *Id.* at 1109-10.

[161] *Id.*

[162] *Id.* at 1111 (Hill, J., dissenting).

[163] *AD*, 151 P.3d at 1111 (Hill, J., dissenting).

[164] *Id.* (Hill, J., dissenting).

[165] *Id.* (Hill, J., dissenting).

[166] *Id.* (Hill, J., dissenting).

[167] *Id.* (Hill, J., dissenting).

[168] *AD*, 151 P.3d at 1106.

[169] Angelone v. Angelone, 404 N.E.2d 672, 673 (Mass. 1980).

[170] *Id.*

[171] *AD*, 151 P.3d at 1110-11 (Hill, J., dissenting).

[172] *See* 45 C.F.R. § 1357.15(n) (2007).

Obstacles in Complying With the Case Plan

The Wyoming Supreme Court's reliance on the case plan was also problematic because the plan failed to consider properly the obstacles the mother faced in complying with it.[173] In many cases, family services and the foster care system serve primarily poor children and their families.[174] Often, many of the parents involved in these proceedings live in poverty, as was the mother here.[175] Poverty makes fulfilling basic needs, such as finding and maintaining shelter, obtaining health care, or even providing food and clothing, far more difficult.[176] If the mother in this case had cavalierly flaunted the case plan requirements, thereby demonstrating her unwillingness to change her lifestyle, even at the risk of losing her children forever, the court would have been more justified in relying on that fact.[177] The mother, however, clearly made great efforts to comply with the plan requirements, successfully completing nearly all of them, despite the inherent obstacles she faced while doing so.[178]

Concurrent Adoption Planning

The court erred in permanently terminating the parental rights without knowing that the children involved would actually find permanency afterwards.[179] While DFS attempted reunification, no concurrent permanency planning took place.[180] This illustrates Wyoming courts' lack of adherence to federal requirements laid out in the Adoption and Safe Families Act (ASFA).[181] ASFA's provisions eliminate the problem of children waiting indefinitely in foster care by requiring courts to hold a permanency hearing within twelve months of the child's entry into foster care.[182] If it deems best, the court then orders termination of parental rights to free the child in the proceeding for adoption.[183] ASFA also requires,

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[173] Elizabeth D. Jones & Karen McCurdy, *National Committee for the Prevention of Child Abuse: The Links Between Types of Maltreatment and Demographics*, 16 CHILD ABUSE & NEGLECT 201, 201(1992).

[174] NORA S. GUSTAVSSON & ELIZABETH A. SEGAL, CRITICAL ISSUES IN CHILD WELFARE 94 (Sage Publishing 1994).

[175] *See* U.S. Advisory Bd. On Child Abuse & Neglect, *A Nation's Shame: Fatal Child Abuse and Neglect in the United States* 13 (1995).

[176] Jones & McCurdy, *supra* note 173, at 201.

[177] *See* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case For "Impermanence"*, 34 CAP. U. L. REV. 405, 448 (2005).

[178] *AD*, 151 P.3d at 1111 (Hill, J., dissenting).

[179] *See id.* at 1112 (Hill, J., dissenting).

[180] *Id.*

[181] *See* Thomas Wade Young & Jae M. Lee, *Responding To The Lament of Invisible Children: Achieving Meaningful Permanency for Foster Children,* 72 J. KAN. B.A. 46, 47-48 (2003); *see also* 42 U.S.C. §675 (2007).

[182] *See* 42 U.S.C. § 671(a)(15) (1997).

[183] *Id.*

concurrent with the initiation of termination proceedings, the initiation of the process of identifying, recruiting, processing, and approving a qualified family for adoption.[184] By simultaneously planning for both outcomes, the court ensures that children are not simply sent back to foster care or a group home without an adoptive situation in place when it terminates parental rights.[185]

The court stated that its policy was to promote permanency and stability in the lives of the children involved in the proceeding.[186] Despite this, the court made no effort to help find a viable permanency option for the children upon permanent removal from their mother's care.[187] Consequently, the children went straight back into DFS' custody, likely either ending up in foster care or a group home situation.[188] While a short period in temporary foster care is acceptable, at ages fourteen, thirteen and ten, the children in this proceeding are unlikely to exit foster care into an adoptive family.[189] The court's decision to send them back into DFS' custody amounted to sentencing them to permanent foster care or group home, with little hope of finding an adoptive family situation.[190] This decision also exposed the children to the risks often faced by teenagers who age out of the foster care system.[191]

Current Problems in Wyoming

The *In re A.D.* decision did not change the law; rather, this decision reflects Wyoming law as it currently relates to children involved in termination of parental rights cases.[192] This case does nothing more than illustrate the existing problems relating to the policy of permanency for children and the lack of effective standards in Wyoming courts' termination rulings.[193] Traditionally, Wyoming courts have been reluctant to terminate parental rights without serious cause.[194] The children in such cases are subject to statutory provisions requiring separation from their families for at least fifteen months before the State may initiate termination proceedings.[195] Furthermore, many of these children have gone through one or

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[184] *Id.* at § 671(a)(15)(F).

[185] Young & Lee, *supra* note 181, at 53.

[186] *AD*, 151 P.3d at 1108.

[187] *Id.*

[188] *Id.* at 1112 (Hill, J., dissenting).

[189] *Id.* (Hill, J., dissenting).

[190] *Id.* (Hill, J., dissenting).

[191] Alice Bussiere, *Permanence For Older Foster Youth*, 44 FAM. CT. REV. 231, 232 (2006).

[192] *See AD*, 151 P.3d at 1103.

[193] *See generally AD*, 151 P.3d 1102; *see also* Lewis, *supra* note 136, at 25.

[194] *See, e.g.*, *AD,* 151 P.3d 1102*; SLB,* 136 P.3d 797.

[195] *AD*, 151 P.3d at 1102.

more periods of attempted rehabilitation and, possibly, one or more attempted reunifications before DFS files a final termination of parental rights petition.[196]

With parents' fundamental right to raise their own children free from state interference in mind, courts make the decision to terminate parental rights as a last resort.[197] Thus, a court's goal in terminating the parental rights includes freeing the child for adoption if it considers termination in the child's best interest.[198] In situations where termination of parental rights is at stake, courts and family service agencies tend to consider the child's adoption the most permanent possible outcome for children who have been severed from their parents.[199] There is no statutory requirement that an adoptive family be found and waiting to take the children after termination of the biological parent-child relationship.[200] This situation exists despite the court's policy of promoting permanency by freeing children for adoption.[201] Inevitably, many children find themselves in the foster care system after being taken from their parents, and must linger there until an agency finds adoptive parents for them, growing less likely the older the children get.[202]

By the time a termination actually takes place, these children have likely already gone through considerable upheaval for an extended period of time.[203] Most children will have likely undergone a long period of uncertainty and trauma leading up to the termination hearing.[204] Often this initial uncertainty relates to these children being taken from their parents.[205] From the child's point of view, "a bad home with his or her natural parents may be preferable to an excellent foster home" with strangers.[206] The uncertainty and trauma grow as the children go back and forth between foster care and home while the system attempts parental rehabilitation.[207] Thus, a final termination decree may amount to nothing more

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[196] *Id.*

[197] *AD*, 151 P.3d at 1109.

[198] 42 U.S.C. § 671(b)(15) (1997).

[199] *Id.*

[200] *See* WYO. STAT. ANN. § 14-2-209 (2007).

[201] *AD*, 151 P.3d at 1110. Without adoptive parents waiting to take the children when a court orders termination, the children risk lingering indefinitely in foster care. *Id.*; *see also* 42 U.S.C. § 671(b)(15)(C) (1997).

[202] Bussiere, *supra* note 191, at 236.

[203] *Id.*

[204] *AD*, 151 P.3d at 1109-10.

[205] Theo Liebmann, *What's Missing From Foster Care Reform? The Need For Comprehensive, Realistic and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 176 (2006).

[206] Bohl, *supra* note 157, at 325.

[207] *AD*, 151 P.3d at 1109-1110.

than an order for continuing uncertainty and trauma if there is no permanent placement for the child once the order is entered.

Ultimately, particularly in the case of older children, permanent removal from their home, without an adoptive family waiting in the wings to take them, does little to "improve their lot" or to provide stability.[208] This places a heavy burden on judges, as they know that while they are removing children from a perilous situation, they could simultaneously be sentencing the children to a potentially indefinite period of foster care while they await adoption.[209]

The court reasoned that someone else other than the biological parents would do a better job at raising the children; thus its ruling was erroneous.[210] Only when the interests of the children in question directly collide with the parents' rights should the court remove the children from the parents' care.[211] In this case, the court chose to put the children into foster care rather than return them to their mother.[212] While she could not achieve perfection, she nevertheless made serious efforts to rehabilitate and provide a decent home for her family.[213] The court could have ordered DFS to remain involved with the family and continue to offer assistance to the mother and the children.[214] It is not reasonable to expect a family that has a background of negative history to reach DFS' ideal standard within such a brief time period.[215] In spite of the court's claim to be extremely tentative to terminate parental rights, in this case the court did not take the children's actual fate into serious consideration when deciding their future, making no effort to ensure permanency for them after the termination.[216]

The Problem of "Legal Orphans"

Only the court has the authority to terminate the parent-child relationship.[217] Therefore, the court is in a position to extend its influence and authority beyond the

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[208] *Id.* at 1112 (Hill, J., dissenting).

[209] *See id.* (Hill, J., dissenting).

[210] *See X*, 607 P.2d at 922.

[211] *AD*, 151 P.3d at 1109.

[212] *Id.* at 1110.

[213] *Id.* at 1111-12 (Hill, J., dissenting).

[214] *See* 45 C.F.R. § 1357.15(n) (2007). Such assistance could include emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period. *Id. See also* WYO. STAT. ANN. § 14-3-403 (2007) (giving courts the authority to order any party in a termination case, including DFS, to perform any act it deems necessary).

[215] Gail Vida Hamburg, *An Act of Compassion May Require Some Decisive Actions to Make it Work*, CHI. TRIB., Jan. 4, 1998, § 13, at 1.

[216] *AD*, 151 P.3d at 1110.

[217] *See* Bohl, *supra* note 157, at 324.

termination hearing to assist those children who can no longer safely remain with their parents.[218] Simply claiming to act in the child's best interest lacks sufficient judicial and agency effort if the reality is that the child will go on to spend the remainder of his or her adolescence in foster care or in a state institution.[219]

Currently, court decisions that sever children's legal relationship with their parents create vast amounts of "legal orphans."[220] Thus the court system, in conjunction with family service agencies, must decide children's fate.[221] Nationwide, 126,000 children in foster care await adoption.[222] Over half of these children have already reached the age of eleven.[223] Generally, adolescents lack options in this "system."[224] Every year, approximately 20,000 children who have reached the age of majority leave the foster care system with nowhere to go and no place to call home.[225] Many foster children who age out of the system experience numerous difficulties while attempting to make their way in the world.[226] Adolescents who leave foster care without permanent family or family-like connections are more likely to have problems with unemployment and unplanned pregnancies, to have legal problems, to have substance abuse issues, and difficulties obtaining health care.[227] Additionally, these legal orphans are also less likely than their peers to have a high school diploma or postsecondary education, or to earn enough to support themselves.[228] These issues show that it is undesirable for children to spend their adolescence in foster care with no permanent family or family-like relationships.[229]

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[218] Michael Compitello, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135, 140 (1997).

[219] Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 246 (1986).

[220] Kristin Andreason, *Eliminating the Legal Orphan Problem*, 16 J. CONTEMP. LEGAL ISSUES 351, 351 (2003). These legal orphans are children who may no longer live with their parents, and cannot live with another relative. *Id.* at 351.

[221] Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Consitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 146 (2004).

[222] ACHIEVING PERMANENCY FOR ADOLESCENTS IN FOSTER CARE: A GUIDE FOR LEGAL PROFESSIONALS 39 (Claire Chimulera & Sally Inada eds., American Bar Association 2006).

[223] *Id.* at 39.

[224] *Id.*

[225] *Id.* at 23.

[226] Bussiere, *supra* note 191, at 231.

[227] *Id.* at 232.

[228] *Id.*

[229] *See id.*

Unfortunately, social workers and adoptive families usually dismiss adoption as an option for adolescents.[230] Once a child has reached the age of twelve, the chances of adoption become extremely slim.[231] Federal law provides a role for the courts by requiring states to obtain a court determination that the court and other agencies made reasonable efforts to place foster children in a permanent placement in a timely manner.[232] The federal government requires this determination regardless of the child's age at the time he or she enters foster care.[233] In fact, if states do not meet the requirement in a number of cases, the law may disqualify any state from receiving federal financial awards for that case, and could even face sanctions.[234] In 2004, no state achieved substantial conformity with the permanency goals put in place by the federal government.[235] This evidences that Wyoming is not alone in failing to provide permanency for "legal orphans."[236]

Federal law encourages permanency for children.[237] In *In re AD*, the desire to create permanency for the three children motivated the Wyoming Supreme Court's decision.[238] The court ruled as though simply terminating the parental rights and freeing the children for adoption amounted to an accomplishment of that goal.[239] While a child with living parents cannot be adopted without termination of the natural parents' rights, terminating parental rights does not itself accomplish the goal of permanency.[240] When the State takes a child into foster care, it takes complete control over that child's family situation.[241] Such a responsibility is immense; the state should not limit its influence to the mere provision of continued foster care for legal orphans that result from the termination of parental rights proceedings.[242]

The court should not intervene to the extent that it does in these cases without actually providing a better situation for the children in question.[243] Termination of parental rights exists to protect and rescue children who are subjected to

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[230] Chimulera, *supra* note 222, at 6.

[231] Bussiere, *supra* note 191, at 236. It is difficult to find families willing to adopt older children. *Id.*

[232] *Id.* at 237.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] Bussiere, *supra* note 191, at 237.

[237] ASFA, PL 105-89 (1997).

[238] *AD*, 151 P.3d at 1110.

[239] *Id.*

[240] Andreason, *supra* note 220, at 351.

[241] *Id.*

[242] *Id.*

[243] *See id.* at 351-52.

horrible abuse by their own parents, and to provide for them when their natural parents neglect them.[244] For many children, foster care constitutes a refuge, a place where they will be safely taken care of, decidedly better than remaining with or returning to their natural parents.[245] Placing children in foster care when such abuse or neglect exists is absolutely the proper function of the foster care system and by extension of termination of parental rights.[246] Because the children in *In re AD* are already adolescents, and their mother was not herself abusive towards them, the foster care system will likely not provide a better situation than the one they would have had with their mother.[247] She made significant progress in her attempts to ameliorate her lifestyle and create a better home for her family.[248] In this situation, the court ruled to terminate her parental rights without actually ensuring that the children's lives would truly be better as a result. To remove the children only to send them into foster care, unlikely to be adopted, with a future then possibly complicated by homelessness, lack of education, lack of livelihood or legal troubles is unacceptable.[249]

Moving Forward in Wyoming

Other states have set an example for Wyoming, by enacting programs to help families and children involved in termination proceedings.[250] Such programs offer recruitment strategies to find families interested in adopting older children.[251] Specific strategies for older children's adoption must be in place because adolescents' adoptions differ from those of younger children.[252] For example, families are more likely to want to adopt an adolescent once they get to know the individual teenager.[253] Emotional connection seems to be the key; successful adolescent adoptions have shown that families wanted to adopt when they made a connection with a specific child, or when they learned of a specific adolescent in need of a home.[254]

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[244] Young & Lee, *supra* note 181, at 47.

[245] *Id.*

[246] Joleen Okun, *Sixth Annual Review of Gender and Sexuality Law: V. Family Law Chapter: Termination of Parental Rights*, 6 GEO. J. GENDER & L. 761,763 (2005).

[247] *See* Bussiere, *supra* note 191, at 231.

[248] *AD*, 151 P.3d at 1112 (Hill, J., dissenting).

[249] *See* Bussiere, *supra* note 191, at 231.

[250] *Id.* at 237.

[251] *Id.*

[252] *Id.* It can simply be more difficult to find families who want to adopt an older child. *Id.* Additionally, negative attitudes of social workers about the importance of permanency for older foster youth and adoptability of older children and children with special needs plays a role in hindering adoption for those adolescents. *Id.*

[253] *Id.*

[254] Bussiere, *supra* note 191, at 237-38.

Some successful programs in other states focus on finding permanent connections for the adolescents rather than focusing purely on finding adoptive placements.[255] These programs result in the legal formality of adoption evolving naturally out of the relationships that form.[256] Such programs require flexibility and persistence to succeed, and often the youths themselves turn out to be the best resources for identifying individuals in their lives, or from their pasts, who might want to adopt them.[257] The attitude of child welfare professionals also constitutes an important component in the success of these programs.[258] The dissent in *In re AD* suggested that DFS had no interest in continuing to work with the family or the children beyond the conclusion of the termination hearing.[259] The programs that succeed in making a positive difference in advancing permanency, however, rely heavily on staff members who really believe in the possibility of finding families for adolescents.[260]

Even before a termination hearing, Wyoming could consider alternative procedures in child protection situations. Frequently, child protection litigation can be a very adversarial process; damaging to families and children.[261] Often, such litigation fails to provide appropriate and timely resolution of problems.[262] Child protection mediation programs can alleviate some of the damaging results of adversarial litigation involving children's fates.[263] Mediation can occur at any time in a child protection case.[264] These programs seek to empower the different participants in the situation, and to encourage the family to work together to create an individualized and personal solution to the problems facing the family.[265] Such programs provide more direct assistance to families who may be facing serious problems leading to a termination hearing.[266] Perhaps families and agencies would find more effective solutions to serious problems if they paid more attention to the individual circumstance of every family's situation.[267] Massive power imbalances exist between parents and the caseworkers who dictate the parents' time with their children and, ultimately, have the power to take children

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[255] *Id.* at 238.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *AD*, 151 P.3d at 1110 (Hill, J., dissenting).

[260] Bussiere, *supra* note 191, at 238.

[261] Kelly Browe Olson, *Lessons Learned from a Child Protection Mediation Program: If At First You Succeed and Then You Don't. . . ,* 41 FAM. CT. REV. 480, 480 (2003).

[262] *Id.* at 480.

[263] *Id.* at 481.

[264] *Id.*

[265] *Id.*

[266] Olson, *supra* note 261, at 481.

[267] *Id.* at 484.

away if termination is in question.[268] With mediation, it also becomes possible to spend more time examining and understanding the personal, cultural, familial and/or environmental stresses, patterns, and deprivations that parents face and how these factors relate to neglectful or abusive situations.[269] Conventional wisdom would dictate that agencies working with families will not find solutions without understanding the root problems and issues.

CONCLUSION

The Wyoming court system, as well as agencies such as DFS, should increase or renew efforts to find permanency for children of all ages when courts remove them from their parents because of abuse or neglect, which is, unarguably, good policy.[270] Today, however, a need exists to reform Wyoming's statutes regarding termination and the intertwining roles that the courts, DFS and MDTs purport to play together, as the current system lacks uniform standards and application across the state.[271]

Rescuing children from danger when their parents cannot be entrusted with their care constitutes one of the only acceptable state interferences in family life.[272] Nevertheless, courts must also adopt a policy to ensure, to the greatest extent possible, that a permanent family situation awaits older children after termination of parental rights.[273] If a child stays in foster care or group homes until the age of eighteen, he or she may have difficulties finding a permanent home or positive support system.[274] Many successful programs, implemented by other states, assist in finding positive, permanent situations for adolescents that Wyoming should consider.[275]

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[268] *Id.*

[269] *Id.* at 485.

[270] *See supra* notes 243-249 and accompanying text.

[271] *See* John M. Burman, *Juvenile Injustice in Wyoming*, 4 WYO. L. REV. 669, 673 (2004).

[272] *See supra* note 31 and accompanying text.

[273] *See supra* notes 179-191 and accompanying text for a discussion of concurrently planning for adoption while attempting the family's reunification.

[274] Chimulera, *supra* note 222, at 39.

[275] Bussiere, *supra* note 191, at 238. Such programs include You Gotta Believe in Brooklyn, New York; Families for Kids in Roxbury, Massachusetts; Project Uplift in Colorado; Catholic Community Services of Western Washington in Tacoma. *Id.* These programs stress the inclusion of the youths themselves in the process of identifying possible permanent families, and provide plenty of support to the adolescents during that process. *Id.* These successful programs also provide opportunities for foster youth and adults in the community to get to know each other by getting the youths involved in programs such as Big Brothers/Big Sisters, Junior Achievement, 4H, Special Olympics, and school service projects. *Id.* In New York City, teens are invited to participate in training sessions for prospective adoptive parents. *Id.*

Judges possess influence in these cases.[276] Their role should be proactive in cases where child abuse or neglect exists.[277] Courts in Wyoming do possess authority over any party in a termination proceeding, including DFS.[278] Wyoming statute dictates that a court may order any party to perform any acts, duties or responsibilities it deems necessary.[279] Thus there should be nothing preventing Wyoming judges from ordering DFS to concurrently plan for adoption while reunification is also attempted in a termination proceeding. Courts and state agencies should make efforts to locate people specifically willing to adopt an older child.[280] Encouraging and advocating for the development of agencies that work specifically to find adoptive parents for adolescents in Wyoming or the greater Rocky Mountain region could make a great difference. These agencies could provide post-adoption expertise for families that face the challenges in adopting older children. Supporting the adoptive parents and the children would foster progress and success in the adoptive relationships. Agencies could also provide a way for older children to become active participants in the recruitment of adoptive parents, giving them a sense of ownership and encouraging them to be an active part of their future that they may not have had in the past.[281]

Courts will continue to face difficult cases that involve abused and neglected children.[282] These children greatly need to find healthy home situations after experiencing the trauma of termination.[283] Judges, lawyers, and state agencies may be able to impact the ultimate fate of these children in an important way, and the Wyoming system should take the initiative to make positive changes.[284] Thus, Wyoming can begin to move away from a culture of eternal foster care for abused and neglected children, and towards a more effective and stable system for all children who come into contact with Wyoming's courts.

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[276] *See generally* WYO.STAT. ANN. § 14-3-403 (2007) (authorizing courts to order any party in a termination proceeding to perform or refrain from performing any act deemed necessary).

[277] Chimulera, *supra* note 222, at 38.

[278] WYO. STAT. ANN. §§ 14-3-403(a)(ii), (iii) (2007).

[279] *Id.*

[280] Bussiere, *supra* note 191, at 238.

[281] *Id.* at 239.

[282] Lewis, *supra* note 136, at 25.

[283] *See supra* notes 217-249.

[284] *See supra* notes 250-269.

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THE PRIVATE SECURITIES LITIGATION REFORM ACT AND THE ENTREPRENEUR: PROTECTING NAÏVE ISSUERS FROM SOPHISTICATED INVESTORS

Robert Sprague and Karen L. Page***

INTRODUCTION

The purpose of U.S. securities laws is to protect investors by requiring full disclosure on the part of the issuers of securities. The intent is to increase the efficiency and integrity of the nation's capital markets by ensuring that all material information is publicly available. Thus, the laws were created and have been amended to provide legal redress for investors who were not provided with sufficient information to make a reasoned decision. In most respects, these laws presume relative naïveté on the part of the investors and relative knowledge and power on the part of the issuers.

There is evidence suggesting, however, that in the sphere of new ventures, the balance of power may be tipped in favor of the investors and away from the issuers. Indeed, it is often the case that entrepreneurs, though expert in their substantive field, tend to be naïve in financial and business matters. Investors, particularly venture capitalists, on the other hand, tend to be experienced and knowledgeable in financial matters. In these circumstances, there was a threat that securities laws could exacerbate the power imbalance in favor of the investors and leave the entrepreneurs vulnerable to unfair dealing. Specifically, because of the tenuous financial position of new ventures, any heavy-handedness on the part of

* J.D., M.B.A., Assistant Professor, Department of Management & Marketing, University of Wyoming College of Business.

** Ph.D., J.D., Assistant Professor, Department of Management & Marketing, University of Wyoming College of Business. The research supporting this paper was funded by the Ewing Marion Kauffman Foundation. The contents of this paper are solely the responsibility of the authors. The authors wish to thank Michael Thatcher, J.D., 2006, University of Wyoming College of Law, for his excellent research assistance for this paper.

investors could kill the venture, regardless of the merits of the investors' claims. Indeed, any threat of litigation, regardless of how spurious, could paralyze a new venture.

This article first examines the current research regarding control mechanisms used by investors in new ventures and conflicts that arise between investors and entrepreneurs. The legal environment associated with private securities litigation is then examined in detail. Specifically, this article examines court interpretations of the language within the Private Securities Litigation Reform Act regarding allegations of fraud; finding that the Act, though intended to address other perceived abuses, may actually benefit entrepreneurs accused of securities fraud in new venture financing. This article then briefly examines additional non-legal attributes that may also favor entrepreneurs when dealing with new venture financiers.

Business Start-Ups and Venture Capital

The iconic perspective of modern entrepreneurship is the handful of bright, young entrepreneurs developing their product with minimal resources, sometimes literally in a garage, to then be "discovered" by venture capitalists who fund and nurture the fledgling enterprise until it becomes a public corporation and leader in its industry, and, at the same time, turning the young entrepreneurs into wealthy captains of modern industry.[1]

Since a start-up business does not have an established product in the market, there are generally little to no revenues in the business' nascent years. A small, start-up business has a variety of sources from which it may draw operating capital: the savings of the owners; bank loans, particularly those guaranteed by the Small Business Administration; friends and relatives; wealthy individuals—often referred to as "angels;" and venture capitalists.

Loans to the business are limited to the extent of the collateral of the owners and create a repayment burden while the business is still developing. Selling part of the business to an investor offers a viable alternative, as the amount of invested funds is structured on the expected future value of the enterprise, and there is no direct repayment burden.

Venture capitalists have become a significant source of new venture financing in recent years. "The venture capital market thus provides a unique link between finance and innovation, providing start-up and early stage firms—organizational forms particularly well-suited to innovation—with capital market access that is

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[1] *See, e.g.*, Robert P. Bartlett, III, *Venture Capital, Agency Costs, and the False Dichotomy of the Corporation*, 54 UCLA L. REV. 37, 38 (2006) (describing the $25 million investment in the start-up company Google, which resulted four years later in a $4 billion public stock offering).

tailored to the special task of financing these high-risk, high-return activities."[2] By 2003, there were nearly 2,000 venture funds actively managing over $250 billion in business investments.[3] The typical venture capital process is for a venture capital firm to form a limited partnership, with itself as the general partner. Limited partners are then solicited to pledge funds to a particular venture fund. The limited partners are usually institutional investors and high-wealth individuals. The venture capital firm manages the fund, selecting in which ventures to invest. The venture capital firm collects a set management fee, as well as shares in positive returns earned by the fund.[4]

Angels, in contrast, are generally high-wealth individuals who invest directly in a business at a very early start-up phase. While there often is some form of personal relationship between the angel and the business owner, the availability of angels has progressed beyond just "friends and families." Angels have become more prominent and accessible, even banding together into organizations to share leads and information.[5]

Whether the initial venture funding is provided by an angel or venture capitalists, it is expected that there will be subsequent rounds of financing as the business develops, often involving more than one venture capital fund.[6] The investors' goal is a liquidity event, usually in the form of an initial public offering (IPO) of the stock of the venture. The IPO creates a market for the stock of the venture, allowing the investors to sell their ownership interest in the venture—theoretically for a substantial profit.

Even where the investors and the entrepreneur are equally committed to maximizing shareholder wealth, they may have recurring disagreements regarding how to prioritize operating goals.[7] The entrepreneur's ultimate goal often is to build a viable business, while the investors' goal is a positive return on investment

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[2] Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons From the American Experience*, 55 STAN. L. REV. 1067, 1068 (2003) (footnote omitted).

[3] *See* Jeffrey M. Leavitt, *Burned Angels: The Coming Wave of Minority Shareholder Oppression Claims in Venture Capital Start-Up Companies*, 6 N.C. J.L. & TECH. 223, 223 (2005).

[4] *See* Joseph Bankman & Marcus Cole, *The Venture Capital Investment Bust: Did Agency Costs Play a Role? Was It Something Lawyers Helped Structure?*, 77 CHI.-KENT L. REV. 211, 216 (2001). *See also* Gilson, *supra* note 2.

[5] *See* Leavitt, *supra* note 3. *See also* Pui-Wing Tam, *Fresh Crop of Investors Grows in Silicon Valley*, WALL ST. J., May 1, 2006, at C1 (discussing the rise of angel investors in Silicon Valley who were previously start-up executives, particularly at Google, Inc.); Jaclyne Badal, *Early Options*, WALL ST. J., Apr. 30, 2007, at R6 (discussing the various options entrepreneurs have for sources of start-up capital).

[6] *See generally* Michael Gorman & William A. Sahlman, *What Do Venture Capitalists Do?*, 4 J. BUS. VENTURING 231 (1989).

[7] *See generally* Harry J. Sapienza & Anil K. Gupta, *Impact of Agency Risks and Task Uncertainty on Venture Capitalist-CEO Interaction*, 37 ACAD. MGMT. J. 1618 (1994).

within a few years. Strategic goals may also differ because of differences in risk tolerance and portfolio balance. Whereas investors, for whom the company is but one of many investments, may be willing to commit to a single strategic target and cease participation if specific milestones are not met, entrepreneurs may be interested in pursuing multiple strategic targets because the company is the sole investment in the entrepreneur's portfolio. As a result, investors and the entrepreneur have different, and possibly conflicting, priorities.[8]

Investing in small, start-up ventures involves significant risk.[9] Risk can have its rewards: venture funds collectively reported returns of 150% in 1999. But risk also sometimes means loss: venture funds collectively reported returns greater than negative 25% in 2002.[10] One study has indicated that approximately 7% of investments account for more than 60% of venture capitalists' profits, while one-third of investments result in losses.[11]

There are significant unknown variables associated with start-up ventures. By definition, the business model of a start-up has not been tested against an actual market. Most start-ups do not yet even have a product. It is unknown whether the idea can be converted to a marketable product, whether a competitive product is about to be introduced in the market, or whether the entrepreneur can manage an operational and growing business.[12] In addition, each party's self-interests may increase the risk of failure. Venture capitalists are only willing to provide the minimum funds necessary for the venture to meet discrete milestones, thereby minimizing the venture capitalists' risk if the venture appears unsuccessful in its early stages. At the same time, the entrepreneur is loath to give up too much ownership and control in the business. "Thus both venture capitalists and entrepreneurs willingly conspire to impose stringent limits on the resiliency of their enterprises."[13] While venture capitalists and entrepreneurs may initially believe they are a partnership which has common goals, when things go badly, their divergent interests become painfully apparent.[14]

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[8] In particular, entrepreneurs and venture capitalists may have different interests regarding the timing and form of exit from the business venture. *See generally* D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA LAW REV. 315 (2005).

[9] *See id.*; *See generally* Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45 (2002).

[10] *See* Douglas Cumming & Jeffrey MacIntosh, *Boom, Bust, and Litigation in Venture Capital Finance*, 40 WILLAMETTE L. REV. 867, 869 (2004). *See also* Rebecca Buckman, *Silicon Valley's Backers Grapple with Era of Diminished Returns*, WALL ST. J., Aug. 3, 2006, at A1 (noting that Silicon Valley-based venture capital firms had negative cumulative returns for six years into 2006).

[11] *See* Amar Bhide, *Bootstrap Finance: The Art of Start-Ups*, HARV. BUS. REV., Sept.-Oct. 1990, at 109.

[12] *See* Sapienza & Gupta, *supra* note 7.

[13] Gorman & Sahlman, *supra* note 6, at 238.

[14] *See generally* Gorman & Sahlman, *supra* note 6.

Venture capitalists attempt to control risk through governance procedures.[15] Studies indicate that venture capitalists pursue less industry and geographic diversification when investment risk is high; therefore they manage risk through monitoring and involvement rather than through diversification.[16] When deciding whether to fund a new venture, venture capitalists must consider more than the potential success of the venture, and hence the positive return on investment. Venture capitalists must also decide how best to structure the financing to protect their own interests while simultaneously enhancing the likelihood that the new venture will succeed.[17] The foundation of this structure is governance and control.[18]

Although venture capitalists do not usually purchase a majority of the venture's stock, they do purchase enough to eventually control the company's board of directors, which has the ultimate responsibility of managing the company. The venture capitalists' equity investments in new ventures are typically in the form of convertible preferred stock.[19] In addition, venture capitalists provide financing in stages, replenishing capital only if the venture remains a potentially viable investment.[20] As the venture capitalists invest more funds over time, they generally gain more control of the venture.[21]

With this level of control, venture capitalists can exert a number of powers. For example, the venture capitalists will require disincentives for the entrepreneur to exit from the venture, particularly by requiring that entrepreneurs sell their interest in the company (back to the company) should they leave[22] or by placing the entrepreneurs on an equity vesting schedule.[23] However, at the same time, venture capitalists will obtain the ability to terminate the entrepreneur if they believe

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[15] *See* Bartlett, *supra* note 1, at 53-54 (discussing control and monitoring rights as one of the means venture capitalists use to manage risk).

[16] *See generally* Sapienza & Gupta, *supra* note 7.

[17] *See* Smith, *supra* note 8, at 316 ("Before venture capitalists invest, they plan for exit.").

[18] *See generally* Jay B. Barney et al., *The Structure of Venture Capital Governance: An Organizational Economic Analysis of Relations Between Venture Capital Firms and New Ventures*, ACAD. MGMT. PROC. 64 (1989); Utset, *supra* note 9.

[19] *See* Gilson, *supra* note 2, at 1072. *See also* Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874, 875 (2003) ("[O]verwhelmingly, venture capitalists make their investments through convertible preferred stock.") (footnote omitted).

[20] *See* Gilson, *supra* note 2. *See generally* Smith, *supra* note 8.

[21] Smith, *supra* note 8, at 324 ("More often than not, venture capitalists do not acquire a majority of the votes in the initial round of financing. In subsequent rounds of financing, the venture capitalists build their voting power, and at some time within the first few rounds, venture capitalists acquire a majority of the votes.") (footnotes omitted).

[22] *See* Utset, *supra* note 9, at 66-67.

[23] See *generally* Thomas Hellmann, *The Allocation of Control Rights in Venture Capital Contracts*, 29 RAND J. ECON. 57 (1998).

more competent senior management is needed and the entrepreneur is no longer necessary for the viability of the venture.[24] Research indicates the most significant reason new ventures fail is because of ineffective senior management, meaning that venture capitalists will "frequently" fire the original senior management.[25] Some anecdotal evidence suggests the entrepreneurs face a much harsher reality as they place confidence in venture capitalists whose business models are based on generating enormous returns on a small percentage of their many investments, rather than nurturing fledgling entrepreneurs. Indeed, some entrepreneurs have thought their dreams of a successful start-up were realized when venture capitalists agreed to invest, only to find that they were left with nothing.[26] Ultimately, if the venture capitalists believe the venture is no longer viable, they can liquidate it, which includes having the company buy back the venture capitalists' stock (to the extent there are assets to pay for the redemption).[27]

The entrepreneur, understandably, will more than likely fight any termination or liquidation decision by the venture capitalists. The entrepreneur is also not necessarily powerless, if the entrepreneur holds the knowledge necessary to make the venture viable. This may set up a conflict between the entrepreneur and the venture capitalists that ultimately may be destructive to the venture. In addition, one commentator has argued that since venture capitalists typically obtain control of the venture in the early stages of financing, they are essentially "locked in" during the early stages of the investment relationship.[28] If the venture capitalists are at odds with the entrepreneur, but the entrepreneur is too valuable to the venture to terminate or the relationship is in too early of a stage for the venture capitalists to have control, the result may be retaliation. Angels, too, may lack control mechanisms required for a graceful exit and feel it necessary to retaliate.

There are reputational costs associated with venture capital financing. The expertise of venture capitalists underlies and justifies their role.[29] Having to abandon an investment altogether would negatively impact a venture capitalist's reputation. Abandonment because of conflicts with the entrepreneur would create a high exit cost for the venture capitalist. However, research indicates that individuals facing high exit costs may choose not to exit unfair transactions,

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[24] *See, e.g.,* Reynolds Holding, *Double-Crossed: Silicon Valley Entrepreneurs Say They Have Been Betrayed By Venture Capitalists and Lawyers, The Very People They Asked for Help*, S.F. CHRON., Nov. 17, 1999, at A1 (discussing an entrepreneur forced out of the company he founded two months after venture capitalists gained control of the company's board of directors).

[25] *See generally* Gorman & Sahlman, *supra* note 6.

[26] *See generally* Holding, *supra* note 24.

[27] *See* Utset, *supra* note 9, at 110-11.

[28] Smith, *supra* note 8, at 317. Indeed, Gilson & Schizer, *supra* note 19, argue that the use by venture capitalists of convertible preferred stock is more for tax purposes rather than control.

[29] *See* Bankman & Cole, *supra* note 4, at 219.

choosing instead to remedy the unfairness by retaliating against the other party.[30] This retaliation may be in the form of litigation filed or threatened against the entrepreneur.

In situations where an investor files or threatens suit against the entrepreneur, some form of claim of misrepresentation, including outright fraud, will be pursued. Although the history surrounding the development of securities law in the United States since the 1930's has strongly favored investors over the issuer of securities (here, the entrepreneur), recent amendments to the U.S. securities laws may actually favor the entrepreneur.

SECURITIES REGULATION AND LITIGATION

The stock market crash of 1929 exposed significant shortcomings in the regulation of the sale of securities in the United States. Post-crash, it was discovered that billions of dollars had been invested in practically worthless securities.[31] In formulating legislation to regulate the securities market, the U.S. Senate's sentiment was that "organizations and promoters . . . [had] sold 'fake' securities throughout this country to the tune of billions of dollars, and [had] sunk their fangs into the pocketbooks of the innocent investors with greater rapacity than a school of sharks ever sank teeth into human flesh."[32] Congressional hearings "indicted a system as a whole that had failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people's money."[33]

In 1933, President Roosevelt recommended to Congress legislation for federal supervision of traffic in investment securities. While the federal government would not take any action that could be construed as approving or guaranteeing that newly issued securities are sound or will earn a profit, it did impose an obligation that every issue of new securities be accompanied by full disclosure. Further, President Roosevelt believed that in order to protect the public, the burden should be on the seller of securities to tell the whole truth—changing the ancient rule of *caveat emptor* (let the buyer beware) when dealing with securities to *caveat venditur* (let the seller beware).[34]

The result of the post-crash investigations were two major pieces of federal legislation, both of which are integral to current securities markets. The Securities

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[30] *See* Utset, *supra* note 9, at 119.

[31] *See generally* S. REP. NO. 73-147 (1933).

[32] 77 CONG. REC. 1018, 1019 (Mar. 30, 1933) (Change of Committee Reference of S. 875 to the Senate Committee on Banking and Currency).

[33] James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959).

[34] *See generally* H.R. REP. NO. 73-85 (1933).

Act of 1933 regulates the initial offering of securities to the public by requiring full disclosure of all matters relevant to the securities, through the form of a registration statement filed with the Securities and Exchange Commission (SEC) and the distribution of a prospectus to all potential purchasers.[35] The Securities Exchange Act of 1934 regulates transactions in securities, particularly by regulating the activities of securities brokers and dealers and requiring companies that offer their securities to the public to regularly file reports with the SEC.[36]

Since the aim of the Securities Act of 1933 is to protect the general public, securities that are not offered for sale to the general public can be exempt from the Act. Certain of these exempted offerings are considered "limited" because they qualify for exemption if they meet limits in the amount of funds raised and/or they are offered only to a limited number or class of investors. In 1982, the SEC promulgated Regulation D[37] to simplify and clarify existing limited offering exemptions from registration and to expand the availability of these exemptions.[38]

In particular, sales of securities to "accredited" investors are generally exempt from the Securities Act. Accredited investors include institutional investors, "insiders" (i.e., officers and directors of the company issuing the stock), and high-wealth individuals.[39] A company (issuer) is under no statutory obligation to make disclosures as long as all of the securities it offers are purchased by accredited investors. The theory is that accredited investors are experienced, sophisticated, and can afford to assume the risks of their investments.[40]

This does not mean that exempt securities are completely free of all securities regulation.[41] Regardless of the disclosure requirements from which a security offering may be exempt, all sales of securities are subject to the anti-fraud provisions of the Securities Exchange Act of 1934.[42] The SEC enforces this anti-fraud provision through Rule 10b-5, which makes unlawful the use of any scheme or artifice to defraud, as well as untrue statements of material facts, or the omission of material facts.[43] The Securities Exchange Act's anti-fraud provision may also be enforced by private parties through a civil action.[44]

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[35] 15 U.S.C. §§ 77a–77aa (2007).

[36] 15 U.S.C. §§ 78a–78mm (2007).

[37] 17 C.F.R. § 230 (2007).

[38] *See* Manning G. Warren, III, *A Review of Regulation D: The Present Exemption Regimen for Limited Offerings Under The Securities Act of 1933*, 33 AM. U. L. REV. 355, 358 (1984).

[39] 17 C.F.R. § 230.501 (2007).

[40] *See* Warren, *supra* note 38, at 376-78.

[41] *See generally* Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).

[42] Section 10b; 15 U.S.C. § 78j (2007).

[43] 17 C.F.R. § 240.10b-5 (2007).

[44] *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499, 2507 (2007).

When new venture investors have lost control so that they are either in disagreement with the manner in which the venture is operated and/or they are in fear of losing their investment, they may invoke section 10b of the Securities Exchange Act. To establish a claim for securities fraud under section 10b and Rule 10b-5, the investor must prove that the entrepreneur (1) made a misstatement or an omission of a material fact; (2) with scienter (i.e., with knowledge of its falsity and with an intent to deceive); (3) in connection with the purchase or the sale of a security; (4) upon which the investor reasonably relied; and (5) the investor's reliance was the proximate cause of his or her injury.[45] The fact that the investor purchased the securities under an exemption that did not require specific disclosures eliminates one possible defense to a securities fraud action—that the information forming the basis of the alleged misstatement or omission was fully disclosed to the investor and despite the disclosure, the investor chose to still invest in the venture.

In theory, sophisticated or professional investors who invest in new ventures via purchases in exempt offerings of securities, such as venture capital firms that are also sophisticated enough to negotiate control mechanisms, generally will insist on enough disclosures from the entrepreneur and undertake its own due diligence to make it highly unlikely that significant material facts can remain undisclosed without making the disclosures they do demand either false or misleading.[46] However, the current law regarding issuer disclosure obligations under the anti-fraud provisions of federal securities laws is both unclear and complex.[47] In addition, angels, including friends and family, may not be as sophisticated and thorough as a venture capital firm and may not ask for sufficient disclosures, creating a later opportunity to claim that material information was not disclosed. Regardless, the mere threat to file a securities fraud claim against the entrepreneur may be sufficient to allow the investor to regain control of the venture or to force an early buyout favorable to the investor.

Filing a lawsuit initiates a long, complex, and expensive process. A lawsuit can achieve a certain perceived strategic advantage for the plaintiff, even if there is no legitimate chance of culminating in a favorable verdict. From a new venture perspective, being accused of securities fraud has a number of consequences. First, it taints the venture. It raises the specter that the entrepreneur has misled—even swindled—the investor. Second, it freezes follow-on financing. It is a signal that the investor who has filed the lawsuit will not be providing future financing. In addition, the filing of the lawsuit raises the distinct possibility—regardless of the improbability—the venture is at risk of paying a large verdict (or settlement) in

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[45] *See* Anish Vashista et al., *Securities Fraud*, 42 AM. CRIM. L. REV. 877, 880 (2005).

[46] *See* Harry S. Gerla, *Issuers Raising Capital Directly From Investors: What Disclosure Does Rule 10b-5 Require?*, 28 J. CORP. L. 111, 113 (2002).

[47] *See id* at 114.

the near future. Investors will not invest in the venture if they believe they will be financing a judgment rather than actual business activities. Finally, the process of the litigation not only extracts costs in the form of funds that would otherwise be directed to actual business activities, but managers' time and energy are also diverted from the business to the litigation.

Disgruntled investors could theoretically use litigation or the threat thereof to obtain a strategic advantage—either to force a cash-out of their investment or a significant change in management or business strategy. Even if the litigation effectively ends the venture, it will at least provide a degree of liquidation from the remaining proceeds that still possibly preserves the investor's reputation by signaling that the investment decision was based on the entrepreneur's alleged fraud rather than the investor's poor decision-making.

The issue is how real the threat or commencement of litigation is for an entrepreneur and new venture even when the claims are designed to extract a strategic advantage not otherwise available through governance mechanisms. Because the standards for filing a claim for misrepresentation are so high under the Private Securities Litigation Reform Act of 1995, the very protections that were originally designed in the 1933 Act to protect naïve investors in fact serve to protect naïve entrepreneurs from sophisticated investors.

THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

While the U.S. Congress recognizes that private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action, it also is aware of substantial abuses in private securities litigation.[48] In 1995, Congress amended the Securities Act of 1933 and the Securities Exchange Act of 1934 by enacting the Private Securities Litigation Reform Act (PSLRA)[49] to address certain perceived private securities litigation abuses, including:

> (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process

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[48] *See generally* H.R. CONF. REP. NO. 104-369 (Nov. 28, 1995).

[49] Pub.L. 104-67, 109 Stat. 737. *See generally* Ann M. Olazabal, *The Search for "Middle Ground": Towards a Harmonized Interpretation of the Private Securities Litigation Reform Act's New Pleading Standard*, 6 STAN. J.L. BUS. & FIN. 153 (2001) (analyzing the PSLRA).

> to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.[50]

The main concern of Congress was the phenomenon of "professional plaintiffs" who own a nominal number of shares in a wide range of publicly traded companies and who "race" to the courthouse, with the aid of class-action law firms, to file abusive lawsuits whenever stock prices drop.[51] Despite Congress' intent, the consequences of the PSLRA are more far-ranging. As the Supreme Court has noted, a clear objective of the PSLRA is a bit more broad: to serve as a check against abusive litigation by private parties.[52] Therefore the standards and procedures promulgated under the PSLRA can apply as well to litigation (or the threat of litigation) arising from issues of disputed control between investors and entrepreneurs within new ventures.

Regardless of the motive of a securities lawsuit, the reality is that it is very expensive to defend. Most of the litigation cost—up to 80%—is incurred during pre-trial discovery.[53] The cost of discovery often forces innocent parties to settle frivolous securities class actions. In addition, the threat that the time of key employees will be spent responding to discovery requests, including providing deposition testimony, often forces coercive settlements.[54] Hence, the mere threat of litigation could lead to a forced outcome favorable to a disgruntled new venture investor.

Because a significant portion of the PSLRA attempts to minimize the potential for frivolous securities litigation, one important strategy of the PSLRA is to raise the requirements for alleging securities fraud by requiring pleading fraud with particularity. Specifically, where a plaintiff alleges that the defendant made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading, then the plaintiff's complaint must specify each statement alleged to have been misleading, and the reason or reasons why the statement is misleading.[55] These heightened pleading requirements are so strict, it is reported that the dismissal rates for securities fraud actions have nearly doubled since passage of the PSLRA.[56]

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[50] H.R. CONF. REP. NO. 104-369, at 31 (1995).

[51] *Id.* at 32-33.

[52] *See Tellabs*, 127 S.Ct. at 2504.

[53] *See* H.R. CONF. REP. NO. 104-369, at 37.

[54] *See id.*

[55] 15 U.S.C. § 78u-4(b) (2007).

[56] *See* Amy J. St. Eve & Bryce C. Pilz, *The Fault Allocation Provisions of the Private Securities Litigation Reform Act of 1995—A Roadmap for Litigants and Courts*, 3 N.Y.U. J. L. & BUS. 187, 187 (2006).

The PSLRA reinforces the heightened pleading requirements by allowing a defendant to file a motion to dismiss the lawsuit if the plaintiff's complaint fails to meet the heightened pleading requirements.[57] To expedite the process and minimize costs, discovery can be stayed while the court considers the motion to dismiss.[58] The plaintiff is also required to prove that the acts or omissions complained of actually caused the plaintiff to suffer the loss for which the plaintiff seeks to recover damages.[59] The PSLRA also strengthens provisions for awarding a defendant attorneys fees and costs associated with a lawsuit the court determines was brought for an improper purpose, unwarranted by existing law, legally frivolous, or not supported by facts.[60]

However, Congress' attempts to stem securities litigation abuse created some uncertainty. Prior to the passage of the PSLRA, securities fraud pleadings were governed by the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.[61] Although Rule 9(b) already required that fraud be pleaded with particularity, Congress believed that that rule alone had not prevented securities litigation abuse.[62] In a securities fraud action in which the plaintiff alleges the defendant made an untrue statement of a material fact or omitted to state a material fact (necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading), the complaint must specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint must state with particularity all facts on which that belief is formed.[63] And if the success of the action is dependent upon proof that the defendant acted with a particular state of mind, the complaint must, with respect to each act or omission alleged, state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind.[64]

Congress' concern with Rule 9(b) was based, in part, on the fact that the various federal courts have interpreted Rule 9(b) in different ways. Although Congress recognized that the Second Circuit Court of Appeals had adopted the most stringent interpretation of Rule 9(b) (and therefore the most stringent requirements for alleging securities fraud), Congress expressly chose not to codify the Second Circuit's interpretation in the PSLRA. This meant that Congress

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[57] 15 U.S.C. § 78u-4(b)(3)(A) (2007).

[58] 15 U.S.C. § 78u-4(b)(3)(B) (2007).

[59] 15 U.S.C. § 78u-4(b)(4) (2007).

[60] 15 U.S.C. § 78u-4(c) (2007); *See also*, H.R. CONF. REP. NO. 104-369, at 37.

[61] *See Tellabs*, 127 S.Ct. at 2507.

[62] *See generally* H.R. CONF. REP. NO. 104-369.

[63] *See* 15 U.S.C. § 78u-4(b)(1) (2007).

[64] *See id.* at § 78u-4(b)(2).

specifically chose not to include in the pleading standard for securities fraud certain language relating to motive, opportunity, or recklessness.[65] This has resulted in confusion as to what is specifically required to successfully allege securities fraud.[66]

The confusion is reflected in a split among various federal courts as to what must be stated in a complaint for securities fraud. The split revolves primarily around the standards required to establish scienter, which is a long-established requirement for a private lawsuit under section 10(b) and Rule 10b-5.[67] An investor who has purchased the stock of a new venture does not have to prove that the entrepreneur actually set out with the intent to defraud the investor. Intent can be established indirectly—it can be inferred through the entrepreneur's conduct or through the surrounding circumstances. The PSLRA states that the plaintiff must state with particularity facts giving rise to a strong inference that the defendant acted with scienter. Further, this strong inference may be reflected by a defendant's motive and opportunity to defraud, or through a defendant's recklessness. This is where the complexity and legal uncertainties lie.

The First Circuit Court of Appeals, in determining what constitutes a "strong inference," has suggested that a plaintiff's allegations must show a "high likelihood" of scienter to satisfy the PSLRA standard.[68] The court has stated that although the inference need not be ironclad, it must be persuasive.[69] "Scienter allegations do not pass the 'strong inference' test when . . . there are legitimate explanations for the behavior that are equally convincing."[70]

In applying the "strong inference" language, the Second Circuit Court of Appeals has held that the

> inference may arise where the complaint sufficiently alleges that the defendants: (1) benefited in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor.[71]

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[65] *See* H.R. CONF. REP. NO. 104-369, at 41 n.23.

[66] *See generally* Joseph T. Phillips, *A New Pleading Standard Under the Private Securities Litigation Reform Act?*, 69 U. CIN. L. REV. 969 (2001).

[67] *See, e.g.,* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976) ("'[S]cienter' refers to a mental state embracing intent to deceive, manipulate, or defraud."); *Tellabs*, 127 S.Ct. at 2507 ("To establish liability under § 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter. . . .").

[68] *In re* Credit Suisse First Boston Corp., Sec. Litig., 431 F.3d 36, 48-49 (1st Cir. 2005).

[69] *See id.* at 49.

[70] *Id.* (citation omitted).

[71] Novak v. Kasaks, 216 F.3d 300, 311 (2nd Cir. 2000) (citations omitted).

The Third Circuit Court of Appeals has interpreted the requirements for establishing a strong inference of an intent to defraud as either an allegation of facts (a) to show that the "defendants had both motive and opportunity to commit fraud" or (b) that "constitute strong circumstantial evidence of conscious misbehavior or recklessness."[72] The Fourth Circuit Court of Appeals, on the other hand, has advocated a flexible, case-specific analysis when examining scienter pleadings.[73] The Fourth Circuit has taken the approach that "courts should not restrict their scienter inquiry by focusing on specific categories of facts, such as those relating to motive and opportunity, but instead should examine all of the allegations in each case to determine whether they collectively establish a strong inference of scienter."[74]

The Sixth Circuit Court of Appeals has noted that, unlike traditional fraud pleadings, a PSLRA plaintiff is not given the benefit of all reasonable inferences, but is, under the "strong inference" requirement, "entitled only to the most plausible of competing inferences."[75] The Sixth Circuit has also ruled that a plaintiff "may plead scienter in [section 10b] or Rule 10b-5 cases by alleging facts giving rise to a strong inference of recklessness, but not by alleging facts merely establishing that a defendant had the motive and opportunity to commit securities fraud."[76]

The Second, Third, and Sixth Circuits' approaches were summarized by the Ninth Circuit Court of Appeals when it noted that a court may: (1) apply the Second Circuit standard requiring plaintiffs to plead mere motive and opportunity or an inference of recklessness; (2) apply a heightened Second Circuit standard rejecting motive and opportunity, but accepting an inference of recklessness; or (3) reject the Second Circuit standard and accept only an inference of conscious conduct.[77] The Ninth Circuit chose to adopt a standard somewhere between the second and third approach: the evidence must create a strong inference of, at a minimum, deliberate recklessness. In other words, within the Ninth Circuit Court of Appeals, plaintiffs proceeding under the PSLRA cannot just allege intent in general terms of mere "motive and opportunity" or "recklessness," but rather, must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent.[78] Further, the Ninth Circuit has held that "when determining whether plaintiffs have shown a strong inference of scienter, the

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[72] Press v. Chemical Investment Services Corp., 166 F.3d 529, 538 (3rd Cir. 1999).

[73] *See* Ottmann v. Hanger Orthopedic Group, Inc., 353 F.3d 338, 345 (4th Cir. 2003).

[74] *Id.*

[75] Helwig v. Vencor, Inc., 251 F.3d 540, 553 (6th Cir. 2001) (en banc) (citation omitted).

[76] *In re* Comshare, Inc., Sec. Litig., 183 F.3d 542, 549 (6th Cir. 1999).

[77] *See In re* Silicon Graphics, Inc., Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

[78] *Id.* at 979.

court must consider *all* reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs."[79]

The Tenth Circuit Court of Appeals has stated that determining whether an inference is a strong one cannot be decided in a vacuum.[80] The Tenth Circuit did agree with the Ninth Circuit that evaluating a plaintiff's suggested inference must be done in the context of other reasonable inferences that may be drawn.[81] However, that is the extent of the Tenth Circuit's agreement with the Ninth Circuit.[82] The Tenth Circuit also rejected the Sixth Circuit's holding that plaintiffs are entitled only to the most plausible of competing inferences.[83] The Tenth Circuit concluded that "[i]f a plaintiff pleads facts with particularity that, in the overall context of the pleadings, including potentially negative inferences, give rise to a strong inference of scienter, the scienter requirement of the [PSLRA] is satisfied."[84]

In *Johnson v. Tellabs, Inc.*, the District Court for the Northern District of Illinois expressly rejected the Sixth Circuit's approach and adopted the Fourth Circuit's approach, holding that plaintiffs may use "motive and opportunity" or "circumstantial evidence" to establish scienter under the PSLRA, only if the plaintiffs' allegations support a strong inference that each defendant acted recklessly or knowingly.[85]

In *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, the Seventh Circuit Court of Appeals reviewed the Northern District's conclusions.[86] First, the *Makor* court concluded that in passing the PSLRA, Congress had not changed the substantive scienter requirements.[87] "Prior to the passage of the PSLRA, every [C]ircuit to consider the substantive scienter standard . . . had held that a showing of recklessness was sufficient to allege scienter."[88] Although the Ninth Circuit appears to have ruled that Congress did intend to change the substantive scienter standard (i.e., that a plaintiff must allege facts that create a strong inference of "deliberate

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[79] Gompper v. VISX, Inc., 298 F.3d 893, 897 (9th Cir. 2002) (emphasis in original). "District courts should consider all the allegations in their entirety, together with any reasonable inferences that can be drawn therefrom, in concluding whether, on balance, the plaintiffs' complaint gives rise to the requisite inference of scienter." *Id.*

[80] *See* Pirraglia v. Novell, Inc., 339 F.3d 1182, 1187 (10th Cir. 2003).

[81] *See id.* at 1188.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Johnson v. Tellabs, Inc., 303 F.Supp.2d 941, 961 (N.D.Ill. 2004), *aff'd in part, rev'd in part*, Makor Issues & Rights, Ltd., v. Tellabs, Inc., 437 F.3d 588 (7th Cir. 2006), *vacated and remanded*, *Tellabs*, 127 S.Ct. 2499.

[86] Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588 (7th Cir. 2006).

[87] *Id.* at 600.

[88] *Id.* (citations omitted).

or conscious recklessness" or a "degree of recklessness that strongly suggests actual intent"),[89] the Seventh Circuit decided to apply the same scienter standard as it did prior to the passage of the PSLRA: "an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."[90]

The Seventh Circuit acknowledged that while the PSLRA did not change the substantive scienter standard, it did "unequivocally raise the bar for pleading scienter."[91] Here, the *Makor* court provided another overview of the various positions taken by the courts in determining whether a "strong inference" of scienter had been sufficiently pleaded. It noted that the Second and Third Circuits had taken the position that the PSLRA adopted the Second Circuit's pre-PSLRA pleading standard for scienter (that plaintiffs may continue to state a claim by pleading either motive and opportunity or strong circumstantial evidence of recklessness or conscious misbehavior), while the Ninth and Eleventh Circuits adopted a higher burden, believing that Congress considered, but ultimately rejected the Second Circuit's approach.[92] The Seventh Circuit, following the remaining Circuits, decided to adopt a middle ground: "the best approach is for courts to examine all of the allegations in the complaint and then to decide whether collectively they establish such an inference."[93]

In its first substantive review of the PSLRA, the U.S. Supreme Court granted certiorari "to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a 'strong inference' of scienter."[94] Its goal was to "prescribe a workable construction of the 'strong inference' standard, a reading geared to the PSLRA's twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims."[95]

The procedural juxtaposition for the Circuit courts' interpretations of "strong inference" had been in consideration of Rule 12(b)(6) of the Federal Rules of Civil Procedure motions to dismiss, which must accept all factual allegations in the complaint as true.[96] This does not change, but when ruling on a Rule 12(b)(6)

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[89] *Id.* (citing *In re* Silicon Graphics, 183 F.3d at 979).

[90] *Makor Issues & Rights, Ltd.*, 437 F.3d at 600.

[91] *Id.* at 601.

[92] *See id.*

[93] *Id.* "Motive and opportunity may be useful indicators, but nowhere in the statute does it say that they are either necessary or sufficient." *Id.*

[94] *Tellabs*, 127 S. Ct. at 2506.

[95] *Id.* at 2509.

[96] *Id.*

motion, the inquiry is "whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard."[97] Finally, "in determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences."[98]

"Strong inference" is contextual. "To determine whether the plaintiff has alleged facts that give rise to the requisite 'strong inference' of scienter, a court must consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff."[99] And, "[t]he inference that the defendant acted with scienter need not be irrefutable, . . . or even the 'most plausible of competing inferences[.]'"[100] However, "the inference of scienter must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, thus strong in light of other explanations."[101] The Court concluded that "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[102]

Addressing the issue of whether motive can give rise to a strong inference of scienter, the Court stated that motive can be relevant, and personal financial gain can weigh heavily in favor of a strong inference, but the absence of a motive is not fatal.[103] Ultimately, the Supreme Court concluded, "the reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?"[104]

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[97] *Id.* (citations omitted; emphasis in original).

[98] *Id.*

[99] *Id.* at 2510.

[100] *Tellabs*, 127 S. Ct. at 2506 (citation omitted).

[101] *Id.*

[102] *Id.* (footnote omitted).

[103] *Id.* at 2511.

[104] *Id.* (footnote omitted). A number of federal courts have quickly applied *Tellabs*. In *Higginbotham v. Baxter International, Inc.*, 495 F.3d. 753, 757 (7th Cir. 2007), the first case interpreting *Tellabs*, the Seventh Circuit Court of Appeals ruled that a complaint that relied on confidential sources did not meet the strong inference of scienter requirement expressed in *Tellabs*. "[A]nonymity conceals information that is essential to the sort of comparative evaluation required by *Tellabs*. To determine whether a 'strong' inference of scienter has been established, the judiciary must evaluate what the complaint reveals and disregard what it conceals." *Id.* at 757. *See also*, Central Laborers' Pension Fund v. Integrated Electrical Services, Inc., 497 F.3d 546, 551 (5th Cir. 2007) (holding that allegations of circumstantial evidence justifying a strong inference of scienter will suffice); Key Equity Investors, Inc. v. Sel-Leb Marketing, Inc., 2007 WL 2510385, *5 (3rd Cir. 2007) (unpublished decision) (refusing to infer scienter from vague and unspecific allegations); Winer Family Trust v. Queen, --- F.3d ---, 2007 WL 2753734, *14 (3rd Cir. 2007) (holding that the group pleading doctrine, a judicial presumption that statements in group-published documents are

One issue the *Tellabs* Court expressly did not address is whether reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5.[105] Every Circuit that has considered the issue has held that scienter may be established by a showing of recklessness.[106] Recklessness, in the context of securities fraud, is generally defined as "an act so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."[107] This "severe recklessness" is well beyond negligence, and, in essence, falls slightly below intentional conduct.[108]

Plotkin v. IPaxess, Inc. exemplifies how these standards are applied when an investor sues a company for securities fraud.[109] In *Plotkin*, the investor (Plotkin) sued on the basis of three allegedly false and misleading press releases used to induce Plotkin (and others) to invest in the company. The Fifth Circuit Court of Appeals ruled that Plotkin had established a strong inference of fraudulent intent with respect to omissions in one of the press releases.[110] The court concluded that Plotkin had alleged specific facts about agreements with strategic partners giving rise to a strong inference that the company knew or was severely reckless in not knowing at the time of the releases that the strategic partners were not able or were not likely to be able to make the payments they contracted to make.[111]

Similarly, in *EP Medsystems, Inc. v. Echocath, Inc.*, the plaintiff-investor sued for securities fraud after four "imminent" contracts supposedly under negotiation with companies that would market the defendant-company's products fell through after the plaintiff made its investment.[112] The court believed a strong inference of fraud could be established where multiple promised events fail to occur.[113] The

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attributable to officers and directors who have day-to-day control or involvement in regular company operations, is inconsistent with the PSLRA's requirement that scienter be pleaded with respect to each act or omission by the defendant); Oppenheim Pramerica Asset Management S.A.R.L. v. Encysive Pharmaceuticals, Inc., 2007 WL 2720074, *3 (S.D. Tex. 2007) (holding that conclusory assertions of knowledge and falsehoods are insufficient to withstand the defendants' motion to dismiss); and *In re* Ditech Communications Corp. Securities Litigation, 2007 WL 2990532, *10 (N.D. Cal. 2007) (holding that defendants' sale of personal stock while promoting financial soundness of corporation were not "suspicious enough" to raise a strong inference of scienter). *See also generally*, Foster v. Wilson, ---F.3d ---, 2007 WL 2893608, (9th Cir. 2007).

[105] *See Tellabs*, 127 S. Ct. at 2507 n.3.

[106] *See Ottmann*, 353 F.3d at 343.

[107] *Id*. (citation and internal quotations omitted).

[108] *Id*. at 344.

[109] Plotkin v. IPaxess, Inc., 407 F.3d 690, 690 (5th Cir. 2005).

[110] *Id*. at 693, 699.

[111] *Id*. at 699-700.

[112] EP Medsystems, Inc. v. Echocath, Inc., 235 F.3d 865, 869-70 (3d Cir. 2000).

[113] *Id*. at 881.

court could not dismiss the possibility that the defendant-company, in an effort to coax a substantial investment, did not fairly represent to the plaintiff-investor the status of its negotiations with these companies.[114]

In contrast, the suing investor in *R2 Investments LDC v. Phillips* failed to meet the strong inference of scienter requirement.[115] In *R2 Investments*, the investor sued the company after it failed (due to bankruptcy) to complete a tender offer to repurchase certain previously issued notes.[116] The plaintiff-investor essentially argued that the company had not disclosed the liquidity crisis it was going through at the time of the investment.[117] Even if the company had knowingly omitted material facts about its financial condition, the court held that "[k]nowledge of an omission does not itself necessarily raise a strong inference of scienter."[118] The court held that the plaintiff-investor had not alleged a clear motive for the alleged misstatements or omissions, therefore, "the strength of its circumstantial evidence of scienter must be correspondingly greater."[119] Essentially, the court concluded the plaintiff had not alleged that the company's executives were aware of anything beyond worst case scenarios. Due to there being potential alternative funding sources, coupled with the plaintiff's failure to allege any motive, the court concluded the plaintiff had failed to allege a strong inference the defendants "acted with an intent to deceive, manipulate, or defraud or that severe recklessness in which the danger of misleading buyers or sellers is either known to the defendant or is so obvious that the defendant must have been aware of it."[120]

As to motive, the court in *GSC Partners CDO Fund v. Washington* held that allegations that the defendant officers stood to benefit from the transaction in question is not sufficient.[121] "[C]atch-all allegations that defendants stood to benefit from wrongdoing and had the opportunity to implement a fraudulent scheme are no longer sufficient, because they do not state facts with particularity or give rise to a strong inference of scienter."[122] A plaintiff must assert a concrete and personal benefit to the individual defendant resulting from the fraud.[123] "In every corporate transaction, the corporation and its officers have a desire to complete the transaction, and officers will usually reap financial benefits from a

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[114] *Id.*

[115] R2 Investments LDC v. Phillips, 401 F.3d 638, 643 (5th Cir. 2005).

[116] *Id.* at 639.

[117] *Id.* at 643-44.

[118] *Id.* at 644 (citation omitted).

[119] *Id.* at 645 (quoting Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)).

[120] *R2 Investments LDC*, 401 F.3d at 645 (citation and internal quotations omitted).

[121] GSC Partners CDO Fund v. Washington, 368 F.3d 228, 237 (3d Cir. 2004).

[122] *Id.* (citation and internal quotations omitted).

[123] *See id.*

successful transaction. Such allegations alone cannot give rise to a 'strong inference' of fraudulent intent."[124]

The heightened PSLRA pleading standards provide a significant hurdle for plaintiffs alleging securities fraud.[125] The authors' research reveals a dearth of individual private plaintiff-investors suing a privately owned enterprise for securities fraud. As for large groups of investors alleging securities violations, the Stanford Law School Class Action Clearinghouse, in cooperation with Cornerstone Research, tracks class action securities filings.[126] It its 2007 Mid-Year Assessment, the Clearinghouse reported that 2007 marked the fourth consecutive six-month period with below average securities class action filing activity.[127] In addition, Rule 10b-5 claims in the first half of 2007 represented 81% of total filings, compared to 88% in all of 2006.[128] The Clearinghouse has suggested two hypotheses for the drop in securities class action filings: less fraud (resulting from increased SEC and Justice Department enforcement activities) and a strong stock market (essentially less volatility in the market leads to fewer disgruntled investors).[129]

The Clearinghouse's findings may reflect a recent trend. Professor Perino studied nearly 1,500 class action filings from 1996 through 2001, concluding the stated goals of the PSLRA (discouraging the filing of non-meritorious lawsuits and the "race to the courthouse") were not accomplished.[130] Perino does, however, suggest that higher pleading standards relating to securities fraud improved overall case quality (driving out weaker cases).[131] In addition, Professor Choi et al. found evidence that pre-PSLRA claims that would have settled for nuisance value would be less likely to be filed under the PSLRA.[132] With the higher pleading standards

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[124] *Id.* (citations omitted).

[125] *See* Olazabal, *supra* note 49, at 196 (concluding that "the PSLRA's pleading requirements make it substantively more difficult for a plaintiff to clear the pleading hurdle and to proceed to discovery in a class action securities fraud case. . . .").

[126] *See* Stanford Law School Securities Class Action Clearinghouse in Cooperation with Cornerstone Research, *Securities Class Action Case Filings: 2007 Mid-Year Assessment, available at* http://securities.stanford.edu/clearinghouse_research/2007_YIR/20070710-01.pdf (tracking federal securities class action filings since the beginning of 1996 through June 22, 2007).

[127] *See id.* (no pagination).

[128] *See id.* (no pagination).

[129] *See id.* (no pagination).

[130] *See* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, COLUM. L. SCH. WORKING PAPER SERIES, Working Paper No. 211, *available at* http://ssrn.com/abstract_id=346840.

[131] *See id.* at 36-37.

[132] *See* Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, JOHN M. OLIN CTR. FOR L. & ECON., Working Paper No. 07-008, *available at* http://ssrn.com/abstract=975301 (finding evidence also that fewer suits resulting in non-nuisance settlements would be filed under the PSLRA, compared to pre-PSLRA, and that for the suits filed, fewer non-nuisance settlements would occur under the PSLRA).

for alleging securities fraud, the legal environment supports the argument that disgruntled new venture investors will be less likely to sue (or even threaten to sue) for securities fraud.

ADDITIONAL PROTECTIONS FOR ENTREPRENEURS

Regardless of the state of securities law, there are additional factors that can impact any potential disputes over control of an enterprise. It is presumed that when an entrepreneur is negotiating with potential investors, the relative power of the entrepreneur and investor largely determine who receives the greater benefit from the investment—and, hence, greater control. It is also presumed that where the entrepreneur has more power, there is less likelihood for litigation. An entrepreneur's personal and resource attributes can enhance his or her power relative to the investor.

While many entrepreneurs are new to the market for venture financing, other entrepreneurs have repeated experience. Entrepreneurs have been described as "novice" entrepreneurs, who have no prior business ownership experience; "serial" entrepreneurs, who have sold or closed a business in which they had an ownership stake and currently have an ownership stake in new, independent business; and "portfolio" entrepreneurs, who have concurrent ownership stakes in two or more independent businesses.[133] The latter two categories suggest that experience in entrepreneurship increases the entrepreneur's power for three reasons. First, experience provides the entrepreneur with a basis for comparison when negotiating with investors. Second, an experience curve effect may enable the entrepreneur to capitalize on his or her existing knowledge base and internal infrastructure, thereby reducing costs of capital. Third, experience is likely to generate credibility on the part of the entrepreneur.[134] The entrepreneur's experience is used by potential investors to screen applications for assistance.[135] Thus, not only will experience help the entrepreneur to see the relationship with the investor and the actual terms in a more sophisticated light, experience will also allow the entrepreneur to be seen by the investor as more capable and credible. Therefore it is arguable that entrepreneurs with more entrepreneurial experience will have more power relative to investors than entrepreneurs with less entrepreneurial experience.

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[133] *See generally* Paul Westhead et al., *Decisions, Actions, and Performance: Do Novice, Serial, and Portfolio Entrepreneurs Differ?*, 43 J. SMALL BUS. 393 ¶ 2 (2005) *available at* 2005 WLNR 25307723.

[134] *See id.*

[135] *See generally* Paul Westhead & Mike Wright, *Contributions of Novice, Portfolio and Serial Founders Located in Rural and Urban Areas*, 33 REGIONAL STUD. 157 (1999); *see also*, Ian MacMillan et al., *Criteria Used by Venture Capitalists to Evaluate New Venture Proposals*, 1 J. BUS. VENTURING 119, 121 (1985).

Expert power is demonstrated when an individual has knowledge or expertise relevant to another.[136] One commentator has suggested that the hallmark of expertise is the ability to adjust one's skills to be adaptive and successful even in the face of changes in situational demands.[137] In venture finance situations, it can generally be assumed that the investor has more financial knowledge and expertise than most entrepreneurs. However, to the extent that the entrepreneur has his or her own financial expertise, the entrepreneur's power relative to the investor will be enhanced. It is therefore arguable that entrepreneurs with financial expertise will have more power relative to investors than entrepreneurs without financial expertise.

Rare substantive expertise in the entrepreneur's field may also enhance the entrepreneur's power, particularly when the field is a popular one for venture capital. Where the value of the enterprise lies within the entrepreneur, it is less likely that the investor will jeopardize the relationship with the entrepreneur than if the value lay within physical assets or intellectual property. It is therefore arguable that entrepreneurs with rare expertise in their fields will have more power relative to investors than entrepreneurs without rare expertise in their fields.

Specific experience or training in negotiations should also give entrepreneurs power in their negotiations with investors. One study has found that while both expert and amateur negotiators were able to reach integrative solutions over time, expert negotiators were more integrative early in the negotiations and tended to secure higher average outcomes than amateur negotiators.[138] Another commentator has found that experienced negotiators make more accurate judgments about the other party's priorities and are more likely to negotiate more favorable agreements.[139]

It can be expected, then, that entrepreneurs who are experienced negotiators will be able to negotiate more favorable terms than will novice negotiators. It is therefore arguable that entrepreneurs with specific training or experience in negotiations will have more power relative to investors than entrepreneurs without training or experience in negotiations.

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[136] *See generally* John R. P. French & Bertran Raven, *The Bases of Social Power*, *in* STUD. IN SOC. POWER 150 (Dorwin Cartwright ed., 1966).

[137] *See generally* Donald W. Fiske, *The Inherent Variability of Behavior*, *in* FUNCTIONS OF VARIED EXPERIENCE 326 (Donald W. Fiske & Salvatore R. Maddi eds., 1961).

[138] *See generally* Margaret A. Neale & Gregory B. Northcraft, *Experts, Amateurs, and Refrigerators: Comparing Expert and Amateur Negotiators in a Novel Task*, 38 ORG. BEHAV. & HUM. DECISION PROCESSES 305 (1986).

[139] *See* Leigh Thompson, *An Examination of Naïve and Experienced Negotiators*, J. PERSONALITY & SOC. PSYCHOL. 82 (1990).

Even where an entrepreneur has some personal attributes that may be advantageous in negotiations with investors, the entrepreneur is likely to strengthen his or her power through the accumulation of certain resources that are also likely to enhance power. These include strong intellectual property, loyal board members, high-status alliance partners, high-status legal counsel, and an advisory board.

Theft of intellectual property, euphemistically called "competitive intelligence," is an important concern for every entrepreneur. Legitimate investors are acutely concerned with the protectability of entrepreneurs' intellectual property; the stronger the protection, the more valuable is the property. Less legitimate investors will be concerned for other reasons; the weaker the protection, the easier it is to appropriate.[140] In either event, strong intellectual property protection should provide more power to entrepreneurs than weak intellectual property protection. It is therefore arguable that entrepreneurs who have strong intellectual property protection will have more power relative to investors than entrepreneurs with weaker intellectual property protection.

While it is often the case that investors will insist on board of directors seats, and even board control, loyal investors at least provide some buffer to this power.[141] It is therefore arguable that entrepreneurs with loyal members on the board of directors will have more power relative to investors than entrepreneurs without loyal members on the board.

A number of scholars have argued that if an individual's partners possess considerable legitimacy or status, then the individual may derive legitimacy or status through that affiliation. This "borrowed" legitimacy or status has been shown to have a number of positive economic benefits for the actor, ranging from survival to organizational growth to profitability.[142]

In one of the more compelling demonstrations of the economic value of ties to high-status actors, one scholar examined the economic effects of interorganizational networks of privately held biotechnology firms and found that an affiliation with a prominent alliance partner increased the market value of the biotechnology

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[140] *See e.g.*, Holding, *supra* note 24 at A1 (discussing one incident in which an entrepreneur sought funding from a venture capital firm only to discover that the very next day a new company was formed to make the same product for the same market—funded by the same venture capital firm).

[141] *See, e.g.*, *id.* at A1 (also discussing an incident in which an entrepreneur allowed a venture capital firm to gain control of the board of directors, only to find himself fired from his own company two months later).

[142] *See* Joel A. C. Baum & Christine Oliver, *Institutional Embeddedness and the Dynamics of Organizational Populations*, 57 AM. SOC. REV. 540, 540-41 (1992); *see generally* Joel M. Podolny & Damon J. Phillips, *The Dynamics of Organizational Status*, 5 INDUS. & CORP. CHANGE 453 (1996); Joel M. Podolny, *A Status-Based Model of Market Competition*, 98 AM. J. SOC. 829 (1993).

firm.[143] Consistent with an interpretation of these ties as carriers of legitimacy, the effect of affiliations varies inversely with the age of the start-up.[144] In other words, young start-ups benefit more from the status of their network partners than did older start-ups. It is therefore arguable that entrepreneurs with high-status alliance partners will have more power relative to investors than entrepreneurs without high-status alliance partners.

Just as high-status alliance partners may be a signal of quality and hence give an entrepreneur more bargaining power, so too may the status of the entrepreneur's general counsel. Some law firms are known in the venture finance industry as higher status and more connected, knowledgeable, and capable than other law firms. Thus, such law firms may provide the entrepreneur with power relative to the investors in at least two ways. First, such law firms may suggest a certain sophistication on the part of the entrepreneur that will translate into more respect. Second, the expertise of the law firms themselves in the domain of venture capital should inure to the benefit of the entrepreneurs through good legal advice. It is therefore arguable that entrepreneurs with high-status legal counsel will have more power relative to investors than entrepreneurs with low-status legal counsel.

One commentator has recommended that entrepreneurs create "quasi-boards of directors" or advisory boards to allow the entrepreneurs to gather expert advice without imposing on the advisors the legal or fiduciary burdens of being board members.[145] These advisors can offer advice without becoming embroiled in operations or politics. Such advice can benefit the entrepreneur in two ways when negotiating with investors. First, the existence of the board of advisors signals that the entrepreneur is willing to listen to independent, outside advice. Second, the advisors can provide invaluable advice with respect to the negotiations themselves. It is therefore arguable that entrepreneurs with an advisory board will have more power relative to investors than entrepreneurs with no advisory board.

CONCLUSION

Investors in new ventures who are unhappy with the state of their investment may wish to regain control of the venture or exit the venture through liquidation. When either of those strategies becomes extremely difficult, investors may resort to retaliation by threatening to file a securities fraud lawsuit against the entrepreneur. The securities legislation passed in 1933 and 1934 favored the naïve investor over the sophisticated issuer, a situation that could be detrimental to an entrepreneur—a relative naïve issuer selling to a sophisticated investor.

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[143] *See* Toby E. Stuart et al., *Interorganizational Endorsements and the Performance of Entrepreneurial Ventures*, 44 ADMIN. SCI. Q. 315, 315 (1999).

[144] *See id* at 320-21.

[145] *See* Harold W. Fox, *Quasi-Boards: Useful Small Business Confidants*, HARV. BUS. REV., Jan.-Feb. 1982, at 158.

Although Congress had other culprits in mind—"professional plaintiffs," encouraged by corrupt class-action plaintiffs' lawyers, "racing" to the courthouse whenever a publicly-traded company's stock price dropped—when passing the Private Securities Litigation Reform Act, its consequences are apparently favorable for entrepreneurs who may face serious disagreements with investors. Although initially there was some disagreement among the courts as to the precise requirements to plead the strong inferences of scienter required by the PSLRA, the Supreme Court has stepped in to clarify the pleading requirements, reinforcing the fact that the PSLRA has created a significant hurdle to filing securities fraud actions. And some of the preliminary data indicate Congress has been successful in decreasing the number of securities fraud lawsuits filed in U.S. federal courts.

There are a number of personal and resource-based attributes of entrepreneurs that can enhance their power when negotiating the terms of investments in their companies. These power attributes, coupled with the heightened PSLRA pleading standards, should make entrepreneurs less vulnerable to claims of securities fraud when investors find they are not pleased with their investment.

COMMENT

Ubi Jus Ibi Remedium—For the Violation of Every Right, There Must Be a Remedy: The Supreme Court's Refusal To Use the *Bivens* Remedy in *Wilkie v. Robbins*.

Heather J. Hanna and Alan G. Harding***

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I. INTRODUCTION

The United States Constitution provides the solid foundation of our country, and defines rights guaranteed to citizens of the United States.[1] But, the Constitution does not explicitly provide a remedy if a violation of those rights is

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* Candidate for J.D. Degree, University of Wyoming College of Law, 2008. I would like to thank my mother, Terri Hanna.

** Candidate for J.D. Degree, University of Wyoming College of Law, 2008. Special thanks to my mother and sister.

This work is a product of the authors and any mistakes contained herein are our own.

[1] *See generally* U.S. CONST.

perpetrated by government actors.[2] It is well established that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever, he receives an injury."[3] Congress has enacted some regulatory schemes to protect our Constitutional interests.[4] However, at times, these regulations lack sufficient remedies or no regulations exist which provide a remedy. When these situations arise, the United States Supreme Court must step in to establish a remedy for those individuals caught in the limbo where no remedy exists.[5] One such example is *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* where the Court held federal officials can be sued for Fourth Amendment violations committed when acting under color of federal authority.[6] *Bivens* was the first time the Court officially recognized a freestanding constitutional claim for damages stemming from violations carried out by government actors acting in their official capacity.[7]

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[2] *Id.*

[3] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[4] The Civil Rights Act of 1871, codified in 42 U.S.C.A. § 1983, which is used as a way to explore the federal courts' functioning in relation to states and Congress. *See Ex parte* Young, 209 U. S. 123, 155 (1908) (holding that the power of a federal court to prevent the enforcement of railroad rates fixed under state legislative authority, which were considered confiscatory).

> The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Ex parte Young, 209 U.S. at 155–56; *see also* Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278, 281–82, 295–96 (1913) (involved a telephone company in Los Angeles who sued the city and some of its officials to try and prevent them from decreasing usage rates, holding a state's violation of the Constitution, even if also a violation of the state's constitution, was nevertheless under the jurisdiction of the federal courts); Monroe v. Pape, 365 U.S. 167, 169 (1961) (suit against police officers and city officials, contending the search of a home and subsequent arrest without a warrant constituted a violation of the Fourth Amendment, held Civil Rights Act, 42 U.S.C.S. § 1983, meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by a state official's abuse of his position). All of these cases deal with § 1983 and remedies available under that statute, but if § 1983 is unavailable the choice comes down to *Bivens* or no remedy at all. *Bivens* is essentially a counterpart to § 1983. *See* Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Round Table Dialogue*, 19 TOURO L. REV. 625, 675-76 (2003).

[5] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 402 (1971) ("[I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute."); J.I. Case Co. v. Borak, 377 U.S. 426, 434-35 (1964) (holding that federal courts could step in and provide all kinds of remedial relief in cases involving violations of the Securities Exchange Act); *Cf.* Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 201-04 (1967) (allowing other remedies not provided in the Rivers and Harbors Act of 1899, including removal of and costs incurred by the negligently sinking of a vessel).

[6] *Bivens,* 403 U.S. at 397–98.

[7] *Id.*

The United States Supreme Court recently ruled on *Wilkie v. Robbins*, a case involving harassment by a governmental administrative agency trying to extract an easement from a private landowner.[8] In *Wilkie*, the Court refused to broaden the *Bivens* holding so it would apply to respondent Robbins's situation.[9] Robbins experienced seven years worth of continued harassment and intimidation by Bureau of Land Management (BLM) officials.[10] This harassment took the form of illegal and illegitimate activities like trespass for an unauthorized survey of the hoped-for easement's topography, as well as an illegal entry into the lodge.[11] There were also administrative claims against Robbins for trespass, land-use violations, fine for unauthorized repairs to the road, and criminal charges.[12] Robbins sought damages as a remedy to the persecution.[13]

The Court's refusal to apply *Bivens* left Robbins no actionable claim for damages.[14] In fact, the *Wilkie* Court conceded that people who experience ongoing governmental harassment, even under the guise of legitimate bureaucratic activity, are left no adequate remedy in the wake of the holding.[15] Justice Ginsburg, writing the dissent, condemned the shortcomings of the majority's opinion, arguing Robbins should have a claim under *Bivens*.[16]

The ruling in *Wilkie* left the question of what governmental activities are sanctioned and permissible in a rather ambiguous state.[17] Equally obscure and unsettling is to what ends governmental actors are allowed to employ their administrative weight in order to meet overall legitimate goals, especially when these activities combine several disparate elements, which in the aggregate become

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[8] Wilkie v. Robbins, 127 S. Ct. 2588 (2007), *rev'd* Wilkie v. Robbins, 433 F.3d 755 (10th Cir. 2006).

[9] *Compare Wilkie,* 127 S. Ct. at 2600 (the Court did not want to broaden the *Bivens* doctrine to include Robbins's situation because it thought broadening *Bivens* would "invite claims in every sphere of legitimate governmental action affecting property interests") *with Bivens,* 403 U.S. at 389-90 (establishing a cause of action for damages against government actors in a Fourth Amendment case).

[10] *Wilkie,* 127 S. Ct. at 2611 (Ginsburg, J., concurring in part, dissenting in part) (noting the extensive factual record of harassment by federal officials).

[11] *Id.* at 2594-95.

[12] *Id.*

[13] *Id.* at 2596. Robbins sought a *Bivens* remedy for the series of government actions because to engage in piecemeal litigation would have been costly, unrealistic, and would result in "death by a thousand cuts." *Id.* at 2596, 2600.

[14] *Id.* at 2600, 2604-05.

[15] *Id.* at 2601 ("Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.").

[16] *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., concurring in part, dissenting in part) ("Robbins has no alternative remedy for the relentless torment he alleges. True, Robbins may have had discrete remedies for particular instances of harassment, but in these circumstances, piecemeal litigation, the Court acknowledges, cannot forestall 'death by a thousand cuts.'").

[17] *See generally Wilkie*, 127 S. Ct. at 2588.

repeated, harassing, small-scale attacks. *Wilkie* leaves an expansive loophole, allowing government agencies and their employees to use menacing tactics to achieve an objective against a private party.[18] An agency may nickel and dime a private citizen into bankruptcy if it so chooses to get what it wants.[19]

The topic of judicially created remedies for constitutional violations is worthy of attention due to the potential repercussions of governmental strong-arming toward private-property owners.[20] Allowing government officials to flex administrative muscles in an abusive fashion for the purpose of intimidation and harassment of private citizens implicates a legion of constitutional violations, even if the acts are within the scope of their legitimate powers.[21] The overall effect of the Court allowing the government to overreach under the umbrella of its legitimate power leaves the private landowner with uncertainty as to what, if any, remedies are available if they find themselves in a similar situation. Potential victims of unreasonable governmental intimidation need to be given means to rectify the situation.[22] This is not to impart that government intimidation is an everyday occurrence. In fact, for the most part, it is an aberration, which is why there needs to be a remedy.[23] Private landowners deserve a realistic legal solution to protect themselves from unreasonable governmental harassment when asserting their constitutionally protected rights.[24] There needs to be a remedy allowing for compensation when intimidation occurs.[25] An appropriate source for a remedy in these circumstances should come from the *Bivens* holding.[26]

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[18] *See generally id*.

[19] *See Wilkie*, 127 S. Ct. at 2611 (Ginsburg, J., concurring in part, dissenting in part) (stating that on just the few claims for which he sought a discrete remedy. "Robbins reported that he spent 'hundreds of thousands of dollars in costs and attorney's fees' seeking to fend off BLM.").

[20] *See generally Wilkie*, 127 S. Ct. at 2588.

[21] *See generally Wilkie*, 127 S. Ct. at 2615 n. 7 (Ginsburg, J., concurring in part, dissenting in part) (agreeing that government agencies "should not be hampered in pursuing lawful means to drive a hard bargain." She then states the activities used by the BLM in *Wilkie* "[t]respassing, filing false criminal charges, and videotaping women seeking privacy to relieve themselves . . . are not the tools of 'hard bargaining.'").

[22] *See generally Wilkie*, 127 S. Ct. at 2618 (Ginsburg, J., concurring in part, dissenting in part) ("Unless and until Congress acts, however, the Court should not shy away from the effort to ensure that bedrock constitutional rights do not become "merely precatory.").

[23] *Id*. at 2616 n. 8 (Ginsburg, J., concurring in part, dissenting in part) ("The rarity of such harassment makes it unlikely that Congress will develop an alternative remedy for plaintiffs in Robbins' shoes, and it strengthens the case for allowing a *Bivens* suit.")

[24] *See* U.S. CONST. amend. V. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

[25] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971).

[26] *Wilkie*, 127 S. Ct. at 2616 n. 8 (Ginsburg, J., concurring in part, dissenting in part) ("[E]very time the Court declined to recognize a *Bivens* action against a federal officer, it did so in deference to a specially crafted administrative regime.") *Id*.

Prior to the *Bivens* ruling, a damages remedy for Constitutional violations at the hands of government officials proved to be elusive.[27] The *Bivens* holding became conceivable after the Court recognized the Constitution as an individual source of rights.[28] This comment first discusses the facts presented in *Wilkie*, the inconsistencies found between *Bivens* and its progeny, and then addresses remedies available under *Bivens* and its progeny for victims of governmental harassment.[29] This comment then discusses why the Court refused to broaden *Bivens* to include situations like that in *Wilkie*, where government officials use a series of minor, yet harassing actions, in order to achieve their desired ends, even where the overall result, torment, justifies an equitable remedy.[30] Finally, this comment addresses possible solutions by broadening or redefining the *Bivens* rule to provide redress to victims in situations involving harassment by governmental actors.[31]

II. BACKGROUND

Wilkie v. Robbins concerns Bureau of Land Management (BLM) officials' harassment of a private landowner.[32] In 1994, Robbins purchased High Island

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[27] *E.g.* U.S. v. Lee, 106 U.S. 196, 223 (1882) (action under the Fifth Amendment, the plaintiff thrown off of land needed for "Arlington Cemetery," held Lee did not acquire rightful title to the land even though it was lost due to government officials failure to pay taxes on the property after the officials asserted they had in fact paid the taxes before the land was turned over to Lee); Giles v. Harris, 189 U.S. 475, 487–88 (1903) (action under the Fourteenth Amendment, request for an order compelling the county board of registrars to register blacks on the voter rolls, held the complaint failed to state a cause of action for which relief could be granted); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 684, 704–05 (1949) (action for an order to the War Assets Administrator to prevent transfer of coal claimed, held this relief was against the sovereign, reasoning the government should not be impeded in its essential governmental functions); Wheeldin v. Wheeler, 373 U.S. 647, 648–52 (1963) (action under Fourth Amendment challenging unauthorized House of Representatives committee subpoena, avoiding the question whether a cause of action existed by construing the fourth amendment as inapplicable based on the facts); *See generally* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[28] *See generally* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. Rev. 737 (1991) (exploring why the principle of damage actions against unconstitutional acts by federal officials brought directly under the Constitution was not officially recognized for so long by taking a closer look at *Monroe v. Pape*, 365 U.S. 167 (1961)).

[29] Bivens v. Six Unkown Fed. Narcotics Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980); Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983); U.S. v. Stanley, 483 U.S. 669 (1987); Schweiker v. Chilicky, 487 U.S. 412 (1988); McCarthy v. Madigan 503 U.S. 140 (1992); Correctional Servs. Corp v. Makesko, 534 U.S. 61 (2001); Wilkie v. Robbins, 127 S. Ct. 2588 (2007).

[30] *Wilkie,* 127 S. Ct. at 2604 ("The point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true. The point is the reasonable fear that a general *Bivens* cure would be worse than the disease.").

[31] *Bivens,* 403 U.S. 388; 18 U.S.C. §§ 1961–1968 (2006).

[32] *Wilkie,* 127 S. Ct. at 2593–96.

Ranch, located in Hot Springs County, Wyoming.[33] The ranch is checker-boarded with other lands belonging to the State of Wyoming, the Federal Government, and other private owners.[34] Unbeknownst to Robbins at the time of his purchase, the BLM had previously bartered with the prior owner of the land for an easement to use and maintain a road running across the ranch which allowed public access to other federal lands.[35] In return the BLM agreed to rent a right-of-way on a different part of the road to the ranch, which allowed for access to remote portions of the ranch.[36] After Robbins purchased the land he recorded a warranty deed.[37] Since the BLM failed to record the easement before Robbins filed the deed, per Wyoming law, Robbins received title to the land free and clear of the easement.[38] When the BLM realized its mistake, a BLM official demanded Robbins reinstate the easement.[39] Robbins refused.[40] This initiated a seven-year standoff between the BLM and Robbins, in which the BLM continually made threats, harassed, used intimidation tactics, and generally gave Robbins a hard time in an attempt to reinstate the easement.[41] The BLM trespassed on the ranch, refused to maintain roadways to provide access to isolated sections of the ranch, brought unfounded criminal charges against Robbins, and canceled his Special Recreation Use Permit and grazing permits.[42] BLM officials also tried to enlist other federal agencies in the harassment spectacle.[43] The harassment had a significant impact on Robbins's ability to organize cattle drives, and forced him to spend "hundreds of thousands of dollar in costs and attorney's fees" to stave off the BLM.[44] In a last ditch effort to fend off the BLM Robbins brought suit seeking damages, declaratory, and injunctive relief under the *Bivens* Rule and the RICO Act.[45] Robbins claimed the BLM tried to extort an easement from him and that it violated his Fourth and

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[33] *Id.* at 2593 (High Island Ranch used to be a guest ranch and mock cattle drive business).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Wilkie*, 127 S. Ct. at 2593.; *see also* WYO. STAT. ANN. § 34-1-120 (2005).

[39] *Wilkie*, 127 S. Ct. at 2593.

[40] *Id.*

[41] *Id.* at 2594-95.

[42] *Id.*

[43] *Id.* at 2611 (Ginsburg, J., concurring in part, dissenting in part) ("BLM was not content with the arrows in its own quiver. Robbins charged that BLM officials sought to enlist other federal agencies in their efforts to harass him. In one troubling incident, a BLM employee . . . pressured a Bureau of Indian Affairs (BIA) manager to impound Robbins' cattle, asserting that he was 'a bad character' and that 'something need[ed] to be done with [him].'").

[44] *Id.* at 2611 (Ginsburg, J., concurring in part, dissenting in part).

[45] *Wilkie*, 127 S. Ct. at 2590. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2000 ed. and Supp. IV).

Fifth Amendment rights.[46] The Supreme Court disagreed and held that Robbins did not have a valid claim under *Bivens* for remedies.[47]

A. Bivens v. Six Unknown Fed. Narcotics Agents

In *Bivens v. Six Unknown Fed. Narcotics Agents*, the Court had to determine whether there was a cause of action under the United States Constitution which gave Bivens a remedy for a Fourth Amendment violation.[48] The Court held monetary damages were an appropriate remedy for federal agent's unconstitutional conduct against a private citizen.[49] Bivens alleged that Federal Bureau of Narcotics agents, acting under the color of federal authority, made a warrantless entry of his apartment, searched the apartment, and subsequently arrested him on narcotics charges.[50] All of this was without probable cause.[51] Bivens sued the federal government, claiming he should receive damages for his "humiliation, embarrassment, and mental suffering" stemming from "the agents' unlawful conduct."[52] He sought $15,000 for each agent involved in the arrest from the United States government.[53]

Federal courts have the power to award damages for violations of "constitutionally protected interests," therefore the traditional judicial remedy of awarding damages is appropriate in *Bivens* type situations.[54] The Supreme Court held damages to be an appropriate remedy for this sort of Fourth Amendment violation.[55] The Court had to address the merits of Bivens' claim because this was the first time it had looked at whether there was an implied cause of action under the United States Constitution, and specifically the Fourth Amendment.[56] Justice Brennan, writing the majority opinion, stated American citizens have an

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[46] *Wilkie*, 127 S. Ct. at 2596.

[47] *Id.* at 2597, 2608.

[48] Bivens v. Six Unkown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .")

[49] *Bivens*, 403 U.S. at 389.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 389-90.

[53] *Id.* at 398 (Harlan, J., concurring).

[54] *Id.* at 399 (Harlan, J., concurring).

[55] *Bivens,* 403 U.S. at 397.

[56] *Id.*

"absolute right to be free from unlawful searches and seizures" under the Fourth Amendment.[57] The judiciary has a fundamental duty to protect this right.[58]

As a result of the constitutional infringement and the violation of Bivens' personal liberty at the hands of the federal agents, the Court created the *Bivens* rule as a constitutional remedy.[59] The Court inferred the *Bivens* rule from the Constitution itself, which allowed Bivens to state a cause of action for damages directly under the Fourth Amendment for violations of his constitutional rights.[60] The Court believed damages were historically "regarded as the ordinary remedy for an invasion of personal interests in liberty."[61] The Court regarded the federal agents' capacity and authority to influence the behavior of others to be a determining factor in its decision to grant a remedy.[62] "[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[63]

Bivens's dissent forcefully objected, declaring the Court had no authority to read a damages remedy into the Constitution.[64] Justice Black said, "The courts of the United States as well as those of the States are choked with lawsuits. . . . The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the states."[65]

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[57] *Id.* at 392.

[58] *Id.* at 392 ("[The Fourth Amendment] guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.") (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

[59] *Bivens*, 403 U.S. at 395.

[60] *Id.*

[61] *Bivens*, 403 U.S. at 395; *see also* Nixon v. Condon, 286 U.S. 73, 81 (1932) (involving a case where an African American brought an action against Texas election judges in order to recover damages for their refusal to permit him to cast his vote at a primary election due to his race).

[62] *Bivens*, 403 U.S. at 392.

[63] *Id.* at 392. Respondents attempted to argue the petitioners' suit involved rights of privacy, therefore the only way to obtain money damages was by a tort claim, "under state law, in the state courts." *Id.* at 390. The Court disagreed with this analysis believing it imposed too great of a restriction on the Fourth Amendment, which "operates as a limitation upon the exercise of federal power . . . [a]nd where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 391-92.

[64] *Id.* at 427-28 (Black, J., dissenting).

[65] *Id.* at 428-29 (Black, J., dissenting).

According to Justice Harlan, in his powerful, well-reasoned concurrence, the disagreement about whether the federal courts are powerless to accord a litigant damages "for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment."[66] Justice Harlan countered the dissent's reasoning stating, "[The] possibility of 'frivolous' claims [do not] warrant closing the courthouse doors to people in Bivens situations . . . . There are other ways of coping with frivolous lawsuits."[67]

The *Bivens* Court adhered to the principle that a victim of Fourth Amendment violations caused by federal officers should be allowed a monetary claim for relief.[68] A fair reading of the *Bivens* decision reveals the majority was not mainly concerned with deterrence, but instead with the idea that "the judiciary has a duty to enforce the Constitution . . . [so] the Court must ensure that each individual receives an adequate remedy for the violation of constitutional rights."[69]The Court did not define what other types of circumstances would also justify such a remedy.[70] In fact, the lower federal courts were given very little guidance to determine the extent to which the Constitution should be used to create and take advantage of the damages remedy.[71]

B. Bivens *Evolution*

Before contemplating a full analysis of the most recent constitutional damages claim before the Supreme Court, *Wilkie v. Robbins,* it is necessary to examine the evolution of *Bivens* case law since the decision was handed down in 1971. Following its debut, *Bivens* has not been confined to Fourth Amendment violations. The United States Supreme Court has applied the "*Bivens* rule," "*Bivens* remedy," or

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[66] *Bivens*, 403 U.S. at 402 (Harlan, J., concurring).

[67] *Id.* at 410 (Harlan, J., concurring).

[68] *Id.* at 389.

[69] *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) (proposing a need to correct the wrong turns taken by the Court in the *Bivens* progeny so damages action against federal officials who violate an individuals' constitutional rights is preserved because the Constitution is "meant to circumscribe the power of government where it threatens to encroach on individuals.") *Id.*

[70] *Bivens*, 403 U.S. at 397 (The Court went on to quote *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," but their use of vague language left the effects of the opinion on ice) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

[71] Nathan R. Horne, Casenote, *Removing the "Special" from the "Special Factors" Analysis in Bivens Actions: Vennes v. An Unknown Number of Unidentified Agents of the United States*, 28 CREIGHTON L. REV. 795, 807-09 (1995).

"*Bivens* claims" to other constitutional violations involving other amendments, while further clarifying the rule along the way.[72]

1. *Broadening* Bivens

Immediately after the *Bivens* ruling, it became apparent the holding was ambiguous as to whether *Bivens* had created a new cause of action that could also apply to violations of other constitutional amendments.[73] The Supreme Court allowed a private cause of action for the first time after *Bivens* in *Davis v. Passerman,* based on a violation of the Fifth Amendment's Equal Protection Clause.[74] Davis brought a suit against her previous employer, a former congressman, based on sexual discrimination and sought damages in the form of backpay for the time she would have been working.[75] The congressman felt that although Davis had been an "able, energetic, and very hard worker" as his administrative assistant, he preferred a male and he let her know as much.[76] The Court determined that a remedy existed under *Bivens* because Davis's constitutional rights had been violated and there were "no effective means other than the judiciary to vindicate these rights." [77] The *Davis* holding developed an expectation that a violation of a constitutional right entitled a plaintiff to a *Bivens* remedy where there were no alternative forms of federal or state relief available.[78]

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[72] The Court has extended *Bivens* to Fifth Amendment equal protection claims, Davis v. Passman, 442 U.S. 228, 248-49 (1979); to some, but not all Eighth Amendment claims in Carlson v. Green, 446 U.S. 14, 23-24 (1980); McCarthy v. Madigan 503 U.S. 140 (1992); but not in Correctional Servs. Corp v. Makesko, 534 U.S. 61, 74 (2001), to First Amendment claims in Bush v. Lucas, 462 U.S. 367, 389-90 (1983), to Fifth Amendment due process claims in U.S. v. Stanley, 483 U.S. 669, 685-86 (1987); Chappell v. Wallace, 462 U.S. 296, 305 (1983). An especially stark example of the Court's unwillingness to see the constitutional source of rights is in Schweiker v. Chilicky, 487 U.S. 412, 428-29 (1988), in which the Court completely failed to acknowledge the plaintiffs' constitutional claim. *See generally*, Sonya Gidumal, *McCarthy v. Madigan: Exhaustion of Administrative Agency Remedies and Bivens*, Note, 7 ADMIN. L. J. AM. U. 373, 390 (1993) (giving an articulate background on *Bivens* holdings and subsequent interpretations).

[73] Marilyn Sydeski, *Righting Constitutional Wrongs: The Development of a Constitutionally Implied Cause of Action for Damages*, 19 DUQ. L. REV. 107, 114 (1980-81) (arguing that there was uncertainty in the federal courts as to how far *Bivens* extended).

[74] *Davis*, 442 U.S. at 234 (1979) (the Fifth Amendment states "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V).

[75] *Id.* at 231.

[76] *Id.* at 230. "Dear Mrs. Davis . . . You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion." *Id.*

[77] *Id.* at 243. The Court, again cited *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), in support of their desire to give Davis a cause of action. *Davis*, 442 U.S. at 242.

[78] *Davis*, 442 U.S. at 248 ("[A] plantiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated.").

The very next year, *Carlson v. Green* presented the Supreme Court with an Eighth Amendment *Bivens* remedy question.[79] In *Carlson*, a federal prisoner's estate claimed the decedent's Eighth Amendment constitutional guarantee of "no cruel and unusual punishment" had been violated.[80] While incarcerated, the decedent was given scant and deficient medical attention.[81] The administratrix of the estate sought compensatory and punitive damages for the alleged constitutional violations under the *Bivens* rule.[82] The Court held a damages remedy could be implied directly from the Eighth Amendment and allowed the *Bivens* damages claim.[83] The *Carlson* Court suggested *Bivens* established a "right to recover damages against [a federal agent] in federal court" for constitutional violations, even if there was not a statute conferring this right.[84] Using dicta from *Bivens,* the Court also addressed two factors which would preclude a *Bivens* claim:

> The first is when defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.'[85] The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.[86]

An examination of *Bivens*, *Davis*, and *Carlson* make it reasonable to believe that the Court wanted to provide flexible guidelines for those desiring a *Bivens* remedy. After *Bivens*, *Davis*, and *Carlson* the necessary elements for a *Bivens* remedy were: first to prove a constitutional right had been violated and second, to prove judicial

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[79] Carlson v. Green, 446 U.S. 14, 16 (1980).

[80] *Id.* at 16-18.

[81] *Id.* at 16 n.1.

[82] *Id.* (referring in the allegations by the estate that the Federal Correction Centers failed to recognize and treat the decedent's asthmatic condition, which ultimately led to his death).

[83] *Id.* at 19 (addressing the factors that would preclude Carlson's claim). "First, the case involves no special factors counseling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* (referring and citing *Davis,* 442 U.S. at 246). "Second, we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress [as there is no remedy in the Federal Tort Acts Claim]." *Carlson*, 446 U.S. at 19.

[84] *Carlson*, 446 U.S. at 18. Justice Rehnquist's dissent stated, "in my view, absent a clear indication from congress, federal courts lack the authority to grant damages relief for constitutional violations." *Id*. at 41 (Rehniquist, J., dissenting)).

[85] *Id*. (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971)); Davis v. Passman, 442 U.S. 228, 245 (1979)).

[86] *Carlson*, 446 U.S. at 41 (citing *Bivens*, 403 U.S. at 397) (emphasis supplied).

relief in the form of damages was appropriate.[87] Before *Carlson*, the damages remedy for constitutional violations seemed to be limited to circumstances where no other relief was available, but after *Carlson* it looked as though it was possible for a *Bivens* remedy to be appropriate, even if legislative relief was also available.[88] Under *Carlson*, which read *Bivens* broadly, a *Bivens* remedy was afforded to a greater number of victims of constitutional violations.[89] The expectation of a continued broad application of the *Bivens* remedy was quickly shot down by the Supreme Court's decisions following *Carlson*, as the Court has systematically and methodically closed off *Bivens* remedies under the Constitution.[90]

2. Bivens *Reined In*

In the early 1980s, the Court began to place stringent limits on *Bivens* remedies.[91] *Bush v. Lucas*, decided just three years after the *Carlson* decision was handed down, held it "inappropriate" to supplement a "regulatory scheme" with a judicial remedy due to Congress's capability of addressing the issue.[92] Bush, an aerospace engineer employed by NASA, gave "highly critical" public statements to the media directed at his employer.[93] After making the statements, Bush was demoted.[94] Bush argued the demotion was a retaliatory act and as a result a violation

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[87] *See* Marilyn Sydeski, *Righting Constitutional Wrongs: The Development of a Constitutionally Implied Cause of Action for Damages,* 19 DUQ. L. REV. 107, 130 (1980). Stating that when making as analysis of *Bivens*, *Davis*, and *Carlson*:

> There are certain guidelines that can be ascertained. Initially, the plaintiff must not only demonstrate that his claim involves a constitutional right, but must also prove the violation of that right. Once this has been established, the plaintiff's complaint will be dismissed, unless it can be determined that judicial relief in the form of damages is appropriate. . . . Additionally . . . the court must be certain that equally effective alternative remedies are not available to the plaintiff.

Id. at 130-31.

[88] *See* Charles Saperstein, *The* Bivens *Doctrine: Ten Years Down the Road*, 47 BROOK. L. REV. 125-26, 134-36 & nn. 49-59 (1980) (discussing *Bivens* cases regarding whether to extend the remedy to other amendments).

[89] *Id.*

[90] *Id.*

[91] *See* Chappell v. Wallace, 462 U.S. 296, 305 (1983) (holding enlisted Navy men could not bring suit under Constitution); U.S. v. Stanley, 483 U.S. 669, 685-86 (1987) (holding no *Bivens* remedy was available for former military service man administered LSD while on active duty); Bush v. Lucas, 462 U.S. 367, 389-90 (1983) (holding civil service remedies are not as effective as individual damage claims while finding that it would still be "inappropriate to supplement a judicial remedy when Congress was more capable of dealing with the problem"); Schweiker v. Chilicky, 487 U.S. 412, 428-29 (1988) (holding improper denial of social security benefits did not give rise to cause of action under Constitution).

[92] *Bush*, 462 U.S. at 389–90.

[93] *Id.* at 369.

[94] *Id.*

of his First Amendment rights.[95] A review board found while Bush's statements were "somewhat exaggerated, [they] 'were not wholly without truth.'"[96] The board proposed Bush "be restored to his former position" and receive backpay.[97] Bush, not satisfied with the board's solution, insisted the "civil service remedies were not effective" in remedying the First Amendment violation, "therefore it did not fully compensate him for the harm he suffered."[98]

The Court began its analysis by assuming Bush's First Amendment rights had in fact been violated.[99] It then turned its attention to the remedy provided by Congress.[100] The Court acknowledged that existing remedial schemes did not offer complete relief, but insisted "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service."[101] The Court indicated its belief that the extensive nature of current civil service remedies was adequate.[102] Therefore, a judicial remedy was not mandatory, and it would be "inappropriate" to sanction a *Bivens* remedy.[103]

The same day as the *Bush* decision, the Court decided *Chappell v. Wallace*, yet another case wherein a plaintiff sought a *Bivens* remedy.[104] *Chappell* dealt with Naval officers who alleged their commanding officers "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity" due to their race.[105] A unanimous Court held enlisted military personnel would not be allowed to bring a *Bivens* claim to recover damages when a superior officer is implicated for alleged Constitutional violations.[106] It proclaimed, "*Bivens* and its progeny, has expressly cautioned that . . . a remedy will not be available when 'special factors counselling hesitation' are

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[95] *Id.* at 370.

[96] *Id.* at 371.

[97] *Id.*

[98] *Bush,* 462 U.S. at 372.

[99] *Id.*

[100] *Id.* at 380-89.

[101] *Bush*, 462 U.S. at 389. The Supreme Court declined to recognize such a claim because a complex mix of legislation, executive orders, and detailed Civil Service Commission regulations comprised an "elaborate, comprehensive scheme" that provided substantive and procedural remedies for improper federal personnel actions. *Id.* at 385; *see also* Wilson v. Libby, 498 F.Supp. 2d 74, 84 (D. D.C. 2007).

[102] *Bush*, 462 U.S. at 390.

[103] *Id.* ("We are convinced Congress is in a better position to decide whether or not the public interest would be served by creating [a remedy]").

[104] Chappell v. Wallace, 462 U.S. 296, 297 (1983).

[105] *Id.*

[106] *Id.* at 297.

present."[107] The Court held a "special status" exists for the military, due to the two systems of justice, one for civilians and one for military personnel.[108] This "special status" of military personnel precludes enlisted men from bringing suits against superior officers for damages.[109]

The "special factors counseling hesitation" take into consideration the need for strict discipline and regulation within the military rank and file.[110] "It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view."[111] Therefore, the Court reasoned, it would be "inappropriate" to allow enlisted personnel a *Bivens* remedy.[112]

Four years later, in *United States v. Stanley*, the Court held a *Bivens* remedy was not available to a former Army sergeant who had been secretly fed the hallucinogen LSD by government agents.[113] The Army secretly administered LSD to Stanley as part of one of its drug testing programs.[114] Army officials in charge of the program told Stanley they wanted to involve him in a program to test clothing and equipment designed for chemical warfare, but never let on their true intentions of testing the effects of hallucinogenic drugs.[115] As a result, "Stanley . . . suffered from hallucinations and periods of incoherence and memory loss, was impaired in his military performance, and would on occasion 'awake from sleep at night and, without reason, violently beat his wife and children, later being

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[107] *Id.* at 298 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971)); *see also* Carlson v. Green, 446 U.S. 14, 18 (1980).

[108] *Chappell*, 462 U.S. at 303-04.

[109] *Id.*

[110] *Id.* at 300.

[111] *Chappell*, 462 U.S. at 301.

[112] *Id.* at 300.

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 301 (quoting Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953)).

[113] U.S. v. Stanley, 483 U.S. 669, 685–86 (1987).

[114] *Id.* at 671-72.

[115] *Id.* at 671. James Stanley was one of over 1000 army personnel who participated in secret experiments designed to test the effects of hallucinogenic drugs on human beings. *See generally* Richard W. McKee, Note, *Defending an Indifferent Constitution: The Plight of Soldiers Used as Guinea Pigs*, 31 ARIZ. L. REV. 633, 633 (1989).

unable to recall the entire incident.'"[116] Years later, Stanley received a letter from the army asking for his cooperation in a study on the long-term effects of LSD on "volunteers who participated" in the 1958 study.[117] This was the first time Stanley heard about the drug-testing program or knew of his involvement in it.[118]

In forming its opinion, the Court again relied on and reaffirmed the "special factors counseling hesitation in the absence of affirmative action by Congress" rationalization used in *Chappell*.[119] Again it held an uninvited intrusion into military affairs by the judiciary would be "inappropriate."[120] "The 'special facto[r]' that 'counsel[s] hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."[121] The Court reasserted that damages actions brought directly under the Constitution are not appropriate when "special factors counseling hesitation" are present.[122] The *Stanley* Court repeated the *Chappell* analysis: the military's unique position in society, its imperative need for discipline, its separate, established system of justice, together with the explicit constitutional grant of power to the Congress to govern the armed forces were all concerns constituting "special factors."[123] According to the Court, Congress had not authorized judicial intervention into this area; therefore Congress retained sole authority over these types of military matters.[124] The Court reasoned the lack of congressional authority allowing federal courts to provide a *Bivens* remedy in a military situation underscored the soundness for its decision in this case.[125] The holding in *Stanley* substantially veered away from *Bivens'* original

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[116] *Stanley*, 483 U.S. at 671. Stanley was discharged from the army in 1969 and one year later was divorced from his wife. *Id.*

[117] *Id.*

[118] *Id.* at 672.

[119] *Id.* at 678 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971)). Stanley tried to distinguish himself from *Chappell* by arguing his case did not implicate military chain of command like *Chappell*, because the people administering the drugs were not his superior officers. *Stanley*, 483 U.S. at 679-80.

[120] *Stanley*, 483 U.S. at 676.

[121] *Id.* at 683.

[122] *Id.* The Court relied on the "incident to service" doctrine set out in *Feres v. U.S.*, 340 U.S. 135, 146 (1950), reasoning this standard would afford adequate protection, yet not be so extreme as to bar *Bivens* actions entirely. *Id.* at 673-701. *Feres* held that the government was not liable under the Federal Tort Claims Act for injuries to servicemen arising out of or in the course of activity incident to military service. *Feres*, 340 U.S. at 146.

[123] *Stanley*, 483 U.S. at 682-83.

[124] *Id.* at 679-80.

[125] *Id.* at 682. The Court said just because a matter is within Congress's power does not mean it is exempt from a *Bivens* remedy: "[w]hat is distinctive here is the specificity of that technically superfluous grant of power, and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches. All this counsels hesitation in our creation of damages remedies in this field."

rationale, which was to provide a remedy for severe constitutional violations at the hands of government officials.[126]

In 1988, the Court decided *Schweiker v. Chilicky*.[127] In *Schweiker*, three separate individuals brought suit for alleged due process violations after their Social Security disability benefits were terminated.[128] The plaintiffs received disability benefits under Title II of the Social Security Act, until their benefits were terminated pursuant to the "continued disability review" program initiated by the Department of Health and Human Services.[129] Termination of benefits was somewhat widespread within the Social Security Administration.[130] In response, Congress passed the 1984 Reform Act, which provided for a continuation of benefits after a state agency determined a recipient as no longer disabled.[131] This legislation did not apply to persons, such as the plaintiffs, whose benefits had terminated before 1983.[132] Although the plaintiffs' benefits were subsequently restored to disability status and they were awarded retroactive benefits in full, the individuals argued that by using impermissible quotas, government officials had deprived them of fair treatment in a distribution of benefits.[133] The issue was "whether the improper denial of Social Security disability benefits, allegedly

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Id.; *See also* Kevin J. Mahoney, Comment, U.S. v. Stanley: *Has the Feres Doctrine become a Grant of Absolute Immunity?*, 23 NEW ENG. L. REV. 767, 780-89 (1989) (Discussing that the Court not only refused to expand *Bivens* by allowing servicemen to recover under the Constitution, but reasoned that the *Feres* doctrine had a more justifiable application to service related *Bivens* actions. The "incident to service" test under *Feres* and furthered in *Stanley* has been expanded beyond acceptable justification. The Court has granted absolute immunity to military officials and has paved the way for these officials to freely violate the constitutional rights of their subordinates.).

[126] *See* McKee, *supra* note 115, at 652, (arguing "[b]y holding that military personnel cannot seek redress for violation of their most fundamental rights, the Court not only condones the outrageous conduct of the government in subjecting soldiers to chemical and nuclear experiments without their consent or knowledge, but may actually encourage such conduct.").

[127] Schweiker v. Chilicky, 487 U.S. 412 (1988).

[128] *Id.* (a due process claim would have been a violation of their Fifth Amendment rights).

[129] *Id.* at 414-15 (The three people were entitled to benefits under Title II of the Social Security Act of 1980, whereby the federal government provides disability benefits to individuals who have contributed to the Social Security program, but who are unable to engage in substantial gainful employment due to a physical or mental impairment).

[130] *Id.* at 417 (The Social Security Administration itself apparently reported that about 200,000 persons were wrongfully terminated, and then reinstated, between March 1981 and April 1984.) "[T]he message [to] State agencies, swamped with cases, was to deny, deny, deny . . . we have scanned our computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go into a free [f]all toward economic chaos." *Id.* at 416.

[131] *Id.* at 415–16.

[132] *Chilicky,* 487 U.S. at 417–18.

[133] *Id.* at 418–19.

resulting from violations of due process by government officials who administered the federal Social Security program, may give rise to a cause of action for money damages against those government officials."[134]

The opinion began by restating the *Bivens* limitation of "special factors counseling hesitation in the absence of affirmative action by Congress."[135] These factors include judicial deference when Congress had not spoken.[136] The Court then explained that when there is even an inkling that Congress provided adequate remedial measures for constitutional violations within a government program, which occur in the course of the programs' administration, *Bivens* remedies would not be available.[137] This holding is based on the premise that "Congress is in a better position to decide whether or not the public interest would be served by creating [a new substantive legal liability.]"[138]

Then the *Chilicky* Court reaffirmed its holding from *Bush*.[139] In comparing *Bush* and *Chilicky*, the Court conceded "Congress has failed to provide for 'complete relief'" in both situations.[140] The Court held that when Congress failed to address the issue of remedies for specific individuals, courts are precluded from inferring a constitutional damages remedy if the legislation provided *any* remedial measures.[141] The Court acknowledged these "decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."[142] Consequently, federal courts are able to use the decisions from *Bush* and *Chilicky* "as a tool in other factual situations to restrict the viability of a *Bivens* action, and one can only speculate what factors in the future might be sufficient to prohibit an individual's cause of action when he or she suffered a constitutional tort at the hands of a federal official."[143]

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[134] *Id.* at 414.

[135] *Id.* at 412 (quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971)).

[136] *Chilicky*, 487 U.S. at 412.

[137] *Id.* at 423.

[138] *Id.* at 426–27 (quoting Bush v. Lucas, 462 U.S. 367, 390 (1983)).

[139] *Chilicky*, 487 U.S. at 425.

[140] *Id.*

[141] Betsy J. Grey, *Preemption of* Bivens *Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087, 1126 (Winter 1992). "*Schweiker v. Chilicky* was the final step in the wrong direction. Making no pretense of searching for congressional intent, the Court deferred to the congressional remedial scheme merely because Congress had already created a remedy to deal with the wrongful termination of disability benefits in an area in which Congress arguably enjoyed special expertise that the Court lacked." *Id.*

[142] *Chilicky*, 487 U.S. at 421.

[143] *See* Gidumal, *supra* note 72, at 400.

In the decade following the *Bivens* decision, the Court extended causes of action under the Constitution to other constitutional amendments when plaintiffs suffered at the hands of government officials.[144] Then in the 1980s, the Court began to rein in the *Bivens* holding and began to give more deference to Congress, citing Congress's ability to create appropriate statutory remedial schemes. In *Bush v. Lucas*, the Court found it "inappropriate" to allow a cause of action if Congress already created a remedial scheme.[145] Then in *Chappell v. Wallace*, the Court prohibited enlisted men from bringing suit under Constitution. [146] The Court further quashed hopes of a *Bivens* comeback in *United States v. Stanley*, when it held a *Bivens* remedy unavailable for a former military serviceman administered LSD while on active duty.[147] *Bivens* was further constrained in *Schweiker v. Chilicky* when the Court deferred to Congress and the Social Security Administration, holding there to be no cause of action available, even if the alternative remedy was inadequate. Then in 1992 there seemed to be a small glimmer of hope for *Bivens* in *McCarthy v. Madigan*.[148]

3. Bivens *Briefly Revitalized?*

In *McCarthy v. Madigan*, the Supreme Court held a prisoner who sought only monetary damages need not exhaust administrative remedies before bringing a *Bivens* cause of action.[149] This was the first time in over a decade the Court ruled in favor of *Bivens*, which provided optimism that the Court had changed its tune and would extend *Bivens* in the future. This turned out to be a hope against hopes.

John J. McCarthy, a federal prisoner, filed a *pro se* complaint against federal prison officials, alleging the officials "had violated his constitutional rights under the Eighth Amendment by their deliberate indifference to his needs and medical condition resulting from a back operation and a history of psychiatric problems."[150] McCarthy sought monetary damages.[151]

In determining whether McCarthy had a *Bivens* claim, the Court had to decide whether he was required to exhaust all administrative remedies first.[152] The

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[144] Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980); Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983); U.S. v. Stanley, 483 U.S. 669 (1987); Schweiker v. Chilicky, 487 U.S. 412 (1988).

[145] *Bush*, 462 U.S. at 389–90.

[146] *Chappell*, 462 U.S. at 305.

[147] *Stanley*, 483 U.S. at 685–86.

[148] McCarthy v. Madigan, 503 U.S. 140 (1992).

[149] *Id.* at 156.

[150] *Id.* at 142.

[151] *Id.*

[152] *Id.* at 144.

Court considered the doctrine of exhaustion and why it is often a prerequisite to asserting a federal claim.[153] The general rule insists that parties exhaust any administrative remedies before seeking relief in federal court.[154] The *McCarthy* Court veered away from this general rule.[155] When making a determination of whether exhaustion of administrative remedies was necessary in this context, the Court relied on precedent directing it to look at congressional intent.[156] "We conclude that petitioner McCarthy need not have exhausted his constitutional claim for money damages. Congress did not properly address the appropriateness of requiring exhaustion [and] McCarthy's individual interests outweighed countervailing institutional interests favoring exhaustion."[157]

The Court found inadequacies in the administrative procedures because of the "heavy burdens" placed on inmates. [158] Furthermore, there was not an option for an award of monetary relief in the remedial scheme.[159] A unanimous Court

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[153] *Id.* "The doctrine of exhaustion . . . govern[s] the timing of federal court decision making." *McCarthy*, 503 U.S. at 144.

[154] *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967) (discussing the doctrine of administrative remedies, the Court held since there was no explicit statutory authority barring pre-enforcement review, then a pre-enforcement judicial determination was allowed); McKart v. U.S., 395 U.S. 185, 195 (1969) (complaining party may have his/her complaint resolved through the administrative process without the court's interference, thereby reducing the number of cases that are heard by federal courts).

[155] *See McCarthy*, 503 U.S. at 144-45 (citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 & n.9 (1938) (discussing cases as far back as 1898)).

[156] *McCarthy*, 503 U.S. at 144; *See* Patsy v. Board of Regents of Florida, 457 U.S. 496, 501 (1982) "legislative purpose . . . is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme . . . ."

[157] *McCarthy*, 503 U.S. at 149.

> The general grievance procedure heavily burdens the individual interests of the petitioning inmate in two ways. First, the procedure imposes short, successive filing deadlines that create a high risk of forfeiture of a claim for failure to comply. Second, the administrative 'remedy' does not authorize an award of monetary damages-the only relief requested by McCarthy in this action. The combination of these features means that the prisoner seeking only money damages has everything to lose and nothing to gain from being required to exhaust his claim under the internal grievance procedure.

Id. at 152; *See also* George Wright, *The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines*, 11 AM. J. TRIAL ADVOC. 83, 93 (Summer 1987) ("[T]he application of the exhaustion doctrine is, in the absence of a statute requiring exhaustion, a matter of the court's discretion to be reviewed only for abuse of discretion.").

[158] *McCarthy*, 503 U.S. at 153. First, inmates were only given a short period of time to file any grievances and/or a formal written complaint to the prison warden. *Id*. Second, even if the filing was done on time, there was no authorization for an award of monetary damages, which was what McCarthy was requesting. *Id*.

[159] *Id*. at 154.

in *McCarthy* held a prisoner seeking money damages does not need to exhaust administrative remedies before filing a *Bivens* claim in federal court.[160] The holding allowed the Court to express that Congress's intentions preclude a *Bivens* claim or that judicial intrusion would be "inappropriate."[161] Based on the *McCarthy* holding, a plaintiff probably will not be given the chance to bring a *Bivens* claim if *any* alternative remedies are available.[162] Although the initial response to *McCarthy* may have suggested a comeback for *Bivens*, the *McCarthy* holding only created a false sense of hope for the future of *Bivens*.[163] Congress had not dealt with whether a prisoner had a claim in federal court if the only relief sought was money.[164] That was the only reason the Court allowed a *Bivens* cause of action.[165] The Court still perceived constitutional damages an issue for the Congress and its decision in *McCarthy v. Madigan* was no change from this view.[166]

4. Bivens *Shackled Again*

In 2001, the Supreme Court handed yet another prison decision in *Correctional Services Corp. v. Malesko*.[167] The case involved an inmate sent to a halfway house run by a private corporation under contract with the federal government.[168] Malesko claimed he suffered injuries from the contractor's negligence in refusing to permit him to use an elevator and instead forcing him to take stairs to his fifth-floor room, even though he had a noted preexisting heart condition and had special permission to use the elevator.[169] Malesko sustained an injury to his left ear when he suffered a heart attack and fell as a result of climbing stairs to his room.[170] The inmate brought a suit for an alleged violation of his Eighth Amendment rights.[171] He sought a remedy under the *Bivens* doctrine.[172]

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[160] *Id.* at 156. Prior to *Bivens*, the Supreme Court held in *Bell v. Hood,* 327 U.S. 678, 685 (1946) that federal courts had the power to hear cases brought under the Constitution. The Court reserved judgment, however, on whether an action brought against a federal agent for his unconstitutional conduct was a cause of action for which relief could be granted. *McCarthy*, 503 U.S. at 142-43.

[161] *See* Gidumal, *supra* note 72, at 405 (although the precise holding of *McCarthy* was expected, it did not change the fact that the *Bivens* remedy has been virtually eliminated).

[162] *Id.*

[163] *See* Gidumal, *supra* note 72, at 379.

[164] *Id.* at 406.

[165] *McCarthy*, 503 U.S. at 148. Also, note that Justice Blackmun wrote the majority opinion in *McCarthy*, but it was he who had cautioned in his *Bivens* dissent that the majority had opened the door to an "avalanche" of federal cases, and it was Congress's job to provide adequate remedies. *Id.*

[166] *See* Gidumal, *supra* note 72, at 406.

[167] Corr. Servs. Corp. v. Malesko*,* 534 U.S. 61 (2001).

[168] *Id.* at 62.

[169] *Id.* at 64.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 64-65.

The Court considered whether to extend *Bivens* "to confer a right of action for damages against private entities acting under the color of federal law."[173] The *Malesko* Court declined to "extend" *Bivens* liability to reach independent contractors working for the government since they are not under its direct control.[174]

The Court's decision, although disappointing, did not come as shock.[175] Justice Scalia, concurring in the *Malesko* holding, declared *Bivens* a product of an era bygone where the need for remedies for violations was far more widespread.[176] Justice Scalia believed an "even greater reason to abandon" the earlier approach in the constitutional field, since Congress lacks power to repudiate a *Bivens* action.[177] He said that he would limit previous *Bivens* holdings "to the precise circumstances that they involved."[178] This is not all that surprising, since the Justice Scalia, as well as the majority, likely knew there would be other cases requesting *Bivens* remedies that it would hear in the future such as *Wilkie*.

III. *WILKIE* ANALYSIS

A. *New* Bivens *Rule Set Forth in* Wilkie

In *Wilkie v. Robbins*, the Court explained the current *Bivens* rule and how it is to be applied.[179] As of now, when a "constitutionally recognized interest is adversely affected by the actions of federal employees," the Court asks: (1) is there an alternative judicial process that can "protect . . . the interest" which is "convincing" enough for the Court to refrain from providing a new remedy; or (2) if there is no "convincing" alternative process, are there "special factors" which favor or disfavor authorizing a new kind of remedy?[180] If the answer to question one is yes, then a new remedy will not be created.[181] However, if the answer to the

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[173] *Malesko*, 534 U.S. at 66.

[174] *Id.* at 66-67.

[175] Daniel J. Meltzer, *The Supreme Court's Passivity*, 2002 SUP. CT. REV. 343, 356-57 (2002) (arguing Malesko's case was not a strong to begin with because: the complaint did not seem to state a meritorious claim; and, in *FDIC v. Meyer*, 510 U.S. 471 (1994), the Supreme Court held no *Bivens* action lies against a federal agency (as distinguished from a federal officer) "the purpose of *Bivens* is to deter the officer," not the agency).

[176] *Malesko*, 534 U.S at 75 (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action. . . ."); *see also* Metzler, *supra* note 175.

[177] *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (stating "the Constitution can presumably not even be repudiated by Congress," meaning the law within the Constitution is superior to all others, including that of Congress).

[178] *Id.*

[179] *Wilkie,* 127 S. Ct. 2588, 2598 (stating the current *Bivens* rule).

[180] *Id.* at 2598 (citing *Bush,* 462 U.S. at 378).

[181] *Id.* at 2599.

first question is no, then the Court will address the second question.[182] At step two, if there is no "convincing" alternative process, or an absence of an alternative process, the Court will look at certain factors discussed below to determine whether a new remedy should be created.[183]

The Court considers the following factors in creating a new remedy: adequacy of alternative remedies; difficulty in defining legitimate action by government actors; the importance of protecting the constitutional interest; the demand and cost on the judicial system from creating a mass of new litigation in the area; the difficulty in defining a broader doctrine; and the ability of Congress to legislate a remedy.[184] From this list, the *Wilkie* Court most meticulously scrutinized the difficulty in defining a broader doctrine, deference to Congress's ability to create a remedy, and the fear of creating a slew of new litigation.[185] Until the *Wilkie* decision however, fear of creating a mass of new litigation was never a sufficient reason to deny a *Bivens* remedy.[186] In fact, the dissent in *Bivens* sounds remarkably similar to the majority's reasoning in *Wilkie*.[187] In *Bivens* Justice Black said, "The courts of the United States as well as those of the States are choked with lawsuits. . . . The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the states"[188]

The *Wilkie* Court addressed whether to expand the *Bivens* remedy in order to allow actions to be brought for administrative officials' retaliation in response to private citizens asserting their constitutionally protected rights, specifically the unwillingness of Robbins to cooperate with the BLM's agenda.[189] The Court refused to extend the *Bivens* remedy to include damages for retaliation against the exercise of property ownership rights.[190] In reaching its conclusion, the *Wilkie* court applied the two-step analysis, stating:

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[182] *Id.* at 2600.

[183] *Id.* at 2598–2605.

[184] *Id.* at 2605; Bivens v. Six Unkown Fed. Narcotics Agents, 403 U.S. 388, 410 (1971).

[185] *Wilkie,* 127 S. Ct. at 2604-05.

[186] *Bivens,* 403 U.S. at 411 (Harlan, J., concurring).

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

[187] *Id.* at 428 (Black, J., dissenting).

[188] *Id.* at 428-29 (Black, J., dissenting).

[189] *Wilkie,* 127 S. Ct. at 2596.

[190] *Id.*

> [O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.' [191]

The Court began by identifying the cases in which it had previously granted a *Bivens* remedy and then cases in which it had not.[192] It realized that "most instances . . . have found a *Bivens* remedy unjustified."[193] The Court then explained that an "assess[ment of] the significance of any alternative remedies at step one has to begin by categorizing the difficulties Robbins experienced in dealing with the [BLM]."[194]

1. Bivens *Step One in* Wilkie

Robbins' difficulties with the BLM broke down into "four main groups: torts or tort-like injuries inflicted on him, charges brought against him, unfavorable agency actions, and offensive behavior by Bureau employees falling outside those three categories."[195] The Court discussed the remedies available for each of these categories: for the "tort and tort-like" injuries Robbins had civil remedies available; for the "unfavorable agency actions" he could have brought administrative claims; he could defend himself against the criminal charges; finally, it was unclear who the proper defendant would have been or what the best remedy would have been for the behaviors that "elude[d] classification."[196] In short, the Court found that

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[191] *Id.* at 2598 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1988)).

[192] *Wilkie,* 127 S. Ct. at 2597.

[193] *Id.* at 2597-98 (finding a *Bivens* remedy in a "Fourth Amendment violation by federal officers," and "two more nonstatutory damages remedies, the first for employment discrimination in violation of the Due Process Clause, and the second for an Eight Amendment violation by prison officials," and holding against finding a *Bivens* remedy in "claims of First Amendment violations by federal employers, harm to military personnel through activity incident to service, wrongful denials of Social Security disability benefits, . . . claims against federal agencies, or against private prisons."(citations omitted)).

[194] *Id.* at 2598.

[195] *Wilkie*, 127 S. Ct. at 2598.

[196] *Id.* at 2599.

"Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating *virtually* all of his complaints."[197] The Court recognized the difficulties inherent in requiring Robbins to address all the claims with separate remedies and decided to more closely examine the situation by moving to "*Bivens* step two."[198] The Court was forced to analyze the factors for step two because:

> [T]he forums of defense and redress open to Robbins are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules. It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim.[199]

2. Bivens *Step Two in* Wilkie

In its analysis of step two, the Court cited competing interests involved in the facts of the case, mainly "the inadequacy of discrete, incident-by-incident remedies" and the difficulty in "defining limits to legitimate [actions]" by the government actors.[200] Robbins' interest was to use the *Bivens* remedy to address all his damages in the aggregate, which conflicted with the Court's interest in avoiding the difficulty of defining legitimate boundaries of government activity.[201] The Court fully acknowledged Robbins' situation to be different from the previous *Bivens* claims it ruled on.[202] The Court recognized Robbins did not want "vindication" for just one claim, like previous cases where the Court extended a *Bivens* remedy.[203] Robbins sought a remedy to redress a series of actions by government officials,

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[197] *Id.* at 2600 (emphasis added).

> He suffered no charges of wrongdoing on his own part without an opportunity to defend himself (and, in the case of the criminal charges, to recoup the consequent expense, though a judge found his claim wanting). And final agency action, as in cancelling permits, for example was open to administrative and judicial review. . . .

[198] *Id.*

[199] *Id.*

[200] *Id.*

> Here, the competing arguments boil down to one on a side: from Robbins, the inadequacy of discrete, incident-by-incident remedies; and from the Government and its employees, the difficulty of defining limits to legitimate zeal on the public's behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private interests that the Government's employees engage in every day. *Id.*

[201] *Wilkie*, 127 S. Ct. at 2600.

[202] *Id.* ("Robbins' situation does not call for creating a constitutional cause of action for want of other means of vindication, so he is unlike the plaintiffs in cases recognizing freestanding claims. . . .").

[203] *Id.*

resulting in multiple, multifarious injuries.[204] The Court then compared the retaliation claims in *Wilkie* with the other damages claims the Court previously ruled on and decided Robbins's claim did not fit the mold because "those cases turn[ed] on an allegation of *impermissible purpose and motivation*. . . ."[205] The questions in the earlier cases were "what for" questions which have "definite" answers, according to the Court, and *Wilkie* "could not be resolved merely by answering a 'what for' question or two."[206] A "what for" question asks: what is the government's purpose for taking an action, and would the government have taken that action despite an "*impermissible purpose or motivation*."[207] Robbins's claim does not fit the "what for" question framework because the government's interest in obtaining an easement was legitimate, so the "what for question has a ready answer in terms of lawful conduct."[208]

The Court explained the two ways Robbins's retaliation claims could be the basis of liability.[209] Either, the government's actions need to "extend beyond the scope of acceptable means for accomplishing the legitimate purpose," or the necessity of a "presence of malice or spite" rendering its actions unconstitutional "even if it would otherwise have been done in the name of hard bargaining."[210] The Court characterizes the former as an unworkable "too much" standard, and the latter as a "motive-is-all" test which is not the law of the retaliation case precedents.[211] Interestingly, the Court seems to suggest that had Robbins only sought a *Bivens* remedy for the illegitimate activities he would have avoided the "too much" problem and could have possibly earned relief.[212]

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[204] *Id.*

[205] *Id.* at 2601 (emphasis added) (comparing Robbins's claim to First Amendment speech claims, Fifth Amendment privilege against self-incrimination claims, and Sixth Amendment privilege to a trial by jury claims); *See also* Rankin v. McPherson, 483 U.S. 378, 382-83 (1987), Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973), U.S. v. Jackson, 390 U.S. 570, 582-83 (1968).

[206] *Wilkie,* 127 S. Ct. at 2602 (stating a person would have to show "that the conduct at issue was constitutionally protected, that it was a substantial or motivating factor" in the government's actions, and that the government's actions were "illicit." (quoting Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 675, 116 S.Ct. 2342 (1996)).

[207] *Wilkie*, 127 S. Ct. at 2601 (emphasis added).

[208] *Id.*

[209] *Id.* at 2602 n. 10.

[210] *Id.*

[211] *Id.*

[212] *Wilkie,* 127 S. Ct. at 2603-04.

> Robbins could avoid the 'too much' problem by fairly describing the Government behavior alleged as illegality in attempting to obtain a property interest for nothing, but that is not a fair summary of the body of allegations before us, according to which defendants' improper exercise of the Government's "regulatory powers" is essential to the claim. . . . Rather, the bulk of Robbins's charges go to actions that, on their own, fall within the Government's enforcement power.

Clearly, the fact that some of the actions the BLM undertook were legitimate is a hurdle the Court was hesitant to cross.[213] The *Wilkie* Court went to great pains to point out that the goals of the BLM were legitimate, although all the actions in pursuit of that goal were not.[214] This mixed bag of claims, according to the Court, begged for a "too much" standard which "can never be as reliable a guide to conduct" as a "what for standard, and for that reason counts against recognizing freestanding liability in a case like this."[215] Claiming a "too much" standard is unworkable does not account for the illegitimate acts of the BLM officials though; it is a justification, albeit weak, for not recognizing a claim for "too much" *legitimate* action by the government.[216] Again, the Court's reasoning does not address situations where illegitimate government activities are mixed with legitimate activities, no matter whether the government's goal is legitimate or not.[217]

B. The Court Chose Not to Give Relief Even Though It Acknowledged No Other Realistic Alternatives for Relief

The Court's failure to extend a *Bivens* remedy to Robbins is troubling because it fully recognized and admitted Robbins had no realistic means of addressing the actions in the aggregate.[218] The underlying reason the Court declined to broaden the *Bivens* rule is for fear of "invit[ing] claims in every sphere of *legitimate* governmental action affecting property interests. . . ."[219] The Court regretfully claimed a "general *Bivens* cure would be worse than the disease."[220] In the most

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[213] *Id*. at 2602.

> The impossibility of fitting Robbins's claim into the simple 'what for' framework is demonstrated, repeatedly, by recalling the various actions he complains about. Most of them, such as strictly enforcing rules against trespass or conditions on grazing permits, are legitimate tactics designed to improve the Government's negotiating position.

[214] *Id*. at 2602 n.10 ("[t]he official act remains an instance of hard bargaining intended to induce the plaintiff to come to *legitimate* terms."(emphasis added)). "[W]e are confronting a continuing process in which each side has a *legitimate* purpose in taking action contrary to the other's interest." *Id.* (emphasis added), *but see* Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (holding that a the government actors could not compel the coastal resident to contribute to their legitimate goal, and trying to force their legitimate goal without compensation would outright violate the takings clause).

[215] *Wilkie,* 127 S. Ct. at 2601-02.

[216] *Id*. at 2602 (explaining how the Government can use their powers to improve their bargaining position when dealing with people, and that they "have discretion to enforce the law to the letter.").

[217] *Id.* at 2601.

[218] *Id.* at 2601 ("Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.").

[219] *Id.* at 2604.

[220] *Id.* at 2604.

recent *Bivens* cases, the Court time and again maintained its power is "sharply limited" and that Congress has primary, if not exclusive, responsibility for fleshing out the operation of schemes of federal regulation.[221] With this said, it should be mentioned that a passive judiciary cannot keep the federal government within its constitutionally granted boundaries.[222] "[P]rofessions of judicial passivity represent a dramatic departure from an important tradition in the Anglo-American legal system . . . courts have a distinctive responsibility for promoting legal coherence."[223]

C. *The Dissent in* Wilkie

Justice Ginsburg makes a forceful and persuasive argument in her dissent. One BLM official, Justice Ginsburg noted, was told to give Robbins a warning that if he continued to defy the BLM's demands, "there would be war, a long war and [the BLM] would outlast him and outspend him."[224] "Even if we allowed that the BLM employees had a permissible objective throughout their harassment of Robbins, and also that they pursued their goal through 'legitimate tactics,' it would not follow that Robbins failed to state a retaliation claim amenable to judicial resolution."[225] Justice Ginsburg argued the majority's fear of being overrun by *Bivens* claims is exaggerated.[226] She insisted the "Court need only ask whether Robbins engaged in constitutionally protected conduct (resisting the surrender of his property sans compensation), and if so, whether that was the reason BLM agents harassed him."[227] Justice Ginsburg stated she understood the "government . . . should not be hampered in pursuing lawful means to drive a hard bargain . . . ," but their actions in this instance "have a closer relationship to [an] armed thug's demand. . . ."[228]

Justice Ginsburg admonished the majority for trying to defer to the legislature stating, "[u]nless and until Congress acts, however, the Court should not shy away from the effort to ensure that bedrock constitutional rights do not become 'merely precatory.'"[229] "Shutting the door to all Plaintiffs, even those roughed

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[221] *See* Metzler, *supra* note 175, at 408-09 ("[I]t is striking . . . how the Court has sought, across a broad range of subject matters, to reduce the role of judicial lawmaking and to refuse to take responsibility for shaping a workable legal system in the everyday disputes . . .").

[222] *Id.*

[223] *Id.* at 345.

[224] *Wilkie,* 127 S. Ct. at 2610 (Ginsburg, J., dissenting).

[225] *Id.* at 2614 (Ginsburg, J., dissenting).

[226] *Id.* at 2615 (Ginsburg, J., dissenting).

[227] *Id.* (Ginsburg, J., dissenting).

[228] *Id.* at 2615 n.7 (Ginsburg, J., dissenting).

[229] *Id.* at 2618 (Ginsburg, J., dissenting) (citing Davis v. Passman, 42 U.S. 228, 242 (1982)).

up as badly as Robbins, is a measure too extreme."[230] The type of harassment Robbins suffered is extraordinary; therefore similar cases are not likely to come before the courts.[231] The dissent astutely suggests developing a standard similar to the one established to remedy sexual harassment.[232] "[W]here a plaintiff could prove a pattern of severe and pervasive harassment in duration and degree well beyond the ordinary rough-and-tumble one expects in strenuous negotiations, a *Bivens* suit would provide a remedy."[233]

As Justice Ginsburg pointed out, the "Fifth Amendment [should] provide an effective check on federal officers who abuse their regulatory powers by harassing and punishing property owners who refuse to surrender their property . . . without fair compensation."[234] This would inevitably involve allowing what the Court considers a "too much" standard.[235] However, in the face of no other alternative for a citizen to address a series of wrongs against them, whether some were legitimate or not, the Court should not be shy of extending a current doctrine to provide a remedy.[236] The Court should also ensure every individual can get an *adequate* remedy.[237] The *Wilkie* Court recognized Robbins had no adequate remedy, and should have accepted the challenge of fashioning a *Bivens* remedy for this type of situation.[238] An appropriate remedy would not be as hard to devise within the *Bivens*-framework as the Court suggests.[239]

D. Implications of the Wilkie *Decision*

The *Wilkie* holding left Robbins, and those who find themselves in similar situations, with no realistic alternative other than to deal with and defend against the multitude of individual actions, separately.[240] Addressing all of the claims discretely is an inefficient use of time and resources, resulting in extraordinary legal fees, or what Robbins called a "death by a thousand cuts."[241] Since a "judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be

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[230] *Wilkie,* 127 S. Ct. at 2616 (Ginsburg, J., dissenting).

[231] *Id.* at 2615 n.8 (Ginsburg, J., dissenting).

[232] *Id.* at 2616 (Ginsburg, J. dissenting).

[233] *Id.* (Ginsburg, J., dissenting).

[234] *Id*. at 2609 (Ginsburg, J., dissenting).

[235] *Id*. at 2591.

[236] *Carlson*, 446 U.S. at 14 ("[It is] established that victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.").

[237] *See, e.g.*, Bandes, *supra* note 69, at 297.

[238] *Wilkie,* 127 S. Ct at 2604-05.

[239] *Id.* at 2604 (defining the limits on excessive legitimate action would be "endlessly knotty to work out.").

[240] *Id.* (citing Respondent's brief at 40).

[241] *Id.* at 2600.

endlessly knotty to work out, and a general provision for tort-like liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions," the Court said "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation."[242]

1. *Legislation is Unlikely to Solve the Issue*

It is highly unlikely legislation will be passed to provide a remedy since situations such as these are irregular and infrequent.[243] Furthermore, it seems implausible, if not impossible, for Congress to create a regulatory scheme which would effectively protect individuals in *Wilkie*-type situations.[244] This is due to the millions of possible variants which cannot possibly be anticipated in advance.[245] While Congress may be able to fashion a remedy in hindsight to encompass a situation like Robbins', the remedy may not be effective nor encompassing enough for other plaintiffs in similar situations.[246] Additionally, several such actions may be required before Congressional actors feel the need to enact a regulatory scheme to address the problem.[247]

By the same token, it is extremely unrealistic to defer to Congress to formulate a remedy. Congress has had since 1971 to create statutory provisions

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[242] *Id.* at 2604-05.

[243] *Id.* at 2616 n.8 (Ginsburg, J., dissenting).

[244] *Wilkie,* 127 S. Ct. at 2615-16 (Ginsburg, J., dissenting).

[245] *Compare Wilkie*, 127 S. Ct. at 2605 ("Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees."), *and* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 115 S.Ct. 1447, 1453 (1995)("Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies." *(*citing Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803))), *and Wilkie,* 127 S. Ct. at 2616 n.8 (Ginsburg, J., dissenting).

[246] *Compare* Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism,"* 55 ME. L. REV. 63, 85 (2003) (discussing whether Congress could create new remedies for sex discrimination in the workplace, this article recognized that "Congress may well find it difficult to use the enforcement power to create imaginative new remedies to address old and familiar problems."), *with* Bandes, *supra* note 69, at 306 (discussing remedies in *Bivens* cases the author notes that "Rights have gone unremedied in the past, and some go unremedied today. The question, however, is not whether every right does have a remedy, but whether every right should have one.").

[247] *Compare* George F. Sanderson III, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present,* 2 N.Y.U. J. LEGIS. & PUB. POL'Y 315, 340 (1998-1999) (discussing the problems Congress has had in creating adequate remedies to the problems in mass tort litigation); *with* Joseph L. Franco, *Needed, Private Attorneys General: Empowering Consumers to Reform the Household Goods Moving Industry,* 9 LEWIS & CLARK L. REV. 981, 987-88 (2005) (discussing Congress' problems in creating remedies that adequately protect consumers).

which would allow *Bivens* remedies, or authorize a similar cause of action.[248] At this point, Congress has been operating under the assumption that *Bivens* stood for the proposition that there is a cause of action to remedy constitutional rights violations committed by a federal official; arguably this is evidence of Congress's approval of the Court extending a *Bivens* remedy in certain *sui generis* cases.[249] Furthermore, it has been observed that a refusal by the Court to extend *Bivens* to include additional constitutional violations, such as the one in *Wilkie*, interfere with the general framework of the United States system of government.[250] Bricks cannot be made without straw, and the Court's refusal to mint new bricks of justice from the straw of *Bivens* weakens the foundation of a good functional government.[251] Judicial decisions are an important part of a healthy government because they provide precedents for lower courts and lawyers to use in enforcing and upholding the laws of the country, as well as provide the legislative branch with information to use when creating new laws and remedies in the future.[252]

2. *The* Bivens *Remedy Could be Tailored to Address Cases like* Wilkie

The Court has set other workable precedents which sound remarkable similar to a "too much" standard.[253] Allowing a *Bivens* claim to be brought for excessive use of the government's regulatory powers would not, if tailored correctly, result

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[248] *Biven,* 403 U.S. at 388. The Federal Employers Liability Reform and Tort Compensation Act of 1988, PL 100-694, is an example. 28 U.S.C. § 2679 (1988). This Act made the Federal Tort Claims Act (FTCA) provide an exclusive remedy for plaintiffs seeking money damages, stemming from a tort, against of a federal employee acting with the scope of employment, 28 U.S.C. § 2679(b)(1)(1988), but the exclusivity provision expressly left open the right of plaintiffs to sue federal employees under *Bivens* for constitutional violations, *see* 28 U.S.C. § 2679(b)(2)(A)(1988).

> Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort [a constitutional tort] as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who violated their Constitutional rights.

HR Rep 100- 700, 100th Cong, 2d Sess, 1998 USCCAN 5945, 5950.

[249] *See* Micheal J. Kaufman, *A Little "Right" Musick: The Unconstitutional Judicial Creation of Private Rights of Action Under Sections 10(b) of the Securities Exchange Act,* 72 WASH. U. L. Q. 287, 334-35 (1994) (discussing how the lack of Congressional response to the Courts creation of private 10b claims under the Securities Exchange Act can be read as approval for creation of those claims. "The promptness and precision with which Congress amended its securities statutes in the wake of these Supreme Court decisions lends credence to the suggestion that the absence of such prompt and precise action indicates congressional approval of other Supreme Court decisions.").

[250] *See* Metzler, *supra* note 175, at 357-58 (judicial decisions are an important piece of the United States framework of government because they are used as precedence for later decisions, interpreted by lower courts, used by lawyer in making argument, and employed by Congress for enactments.).

[251] *Id.*

[252] *Id.*

[253] *Compare* Rochin v. Cal., 342 U.S. 165, 172 (1952) (establishing a "shocks-the-conscience" test for due process violations), *with Wilkie,* 127 S. Ct. at 2616 ("Sexual harassment jurisprudence

in a tide of new *Bivens* claims.[254] The solution to avoiding an onslaught of new *Bivens* claims lies in how the Court defines the upper limit of acceptable activity.[255] Allowing a *Bivens* remedy for a pattern of *completely* legitimate governmental activity may invite a slew of claims, but Robbins sought a remedy for a pattern of governmental activity, *some* of which was legitimate, but in the aggregate amounted to a "campaign of harassment and intimidation."[256]

3. *The* Bivens *Remedy Should Be Available When Government Employees Engage in Illegitimate Action*

The *Bivens* remedy should be made available when there are at least some illegitimate individual actions, and in the aggregate those actions amount to absurd and unreasonable infringement by government actors on constitutionally recognized rights regardless of whether the overall goal is legitimate.[257] The extent of the infringement, especially if it would be financially devastating for an injured party to defend all the claims discretely, should give more than enough reason for finding factors in favor of extending a *Bivens* remedy.[258] The rarity of government abuse in this fashion is yet another reason to extend a *Bivens* remedy.[259] The infrequency is also why providing a remedy in these situations will not instigate a rash of people bringing new *Bivens* claims. This kind of extreme overreaching by the government simply does not happen often enough.[260]

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is a helpful guide. Title VII, the Court has held, does not provide a remedy for every epithet or offensive remark. 'For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the condition of the victim's employment and create an abusive work environment.'"(citations omitted))(Ginsburg, J., dissenting).

[254] *See* Wilkie v. Robbins, 127 S. Ct. 2588, 2604 (2007) (the majority's main fear is a tide of new litigation which would, it believed, result from allowing a *Bivens* remedy for Robbins's situation).

[255] *Id.* at 2614 (Ginsburg, J., dissenting).

[256] *Id.* at 2594.

[257] *Id.* at 2601-04 (where the majority focuses on the fact that the goal was legitimate, even though some of actions were not).

[258] *Id.* at 2609-11 (Justice Ginsburg notes in her dissent that the facts, viewed in the light most favorable to Robbins were much worse than what the majority recognized in the Court opinion).

[259] *Id.* at 2616 n.8 (Ginsburg, J., dissenting).

[260] *Wilkie,* 127 S. Ct. at 2616 n.8 (noting the rarity of this kind of harassment). As of May 1985, only thirty of the more than 12,000 *Bivens* suits filed since 1971 resulted in judgments on behalf of plaintiffs. Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise,* 67 N.C. L. REV. 337, 343 (1989). Although the figures are dated, more recent statistics are unlikely to be much different given the Court's accelerated efforts to curtail the scope of *Bivens* over the last two decades. *Id.* Despite the absence of systematic empirical data since 1985, it nevertheless appears that recoveries from both settlements and litigated judgments are exceedingly rare. *Id.* For example, as the largest category of *Bivens* suits, prisoner litigation provides an excellent example of continued low success rates for plaintiffs. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 66 (1999). From 1992 to 1994, prisoners filed 1,513 *Bivens* claims against officials of the Bureau of Prisons that resulted in two monetary judgments and sixteen monetary settlements. *Id.* at n.6.

The *Bivens* remedy could easily encompass series of government activities which result in an unreasonable infringement on a constitutionally protected interest. Some of the activities must be illegitimate for the rule to apply, and the amount of actions must be sufficient that pursuing a remedy for each action discretely would be a financial or unrealistic burden.[261]

E. The Court's Motivation

Due to its concern with stepping on the toes of Congress and separation of power, the Court seemingly forgot the primary purpose of the *Bivens* cause of action, to redress constitutional violations committed by federal officials when other remedies are unavailable or inadequate.[262] *Bivens* was not originally intended as a deterrent.[263] The decisions up to this point have almost entirely eliminated *Bivens* as a constitutional remedy.[264] The Court's stance is equivalent to guaranteeing that those who suffer constitutional violations at the hands of the federal government are not given the opportunity to receive fair compensation.[265] It is against this "backdrop of apparent judicial animosity towards the *Bivens* action that the question of whether alternate remedies must be exhausted prior to bringing an action in a court must be answered."[266] Based on the *Wilkie* holding, it seems the answer is that if there are any alternative remedies, then a *Bivens* cause of action is unavailable.

Over the past twenty-five years, since *Bush v. Lucas* in 1983, the Court has rejected almost every attempt to assert a claim under the *Bivens* remedy and has given one justification or another for doing so.[267] Consequently there was no reason to believe *Wilkie* would be any different from this general trend. At this

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[261] *Wilkie,* 127 S. Ct. at 2611 (Ginsburg, J., dissenting).

[262] Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise.*, 67 N.C. REV. 337, 343-45 (observing that although federal courts have been inundated by *Bivens* lawsuits, there has been no problem finding against plaintiffs). Of the some 12,000 *Bivens* suits filed, only 30 have resulted in judgments for the plaintiff. *Id.* at 343.Of these, a number have been reversed on appeal and only four judgments actually have been paid by the individual federal defendants. *Id.*

[263] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392-06 (1971).

[264] *See* Rosen, *supra* note 262, at 377.

[265] *Id.* ("[T]he Supreme Court must awaken to the fact that its recent decisions have essentially eliminated [the *Bivens*] remedy. The Court must act to give the Bivens plaintiff, whose 'cherished constitutional rights' were in fact violated, at least a fair opportunity to obtain redress for those violations.").

[266] Howard Jay Pollack, *In The Right Place At The Wrong Time: Should Federal Prisoners Be Required To Exhaust Their Administrative Remedies Prior To Bringing a* Bivens-*Type Claim in Federal Court?*, 42 SYRACUSE L. REV. 241, 242-43 & nn.10-16 (1991).

[267] Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983); U.S. v. Stanley, 483 U.S. 669 (1987); Schweiker v. Chilicky, 487 U.S. 412 (1988), McCarthy v. Madigan, 503 U.S. 140 (1992), Fed. Deposit Insurance Corp. (FDIC) v. Meyer, 510 U.S. 471 (1994), Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).

point in time, the members of the Court are a very different mix than in the 1970's and early 1980's.[268] When *Bivens* was formulated, the Court stated plaintiffs were entitled to money damages for violations of their Constitutional rights and the Court had the power to create those remedies under the Constitution.[269] Now the Court says Congress is in charge of creating a remedy, or if there is *any* other remedy available then *Bivens* is unavailable.[270] "We have come from a fairly strong presumption in favor of the *Bivens* doctrine, to a fairly strong presumption against it."[271]

Prior to *Wilkie*, the Court had narrowed *Bivens* to the following doctrine: a *Bivens* claim was considered a free-standing, generally implied, cause of action independent of state law; a *Bivens* claim could only be brought against individual defendants, not agencies of the federal government; a *Bivens* cause of action was not appropriate when Congress provided alternative forms of relief, even if it did not provide complete relief; a *Bivens* claim was precluded without affirmative action by Congress if special factors counseling hesitation were present.[272]

The Court's decision in *Wilkie* is not surprising because the *Bivens* holding has been significantly narrowed since its inception over thirty-five years ago.[273] A substantial amount of commentary has developed arguing that the dissenters in *Bivens* have become the majority.[274] *Wilkie* is simply demonstrative of the Court's reticence toward *Bivens* causes of action.[275]

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[268] *Wilkie,* 127 S. Ct. at 2588.

[269] *Bivens*, 403 U.S. at 397.

[270] *Wilkie,* 127 S. Ct. at 2604-05.

[271] Chemerinsky, *supra* note 4, at 676 -77.

[272] *See generally* Erwin Chemerinsky, *Federal Jurisdiction*, 523, 526-31 (2d ed. 1994); *Meyer,* 510 U.S. at 485 (1994) ("the purpose of *Bivens* is to deter the *officer*. . . .") (emphasis in original); Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of Peoples v. CCA Detention Centers*, 83 DENV. U. L. REV. 685, 692 (2006); Betsy J. Grey, *Preemption of* Bivens *Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L. Q. 1087, 1088 (1992) (arguing *Bivens* actions are available except where Congress clearly states its intent to supersede them); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552-53 (1972) ("[W]here the judiciary independently infers remedies directly from constitutional provisions, Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy."); Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1142-45 (1989).

[273] *Wilkie,* 127 S. Ct. at 2604-05.

[274] *See* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L. J. 263 (1989) (Commentators assert the *Bivens* dissenters' rise to power has allowed the justices, concerned that the judiciary lacks the authority to imply damages remedies, to betray *Bivens'* core goals).

[275] *Wilkie,* 127 S. Ct. at 2604-05.

F. The Future of Bivens *Remedies Following* Wilkie

The positions of the Justices in the *Wilkie* decision, and the recent holdings of the Supreme Court, foreshadow the future of *Bivens* rulings. During the 2006 term, eight opinions were released the same week as the *Wilkie* opinion.[276] It is important to evaluate how the Court is divided on the *Bivens* remedy, and in general, because *Wilkie* was the first time that the *Bivens* remedy has been addressed by the Court since the newest Justice Samuel Alito joined the Court on January 31, 2006.[277]

Looking at all the cases decided during the week the *Wilkie* decision was released provides a snapshot of how the Court is split.[278] In this snapshot there is a noticeable pattern on how the Court divides in its opinions.[279] In the midst

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[276] Morse v. Frederick, 127 S. Ct. 2618 (2007); Fed. Election Comm'n v. Wisconsin Right to Live, Inc., 127 S. Ct. 2652 (2007); Hein v. Freedom from Religion Found., 127 S. Ct. 2553 (2007); Nat'l Ass. of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007); Panetti v. Quarterman, 127 S. Ct. 2842 (2007); *Wilkie,* 127 S. Ct. at 2588.

[277] *Wilkie,* 127 S. Ct. at 2588.

[278] *Compare Morse,* 127 S. Ct. at 2618 (majority opinion by CJ. Roberts, J. Thomas concurring, J. Alito Concurring, J. Breyer concurring in part and dissenting in part, J. Stevens dissenting joined by J. Souter and J. Ginsburg), *with Fed. Election Comm'n,* 127 S. Ct. at 2652 (majority opinion by CJ. Roberts for parts I & II and an opinion for parts III & IV that J. Alito joins, J. Alito concurring, J. Scalia concurring joined by J. Kennedy and J. Thomas, J. Souter dissenting joined by J. Stevens, J. Ginsburg and J. Breyer), *with Wilkie,* 127 S. Ct. at 2588 (majority opinion by J. Souter, J. Thomas concurring joined by J. Scalia, J. Ginsburg dissenting joined by J. Stevens), *with Hein,* 127 S. Ct. at 2553 (majority opinion by J. Alito joined by CJ. Roberts and J. Kennedy, J. Kennedy concurring joined by J. Scalia and J. Thomas, J. Souter dissenting joined by J. Stevens, Ginsburg and Breyer), *with Defenders of Wildlife,* 127 S. Ct. at 2518 (majority opinion by J. Alito joined by JJ. Roberts, Scalia, Kennedy, and Thomas, J. Souter dissenting joined by JJ. Ginsburg, Breyer, and Stevens), *with Parents,* 127 S. Ct. at 2738 (majority opinion by CJ. Roberts joined by JJ. Scalia, Thomas, and Alito, J. Thomas concurring joined by Kennedy, J. Stevens dissenting joined by JJ. Breyer, Souter, and Ginsburg), *with Leegin*, 127 S. Ct. at 2705 (majority opinion by J. Kennedy for the Court, J. Breyer dissenting joined by JJ. Stevens, Souter, and Ginsburg), *with Panetti,* 127 S. Ct. at 2842 (majority opinion by J. Kennedy for the Court, J. Thomas dissenting with CJ. Roberts and JJ. Scalia and Alito).

[279] In five of these eight cases, JJ. Souter, Stevens, Ginsburg, and Breyer joined in dissenting opinions. *See Fed. Election Comm'n,* 127 S. Ct. at 2652; *Hein,* 127 S. Ct. at 2553; *Defenders of Wildlife,* 127 S. Ct. at 2518; *Parents,* 127 S. Ct. at 2738; *Leegin,* 127 S. Ct. at 2705. In those same five cases, the Majority opinion was either written for the Court, concurred with, or specifically joined by JJ. Kennedy, Scalia, Thomas, Alito, and CJ. Roberts. *Id.* CJ. Roberts, along with JJ. Kennedy, Scalia, Thomas, and Alito often come together in agreement, while JJ. Souter, Breyer, Stevens, and Ginsburg tend to agree. *Id.* This split can also be seen in the remaining three cases from that week. *See Morse,* 127 S. Ct. at 2618; *Wilkie,* 127 S. Ct. at 2588; *Panetti,* 127 S. Ct. at 2842. In *Morse*, JJ. Ginsburg, Stevens, and Souter joined in a dissenting opinion, while J. Breyer concurred and dissented in part. *Morse,* 127 S. Ct. at 2618. In *Panetti*, J. Kennedy wrote an opinion for the Court in which JJ. Thomas, Roberts, Scalia, and Alito joined in a dissenting opinion. *Panetti,* 127 S. Ct. at 2842.

of these decisions is the *Wilkie* opinion, which was written by Justice Souter.[280] Had Justice Alito joined in agreement with Justices Ginsburg, Stevens, Breyer and Souter there would have been a different result.[281] He did not, and only Justices Ginsburg and Stevens dissented.[282] The *Wilkie* opinion is the only opinion out of the eight cases decided that week that Justices Souter and Breyer did not join Justices Ginsburg and Stevens.[283] Instead, Justice Souter wrote the majority opinion, concurred with by Justices Thomas and Scalia, while Justices Ginsburg and Stevens dissented.[284] This is important to note, because how the court commonly divides, compared to how the Justices aligned in *Wilkie*, gives an idea of how the Court will approach *Bivens* actions in the future.[285] Leading up to *Wilkie*, the *Bivens* remedy had already undergone a period of drought when it came to allowing new causes of action.[286] The first time the current Court addressed the *Bivens* remedy in *Wilkie*, the number of Justices that aligned with the majority opinion, along with the concurring Justices, makes a strong statement about how the current Court feels about the *Bivens* remedy.[287]

Justice Ginsburg and Justice Stevens were the only two justices to support allowing a *Bivens* remedy in the *Wilkie* dissent.[288] Not only did Justice Souter and Justice Breyer not join with Justice Ginsburg and Justice Stevens, but Justice Souter wrote the majority opinion in *Wilkie*.[289] This makes the future of new *Bivens* remedies seem bleak because of the number of Justices opposed to new *Bivens* remedies.[290] Further dismay results from looking at the language some of the Justices in the majority have used in recent cases when discussing *Bivens* remedies. Justice Souter stated in *Wilkie* that remedies for damages resulting from the government overreaching should come from legislation.[291] Justice Scalia,

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[280] *Wilkie,* 127 S. Ct. at 2588.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *See* Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983); U.S. v. Stanley, 483 U.S. 669 (1987); Schweiker. v. Chilicky, 487 U.S. 412 (1988); Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001).

[287] *Wilkie,* 127 S. Ct. at 2588 (five justices in the majority, with two justices concurring with the majority opinion, and only two Justices dissenting).

[288] *Id.* at 2608.

[289] *Id.* at 2593.

[290] *See id.* at 2588 (in *Wilkie*, seven justices agreed that a *Bivens* remedy was not appropriate either in the majority or concurring opinions).

[291] *Id.* at 2604-05 ("We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation.").

who concurred in *Wilkie*, said in *Malesko*, "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action."[292] Additionally, Justice Thomas, joined by Justice Scalia in his *Wilkie* concurrence, stated, "[He] would not extend *Bivens* even if its reasoning logically applied to [a] case."[293]

The weight of the current Court against *Bivens* remedies at this point is clear.[294] Only Justice Ginsburg and Justice Stevens seem to support allowing new remedies, while not even Justice Souter agrees.[295] On top of that, Justice Thomas and Justice Scalia have openly shown disfavor for *Bivens* remedies, and they commonly disagree with Justice Ginsburg and Justice Stevens in Court opinions.[296] The likelihood of getting five justices of the Court to allow a new *Bivens* remedy now is miniscule. It will take the right case, reconsideration of the Court's power to provide a remedy, and a fresh read of the *Bivens* line of cases for the Court to once again broaden *Bivens*. Although not dead yet, the *Bivens* remedy will likely be narrowed to the point of non-existence, or become forgotten altogether.[297]

IV. CONCLUSION

Bivens was a landmark decision because it officially gave courts the power to fashion remedies for violations of constitutional rights by federal officials. Early in *Bivens* history, the Court allowed a *Bivens* claim for Fourth Amendment, Fifth Amendment, and Eight Amendment violations, before casting *Bivens* into the scrapheap. The availability of redress for private citizens when enduring harassment resulting in Fifth Amendment violations by government officials is necessary in order to preserve the public's interest in being secure in individual property rights. There are intense feelings on both sides of the issue regarding private citizen's sovereignty in their property, and the scope of the government's ability to interfere with their rights. There must be some check on how much is too much when it comes to the government's use of their legitimate regulatory powers. A *Bivens* remedy under Robbins's circumstances would not limit the government's ability to do its legitimate regulatory tasks, nor would it result in a swarm of new litigation, but rather would protect the private landowner.

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[292] *Malesko*, 534 U.S at 519 n.3 (Scalia, J., concurring).

[293] *Wilkie,* 127 S. Ct. at 2608.

[294] *Id.* at 2604.

[295] *Id.* at 2608.

[296] *Id.*

[297] *See* Chemerinsky, *supra* note 4, at 678 ("[A]lthough the court is continuing to narrow *Bivens*, it is not overruling or signaling an overruling of *Bivens*. The core of *Bivens* is that if a federal officer violates a constitutional right, there is generally a remedy available. That has not been overturned.").

Despite the current forecast that it is unlikely for the Court to provide new remedies under *Bivens*, litigants must continue to raise such arguments for redress. The Court has ample room and reasons to allow *Bivens* remedies again in the future. The *Bivens* remedy's original purpose can still outshine the reasons against it in extreme cases where it is needed the most.

Bivens was once a shining ray of hope for individuals who had no other alternative for a remedy. It's time to reincarnate *Bivens*. Existing statutory remedies either require an extremely liberal construction to apply, or would not address all the injuries to a party like Robbins. The *Bivens* rule, however, can and should be tailored to allow a remedy in a Robbins-like situation.

CASE NOTE

CONSTITUTIONAL LAW—Challenging Anti-Commerce State Regulatory Schemes in Light of the Supreme Court's Admonition of Protectionist Alcohol Regulations; *Granholm v. Heald*, 544 U.S. 460 (2005).

*Mike Figge**

Introduction

Not long ago, wine aficionados seeking an eclectic vintage or specialty wine were left with their thirst unquenched if the local wine shop did not carry the wine they sought. [1] But today, the advent of the Internet has given individuals access to wineries from across the nation.[2] From California to New York, nearly every vineyard operates a web site offering their wines for purchase.[3] However, even with increased ease of access via the Internet, many wine lovers still cannot get their favorite wines because states restrict the sale and transportation of alcohol within their borders; a power they received upon the repeal of prohibition. [4]

Prohibition, the complete ban of manufacture and distribution of alcohol throughout the country, ended in 1933 with the Twenty-first Amendment to the United States Constitution.[5] With ratification came the expansion of state regulatory powers under section two of the Amendment which states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use there in of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[6] Since then, states have created discriminatory regulatory schemes that protect in-state producers of alcohol from out-of-state competition.[7] Some states allow all wineries to ship wines ordered online directly to

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*Candidate for J.D., University of Wyoming, 2009. I would like to thank my family and friends for their support during this project. I would also like to thank Professor Stephen Feldman for his insight and guidance.

[1] *See generally* Possible Anti-competitive Barriers to e-commerce: Wine, A Report from the Staff of the Federal Trade Commission, July 2003, http://www.ftc.gov/os/2003/07/winereport2.pdf (last visited September 7, 2007).

[2] *Id.* at 1.

[3] *See, e.g.,* Figge Cellars, http://www.figgecellars.com/ (last visited November 27, 2007); Snowden Vineyards, http://www.snowdenvineyards.com/ourWines-overview.htm (last visited November 27, 2007); Atwater Estate Vineyards, http://www.atwatervineyards.com/ (last visited November 27, 2007).

[4] U.S. Const. amend. XXI, § 2.

[5] *Id.*

[6] *Id.*

[7] *See, e.g.,* Ariz. Rev. Stat. Ann. § 4-205.04(c) (2006); Mass. Gen. Laws ch. 138, § 19F (2006); Ohio Rev. Code Ann. § 4303.232 (West 2006).

consumers' homes.[8] Others require the wineries to ship their wines to a distributor for pickup.[9] Still others, like Utah, prohibit shipments of alcohol within its borders altogether.[10] Further, some states allow direct-to-consumer shipping by in-state retailers but prohibit direct-to-consumer shipments by out-of-state retailers.[11]

Granholm v. Heald

In 2003, Domaine Alfred, a small California winery, filed suit in the United States District Court for the Eastern District of Michigan.[12] The winery challenged Michigan's laws prohibiting the direct shipment of wine to consumers by out-of-state wineries while simultaneously allowing direct shipping by in-state wineries.[13] The plaintiff argued that Michigan's shipping laws violated the dormant Commerce Clause of the United States Constitution.[14] The State argued that section two of the Twenty-first Amendment abrogates the State's Commerce Clause responsibilities when regulations pertain to alcohol within the state's

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[8] *See, e.g.,* WYO. STAT. ANN. § 12-2-204 (2006).

[9] *E.g.,* KAN. STAT. ANN. § 41-348(b)(3) (2006).

[10] UTAH CODE ANN. § 32A-8-505 (2006).

[11] *See, e.g.,* 235 ILL. COMP. STAT. 5/3-12 (2006).

[12] Heald v. Engler, 342 F.3d 517 (6th Cir. 2003) (holding that state regulations that benefit in-state interest and burden out-of-state interests unevenly violate the negative implications of the Commerce Clause and are not saved by section two of the Twenty-first Amendment).

[13] *Id.* at 520-22.

[14] *Id.* at 520. For an excellent description of the Court's Commerce Clause jurisprudence *see, e.g.,* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore., 511 U.S. 93 (1994).

> The Commerce Clause provides that '[t]he Congress shall have power . . . [t]o regulate Commerce . . . among the several states.' Though phrased as a grant of regulatory power to Congress, the Clause has long been under stood to have a 'negative' aspect that denies the states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. The Framers granted Congress plenary authority over interstate commerce in the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Id. at 99 (internal citations omitted).

> Consistent with these principles . . . the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce. As we use the term here, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 100 (internal citations and quotations omitted).

borders.[15] The United States Court of Appeals for the Sixth Circuit held that the Twenty-first Amendment does not immunize all liquor laws from the Commerce Clause.[16] The court also held that the State's failure to prove it could not meet its regulatory objectives through a non-discriminatory alternative invalidated the state law.[17] The State appealed.[18]

Similarly, in 2004, two small out-of-state wineries challenged New York laws regarding direct shipments of wine to consumers, again in federal court.[19] The plaintiffs claimed a direct shipping exception in New York's laws, allowing only wineries whose wines are made from at least seventy-five percent of New York grown grapes to ship directly to consumers, impermissibly discriminated against interstate commerce.[20] The plaintiffs also claimed that to require out-of-state wineries to establish a physical presence in the state to qualify for the direct shipping license discriminated against interstate commerce.[21] Like Michigan, New York argued that the Twenty-first Amendment affords the State broad authority to regulate alcohol as it sees fit even if to do so violates the Commerce Clause.[22] The United States Court of Appeals for the Second Circuit held that were it regulating a commodity other than alcohol, the physical presence requirement could create significant dormant Commerce Clause problems.[23] However, the court held that section two of the Twenty-first Amendment affords the states the ability to

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[15] *Heald*, 342 F.3d at 520 (arguing that the Michigan direct shipment law is a permitted exercise of State power under section two of the Twenty-first Amendment because it is not mere economic protectionism).

[16] *Id.* at 524 (concluding that Michigan did not provide sufficient evidence that discrimination between in-state and out-of-state wineries, furthers the state's goals of temperance, ensuring orderly market conditions, and raising revenue, much less that no reasonable nondiscriminatory means exist to achieve these goals).

[17] *Id*. at 527.

[18] Granholm v. Heald, 544 U.S. 460 (2005).

[19] Swedeburg v. Kelly, 358 F.3d 223, 229 (2d Cir. 2004) (holding that section two of the Twenty-first Amendment affords states the ability to create alcohol regulations that violate the negative implications of the Commerce Clause).

[20] *Id.* at 229. New York's law required a licensed winery that sells directly-to-consumers, to maintain an in-state presence. *Id.* New York also allowed wineries that produce less than 150,000 gallons per year and use seventy-five percent New York grown grapes to obtain a farm winery license. *Id.* A licensed farm winery could, in addition to selling directly to consumers, sell and ship its wine to another licensed winery, wholesaler, or retailer. *Id.*

[21] *Id*. The Second Circuit held that New York's requirement that licensed wineries maintain an in-state presence ensures accountability because it facilitates the State's compliance enforcement. *Id.* at 236. Further, the Second Circuit held that because all wineries must either utilize the three-tier system or obtain a physical presence to be eligible for direct shipping privileges, the law restricts both in-state and out-of-state interests evenhandedly. *Id.* at 238.

[22] *Id.* at 229. New York argued its "regulatory scheme is exempted from dormant Commerce Clause scrutiny, as it is a proper exercise of the State's authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol for delivery or use within its borders." *Id.*

[23] *Id.* at 238.

regulate alcohol in any manner they choose.[24] Thus, the Court of Appeals upheld the New York law.[25] The plaintiffs appealed.[26]

In the landmark case *Granholm v. Heald*, the United States Supreme Court consolidated these two cases to answer the following question: "Does a state's regulatory scheme that permits in-state wineries [to ship alcohol directly to consumers] but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of section two of the Twenty-first Amendment?"[27] The Court held, in a five-to-four decision, contrary to the States' interpretation, that section two of the Twenty-first Amendment does not abrogate nondiscrimination principles of the Commerce Clause in alcohol regulations.[28] The Court held that the "Twenty-first Amendment did not give states the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time."[29] To the contrary, the majority held that states have broad power to police alcohol within their borders but must do so on evenhanded terms.[30] Furthermore, the Court found that the failure to adequately demonstrate the need for discriminatory regulations by the states required those regulations be found invalid in the face of traditional Commerce Clause jurisprudence.[31]

This case note traces the development of alcohol regulations beginning with the nation's inception, through prohibition and the current regulatory climate.[32] It demonstrates that, with the exception of prohibition, the courts historically treat alcohol as a normal good in interstate commerce.[33] It also shows that section two of the Twenty-first Amendment gives states authority to regulate alcohol to further temperance goals, raise revenue, and restrict sales to minors, but does not authorize states to create laws that subject out-of-state interests to greater regulatory hurdles than in-state interests.[34] Further, this case note illustrates and focuses on the need for the U.S. Supreme Court to revisit its assertion that the three-tier system of alcohol distribution is "unquestionably legitimate."[35]

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[24] *Swedenburg*, 358 F.3d at 238.

[25] *Id.*

[26] *Id.* at 229.

[27] Granholm v. Heald, 544 U.S. 460, 471 (2005) (internal quotations omitted).

[28] *Id.* at 484.

[29] *Id.* at 485-86. The Wilson Act was codified at 27 U.S.C § 121 and the Webb-Kenyon Act was codified at 27 U.S.C. § 122. *Id.* at 482-83.

[30] *Id.* at 493.

[31] *Id.*

[32] *See infra* notes 39–100 and accompanying text.

[33] *See infra* notes 39–100 and accompanying text.

[34] *See infra* notes 147–219 and accompanying text.

[35] *See infra* notes 188–218 and accompanying text. *See also Granholm*, 544 U.S. at 489 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990) (holding that the three-tier system of

BACKGROUND

The Dormant Commerce Clause

The United States Constitution states that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[36] The United States Supreme Court has interpreted this clause to infer a negative implication on the states known as the dormant Commerce Clause.[37] The dormant Commerce Clause prohibits states from enacting laws that favor in-state interests over out-of-state interests.[38]

The History of Alcohol Regulation and the Commerce Clause in the United States

The regulation of alcohol has always been subject to careful, albeit disparate, review.[39] "Since the founding of our republic, power over the regulation of liquor has ebbed and flowed between the federal government and the states."[40] The disparity in regulation began with promulgation of the "Original Package Doctrine" by Chief Justice Marshall which allowed alcohol to be shipped directly to consumer's homes.[41] Later, the Supreme Court recognized the states' broad authority to regulate alcohol free from traditional Commerce Clause principles thereby disbanding the practice of shipping alcohol directly to consumers.[42]

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alcohol distribution is "unquestionably legitimate")). "Under the . . . [three-tier] regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers[, and] . . . [l]icensed wholesalers, in turn, may sell to licensed retailers, [and] other licensed wholesalers." *Id.* at 428.

[36] U.S. CONST. art. I, § 8, cl. 3.

[37] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824). Justice Marshall wrote that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." *Id.*

[38] *See* Brown-Forman Distillers v. New York State Liquor Auth., 476 U.S. 573 (1986) (holding that New York ABC regulation mandating liquor producers post prices on a monthly basis and seek ABC Board approval before changing prices in other states first is a violation of the Commerce Clause); Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333 (1997) (holding the requirement that all apple producers use a state mandated grading system when the source state's grading system indicates higher quality produce violates the Commerce Clause by benefitting in-state producers of apples at the expense of out-of-state producers).

[39] *Granholm*, 544 U.S. at 477. Justice Kennedy discusses the history of this nation's alcohol regulations focusing on the changes in position the Court has taken over time. *Id.*

[40] Castlewood Int'l Corp. v. Simon, 596 F.2d 638, 641 (5th Cir. 1979).

[41] Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1927) (holding that the delivery of wine directly to consumer was permissible so long as it remained in its original package for shipping).

[42] The License Cases, 46 U.S. (5 How.) 504, 579 (1847) (upholding state statutes which tax in-state producers of alcohol more favorably than out-of-state producers of alcohol).

Allowing states unfettered regulatory power remained the trend until late in the nineteenth century when the Supreme Court decided *Leisy v. Harden*, a case dealing with the regulation of out-of-state produced liquor.[43] In *Leisy*, a brewery in Illinois shipped beer to Iowa.[44] Upon arrival the alcohol was offered for sale in its original packaging.[45] Iowa seized the beer on the ground that its sale violated the State's prohibition on shipments of alcohol for sale within the state.[46] Leisy, the seller, brought suit seeking return of his merchandise.[47] The Supreme Court struck down Iowa's prohibition of direct shipments as an impermissible regulation on interstate commerce so long as those shipments remain in their original packaging.[48] For the time being, direct shipping remained out of the states' regulatory ambit.[49]

Shortly after the Supreme Court's decision in *Leisy*, Congress responded by enacting the Wilson Act with the intention of closing the original package loophole.[50] However, even in light of their recent victory in Congress, the states were still bound to the nondiscrimination principles of the dormant Commerce Clause.[51] This reemphasis on the nondiscrimination principle arose through a series of decisions by the Supreme Court. [52] Thus, the Court rejected Congress's mandate by holding that the Wilson Act did not authorize application of state regulatory laws to alcohol still in transit.[53] Further, the Court held that the Wilson Act did not prohibit individuals from ordering liquor for personal consumption from out-of-state vendors.[54]

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[43] Leisy v. Harden, 135 U.S. 100 (1890) (holding that Iowa statute affecting liquor being shipped from outside the state is in violation of anti-discrimination principles of the Commerce Clause).

[44] *Id.* at 124–25.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See generally Leisy*, 135 U.S. 100 (1890).

[49] *See id.*

[50] The Wilson Act, Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121 (1890)). Congress responded to the effects of *Leisy v. Harden* which abrogated the ability of state alcohol regulation agencies to regulate out-of-state liquor in a manner that discriminated against interstate commerce. *See Leisy*, 135 U.S. at 123. Essentially, the Wilson Act gave states the power to regulate all liquor regardless of whether it is or remains in interstate commerce. *Id.*

[51] *See, e.g., In re* Rahrer, 140 U.S. 545, 565 (1891) (holding that Congress has the power to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier time than would otherwise be the case).

[52] *See* Vance v. W.A. Vandercook Co., 170 U.S. 438, 456–57 (1898); *see also* Rhodes v. Iowa, 170 U.S. 412, 422–26 (1898) (holding the Wilson Act to allow direct-to-consumer shipping); Scott v. Donald, 165 U.S. 107, 110 (1897) (holding that the Wilson Act does not allow states to regulate liquor in a way that discriminates against out-of-state producers).

[53] *Id.*

[54] *See* Scott v. Donald, 165 U.S. 107 (1897).

Congress again responded to the Court's actions, this time by passing legislation that stripped liquor of its interstate characteristics.[55] In passing the Webb-Kenyon Act, Congress again returned to the states the ability to regulate alcohol within their borders.[56] This time the Supreme Court upheld the law by reasoning Congress was free to "divest" an article of commerce of its interstate characteristic through its commerce power.[57] The Court's new stance gave states complete control over alcohol, yet still did not abrogate their accountability to the Commerce Clause.[58]

The temperance movement gained momentum in the late 1910s.[59] By 1921, Congress had passed and state legislatures had ratified the Eighteenth Amendment.[60] Although criticized by some individuals, the temperance movement continued to

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[55] The Webb-Kenyon Act, 37 Stat. 699 (codified at 27 U.S.C. § 122 (1890)). "An act divesting intoxicating liquor of its interstate characteristics in certain cases." *Id.* The purpose of the Webb-Kenyon Act was to allow states to regulate alcohol as they see fit so long as those regulations do not discriminate against interstate commerce. *Id.*

[56] *Id.*

[57] *See* James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 324 (1917). "[The] purpose [of the Wilson Act] was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor though such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Id.*

[58] *Id.*

[59] *See* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE, REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920, 19 (Thomas A. Green & Hendrick Hartogs eds., 1995).

> A radical temperance ideology with its allied mosaic legal culture predominated within the temperance crusade in the last two decades of the century. The drys' ideology and legal notions made it difficult for them to achieve much success in the American polity dominated by formal and informal rules administered by political parties and courts. Yet the popularity of temperance allowed drys to establish beach-head prohibition states. The liquor industry, after failing to block the adoption of prohibition in these states, challenged the policy in the federal courts. These legal confrontations set the parameters for the next three decades of liquor law struggles.

Id.

[60] U.S. CONST. amend. XVIII (repealed 1933). The text of the Eighteenth Amendment reads:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Id.

gain the approval of the masses.[61] From 1921 to 1933, Congress prohibited all production, transportation, and sale of alcohol.[62]

By 1933, the temperance movement faltered.[63] What had once been called "the noble experiment" had failed.[64] In its stead remained a charge to repeal the Eighteenth Amendment.[65] The introduction of the Twenty-first Amendment into Congress and its subsequent ratification by state conventions ended prohibition.[66] In 1933, the mass production and sale of alcohol resumed.[67] With production also came the return of the controversy over states' rights and the regulation of alcohol that dominated the judicial landscape prior to prohibition.[68]

This controversy centered on the Twenty-first Amendment's similar language to the Webb-Kenyon Act of 1913.[69] In fact, the Twenty-first Amendment codifies

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[61] ALBERT EINSTEIN, MY FIRST IMPRESSION OF THE U.S.A. (1921). *reprinted in* IDEAS AND OPINIONS 3-7 (Random House, New York, 1954).

> The prestige of government has undoubtedly been lowered considerably by the prohibition law. For nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced. It is an open secret that the dangerous increase of crime in this country is closely connected with this.

Id.

[62] *See* Hamm, *supra* note 59, at 19–21 (explaining the background of prohibition and legislative history leading up to the passage of the Eighteenth Amendment). Interestingly, the Eighteenth Amendment did not prohibit the production and sale of sacramental wine. *See* DOBYNS, F., THE AMAZING STORY OF REPEAL, AN EXPOSE OF THE POWER OF PROPAGANDA 297 (1940). During the prohibition years, the production and sale of sacramental wine increased dramatically perhaps saving what remained of an already tattered wine industry. *See id.* The exception for sacramental wine from protection under the Volstead Act invited abuse. *See id.* In 1925, the Department of Research and Education of the Federal Council of the Churches of Christ reported that:

> The withdrawal of wine on permit from bonded warehouses for sacramental purposes amounted in round figures to 2,139,000 gallons in the fiscal year 1922; 2,503,500 gallons in 1923; and 2,944,700 gallons in 1924. There is no way of knowing what the legitimate consumption of fermented sacramental wine is but it is clear that the legitimate demand does not increase 800,000 gallons in two years.

Id.

[63] GUILLAUME FOURNIER, FROM ALCOHOL PROHIBITION TO REGULATION 5 (2002), http://www.senliscouncil.net/documents/from_alcohol_prohibition_to_regulation (last visited October 21, 2007).

[64] *See* HERBERT HOOVER, MEMOIRS OF HERBERT HOOVER-THE CABINET AND THE PRESIDENCY: 1920-1933 209 (1952).

[65] Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 169 (1987). In *Battipaglia*, Judge Friendly, writing for the majority of the Second Circuit Court of Appeals, noted that "[t]he Twenty-first Amendment was designed to end the noble experiment by which the federal government endeavored to control the drinking habits of all citizens and place control of alcoholic beverages in the states." *Id* at 168-69. (citations omitted).

[66] Fournier, *supra* note 63.

[67] *Id.*

[68] *Id.*

[69] *See* 45 AM. JUR. 2D *Intoxicating Liquors* § 34 (1964); U.S. CONST. amend. XXI, § 2.

the language of the Webb-Kenyon Act.[70] With this similarity in mind, the Supreme Court held that section two of the Twenty-first Amendment "reserves to the states power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause."[71] The Court even went so far as to say that section two "represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product-intoxicating liquors."[72]

With the ability to regulate alcohol free from federal interference, many states enacted a three-tier system of alcohol distribution.[73] The three tiers are producers, wholesalers, and retailers.[74] The system purportedly aids in achieving the goals of temperance by increasing prices, raising revenue by remittance of taxes, and eliminating undesirable market influence from one level of the system over the others.[75] This is achieved by mandating that producers sell only to wholesalers, wholesalers to retailers, and retailers to consumers.[76] Finally, the three-tier system requires that all alcoholic beverages be distributed through licensed entities to ensure compliance with all state laws.[77]

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[70] *Compare* The Webb-Kenyon Act, 37 Stat. 699 (codified at 27 U.S.C. § 122 (1890)) ("The shipment or transportation . . . in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.") *with* U.S. CONST. amend. XXI § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

[71] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984) (holding that a state law banning alcohol advertising did not directly relate to the core power of the Twenty-first Amendment to control whether to permit importation or sale of liquor and how to structure the liquor distribution or to regulate the times, places and manner under which liquor may be imported and sold in the state).

[72] *Castlewood Int'l Corp.*, 596 F.2d at 642. A few years prior to the decision in *Castlewood*, the Court changed its position by holding that section two of the Twenty-first Amendment is not free from other aspects of the Constitution. *See* Craig v. Boren, 429 U.S. 190 (1976) (holding that section two of the Twenty-first Amendment must be read in light of other constitutional provisions including the first amendment and the privileges and immunities clause).

[73] *Granholm*, 544 U.S. at 489 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990) (holding that the three-tier system of alcohol distribution is "unquestionably legitimate.")). "Under the . . . [three-tier] regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers[, and] . . . [l]icensed wholesalers, in turn, may sell to licensed retailers, [and] other licensed wholesalers." *North Dakota*, 495 U.S. at 428.

[74] *North Dakota*, 495 U.S. at 428; *see also* 48 C.J.S *Intoxicating Liquors* §§ 297-298 (1955).

[75] *North Dakota*, 495 U.S. at 431-32 (declaring that promoting temperance, ensuring orderly market conditions, and raising revenue are all core concerns of the Twenty-first Amendment).

[76] 48 C.J.S *Intoxicating Liquors* §§ 297-298 (1955).

[77] *Id.*

The Granholm *Effect*

In *Granholm*, the Court struck down state regulatory laws favoring in-state producers over out-of-state producers.[78] Since the Court's decision, numerous actions have been filed in federal courts challenging state regulatory schemes in the wake of the Supreme Court's decision.[79] Some of the post-*Granholm* cases challenge clever attempts by legislatures to continue to discriminate against out-of-state wine producers.[80]

Across the nation, wineries and consumers are challenging state laws that restrict direct-to-consumer shipping.[81] Common challenges in some of the lawsuits are state code provisions which veil a protectionist economic barrier behind production capacity caps.[82] These provisions allow direct-to-consumer shipping only to wineries producing less than a certain number of gallons per year.[83] Often these limits are set just above the largest in-state winery's annual production, but so low that many out-of-state wineries remain prohibited from participating in the direct-to-consumer market.[84] Even in the face of *Granholm* and pending litigation across the nation, state legislatures have continued to enact laws that, albeit increasingly crafty in design, continue to discriminate against

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[78] *Granholm*, 544 U.S. at 493.

[79] *See, e.g.,* Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); Beau v. Moore, No. 4:05-903 (E.D. Ark. filed June 22, 2005) (alleging discrimination based on the right of Arkansas wineries producing less than 250,000 gallons to sell directly to local consumers at their premises while the plaintiff winery must sell to an Arkansas wholesaler or retailer).

[80] *E.g.,* BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006).

[81] *E.g.,* Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); Beau v. Moore, No. 4:05-903 (E.D. Ark.. filed June 22, 2005) (alleging discrimination based on the right of Arkansas wineries producing less than 250,000 gallons to sell directly to local consumers at their premises while the plaintiff winery must sell to an Arkansas wholesaler or retailer).

[82] *E.g.,* BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006).

[83] *E.g.,* MASS. GEN. LAWS ch. 138, § 19F (2006) (subjecting out-of-state wineries to a volume cap and to ineligibility if they also sell through wholesalers, while affording in-state wineries access to Massachusetts consumers).

[84] *See* BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); *See also infra* note 99.

interstate commerce.[85] The recent legislative activity in Ohio and Wisconsin are good examples of this trend.[86]

The trend of legislatures enacting facially neutral yet practically burdensome regulations indicate that states have not heeded the Supreme Court's decision in *Granholm*.[87] In fact, some states have chosen to act in rogue fashion with complete disregard to *Granholm*.[88] In these states, these protectionist state regulations affect retailers as well as wineries.[89] While some argue the retail-to-consumer market

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[85] *See, e.g.,* H.B. 119, 127th Gen. Assem. § 4303.071(2) (Ohio 2007) (allowing wineries that produce less than 150,000 gallons annually to hold a permit to ship wine of its own production to resident consumers who have a household limit of twenty-four cases annually from all wineries); S.B. 40 §125.535, 2007-2008 Leg., (Wis. 2007) (replacing Wisconsin's reciprocal law with a Direct Shipper's Permit allowing shipment of up to twenty-seven liters per year directly to individual consumers subject to a twenty-seven liter annual limit on direct shipment purchases from all wineries).

[86] H.B. 119, 127th Gen. Assem. § 4303.071(2) (Ohio 2007). In Ohio, the General Assembly recently passed legislation that requires a direct shipping permit for wineries producing less than 150,000 gallons per year. *Id.* In addition to the production capacity restriction, the Ohio law also includes a customer volume limit of twenty-four cases per year. *Id.* This purchase limit applies to "family households," a term which remains undefined by the Ohio Legislature. *See* OHIO REV. CODE ANN. § 4303.232 (2006). In Wisconsin, an anti-commerce direct shipping provision was entered into the Biennial Budget Bill. S. B. 40 §125.535, 2007-2008 Leg., (Wis. 2007). If passed, the new law would remove reciprocal language from the current Wisconsin laws. *See* WIS. STAT. § 139.035 (2006). It would also limit direct shipments of wine to twenty-seven liters per year for all wineries. S.B. 40, 2007-2008 Leg., (Wis. 2007). This type of provision burdens producers to do the impossible and track all shipments of wine from across the nation to each individual consumer. *See generally* News, Free The Grapes!, http://www.freethegrapes.org/news.html#FTGUpdates (last visited on August 19, 2007). The trend of including provisions like this into direct shipping legislation seems to be evenhanded at first glance since they apply to both in-state and out-of-state interests. *Id.* However, upon further examination, it is apparent that the bill is really meant as a means of protecting the interests of wholesalers who successfully lobby the legislature for preferential treatment. *See, e.g.,* Jason Stein, *Proposed Law Alarms Wisconsin Vintners*, WISCONSIN STATE JOURNAL, June 29, 2007, at A1. In effect, the proposed amendment removes the ability of small in-state wineries to self-distribute to retailers and restaurants. *Id.* The removal of self-distribution will cause wineries to increase prices of products in order to retain some portion of their profit margin. *Id.*

[87] *See, e.g.,* ARIZ. REV. STAT. § 4-205.04(c) (2006); MASS. GEN. LAWS ch. 138, § 19F (2006). *See also* Complaint 2, Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries).

[88] *Illinois Lawmakers Invite Lawsuit by Disregarding Supreme Court Ruling with Passage of HB 429* at 1, http://chicagoist.com/attachments/chicagoist_chuck/HB%20429%20Response%20by%20SWRA.pdf (last visited on October 17, 2007).

[89] *See* Judge Kenneth Starr, *Introduction*, http://www.specialtywineretailers.org/press-release/SWRA_Constituticacy_Letter.pdf (last visited on September 7, 2007). *See also* Arnold's Wine's, Inc. v. Boyle, No. 06-3357, slip op. at 2 (S.D.N.Y. Sept. 28, 2007) (holding that New York laws requiring all liquor sold, delivered, shipped, or transported to a New York consumer must first pass through an entity licensed by the state of New York (i.e. the three-tier system) are not subject to review under the Commerce Clause because the Supreme Court held in *Granholm* that the three-tier system is unquestionably legitimate).

is distinguishable from the winery-to-consumer market and thus not controlled by *Granholm*, they are mistaken.[90] Placing protectionist restrictions on retailers is the same sort of limitation on sale and delivery that *Granholm* forbids.[91] The effects of these laws are similar to those ruled unconstitutional by the Court.[92] They prohibit out-of-state retailers from selling their products while allowing in-state retailers to continue to enjoy the profits of selling and delivering directly to consumers.[93] Yet states continue to pass laws that violate the Commerce Clause even when those laws are analogous to laws currently being challenged.[94] The continued passage of laws like these illustrates the need for the Court to clarify the limits of the Twenty-first Amendment in relation to the negative implications of the Commerce Clause.[95]

Summary

The history of alcohol regulation in the United States has evolved from treating alcohol as a normal article of commerce to an illicit substance subject to criminal penalties for possession.[96] Post prohibition, the regulatory pendulum is swinging, once again, in the pro-commerce direction.[97] Today, e-commerce affords consumers the ability to purchase almost anything for home delivery.[98]

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[90] Starr, *supra* note 89. "State laws discriminating against out-of-state retailers raise the same policy and constitutional concerns as state laws discriminating against out-of-state wineries." *Id.* at 2.

[91] *Id.*

[92] *Granholm*, 544 U.S. at 460 (2005) (stating that laws that mandate differential treatment of in-state and out-of-state economic interest that benefits the former and burdens the latter discriminate against interstate commerce and face a virtually *per se* rule of invalidity).

[93] *Id.* at 468-70.

[94] *Compare* MASS. GEN. LAWS ch. 138, § 19F (2006) (permitting only wineries producing less than thirty-thousand gallons of wine per year) *with* OHIO REV. CODE. ANN. § 4303.232(2) (permitting only wineries producing less than one-hundred-fifty-thousand gallons of wine per year); *see also* Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market).

[95] *See* Starr, *supra* note 89, at 1; *Granholm* 544 U.S. at 493.

[96] *See Castlewood Int'l Corp.*, 596 F.2d at 642 ("Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states"); William Glunz, Granholm v. Heald*: The Twenty-first Amendment Takes Another Hit—Where Do States Go From Here?*, 40 J. MARSHALL L. REV. 651, 653–62 (2007) (discussing the history and trends of alcohol regulations).

[97] *Compare Castlewood Int'l Corp.*, 596 F.2d at 642 ("Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states") *with Granholm*, 544 U.S. at 484-85 ("The [Twenty-first] Amendment did not give States authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.").

[98] BLACK'S LAW DICTIONARY 551(8th ed. 2004). "E-commerce: The practice of buying and selling goods and services through online consumer services on the Internet." *Id.*

State legislatures continue to address laws which violate *Granholm* and litigation in the lower courts is clarifying its outer limits.[99] Over time, the Court's traditional Commerce Clause analysis, combined with growing pressure from free-market economists, could cause the Court to clarify that retail-to-consumer laws must be evenhanded and reverse its position towards the three-tier system as being "unquestionably legitimate."[100]

PRINCIPAL CASE

In the past several years, there have been significant challenges to state regulations that afford privileges to in-state producers and retailers that are not also extended to their out-of-state counterparts.[101] The two most significant of these challenges occurred in Michigan and New York in 2003 and 2004 respectively.[102] These cases were consolidated on appeal to United States Supreme Court.[103]

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[99] *E.g.,* Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); Beau v. Moore, No. 4:05-903 (E.D. Ark. filed June 22, 2005) (alleging discrimination based on the right of Arkansas wineries producing less than 250,000 gallons to sell directly to local consumers at their premises while the plaintiff winery must sell to an Arkansas wholesaler or retailer).

[100] Philadelphia v. New Jersey, 437 U.S. 617 (1978); *Possible Anti-competitive Barriers to E-commerce: Wine, A Report from the Staff of the Federal Trade Commission,* July 2003, http://www.ftc.gov/os/2003/07/winereport2.pdf (last visited September 7, 2007) [hereinafter FTC Report].

[101] *See* Granholm v. Heald, 544 U.S. 460, 468 (2005); BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries). The Arizona law affords direct-to-consumer shipping privileges to wineries producing less than 25,000 gallons per calendar year. ARIZ. REV. STAT. ANN. § 4-205.04(c) (2006). Interestingly, the aggregate of wine produced by all wineries in Arizona was just 32,031 gallons from July of 2005 to June of 2006. *US Wine Production*, http://www.wineamerica.org/newsroom/wine%20data%20center/Production%20of%20Wine%207-05%20to%206-06.pdf (last visited August 18, 2007). Also, the largest producing winery in Arizona, Kokopelli Winery, produces approximately 25,000 gallons per year. *Id.* In contrast, California, which is responsible for eighty percent of all wine produced in the country, produced 713,540,740 gallons in the same time frame. *Id.* A very small number of California wineries produce amounts less than the limits imposed by the Arizona law. *Id.* Thus, the Arizona law, while facially neutral, in practical effects, allows in-state producers to ship their wines directly to consumers and prohibits out-of-state producers the same privilege, a clear cut case of discrimination against interstate commerce. BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries).

[102] Heald v. Engler, 342 F.3d 517, 525 (2d Cir. 2003) (holding the Twenty-first Amendment does not allow a state to discriminate against out-of-state producers in violation of the Commerce Clause.); Swedenburg v. Kelly, 358 F.3d 223, 238 (6th Cir. 2004) (holding that under section two of the Twenty-first Amendment, states are free to regulate alcohol in a way that discriminates against interstate commerce in violation of the Commerce Clause).

[103] Granholm v. Heald, 544 U.S. 460, 471 (2005). Justice Kennedy delivered the opinion of the Court in which Justice Scalia, Justice Souter, Justice Ginsburg, and Justice Breyer joined.

In *Granholm*, the plaintiffs argued that the Twenty-first Amendment must be read in light of other constitutional provisions.[104] In particular, the plaintiffs asserted that the Twenty-first Amendment does not abrogate the states' accountability to the dormant Commerce Clause's anti-discrimination principle.[105] Moreover, they argued that when a state chooses to regulate alcohol, it must do so on evenhanded terms for both in-state and out-of-state interests.[106]

The States argued the opposite.[107] The States asserted that the Twenty-first Amendment of the Constitution removes any Commerce Clause concerns from state alcohol regulations.[108] They also contended that section two of the Twenty-first Amendment gives the states power to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.[109]

Relying on the California Wine Institute's amicus curiae brief, the Supreme Court held that both New York and Michigan's regulatory goals could be achieved by less restrictive alternatives.[110] The Wine Institute inventoried state laws that allow out-of-state wineries to ship directly to consumers and maintain the temperance goals of the states.[111] These examples, the Wine Institute argued, prove

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Justice Stevens filed a dissenting opinion in which Justice O'Connor joined. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor joined. *Id.*

[104] Pet. for Writ of Certiorari at 24, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1120) ("[T]he [Twenty-first] Amendment was not designed to repeal, but only to modify, the precious liberties protected by the Commerce Clause."); *Granholm,* 544 U.S. at 470. "Plaintiffs contend . . . that Michigan's direct-shipment laws discriminate . . . against interstate commerce in violation of the Commerce Clause." *Id.*

[105] *Granholm,* 544 U.S. at 470.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 476. "The two States, however, contend their statutes are saved by [section] 2 of the Twenty-first Amendment, [however], . . . section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers." *Id.*

[109] *Id.*

[110] Brief of Amicus Curiae Wine Institute in Support of Resp't at 1, 5, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1120). The Wine Institute is a pro-commerce advocacy group. *Id.* at 1. Its membership of California wineries produce greater than eighty percent of all wine manufactured in the U.S. *Id.*

[111] *Id.* at 5. "In fact, 26 states now allow and regulate interstate direct shipments of wine to consumers." *Id.* For example, at the time of submission of the Amicus Curiae Brief, "Alaska, Arizona, California . . . Wisconsin, West Virginia, and Wyoming" all allowed limited direct-to-consumer shipping of wine. *Id.* at n.3.

that allowing in-state producers to ship directly-to-consumers while prohibiting the same for out-of-state producers is merely a veil to protect in-state interests.[112] The Supreme Court agreed.[113]

Majority Opinion

Justice Kennedy authored the majority opinion in *Granholm v. Heald*.[114] Justices Stevens and Thomas each wrote separate dissenting opinions.[115] In *Granholm*, the Supreme Court engaged in a two-prong analysis.[116] Under the first prong, the Court determined whether the state laws in question violated the nondiscrimination principle of the Commerce Clause.[117] If the Court found a violation committed by the State then the Court, under the second prong, determined whether those laws "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives."[118]

Under the first prong, the Court held that Michigan's law prohibiting direct shipments of wine by out-of-state wineries, but explicitly allowing in-state wineries direct shipping privileges was obvious discrimination.[119] Conversely, the Court

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[112] *Id.* Michigan's laws prohibited direct-to consumer shipping by out-of-state producers while allowing intrastate shipments. *Id.* at 13. In contrast, reasonable alternatives exist, as indicated from the states that "allow and regulate direct shipment without discriminating against out-of-state wineries." *Id.* For example, states can adopt reporting requirements to assist in enforcement. *Id.* at 11. In Wyoming, out-of-state shippers must maintain and submit shipping records upon request. WYO. STAT. ANN. § 12-2-204(d)(vi) (2006). They can also subject out-of-state shippers who violate state laws regulating direct shipments to fines. *See* Brief of Amicus Curiae Wine Institute, *supra* note 110, at 10. In New Hampshire, direct shipping permit holders who ship liquor, wine, or beer to a person under twenty-one years of age are subject to a class B felony and permanent permit revocation. N.H. REV. STAT. ANN. § 178.27(vii) (2006). Finally, statutes can provide that licensed out-of-state shippers are deemed to have consented to the State's jurisdiction. *See* Brief of Amicus Curiae Wine Institute, *supra* note 110, at 9. In South Carolina, an out-of-state shipper licensee shall be deemed to have consented to the jurisdiction of the courts. *See* S.C. CODE ANN. § 61-4-747(c)(6) (2006).

[113] *Granholm,* 544 U.S. at 491 ("States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.").

[114] *See generally Granholm*, 544 U.S. 460 (2005).

[115] *Id.* at 493 (Stevens, J., dissenting).

[116] *Id.* at 472-76, 489-93.

[117] *Id.*

[118] *Id.* at 489 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

[119] *Granholm*, 544 U.S. at 474. "The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly-to-consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment." *Id.* at 474-75.

found that New York's law was less openly restrictive.[120] New York permitted in-state wineries to direct ship to consumers whereas out-of-state wineries were permitted to ship direct-to-consumers only if they established a branch office and/or warehouse in-state.[121] Looking to precedent, the Court noted that it had "viewed with particular suspicion state statutes requiring business operation to be performed in the home state that could more efficiently be performed elsewhere."[122] Thus, both New York and Michigan's laws failed under the first prong of the Court's analysis.[123]

Next, under the second prong, the Court examined the two state laws to determine if they advanced a legitimate local purpose that could not be adequately served by reasonable non-discriminatory alternatives.[124] The States offered two reasons for restricting direct-to-consumer shipments of wine: "[K]eeping alcohol out of the hands of minors and facilitating tax collection."[125] The Court rejected each of these arguments, finding there were less discriminatory means the states could employ to protect such interests.[126] Thus, the Court ruled that the Michigan and New York laws were unconstitutional and that the Twenty-first Amendment does not allow a State to discriminate against out-of-state producers of wine in violation of the Commerce Clause.[127] Nevertheless, the Court was careful to mention that "states [retain] broad power to regulate liquor under section two of the Twenty-first Amendment."[128] This power, however, "does not allow states to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."[129]

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[120] *Id.* at 475 (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963)). "[I]n-state presence requirement[s] run . . . contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms." *Id.*

[121] *Id.* at 476.

[122] *Id.* at 475 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)).

[123] *Granholm*, 544 U.S. at 476. "State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity. The Michigan and New York laws by their own terms violate this proscription." *Id.* (citation and quotations omitted).

[124] *Granholm*, 544 U.S. at 489 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

[125] *Granholm*, 544 U.S. at 489.

[126] *Id.* at 492. Justice Kennedy stated the potential loss of federal distilling permits as punishment for noncompliance of state laws combined with state licensing requirements adequately protect states from lost tax revenue. *Id.* Further, he noted that states have not shown that tax evasion and selling alcohol to minors by out-of-state wineries poses such a unique threat that it justifies discrimination. *Id*

[127] *Id.* at 493.

[128] *Id.*

[129] *Granholm*, 544 U.S. at 493.

Writing for the majority, Justice Kennedy gave the three-tier system a cursory analysis in *Granholm*.[130] But, he mentioned it only to calm the concern the states expressed in their briefs that to hold direct shipment laws unconstitutional would logically result in finding the entire three-tier system unconstitutional.[131] Justice Kennedy, in dictum, stated this result did not "follow from [the Court's] holding."[132] The Court reasoned that the "Twenty-first Amendment grants states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[133] Moreover, the Court has "previously recognized that the three-tier system itself is unquestionably legitimate."[134]

Justice Stevens, with whom Justice O'Connor Joined, Dissenting

Granholm was decided by a narrow five-to-four vote.[135] Two of the four dissenters chose to write their own opinions.[136] Justice Stevens wrote that the majority was acting contrary to the intent of the Twenty-first Amendment.[137] He argued that the Court should defer to justices like himself who were alive at the time of ratification and had lived through the beginning and end of prohibition.[138] Justice Stevens would have held that "intoxicating liquors" for "delivery or use

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[130] *Id.* at 489-90. *See also* North Dakota v. United States, 495 U.S. 423, 428 (1990) ("Under the . . . [three-tier] regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers[, and] . . . [l]icensed wholesalers, in turn, may sell to licensed retailers, [and] other licensed wholesalers.").

[131] *Granholm*, 544 U.S. at 488-89.

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. The Twenty-first Amendment grants States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. States may . . . assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously held that the three-tier system itself is unquestionably legitimate.

Id. (citations and quotations omitted).

[132] *Id.* at 488.

[133] *Id.*

[134] *Id.* (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)).

[135] *Granholm*, 544 U.S. at 463.

[136] *Granholm*, 544 U.S. at 463.

[137] Granholm v. Heald, 540 U.S. 460, 495 n.2 (2005) (Stevens, J., dissenting). "According to Justice Black, who participated in the passage of the Twenty-first Amendment in the Senate, [section] 2 was intended to return 'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed." *Id.* (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 338 (1964) (Black, J., dissenting)).

[138] *Granholm*, 544 U.S. at 495 (Stevens, J., dissenting). "The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference." *Id.* (Stevens, J., dissenting).

therein" are exempt from dormant Commerce Clause scrutiny.[139] He reasoned that since "the Twenty-first Amendment is the only amendment to have been passed by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning."[140]

Justice Thomas, with whom Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor Joined, Dissenting

Justice Thomas asserted that the dormant Commerce Clause does not invalidate the state laws in question.[141] He argued the text of the Twenty-first Amendment combined with legislative history and text of the Webb-Kenyon Act clearly indicated that states are free to regulate alcohol as they choose.[142] Moreover, he would have held that states have such broad authority under the Twenty-first Amendment that they may pass laws regulating alcohol in violation of nondiscrimination principles of the dormant Commerce Clause.[143]

Summary

In *Granholm,* the Supreme Court ruled on the issue of whether states may regulate alcohol free from Commerce Clause principles.[144] The Court clarified that while states retain broad authority to regulate alcohol within their borders, they must do so in accordance with the negative implications of the Commerce Clause.[145] Thus, if a state chooses to allow intrastate direct-to-consumer shipments

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[139] *Id.* at 496 (Stevens, J., dissenting).

[140] *Id.* at 497 (Stevens, J., dissenting).

[141] Granholm v. Heald, 544 U.S. 460, 497 (2005) (Thomas, J., dissenting).

[142] *Id.* (Thomas, J., dissenting). Justice Thomas relied on the decision in *State Board of Equalization of Cal. v. Young's Market*, the language of the Webb-Kenyon Act, and the Twenty-first Amendment in support of his reasoning. State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59 (1936); 37 Stat. 699 (codified at 27 U.S.C. § 122); U.S. CONST. amend. XXI.

[143] *Granholm.* 544 U.S. at 498 (Thomas, J., dissenting).

[144] *Granholm*, 544 U.S. at 493.

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by instate producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.

Id. See also The National Pulse, States Mull the Wine Decision, Consumers Savor High Court's Pleasing Delivery, But Some Are Left With a Bitter Aftertaste, Molly McDonough, 4 No. 20 A.B.A J. E-REPORT 2, 3 (May 20, 2005). "Merely the effort to protect entrenched special interest is not going to be [a] good enough reason to allow these regulations to stand." *Id.* "As for the Twenty-first Amendment analysis, Zywicki says the majority 'got it exactly right'" (quoting Professor Todd Zywicki, George Mason University School of Law). *Id.*

[145] *Granholm*, 544 U.S. at 493.

of wine, it also must allow interstate direct-to-consumer shipments of wine or find its regulations invalid.[146]

ANALYSIS

In *Granholm v. Heald*, the United States Supreme Court clarified that the Twenty-first Amendment does not allow states to regulate alcohol in violation of the Commerce Clause's nondiscrimination principle.[147] The Court's ruling indicates a return to its pre-Eighteenth Amendment jurisprudence.[148] This decision reaffirms the proposition that even alcohol regulations must be drafted in compliance with other provisions of the United States Constitution.[149] While the Court correctly ruled on the direct-to-consumer wine shipping issue, its collateral approval of the three-tier system as "unquestionably legitimate" was cursorily inadequate and contradictory to its main holding.[150] Furthermore, the *Granholm* framework

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[146] *Id.*

[147] *Id.*

[148] *Compare* Vance v. W. A. Vandercook Co., 170 U.S. 438 (1898) (holding that a state could not stop the interstate shipment of liquor for personal use) *with Granholm*, 544 U.S. 460 (2005) (holding the section two of the Twenty-first Amendment does allow states to allow in-state wineries to ship directly-to-consumers for personal consumption while simultaneously prohibiting the same privilege to out-of-state interests); *see also* Marcia Rablon, *The Prohibition Hangover: Why are we Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L 552, 582 (explaining the Court treated direct-shipping regulations, prior to passage of the Eighteenth Amendment, as if it were a normal article of interstate commerce).

[149] *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976) (holding state laws that regulate alcohol must accord with other provisions of the U.S. Constitution and that the Twenty-first Amendment's grant of authority does not abrogate this requirement); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150 (1940) (holding the broad police power of the states over liquor traffic does not justify the disregard of constitutional guarantees or authorize the imposition of conditions requiring the relinquishment of constitutional rights).

[150] Reply Brief of Petitioner at 7-8, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1120). As noted in greater detail below, *infra* note 152 and accompanying text, Michigan worried in its reply brief that to hold its direct-to-consumer wine shipping laws unconstitutional would also call into question the legitimacy of the three-tier system itself. *Id.* However, the majority disagreed. *Granholm*, 544 U.S. at 488. It found the state's conclusion does not follow from the Court's holding in *Granholm*. *Id.* Furthermore, the Court held it had "previously recognized that the three-tier system is 'unquestionably legitimate' . . . [and that] [s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent." *Id.* at 489. *See also* Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1252 (W.D. Wash.) (2005) (holding that state laws that allow in-state wineries to "self-distribute" to retailers while simultaneously prohibiting out-of-state wineries to "self distribute" violates the negative implication of the Commerce Clause). In *Costco*, the United States District Court for Washington evaluated whether certain aspects of Washington State's three-tier system were valid. *Id.* Applying the *Granholm* framework, the court found that regulatory scheme in Washington, which allows in-state wineries to self-distribute but requires out-of-state wineries to channel their wines through the three-tier system was a violation of the Commerce Clause. *Id.* at 1256. Furthermore, the district court held Washington does not achieve its goals of ensuring orderly distribution by prohibiting out-of-state producers from self-distributing to in-state retailers. *Id.* at 1253. The district court noted these objectives can "be achieved through the alternative of an evenhanded licensing requirement." *Id.*

implies that alcohol regulations which allow in-state retailers to ship directly-to-consumers and prohibit out-of-state retailers to ship directly-to-consumers are invalid.[151] With these results in mind, the Court must revisit these issues and apply its analytical framework to condemn residual discriminatory state alcohol regulations and clarify the acceptable role of the three-tier system in the twenty-first century.[152]

Granholm's *Implications*

Many states mandate that alcohol producers channel their products through what is commonly known as the "three-tier system."[153] The three-tiers are producers, distributors, and retailers.[154] Under the three-tier system, a producer must sell to a licensed in-state distributor who, in turn, must sell to a licensed in-state retailer.[155] States that mandate the three-tier system for all wines argue the three-tiers facilitate temperance goals by increasing prices, raising revenue via taxes, and restricting access to alcohol for minors.[156] Moreover, some states allow in-state retailers to ship direct-to-consumers and prohibit out-of-state retailers from shipping direct-to-consumers.[157] The factual similarities of the three-tier

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at 1253. Thus, *Costco* represents a glimpse of how courts may deal with challenges to the three-tier system. *See also* Starr, *supra* note 89, at 3.

[151] *See, e.g.,* Starr, *supra* note 89, at 3; Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1250 (W.D. Wash. 2005); Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006).

[152] Matthew B. Millis, Note, *Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-*Granholm *Era*, 81 IND. L.J. 1097, 1098 (2006).

> [S]tates will not simply abandon their discriminatory alcohol regulations without a fight. Likely, states will respond by redrafting facially discriminatory laws to be facially neutral. These seemingly neutral laws will . . . perpetuate the discrimination that the Supreme Court sought to prohibit in *Granholm*. The Court will then be presented with a string of cases challenging the constitutionality of these new statutes.

Id.

[153] *See* 45 AM. JUR. 2D *Intoxicating Liquors* § 94 (1964).

[154] *See, e.g.,* David H. Smith, *Consumer Protection or Veiled Protectionism? An Overview of Recent Challenges to State Restrictions on E-Commerce*, 15 LOY. CONSUMER L. REV. 359, 366 (2003).

[155] Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1621 (2000).

[156] *See e.g.,* Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003). The court in *Beskind*, stated that a number of valid state interests are served by North Carolina's three-tier structure, including regulating consumption of alcohol controlling distribution of alcohol and collecting taxes on alcohol. *Id.*; *See also North Dakota*, 495 U.S. at 432. "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *Beskind*, 325 F.3d at 516.

[157] *See, e.g.,* 235 ILL. COMP. STAT. 5/3-12 (2006).

system and the retail-to-consumer market to those issues decided in *Granholm* intuitively indicate that laws of this nature are as unconstitutional as those the *Granholm* Court invalidated.[158]

Although the constitutionality of the three-tier system, as a whole, was not directly at issue in *Granholm*, the Court gave it a cursory stamp of approval.[159] Michigan, in its brief, worried that finding laws prohibiting direct-to-consumer shipping unconstitutional in the face of the Commerce Clause would also result in the three-tier system being found unconstitutional.[160] More precisely, Michigan argued:

> [I]f [it] cannot draw rational distinctions between out-of-state and in-state suppliers of alcoholic beverages, there is no obvious reason why it would not be required to allow any out-of-state wholesalers to ship wine . . . to in-state retailers and out-of-state retailers to ship . . . directly to consumers. [To do so] would largely mean the end of the three-tier system of regulation that this Court has called 'unquestionably legitimate.' This case is . . . about the viability of the entire system of alcohol regulation that the states have relied upon for seventy years.[161]

The States' concern is not misplaced.[162] The prediction about retailers seeking to participate on equal terms in the direct-to-consumer market has come true.[163] For example, recent legislation in Illinois illustrates that some states continue to craft laws which disregard *Granholm*.[164] In these states, the effects of these

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[158] *See* Starr, *supra* note 89.

[159] *Granholm,* 544 U.S. at 488-89.

[160] Reply Brief of Petitioner, at 7-8 n.6.

[161] *Id.* at 2 (internal citations omitted).

[162] Michael A. Pasahow, Note, Granholm v. Heald: *Shifting the Boundaries of Cal. Reciprocal Wine Shipping Laws*, 21 BERKELEY TECH L.J. 569, 583-84 (2006).

> California's continued involvement in the internet wine market will boost the market's size and visibility and push states currently banning direct retail shipments to rethink their restrictions as consumers and voters get information about the greater value and range of choices available online. The continued growth of an interstate, internet-based retail wine industry to compete with the three-tier system will further decrease the political and economic clout of the wholesalers and will continue to put pressure on states to streamline their traditional distribution channels, leading to greater efficiency and customer savings in the longer term.

Id.

[163] *See generally Specialty Wines Retailer Association*, http://www.specialtywineretailers.org/ (last visited on October 1, 2007).

[164] *Compare* 235 ILL. COMP. STAT. 5/3-12 (2006) *with* H.B. 429, 95th Gen. Assem., Reg. Sess. (Ill. 2007). The newly amended law was recently signed by the governor and is scheduled to become effective on June 1, 2008. *Id.*

protectionist state regulations have not been felt by wineries alone.[165] Retailers have also fallen victim to the direct shipping trade war.[166] In Illinois, Governor Rod Blagojevich signed the recently passed House Bill 429 to become effective on June 1, 2008. [167] House Bill 429 removes reciprocal language that allows out-of-state wineries to ship directly to Illinois consumers free from taxes and reporting so long as Illinois wineries are able to enjoy the same privileges in that state.[168] House Bill 429 creates a limited direct shipping permit system in place of the old law.[169] The bill also removes direct-to-consumer shipping privileges by out-of-state retailers, a privilege they have enjoyed since 1980.[170] However, in-state retailers continue to enjoy the ability to ship direct.[171]

Granholm, *Out-of-State Retailers, and the Three-Tier System*

If *Granholm* is held to posit an analytical framework, it is as follows: First, the Court must determine whether a state law discriminates against interstate commerce.[172] If the law does discriminate against interstate commerce, then the Court determines whether there are less discriminatory alternatives that might be employed to achieve the stated purpose of those laws.[173] If less burdensome alternatives exist, then the laws in question are struck down.[174] However, if no less restrictive alternatives exists then the law is saved, even in face of the Commerce Clause's nondiscrimination principles.[175]

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[165] *See generally* Starr, *supra* note 89.

[166] *Id.*

[167] H.B. 429, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.* When House Bill 429 takes affect it will replace Illinois's current relevant laws. In particular, 235 ILL. COMP. STAT. 5/3-12(d) (2006) will remove the retailer-to-consumer shipping privilege and replace it with:

> (d) A retailer license shall allow the licensee to sell and offer for sale at retail, only in the premises specified in the license, alcohol liquor for use or consumption, but not for resale in any form. Nothing in the Amendatory Act of the 95th General Assembly shall deny, limit, remove, or restrict *the ability of a holder of a retailer's license to transfer, deliver, or ship alcoholic liquor to the purchaser for use or consumption* subject to any applicable local law or ordinance.

Id. (emphasis added). This language is pertinent because only in-state retailers can qualify for a retail license in Illinois.

[172] *Granholm*, 544 U.S. at 472.

[173] *Id.* at 492.

[174] *Id.*

[175] *See id.; See also* Brooks v. Vassar; Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1250 (W.D. Wash.) (2005).

Applying the Court's analytical framework from *Granholm* to the retailer-to-consumer market, using Illinois law as an example leads to the conclusion that laws prohibiting out-of-sate retailers from shipping directly-to-consumers, while simultaneously allowing the same to in-state retailers, impermissibly burdens interstate commerce.[176] Similarly, while the Court has indicated that the three-tier system is a valid exercise of state authority, the rule from *Granholm* illuminates a contradiction in the Court's reasoning.[177] Allowing in-state wholesalers to participate in the distribution of wine while out-of-state wholesalers are completely prohibited from doing so impermissibly burdens interstate commerce under the *Granholm* holding.[178] Additionally, there are less burdensome alternatives to the system that meet the States' regulatory goals.[179]

Out-of-State Retailers

Under the first prong of the *Granholm* analysis, laws that "mandate differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter" are virtually *per se* invalid.[180] The new Illinois law overtly discriminates against interstate commerce because it creates a regulatory scheme that is openly discriminatory.[181] As such, the retailer aspect of Illinois's direct shipping laws, if challenged, should fail the first prong of the *Granholm* analytical framework.[182] Wholesalers maintain that federally permitted wineries are subject to steep penalties should they violate the law, and thus are distinguishable from

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[176] *See Granholm*, 544 U.S. at 489 (stating that although the three-tier system is legitimate, state regulations are only protected by the Twenty-first Amendment when they treat in-state and out-of-state interests evenhandedly); *See also* Starr, *supra* note 89, at 3.

[177] *See Granholm*, 544 U.S. at 489.

[178] *See id.; See also* Donna Walter, *Missouri Laws on Wine Shipping Challenged*, SAINT LOUIS DAILY RECORD, Nov. 29, 2006.

> [A]lthough closing down the market in wine sounds a lot like going back to the 1950s, that's where states are going, at least in the short run, because if the market is closed down, then all the wine goes back to being handled by [wholesale distributors], and they get to mark it up and make a nice profit and continue to make money off of it.

Id.

[179] *See* FTC Report, *supra* note 100, at 27.

[180] *Granholm*, 544 U.S. at 472 (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore., 511 U.S. 93, 99 (1994)).

[181] *Compare* H.B. 429, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (allowing direct-to-consumer shipments by in-state retailers while simultaneously prohibiting the same privilege from out-of-state retailers) *with* MICH. COMP. LAWS § 436.1113(9) (allowing in-state wineries eligibility for a "wine maker" license that allow direct-to-consumer shipping prohibiting the same privilege to out-of-state wineries). The Michigan law was found to be an example of overt discrimination of the kind strictly forbidden by the dormant Commerce Clause. *See also Granholm,* 544 U.S. at 473 ("The discriminatory character of the Michigan system is obvious.").

[182] *See Granholm*, 544 U.S. at 493 (holding laws that discriminatorily benefit in-state economic interests and burden similar out-of-state interests face a virtually *per se* rule of invalidity).

retailers and not subject to the *Granholm* rule.[183] However, this notion fails to take into account the fact that in those states that allow retailer-to-consumer shipping, retailers, like their winery counterparts, must agree to the jurisdiction and restrictions of the state as a condition of obtaining a permit.[184]

For example, in Wyoming, both in-state and out-of-state retailers have the ability to ship up to two cases of wine per year directly to consumers as long as they obtain a permit and remit copies of invoices of all wine shipped throughout the state.[185] Wyoming is a good example of a reasonable alternative regulatory scheme which treats both in-state and out-of-state retailers equally and in compliance with the Commerce Clause.[186] Therefore, as was the case with Michigan's and

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[183] *See* Trial Brief of Def., Costco v. Hoen, No. 04-0360 at 39 (2006) (stating that state laws that allow in-state wineries to "self-distribute" to retailers while simultaneously prohibiting out-of-state wineries to "self distribute" does not violate the *Granholm* decision because, in *Granholm*, the Court's holding was narrowly tailored only to apply to the winery-to-consumer factual scenario).

[184] *See* WYO. STAT. ANN. § 12-2-204(d)(vii) (2006). "Any out-of-state shippers licensed pursuant to this section shall: . . . (vii) Be deemed to have consented to the personal jurisdiction of the liquor division or any other state agency and the courts of this state concerning enforcement of this section and any related laws, rules or regulations." *Id;. See also* Starr, *supra* note 89, at 5.

[185] WYO. STAT. ANN. § 12-2-204 (2006). The relevant statutory language in Wyoming states:

> (a) Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in its state of domicile as an alcoholic liquor or malt beverage manufacturer, importer, wholesaler or retailer who obtains an out-of-state shipper's license, as provided in this section, may ship no more than a total of eighteen (18) liters of manufactured wine directly to any one (1) household in this state in any twelve (12) month period.
>
> (b) Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in its state of domicile as an alcoholic liquor or malt beverage manufacturer, importer, wholesaler or retailer who obtains an out-of-state shipper's license, as provided in this section, may ship to any Wyoming retail establishment which holds a liquor license in this state any manufactured wine which is not listed with the liquor division as part of its inventory and distribution operation.
>
> (c) Before sending any shipment to a household or to a licensed retailer in this state, the out-of-state shipper shall:
>
> > (i) File an application with the liquor division of the department of revenue;
> >
> > (ii) Pay a license fee of fifty dollars ($50.00) to the liquor division;
> >
> > (iii) Provide a true copy of its current alcoholic liquor or malt beverage license issued in its state of domicile to the liquor division;
> >
> > (iv) Provide such other information as may be required by the liquor division; and
> >
> > (v) Obtain from the liquor division an out-of-state shipper's license, after the division conducts such investigation as it deems necessary.

Id.

[186] *See, e.g.,* WYO. STAT. ANN. § 12-2-204(b) (2006); *see also* WYO. STAT. ANN. § 12-2-204(c) (2006); The Associated Press, *Committee Passes Wine Bill*, BILLINGS GAZETTE, Feb. 15, 2006, *available at* http://www.billingsgazette.net/articles/2006/02/15/news/wyoming/60-wine-bill.txt. ("A bill

New York's laws at issue in *Granholm,* where less restrictive means of achieving the States' intended goals exist (as is the case with Illinois House Bill 429) the law should be found unconstitutional.

The Three-Tier System

The three-tier system, which allows only in-state (domestic) wholesalers to sell wines to retailers, also violates the nondiscrimination principle of the Commerce Clause.[187] The first prong of *Granholm* is easily satisfied.[188] The practice of forcing out-of-state wineries to sell their products to domestic wholesalers, but forbidding out-of-state wholesalers a similar privilege is a clear case of discrimination.[189] In fact, no state employing the three-tier system affords the opportunity to participate in the sale and distribution of wine to out-of-state distributors.[190] Only in-state firms may distribute wine directly to retailers.[191]

As stated above, the Court acknowledged time and again that it has invalidated laws mandating differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter as virtually *per se* invalid.[192] With this proclamation in mind, the Court should have taken steps to properly address the three-tier system and found it to be an unconstitutional burden on interstate commerce when the distribution of wine is permitted only by in-state distributors.

Under the second prong of the analysis, the Court determines whether the proposed state interest can be achieved by other, less burdensome regulations.[193] If there are sufficiently reasonable alternatives, discriminatory laws are struck down.[194] If the Court evaluated the three-tier system, it is reasonable to conclude

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bringing Wyoming into compliance with a U.S. Supreme Court ruling on direct wine shipment to consumers unanimously passed."); *Wyoming Close to Compliance*, http://www.shipcompliantblog.com/index.php?s=wyoming (Feb. 16, 2006).

[187] *See* Vidram David Amar, *The Fight Over State Laws Favoring In-State Alcohol Purveyors: Do Such Laws Violate the Dormant Commerce Clause? A Federal District Court in New York Says No, But May Well Be Wrong*, http://writ.news.findlaw.com/amar/20071012.html (last visited on November 18, 2007).

[188] *See Granholm*, 544 U.S. at 472-76.

[189] *See id.* at 476 (holding Michigan's and New York's direct shipping regulatory schemes violate the Commerce Clause's nondiscrimination principle).

[190] *See generally Ship Compliant Blog*, http://shipcompliantblog.com/ (last visited on November 15, 2007).

[191] *Id.*

[192] *See Granholm*, 544 U.S. at 489.

[193] *Id.*

[194] *Id.*

it would have found that the evidence listed below indicates that less burdensome alternatives exist for the states to achieve their proposed goals of promoting temperance, raising revenue, and restricting access to alcohol for minors.[195]

Less Restrictive Alternatives to the Three-Tier System

In July of 2003, the Federal Trade Commission published findings and recommendations from a workshop intended to discuss possible anti-competitive barriers to wine and other industries.[196] The commission heard testimony from state regulators, vintners, wholesalers, and consumers.[197] After review of testimony and its own studies, the commission found that states could "significantly enhance consumer welfare by allowing direct shipments of wine."[198] Furthermore, the commission found that state mandated bans on e-commerce and direct shipping, increases prices, limits consumer selection, and does little to keep alcohol out of the hands of minors.[199]

Proponents of the three-tier system argue the system furthers the goals of collecting taxes, reducing access to alcohol by minors, and preventing organized

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[195] FTC Report, *supra* note 100, at 26. "In practice, many states have decided that they can prevent direct shipping to minors through less restrictive means than a complete ban, such as by requiring an adult signature at the point of delivery. These states generally report few, if any, problems with direct shipping to minors." *Id.*

> As an alternative to banning interstate direct shipment of wine, some states have adopted less restrictive means to satisfy their regulatory objectives. For example, some states register out-of-state suppliers and impose various civil and criminal penalties against violators. Several states, including Nebraska, New Hampshire, and Wyoming, require out-of-state suppliers to register and obtain permits (a permit can be conditioned on the out-of-state supplier's consent to submit to the state's jurisdiction). None of these states reported any problems with interstate direct shipping to minors.

Id. at 27.

> Courts have suggested that in addition to regulating the suppliers, states also could develop statutory systems that would impose similar requirements on package delivery companies as on retail stores. One court concluded that '[t]here is no practical difference from requiring such a procedure and that required of store clerks or bartenders who regularly check customers for valid identification to verify age before allowing the sale of alcoholic beverages.' For instance, Michigan requires that retailers make a "diligent inquiry" to verify a customer's age, such as by examining a picture identification. States could impose similar requirements on delivery personnel, including training requirements, along with appropriate penalties.

Id. at 29 (internal citations omitted).

[196] *Id.*

[197] *Id.* at 2.

[198] *Id.* at 3.

[199] *Id.*

crime from gaining control of alcohol distribution.[200] Proponents also argue that disbanding the three-tier system in favor of direct shipping options for consumers is contrary to these goals.[201]

The findings of the Federal Trade Commission indicate differently.[202] These findings indicate that the system does not further the goals it was designed for better than alternatives.[203] For example, advocates of the three-tier system claim it is necessary to ensure revenue collection.[204] According to the Federal Trade Commission, of those states that do allow direct-to-consumer shipping of alcohol, few report problems with the remittance of taxes.[205] Likewise, many states allowing direct shipping report few problems restricting access to alcohol for minors.[206] Finally, most, if not all producers, are willing to submit themselves to aggregate customer purchase limits in furtherance of temperance goals.[207]

The Three-Tier System Equals Higher Prices for Consumers

According to the Federal Trade Commission the three-tier system increases the price of wine for consumers.[208] These findings indicate that when purchased over the Internet, wine is typically sixteen percent cheaper than when purchased at traditional brick-and-mortar retail establishments and this percentage of savings increases with the price of the wine.[209] The study also suggests that by buying online, consumers can forgo the costs normally added on at the wholesale level which can be upwards of eighteen to twenty-five percent more than buying the same bottles online.[210] Even the Fourth Circuit recognized that "wine sold through the three-tiered system is more expensive than the same or comparable

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[200] Tr. Brief of Def. & Def.-Intervenor at, 13. Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1120). "The evidence offered at trial will show not only that the State has clear and expressed interests in regulating the distribution and sale of alcoholic beverages but also that those interests relate directly to the core concerns of the [Twenty-first] Amendment." *Id.* "One of the greatest concerns . . . has been how to moderate and control the consumption of alcoholic beverages." *Id.* "[T]he goal of Washington's . . . Act . . . is the generation of tax revenue." *Id.* at 14. "One of the key purposes . . . of a system regulating alcoholic beverages [is] . . . to facilitate orderly market conditions." *Id.; see also* FTC Report, *supra* note 100, at 6.

[201] Tr. Brief of Def. & Def.-Intervenor, *supra* note 200, at 13.

[202] FTC Report, *supra* note 100, at 26-40.

[203] *Id.*

[204] *Id.* at 5.

[205] *Id.* at 38.

[206] *Id.* at 26-38.

[207] FTC Report, *supra* note 100, at 28.

[208] *Id.* at 19, 26-38.

[209] *Id.*

[210] *Id.*

wine sold in-state [directly to consumers] because wine distributed through the three-tiered structure is subjected to two 'mark-ups' in price . . . ."[211]

The findings of the Federal Trade Commission illustrate that the three-tier system is not, as many states contend, *necessary* to achieve effective regulation of alcohol.[212] One thing apparent from these findings is that less restrictive alternatives exist to achieve these goals.[213] Additionally, these alternatives not only serve small start-up and boutique producers who would gain market access, they also serve consumers by lowering prices and increasing variety.[214]

These alternatives also continue to ensure adequate tax revenue and maintain restrictions on minors.[215] If the findings of the Federal Trade Commission show anything, they show that the three-tier system is not *necessary*.[216] If states insist on maintaining the three-tier system, these findings are applicable to instances where the three-tier system prohibits market access by out-of-state wholesalers who, like retailers, will happily submit to each state's jurisdiction and licensing requirements.[217] Therefore, the three-tier system is not the only manner that the "core concerns" of section two of the Twenty-first Amendment can be achieved.[218]

CONCLUSION

In light of the Supreme Court's decision in *Granholm*, proscriptions against out-of-state retailers and wholesalers should be found unconstitutional because they regulate in-state and out-of-state interests in an uneven manner.[219] The Court has held that the Twenty-first Amendment gives the states broad authority to regulate alcohol as long as it does so on evenhanded terms. Therefore, the Court needs to revisit its analysis of the three-tier system using the framework it has set forth in *Granholm* and revoke the rubber stamp it has mistakenly given to the system. The majority has already recognized that where reasonable alternatives exist, burdensome regulations will not be tolerated. As this note has shown, alternatives are easily implemented which practically achieve the States' regulatory goals while simultaneously promoting the principles of economic unity that our republic was founded upon.

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[211] *Id.* at 22 (quoting Beskind v. Easley, 325 F.3d 506, 515 (4th Cir. 2003)).

[212] FTC Report, *supra* note 100, at 41.

[213] *Id.* at 26-27, 38. *See also supra* note 181 and accompanying text.

[214] FTC Report, *supra* note 100, at 42.

[215] *Id.* at 41.

[216] *See id.*

[217] *Id.* at 28.

[218] *Id.*

[219] *See supra* notes 88-218 and accompanying text.

CASE NOTE

CIVIL RIGHTS—The Clock Starts Ticking: Title VII Pay Discrimination Claims. *Ledbetter v. Goodyear Tire & Rubber, Co.*, 127 S. Ct. 2162 (2007).

*Jennifer F. Kemp**

Introduction

Goodyear Tire and Rubber Company (Goodyear) employed Lilly Ledbetter as a non-union area manager in a Gadsden, Alabama tire-production plant for nineteen years.[1] After years of suspecting Goodyear paid her less than men in her department, an anonymous note appeared in her mailbox relating the salaries of three of her male counterparts.[2] The note prompted an investigation.[3] Ledbetter learned that although she started at the same wage as men in her position, her current salary fell below every other male supervisor in her department, even those hired well after her.[4] At times, her pay even dipped below what Goodyear set as the minimum pay level for the area-manager position.[5]

Ledbetter filed a questionnaire with the Equal Employment Opportunity Commission (EEOC) in March 1998 and a formal EEOC charge in July 1998.[6] Following her early retirement from Goodyear and the EEOC's issuance of a right to sue letter, Ledbetter filed suit.[7] Ledbetter presented evidence at trial that Goodyear paid her less money than any other male supervisor at the Gadsden location, solely because of her gender.[8] The jury awarded her $3.8 million in back pay and punitive damages.[9] The trial court, however, reduced the judgment based

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*Candidate for J.D., University of Wyoming, 2009.

[1] *See* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007) [hereinafter *Ledbetter II*].

[2] *Impact of* Ledbetter v. Goodyear *on the Effective Enforcement of Civil Rights Laws: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) *available at* http://edworkforce.house.gov/hearings/fc061207.shtml [hereinafter Hearings] (testimony of Lilly Ledbetter).

[3] *See id.*

[4] *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1174 (11th Cir. 2005) [hereinafter *Ledbetter I*].

[5] *Ledbetter II*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting). By the end of 1997 Ledbetter earned $3,727 per month, less than all other area managers in her section. *Ledbetter I,* 421 F.3d at 1174. The lowest paid male area manager made roughly 15% more than Ledbetter; the highest paid made roughly 40% more. *Id.*

[6] *Ledbetter I,* 421 F.3d at 1175.

[7] *See Ledbetter II,* 127 S. Ct. at 2165.

[8] *Ledbetter I,* 421 F.3d at 1175.

[9] *Id.* at 1176. The jury awarded $223,776 in back pay, $4,662 for mental anguish, and $3,285,979 in punitive damages. *Id.*

on Title VII damage limits.[10] Ledbetter's ultimate trial court judgment amounted to $360,000.[11]

Goodyear appealed the judgment, arguing that time barred Ledbetter's claim because according to Title VII "unlawful employment practices" must occur within 180-days of the EEOC claim, and none of the allegedly discriminatory pay decisions occurred within that limitations period.[12] Although two performance reviews had taken place during the 180-day charging period, Ledbetter presented no evidence proving discriminatory intent behind those decisions.[13] Ledbetter instead argued that each paycheck issued, reflecting a lower wage than other similarly situated employees, constituted a new violation, and created a new 180-day charging period.[14] The United States Court of Appeals for the Eleventh Circuit declined to follow this "paycheck accrual rule" set forth by Ledbetter and originally articulated by the Supreme Court in *Bazemore v. Friday.*[15] The Eleventh

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[10] *Id.* Title VII limits compensatory and punitive damages to $300,000 in actions against employers with more than 500 employees. Civil Rights Act of 1964, 42 U.S.C. § 1981a(b)(3)(D) (2006). Additionally, because back pay may accrue no more than two years prior to the date a charge is filed with the Commission, the court awarded only $60,000 in back pay. 42 U.S.C. § 2000(e)-5(g)(1) (2006).

[11] *Ledbetter I,* 421 F.3d at 1176.

[12] *See id.* Title VII requires filing of a discrimination charge with the EEOC within 180-days of the "unlawful employment practice," or if the complainant files the charge with a state or local agency with authority to grant or seek relief from such practices, within 300 days of the "unlawful employment practice." 42 U.S.C. § 2000(e)-5(e)(1). Lilly Ledbetter lived and worked in Alabama, where there is no state or local agency with the authority to grant relief, therefore the author will assume a 180-day charging period for the purposes of this case note. *See Ledbetter I*, 421 F.3d at 1178. Both Goodyear and Ledbetter agreed the filing period started 180-days before the March filing. *Id.*

[13] *Ledbetter I,* 421 F.3d at 1186-87.

[14] *Id.* at 1181.

[15] *See* Bazemore v. Friday, 478 U.S. 385, 395-96 (1986). The EEOC and the majority of circuit courts, including the Eleventh Circuit, applied the paycheck accrual rule until the *Ledbetter* decision. *See* 2 EEOC Compliance Manual §2-IV-C(1)(a), p. 605:0024, n. 183 (2006) (providing that "repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period"); Cardenas v. Massey, 269 F.3d 251, 258 (3d Cir. 2001) ("[I]n a Title VII case claiming discriminatory pay, the receipt of each paycheck is a continuing violation."); Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 168 (8th Cir. 1995), *abrogated on other grounds by* Madison v. IBP, Inc., 330 F.3d 1051 (8th Cir. 2003) ("Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge."); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 349 (4th Cir. 1994) ("[P]aychecks are to be considered continuing violations of the law when they evidence discriminatory wages."); Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 448-49 (11th Cir. 1993) ("Contrary to Partners' assertions, Calloway's wage claim is not a single violation with a continuing effect . . . When the claim is one for discriminatory wages the violation exists every single day the employee works."); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1399 (9th Cir. 1986) ("[T]he policy of paying lower wages to female employees on each payday constitutes a continuing violation.") (internal quotation marks omitted); Hall v. Ledex, Inc., 669 F.2d 397, 398 (6th Cir. 1982) ("[T]he discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received.").

Circuit reasoned that because Goodyear had a system for periodically reviewing and re-establishing employee salaries, Ledbetter could only recover if she could prove that a discriminatory decision affecting her pay occurred within the 180-day charging period.[16]

Ledbetter appealed to the United States Supreme Court, which upheld the Eleventh Circuit ruling and agreed that the statute of limitations barred Ledbetter's claim.[17] The Court reasoned that each paycheck issued merely carried on the "effects" of an unlawful employment act, but did not constitute an unlawful employment act in and of itself.[18] According to the Court, Ledbetter could challenge only the two performance reviews occurring during the 180-day statute of limitations period, and no evidence proved those decisions "unlawful."[19] The Court's decision nullified both the back pay and punitive damages awarded by the jury.[20] The *Ledbetter* decision ultimately sends the message to victims of discriminatory pay that unless challenged within six months, pay decisions contaminated by discrimination "become grandfathered . . . beyond the province of Title VII ever to repair."[21]

This note discusses the repercussions of *Ledbetter* for pay discrimination cases in the future.[22] It argues that Congress should pass legislation to correct the harsh and inequitable results of the *Ledbetter* decision.[23] Congress must act to ensure that Title VII continues to render broad relief to victims of discrimination.[24] This note argues the Supreme Court ruling ignores the realities of pay discrimination in the workplace.[25] Moreover, the analysis discusses current Congressional action proposing an amendment to Title VII establishing the receipt of discriminatory paychecks as separate employment acts.[26] Finally, the analysis argues that further Congressional action lengthening the 180-day filing period is necessary to ensure claims like Ledbetter's are fairly brought before the court.[27]

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[16] *See Ledbetter I*, 421 F.3d at 1182-83.

[17] *See Ledbetter II*, 127 S. Ct. at 2165.

[18] *Id.* at 2169.

[19] *Id.*

[20] *See id.* at 2165.

[21] *Id.* at 2178 (Ginsburg, J., dissenting).

[22] *See infra* notes 221-237, 287-303 and accompanying text for a discussion of how the *Ledbetter* applies and its economic repercussions.

[23] *See infra* notes 268-285 and accompanying text for suggestions of adopting a paycheck accrual rule and lengthening the filing period.

[24] *See infra* notes 268-285 and accompanying text.

[25] *See infra* notes 185-204 and accompanying text for a discussion of how discrimination is perceived.

[26] *See infra* notes 268-277 and accompanying text for a discussion of the Ledbetter Fair Pay Act.

[27] *See infra* notes 278-285 and accompanying text.

BACKGROUND

History of Title VII

The Civil Rights Act of 1964 grew out of the legacy of slavery and racial prejudice in the United States.[28] The evolution of Title VII began during World War II when it became necessary for the country to utilize minority workers.[29] At the height of the war effort in 1942, Franklin Roosevelt issued an executive order to protect minorities in defense and government industries from discrimination because of race, creed, color, or national origin.[30] President Roosevelt also established the Committee on Fair Employment Practices (FEPC) to monitor the order.[31] Although not included in President Roosevelt's protections, women also joined the influx of minorities in the workplace with the government using the iconic "Rosie the Riveter" as inspiration for women to fill traditionally male jobs.[32] When the war ended, however, the civil rights movement waned.[33] The government encouraged women to relinquish their jobs to the returning troops saying they "owed it to the boys."[34] Congress abolished the FEPC in 1946 and racial discrimination pervaded the workplace once again.[35]

Public support for civil-rights gained significant momentum by 1963, and President Kennedy determined the time was ripe to propose major civil-rights legislation.[36] President Kennedy's death in November 1963 threatened to stall the

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[28] John J. Donohue III, *Historical Background*, *in* FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 2, 3 (John J. Donohue III ed., 1997).

[29] *Id.*

[30] Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

[31] Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943).

[32] 1 KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 1.4 (1994). For a detailed discussion of Title VII's drafting and legislative history see Francis J. Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1965).

[33] SPRIGGS, *supra* note 32, at § 1.4.

[34] *Id.*

[35] *Id.*

[36] Norbert Schlei, *Foreword* to 1 BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, at vii, vii (2d ed. 1983). In May of 1963, the national press covered the campaign against segregation in Birmingham, Alabama. *Id.* For the first time "[t]he people of the United States saw on their television screens night after night . . . the seemingly senseless use . . . of police dogs, fire hoses and other undiscriminating weapons against apparently well-behaved demonstrators, many of them children, protesting discrimination." *Id.* Other major civil-rights protests occurred in 1963, including The March on Washington for Jobs and Freedom, where Martin Luther King, Jr. delivered his "I Have a Dream" speech. *See* Pre 1965: Events Leading to the Creation of EEOC, http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html (last visited Nov. 10, 2007).

Civil Rights Act, but President Lyndon Johnson took up the cause.[37] Congress passed the Act in 1964 making it illegal, among other things, to discriminate in voting (Title I), public accommodations (Title II), and access to public facilities (Title III) because of color, race, creed, or sex.[38]

Title VII, one of the most controversial sections of the Act, made it illegal to pay a different wage to employees based on their color, creed, race, or sex.[39] The statute provides protection from both disparate treatment and disparate impact, and aims to compensate wronged employees, remedy past unfair treatment and stop future workplace discrimination.[40] The statute set out to accomplish these goals by providing injunctive relief along with monetary compensation to wronged employees.[41]

President Johnson later reflected: "In the Civil Rights Act of 1964, we affirmed through law that *men* equal under God are also equal when they seek a job, when they go to get a meal in a restaurant, or when they seek lodging for the night in any State in the Union."[42] Today, more than forty years after the passage

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[37] *See* Pre 1965: Events Leading to the Creation of EEOC, http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html (last visited Nov. 10, 2007). Following President Kennedy's death, President Johnson stated "[n]o eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long." *Id.*

[38] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et. seq. (2006). Congress added sex as a protected class the day it passed the Act. Claudia Golden, *Understanding the Gender Gap: An Economic History of American Women, in* FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 326, 332 (John J. Donohue III ed., 1997). Enemies of the bill expected that adding sex as a protected class would stall the legislation. *Id.* The opposition believed persons supporting protection for African-Americans would not be as eager to extend protection to women. SPRIGGS, *supra* note 32, at § 1.8. The plan to stall passage of the Civil Rights Act of 1964 backfired, and the House passed the amendment without holding a hearing or considering testimonials respecting the inclusion of sex as a protected class. John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, in* FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 380, 381 (John J. Donohue III ed., 1997). The Senate, likewise, made no objection and women quickly found themselves under Title VII protections. *Id.*

[39] *See* Schlei, *supra* note 36, at viii. Prior to Title VII, only the National Labor Relations Act (NLRA) and the Railway Labor Act provided relief from employment discrimination, but not on the bases of race, creed, color or sex. *Id.* The NLRA served as a template for Title VII's remedial provisions. *Id.*

[40] *See* 42 U.S.C. § 2000e-2(a)(1) (proscribing disparate treatment); § 2000e-2(a)(2) (proscribing disparate impact); *See also* Teamsters v. United States, 431 U.S. 324, 348 (1977) (explaining the primary purpose of Title VII is to assure equality of employment and elimination of discrimination); Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) ("It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").

[41] *See Albermarle,* 422 U.S. at 417-18 (explaining that injunctive relief together with the prospect of a back pay award prompts employers to eliminate discriminatory practices).

[42] JOHN T. WOOLLEY & GERHARD PETERS, *Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Act*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=28799/ (last visited Nov. 18, 2007) (emphasis added). Although the Act included women under its umbrella of protection, President Johnson tellingly referred to men as the beneficiaries of the new law. *See id.*

of the Act, women still earn less than men in almost every profession, at every age and for every hour worked.[43] The outlook is particularly stark in Wyoming where the female-male earnings ratio ranks as the worst in the nation.[44] Women in Wyoming earn lower than national average wages and men earn higher than average pay.[45]

The Equal Employment Opportunity Commission and Title VII Amendments

The Civil Rights Act of 1964 created the EEOC to enforce Title VII's workplace discrimination measures.[46] By providing an agency that attempts to obtain a remedy before a party resorts to litigation, the EEOC promotes voluntary compliance with employment discrimination law.[47] As a compromise to getting the bill passed, the EEOC did not originally have enforcement powers.[48] As a result, many civil rights activists viewed the EEOC as a "toothless tiger."[49] In 1971 Congress held hearings on proposed amendments to Title VII finding workplace discrimination as widespread as ever, despite the best efforts of the EEOC.[50] Accordingly, Congress passed the Equal Opportunity Employment Act (EOEA) of 1972 to provide the Commission with the authority to litigate discriminatory

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[43] Daniel H. Weinberg, U.S. DEP'T OF COMMERCE, CENSUS 2000 SPECIAL REPORTS, EVIDENCE FROM CENSUS. 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 7 (2004).

[44] HEIDI HARTMANN, OLGA SOROKINA & ERICA WILLIAMS, INST. FOR WOMEN'S POLICY RESEARCH, BRIEFING PAPER R334, THE BEST AND THE WORST STATE ECONOMIES FOR WOMEN 9 (2006), http://www.iwpr.org/pdf/ R334_BWStateEconomies2006.pdf. In 2006 women in Wyoming made 60.7% of what men earned. *Id.*

[45] ANN M. ALEXANDER ET AL., WYO. COUNSEL FOR WOMEN'S ISSUES, STATE OF WYO., A STUDY OF THE DISPARITY IN WAGES AND BENEFITS BETWEEN MEN AND WOMEN IN WYOMING 5 (2003), http://www.wyomingwomens council.org/_pop-up_content/wage_disparity_intro.pdf. Although no agreement exists as to the cause of the gender wage gap, most scholars believe wage discrimination contributes to the disparity. *See* Michael Selmi, *Family Leave & the Gender Wage Gap*, 78 N.C. L. REV. 707, 715 (2000).

[46] *See* Pre 1965: Events Leading to the Creation of EEOC, http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html (last visited Nov. 10, 2007).

[47] *See* Miller v. Int'l. Tel. & Telegraph, Corp., 755 F.2d 20, 24 (2d Cir. 1985) (explaining tolling applies for one year while the EEOC attempts to obtain voluntary compliance); E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 77 (1984) (describing Congress's intent to encourage employers to voluntarily comply with Title VII).

[48] *See* Pre 1965: Events Leading to the Creation of EEOC, http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html (last visited Nov. 10, 2007).

[49] *See* 1965-1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public, http://www.eeoc.gov/ abouteeoc/35th/1965-71/index.html (last visited Nov. 10, 2007).

[50] *See* The 1970s: The "Toothless Tiger" Gets Its Teeth—A New Era of Enforcement, http://www.eeoc.gov/ abouteeoc/35th/1970s/index.html (last visited Nov. 10, 2007).

claims.[51] The EOEA also expanded Title VII protections to employees of most educational institutions and federal, state and local governments.[52]

The next major change to Title VII did not occur until 1991.[53] In July of 1989, in a series of limiting decisions dubbed the "July 1989 Massacre," the United States Supreme Court severely reduced Title VII's powers.[54] In response Congress passed the Civil Rights Act of 1991.[55]

With the 1991 amendment Congress overturned several cases including *Lorance v. AT&T Technologies,* a Title VII case dealing with seniority systems.[56] In *Lorance*, the Supreme Court ruled employees could not challenge facially neutral seniority systems that had discriminatory effects outside the 180-day EEOC filing period.[57] The 1991 amendment added language to Title VII allowing challenges to discriminatory seniority systems both when adopted by the company and when employees feel the discriminatory effects of the system.[58]

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[51] 42 U.S.C. § 2000e-5(a)-(g) (2006) (giving the Commission the power to bring a suit on behalf of employees suffering discrimination).

[52] *Id.* at § 2000e-16 (protecting employees of the federal government and governmental agencies from workplace discrimination).

[53] Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. (2006).

[54] *See* Wards Cove Paving Co. v. Atonio, 490 U.S. 642, 653 (1989) (holding racial imbalance in one segment of the workplace did not evidence disparate impact); Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53 (1989) (holding a defendant could avoid liability by showing he would have made the same decision in the absence of discrimination); Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 177 (1989) (holding the conditions of an employee benefit plan are exempt from the Age Discrimination in Employment Act if they are not used to discriminate in other non-fringe-benefit aspects); Patterson v. McLean Credit Union, 491 U.S. 164, 178 (1989) (holding that 42 U.S.C. § 1981, which gives persons of all races the same rights when entering into private contracts, does not apply to racial harassment relating to conditions of employment after contract formation); Lorance v. AT&T Technologies, 490 U.S. 900, 909 (1989) (holding the Title VII statute of limitations begins at the adoption of a seniority system, not when its effects are felt); Martin v. Wilks, 490 U.S. 755, 769 (1989) (reversing the trial court's dismissal of white firefighters' reverse discrimination claims on res judicata grounds). All preceding cases *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. (2006).

[55] Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. (2006).

[56] *See* Civil Rights Act of 1991, § 112, 105 Stat. 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)) (making an intentionally discriminatory seniority system unlawful, even if neutral on its face, when the system is adopted, when an individual becomes subject to the system, or when an individual is injured by application of the system).

[57] *Lorance*, 490 U.S. at 906, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[58] *See* 42 U.S.C. § 2000e-5(e)(2) (2006) (making an intentionally discriminatory seniority system unlawful, even if neutral on its face, when the system is adopted, when an individual becomes subject to the system, or when an individual is injured by application of the system).

Title VII Procedural Requirements

Title VII does not pave a wide and easy road leading to an economic windfall for those victimized by workplace discrimination.[59] If a complainant does not meet Title VII's procedural requirements, he or she cannot bring an otherwise legitimate claim.[60] For instance, an employee must file a claim with the EEOC before suing an employer.[61] Once investigated, the EEOC may choose to file suit on behalf of the complainant.[62] If it does not, the EEOC issues a "right to sue" letter to the complainant within 90 days.[63] Upon receiving the right to sue letter, the complainant can sue the employer in a civil court.[64] Requiring a complainant to exhaust his or her administrative remedies in this way allows the EEOC to encourage willing resolution through negotiation.[65]

Additionally, a statute of limitations applies to Title VII cases.[66] Urging employees to take quick action protects the balance of interests between Title VII protected groups and their employers.[67] Imposing time limits on bringing certain claims embodies a general notion that failing to notify a party of a pending claim against them is fundamentally unfair.[68] The relatively short limitations period of

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[59] *See Ledbetter II,* 127 S. Ct. at 2166 (explaining the procedural requirements of Title VII).

[60] *See, e.g.,* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002) ("A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within . . . 180 . . . days of the date of the act or lose the ability to recover for it."); Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980) (holding the statute of limitations barred complainant's claim because he did not challenge denial of tenure, but instead challenged actual termination occurring a year later); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) (holding no claim existed alleging current discrimination where prior unchallenged termination affected current seniority level).

[61] 42 U.S.C. § 2000(e)-5(e)(1) (2006).

[62] 42 U.S.C. § 2000e-5(f)(1) (2006).

[63] *Id.*

[64] *Id.*

[65] *Miller*, 755 F.2d at 26 ("The purpose of the notice provision, which is to encourage settlement of discrimination disputes through conciliation and voluntary compliance, would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC.").

[66] 42 U.S.C. § 2000(e)-5(e)(1) (2006) (requiring filing of a discrimination charge with the EEOC within 180 days of the "unlawful employment practice," or if the complainant files the charge with a state or local agency with authority to grant or seek relief from such practices, within 300 days of the "unlawful employment practice"). *Id.* Lilly Ledbetter lived and worked in Alabama, where there is no state or local agency with the authority to grant relief, therefore the author will assume a 180-day charging period for the purposes of this article. *See Ledbetter I,* 421 F.3d at 1178.

[67] *See Ledbetter II,* 127 S. Ct. at 2170.

[68] United States v. Kubrick, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'") (quoting R.R. Tel. v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944)).

180-days reflects Congress's preference for the quick resolution of employment discrimination claims through voluntary resolution and negotiation.[69]

Even with this congressional preference, courts have applied broad, flexible interpretations to many Title VII procedural limitations in the past.[70] Courts have generally been lenient when interpreting Title VII procedural requirements because lay-people, rather than trained attorneys, usually initiate proceedings.[71] In *Love v. Pullman*, a black "porter-in-charge" alleged that those in his position performed substantially the same work as conductors, most of whom were white, for less pay.[72] At trial the dispute centered on whether statutory requirements barred Love's claim since he did not file a second formal charge with the EEOC once the state commission formally discharged his claim.[73] The United States Supreme Court refused to require Love to file a second formal complaint, reasoning that the procedure followed fully complied with the intent and purposes of Title VII.[74] Concerned with the ability of employees to challenge discriminatory acts, the Supreme Court has also held that statutes of limitation "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."[75]

Despite the Court's flexible interpretation of Title VII's procedural requirements, failure to file a claim within 180-days of the unlawful employment

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[69] *See* Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980) ("By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.").

[70] Jeffery M. Fisher, Note, *In the Wake of* Lorance v. AT&T Technologies, Inc.*: Interpreting Title VII's Statute of Limitations for Facially Neutral Seniority Systems,* 1990 U. ILL. L. REV. 711, 712-13 (1990) (discussing Title VII policies of exposing discrimination, allowing laymen to vindicate their rights and eliminating inequity).

[71] *See* Egelson v. State Univ. Coll., 535 F.2d 752, 754 (2d Cir. 1976)

> Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act.

See also Love v. Pullman, 404 U.S. 522, 526-27 (1972) (describing actions which create additional procedural technicalities and nothing else as "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process").

[72] *Love,* 404 U.S. at 523. Love first filed a charge with the Colorado Civil Rights Commission, but the claim was terminated without a satisfactory conclusion. *Id.* Love then filed a "letter of inquiry" with the EEOC, and the EEOC orally informed the Colorado Commission that it had received the complaint. *Id.* at 524. The Colorado Commission waived the option to take further action and the EEOC filed suit on Love's behalf. *Id.*

[73] *Id.* at 524.

[74] *Id.* at 526-27.

[75] *Ricks*, 449 U.S. at 262 n.16.

practice has proven fatal to many employment discrimination claims.[76] Most Title VII discrimination claims hinge on two questions: 1) What is the unlawful employment practice complained of? and 2) Did the employee file a claim with the EEOC within 180-days of that act?[77]

Cases Defining an "Unlawful Employment Practice"

After the passage of Title VII the Court struggled to define what constituted an "unlawful employment practice" and when those practices occurred.[78] Starting with *United Airlines v. Evans* the Court made it clear that an unlawful employment practice occurred on the date of communication, and other later effects of that decision or act could not be challenged outside the 180-day filing period.[79] Several subsequent cases followed the *Evans* Court in refusing to recognize the effects of a discriminatory act as actionable.[80]

Starting with *United Airlines v. Evans*, the Supreme Court began to identify the specific employment acts at issue to determine when the Title VII filing period started to run.[81] In 1968, United Airlines (United) forced Carolyn Evans to resign because it refused to employ married flight attendants.[82] Despite her termination, Evans failed to file an EEOC charge within the requisite filing period.[83] United later rehired Evans, but calculated her seniority level using her new hire date, rather than her original hire date.[84] Evans sued United alleging that the company's refusal to give her credit for prior service gave current effect to past illegal acts and carried on the effects of unlawful discrimination.[85] While the Supreme Court agreed that the airline's actions continued to impact her pay, it determined no present violation existed.[86] United was free to treat the past act as lawful once the time for Evans to dispute the act had expired.[87] She could not sue based on

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[76] *See Evans*, 431 U.S. at 558; *Ricks*, 449 U.S. at 254; *Morgan*, 536 U.S. at 110; *Lorance,* 490 U.S. at 912, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[77] *Ledbetter II,* 127 S. Ct. 2179.

[78] *See infra* notes 79-131 and accompanying text.

[79] *See Evans*, 431 U.S. at 558.

[80] *Ricks*, 449 U.S. at 254; *Morgan*, 536 U.S. at 110; *Lorance,* 490 U.S. at 912, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[81] *Evans,* 431 U.S. at 558.

[82] *Id.* at 554.

[83] *Id.* at 554-55. At the time of Evans's suit the statute allowed 90 days from the unlawful employment act to file a claim. *Id.* at 558.

[84] *Id.* at 555.

[85] *Id.* at 557.

[86] *Evans,* 431 U.S. at 558.

[87] *Id.*

the effects of a previous unlawful act.[88] Evans could object to her termination immediately following its occurrence, but she could not attack effects of the termination later.[89]

The Supreme Court considered the firing of an employee for discriminatory reasons again in *Delaware State College v. Ricks*, and reached a similar conclusion.[90] In *Ricks*, Delaware State College denied tenure to a black Liberian professor.[91] The college did not terminate Ricks immediately, but gave him a final one-year contract.[92] The Court held that the EEOC charging period ran from "the time the tenure decision was made and communicated," not from the time of his actual termination.[93]

The Court again held the effects of a discriminatory act not independently actionable in *Lorance v. AT&T Technologies, Inc.*[94] In *Lorance*, the dispute arose out of AT&T's changes to seniority systems under a collective bargaining agreement.[95] Before the collective bargaining agreement, AT&T based its seniority simply on the number of years an employee worked for the company in any position.[96] The new agreement based seniority on the time an employee spent in the "tester" position alone, rather than time the employee spent with the company overall.[97] Female testers did not feel the full effect of this change until several years later when AT&T made lay-off decisions.[98] At that point, AT&T laid-off many female testers, who had long service records with the company, but did not work as testers during their entire tenure.[99] On the other hand, AT&T retained many men who had more seniority in the tester position, but less seniority than the female testers

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[88] *Id.*

[89] *Id.*

[90] *Ricks,* 449 U.S. at 254.

[91] *Id.* at 252.

[92] *Ricks,* 449 U.S. at 252-53. Ricks neglected to file an EEOC charge alleging a discriminatory tenure decision until just before the one-year contract expired. *Id.* at 252. Ricks argued that the EEOC filing period ran from the date of his actual termination, not from the decision to deny tenure. *Id.* The Supreme Court disagreed and stated that the decision to deny tenure constituted the actual unlawful employment act even though actual termination, one of the effects of the decision, did not occur until later. *Id.* at 253.

[93] *Id.* at 258.

[94] *Lorance,* 490 U.S. at 912, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[95] *Id.* at 901-02.

[96] *Id.*

[97] *Id.* Male employees traditionally filled the highly skilled position of "tester." *Id.* at 902-03.

[98] *Id.* at 902.

[99] *Lorance,* 490 U.S. at 902-03, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

overall.[100] When the female employees filed charges with the EEOC, the Supreme Court held that time barred the suits because the discrete act of adopting the new seniority system occurred more than 180-days before the women filed their EEOC charges.[101] Their firing was merely an effect of the discrete action and therefore not actionable on its own.[102]

In a recent decision, *National Railroad Passenger Corp. v. Morgan,* the Supreme Court differentiated between discrete acts of discrimination and acts that make up a pattern or practice of discrimination in the workplace.[103] Morgan, a black employee, sued Amtrak alleging that the company had wrongfully suspended him, denied training, falsely accused him of threatening a manager and subjected him to a hostile work environment.[104] In its decision, the *Morgan* Court separated discriminatory acts into two categories.[105] First, an act could consist of a series of events, none of which represent a claim on their own, but together amount to an "unlawful employment practice."[106] For these types of actions a complainant could reach outside of the 180-day filing period to prove discriminatory intent as long as at least one of the acts occurred within the 180-day period.[107] Second, an act could be a distinct, one-time occurrence such as a hiring, firing, or promotion.[108] A complainant could challenge these acts independently, and must file a claim within 180-days of the occurrence of this type of act.[109] In Morgan's case, the Court held the complainant could only challenge the discrete discriminatory acts occurring within the filing period.[110] Time barred an individual claim for all other discrete, easily identifiable acts, but they could serve as evidence to support Morgan's hostile work environment claim.[111]

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[100] *Id.*

[101] *Id.* at 906.

[102] *Id.* The Civil Rights Act of 1991 supersedes the *Lorance* decision by making an intentionally discriminatory seniority system unlawful, even if neutral on its face, when the system is adopted, when an individual becomes subject to the system, or when an individual is injured by application of the system. Civil Rights Act of 1991, § 112, 105 Stat. 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)).

[103] *Morgan*, 536 U.S. at 105.

[104] *Id.* at 115.

[105] *Id.* at 111-15.

[106] *Id.* at 115-16.

[107] *Id.* A hostile work environment is an example of such an employment practice. *See id.* at 105.

[108] *Morgan*, 536 U.S. at 111-13.

[109] *Id.* at 111-13. The Court stressed the need to identify the exact employment practice at issue to determine which category to apply. *Id.* at 110-11.

[110] *Id.* at 114.

[111] *Id.* at 115. As for Morgan's claim, the Court held evidence from outside the filing period can help determine liability, as long as at least one act contributing to the claim occurred with in the specified period. *Id.* at 117. The Court ultimately remanded the case for a determination of Amtrak's liability. *Id.* at 122.

These four cases clearly illustrate that an employee must challenge a discrete discriminatory act within the prescribed filing period.[112] None of these cases, however, dealt with Lilly Ledbetter's problem, that of discriminatory paychecks.[113]

The "Paycheck Accrual Rule"

Before *Ledbetter v. Goodyear*, the only Supreme Court decision dealing with discriminatory paychecks was *Bazemore v. Friday.*[114] In that case, African-American employees of the North Carolina Agricultural Extension Service (the Extension Service), a federal agency, brought suit against the United States.[115] The Extension Service historically separated its employees into a "white branch" and a "negro branch," with the "negro branch" receiving less pay.[116] In 1965, the Extension Service merged the two branches, but did not adjust the wages to compensate for the previous differences.[117] Since the Civil Rights Act of 1964 did not extend its protections to federal government employees, the Extension Service did not violate federal law by allowing the disparities to continue.[118] When the 1972 amendment to Title VII made discrimination by the federal government actionable, African-American employees of the Extension Service filed suit.[119]

The Supreme Court found the merging of the two branches in 1965 did not eliminate the difference in salaries.[120] The Court reasoned while the discriminatory pay scale was not unlawful at the time of the merging in 1965, it perpetuated discrimination by the Extension Service from 1972 onward.[121] While the African American employees could not recover back pay for the time that Title VII did not prohibit such discriminatory pay scales, they could recover for post-1972 disparate pay.[122] The practice of keeping two pay scales would have been a violation of Title VII had the statute applied to the Extension Service in 1964; therefore, once the Extension Service came under Title VII protections, the dual pay scale system

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[112] *See supra*, notes 78-111 and accompanying text.

[113] *See Ledbetter II*, 127 S. Ct. at 2172 (explaining Ledbetter's argument that her case is not governed by the *Evans*, *Ricks*, *Lorance*, and *Morgan* line of cases, but rather by *Bazemore v. Friday*, 478 U.S. 385 (1986) (*per curiam*) a case dealing specifically with disparate pay).

[114] *See Bazemore*, 478 U.S. at 394 (Brennan, J., concurring). Justice Brennan wrote a concurrence which all other members of the Court joined. *Id.* at 389.

[115] *Id.* at 391 (Brennan, J., concurring).

[116] *Id* at 390 (Brennan, J., concurring).

[117] *Id.* at 390-91 (Brennan, J., concurring).

[118] *See* Spriggs, *supra* note 32, at § 1.8.

[119] *Bazemore,* 478 U.S. at 390 (Brennan, J., concurring).

[120] *Id.* at 395 (Brennan, J., concurring).

[121] *Id.* (Brennan, J., concurring).

[122] *Id.* (Brennan, J., concurring).

became unlawful.[123] To the degree the Extension Service issued discriminatory paychecks under that system, it owed employees compensatory back pay.[124]

The Extension Service hired new employees at equal salaries after the 1965 merger; however, some of these employees alleged discriminatory pay stemming from individual pay decisions, not from the two-branch system.[125] The Court concluded that the Extension Service had an obligation to remedy any racially motivated pay disparities present after 1972, whether stemming from a facially discriminatory pay scale or from individual discriminatory decisions.[126] The Court maintained that each time the Extension Service paid a black man less than a similarly situated white man it violated Title VII, regardless of whether the Extension Service acted legally when discriminating in the first instance.[127]

Since the 1985 *Bazemore* opinion, the majority of circuits followed Justice Brennan's "paycheck accrual rule."[128] This rule states that each paycheck constitutes a separate employment practice and with each issuance of a paycheck a separate filing period begins to run, during which the employee has 180-days to challenge the discriminatory paycheck.[129] The EEOC, too, interpreted the Act as allowing employees to challenge disparate pay each time an employer issues a paycheck.[130] It is against the background of these five cases that Lilly Ledbetter brought her discriminatory pay claim against Goodyear.

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[123] *Id.* (Brennan, J., concurring).

[124] *Bazemore,* 478 U.S. at 395 (Brennan, J., concurring).

[125] *Id.* at 397 n.8 (noting these "two distinct types of salary claims") (Brennan, J., concurring).

[126] *Id.* (Brennan, J., concurring).

[127] *Id.* at 395-96 (Brennan, J., concurring) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.").

[128] *See, e.g., Cardenas*, 269 F.3d at 258 (Third Circuit holding that "in a Title VII case claiming discriminatory pay, the receipt of each paycheck is a continuing violation"); *Ashley*, 66 F.3d at 168, *abrogated on other grounds by* Madison v. IBP, Inc., 330 F.3d 1051 (8th Cir. 2003) (Eighth Circuit holding that "Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge"); *Brinkley-Obu*, 36 F.3d at 346 (Fourth Circuit holding that "paychecks are to be considered continuing violations of the law when they evidence discriminatory wages"); *Calloway*, 986 F.2d at 446 (Eleventh Circuit holding that "contrary to Partners' assertions, Calloway's wage claim is not a single violation with a continuing effect . . . When the claim is one for discriminatory wages the violation exists every single day the employee works"); *Gibbs*, 785 F.2d at 1400 (Ninth Circuit holding that "the policy of paying lower wages . . . on each payday constitutes a continuing violation") (internal quotation marks omitted); *Hall*, 669 F.2d at 398 (Sixth Circuit holding the "the discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received.").

[129] *See Bazemore*, 478 U.S. at 395-96 (Brennan, J., concurring).

[130] 2 EEOC Compliance Manual §2-IV-C(1)(a), p. 605:0024, n.183 (2006) ("[R]epeated occurrences of the same discriminatory employment action, such as a discriminatory paycheck, can be challenged as long as one discriminatory act occurred within the charge filing period.").

PRINCIPAL CASE

At the end of her nineteen year career, Lilly Ledbetter learned Goodyear consistently paid her less than her male counterparts.[131] After confirming this information, Ledbetter filed an EEOC questionnaire alleging sex discrimination.[132] Title VII of the Civil Rights Act requires that a complainant file such a charge within 180-days of the unlawful employment practice.[133] At trial, Ledbetter alleged that each discriminatory paycheck Goodyear issued constituted an unlawful employment act and that she received several paychecks in the 180-days before filing her EEOC charge.[134] The trial court agreed, and awarded Ledbetter a back pay and punitive damages award.[135] Goodyear appealed, arguing paychecks constituted merely a discriminatory effect and could not be challenged on their own.[136] The United States Court of Appeals for the Eleventh Circuit agreed with Goodyear and reversed the trial court's decision.[137] Ledbetter appealed to the United States Supreme Court.[138]

The Majority Opinion

The majority agreed with the Eleventh Circuit ruling that Ledbetter's paychecks simply represented effects of past discriminatory decisions.[139] According to the Supreme Court, the actual pay-setting decisions constituted the discriminatory act.[140] Two pay-setting decisions occurred within 180-days of Ledbetter's EEOC claim; however, no evidence supported discriminatory intent behind those two acts.[141] As a result Ledbetter could not prevail on her discriminatory pay claim.[142]

The Effects of Discrete Acts Are Not Actionable

The *Ledbetter* Court relied on the *Evans*, *Ricks, Lorance* and *Morgan* series of Title VII decisions to support the holding that the time for filing a charge with

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[131] *Ledbetter I*, 421 F.3d at 1174.

[132] *Ledbetter II*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting).

[133] 42 U.S.C. § 2000(e)-5(e)(1) (2006).

[134] *Ledbetter I,* 421 F.3d at 1181.

[135] *Id.* at 1175-76.

[136] *Id.* at 1181.

[137] *Id.* at 1181-84.

[138] *See Ledbetter II,* 127 S. Ct. at 2165.

[139] *Id.*

[140] *Id.* at 2167.

[141] *See id.* at 2166.

[142] *See id.* at 2172.

the EEOC begins when the "unlawful employment practice" occurs.[143] Ledbetter urged the Court to view each issuance of a paycheck paying her less than similarly situated males as the exact employment practice at issue.[144] The Court rejected this argument stating a paycheck represents merely an effect of a specific employment practice and is not actionable on its own.[145]

The Court viewed Ledbetter's depressed paychecks as merely effects of past unlawful pay setting decisions.[146] Because Ledbetter did not challenge the actual pay decisions within 180-days, the discriminatory decision to pay her less than her male counterparts was "an unfortunate event in history which ha[d] no present legal consequences."[147]

Applying *Delaware State College v. Ricks*, the Court reasoned Ledbetter could have disputed the decisions to pay her less than her male counterparts, but not the paychecks implementing those decisions.[148] Because Ledbetter failed to identify any specific discriminatory act persisted until, or took place at the time of, her resignation, time barred her Title VII claim.[149]

The *Ledbetter* Court relied on the same analysis that instructed its decision in *Lorance v. AT&T Technologies, Inc.*[150] The *Lorance* Court saw the termination of female employees as an effect of adopting a facially neutral seniority system.[151] As in *Evans* and *Ricks*, the *Lorance* Court held that the time to challenge a discriminatory act started at the moment of the alleged discrimination, not when employees felt the effects of that discrimination.[152] Like the female AT&T employees, suffering termination more than 180-days after adoption of a discriminatory seniority

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[143] *See Evans*, 431 U.S. at 558; *Ricks*, 449 U.S. at 254; *Morgan*, 536 U.S. at 110; *Lorance*, 490 U.S. at 912, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[144] *Ledbetter II*, 127 S. Ct. at 2167.

[145] *Id.*

[146] *Id.*

[147] *Ledbetter II,* 127 S. Ct. at 2168 (quoting United Airlines v. Evans, 431 U.S. 553, 558 (1977)). The Court went on to state "[i]t would be difficult to speak to the point more directly" than the *Evans* decision. *Ledbetter II,* 127 S. Ct. at 2168.

[148] *See Ledbetter II*, 127 S. Ct. at 2168. Ricks challenged his actual termination, which occurred more than 180-days after the College's denial of tenure. *Ricks,* 449 U.S. at 254. The Court denied his claim because he failed to name an employment act that "continued until, or occurred at the time of, the actual termination of his employment." *Id.* at 257.

[149] *See Ledbetter II,* 127 S. Ct. at 2168.

[150] *Id.*; *Lorance,* 490 U.S. at 912, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. The female AT&T employees did not challenge the new seniority system within the specified filing period, nor did they allege the company adopted a facially discriminatory system or applied the system in a discriminatory way. *Id.* at 907-08.

[151] *Lorance.* 409 U.S. at 907-08.

[152] *Id.* at 912.

system, Ledbetter could not challenge the paychecks issued more than 180-days after the decisions to pay her less.[153]

Finally, the Court referenced *National Railroad Passenger Corp. v. Morgan* to define the phrase "employment practice" as one that generally refers to "a discrete act or single 'occurrence'" that takes place at a particular point in time.[154] Termination, failure to promote, denial of transfer, and refusal to hire qualify as such discrete acts.[155] The Court used *Morgan* to support its decision that the acts Ledbetter complained of must occur within the 180-day charge filing period.[156]

The *Evans, Ricks, Lorance* and *Morgan* line of cases led the Court to decide that a new infraction, with a fresh filing period, does not occur when non-discriminatory actions carry out past discriminatory acts.[157] For example, the issuance of a depressed paycheck is not a new violation simply because it gives effect to a past discriminatory decision.[158] Since Ledbetter argued that Goodyear's issuance of depressed paychecks gave present effect to discriminatory acts outside the 180-day filing period, but made no claim that intentionally discriminatory conduct occurred within the filing period, she could not maintain her claim.[159]

The "Paycheck Accrual Rule" Does Not Apply

The *Ledbetter* Court declined to follow *Bazemore v. Friday* while not specifically overruling it.[160] The Court explained that Ledbetter interpreted Justice Brennan's decision in *Bazemore* too broadly.[161] According to the Court, the "paycheck accrual rule" applied only to situations involving facially discriminatory wage practices.[162] Because Ledbetter did not prove, or even assert, a facially discriminatory pay system, the Court held *Bazemore* did not apply to her case.[163] Since Goodyear's pay system did not assign some employees to a lower scale based on their gender, Goodyear did not engage in intentional discrimination each time it delivered a depressed paycheck.[164] Ledbetter's paychecks were merely an *effect* of

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[153] *See Ledbetter II,* 127 S. Ct. at 2168.

[154] *Id.* at 2169 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-11 (2002)).

[155] *Ledbetter II*, 127 S. Ct. at 2169.

[156] *Id.*

[157] *Id.*

[158] *Ledbetter II,* 127 S. Ct. at 2169.

[159] *Id.* ("Ledbetter should have filed an EEOC charge within 180-days after each allegedly discriminatory pay decision was made and communicated to her.").

[160] *Id.* at 2167, 2173-74.

[161] *Id.* at 2173.

[162] *Id.*

[163] *Ledbetter II,* 127 S. Ct. at 2174.

[164] *Id.* at 2173.

the discriminatory pay raise decisions by her supervisors.[165] The Court determined the paychecks do not stand alone; Ledbetter could dispute only the pay decisions themselves.[166] Because Goodyear made the individual decisions to pay Ledbetter a lower wage based on her gender before the 180-day charging period, the statute of limitations barred review of these decisions under Title VII.[167]

The Dissent

The dissenting opinion, written by Justice Ginsburg and joined by Justices Souter, Breyer and Stevens, argued that pay disparities have a closer kinship to situations where the cumulative effect of discriminatory behavior comprises the "unlawful employment practice," like hostile work environment claims.[168] In contrast to the hiring or firing of an employee, pay discrimination does not generally appear as a fully communicated, discrete act.[169] Pay disparities often occur in small increments which are either not actionable on their own, or not worth the time, hassle, or prospect of retaliation.[170] Only when these small disparities compound over time, does an employee realize her situation and find it worthwhile to complain.[171]

The *Ledbetter* dissent explained that pay disparities differ from the termination and failure to promote actions of *Evans, Ricks* and *Morgan.*[172] Employees can easily identify terminations, promotions and demotions as potentially discriminatory practices.[173] An employer communicates these types of "discrete acts" directly to the employee and such decisions become common knowledge among other employees.[174] An employee must challenge these decisions within 180-days and the effects of these decisions are not actionable on their own.[175]

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[165] *Id.* at 2169.

[166] *Id.* at 2174.

[167] *Id.* Two pay setting decisions did occur during the 180-day charging period. *Id.* at 2166. Ledbetter did not present evidence showing these decisions as discriminatory, but rather argued that the decisions were actionable because they gave effect to previous unlawful decisions. *Id.* at 2167. The Court summarily rejected this argument as challenging an effect of an employment practice, not an actual act. *Id.*

[168] *Ledbetter II,* 127 S. Ct. at 2178-79 (Ginsburg J., dissenting).

[169] *Id.* at 2179 (Ginsburg, J., dissenting).

[170] *Id.* (Ginsburg, J., dissenting).

[171] *Id.* at 2179 (Ginsburg, J., dissenting). Goodyear's pay system based pay raises on a percentage of the employee's current salary; therefore each of Ledbetter's pay decisions reaffirmed her unlawfully low base salary. *Id.* (Ginsburg, J., dissenting).

[172] *Id.* at 2182 (Ginsburg, J., dissenting).

[173] *Ledbetter II,* 127 S. Ct. at 2182. (Ginsburg, J., dissenting).

[174] *Id.* at 2181. (Ginsburg, J., dissenting).

[175] *Id.* at 2169.

The dissent argued challenges to discriminatory pay, however, are different and deserve individual treatment.[176] A discriminatory pay decision often appears as good news, perhaps as a raise.[177] Employers frequently refuse to disseminate salary information and employees often keep their earnings confidential.[178] Once an employee suspects discrimination the discrepancy may seem too small to dispute or the employer's intent too ambiguous to prove.[179] Like a hostile work environment, where many events make up one discriminatory employment practice, each paycheck Goodyear issued aggravated Lilly Ledbetter's injury.[180]

ANALYSIS

This analysis section begins by exploring the Court's decision in light of the realities of the workplace.[181] Next, it discusses the Court's misapplication of *United Airlines v. Evans* and subsequent cases centering on discrete employment acts.[182] Third, the analysis discusses the effect of the *Ledbetter* decision on bringing claims in the future.[183] Finally, the analysis argues that Congress must declare the receipt of each paycheck an actionable employment practice and lengthen the 180-day filing period.[184]

The Court's Decision Ignores the Realities of Pay Discrimination

The Court's ruling plainly ignores the realities of the workplace.[185] Employees do not identify pay disparities immediately.[186] Employers frequently encourage

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[176] *Id.* at 2179 (Ginsburg, J., dissenting).

[177] *Id.* (Ginsburg, J., dissenting).

[178] *Ledbetter II,* 127 S. Ct. at 2181-82 (Ginsburg, J., dissenting).

[179] *Id.* at 2182 (Ginsburg, J., dissenting).

[180] *Id.* at 2181 (Ginsburg, J., dissenting).

[181] *See infra* notes 185-204 and accompanying text for a discussion of obstacles in perceiving and reporting discrimination in the workplace.

[182] *See infra* notes 205-220 and accompanying text.

[183] *See infra* notes 221-237 and accompanying text for a discussion of a discovery rule and equitable tolling.

[184] *See infra* notes 268-285 and accompanying text. At the outset, it is important to observe that this note references female employees because Ledbetter's case dealt with gender discrimination. However, the Supreme Court's "cramped" reading of Title VII in *Ledbetter* affects the ability of other protected classes to maintain similar actions. *Ledbetter II,* 127 S. Ct at 2188 (Ginsburg, J., dissenting). The Court's decision arguably impacts women less than those experiencing discrimination because of race, creed, color or national origin. *Id.* at 2186 (Ginsburg, J., dissenting). No specific legislation, such as the Equal Pay Act, protects these other classes from disparate pay. *Id.* (Ginsburg, J., dissenting).

[185] *Ledbetter II,* 127 S. Ct. at 2178-79 (Ginsburg, J., dissenting).

[186] *Id.* at 2179 (Ginsburg, J., dissenting).

workers not to discuss salaries with other employees.[187] Even if an employer does not discourage discussing pay, social etiquette often keeps workers from sharing salaries with one another.[188] Because of this, those suffering from wage discrimination often only learn of the disparity when a colleague informs them or by some other accident.[189] When a company fires, demotes or refuses to promote an employee, she can seek explanation from the employer.[190] Pay discrimination, however, rarely comes with an explanation, comparative information or other recognizable sign of prejudice.[191]

The *Ledbetter* Court also disregarded how victims perceive and react to real-life discrimination.[192] Those who suffer disparate treatment often do not immediately identify discrimination as the cause.[193] Even if an employee recognizes discrimination for what it is, this does not mean she will immediately file an EEOC charge.[194] Employees often fear retaliation, whether legal or illegal, from their employers.[195] Complaining employees may worry about a reputation as a troublemaker or "squeaky wheel."[196] Unwillingness to disrupt the workplace or to compromise her own position may lead an employee to tolerate a pay disparity even after she has learned of her employer's discrimination.[197]

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[187] *See* Leonard Bierman, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004) (explaining one-third of United States private employers have adopted specific pay secrecy policies even though such policies directly conflict with the law).

[188] *See* Abby Ellin, *Want To Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, § 3, at 9.

[189] *See, e.g.,* Goodwin v. General Motors Corp., 275 F.3d 1005, 1008-09 (10th Cir. 2002) (describing a situation where complainant did not know what other employees earned until a printout of employee salaries appeared on her desk, showing that her starting wage was lower than that of her co-workers).

[190] Brief for Nat'l Partn. Women & Fams. as Amici Curiae Supporting Petitioner-Appellant at 13, Ledbetter v. Goodyear Tire and Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2570985. [hereinafter Brief for Nat'l Partn. Women & Fams.].

[191] *Id.*

[192] *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25 (2005) (discussing psychological and social forces working to stifle claims of discrimination).

[193] *Id.* at 27 (describing subjects of a research experiment who consistently blamed poor test results on themselves even when told their evaluator was biased against their social group).

[194] *Id.* at 37 (discussing the social costs, such as retaliation, of reporting perceived discrimination).

[195] *Id.* at 20. Title VII makes it illegal to fire an employee because he or she files an EEOC claim. 42 U.S.C. § 2000e-3(a) (2006). *But see* Clark County School District v. Breeden, 532 U.S. 268, 271 (holding Title VII protections against retaliation only apply if the employee holds a reasonable belief of discrimination).

[196] *See* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 819 (2006) (finding that regardless of their gender, subjects of a research experiment regarded a fellow test-taker as more of a "complainer" if he or she blamed failure on discrimination by the grader rather than their own skills).

[197] Brief for Nat'l Partn. Women & Fams. *supra* note 190, at 13.

Although *Ledbetter* involved an employee with a long work history, the Court's opinion places a special burden on new employees.[198] Inexperienced employees lack knowledge of the particular workplace and established relationships with co-workers which foster the ability to recognize discrimination.[199] Terminated new employees face special risks because they lack an established employment record to demonstrate their firings resulted from discrimination rather than poor job performance.[200]

The Court's decision is not in line with workplace realities.[201] It takes time and well established relationships for employees to learn of pay disparities.[202] The Court's decision that any perceived discrimination must be challenged within 180-days of the pay-setting decision does not allow enough time for discovery of the disparities.[203] Even if an employee does discover the disparity, he or she may hesitate to report it because of real social and professional costs.[204]

Ledbetter's Case is Not Controlled by United Airlines v. Evans

The Court mistakenly emphasized the *Evans, Ricks, Lorance*, and *Morgan* line of cases.[205] These cases stand for the principle that discrete discriminatory acts must be challenged within 180-days of their occurrence.[206] Ledbetter, however, challenged her disparate pay.[207] She did not challenge the effect of a clearly communicated decision such as termination or tenure denial.[208] Her case turns on whether a discriminatory paycheck constitutes a present violation of Title VII.[209] Nothing in *Evans*, *Ricks*, *Lorance*, or *Morgan* speaks to the issue of paychecks at all.[210]

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[198] *Id.* at 15.

[199] *Id.*

[200] *Id.*

[201] *See supra* notes 185-204 and accompanying text.

[202] *See supra* note 199 and accompanying text.

[203] *See supra* notes 192-197 and accompanying text.

[204] *See supra* notes 195-200 and accompanying text.

[205] Reply Brief of Petitioner-Appellant at 16, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2610990.

[206] *See supra* notes 78-130 and accompanying text.

[207] *Ledbetter II,* 127 S. Ct. at 2167.

[208] Reply Brief of Petitioner-Appellant, *supra* note 205, at 16.

[209] *Ledbetter II,* 127 S. Ct. 2167.

[210] Reply Brief of Petitioner-Appellant, *supra* note 205, at 3. While Evans alleged that she received less pay, she did not allege that United decided to pay her less because of her sex, but instead that United's unlawful act affected her seniority level. *Id.* Ledbetter, on the other hand brought an ordinary disparate pay claim, alleging Goodyear decided to pay her less based on gender. *Id.*

Bazemore v. Friday is the only United States Supreme Court case addressing whether pay discrimination occurs with the pay decision alone, or each time the employer issues a paycheck.[211] The *Ledbetter* Court reasoned that *Bazemore* only applies to facially discriminatory pay systems.[212] However, the *Bazemore* decision, itself, made no such distinction.[213]

Only a slight difference exists between a facially discriminatory pay system and individual acts of discrimination.[214] A facially discriminatory system victimizes with each application because it treats similarly situated employees differently.[215] An individual discriminatory pay decision likewise treats similarly situated workers differently by paying one employee less than others doing the same work.[216]

Further undermining its case, the *Ledbetter* Court supported its decision with *Lorance v. AT&T Technologies,* which Congress overruled in 1991.[217] *Lorance* dealt with a "facially non-discriminatory and neutrally applied" seniority system.[218] The *Ledbetter* Court also interpreted Goodyear's pay system as facially non-discriminatory and neutrally applied.[219] Nevertheless, as Congress made clear by overturning *Lorance*, a facially non-discriminatory and neutrally applied system does not reside outside the sphere of Title VII protections.[220]

When Does the Clock Start Ticking?

The *Ledbetter* Court left several unanswered questions regarding how the Title VII limitations period now applies.[221] Most troubling, the Court made no

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[211] *Id.*

[212] *Ledbetter II,* 127 S. Ct. at 2174.

[213] *Bazemore,* 478 U.S. at 397 n.8 (noting "two distinct types of salary claims," those stemming from the Extension Service's facially discriminatory pay system existing before 1965 (a facially discriminatory practice) and individual decisions discriminating against black employees hired after 1965 at equal starting pay (a facially neutral practice)).

[214] *See* Reply Brief of Petitioner-Appellant, *supra* note 205, at 9.

[215] *See id.*

[216] *See id.*

[217] *Ledbetter II,* 127 S. Ct. at 2183 (Ginsburg, J., dissenting) ("The Court's extensive reliance on *Lorance* . . . is perplexing for that decision is no longer effective."). *Id.* Congress superseded the *Lorance* decision with the Civil Rights Act of 1991, making discriminatory seniority systems actionable when implemented or when employees feel the impacts of the system. Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[218] *Lorance*, 490 U.S. at 911, *superseded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[219] *See Ledbetter II,* 127 S. Ct. 2174.

[220] *See* Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

[221] Deborah Brake & Joanna Grossman, *Reviving Title VII's Protection Against Pay Discrimination In the Wake of the Supreme Court's Harsh Decision: A Call for Congressional Action*, FINDLAW, July 10, 2007, http://writ.news.findlaw.com/commentary/20070710_brake.html (last visited Nov. 13, 2007). [hereinafter Brake & Grossman].

clear statement defining what kind of information an employee must know in order to start the 180-day limitation "clock."[222] It stated only that the employee must file a claim 180 days from when the employer made and communicated the discriminatory pay decision.[223] Read strictly, the employee must file an EEOC claim within 180 days of every pay decision made, even if she does not discover or suspect discrimination during that 180-day period.[224] "If so, then Title VII pay claims have just been relegated to the dustbin of civil rights history."[225]

Discovery Rule

Perhaps the majority meant the clock starts ticking when an employee discovers the employer's discriminatory intent.[226] Instead of providing guidance as to what the employee must know and when, the Court simply stated it has never specified whether a discovery rule applies to Title VII.[227] A discovery rule stops the limitations period from starting until the employee discovers (or reasonably should have discovered) the facts establishing a claim.[228] If a court decides to apply a discovery rule, there exists no clear rule on how much an employee must know to trigger the filing period.[229] The clock may start to tick when an employee learns she received less pay than her male counterparts, or simply that she received a lower raise than her colleagues.[230] But even more specific pay information will often not alert an employee to a potential claim without other circumstances pointing to underlying discrimination.[231] Instead of fashioning a bright-line rule, the Court has left it to the lower federal courts to decide how to apply a discovery rule, if at all.[232]

Equitable Tolling

If the lower courts decide against applying a discovery rule, equitable tolling may operate to delay the start of the filing period until the complainant discovers

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[222] *Id.*

[223] *Ledbetter II*, 127 S. Ct. at 2169.

[224] Brake & Grossman, *supra* note 221.

[225] *Id.*

[226] *Id.*

[227] *Ledbetter II*, 127 S. Ct. at 2177 n.10 (stating that the Court declined to address whether a discovery rule applied to Title VII in *Morgan*, and declining to do so in this case).

[228] *See* Nelson v. Krusen, 678 S.W.2d 918, 920 (Tex. 1984) (holding that the statute of limitations to bring a wrongful birth suit did not begin to run until the parents of a sick child knew of, or through diligence and care should have known of, their child's illness).

[229] Brake & Grossman, *supra* note 221.

[230] *Id.*

[231] *Id.*

[232] *Id.*

she has been a victim of disparate pay.[233] Equitable tolling functions to stop the statute of limitations from running when the accrual date for a claim has already passed.[234] While the Supreme Court has held that equitable tolling applies to Title VII cases, it has limited application to extraordinary circumstances, such as active concealment by an employer.[235] Tolling may also apply to practices where an employee can show a reasonably prudent person could not possibly have discovered the discriminatory intent behind the act until after the filing period expired.[236] While equitable tolling should certainly apply in such drastic situations, active concealment and practical impossibility are not the classic reasons why victims do not recognize pay discrimination.[237]

Protection from Stale Claims

The Court argued that limiting challenges to discrete pay decisions, rather than allowing each paycheck to stand alone as a discrete act "protect[s] employers from the burden of defending claims arising from employment decisions that are long past."[238] But, as the dissent pointed out, Goodyear inflicted increasing damage with each paycheck issued; the employment decision was not long past.[239] An employee cannot begin the process of recovery when the pay decision occurs because there is nothing to recover until the employee receives the paycheck.[240]

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[233] *Id.*

[234] Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994). The doctrines of equitable tolling and the discovery rule are similar because they both require the plaintiff to exercise due diligence in discovering an injury. *Id.* at 1390. The difference lies in the type of knowledge the plaintiff must acquire. *Id.* The discovery rule focuses on a plaintiff's knowledge of an actual injury. *Id.* Equitable tolling, however, focuses on a plaintiff's knowledge of the facts that support a cause of action. *Id.* Additionally, equitable tolling serves to stop the statute of limitations from running once a cause of action has accrued, where the discovery rule functions to start the statute of limitations when the plaintiff learns of the cause of action. *See id.* at 1385, 1390.

[235] Olson v. Mobil Oil Corp., 904 F.2d 198, 201 (4th Cir. 1990) (stating that equitable tolling only applies when an employer has "wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action" (quoting English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987)); Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) (holding that equitable tolling applies to Title VII cases).

[236] *Miller*, 755 F.2d at 24 (suggesting "[a]n extraordinary circumstance permitting tolling of the time bar on equitable grounds might exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory") (internal quotation marks omitted).

[237] *See* Brake & Grossman, *supra* note 221. *See also, supra* notes 185-220 and accompanying text for a discussion of the classic reasons employees do not recognize discrimination.

[238] *Ledbetter II*, 127 S. Ct. at 2170 (quoting Ricks v. Del. State. Coll., 449 U.S. at 250, 256-57 (1979)).

[239] *Id.* at 2185-86 (Ginsburg, J., dissenting) ("As she alleged, and as the jury found, Goodyear continued to treat Ledbetter differently because of sex each pay period, with mounting harm.").

[240] *See* Brief for Nat'l Partn. Women & Fams, *supra* note 190, at 9.

Goodyear supervisors had access to pay information and refused to remedy Ledbetter's disparate pay situation even though she obviously earned less money than every other man in her position.[241] Just as the Extension Service in *Bazemore* had a duty to repair discriminatory pay disparities, Goodyear had an obligation to ensure that Ledbetter's pay decisions and paychecks did not carry forward salary disparities based on gender.[242]

Allowing employees to challenge discrimination that began before the charging period and continue into it will not "leave employers defenseless" against unfair or harmful delay.[243] The defense of laches will protect the employer when delay prejudices a party.[244] This provision will effectively eliminate stale claims.[245] The courts can also employ waiver, estoppel and equitable tolling, allowing the ability to correct discrimination and give an employer adequate notice of a claim.[246] Additionally, although the majority of lower circuit courts applied the paycheck accrual rule for twenty years, Goodyear presented no evidence that the rule had inundated employers with an unreasonable number of stale pay claims.[247]

Congressional Intent in Title VII's Back Pay Provision and Civil Rights Act Amendments

The Court's holding in *Ledbetter* does not promote Title VII's goals of preventing discrimination and compensating victims.[248] The Court abandoned the broad and equitable approach of its previous Title VII decisions, establishing evenhanded administration of the law as its first priority.[249]

The *Ledbetter* Court refused to adopt a "special rule" for pay discrimination cases.[250] Title VII's back pay provision, however, indicates that Congress intended

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[241] *See* Reply Brief of Petitioner-Appellant, *supra* note 205, at 20.

[242] *See Bazemore,* 478 U.S. at 397.

[243] *See* Hearings, *supra* note 2, at 10 (testimony of Prof. Deborah Brake). It is the employee, not the employer, who suffers when a suit is delayed. *Id.* The plaintiff carries the burden of proof and evidence of intentional discrimination is harder to discover as time passes. *Id.*

[244] *Morgan*, 536 U.S. at 121 (explaining the defense of laches can block suit from a complainant "if [an employee] unreasonably delays in filing and as a result harms the defendant").

[245] *Ledbetter II,* 127 S. Ct. at 2186 (Ginsburg, J., dissenting).

[246] *Zipes*, 455 U.S. at 398 (holding application of waiver, estoppel and equitable tolling allows the Court "to honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer").

[247] Reply Brief of Petitioner-Appellant, *supra* note 205, at 16.

[248] *See Albermarle*, 422 U.S. at 418 (describing the purpose of Title VII to make employees whole for unlawful discrimination).

[249] *Ledbetter II,* 127 S. Ct at 2171-72. ("Ultimately, 'experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" (quoting Mohasco Corp. v. Silver, 477 U.S. 807, 826 (1980)).

[250] *Ledbetter II,* 127 S. Ct. at 2176.

to treat disparate pay cases differently than other types of discrimination claims.[251] Thus, the Court's refusal to allow challenges of pay discrimination that began before, and continued into, the 180-day charging period renders the statute's back pay provision virtually meaningless.[252]

Title VII states "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."[253] In *National Railroad Passenger Corp. v. Morgan,* the Supreme Court established back pay awards arising out of termination and failure to promote actions only reach back to the date of the "discrete act."[254] This discrete act must take place within the 180-day EEOC charging period.[255] Therefore, a court could never award two-years of back pay in these situations.[256]

Perhaps hostile work environment claims can take advantage of the two-year back pay provision, even if claims concerning discrete acts cannot.[257] For hostile environment claims, a complainant can reach back to occurrences before the 180-day filing period to establish discriminatory intent as long as at least one of those occurrences occurred within the 180-days.[258] Even if an employee reaches back further than 180-days to prove discriminatory intent, however, the Supreme Court decided the back pay remedy does not apply to hostile environment claims.[259]

The last common type of Title VII claim is disparate pay.[260] Since the back pay provision does not apply to other types of claims, Congress must have foreseen challenges to pay discrimination cases that began before, and continued into, the 180-day filing period.[261] Congress intended the two-year back pay provision to

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[251] *Id.* at 2184 (Ginsburg, J., dissenting).

[252] *See* Brief for Nat'l Partn. Women & Fams., *supra* note 190, at 25.

[253] 42 U.S.C. § 2000e-5(g)(1) (2006).

[254] *See Morgan*, 536 U.S. at 114. For example, if an employee was unlawfully terminated and filed an EEOC claim exactly 180 days later, they could only be awarded back pay for 180 days worth of work. *See id.* A complainant could never reach the Title VII limit of two-year's back pay with this type of claim. *See id.*

[255] 42 U.S.C. § 2000(e)-5(e)(1).

[256] *See* Brief for Nat'l Partn. Women & Fams., *supra* note190, at 25.

[257] *Id.*

[258] *See Morgan,* 536 U.S. at 114.

[259] *See* Penn. St. Police v. Suders, 542 U.S. 129, 147 (2004) (holding that back pay is available for hostile environment claims only when there has been a "constructive discharge," which is treated as a termination).

[260] *See* Brief for Nat'l Partn. Women & Fams., *supra* note 190, at 25.

[261] *See Morgan*, 536 U.S. at 119 ("If Congress intended to limit liability to conduct occurring in the period which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of back pay.").

apply directly to these cases, allowing an employee to recover what they should have been paid absent discrimination.[262]

Congressional intent becomes even clearer when examining the legislative history of the Civil Rights Act of 1991.[263] At the time of the amendment, most circuits decided pay discrimination cases in accordance with "paycheck accrual rule" articulated in *Bazemore v. Friday*.[264] If Congress disagreed with the Court's ruling in *Bazemore*, or how the circuits and the EEOC applied the "paycheck accrual rule," it certainly had the power and opportunity to clarify Title VII as it relates to pay discrimination when amending the statute.[265] Instead, the Senate Report stated:

> Where, as was alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* . . . , for example, . . . the Supreme Court properly held that each application of th[e] racially motivated salary structure, i.e., each new paycheck constituted a distinct violation of Title VII.[266]

Title VII's back pay provision and Congress's refusal to amend the application of *Bazemore v. Friday* by the federal circuit courts and the EEOC prove that pay discrimination cases should be decided differently than other employment discrimination claims.[267]

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[262] *See* Brief for Nat'l Partn. Women & Fams, *supra* note 190, at 25.

[263] *See* S. REP. NO. 101-315, at 54 (1990). The Civil Rights Act of 1990 was the forerunner to the 1991 Act.

[264] *See, e.g.,* EEOC v. Penton Indus. Publ'g Co., 851 F.2d 835, 838 (6th Cir. 1988) ("The Supreme Court has recognized the existence of a 'continuing violation' [in *Bazemore*, where] there was a current and continuing differential between the wages earned by black workers and those earned by white workers."); Berry v. Bd. of Supv. of LSU, 715 F.2d 971, 980 (5th Cir. 1983) ("We also observe that there are a number of decisions in which salary discrimination has been found to constitute a continuing violation of Title VII, usually on the rationale that each discriminatory paycheck violates the Act."); Bartelt v. Berlitz Sch. of Languages of Am., 698 F.2d 1003, 1004-05, n.1 (9th Cir. 1983) (rejecting the argument that a disparate pay claim accrued upon making of pay decision); Satz v. ITT Financial Corp., 619 F.2d 738, 743 (8th Cir. 1980) ("The practice of applying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues.").

[265] *Ledbetter II*, 127 S. Ct. at 2183 (Ginsburg, J., dissenting).

[266] S. REP. NO. 101-315, at 54 (1990).

[267] *See* Brief for Nat'l Partn. Women & Fams., *supra* note 190, at 25.

Congress Should Reinstate the "Paycheck Accrual Rule"

Justice Ginsburg ended the dissenting opinion by imploring Congress to act, as it did in 1991, to "correct this Court's parsimonious reading of Title VII."[268] Congress was listening.[269] The chairman of the House Education and Labor Committee introduced the Ledbetter Fair Pay Act of 2007 (the Ledbetter Act), on June 22, 2007.[270] The Ledbetter Act will negate the Court's ruling and restore the paycheck accrual rule introduced in *Bazemore v. Friday*.[271]

The United States House of Representatives passed the Ledbetter Act on July 30, 2007 with a vote of 215–187, largely along party lines.[272] The Senate then placed the bill on its calendar.[273] If the Ledbetter Act passes the Senate, President Bush's advisors have recommended a veto.[274]

The President's advisors cite concerns that adoption of the paycheck accrual rule will impede justice and negate incentives to promptly resolve alleged discrimination claims.[275] The advisors also criticize the bill as essentially eliminating the statute of limitations periods for claims such as promotion and termination, which an employee can currently challenge only within 180-days communication.[276] Such

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[268] *Ledbetter II*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting).

[269] H.R. 2831, 110th Cong. § 3 (2007).

[270] *Id.*

[271] *Id.* The Ledbetter Act proposes the following provision to Title VII:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, *including each time wages, benefits, or other compensation is paid*, resulting in whole or in part from such a decision or other practice.

Id. (emphasis added). The Ledbetter Act also proposes addition of this language to the Age Discrimination Act of 1967, Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. *Id.*

[272] National Organization for Women, http://www.capwiz.com/now/vote.xc/?votenum=768&chamber= H&congress=1101&voteid=10130076&state=US (last visited on Nov. 18, 2007).

[273] *Id.*

[274] Statement of Administration Policy—H.R. 2831 Lilly Ledbetter Fair Pay Act of 2007, July 27, 2007.

[275] *Id.*

[276] *Id.*

> [E]xtending the expanded statute of limitations to any 'other practice' that remotely affects an individual's wages, benefits or other compensation in the future . . . could effectively waive the statute of limitations for a wide variety of claims (such as promotion and arguably even termination decisions) traditionally regarded as actionable only when they occur.

arguments overreact to the language of the bill. The Ledbetter Act does not overrule *United Airlines, Inc. v. Evans* and its progeny—those cases squarely stand for a claimant's inability to challenge a discrete act, such as hiring or firing, outside the limitations period.[277]

Congress Should Also Lengthen the 180-day Filing Period

Congress has taken one essential step toward remedying the harsh consequences of *Ledbetter,* but it should go further.[278] The root of the problem exists with the unusually short statute of limitations.[279] The Civil Rights Act of 1964 originally provided for a 90-day statute of limitations.[280] The amendments of 1972 lengthened the filing period to the now current 180-days to bring it into line with the National Labor Relations Act, which served as a template for Title VII.[281] The Civil Rights Act of 1991 proposed an extension of the statute of limitations to two years, but Congress challenged the provision and eventually removed it from the amendment.[282] Congress must realize that an employee needs more time to realize the discrimination, gather information to file a complaint and find representation.[283] Statutes of limitations for many civil actions allow a year or more to bring a claim.[284] No persuasive reason exists why someone who slips on a wet floor should have more time to assert her rights than an employee who experiences pay discrimination.[285]

Impact of Ledbetter v. Goodyear

If the Ledbetter Act fails, both employers and employees will feel adverse effects.[286] Because employees encounter difficulty recognizing a disparate pay

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[277] *Evans,* 122 U.S. at 558 (describing Evans's termination as "merely an unfortunate event in history which has no present legal consequences"); *Ricks,* 449 U.S. at 259 (holding termination decision must be challenged within the filing period even if last day of employment did not occur until a year later); *Morgan,* 536 U.S. at 114 ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. . . Morgan can only file a charge to cover discrete acts that 'occurred' within the appropriate time period.").

[278] Brake & Grossman, *supra* note 221.

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] Brake & Grossman, *supra* note 221.

[284] *See* WYO. STAT. ANN. § 1-3-105 (iv) (2006) (allowing four years to bring an action for trespass upon real property; injury to rights not arising on contract; and relief on the ground of fraud). *See also* WYO. STAT. ANN. § 1-3-105 (v) (allowing one year to bring an action for libel; slander; malicious prosecution; false imprisonment; and assault or battery (not including sexual assault)).

[285] Brake & Grossman, *supra* note 221.

[286] Hearings, *supra* note 2, at 3 (testimony of Prof. Deborah Brake).

claim and the filing period ends quickly, time will bar most legitimate claims.[287] If an employee cannot challenge her paycheck as discriminatory, illegal acts by employers will be legitimized once the 180-day filing period expires.[288] Workers' base salaries often inform pension and social security payments; therefore, unchallenged pay discrimination will continue to affect workers well after they no longer work for an employer.[289]

The *Ledbetter* decision also exacerbates the gender-wage gap.[290] This effect is particularly bleak for Wyoming, where the high gender-wage gap already discourages women from settling in the state.[291] The Ledbetter Act will undo the damage of the decision, helping to reduce the wage gap and benefit both employers and employees.[292] Employee turnover would likely decrease, resulting in lower training and recruiting costs.[293] The number of welfare and medical benefits would also likely decline, benefiting state and federal governments as well.[294]

The *Ledbetter* Court insisted on protecting defendants from stale claims.[295] Many who support the decision view it as a victory for employers.[296] Employers, however, are not served well by the impacts of the judgment.[297] The ruling creates incentives for employees to file EEOC claims early and often to preserve any potential challenges.[298] The decision also encourages employees who fear retaliation to file their claims without first informing their employers.[299] Employees now must frequently investigate the wages of other employees, so as not to sit on their rights.[300] Such results do not promote a friendly workplace or

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[287] *Id.*

[288] *Ledbetter II,* 127 S. Ct. at 2178 (Ginsburg, J., dissenting).

[289] Hearings, *supra* note 2, at 4 (testimony of Lilly Ledbetter).

[290] Hearings, *supra* note 2, at 4 (testimony of Prof. Deborah Brake).

[291] *See* Dona Playton & Stacey Obrecht, *High Times in Wyoming: Reflecting the State's Values by Eliminating Barriers and Creating Opportunities for Women in the Equality State*, 7 WYO. L. REV. 295, 302 (2007) (discussing the impact of the recent oil and gas boom on women in Wyoming).

[292] *See id.*

[293] *See id.*

[294] *See id.*

[295] *Ledbetter II,* 127 S. Ct. at 2171.

[296] *See* Hearings, *supra* note 2, at 1 (testimony of Neal D. Mollen on behalf of the U.S. Chamber of Commerce) ("The *Ledbetter* decision emphatically endorsed methods of voluntary cooperation and conciliation.").

[297] *See* Hearings, *supra* note 2, at 13 (testimony of Prof. Deborah Brake).

[298] *Id.*

[299] *Id.*

[300] *Id.*

trusting environment.[301] These consequences do not advance the Title VII goal of voluntary conciliation.[302]

CONCLUSION

The Supreme Court's decision in *Ledbetter v. Goodyear*, starts the "clock" of statutory limitations far too soon for most reasonable employees to learn of discriminatory pay decisions.[303] According to the Court, once an employer informs an employee of each pay decision, even a raise, she must "rock the boat" by immediately investigating colleagues' finances and filing a claim with the EEOC.[304] This interpretation does not eliminate discrimination.[305] In fact, rather than relying on Title VII's protections, those in a protected class must now choose between hyper-vigilance and losing the chance to ever remedy pay discrimination.[306]

In the past, the circuit courts and the EEOC followed the "paycheck accrual rule" articulated in *Bazemore v. Friday*, allowing employees to challenge each paycheck as an independent employment act.[307] When Congress set out to restore the power of Title VII in 1991, it could easily have disagreed with this interpretation and clarified its position on the "paycheck accrual rule."[308] It did not.[309] Still, the *Ledbetter* Court chose even-handed administration over restoring victims of discrimination.[310] The Court emphasized that because Goodyear implemented a facially non-discriminatory pay system, the company did not discriminate with each paycheck it issued.[311] The Court legitimized Goodyear's bias simply because the company was wise enough not to discriminate overtly.[312]

Congress has taken the right step in introducing the Ledbetter Fair Pay Act, but discovery and tolling issues remain.[313] Also the presidential veto threat could jeopardize the protections Congress has struggled to provide for decades.[314] It

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[301] *Id.*

[302] *See Miller,* 755 F.2d at 20.

[303] *See supra* notes 185-204 and accompanying text.

[304] Brief of Petitioner-Appellant at 25, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2610990.

[305] *See supra* notes 286-302 and accompanying text.

[306] *See supra* note 300 and accompanying text.

[307] *See supra* notes 114-130 and accompanying text.

[308] *See supra* notes 263-267 and accompanying text.

[309] *See supra* note 266 and accompanying text.

[310] *See supra* note 249 and accompanying text.

[311] *See supra* notes 161-167 and accompanying text.

[312] *See supra* notes 161-167 and accompanying text.

[313] *See supra* notes 226-237, 268-272 and accompanying text.

[314] *See supra* notes 274-277 and accompanying text.

remains the duty of Congress to push zealously for legislation ensuring victims of disparate pay receive compensation and to deter future discrimination by employers.[315]

[315] *See supra* notes 286-302 and accompanying text.

CASE NOTE

CONSTITUTIONAL LAW—The Supreme Court Takes a Fractured Stance on What Students Can Say About Drugs; *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

*Kellie Nelson**

Introduction

One student's publicity stunt lead to the Supreme Court restricting what students all over the United States may legally say about drugs.[1] It all began when Juneau-Douglas High School released its students to attend the Olympic torch relay as it passed in front of the school.[2] As the Olympic torch (and television cameras) approached, a group of students, including Joseph Frederick, raised a fourteen-foot banner that read, "BONG HiTs 4 JESUS."[3] When the high school principal, Deborah Morse, saw this banner, she crossed the street and asked the students to lower it.[4] Frederick was the only student who refused.[5] Principal Morse confiscated the banner and later suspended Frederick for ten days.[6] Morse explained to Frederick that she confiscated the banner because it promoted illegal drug use, in violation of school board policy.[7] Frederick administratively appealed to the Juneau School District Superintendent, who upheld Frederick's suspension, but limited his punishment to time served.[8] Like Principal Morse, the Superintendent determined the message promoted the use of illegal substances, and thus violated school board policy.[9] The Juneau School District Board of Education upheld the Superintendent's decision.[10]

Frederick then filed a suit in United States District Court for the District of Alaska, alleging that Morse and the school board violated his First Amendment rights by removing his banner and punishing him for displaying the banner.[11] The

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*Candidate for J.D., University of Wyoming, 2009.

[1] Morse v. Frederick, 127 S. Ct. 2618 (2007).

[2] *Id.* at 2622.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Morse,* 127 S. Ct. at 2622.

[7] *Id.* at 2622-23.

[8] *Id.* at 2623. Frederick had already served eight days of his suspension. *Id.*

[9] *Id.*

[10] *Id.*

[11] Frederick v. Morse, No. J 02-0008 CV (D.Alaska May 27, 2003). Frederick filed suit under 42 U.S.C. § 1983. *Morse,* 127 S. Ct. at 2623.

district court granted summary judgment in favor of the principal and the school board, ruling that Morse was entitled to qualified immunity and that neither Morse nor the school board violated Frederick's First Amendment rights.[12] The United States Court of Appeals for the Ninth Circuit reversed the district court's decision, finding that Principal Morse violated Frederick's right to free speech.[13] The Ninth Circuit also held that Morse was not entitled to qualified immunity because the law on student speech was clear and Morse violated it.[14] Because she was not entitled to qualified immunity, the Ninth Circuit held Morse personally liable for monetary damages due to her violation of Frederick's rights.[15]

The United States Supreme Court reversed the Ninth Circuit and held that, "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[16] Under this ruling, Principal Morse did not violate Frederick's right to free speech.[17] Thus, the Court did not address the qualified immunity issue.[18]

This case note discusses student speech jurisprudence as it stood before the decision in *Morse*.[19] This discussion focuses primarily on three United States Supreme Court cases referred to as the *Tinker* trilogy.[20] The note also provides some background information on speech that advocates illegal conduct and the doctrine of qualified immunity.[21] The note then summarizes the five separate opinions issued in *Morse* and how the Justices reached the conclusion that school administrators can restrict student speech advocating drug use.[22] This note contends that the Court made the area of student speech more confusing by issuing five different opinions.[23] It also argues the Court should not have allowed a viewpoint-based restriction of speech.[24] Finally, this note expresses concern that

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[12] *Frederick,* No. J 02-0008 CV slip op. at 25.

[13] Frederick v. Morse, 439 F.3d 1114, 1125 (9th Cir. 2004).

[14] *Id.* In order to be covered by qualified immunity, a public official must show, among other things, that the constitutional right was not clearly established at the time the public official violated it. Anderson v. Creighton, 483 U.S. 635, 640 (1987); for further explanation of qualified immunity *see also infra* notes 117-23 and accompanying text.

[15] *Frederick,* 439 F.3d at 1123.

[16] *Morse,* 127 S. Ct. at 2622.

[17] *Id.*

[18] *Id.* at 2624.

[19] *See infra* notes 29-109 and accompanying text.

[20] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *See infra* notes 29-109 and accompanying text.

[21] *See infra* notes 110-123 and accompanying text.

[22] *See infra* notes 129-218 and accompanying text.

[23] *See infra* notes 223-1241 and accompanying text.

[24] *See infra* notes 242-251 and accompanying text.

this decision could lead to further restrictions on both student speech and speech in other contexts.[25]

BACKGROUND

Since the Court focused primarily on whether Frederick's banner constituted protected speech under the First Amendment, this Background section focuses primarily on student speech as embodied by Supreme Court cases known as the *Tinker* trilogy.[26] However, since drugs are illegal, the background section also covers how the First Amendment applies to advocacy of illegal activity.[27] Finally, the background section addresses the doctrine of qualified immunity, which Principal Morse raised as a defense in this case.[28]

Student Speech and the First Amendment

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech or of the press."[29] At first glance, this amendment looks like an absolute shield against government action that would limit freedom of expression.[30] However, the Supreme Court has never interpreted the First Amendment so absolutely.[31] Rather, the Supreme Court has consistently upheld certain limitations on expression based on the potential effects of the speech.[32] In particular, the Supreme Court has afforded student speech less protection than adult speech under the First Amendment.[33] A trilogy of cases, often referred to as the *Tinker* trilogy, formed the basis of student speech law prior to the holding in *Morse.*[34]

Tinker v. Des Moines Independent School District

The Supreme Court first recognized students' First Amendment rights to free speech in *Tinker v. Des Moines Independent Community School District.*[35] In

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[25] *See infra* notes 252-255 and accompanying text.

[26] *See infra* notes 29-109 and accompanying text; *Kuhlmeier,* 484 U.S. 260; *Fraser,* 478 U.S. 675; *Tinker,* 393 U.S. at 503.

[27] *See infra* notes 110-116 and accompanying text.

[28] *See infra* notes 117-128 and accompanying text.

[29] U.S. CONST. amend. I.

[30] LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 214 (CQ Press 2004).

[31] *Id. See also* Dennis v. United States, 341 U.S. 494, 503 (1951) (holding speech is not an unlimited right); Schenck v. United States, 249 U.S. 47, 52 (1919) (establishing words that pose a clear and present danger can be limited).

[32] *See Dennis*, 341 U.S. at 503; *Schenck*, 249 U.S. at 52.

[33] *Fraser*, 478 U.S. at 682; *Tinker*, 393 U.S. at 506.

[34] *Tinker,* 393 U.S. at 503; *Fraser,* 478 U.S. 675; *Kuhlmeier,* 484 U.S. 260.

[35] *Tinker*, 393 U.S. 503, 504 (1969).

December of 1965, a group of students and adults in Des Moines, Iowa decided to wear black armbands to protest the Vietnam War.[36] When the Des Moines public school principals heard about the students' plan to wear black armbands to school, they met and adopted a policy.[37] According to the policy, faculty members would first ask student wearing black armbands to remove them.[38] The schools would then suspend any student who refused to remove the armband until he or she returned without it.[39] John Tinker, Christopher Eckhardt, and Mary Beth Tinker all wore black armbands to school.[40] They refused to remove the armbands when asked, and, in accordance with the school board policy, they were all suspended.[41]

The Supreme Court held the Constitution did not allow school officials to deny students this form of expression.[42] The Court began by explaining that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[43] However, the Court tempered this ruling by noting that the First Amendment in student speech cases must be applied in light of the special circumstances of the school environment.[44]

The Court stated that under the special circumstances of the school environment, if a school cannot find that the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" the prohibition cannot be sustained.[45] This standard requires school officials to show "more than a mere desire to avoid the discomfort and unpleasantness" that comes with an unpopular opinion.[46] *Tinker* also requires more than an undifferentiated fear or apprehension of disturbance.[47]

The Court found school authorities had no reason to believe students wearing black armbands would substantially interfere with the classroom or impinge on

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Tinker,* 393 U.S. at 504. John Tinker was fifteen years old, Christopher Eckhardt was sixteen years old, and Mary Beth Tinker was thirteen years old. *Id.*

[41] *Id.*

[42] *Id.* at 514.

[43] *Id.* at 506.

[44] *Id.*

[45] *Tinker,* 393 U.S. at 509 (quoting Burnside v. Byers, 363 F.2d 744, 749 (1966)).

[46] *Tinker,* 393 U.S. at 509. In *Tinker,* the Court said the school officials' concern that if students wore the armbands, other students might ridicule them or argue with them was no more than a desire to avoid an unpleasant situation. *Id.*

[47] *Id.* at 508. The Court also held that the school officials' fear that the armbands might cause conflict between the students was only an undifferentiated fear of apprehension. *Id.*

the rights of other students.[48] The armbands silently and passively expressed an opinion, and no evidence existed to show the armbands caused any disturbance.[49] Further, the Vietnam War created major political controversy at that time.[50] School officials, motivated by their desire to avoid the controversy surrounding the Vietnam War, tried to avoid conflict at the cost of student expression.[51] The Court found this denial of expression unacceptable.[52]

The Court found particular significance in the school's prohibition of black armbands but not other political or social symbols.[53] It interpreted the schools' prohibition of just one symbol as evidence that the school officials' actions amounted to the prohibition of one particular viewpoint.[54] Absent a substantial interference with school work or discipline, the Court held this prohibition unconstitutional.[55] Thus under *Tinker,* freedom of expression exists within public schools as long as the student does not substantially interfere with the requirements of appropriate discipline or violate the rights of others.[56]

Bethel School District No. 403 v. Fraser

The Court heard the second major student speech case, *Bethel School District No. 403 v. Fraser* in 1986.[57] In that case, Matthew Fraser delivered a speech at a high school assembly, nominating another student for student elective office.[58] He delivered his speech in front of approximately six hundred high school students, many as young as fourteen, at a school-sponsored assembly as part of an educational program in self-government.[59] In his speech, Fraser used an elaborate, graphic, and sexually explicit metaphor to describe the candidate he was nominating.[60]

Before Fraser presented his speech, two of his teachers warned him they considered the content of his speech inappropriate and he would likely be

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[48] *Id.* at 509.

[49] *Id.* at 508.

[50] *Tinker,* 393 U.S. at 510.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Tinker,* 393 U.S. at 511. The Court also held that a student's speech rights apply not only in the classroom, but also in the cafeteria, on the playing field, or anywhere on campus. *Id.* at 512-13.

[56] *Id.* at 512-13.

[57] *Fraser*, 478 U.S. at 677.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 677-78.

punished.[61] Despite these warnings, Fraser presented his remarks as planned.[62] The day after the speech, the assistant principal called Fraser to her office.[63] The assistant principal informed Fraser of Bethel High School's disciplinary rule, which prohibited conduct that interfered with the educational process, including obscene or profane language or gestures.[64] The assistant principal told Fraser she considered his speech a violation of that rule.[65] The assistant principal suspended Fraser for three days and removed his name from the list of students to be considered for a graduation speaker.[66] The school district upheld Fraser's punishment by finding his speech plainly offensive.[67] After Fraser served two days of his suspension, the school permitted Fraser to return to school.[68]

The United States District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit both found that the assistant principal violated Fraser's free speech rights under the *Tinker* standard.[69] The Supreme Court reversed the Ninth Circuit on several grounds.[70] The Court began by explaining that although students have a constitutional right to free expression while at school, students must also learn the boundaries of socially acceptable behavior in school.[71] As such, schools are not required to grant students the same latitude in expressing their opinions as government officials would have to grant adults for the same expressions.[72] Thus, "the constitutional rights of students in public schools are not automatically co-extensive with the rights of adults in other settings."[73]

The Court went on to hold that school officials could punish lewd and offensive speech.[74] Focusing on the public schools' role in protecting young students from offensive and vulgar language, the Court explained that offensive speech did not warrant the same level of protection as other forms of speech.[75] It

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[61] *Id.* at 678.

[62] *Fraser,* 478 U.S. at 678.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Fraser,* 478 U.S. at 678-79.

[68] *Id.* at 679. The school allowed Fraser to speak at graduation. *Id.*

[69] *Id.* at 679-80.

[70] *Id.* at 680.

[71] *Id.* at 681. The Court stated "that right must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.*

[72] *Fraser,* 478 U.S. at 682.

[73] *Id.*

[74] *Id.* at 683.

[75] *Id.* at 684.

referenced *Chaplinsky v. New Hampshire* stating that such offensive speech did not contribute to the exchange of ideas and had very little value in finding truth.[76]

The Court distinguished *Fraser* from *Tinker* by explaining the penalty imposed on Fraser was unrelated to any particular viewpoint.[77] *Fraser,* the Court noted, did not follow the rule set out in *Tinker.*[78] As long as the speech is offensive or obscene, under *Fraser*, the school can censor the speech even if the school cannot show any actual or substantial disruption, as required by *Tinker*.[79]

Hazelwood School District v. Kuhlmeier

The third case in the *Tinker* trilogy is *Hazelwood School District v. Kuhlmeier.*[80] In that case, Hazelwood East High School, through its Journalism II class published a school paper entitled *Spectrum* approximately every three weeks.[81] The Board of Education bore the majority of the financial responsibility for *Spectrum.*[82] The normal practice at Hazelwood East High was for the Journalism II teacher to present a copy of the paper to the principal, Robert Reynolds, for review prior to publication.[83]

Three days prior to the scheduled publication, the Journalism II teacher submitted a copy of the May 13th edition of *Spectrum* for Principal Reynolds's review.[84] Reynolds thought the school should not publish two of the stories in that edition of the school paper.[85] One of the stories he objected to discussed three students' experiences with pregnancy.[86] He worried that even though the authors withheld the students' names, the limited number of pregnant students at Hazelwood East would make the identity of the students in the story easy for other students to determine.[87] The other story he found objectionable discussed the impact of divorce on the Hazelwood East students.[88] The article contained

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[76] *Id.* at 684. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). The *Chaplinsky* Court stated, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky,* 315 U.S. at 572.

[77] *Fraser,* 478 U.S. at 685.

[78] *See id.*

[79] *See id.* at 685.

[80] *Kuhlmeier*, 484 U.S. at 262.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 263.

[84] *Id.*

[85] *Kuhlmeier,* 484 U.S. at 263.

[86] *Id.*

[87] *Id.*

[88] *Id.*

some negative remarks about one student's parents.[89] Principal Reynolds expressed concern that the parents did not have a fair opportunity to respond to such remarks.[90]

Due to Principal Reynolds's concerns, the Journalism II class published *Spectrum* without the two pages containing the stories to which the principal objected.[91] The class did not print the other articles that would have been on the pages with the objectionable articles.[92] Principal Reynolds explained there was not enough time to make the necessary changes before the scheduled publication date, and delayed publication would result in publication after the end of the school year.[93]

Three students in Hazelwood East's Journalism II class filed suit in United States District Court for the Eastern District of Missouri, alleging that the school violated their First Amendment rights.[94] The district court found no violation had occurred.[95] The district court held "school officials may impose restraints on students' speech in activities that are 'an integral part of the school's educational function,'. . . so long as their decision has a 'substantial and reasonable basis.'"[96] Relying on *Tinker*, the United States Court of Appeals for the Eighth Circuit reversed and found that *Spectrum* amounted to a public forum, and thus deserved increased protection.[97]

The United States Supreme Court reversed the Eighth Circuit's decision.[98] The Court relied on *Tinker* and *Fraser*, stating that although students do not shed their constitutional rights at the schoolhouse gate, those rights are not necessarily the same rights as those possessed by adults.[99] The Court determined that *Spectrum* did not amount to a public forum because school officials did not show any intention to open its pages to "indiscriminate use" by student reporters and editors.[100] Rather, *Spectrum* was part of the Journalism II curriculum, overseen by teachers and school administrators.[101] Since the Court did not consider *Spectrum*

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[89] *Id.*

[90] *Kuhlmeier,* 484 U.S. at 263.

[91] *Id.* at 264.

[92] *Id.*

[93] *Id.* at 263-64.

[94] *Id.* at 264.

[95] *Kuhlmeier,* 484 U.S. at 264.

[96] *Id.* at 264.

[97] *Id.* at 265.

[98] *Id.* at 266.

[99] *Id.*

[100] *Kuhlmeier,* 484 U.S. at 270.

[101] *Id.* at 268-70.

a public forum, the Court held "school officials were entitled to regulate the content of *Spectrum* in any reasonable manner."[102]

In this case, the Court distinguished between tolerating particular student speech and affirmatively promoting that same speech.[103] When students, parents, and members of the community could reasonably perceive that activities such as school-sponsored publications, theatrical productions, and expressive activities are sponsored or promoted by the school, educators have more authority.[104] Even if such activities do not take place in the classroom, they may be considered part of the school's curriculum.[105] As such, school authorities can exercise control over such activities to ensure students learn the lessons the activity is designed to teach.[106] The school can also "disassociate" itself from speech, even if it is not disruptive or offensive.[107] The Court specifically held, "[a] school must also retain authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'"[108] Thus the *Tinker* trilogy established that students possessed First Amendment rights subject to restriction if the expression created a substantial disruption, was lewd or obscene, or bore the school's imprimatur.[109]

Incitement to Lawless Activity

In addition to student speech, speech that incites lawless action also receives less protection under the First Amendment than other types of speech.[110] The current test for whether state officials can restrict speech that incites lawless action is found in *Brandenburg v. Ohio.*[111] In that case, a leader of the Ku Klux Klan (KKK) was convicted under the Ohio Criminal Syndicalism statute, fined $1,000 and sentenced to ten years imprisonment for speeches he made at KKK rallies.[112] In the speeches he expressed racist attitudes and threatened "revengeance."[113] The Supreme Court reversed Brandenburg's conviction, holding the Ohio Criminal Syndicalism statute unconstitutional under the First and Fourteenth

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[102] *Id.* at 270.

[103] *Id.* at 270-71.

[104] *Id.* at 271.

[105] *Kuhlmeier,* 484 U.S. at 271.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

[109] *Tinker,* 393 U.S. at 503; *Fraser,* 478 U.S. 675; *Kuhlmeier,* 484 U.S. 260.

[110] *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[111] *Id.* at 447.

[112] *Id.* at 445.

[113] *Id* at 446.

Amendments.[114] The Court held a state can only prohibit speech that 1) advocates the use of force or law violation when such advocacy directly incites or produces imminent lawless action, and 2) is likely to actually incite or produce such action.[115] This narrow holding does not allow a state to punish mere advocacy of illegal action.[116]

Qualified Immunity

Another issue in the *Morse* case was qualified immunity, a doctrine in which courts grant public officials performing discretionary functions qualified immunity and "shield them from liability for civil damages [when] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[117] To determine whether a public official is entitled to qualified immunity, courts engage in a two-step inquiry as described in *Saucier v. Katz*.[118] First, the court must determine if the plaintiff has alleged a deprivation of a constitutional right, and if so, whether that constitutional right was clearly established at the time of the alleged violation.[119] A constitutional right is "clearly established," if it is clear within the specific context of the case, rather than in a general sense.[120] While there does not have to be a case prohibiting the exact conduct in question, the right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[121]

The second step in the qualified immunity analysis requires the court to determine whether the public official was objectively reasonable in taking the particular action in light of the legal rules that were clearly established at the time of the action.[122] The court does not need to address the second step unless it first finds the law clearly established.[123]

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[114] *Id.* at 448.

[115] *Brandenburg,* 395 U.S. at 447.

[116] *Id.*

[117] Wilson v. Layne, 526 U.S. 603, 609 (1999); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[118] Saucier v. Katz, 533 U.S. 194, 201 (2001); *Wilson,* 526 U.S. at 609.

[119] *Wilson,* 526 U.S. at 609.

[120] Anderson v. Creighton, 483 U.S. 635, 640 (1987); *Saucier,* 553 U.S. at 200.

[121] *Anderson,* 483 U.S. at 640; *Wilson,* 526 U.S. at 615. The Court also phrased this standard as "in the light of pre-existing law the unlawfulness must be apparent." *Anderson,* 483 U.S. at 640; *Wilson,* 526 U.S. at 615.

[122] *Anderson,* 483 U.S. at 641; *Wilson,* 526 U.S. at 614.

[123] *Harlow*, 457 U.S. at 818. This is because "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.*

The Court justified this order-of-battle in *Saucier*.[124] In that case, a demonstrator sued the military police officer who arrested him after a protest, alleging the police officer violated numerous rights.[125] The police officer raised the defense of qualified immunity.[126] The Supreme Court held that in a qualified immunity analysis the Court must consider the constitutional question before determining whether the official acted reasonably.[127] This order-of-battle is justified, according to the Court, because it allows constitutional law to develop.[128]

PRINCIPAL CASE

The decision in *Morse v. Frederick* consists of five separate opinions.[129] Chief Justice Roberts wrote the Court's opinion joined by Justices Scalia, Alito, Thomas, and Kennedy.[130] Justice Thomas wrote a concurring opinion.[131] Justice Alito also wrote a concurring opinion, joined by Justice Kennedy.[132] Justice Breyer concurred in part and dissented in part, and Justice Stevens authored the dissent joined by Justice Souter and Justice Ginsburg.[133]

Chief Justice Roberts, Opinion of the Court

The Supreme Court granted certiorari to consider two questions: whether Frederick had a First Amendment right to wield his banner, and whether Principal Morse was entitled to qualified immunity.[134] The Court initially determined

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[124] *Saucier,* 533 U.S. at 201.

[125] *Id.* at 198-99.

[126] *Id.* at 199.

[127] *Id.* at 200.

[128] *Id.* at 201.

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Saucier, 533 U.S. at 201.

[129] *See generally Morse*, 127 S. Ct. 2618 (2007).

[130] *Id.*

[131] *Id.* at 2629 (Thomas, J., concurring).

[132] *Id.* at 2636 (Alito, J., concurring).

[133] *Id.* at 2637 (Breyer, J., concurring in part and dissenting in part); *Id.* at 2643 (Stevens, J., dissenting).

[134] *Morse*, 127 S. Ct. at 2624.

Frederick did not have a First Amendment right to waive his banner.[135] Therefore, the Court never had to address the qualified immunity issue.[136]

School Speech

The Court quickly rejected Frederick's argument that this case did not amount to a school speech case.[137] Chief Justice Roberts noted every authority that addressed the case considered Frederick's banner student speech.[138] The opinion also explained the facts indicate this amounted to school speech.[139] Namely, the expression occurred during school hours, at an approved school event, supervised by teachers, while the high school band and cheerleaders performed in uniform.[140] The Court also noted that Frederick directed his banner toward the student body, providing further evidence that the banner constituted student speech.[141]

Meaning of the Message

Whether the message "BONG HiTs 4 JESUS" promoted illegal drug use was a hotly contested factual issue.[142] The Court began by describing the message as cryptic.[143] The Court reasoned, to some the message could be offensive, while others may find it amusing.[144] Still others could believe, as Frederick claimed, the words meant nothing and were merely nonsense meant to attract the attention of television cameras.[145] Yet, the opinion took none of these views.[146]

The Court discussed Principal Morse's interpretation of the message.[147] Morse explained when she saw the banner she thought many people would understand the term "bong hit" as a reference to smoking marijuana.[148] In particular, she believed the other high school students would interpret "bong hits" in that way.[149]

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[135] *Id.*

[136] *Id.* The Court's opinion did, however, address Justice Breyer's contention that the court should have decided based on qualified immunity alone in a footnote. *Id.* at n.1.

[137] *Id.*

[138] *Id.*

[139] *Morse,* 127 S. Ct. at 2624.

[140] *Id.*

[141] *Id.*

[142] *Compare Morse,* 127 S. Ct. at 2624-25 *with Morse,* 127 S. Ct. at 2643-44 (Stevens, J., dissenting).

[143] *Morse*, 127 S. Ct. at 2624.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 2625.

[147] *Id.* at 2624-25.

[148] *Morse,* 127 S. Ct. at 2624-25.

[149] *Id.*

Thus, Morse viewed the banner as promoting illegal drug use, in violation of school board policy.[150]

The Court agreed with Morse's interpretation of the sign.[151] Chief Justice Roberts claimed "BONG HiTS 4 JESUS" could be interpreted two ways.[152] First, the message could be an imperative, as in "[Take] bong hits for Jesus."[153] Second, it could celebrate marijuana use, as in "bong hits [are a good thing]" or "[we take] bong hits."[154] The majority then stated that no practical difference existed between promoting illegal drug use and celebrating it.[155] Further, the "paucity of alternative meanings" made it highly probable the banner promoted marijuana use.[156] The Court rejected Frederick's alternative interpretation of the banner as meaningless.[157] While 'meaningless' was a possible interpretation, dismissing the banner as meaningless would ignore an undeniable reference to illegal drugs, according to the Court.[158] It refused to consider that Frederick just wanted to appear on television.[159] The majority summarily dismissed any argument that Frederick's message constituted political speech.[160]

Application of the Tinker *Trilogy*

Chief Justice Roberts discussed previous case law, but determined that the Court need not follow that case law in its holding.[161] The Court cited *Tinker v. Des Moines Independent Community School District* for the proposition that students and teachers have First Amendment rights.[162] Nevertheless, the Court went on to distinguish the present case from *Tinker.*[163] The Court determined the black armbands worn by the students in *Tinker* constituted political speech,

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[150] *Id.* at 2625.

[151] *Id.*

[152] *Id.*

[153] *Morse,* 127 S. Ct. at 2625.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Morse,* 127 S. Ct. at 2625.

[159] *Id.* The Court reasoned getting on television was Frederick's motive for the creating the banner and not an interpretation of what the banner said. *Id.*

[160] *Id.* All the court said regarding political speech was "not even Frederick argues that the banner conveys any sort of political or religious message," and "this is plainly not a case about political debate over the criminalization of drug use or possession." *Id.*

[161] *Id.* at 2625-29. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to students and teachers." *Id.*

[162] *Id.* at 2625 (citing *Tinker*, 393 U.S. at 506).

[163] *Morse,* 127 S. Ct. at 2625-26.

while Frederick's banner did not.[164] Political speech, as in *Tinker*, deserves more protection than other forms of speech because political speech is "the core of what the First Amendment aims to protect."[165] The Court also distinguished the present case from *Tinker,* because unlike black armbands, Frederick's fourteen-foot banner was not a passive expression.[166]

From the second case in the *Tinker* trilogy, *Bethel School District No. 403 v. Fraser,* the Court cited two principles.[167] First, students do not have the same extent of free expression rights as adults in other settings.[168] The Court stated if Frederick had unfurled his banner in a public forum outside the school his expression would be protected.[169] Second, the Court used *Fraser* to illustrate that the analysis in *Tinker* is not absolute.[170] The Court reasoned whatever analysis the *Fraser* Court used, it did not follow the material disruption standard from *Tinker*.[171]

In its discussion of *Hazelwood School District v. Kuhlmeier,* the Court quoted, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns."[172] The Court concluded since no reasonable person would reasonably believe Frederick's banner was promoted by the school, *Kuhlmeier* did not control as precedent.[173] Nevertheless, the Court did find *Kuhlmeier* instructive because *Kuhlmeier* acknowledged public schools' ability to regulate some speech "even though the government could not censor similar speech outside the school."[174]

Important Interest

The Court next addressed the importance of deterring drug use by school children.[175] The Court stated that deterring drug use among school children is

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[164] *Id.* at 2626.

[165] *Id.* (citing Virginia v. Black, 538 U.S. 343, 365 (2003)).

[166] *Morse*, 127 S. Ct. at 2626.

[167] *Id.*

[168] *Morse,* 127 S. Ct. at 2626 (citing *Fraser,* 478 U.S. at 682). "The rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Fraser,* 487 U.S. at 682.

[169] *Morse*, 127 S. Ct. at 2626.

[170] *Id.* at 2627.

[171] *Id.*

[172] *Id.* (citing *Kuhlmeier*, 484 U.S. at 273).

[173] *Morse*, 127 S. Ct. at 2627.

[174] *Id.* (citing *Kuhlmeier,* 484 U.S. at 266). According to the Court, *Kuhlmeier* also confirms that *Tinker* is not the only analysis the Supreme Court can use in student speech cases. *Id.* (citing *Kuhlmeier,* 484 U.S. at 260).

[175] *Morse*, 127 S. Ct. at 2628.

an important, and possibly even compelling, interest.[176] The Court also found that drug use among young people has become an even larger problem in the past twelve years.[177] The Court cited statistics and referred to Congressional spending to support the contention that drug use among teens in the United States remains a serious problem.[178] In particular, Congress provided billions of dollars for school drug-prevention programs, requiring that schools receiving such funds convey a clear message to students that illegal drugs use is wrong and harmful.[179] According to the Court, this showed Congress deemed teen drug use a serious problem.[180] The Court also relied on the thousands of school board policies across the nation aimed at educating students about the harmful effects of drug use.[181] Based on statistics and congressional and school board policies, the Court determined the goal of preventing drug use among teens sufficiently justified punishing drug advocacy in public schools.[182]

The majority's emphasis on the importance of preventing teen drug use was the final justification for holding that school officials could punish students for messages promoting drug use, thus creating a fourth rule on student speech.

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[176] *Id.* (citing Veronia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)). To support this conclusion, Chief Justice Roberts explained many of the negative effects drug use can have on teens including harm to the nervous system, losses in learning, increased risk of chemical dependence, and a low recovery rate. *Morse*, 127 S. Ct. at 2628 (citing *Veronia School Dist. 47J,* 515 U.S. at 661-62). The Court then stated that student drug use affects a school's entire student body because even one student taking drugs can harm a learning environment. *Morse,* 127 S. Ct. at 2628 (citing *Veronia School Dist. 47J,* 515 U.S. at 661-62).

[177] *Morse,* 127 S. Ct. at 2628 (citing Bd. of Edu. of Indep. Sch. Dist. No. 92 of Pattawatomie Cty. v. Earls, 536 U.S. 822, 834, n.5 (2002)). The Court determined that the drug problem has gotten worse since the Court decided *Earls* in 2002. *Morse,* 127 S. Ct. at 2628. In *Earls,* the Court found that the drug use problem among teens had grown worse since 1995. *Earls,* 536 U.S. at 834, n.5.

[178] *Morse*, 127 S. Ct. at 2628 (citing 1 National Institute on Drug Abuse, National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2005 Secondary School Students*, 99, 101 (2006)). The Court noted that about half of American twelfth graders, one-third of tenth graders, and one-fifth of eighth graders have used an illicit drug. *Morse,* 127 S. Ct. at 2628. It also recognized that nearly one in four twelfth graders has used an illicit drug in the past month. *Id.* The court also noted that 25% of high school students say they have been offered, sold, or given an illegal drug on school property in the last year. *Id.* (citing DEPT. OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE-UNITES STATES, 2005, 55 MORBIDITY AND MORTALITY WEEKLY REPORT, SURVEILLANCE SUMMARIES, NO. SS-5, P. 19 (June 9, 2006)).

[179] *Morse,* 127 S. Ct. at 2728 (citing Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. § 7114(d)(6) (2000 ed., Supp. IV)).

[180] *Morse*, 127 S. Ct. at 2728.

[181] *Morse,* 127 S. Ct. at 2728. The Court suggested that one reason so many school boards have such policies is that they understand the power of peer pressure in influencing teens to consume illegal substances. *Id.* (citing Bd. of Edu. of Indep. Sch. Dist. No. 92 of Pattawatomie Cty. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring)).

[182] *Morse*, 127 S. Ct. at 2629.

The Court's determination that Frederick's banner was unfurled at school and that "BONG HiTS 4 JESUS" promotes drug use caused the Court to hold that Frederick's banner was unprotected.

Justice Thomas, Concurring

Justice Thomas agreed schools should be allowed to prohibit student speech advocating illegal drug use, however, he also argued the Constitution allows schools to prohibit any and all student speech.[183] Justice Thomas stated that the ruling in *Tinker* had no basis in the Constitution.[184] In reaching this conclusion, Justice Thomas relied on the history of U.S. public education.[185] He also relied on the doctrine of *in loco parentis,* which gave schools power to discipline and teach children similar to parental power.[186] Justice Thomas claimed that by granting students First Amendment rights, *Tinker* ignored the *in loco parentis* doctrine and undermined teachers' authority to maintain order in public schools.[187]

Justice Alito, With Whom Justice Kennedy Joined, Concurring

Although Justices Alito and Kennedy concurred in the Court's opinion, they wrote separately to clarify that any further restrictions on student speech based on precedent formed by this decision would be unacceptable.[188] Justice Alito's concurrence even stated it regards this regulation as "standing at the far reaches of what the First Amendment permits."[189] While this concurrence agreed with the Court that student speech rights are limited, it argued there are no further grounds for regulation that this Court has not already recognized in *Tinker, Fraser, Kuhlmier,* and now *Morse.*[190]

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[183] *Morse,* 127 S. Ct. at 2629-30 (Thomas, J., concurring).

[184] *Id.* at 2630-31 (Thomas, J., concurring).

[185] *Id.* at 2631 (Thomas, J., concurring). Justice Thomas explained that early public schools instilled a "core of common values in students and taught them self-control." *Id.* at 2630 (Thomas, J., concurring) (citing A. POTTER & G. EMERSON, THE SCHOOL AND THE SCHOOLMASTER: A MANUAL 125 (1843)). Teachers taught, and students listened. *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring). Teachers commanded, and students obeyed. *Id.* (Thomas, J., concurring).

[186] *Morse*, 127 S. Ct. at 2631 (Thomas, J., concurring).

[187] *Id.* at 2631-35 (Thomas, J., concurring). Justice Thomas did not accept the argument that today's public schools should not treat children as if they were still in the nineteenth century. *Id.* at 2635 (Thomas, J., concurring). Rather, he suggested that parents who want their children to have freedom of speech can send their children to private school or work through the political process with local school boards. *Id.* (Thomas, J., concurring).

[188] *Morse,* 127 S. Ct. at 2636 (Alito, J., concurring).

[189] *Id.* at 2638 (Alito, J., concurring).

[190] *Id.* at 2637 (Alito, J., concurring). Justice Alito's concurrence made an effort to combat one argument made by Morse that the Court's opinion did not address. *Id.* (Alito, J., concurring). Morse argued *Tinker* would allow school officials to prohibit speech that interferes with a school's educational mission. *Id.* (Alito, J., concurring). The concurrence reasoned this would be much too broad, and allow school boards to define the school's 'educational mission' of the school in terms of the political and social views of that group. *Id.* (Alito, J., concurring).

Justice Alito also emphasized that schools are organs of the State, and they do not stand in the shoes of parents.[191] Rather, the special characteristics of the school environment often pose special dangers because parents do not have the ability to protect their children while they attend school.[192] Justice Alito went on to argue that speech advocating the use of illegal drugs is one of the special dangers posed by the school environment.[193] As such, the concurrence agreed schools can prohibit speech advocating illegal drug use.[194]

Justice Breyer, Concurring in the Judgment in Part and Dissenting in Part

Justice Breyer argued the Court should have ruled solely on the grounds of qualified immunity, by finding Principal Morse's conduct reasonable.[195] Justice Breyer worried the *Morse* ruling could authorize further viewpoint-based restrictions on speech.[196] He also pointed out the Court produced several differing opinions, only confusing the area of law.[197] Whereas, if the Court decided the case solely on qualified immunity grounds, the decision would have likely been unanimous.[198] He argued that making a constitutional ruling was unnecessary and violated the principle of judicial restraint.[199]

Justice Stevens, With Whom Justice Souter and Justice Ginsburg Joined, Dissenting

The dissent agreed that Principal Morse should not be personally liable for restricting Frederick's speech, but the agreement ended there.[200] The interpretation

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[191] *Id.* (Alito, J., concurring). This argument specifically addressed Justice Thomas's contention that schools stand *in loco parentis* and thus have unlimited authority to discipline school children. *See Morse,* 127 S. Ct. at 2629-36 (Thomas, J., concurring).

[192] *Id.* at 2638 (Alito, J., concurring). Justice Alito's concurrence also pointed out that public school is the only option for many parents. *Id.* at 2637 (Alito, J., concurring).

[193] *Morse,* 127 S. Ct. at 2628. (Alito, J., concurring).

[194] *Id.* (Alito, J., concurring).

[195] *Morse,* 127 S. Ct. at 2638 (Breyer, J., concurring in part and dissenting in part). Justice Breyer also argued that lower courts should be able to determine whether a public official is entitled to qualified immunity before determining whether the actions of the public official violated the constitution. *Id.* at 2642 (Breyer, J.,concurring in part and dissenting in part).

[196] *Id.* at 2639 (Breyer, J., concurring in part and dissenting in part).

[197] *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

[198] *Id.* (Breyer, J., concurring in part and dissenting in part).

[199] *Id.* at 2639-42 (Breyer, J., concurring in part and dissenting in part). The doctrine of judicial restraint posits that when possible, the federal courts should avoid ruling on constitutional issues. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936).

[200] *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting.).

of the facts sparked a strong disagreement between the dissent and the majority.[201] Unlike the majority, the dissent found it relevant that Frederick did not have any particular desire to spread the pro-drug message.[202] Rather, he claimed he only wanted to be on television.[203] The dissent also found Frederick's message did not advocate the use of illegal drugs.[204] At best, the banner proclaimed a nonsense message that mentioned drugs.[205] The dissent, therefore, would have decided the case on much narrower grounds, finding Principal Morse justified in removing the fourteen-foot banner based on concern about nationwide evaluation of student conduct at Juneau-Douglas High School.[206]

The dissent also disagreed with the Court's application of the *Tinker* trilogy to this case.[207] Justice Stevens, writing for the dissent, stated that *Tinker* stood for two basic First Amendment principles that the Court ignored in its ruling.[208] First, the Court ordinarily presumes censorship based on the speech's content, and more particularly the speech's viewpoint, is unconstitutional.[209] The dissent declared that the Court sanctioned stark viewpoint discrimination in this decision.[210] The dissent reasoned this was inappropriate because the First Amendment protects against government interference with the expression of unpopular ideas.[211]

Second, the dissent asserted that punishing advocacy of illegal conduct is only constitutional when that advocacy is actually likely to provoke such harm.[212]

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[201] *Compare Morse,* 127 S. Ct. at 2649 (Stevens, J., dissenting) (calling the majority's interpretation "feeble" and stating that the majority's interpretation required "real imagination") *with Morse,* 127 S. Ct. at 2624-25 (finding that Frederick's banner can only be interpreted as advocacy or celebration of drug use).

[202] *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting).

[203] *Id.* (Stevens, J., dissenting).

[204] *Id.* at 2643-46 (Stevens, J., dissenting).

[205] *Id.* at 2643 (Stevens, J., dissenting).

[206] *Id.* (Stevens, J., dissenting). The dissent stated that Morse's concern about the evaluation of student conduct would have justified removal even if the banner had said something as benign as "Glaciers Melt." *Id.* (Stevens J., dissenting).

[207] *Morse,* 127 S. Ct. at 2644-45 (Stevens, J., dissenting).

[208] *Id.* at 2645 (Stevens, J., dissenting).

[209] *Id.* at 2644 (Stevens, J., dissenting) (citing Rosenburger v. Rector & Visitors of Univ. of Va., 515 U.S. 819,828-29 (1969)).

[210] *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting).

[211] *Morse,* 127 S. Ct. at 2645 (Stevens, J., dissenting) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable")).

[212] *Morse,* 127 S. Ct. at 2645 (Stevens, J., dissenting) (citing *Brandenburg*, 395 U.S. at 449 (holding a state can only prohibit speech that advocates the use of force or law violation when such advocacy directly incites or produces imminent lawless action, and is likely to actually incite or produce such action)).

Advocating illegal drug use is far from "incitement to imminent lawless action," the standard established by *Brandenburg v. Ohio.*[213] Even though the dissent agreed on the importance of preventing teenage drug use, it asserted the high school must show Frederick's supposed advocacy stood a meaningful chance of making other students try marijuana.[214] The dissent asserted that Morse could not show a meaningful chance of inducing other students to try marijuana existed in this case.[215]

The dissent argued that in the First Amendment context, any tie should be resolved in the speaker's favor.[216] The policy behind such a standard aims to prevent the fears of a political majority from silencing the view of a political minority.[217] The dissent worried that school administrators would use this decision to silence opposition to the "war on drugs."[218]

ANALYSIS

The Supreme Court's reasoning in *Morse v. Frederick* is problematic for several reasons.[219] First, rather than clarify student speech law, the multitude of opinions and the creation of a fourth rule make student speech law even more confusing.[220] Second, the Court's ruling allows viewpoint-based discrimination,

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[213] *Morse,* 127 S. Ct. at 2645 (Stevens, J., dissenting) (citing *Brandenburg*, 395 U.S. at 447). Relying on *Tinker,* the dissent asserted prohibiting a certain kind of speech, even in a school setting, requires more than a remote fear of apprehension of a disturbance. *Morse,* 127 S. Ct. at 2645 (Stevens, J., dissenting).

[214] *Morse,* 127 S. Ct. at 2649 (Stevens, J., dissenting).

[215] *Id.* (Stevens, J., dissenting). The dissent stated:

> Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would persuade the average student, or even the dumbest one, to change his or her behavior is implausible.

Id. at 2649 (Stevens, J., dissenting).

[216] *Morse,* 127 S. Ct. at 2649 (Stevens, J., dissenting) (citing Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007)).

[217] *Morse,* 127 S. Ct. at 2651 (Stevens, J., dissenting).

[218] *Id.* (Stevens, J., dissenting) The dissent analogizes current debate over the wisdom of the so called war on drugs with the debate surrounding prohibition. *Id.* (Stevens, J., dissenting). It argued that this nation's experience with alcohol should make the Court cautious with restrictions on speech regarding marijuana. *Id.* (Stevens, J., dissenting). The dissent also noted the Court's ruling did not differentiate between types of drugs, specifically alcohol. *Id.* at 2650 (Stevens J., dissenting). Justice Stevens hypothesized that if Frederick's banner had instead said "WINE SiPS 4 JESUS," a message that could easily be construed either as a religious message or as a pro-alcohol message, the Court's ruling would allow school officials to punish such a message. *Id.* at 2650 (Stevens, J. dissenting).

[219] *See infra* notes 220-65 and accompanying text.

[220] *See infra* notes 223-41 and accompanying text.

which is ordinarily unconstitutional.[221] Third, the court's decision could have a chilling effect on student speech.[222]

Morse v. Frederick *Further Confuses Student Speech Law*

Morse v. Frederick is the first student speech case addressed by the Supreme Court since *Hazelwood v. Kuhlmeier* in 1988.[223] As such, this case was widely anticipated in the hopes that the Court would finally clarify what had become a confusing area of law.[224] The Supreme Court, however, dashed those hopes by making student speech law even more confusing than it was prior to this decision.[225] The Court's opinion made student speech law more confusing by 1) creating a new rule, rather than clarifying precedent, 2) relying on an ambiguous factual situation to create the new rule, and 3) issuing five separate opinions.[226]

Rather than rely on the precedent set by the *Tinker* trilogy, the Court further confused the law by adding a fourth condition under which schools can prohibit student speech.[227] Chief Justice Roberts, in the Court's opinion, stated, "the special characteristics of the school environment, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[228] This new rule does not clarify when student expression is sufficiently disruptive or whether school officials can curtail expression that conflicts with the school's mission in the absence of

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[221] *See infra* notes 242-55 and accompanying text.

[222] *See infra* notes 256-60 and accompanying text.

[223] *See Kuhlmeier*, 484 U.S. 260; *Morse,* 127 S. Ct. at 2618.

[224] *See* Martha McCarty, Ph.D., *Student Expression Rights: Is a New Standard on the Horizon?*, 216 ED. LAW REP. 15, 27 (2007). Dr. McCarty argues that student speech rights were not clear. *Id.* (citing Guiles v. Marrineau, 461 F.3d 320, 321 (2d Cir. 2006) (recognizing the "unsettled waters of free speech rights in public schools") and Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005) (acknowledging that much of the law on student expression is "difficult to understand and apply")). Dr. McCarty also claims that, "[c]larification is needed as to when student expression has to be disruptive to be censored and whether expression that conflicts with the school's mission can be curtailed in the absence of a threat of disruption." *Id.* at 30.

[225] *See* Clay Calvert & Robert D. Richards, *A Narrow Win for Schools,* 29 NAT'L L.J. No. 49 (2007) (stating neither administrators nor student come out of this decision with a greater understanding of the broader issue of how much protection student speech deserves).

[226] *See Morse,* 127 S. Ct. at 2629 (creating a fourth rule about student speech and issuing five separate opinions); Murad Hussain, *The "BONG" Show: Viewing Frederick's Publicity Stunt Through Kuhlmeier's Lens,* 116 YALE L.J. Pocket Part 292, 300 (2007) (arguing that the Court should not shape student speech law based on such an idiosyncratic fact situation).

[227] *See* Calvert & Richards, *supra* note 225 (arguing the Court's decision does not "advance, overrule, diminish or even substantially tweak" any earlier precedent).

[228] *Morse*, 127 S. Ct. at 2629.

disruption, as many had hoped it would.[229] It merely added a fourth rule for administrators to consider: whether the student's expression could reasonably be interpreted as promoting illegal drug use.[230]

The facts of this case and the ambiguous nature of the message amplify the confusion created by adding a fourth rule.[231] Great debate ensued over whether the phrase "BONG HiTS 4 JESUS" even amounted to drug-use advocacy.[232] Chief Justice Roberts, in the Court's opinion, added his own words to Frederick's banner to come to the conclusion that the message constituted either an incitement to use drugs or a celebration of drug use.[233] Thus, the extent to which school administrators can add their own interpretation to a student's speech to create a pro-drug message remains unclear.[234] The Court also stated no practical difference exists between the celebration of drugs and the promotion of drug-use, leaving which activities are close enough to the advocacy of drug use to warrant suppression also unclear.[235] As such, this opinion may cause teachers, school administrators, and students great confusion as to which messages involving drugs can be proscribed as "advocacy" and which messages cannot.[236]

Finally, the *Morse* decision confuses student speech law by issuing five different opinions and rationales.[237] Although five Justices agreed with the Court's opinion, they clearly had different reasons for doing so, as demonstrated by the abundant concurrences.[238] The existence of five opinions and vastly differing rationales gives very confusing guidance to the teachers and school administrators who have the

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[229] *See* McCarthy, *supra* note 224, at 30 (expressing hope that the Court would clarify student speech law); Calvert & Richards, *supra* note 225.

[230] *Morse,* 127 S. Ct. 2618.

[231] *See* Posting of David French (Senior Legal Counsel at the Alliance Defense Fund and the Director of its Center for Academic Freedom) phibetacons.nationalreview.com <click on archives><June 2007><A Bong Hit to Free Speech> (June 25, 2007, 12:19 EST) (arguing that in *Morse*, "bad facts make bad law"); Hussain, *supra* note 226 (stating "it would be unfortunate if the Court broadly reshapes the contours of intra-school discourse with an idiosyncratic case in which the student was not trying to speak to anyone at school").

[232] *Compare Morse*, 127 S. Ct. at 2624-25 *with Morse,* 127 S. Ct. at 2643-44 (Stevens, J., dissenting).

[233] *Morse,* 127 S. Ct. at 2625. *See supra* notes 147–151 and accompanying text.

[234] *See Morse,* 127 S. Ct. at 2649 (Stevens J., dissenting).

[235] *Id.* at 2625.

[236] *See* Hussain, *supra* note 226; Perry A. Zirkel, *The Supreme Court Speaks on Student Expression: A Revised Map,* 221 ED. LAW REP. 485, 491 (2007). "In the meanwhile, pending further Supreme Court speech on student expression, caution is warranted in these grey, unsettled areas, particularly in, but not limited to, jurisdictions without pertinent lower court decisions. In short, deciphering content of Morse code beyond pro-drug messages is subject to (mis)interpretation." *Id.*

[237] *See generally Morse,* 127 S. Ct. 2618.

[238] *Id.*

responsibility of making the day-to-day decisions regarding student speech.[239] A United States District Court opinion issued less than a month after the decision in *Morse* recognized that school administrators are justified in their confusion about the boundaries of student speech.[240] Thus, rather than clarify student speech law, the Court only made it more confusing through the *Morse* decision.[241]

Morse *Allows Viewpoint-Based Discrimination.*

The Supreme Court's decision not only utterly confused student speech law, but more importantly it essentially condoned viewpoint-based discrimination.[242] In First Amendment cases, content-based, and especially viewpoint-based prohibitions, are subject to the most stringent standards.[243] The Court generally presumes viewpoint-based discrimination unconstitutional.[244] The reasoning behind this presumption relates to a major justification of the First Amendment itself: the least popular political views need the most protection for democracy to function.[245]

This reasoning applies equally to the school environment.[246] Since public schools are a primary vehicle of social and civic learning in our society, the infringement of rights in schools while students are at an impressionable age is

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[239] *See* Calvert & Richards, *supra* note 225; Margaret Graham Tebo, *High Court Hits "BONG,"* 6 No. 26 ABA J. E-Report 1 (June, 29 2007) ("Noting the close vote and variety of opinions expressed by the justices . . . the case provides little value as precedent. There was nothing close to consensus here"). Justice Breyer argued that it was "utterly unnecessary" to produce five differing opinions in this case. *Morse,* 127 S. Ct. at 2641 (Breyer J., concurring in part and dissenting in part).

[240] Layshock v. Hermitage School District, 496 F.Supp.2d 587, 604 (2007). "The five separate opinions in *Morse* illustrate the plethora of approaches that may be taken in this murky area of law." *Id.*

[241] *See supra* notes 218-36 and accompanying text.

[242] *See* Hans Bader, *Campaign Finance Reform and Free Speech: Bong HiTS for Jesus: The First Amendment Takes a Hit,* 2006-07 Cato Sup. Ct. Rev. 133, 142 (2007) (stating that the decision in *Morse* was disappointing because it permitted "viewpoint discrimination and censorship based on speculation about the consequences of speech").

[243] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828 (1995); *See generally* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988).

[244] *Rosenberger,* 515 U.S. at 828.

[245] *Id.*

[246] *Tinker*, 393 U.S. at 512.

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.

Id. (citing Keyishan v. Board of Regents, 385 U.S. 589, 603 (1967)(internal citations omitted)).

detrimental.[247] If students do not learn about their constitutional rights early, they will not be as willing to exercise those rights in the future.[248]

In creating a restriction that prohibits students from expressing possible views concerning drugs, the Court has taken the increased First Amendment flexibility granted 'in light of the special circumstances' of public schools too far.[249] Although preventing student drug use may be an important objective of public schools, that concern does not raise it above constitutional grounds.[250] In effect, the Supreme Court raised the "war on drugs," a highly controversial political topic, to a level equal with the First Amendment, and gave the "war on drugs" equal footing with constitutional guarantees.[251]

Morse may pave the way for further speech restrictions.[252] Perhaps colleges and universities will adopt the *Morse* rationale and prohibit drug-related messages on campuses.[253] If the Court deems preventing drug use among teens a sufficient justification to pass constitutional scrutiny in schools, it is likely other justifications for censorship will also pass constitutional scrutiny.[254] Student speech regarding alcohol, sex, and violence may be on the path to restriction.[255]

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[247] *See* Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954) (stating public education "is the very foundation of good citizenship," and "is a principal instrument in awakening the child to cultural values").

[248] *See* Hussain, *supra* note 226.

[249] *Id.* (arguing that permitting broader content regulation is likely to have a chilling effect on student speech).

[250] *See* Bader, *supra* note 242. "The idea that viewpoints can be restricted when they oppose or undercut important government policies is fundamentally at odds with the purpose of the First Amendment." *Id.*; *see also* Posting of French, *supra* note 231 (arguing that virtually all restrictions on speech are justified by preventing harm to young people and by referencing other laws and regulations, and that the same justifications could be used to silence virtually any speech, including speech on political and religious issues).

[251] *See* Bader, *supra* note 242.

[252] *See ACLU Slams Supreme Court Decision in Student Free Speech Case,* http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html ("because the decision is based on the Court's view about the value of speech concerning drugs, it is difficult to know what its impact will be in other cases involving unpopular speech").

[253] *See* Posting of French, *supra* note 231 (asserting, "[w]hen high school rights shrink, universities grow bolder").

[254] *See* Zirkel, *supra* note 236 at 488 (arguing that the Supreme Court may also subject expression supportive of alcohol, sex, and violence to censorship in public schools); *see also* Bader, *supra* note 242, at 142.

[255] Zirkel, *supra* note 236; Bader, *supra* note 242, at 142.

Morse *May Have a Chilling Effect on Student Speech*

The danger of the confusing *Morse* decision is its potential to lead school officials to prohibit any message in which drugs form the content.[256] Schools may become more apt to censor drug related speech, even if the message contains political or social commentary in ways that Frederick's message did not.[257] Even if school officials do not punish protected speech regarding drugs this decision may create a chilling effect on students.[258] Increasing the possibility of punishment for drug-advocacy may encourage students to steer far clear of any speech about drugs, even constitutionally protected speech, out of fear of punishment.[259] A chilling effect is particularly likely since the Court did not attempt to clarify that political or social speech is protected, despite Justice Alito's attempt to make the limits on this ruling clear.[260]

Qualified Immunity

Although the Supreme Court granted certiorari based partially on qualified immunity, which performed a major role in the lower courts' decisions, the Supreme Court virtually ignored qualified immunity by stating since Morse did not violate Frederick's constitutional rights, the Court did not need to consider the second issue of whether Morse was entitled to qualified immunity.[261] Justice Breyer argued that the Court erred by ruling on the constitutional issue rather than limiting its review to qualified immunity.[262] Justice Breyer asserted that the principle of judicial restraint prohibited the Court from considering a question of constitutionality when it can decide a non-constitutional question.[263] In this case, Justice Breyer concluded the Court could have unanimously decided that Morse was entitled to qualified immunity without addressing the merits of Frederick's claim, and thus should have done so.[264]

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[256] *See Morse,* 127 S. Ct. at 2649-50 (Stevens, J., dissenting).

[257] *See id.* at 2649 (Stevens, J., dissenting) (stating, "that the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principal it articulates has no stopping point").

[258] *See id.* at 2650 (Stevens, J., dissenting); Hussain, *supra* note 226.

[259] *Morse,* 127 S. Ct. at 2650 (Stevens, J., dissenting). "If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some reasonable observer censor and punish them for promoting drugs." *Id.* (Stevens, J., dissenting).

[260] *See* Morse v. Frederick, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring).

[261] *Morse,* 127 S. Ct. at 2624.

[262] *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

[263] *Id.* at 2641 (Breyer, J., concurring in part and dissenting in part).

[264] *Id.* (Breyer, J., concurring in part and dissenting in part).

The Court rightfully rejected Justice Breyer's argument for two reasons.[265] First, the two-step qualified immunity test the Supreme Court announced in *Saucier* requires the Court to determine the constitutional issue before determining whether a public official qualifies for qualified immunity.[266] Second, if the Court found Principal Morse was covered by qualified immunity, it would only eliminate Frederick's claim for damages.[267] Such a ruling would not address Frederick's claim for injunctive relief.[268]

The Court addressed the First Amendment issue first because that is the first step specifically described by the controlling precedent, *Saucier.*[269] Although Justice Breyer has urged the court to overrule the *Saucier* order many times, the Court has never adopted his view.[270] On policy grounds, the *Saucier* order of considering the constitutional question allows constitutional law to develop.[271] Under the test as Justice Breyer urges, courts could consistently hold public officials are entitled to qualified immunity because the law was unclear without addressing the constitutional merits.[272] Since so many constitutional cases involve public officials, important constitutional questions may never be addressed, and

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[265] *See infra* notes 266-80 and accompanying text.

[266] *Saucier,* 533 U.S. at 200-01.

[267] *Morse,* 127 S. Ct. at 2624 n.1.

[268] *Id.*

[269] *Saucier,* 533 U.S. at 201.

[270] *See* Scott v. Harris, 127 S. Ct. 1769, 1780-81 (2007) (Breyer, J., concurring); Brosseau v. Haugen, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring). Justice Breyer concurred in these cases to argue that the *Saucier* order-of-battle should be overturned. *Scott,* 127 S. Ct. at 1780-81 (Breyer, J., concurring); *Brosseau,* 543 U.S. at 201-02 (Breyer, J., concurring). He argued that the order-of-battle sometimes requires lower courts to unnecessarily consider constitutional questions, and that such inquiries often lead to a waste in judicial resources. *Scott,* 127 S. Ct. at 1780-81 (Breyer, J., concurring); *Brosseau,* 543 U.S. at 201-02 (Breyer, J., concurring). As such, Justice Breyer contended the Court should not have followed the principal of *stare decisis* in this instance, and the Supreme Court should have overruled *Saucier,* allowing courts to choose the order of review on a case-by-case basis. *Scott,* 127 S. Ct. at 1780-81 (Breyer, J., concurring); *Brosseau,* 543 U.S. at 201-02 (Breyer, J., concurring).

[271] *Saucier,* 533 U.S. at 201.

[272] *Saucier,* 533 U.S. at 201.

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Saucier, 533 U.S. at 201; *see also Scott,* 127 S. Ct. at 1774 n.4.

in many cases government agencies may escape review of their actions.[273] In light of this policy, the Court was reasonable in following precedent rather than addressing qualified immunity before the constitutional question.[274]

The second reason the Court could not dispose of this case by simply claiming Morse was entitled to qualified immunity without addressing the constitutionality of her actions was that Frederick requested injunctive relief regarding his suspension.[275] A holding in favor of Morse on qualified immunity grounds alone would prevent Frederick from recovering damages.[276] However, it would not address his claims for injunctive relief.[277] Although Justice Breyer hypothesizes that Frederick's suspension might be completely justified on non-speech-related grounds, the Court points out that none of the lower courts considered that possibility and none of the parties alleged it.[278] The Court further asserted the record supports the opposite conclusion, that Frederick's suspension was based at least in part on his speech.[279] Based on these two reasons, the Court rightly concluded disregarding the *Saucier* order-of-battle and deciding based on qualified immunity alone was not the quick and easy answer Justice Breyer suggested it was.[280]

CONCLUSION

The Supreme Court created a fourth justification for suppressing student speech by ruling that school officials can take steps to safeguard students from speech that can reasonably be interpreted as encouraging illegal drug use.[281] Rather than rely on existing precedent the Court now requires school officials to consider a new rule.[282] This holding, unlike previous student speech law allows for the restriction of a specific viewpoint which may lead to further restrictions of speech in the future and may discourage students from exercising their First Amendment rights. [283]

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[273] *Saucier,* 533 U.S. at 201; *See also Scott,* 127 S. Ct. at 1774 n.4.

[274] *See Saucier,* 533. U.S. at 201.

[275] *Morse,* 127 S. Ct. at 2623, 2624 n.1.

[276] *Id.* at 2624 n.1.

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *See supra* notes 261-79 and accompanying text.

[281] *Morse,* 127 S. Ct. at 2622.

[282] *See supra* notes 227-30 and accompanying text.

[283] *See supra* notes 242-60 and accompanying text.

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TRANSCRIPTS

WHY LAWYERS SHOULD LEAD

*Professor Harvey Gelb**

April 24, 2007

On April 4, 2007 Harvey Gelb, The Kepler Chair in Law and Leadership and Professor of Law, delivered the 2007 Kepler Lecture on Law and Leadership.[1]

The Kepler Chair honors three University of Wyoming Law School alumni, Charles Kepler (J.D. 1948), his daughter Loretta (J.D. 1981) and his late nephew Courtney (J.D. 1992), all honor students. Professor Gelb recalled his students Loretta and Courtney as highly intelligent and honorable people.

An anonymous donor, Charles and Ursula Kepler, and the Paul Stock Foundation jointly funded the Kepler Chair in Law and Leadership.

Charles Kepler, a very popular guest lecturer in Professor Gelb's Business Planning Class, shares wisdom and expertise gleaned from his practice of law in Cody, Wyoming. Taking time for students is just another item in the long list of services Charles Kepler has provided to his community, this University, and the legal profession. Examples include such diverse roles as Trustee, Buffalo Bill Historical Center in Cody, Wyoming; Member, UW College of Law Dean's Advisory Board; Member, Board of Directors: The Salk Institute; and Life Member, National Conference on Uniform State Laws.

Those the Kepler Chair honors serve as inspiration for Professor Gelb's lecture, *Why Lawyers Should Lead*.

Introduction

I have come to praise lawyers, not to bury them. In fact, society cannot bury us; we are needed too much. I have been a lawyer for almost 46 years, 18 in practice and 28 as a law professor. My first-hand experience makes me proud of my profession. We are not always perfect, but who is without flaws? In any occupational group, some will act shamefully and give ammunition to those who wish to be critics. I say to you that when we are victims of bad publicity, consider the sources and their motives. I adhere to my faith that lawyers generally are a strong force for the good in society, and I would like to talk with you about why lawyers should lead.

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* Kepler Chair in Law & Leadership and Professor of Law, University of Wyoming College of Law. B.A. 1957, Harvard College; J.D. 1960, Harvard Law School. The author is grateful to his excellent student research assistants William P. Elliot II and Nathan Burbridge.

[1] In preparing the talk for publication, footnotes were added and some slight revisions were made.

WHY SHOULD WE LOOK TO LEADERSHIP FROM LAWYERS, A GROUP THAT SUFFERS A BAD REPUTATION?

Let's First Consider Why Lawyers Are Maligned.

A) In performing our work, we are often part of an adversarial system. We negotiate for one side against another; we represent those charged by the government with heinous or other crimes; we counsel businesses accused of harming the interests of the public, and we represent those who do battle with such businesses. Our rules of conduct require us to be loyal to our clients. Those who oppose us and even neutrals may see us as mercenary troublemakers or hired guns and not as seekers of justice. Even to us, achieving fairness or justice in a particular situation may be a somewhat foreign notion. Rather, our goal is the best result for our client.

This system of adversarial conflict may be justified on the basis that it somehow or generally leads to "just" results or the "best results" in most situations. For example, it may be argued that out of the clash of advocates in the courtroom, with each side presenting law and facts to the court, justice will ensue. Or at a negotiating table with each side offering proposals and arguing over the content of documents, a reasonable and beneficial transaction will result. Counter arguments may question results achieved under the adversarial system at least in some contexts, such as where an attorney on one side is much better than her opponent. But my point here is not to raise such issues, but simply to show how the adversarial system may damage public perceptions of how we lawyers conduct our profession.

B) Sometimes lawyers are attacked because they antagonize powerful special interests. These special interests, who themselves use lawyers to promote their goals, nonetheless may benefit from discrediting lawyers generally. This approach may help them to counter efforts of lawyers such as those who work as government officials to regulate special interests, or who represent class action private plaintiffs who sue for employment discrimination, or who file derivative corporate suits for breach of fiduciary duty by corporate officials. Lawyers represent those who battle against corporate environmental abuse or other antisocial behavior. Businesses and their lobbyists may benefit with courts, juries and legislatures by smearing the legal profession that calls them to account.

In a February 2007, ABA Journal article, one trial lawyer stated: "We tip our hat to the insurance companies and others in Corporate America who spent millions of dollars over a lot of years to poison the well for the name of trial lawyer. . . ."[2] This article lists some of the buzzwords: "Greedy Trial Lawyers.

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[2] Terry Carter, *New Name, New Strategies: ATLA Changes Its Moniker and Hones Its Tactics to Battle Tort Reformers*, ABA JOURNAL, Feb. 2007, at 39.

Lawsuit lottery. Jackpot justice. Lawsuit abuse. Junk lawsuits. McDonald's coffee case. Runaway juries. Tort tax. Judicial hellholes."[3] Recently the Association of Trial Lawyers of America voted to change their group's name to the American Association for Justice, a reasonable move in the public relations battle that has been raging.[4]

C) Sometimes lawyers do misbehave and bring discredit to themselves and the legal profession. For example, some lawyers bring frivolous lawsuits, and some district attorneys are unjust in their behavior to persons accused of crime and therefore give ammunition to those who seek to undermine the legal profession in the eyes of the public. Our profession, and we as individual professionals, must respond meaningfully to attorney misbehavior. But no human or group of humans is perfect, and our profession should not be condemned irrationally or unfairly. And remember, it's the misbehavior, real or fictional, that makes a more interesting TV or movie script or the sensational press release, so that's what the public often hears.

LET'S TURN NOW TO CONSIDER THE MORE TRUE-TO-LIFE PICTURE OF THE PRACTICING LAWYER, THE NEGATIVE AND THE POSITIVE.

Unquestionably, Some Lawyers Experience Tough Going. Why?

A) Tension: For some of us a big and frequent dose of adversarial conflict generates significant tension. Moreover, our work generally requires much care and precision, and errors can be devastating. Furthermore, we may live with deadlines and time pressures within or outside of our control. To some, the tensions are no big problem and can be turned to productive purposes. To others, tensions may cause sleep problems, indigestion, and other physical or mental problems and may actually diminish the quantity and quality of their production. Tensions may even contribute to burnout and withdrawal from the profession once enthusiastically and completely embraced.

B) The Idealism Gap: If the practice of law seems to some of us to be insufficiently linked to working for justice, fair play, and good social goals—and overly linked to controversy on behalf of causes with which we do not agree or have grave doubts—idealistic considerations which would fuel our efforts and lead to psychological satisfactions may be largely absent in our careers. The evident lack of a career purpose acceptable to a lawyer may undermine and end the pursuit of that career. Moreover, the relentless and unfair public relations campaigns which ridicule or condemn our profession may erode the appropriate

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[3] *Id.*

[4] *Id.*

pride and satisfaction we should possess in being part of a noble, venerable and essential profession. To my brother and sister lawyers, I say that the appropriate reaction to such campaigns is embodied in the Latin phrase, "*Illegitimati non carborundum*."

C) Money: All of this is not to ignore the financial side of the practice of law. To many of us as in any occupation, earning money to support our families is essential. Some of us may do extremely well or moderately well. But not all lawyers are able to make a sufficient living from practice, and the anxiety caused by inadequate or uncertain financial compensation that may leave family needs unmet may drive people from the practice of law, a form of economic burnout.

The Other Side of the Matter: The Good That Lawyers Do

What about lawyer satisfaction from practice? There are bright sides—very bright sides—to the legal profession that for many outweigh the pressures and lead to great satisfaction. I asked a practitioner of 20 years who worked on difficult cases why he was positive about his profession. His response was a simple one—because he helped people. We lawyers work to protect society from crime and to protect individual rights against improper government intrusion. We prepare the documents that provide for educational, recreational, business, and residential facilities to be created. For example, when I was city solicitor I did work to enable our city to renovate and build swimming pools, parking facilities, and sewage facilities, and when I saw the city's progress I felt good about it. We help people to buy businesses when they are eager to embark on ventures and to sell them when they want to retire. I have represented clients who worked hard to develop good businesses and wanted to sell them for a fair price that would actually get paid—even in installments—so that they would have security in their retirement. It is a special feeling when we use our skills as lawyers to help clients achieve such security. We represent people with personal injuries and property damage as well as those from whom they seek damages. We help people plan their estates and provide for their families. We deal with environmental issues and natural resources matters. We counsel clients to prevent their violating laws—and this is an important role—in fact I would say that practitioners know—but the public does not realize—the extent to which lawyers prevent violations of the law. Although we participate in conflict and adversarial situations, we often work for the resolution of conflict and settlement of disputes and earn the honor of being called peacemaker. In other words, there are many ways in which we achieve satisfaction in helping people and society.

The main thrust of my comments today is concerned with lawyers, not as they are engaged in the technical practice of our profession, but rather as leaders in our society.

III. I OFFER THREE REASONS WHY LAWYERS SHOULD LEAD

First, law is so important to all of us. It establishes rules of conduct backed by the power of government. These rules affect our lives in many ways. They are protective but they can also be threatening. The government that makes rules and enforces public and private ones has a huge responsibility to be reasonable, clear, fair and just. Lawyers are well suited to roles in government. It is no accident that 25 of 42 American presidents were lawyers,[5] as are many of our Senators and Representatives, and as we know our Supreme Court plays a vital role in our governmental system. Among those presidents who were lawyers and leaders were John Adams, who defended British soldiers when it was unpopular to do so in a case involving the Boston Massacre, and Abraham Lincoln, who drafted the Emancipation Proclamation, one of the most important documents in our history and an outstanding example of legal drafting skills. And there was Thomas Jefferson who directed that his tombstone should refer to his authorship of the Declaration of Independence, founding of the University of Virginia, and responsibility for the Virginia Statute for Religious Freedom, (though he did not refer to his presidency, which was not without significant accomplishment e.g. the Louisiana Purchase). Americans realize the enormous importance of law in our society and lawyers are after all "learned in the law." By education and experience, we lawyers understand the separation of powers, checks and balances, and the protection of rights and respect for legal obligations.

But we need not be officeholders to help preserve our great American legal system. We can educate each other and our fellow Americans about our government and the importance of active citizenship in our nation. We can encourage participation in elections and help insure that votes are properly counted. Where necessary we can participate in litigation and let our voices be heard in letters and public forums, at our barber shops and hair salons, and on a one-to-one basis. Our education and professional license have given us certain expertise and practical power, and with such power comes our responsibility to be good citizens. Indeed lawyers in government and lawyers outside of government have a great responsibility to protect people from government abuses.

Let me offer an example of lawyers speaking out in public against a fellow lawyer. Not long ago, the Deputy Assistant Secretary of Defense for Detainee Affairs Charles "Cully" Stimson, a lawyer, found it shocking that major law firms in the United States were representing Guantanamo Bay detainees and opined that corporate CEOs would make the law firms choose between representing terrorists or representing reputable firms.[6]

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[5] James Podgers, *Mr. President, Esq.: For Better or Worse, Most U.S. Chief Executvies Have Been Lawyers, Says New Book*, ABA JOURNAL, Nov. 2004, at 66.

[6] Interview by Jane Norris and Mike Causey with Charles Stimson, on Fed. News Radio (Jan. 11, 2007).

I am pleased to report that ABA President Karen J. Mathis responded as follows: "Lawyers represent people in criminal cases to fulfill a core American value: the treatment of people equally before the law. To impugn those who are doing this critical work—and doing it on a volunteer basis—is deeply offensive to members of the legal profession, and we hope to all Americans."[7]

I take pride in the fact that more than 130 leaders of law schools, including our own Dean Parkinson, signed a letter reading in part as follows:

> Our American legal tradition has honored lawyers who, despite their personal beliefs, have zealously represented mass murderers, suspected terrorists, and Nazi marchers. At this moment in time, when our courts have endorsed the right of the Guantanamo detainees to be heard in courts of law, it is critical that qualified lawyers provide effective representation to these individuals. By doing so, these lawyers protect not only the rights of the detainees, but also our shared constitutional principles.[8]

A second reason for lawyers to lead is lawyers have skills to contribute. Not very long ago I spoke to an outstanding Rabbi—a person with a brilliant intellect—who had been chair of an important Board responsible for humanitarian service to people with needs: the elderly. He perceived the considerable value of lawyers on his Board as the ability to raise significant points that probably would not have been made otherwise. Recently a senior college development director conducted a quick survey of Arts and Sciences Boards of Visitors that yielded positive responses about lawyers on Boards. One administrator stated their value as follows: "clear thinkers, process oriented, provide good feedback, value their liberal arts education, keep others on track and help summarize materials well."[9]

During my practice years, many philanthropic organizations asked me to serve on their Boards or in other ways, and I often did, not to give professional representation to these organizations, but to serve their purposes in other ways such as chairing a community relations committee, promoting education, and soliciting contributions for causes dear to me.

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[7] Press Release, American Bar Association, Statement by APA President Karen J. Mathis on Remarks of Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, in January 11, 2007 Federal News Radio Interview (Jan. 12, 2007) http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=64.

[8] Yale Law School News & Events, Law Deans Release Statement on Remarks of Cully Stimson Regarding Lawyers for Detainees (Jan. 16, 2007) http://www.law.yale.edu/news/4055.htm.

[9] Survey by Dale Walker of Arts and Sciences Boards of Visitors (on file with author).

Despite all the unfair lawyer jokes, and our bad public relations, community organizations want our services. And by the way, I hate unfair lawyer jokes. They are part of the demeaning of our profession. The people who tell them may not always realize their negative impact, but we should let them know.

I submit that organizations are wise to seek lawyers as board members or in other capacities, and lawyers will benefit from accepting a reasonable number of community positions. But note well the word, "reasonable number." We must learn to accept only what time and inclination permit. We must learn to say "no" even when we feel flattered by offers. We must also be mindful that certain positions may carry with them the threat of personal liability and assess our risk before accepting them.

Why are lawyers great candidates for community service? 1) By education—we are trained to be logical and analytical, to see issues factual and legal, and engage in problem solving. 2) We are trained to gather facts and to discern what is relevant in the various situations with which we deal. 3) We are trained to look to precedent—to past practice and also to current analogous situations to see what wisdom can be garnered from the experiences and methods of others—to ascertain its applicability to or differing characteristics from situations we are facing. 4) We know a great deal about doing research. 5) We know how to ask questions of others. 6) We know what is expected of agents and directors and trustees in the eyes of the law—the loyalty and care that they owe as fiduciaries to those they serve. For example, many of us, including my students in Business Organizations, are schooled in idealistic principles like those stated by Judge Benjamin Cardozo in the context of a case involving fiduciary duties owed by partners or joint adventurers in business together. Cardozo said:

> Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[10]

Is it not a good thing for organizations to have the services of lawyers schooled in such lofty principles of fiduciary responsibility? 7) We are, therefore, in a position by example and by advice to instruct other fiduciaries who serve with us as to their duties.

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[10] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

There were many days when I raced from my office to attend a directors or trustees meeting of a philanthropic organization. It was a great change of pace and spiritually uplifting, as the doing of a good deed can be. Let me hasten to add that I chose my community work because of feeling for the causes it served, but it did at times lead to an important side benefit, the acquisition of clients also devoted to such causes, the possibility of which I was not totally ignorant.

For the third reason for lawyers to lead, strangely enough, I now return to the subject of dissatisfaction and burnout. In my earliest weeks as an undergraduate freshman at college, an essay about Sigmund Freud with his famous id, ego, and superego terminology was required reading for my entire class. After all, one could hardly engage in social discourse or understand frequent academic references without knowing some basic Freudian terms. It was not uncommon for students to discuss each others' psychological problems face-to-face in Freudian terms. I never took a course in psychology and over the years have read little more in that field. A few years ago, I acquired a copy of Viktor E. Frankl's *Man's Search for Meaning*, a book that has sold millions of copies. Frankl's theory, called Logotherapy, states that the "striving to find a meaning in one's life is the primary motivational force in man."[11] This contrasts to the pleasure principle on which Freudian psychoanalysis is based and the will to power on which Adlerian psychology is focused.[12] There are many treatises written about psychology and logotherapy and my knowledge is like a drop in the sea. But I have the temerity to call to your attention some thoughts declared by Dr. Frankl because they resonate with me. He states "that man is responsible for and must actualize the potential meaning of his life" and that "the more one forgets himself—by giving himself to a cause to serve or another person to love—the more human he is and the more he actualizes himself."[13] I believe that our profession is exceptionally well-suited to the attainment of a meaningful life through service to causes and to people.

Ah—you say—look at all of the tensions in our profession. But not all tensions are bad. Tensions may lead us to better performance, to more alertness—to better preparation. And there is Dr. Frankl's perspective on tension: "that mental health is based on a certain degree of tension, the tension between what one has already achieved and what one still ought to accomplish, or the gap between what one is and what one should become."[14] This is reminiscent of a favorite Justice Brandeis quote from Mathew Arnold, "Life is not a having and a getting, but a being and a becoming."[15] Admittedly the practice of law may not be everyone's best road to

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[11] VIKTOR E. FRANKL, MAN'S SEARCH FOR MEANING 121 (Washington Square Press 1985) (1946).

[12] *Id.* at 121.

[13] *Id.* at 133.

[14] *Id.* at 127.

[15] ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 94 (Viking Press 1946).

follow—and some may appropriately change course to pursue their meaning in life. But for many of us, it can bring true satisfaction.

TO SUMMARIZE, THESE ARE THE THREE REASONS WHY LAWYERS SHOULD LEAD.

A) We are good at it—our training and expertise match needs of leadership.

B) It is good for us. Professional and civic work helps us to satisfy our "meaning in life" needs.

C) It's good, even essential, to safeguard the American way of life—we can perpetuate a society of law and freedom under law.

When I was a very little boy I asked my mother what I could be when I grow up. I used to hear other kids talk about being firemen and I wondered about it. My mom said: "Well you can be a doctor or lawyer or engineer." My mother had been a schoolteacher and my father a physician and my future was very important to them. When I couldn't stand the sight of dissecting a frog and knew next to nothing about being an engineer, one possibility remained, the law. I read about great lawyers like Louis Brandeis and Clarence Darrow. I knew that law was a gateway to a variety of interesting careers and I opted for law. My saintly parents were very happy with that decision and they sacrificed a great deal cheerfully to provide me with a law school education. They knew, and so did I, that I was becoming a part of an honorable and important profession—a profession which to this moment I am proud to be part of. You students of the law, members of the profession, your families, friends and the American people should know that too.

REPORT TO THE WYOMING STATE BAR

*Barton R. Voigt, Chief Justice**

September 14, 2007

I am pleased once again to report to the State Bar as Chief Justice. This past year has gone by all too quickly, and the judiciary has been neck-deep in projects, but I believe we are keeping our heads above water. I know I will forget something I should be telling you, but here are the highlights:

The remodeling of the Supreme Court building is going better than expected, at least as to timeliness. We have been assured that construction is ahead of schedule, and we anticipate being "back home" by this summer. We expect everything to be grand, but we have some trepidation that modern construction methods and materials simply will not match the simple grandeur of the building as it was. Nevertheless, we have no doubt that it will be much more functional than it was, and that it will serve the people of the State for many years to come. In particular, the courtroom, which will now be located in the center of the main floor, and which will be nearly twice the size of the previous courtroom, will now be the focal point of the building.

One big challenge during the remodeling is reflective of the changing nature of both legal research methods and daily office work. The architects worked mightily to maintain the necessary space for our "paper" library, while making space for our ever-increasing electronic information technology staff. That staff, which used to consist of two people, maintains the computer network for the entire judicial branch, not just the Supreme Court. We now have a network systems administrator, a senior network systems manager, a help desk/network manager for the Supreme Court and Circuit Courts, a network systems manager for the District Courts, a database administrator, a database/software manager, and a software developer. We are trying to hire Bill Gates as our new court administrator.

The biggest project presently being tackled by all of these people is implementation of an electronic case management system at the Supreme Court. That system is now up and running internally in the clerk's office. The transition into that system, whose trade name is C-Track, was nearly seamless, and we are already deep into the process of developing the electronic filing system that will

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* Barton R. Voigt was raised in Thermopolis, Wyoming. He obtained a B.A. and M.A. in American History, as well as a J.D., at the University of Wyoming. He practiced law in his home town for ten years, serving as Hot Springs County and Prosecuting Attorney for two terms. After two years as a county judge in Gillette, he was for eight years a district judge in Douglas. He was appointed to the Supreme Court on March 29, 2001, and became Chief Justice on July 1, 2006.

follow. Soon after that, the third phase of the case management system—full electronic case management within each of the five justice's chambers—will be implemented. All of this should be available for public access and use by the next time I show up for this presentation. Other major projects for the I.T. staff have included replacing the recording systems in all of the circuit courts with digital recording equipment, and cataloguing the electronic needs and wants of the district court judges.

You may have noticed the August 13, 2007, article in the Casper Star Tribune, reporting on the impact of Wyoming's current economic boom upon the court system. While all of the State has been affected, Gillette, Rock Springs, and Pinedale are particularly busy. During its last session, the legislature funded a new weighted caseload study to allow us to analyze that impact upon the functioning of the courts. The results of that study are just now available. We hope to use the study to determine if, and where, additional judges are needed. I will not bore you with the caseload statistics from the individual courts; suffice it to say that nowhere are the numbers going down. We recognize, and hope to address, the central problem, which is the fact that criminal and juvenile case deadlines continually push civil cases further and further down the docket. Many of our courts are now setting cases well beyond a year down the road—a situation we find unacceptable. As was evidenced over the past couple of years in Casper, a significant roadblock in solving this problem lies in the fact that our state courts are housed in county courthouses, many, if not most, of which, are outdated, undersized, and inadequate. We have no magic solutions.

In our spare time, we have kept busy by "messing with" various court rules and the Bar's by-laws. A quick synopsis of those changes:

> Pursuant to Article I, Section 4(a) of the by-laws, and at the request of the Bar Commissioners, we approved an increase of $50 to the annual license fee to $300 for active members and $187.50 for inactive and new members.
>
> Pursuant to Article X, section dues will now be set by the Bar Commissioners rather than by each section's members.
>
> Pursuant to Rule 7, the Wyoming State Board of Continuing Legal Education may now consider untimely requests for hardship or extenuating circumstances.
>
> Changes to Rule 10 (penalties), Rule 11 (duties of suspended attorneys), and Rule 12 (reinstatement), cover new admittees, time frames, and the form of petitioning for reinstatement.

> New Rule 21 of the Wyoming Rules of Appellate Procedure provides a method for remanding cases to the trial court for hearings on claims of ineffective assistance of counsel.
>
> There is an entirely new section of the rules governing procedure in juvenile courts.
>
> Changes to Rule 6 of the Wyoming Rules of Civil Procedure clarify motion practice, particularly in regard to dispositive motions and the "deemed denied" rule.
>
> And finally, a Revised Uniform Bail and Forfeiture Schedule went into effect on July 1, 2007.

When I last reported to you, District Judges Hunter Patrick of Cody and John Brackley of Sheridan, as well as Circuit Court Judge Sam Soulé of Rock Springs, had just retired. They have been replaced, respectively, by Steve Cranfill, John Fenn, and Dan Forgey. In addition, Curt Haws has replaced John Crow as the Circuit Judge in Pinedale. We welcome these new Judges to the fold and wish them well in tackling their new responsibilities. Probably, we should feel sorry for them, as Sheridan, Cody, Rock Springs, and Pinedale are all growing and changing, and are in the midst of the throes of the economic boom I mentioned earlier.

Finally, I will mention a few of the special projects and initiatives with which we are involved. The federally funded Children's Justice Project continues to operate out of our court. The CJP was instrumental in helping develop the juvenile court procedural rules, and it continues to work with the juvenile courts in attempting to maximize compliance with federally mandated timelines and other goals. We also recognize the need to develop procedures to deal with the ever-increasing number of self-represented litigants and non-English speaking litigants. The Court is also working with the Judicial Nominating Commission and the Commission on Judicial Conduct and Ethics to help members of the Bar and the public better to understand the judicial selection and judicial supervision processes. We are concerned about recent attacks upon the merit selection system, both here and across the nation, and we are cognizant of a perception that judicial supervision is overly confidential.

I will end by thanking you for giving me this opportunity to tell you all a little about what we are doing in the judiciary. Feel free to give me or any of your local judges a call if you believe something needs particular attention in the court system. I cannot promise you that we can fix whatever it may be, but I can promise you that we will listen.

PHYSICIAN ASSISTED DEATH: FROM RHETORIC TO REALITY IN OREGON

*Arthur LaFrance**

Introduction

The topic is physician assisted death, and there is no easy way to transition into it except to say that it is a subject of importance to every person in this room, and for that matter, every person in America. We all face death at some point, and we all have friends or relatives who are either facing death or have already done so. And so this is a part of our lives. The subject of assisting people to die is particularly close to me because my state, Oregon, has adopted what is, in the world, the only legislative authorization for physicians to assist people to die.

Ten years ago, actually this month, November of 1997, Oregon's legislation became effective. It was adopted by referendum two years earlier, and as everything does, it wound its way through the courts. An injunction was dissolved in 1997 and the legislation became effective. For a second time, as well, in 1997 it was reaffirmed by yet a second referendum. Thus, on two separate occasions, we Oregonians voted that we wanted this option to be available to Oregonians who are facing a terminal illness. It is ten years this month, November of 2007, that we have been living with what is, in all the world, a unique legislative experience and experiment.

Additionally, the Oregon Department of Human Services maintains an extensive Web site detailing the nature and extent of this experiment and experience.[1] Among other resources, that Web site has eight annual reports posted to it. Those reports reflect in extensive detail all of the experience under the

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* Professor Arthur LaFrance has taught courses in healthlaw and bioethics at Lewis and Clark Law School in Portland, Oregon for twenty years, as well as at universities in Perth, Australia; Houston, Texas; Christchurch, New Zealand and most recently, the University of Wyoming. He is the author of a book, Bioethics: Healthcare, Human Rights and the Law (2d Ed., 2007, Lexis Pub.), as well as a number of articles in the field of bioethics. He confesses to being an avid cyclist, a mediocre tennis player, and an ineffectual, but committed, flyfisherman. The present article is based on lectures Professor LaFrance delivered to the national judiciary at Tongoriro National Park in New Zealand in March of 2007 and the Rudolph lecture delivered in November of 2007 at the University of Wyoming.

[1] *See generally* http://www.oregon.gov/DHS/index.shtml (It is a useful resource on the history of the adoption of the Oregon legislation, as well as a reference for scholarly writings on the subject. Additionally, the Department has posted eight annual reports on the practice and experience under the Death With Dignity Act, providing most of the data reflected in this paper. Because this paper, while accurate according to scholarly traditions, is not a conventional scholarly piece, many of the references one might usually find are omitted, in anticipation that the motivated reader will visit the Oregon DHHS website for further sources and validation).

legislation since its inception. That Web site also has references to scholarly articles and commentary, as well as the legislation itself. Much of this is reflected in the handout, which I hope all of you have picked up. Of course there are a number of good books, some of which I've noted towards the end of this handout.[2]

As we approach this subject, we will first discuss the place of death in life, then we will review the statute and the experience under it, and then we'll turn to some of the criticisms of the statute, and conclude with the present and future legal status of the Oregon legislation. In a nutshell, as I've said, the law became effective in 1997. There was a challenge that went to the United States Supreme Court which decided in favor of Oregon in 2006.[3] By this year, and this month, November of 2007, two-hundred and ninety-seven [297] Oregonians have chosen to end their lives pursuant to the legislation. That is a significant number of people—about thirty [30] each year for the past ten [10] years. Perhaps more significant, of those who successfully qualify through the screening process, some twenty-five [25] percent choose *not* to go through with it.

A number of other states have considered similar laws, but those with which I am familiar have so far chosen not to enact similar legislation. There was a bill before the California Legislature this year which died in the Committee. Australia briefly had a physician assisted death statute in the Northern Territory in 1996,[4] and the Netherlands adopted authorizing legislation in 2002. But each was different from Oregon's legislation in significant ways.[5]

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[2] *See* WILLIAM H. COLBY, LONG GOODBYE: THE DEATHS OF NANCY CRUZAN (2003);ELISABETH KUBLER ROSS, ON DEATH AND DYING (2007); SHERWIN NULAND, THE AMERICAN WAY OF DEATH.

[3] Gonzales v Oregon, 546 U.S. 243 (2006) (The author wrote an amicus curiae brief in that case, on behalf of two dozen law professors, presenting much of the data reflected in this speech. Most of the challenges to Oregon's law were factually grounded: that it would discriminate against the poor or ill educated or disabled; that it would be a means of abuse and over reaching; that it would go badly and lead to bad outcomes for patients; that assisting death is not properly the practice of medicine. The Amicus brief argued the contrary, relying on the facts reflected in the Annual Reports on the DHHS website and reviewed in this paper).

[4] *See* A.B. LaFrance, *Physician Assisted Death: A Comparison of the Oregon and Northern Territory Statutes*, 1 NEWCASTLE LAW REVIEW 33 (1996) (The Australian statute was a marked contrast to Oregon's: it required the physician to be present and deliver the deadly substance and the patient to exhaust palliative care before the death event. The Australian statute thus tapped the Commonwealth tradition of public health, while—as the present text develops—the Oregon statute respects the American traditions of individual rights and autonomy).

[5] The literature on the Netherlands is vast and troubling. Until 2002, euthanasia was practiced without explicit authorization or clear reporting and review. Since then, explicit authority has been provided, and it is reported that euthanasia has been extended to infants, with inconsistent reporting by physicians. The safeguards and limitations in the Oregon Death With Dignity Act are missing. The Oregon DHHS website provides leads for the interested reader, who will find ample recent research on the Netherlands in the New England Journal of Medicine.

DEATH AS A PART OF LIFE

Physician assisted death as a concept seems to put people off. But all of our lives and all our parents and grandparents lives, we have been living with death, and dealing with it in ways with which we are familiar, ways which are not entirely different from physician assisted death. Life leads to death, and death is very much a part of life.

When I was six or seven, our elderly next door neighbor, Mr. Chapman, who had read stories to us, played with our dogs, whose wife made those great Concord grape jelly jars—the ones with the funny paraffin wax on top—which as a kid I always ate before the jelly—died. And I still recall my mother saying, with sadness one day, that Mr. Chapman had died, a concept I didn't understand, but that we could say "good-bye" before he left forever. So we dressed up and went next door and there was Mr. Chapman in a casket in his home, in the front parlor of his New Hampshire house, where I had visited any number of times. And he didn't look exactly like Mr. Chapman, but he looked a lot like Mr. Chapman, and we paused and we passed, and we said "good-bye" to Mr. Chapman.

I've always been happy that I had that experience. It's stayed with me all these uncounted years since. I mentioned it to my sister the other day, in preparation for this presentation, and she recalled the occasion vividly and thankfully, as do I. Yet in those post-war years, America was already beginning to build the huge hospital industrial complex of today, so that the opportunity to include death in life has been compromised or lost, and more and more, dying has become something that is done in hospitals. Somewhere between eighty [80] and eighty-five [85] percent of Americans die in a hospital—a foreign place, a place that is necessarily sterile, regulated, staffed by strangers; no matter how well done, no matter how well supported, far removed from the place where we lived our lives.

But the practice of assisting people to die, whether to die at home or in hospital, remains quite commonplace and we've lived with it for decades. A "D.N.R." is a "do not resuscitate" notation, which is a common order in hospitals for people who are facing terminal illness. It is a notation that, should the person expire, he or she should not be resuscitated. The team that races out in E.R. or Gray's Anatomy should *not* race out and clap those paddles around and shock somebody back to life. We also, when somebody is hooked up to life support, understand that the person may be unhooked from the ventilator or that tubes and nutrition and hydration may be withdrawn. That's a practice with which we're well familiar.

These are familiar practices in critical settings. As well, there is also a term called "futility," a common sense concept, that when care and treatment cease to have the probability or possibility of success, then treatment becomes futile and we should stop. We should end efforts which are unavailing. Pointless care can

become cruelty. For those of us who remember the Terry Schiavo controversy of a few years ago, futility was at the center of the debate.

So, in a hospital, assisting someone to die is a well understood practice in various forms. Legally, for those of us who do estate planning or do elder law, tools like advanced directives and health care powers of attorney are for people to execute in advance of a life crisis—in advance of becoming incompetent and facing death. These then become the context for the hospital to respect in assisting a patient to die, by withholding the heroic measures the patient has chosen against.

Finally, increasingly in America, the good news is that hospice care is available in almost every community, not only in the United States, but throughout the world. With hospice, people are towards the end of life and may receive support and care in their dying days or dying weeks. There is a hospice just over in Cheyenne, which my students and I have visited, built with a gift of over $8,000,000, as comfortable and welcoming a place as anyone could choose for a vacation . . . or for dying. I have visited hospices all the way from Houston, to Christchurch, New Zealand, to Houston, and points in between. Hospice is a philosophy, as well as a methodology, as well as a place, and it offers hope and comfort for people who are dying. It is one of the important tools that we should have available to us, but physician assisted death is as well, another such tool.

PHYSICIAN ASSISTED DEATH

Qualifying Under the Statute

Let me then talk about physician assisted death. What does it add to the other techniques of assisting people to die—DNRs, and withdrawal of support, and the concept of futility, and the support methods of hospice? In essence, and perhaps this is obvious, physician assisted death enables people to choose, independently of professionals or even family, when and where they will die; it creates the real possibility of moving death back into the home, as a part of life.

First of all, significantly, the Oregon Death With Dignity Act is available only for Oregon residents. There was in the debate, the assertion that Oregon would become "death tourists" site of choice, bringing new meaning to the term, "destination resort." I'm not sure that that would be a bad thing, but it's not a possible thing under the Oregon statute.[6]

[6] The Oregon Death With Dignity Act is set out in full at the DHHS website, and, as well, may be found in the Oregon Revised Statutes at ORS § 127.800-995. As my discussion proceeds in the text, I will not provide, contrary to the usual custom, frequent section references. These may easily be found and consulted by the interested reader.

Secondly, a person must have received a terminal diagnosis—that is, the best medical judgment is that he or she in all probability will be dead within six [6] months. That has to be confirmed. The initial diagnosis is by an attending physician and then the second is by a consulting physician. Almost always at least one of these is an oncologist; eighty [80] to ninety [90] percent of these patients have cancer of varying kinds.

The next step is the person must be competent—that is defined in the statute, but it is a term that is familiar to all of us—able to make a choice, understanding what he or she faces, and what another choice available might be. Moreover, the attending physician has to conclude that there is not a clinical depression. If there is, then there has to be a referral to a specialist either to deal with the depression or to report back that the person simply does not qualify to proceed under the physician assisted death statute. Early on there were a number of these, I'm thinking about twenty [20] percent, but over the last few years the numbers have dwindled to about five [5] to ten [10] percent. Most of those who are so classified, that is depressed, are simply shunted out of the process—they do not ultimately qualify for prescription.

Those patients who are competent and have a terminal diagnosis make two oral requests and a written request. The written request is on a form on the Department of Health Web site. It is fairly plain vanilla for such an important subject that's readily understandable. Fifteen [15] days have to pass between the two [2] oral requests. What the person is basically saying to the physician is "I've been given a diagnosis, what I want to do is to be assisted in dying and I would like a prescription from you to make that happen." The attending physician advises of the alternatives and requests that the person notify the next-of-kin. There's no requirement that the person do that, which was the subject of some controversy. Our American tradition is one of autonomy, and choice, and privacy. And so, for those of us who have problematic relatives, not having to notify them at a problematic time is an option well worth having available.

The prescription is written within the fifteen [15] days of the last request. Since 1999 the pharmacist must be told the purpose of the prescription. The prescription will be of a barbiturate which will be prescribed for a number of purposes, Secobarbitol or Pentabarbitol. The pharmacist is told the purpose so that he or she may opt out—it's sort of a conscience clause for those who do not want to participate. Again, this is the subject of some controversy, but it is there and it is part of the process.

The last point about the statute is that there is extensive reporting. The forms that the physicians fill out on every patient are on the DHS Web site and are gathered in the routine. One point I should mention is that the patient's names are submitted to the Department of Health, but the Department of Health says they are nowhere recorded. The only purpose is to check them against the death

certificate that is ultimately filed, which reflects the underlying cause of death as the disease, cancer, or ALS or HIV. It does not reflect that the person has availed of this statute. The notes of the names are destroyed after a year's time.

Some Distinctions

Many people confuse the Oregon approach with euthanasia, or the practices in the Netherlands, or the work of Doctor Kevorkian. It is quite narrower and safer, and practices elsewhere would be illegal in Oregon, as they would be here in Wyoming.

First of all, methodology is limited to prescription. The choice could have been injection, a fatal injection, as was permitted in Australia or is now allowed in the Netherlands. But the point of having a prescription is simply to enhance the patient's autonomy. He or she makes the choices of when and where, takes the medication, and nobody else need be present. The distinction is an important one. The physician need not be present, although in fact physicians are present in about thirty [30] percent of the cases. In fifty [50] percent of the cases another provider is present.[7] Almost never are the patients alone; often times there are a number of people present with them when they take the medication.

The patient need not take the prescription—it's an important point. About sixty [60] prescriptions are written each year and about forty [40] people take them. That means about one-quarter [1/4] to one-third [1/3] of the people are not taking them. When I talked about this in New Zealand a member of the audience said "this stuff is sitting in someone's medicine cabinet, it could be sold to children on elementary playgrounds!" And I said, "Well, you know, it could be. But I don't think it is. These patients have six [6] month diagnoses; in all likelihood, their medicine cabinets will be cleaned out when their homes are cleaned out, after their deaths." The truly significant aspect of this is that people are making choices at each point along the way, even at the very end.

Another important point, truly crucial, is that any other method or any other agent is homicide. For those of us who remember Jack Kevorkian, Michigan's Doctor Death, recently released from prison, who was involved in administering death by injections and convicted of homicide—he would be prosecuted for homicide in Oregon as well. The only permitted technique in Oregon is orally taking the medication; and the actor is the patient himself or herself. No physician may do it to or for the patient, nor may anyone else.

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[7] Perhaps this need not be said, but the text discussion of the statistics and practices and patients under the Oregon DWDA are based on the eight annual reports on the DHHS website. The interested reader will probably find all she or he needs by consulting the Eighth Annual Report, since it is cumulative. One might also find there references to articles based on the Reports by Hedberg et al., in the New England Journal of medicine over the past ten years.

Finally I want to distinguish the Netherlands which for two to three decades had what could properly be characterized as euthanasia—that is to say, physicians in the Netherlands were killing patients, and were doing so pursuant to an unwritten understanding that they would not be prosecuted criminally. In 2002, the Netherlands adopted explicit authorization for physicians there to put people to death. That is in fact euthanasia. Oregon does not practice euthanasia.

The most recent reports from the Netherlands, I think, are quite scary because while they had previously been focusing chiefly on the elderly, physicians in the Netherlands are now putting to death young infants born with massive disabilities or birth complications.[8] It's not clear that they're doing so with the knowledge or consent of the parents. And, it is absolutely clear that in the Netherlands they do not have the extensive system of reporting we have in Oregon; the controls are missing. We should be concerned about the Netherlands.

THE EXPERIENCE

The Practice

Starting in 1997, there were twenty-three [23] prescriptions written for patients with a terminal diagnosis. The annual number has been slowly moving up to about sixty [60] to sixty-five [65] a year.[9] This means that a person has gone through all the stages I described earlier, and the physician has concluded that he or she should receive a prescription to use for purposes of hastening death. The prescriptions consumed amount to about two-thirds [2/3] on the average. The last report for the year 2006, recited that thirty-five [35] out of sixty-five [65] took the prescriptions. Nineteen [19] died of the underlying disease, eleven [11] are still alive, but eleven [11] in 2006 took prescriptions from 2005.

Forty [40] M.D.s participated in 2006—that number has been pretty consistent over the years. Several write prescriptions for two [2] or three [3] patients. As I recall, the maximum is one physician who in one year, dealt with seven patients. It is not a specialty that physicians are fighting for, and it is a problem to find physicians who are willing to participate since, like all other practitioners, they really entered the medical profession to keep people alive. Assisting people to die is not an attractive undertaking. It's also, for physicians, in some settings, a source of criticism and stigma. But about forty [40] physicians regularly participate.

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[8] In the United States, of course, these conditions and practices would trigger protections and sanctions of the Americans with Disabilities Act, 42 U.S.C. § 12101 (1990). Concerns that the disabled would be victimized by the Oregon DWDA prompted disabilities groups to file Amicus in the United States Supreme Court, challenging the Oregon Act.

[9] For reasons that are not clear, the total number of people using the DWDA has stabilized at about sixty [60] or so. One would think that the number would continue to climb, as the population increases, and the aged increase in number.

The terminal diagnosis about ninety [90] percent of the time is cancer, of a number of different kinds. The balance is A.I.D.S. and A.L.S. Those two are interesting. Obviously H.I.V. is a terrible source of disease and death, but because of success in treating them, over the past five [5] to ten [10] years, the percentage of people with H.I.V. using physician assisted death is relatively small, of all of those with H.I.V. On the other hand, A.L.S. is a relatively small population, but about fifty [50] percent of those in Oregon with A.L.S. avail themselves of physician assisted death. I think it is simply because they understand they are facing a slow, wasting, horrific death and there simply is no treatment.

In 2006, there were forty [40] to fifty-four [54] days from the final request to death, less than two months. On the average, death came within twenty-nine [29] minutes from the taking of the medication. Folks are unconscious within five [5] minutes of taking the medication. These are averages. One fellow after a passage of twelve [12] to fourteen [14] hours woke up and said, "What the hell, I'm supposed to be dead!" And then followed through and did achieve that objective. But on the average, most are gone within thirty [30] minutes.

In terms of complications, the only complication which is recurring is simply nausea and vomiting from the medications themselves. I will come to talk about a case where a woman volunteered to be recorded and interviewed and so her entire experience is available to anybody who'd like to read it. One of the things she said was "The stuff just tastes awful." So I think she had to wash it down with Gatorade or something else.

Insurance covers it. The statute specifically says that insurance shall be unaffected by somebody taking the medication. So if, for example, an insurance policy had an exclusion for suicide, physician assisted death would not be excluded from life insurance. Medicaid in Oregon will cover assisted death, but only with state funds. For those of us who know about Medicaid, about fifty [50] to seventy [70] percent of the funding is federal, so the state has to be very careful to track the monies involved. The monies involved here are not huge: going to see a doctor, you've got cancer, you've had your diagnosis, you pick up a prescription. Lots of us pick up prescriptions regularly, Lipitor for example, and the costs are within that range.

One of the criticisms as the legislation was being debated was that you cannot trust the M.D.s—who will they be? What specialties will be involved? There will be pressures on them to engage in malpractice and the like. There hasn't been a single instance of that reported. There have been reports to the Board of Medical Examiners of physicians inadequately filling out the reports, which are quite extensive. Each of those has been corrected and there have been no sanctions physically. So, the performance of the M.D.s has been within the professional norm.

The Patients

Ninety-three [93] percent of the patients die at home. Now, home may be a friend's home, or a friend's apartment, but they're at a home. In the definition of "home" as the reports use it, a hospice may also qualify. About three-quarters [3/4] of these folks are dying in hospice. This practice of hospice varies from community to community. In hospice in Christchurch, fewer than half [1/2] of the patients die in the hospice facility. That was surprising to me. In hospices in Houston, Texas, about ninety [90] percent of the patients die in the facility. They would come in about a week before they would die and that was the chief function of the hospice facility. In Cheyenne, patients dying in hospice take on average fourteen [14] to eighteen [18] days.

Most hospices do not participate in assisted death, simply because the practice is limited to Oregon. But of course, they support people who are dying, while they die. In Oregon, as I have said, about three-quarters [3/4] of these folks, who qualify for assisted death, go to hospice and they die there. Of those present at the death event, most are family member and friends; M.D.s are present about thirty [30] percent of the time, another provider about fifty [50] percent.

The majority of the patients are in their sixties. The median age in 2006 was seventy-four [74], which is up significantly from previous years. They are educated: forty-one [41] percent have a Bachelor of Arts degree. They tend to be employed and insured: sixty-four [64] percent have private insurance, one-third [1/3] have Medicaid. Fifty-four [54] percent are male, and of them, forty-six [46] percent are married. Of the balance, half [1/2] were divorced, and half [1/2] were either widowed or had never been married.

The reasons given for seeking assisted death were fairly consistent, year to year: dignity and autonomy with some fear of pain. Significantly in 2006, forty-four [44] people said they were motivated by the fear of pain at the end of life with cancer. The previous years the numbers had been around twenty-two [22]. So for whatever reason, in 2006, many more people were concerned with pain at the end of life than previously.

The average length of the relationship with the physician had been about twelve [12] weeks or three [3] months. Now that will be with the physician who wrote the prescription. There will also have been other physicians typically in the picture. The average experience of the physician was about twenty [20] plus years in practice. On average, they were in their forties, and were family doctors, internists or oncologists.

Still on the human dimension, it helps to put a human face on these patients. This is difficult, because of the guaranties of privacy and the respect due those who are dying and pursuing the difficult path of death with dignity. But the

Portland Oregonian newspaper was recently able to follow one such patient, with her full cooperation, as she prepared to die and in fact did so, by means of physician assisted death.[10] Lovelle Svart died September 30th, perhaps a month or six [6] weeks ago. For somebody here who would like to get a feeling for the feeling of this experience, her contribution is extraordinary because she agreed, after she got her diagnosis of six [6] months terminal cancer, to be video taped, to be interviewed, and to have the final events taped with a reporter present. This is uncommon courage and uncommon commitment to the community. But she was an uncommon lady—a very feisty lady who the afternoon of the death event danced the polka with a counselor, George Eighmey, from Compassion and Choices, who has devoted his career to assisting people to die.

Lovelle Svart had lung and throat cancer; chemo and radiation failed; in June she got a six [6] month diagnosis. July 1st, she filled out the form. August 7th, Lovelle fills the script. The morning of the event she bought food, she visited a park, she actually had the battery of her car charged because the car was going to the son of a friend, and she wanted to make sure the car was operating well. She visited with friends privately in her bedroom, took the pills and went to the bedroom with her mother, came back danced the polka, had a hugging line, she had one last cigarette, then she went to bed. She took the liquid, went to sleep, and in five [5] hours she was dead. Her case obviously took much longer than the average of thirty [30] minutes, but there was little about Lovelle Svart that was average in life or death.

Reading the Oregonian articles, and visiting the Web site, are both journeys well worth undertaking.

The Critics and the Criticism

So, this is the human dimension. Let us now turn to the polemics, the critics and the criticism.[11]

The criticisms, first of all, were that physician assisted death would discriminate against people; the poor, the disabled, the elderly, the poorly educated. The demographics of the State of Oregon Reports indicate that this has simply not happened. As well, interviews with family members support the conclusion

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[10] Video Diary: Living to the End, *available at* http://blog.oregonlive.com/multimedia/living_to_the_end/.

[11] The literature on assisted death is vast and the critics numerous. For ease of manageability, the reader might find most informative reviewing the briefs of the parties and the amici in *Gonzales v. Oregon*, 546 U.S. 243 (2006), where the critics were forced to focus and substantiate, as best they could, their criticism. The briefs are all available on the Supreme Court website or through Westlaw.

that the feared discrimination has not happened.[12] There was a fear as well of imposition for financial concerns. But the participants themselves list financial concerns as a very minor position in their choosing to go through with this. The remarkable thing with most of these folks is that they have enough to support themselves, both by way of insurance and their own personal resources. There was also a fear that there would be misfire or malfunctioning—that somebody would be rendered brain dead or in a persistent vegetative state or in a coma, due to maladministration of the medication. There is not one instance of that.

Most tellingly, I think, the critics have advanced palliative care as an alternative. They argue that if someone is approaching the end of life and experiencing pain, there is palliative care available—ultimately Morphine or increasing dosages of Morphine or some other pain killer so that the person need not be hastened to the end, and may in fact live out somewhat close to a natural span. Other people respond differently to this, that surviving in a heavily sedated state is not living or dying with dignity. My own response is I think it's important for palliative care to be available as a choice, and I think equally that physician assisted death should also be available as a choice.

Finally there are those that simply object to the statute because it involves the inflicting of harm and the ending of life and we ought not to do that, we should leave death in God's hands. I cannot really respond to that except to say that if these choices and these tools are made available to us, then maybe that is part of the natural order as well. Indeed, the Roman Catholic view is that increasing sedation is permissible even if it will ultimately hasten death,[13] under the principle of double effect.

LEGAL STATUS

Homicide

I've already distinguished the Oregon practice of assisted death from euthanasia. It is a permissible medical practice, although the medical community is much divided about whether physicians should be participating in this practice.

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[12] It is important to note, on behalf of the critics, that what we know about the motivations and independence of the patients was largely gathered by their caregivers. Few patients were interviewed, due to privacy concerns, as to their motivations and feelings and freedom of choice. Hence, critics would argue that much of the supposed data was gathered by the very people who might most profit by the person's death.

[13] The Roman Catholic Church has a highly developed set of principles, codified as THE ETHICAL AND RELIGIOUS DIRECTIVES ON HEALTHCARE, supported by commentary and frequently updated. These guide the Catholic Church's opposition to Oregon's DWDA, and were the basis of the Church's continuing opposition, despite the principle of double effect. The ERDs are available on the Church's website, at http://www.usccb.org/bishops/directives.shtml.

The statute specifically relieves practitioners of criminal and civil liability. The key point is that the physician does not administer the death agent; only the patient does do. It is not euthanasia, which would, in fact, be homicide in Oregon, as elsewhere.

While I was teaching this spring in New Zealand, I attended meetings there of groups advocating legislation similar to Oregon's. There had been cases where family had assisted people to die. The prime mover, a remarkable woman named Lesley Martin,[14] had in fact smothered her own mother, after injecting morphine, as she lay in pain, dying of cancer. There had been other cases. However compelling and sympathetic such stories may be, the result there and here is the same: the act is homicide, and any compassion we may feel is reflected only in a light sentence, usually around two years in prison.

Continued Validity

It seems clear that Oregon will continue to authorize physicians to write prescriptions assisting terminal patients to choose the time and place of their deaths. We have twice done so by state-wide referenda. The leading advocate in Oregon, an extraordinary nurse practitioner and attorney, and a former student of mine, Barbara Coombs Lee, Executive Director of Compassion and Choices, recently told me that the main opponents have now accepted physician assisted death as a part of the Oregon healthcare landscape.

The chief threat comes from without, from conservatives in Washington, both Congress and the White House. Congressional critics have been unsuccessful because of the uniquely unanimous support of Oregon's Congressional delegation, Republican and Democrat. But the Bush Administration persists in its opposition, and has sought to terminate Oregon's practice by withdrawing the Drug Enforcement Administration (D.E.A.) licenses of participating Oregon physicians. These licenses are essential to medical practice of participating physicians, such as family doctors, internists and oncologists, whose practices would simply shut down without them. So the Bush Administration's approach is hugely, and disproportionately, punitive, punishing the physicians, not simply blocking the assistance to thirty or forty Oregonians annually. The *in terrorem* effect alone would prospectively and totally shut down Oregon's legislation.

The Drug Enforcement Agency ranks medications and has a list of those which are simply unavailable—marijuana for example. There is another list of medications which are available for general practice and the medications used in assisted death, Secobarbitol and Pentabarbitol, are on that list. They are regularly

[14] Ms. Martin has written two books about her experience.

used as pain killers and anti-nausea treatments and occasionally to help people sleep. Their use in assisting death is not due to their properties, but to the size of the prescribed dosage.

What the D.E.A. was trying to do was to sanction physicians for appropriately prescribing a licensed medication, but for what the D.E.A. considered impermissible purposes. The short of it is, that the U.S. Supreme Court rejected the challenge, in *Gonzales v. Oregon* and the practice as it is currently undertaken in Oregon is legal and constitutionally permissible. I should add, however, that the grounds of the Supreme Court's decision were that Congress had not authorized the D.E.A. to determine what the proper practice of medicine is. Should Congress do so, then the constitutional issues would be squarely raised: can Congress' Interstate Commerce powers regulate the local practice of medicine? Can the First Amendment protect the doctor-patient relationship? Does a patient have a right to die?[15]

These are fundamental, difficult issues, which the Supreme Court typically avoids reaching unnecessarily. And Congress would be reluctant to force them on the Court. So, I think with a presently liberal majority in Congress, Oregon's legislation is secure for the foreseeable future. But if the issues were to come before the presently conservative Court, the outcome is in doubt. On the one hand, conservatives believe in deference to states under the doctrine of federalism; on the other, they tend to have an expansive view of Congress' authority. And the balance would turn on how the then majority of the Court would view the individual rights at issue . . . the right to death, with dignity . . . to autonomy and choice . . . as an aspect of the First Amendment or the Due Process Clause.

CONCLUSION

This is the conclusion:

My friends who are constitutional law scholars tell me that Oregon's legislation would lose in a frontal challenge in the Supreme Court. But I'm not so sure. In the end, Court nominees are selected in part because of their human qualities. And they, and we, are all growing older, and fear the kind of isolated, inhumane death that awaits us in hospital ICUs. I bank on that as a tipping factor in motivating Justices, as with voters.

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[15] Obviously, these are complex questions and there is abundant case law from a number of courts on them. *See* among others, *In re* Quinlan 70 N.J. 10, 355 A.2d 647 (1976); Bouvia v. Superior Court, 255 Cal. Rptr. 297, 300 (Ct. App. 1986); Cruzan v. Director, MDH, 497 U.S. 261 (1990); Planned Parenthood v. Casey, 505 U.S. 833 (1992). These case names on Westlaw will provide an easy to guide to abundant commentary in the JLR database.

When I speak to audiences such as this, comprised of voters, I am often asked why more states haven't adopted Oregon's approach. Legislative reform efforts have failed in other states and I've talked with people who've been involved with them and there are just differing reasons, but the short of it is that assisting people to die is a troubling practice and people in different states have different demographics and different political makeups. Oregonians tend to be, I think, a lot like the folks who live here in Wyoming—independent minded and thoughtful in ways that, let's say, Massachusetts or California, may be missing.

One consideration is the Netherlands specter and people are concerned about a slippery slope—if we do this, then maybe we'll do this next, and it's a legitimate fear, but I think the safeguard is simply that you don't slide down the slippery slope! You establish safeguards or fail-safes. Oregon has done that, to avoid abuses.

The hospitals and pharmaceutical industries are very powerful forces in resisting change in American health care, and they dig in their heels in resisting assisted death because they fear liability and lawsuits. The hospice and palliative care movements are also in opposition, because they take away some of the apparent necessity for the Oregon approach.

One other consideration that is hard to capture or express is the difference between fearing the general but supporting the specific. Those who fear abuses if assisting death is authorized might well understand and support it in specific cases where the need and circumstances are compelling, as with the case of Lovelle Svart or Lesley Martin. And the truth is, as with Lesley Martin, we have a way of accommodating to individual cases, by labeling them homicide and giving light, compassionate sentences, or—as in the Netherlands for decades—simply not prosecuting. The trouble with this approach is that it is too hit-or-miss, and people may be treated very unevenly, or be deterred by uncertainty from acting at all, even in extreme, compelling cases.

But two things that I think work in favor of other states considering Oregon's approach are demographics and common sense. The demographics are clear and they're simple. We have an aging population in the United States. More of the middle class are contemplating the possibility of high tech death and it's ugly. The option of a more comforting and comfortable death is attractive. The more we immediately face this, the more urgent becomes the need to have physician assisted death as an option.

Finally, I truly do believe there is something about dignity and humanity in a process empowering a person, who is ultimately going to die like all of us will die, but will die soon, predictably and possibly without dignity. I think there's something about dignity and humanity in permitting that person to make a choice that brings death into life and blends the two together. Call it the legacy of Mr. Chapman.

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