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Editor’s Note

Our lead article is a thorough review of the 2010 Iowa judicial-retention elections by Professor Roy Schotland, a leading authority on judicial elections. He provides a thorough context for the 2010 election cycle, a detailed discussion of what took place during the Iowa campaign season, and his thoughts about the likely impact from the defeat of three Iowa Supreme Court justices.

Professor Schotland has been following judicial-selection systems, including elections, for decades. He has authored five amicus briefs for the Conference of Chief Justices, including an influential brief in Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009). We think you’ll find his review of the 2010 Iowa election worthy of careful consideration.

Please note on the facing page in AJA president Mary Celeste’s column that the AJA will be hosting a symposium aimed at educating judges about judicial-retention issues and methods, as well as a workshop to teach judges about what they can do to keep both their own jobs and an independent judiciary.

United States Magistrate Judge Morton Denlow, who spends a great deal of his time getting cases settled, provides seven techniques for breaking impasses during judicial settlement conferences. Judge Denlow provided a great article for us in 2002 on how to get judicially encouraged settlements properly documented. See Morton Denlow, Concluding a Successful Settlement Conference: It Ain’t Over Till It’s Over, Ct. Rev., Fall 2002, at 14. We’re pleased to have him return to our pages with another practical article about how to achieve settlements whenever that’s at all possible.

Our final article is a review of the leading non-criminal cases from the 2009-2010 Term of the United States Supreme Court. Kansas City lawyer Tim Davis reviews all of the important cases involving civil procedure, the right to bear arms, freedom of speech, employment discrimination, and federalism. This completes our two-part review of the 2009-2010 Term; Professor Charles Weissselberg’s review of the criminal decisions was in our last issue.

We also have a review of an interesting book by Professor Steven Lubet, a law professor at Northwestern University and a member of Court Review’s Editorial Board. Good, readable books about legal history aren’t plentiful, but Lubet is a master at merging law and history and good stories. Judge Karen Arnold-Burger provides a review of Lubet’s book about the importance of the Fugitive Slave Acts in the years leading up to the Civil War and the role that attorneys and judges played, an interchange that provided an important backdrop for the debate over slavery and the run-up to the Civil War.—SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 149. Court Review reserves the right to edit, condense, or reject material submitted for publication.

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Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo is of a building called Ali‘iolani Hale, which is the present home of the Hawaii Supreme Court. The building once served as the seat of government in Hawaii. The building’s courtyard features a gold-leaf statute of King Kamehameha I, who established a kingdom in Hawaii in 1810.

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ARE YOU PREPARED FOR YOUR JUDICIAL ELECTION OR RETENTION ELECTION IN NOVEMBER 2012?

The ousting of three Iowa Supreme Court Justices has sent shockwaves throughout the country for all judges, no matter their method of selection and retention. Not only are justices and judges in election states suddenly vulnerable to judicial opponents with large war chests, even those in retention-election states are now vulnerable on issues that may bring players backed by large war chests. Iowa, as a retention-election state, was not alone in encountering organized efforts to remove justices from state supreme courts. Alaska Justice Dana Fabe squeaked by in her retention election despite anti-abortion/pro-traditional-marriage issue opposition; three justices up for retention in Colorado staved off a redistricting-issue opposition; two Florida justices tied to an issue on federal health-care legislation won with the lowest approval rating ever; in Illinois, Justice Kilbride headed off big money, also over a redistricting decision; and four Kansas justices managed to keep their jobs with the assistance of a full-page campaign ad. In both Iowa and Colorado, the justices did not engage in any campaign activity. In Kansas they did. What was the strategy, if any, used in each of these states by these justices, and why? These are the types of questions that will be addressed in an upcoming AJA seminar and workshop.

According to an article within this issue of Court Review, Iowa’s 2010 Judicial Election: Appropriate Accountability or Rampart Passion? by Professor Roy A. Schotland, “there was less support for retention, on average, than had been the case from 1998 to 2008. Support also declined even in states without organized opposition to retention. . . . The six states with organized opposition saw these declines in the percentage vote for retention: Iowa 27%-28%, Illinois 13%, Colorado 10%-13%, Kansas 6%-7%, Florida 6%-9%, and Alaska 7%.” Gone are the days when retention-election judges could shake their heads at their election brethren and think, “Boy do we have it better.” In fact, because retention-election judges have no experience running campaigns and have a more difficult challenger—an elusive issue—some may argue that retention-election judges actually are in an inferior position to their election-selected counterparts.

The bottom line is well stated by Samuel W. Seymour, President of the New York City Bar Association, as quoted in Professor Schotland’s article: “When a judge suffers an electoral defeat because he or she exercised judicial independence, we all suffer.” The judiciary as the third branch of government, the branch that is seen as an impartial body that is responsible to balance the other two branches of government, may be in jeopardy of diminished power if judicial independence is threatened by ideologic or partisan politics. Judges and justices have a duty to protect the judiciary.

Although there are several national organizations that currently focus on judicial elections, they are restricted to some degree by their 501(c)(3) non-profit status. The AJA as the Voice of the Judiciary® is a national judicial organization that is well positioned to address the challenges to come. Plans are in the works for a symposium that will involve national organizations, academia, lawmakers, sociologists, cultural experts, and, most important, justices and judges to edify all of us about the methods of selection and retention. In conjunction with this symposium, the AJA will hold a workshop tailored to give judges and justices the toolboxes and tools necessary to maintain their judicial independence—without fear of being ousted in either a retention or judicial election—in November 2012.

MARK YOUR CALENDARS NOW! PLEASE JOIN THE AJA AND NATIONAL EXPERTS FOR A SYMPOSIUM ON THE METHODS OF JUDICIAL RETENTION, AND A COMPANION WORKSHOP ON JUDICIAL ELECTIONS AND JUDICIAL RETENTION ELECTIONS, MAY 17-19, 2012, IN NASHVILLE, TENNESSEE.
Fugitive Justice: Slavery and the Law in Pre-Civil War America

Karen Arnold-Burger

The seeds for the Civil War were first planted at the Constitutional Convention in Philadelphia in 1787 according to Northwestern University Law Professor Steven Lubet, in his new book, Fugitive Justice. Lubet provides detailed accounts of important trials and of the persecution of a judge after a controversial ruling, as well as the historical context necessary for the reader to better understand this volatile period in American history.

The first chapter, “Slavery and the Constitution,” demonstrates that slavery became a topic of debate when attempting to determine the size of the House of Representatives. Were they to measure a state’s size based on the number of “free” inhabitants or on property value? And if so, should slaves be counted as property? The Southern delegates made it clear that slaves would have to be counted for an agreement to be reached. The North felt that giving the Southern states more delegates because of their slaves rewarded the abhorrent practice of slavery.

In addition, they argued, if they were going to be counted for representation, why not make them citizens and give them the right to vote? A compromise was drafted by James Wilson of Pennsylvania, a well-known opponent of slavery, and Charles Cotesworth Pinckney of South Carolina, a bold defender of slavery. Known as the Wilson-Pickney proposal, it eventually became the three-fifths provision, counting three-fifths of the population of slaves for enumeration purposes.

The slaveholders were not finished, however. They felt it was important that they be able to apprehend fugitive slaves in the North as criminals. Without much debate, a final slavery-favoring provision was added:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be dis-charged from such Service or Labour, But shall be deliv-ered up on Claim of the Party to whom such Service or Labour may be due. (Article IV, Section 2, U.S. Constitution, later superseded by Amendment XIII.)

Known as the Fugitive Slave Clause, its adoption was viewed as necessary by the South, according to Lubet, as a direct result of Somerset v. Stewart, 98 E.R. 499 (K.B. 1772), a 1772 British decision. James Somerset, a Virginia slave, was taken to England by his owner, Charles Stewart. Somerset escaped, but was recaptured and placed on a slave ship headed for Jamaica. There was no doubt that Somerset was a slave under the laws of Virginia. However, there was no comparable English statute authorizing slavery. A group of British abolitionists became familiar with Somerset’s predicament and filed a writ of habeas corpus on his behalf. The English court had to decide which law would govern Somerset’s status. Lord Mansfield’s decision was clear: slavery was morally and politically wrong and nothing should be done to support it. A slave’s status does not follow him from place to place. Therefore, he reasoned, if there is no specific statute to the contrary, a slave becomes a free man once he steps foot on free soil.

Although the decision was limited to England, it concerned the Southern slave owners enough that they felt they needed constitutional protection from such a rule in the new United States. Many, including Lubet, believe that had it not been for the Three-Fifths Compromise and the Fugitive Slave Clause, there would be no United States of America.

Almost immediately, conflicts arose between states. Several Northern states viewed attempts to capture runaway slaves as “kidnapping” and refused to adhere to the Fugitive Slave Clause. In response, Congress enacted the Fugitive Slave Act of 1793. It passed with no opposition in the Senate and an overwhelming majority in the House. The Act allowed slaveholders to seize and arrest runaways and take them before a federal judge or magistrate. If the slaveholder was able to establish that the person was in fact a runaway slave, the judge had a duty to give the slaveholder a certificate authorizing the slave’s return to the person from which he or she fled. Another portion of the Act made it a crime to obstruct or hinder a slave’s capture or to conceal a runaway. Passage of the Act was seen as an attempt to placate the Southern states and keep this fragile union born in Philadelphia in place.

As more states entered the Union, Lubet illustrates, new conflicts arose as the political gulf between free states and slave states widened. Within the next 10 years the lines of demarcation became clear with all of the original Northern states having either abolished slavery or established gradual emancipation. Any new states created in the Northern Territories would have to prohibit slavery. At the same time, slavery was flourishing in the South, expanding from 650,000 Southern slaves in 1790 to over four million by 1860. When a new state sought to enter the Union, much debate ensued regarding the balance of power between slave states and free states. Free states gradually started adopting laws to prevent the kidnapping of “free people of color” and providing criminal penalties for wrongful enslavement. The fear was that in their zeal to capture and return runaways, slave “catchers” were kidnapping free blacks. These statutes made it increasingly difficult for masters to reclaim their slaves. Enter Prigg v. Pennsylvania, 41 U.S. 539 (1842), in which the U.S. Supreme Court held that the Fugitive Slave Act of 1850 was self-executing and independent of any state regulation. Every slaveholder had a right to request his slaves anywhere in the Union without being impeded by local laws. The power to legislate for the recovery of fugitives belonged exclusively to Congress, as Justice Story wrote.
Since Prigg found that fugitive slave catching was exclusively a federal duty, free states began adopting laws prohibiting the involvement of their courts, sheriffs, or even use of their jails for rendition of fugitives. This again made life difficult for the slaveholders because there were limited federal officials and virtually no federal jails at the time. Southerners were becoming more and more disillusioned with the North's obvious intent to sabotage their efforts whenever possible, in clear violation of the compromises that convinced them to become a part of the United States to begin with. Staunch revolutionary patriots like Daniel Webster jumped to the defense of the South and chastised the Northern states for reneging on their promises. By 1850, Congress was forced to amend the Fugitive Slave Act to beef up the exclusive federal authority and make fugitive slave rendition as simple as possible. Not only did it provide very little due process for the fugitive, it put stiff penalties in place for hindering the process in any way, including use of state courts to protect fugitives. It allowed federal marshals to call upon any bystander to help and imposed penalties if they refused, including the right of the slaveholder to sue obstructionists civilly for the value of the “lost” slave.

Though the Compromise of 1850 “seemed to be working,” as Lubet writes, “tensions reemerged with the eruption of the Kansas-Nebraska controversy.” The Kansas-Nebraska Act was signed into law in 1854, allowing all questions pertaining to slavery in the Territories to be left to the people residing therein. This was viewed as a repeal of the Missouri Compromise, which had set a demarcation line between North and South, slave and free states. Northerners felt that if Southerners did not have to comply with the agreed-upon “boundary,” they should not have to adhere to the Fugitive Slave Act.

The next 10 years saw several notorious Fugitive Slave Act cases in which Northern sympathizers rescued captured slaves and were then tried with violations of the Act and even treason. Capturing slaves in the North, particularly the Boston area, became an extremely dangerous proposition resulting in the deaths of both slave catchers and slave rescuers.

Lubet presents detailed accounts of three such trials. He includes fascinating background information about the attorneys involved and trial strategy, and he even provides excerpts from trial transcripts. At a time when opening and closing statements could wind on for days and parties to the proceeding were not allowed to testify, Lubet has painted a picture of the trials of interest to both lawyers and historians. Arguments involving “god’s law v. man’s law,” whether an “unjust” law can bind anyone, and whether it is acceptable to violate one law to enforce another make these trials relevant 150 years later. Each trial brings clarity to the reasons that the South felt pushed to secession: the Union had not lived up to its promises.

Judges will be particularly interested in some of the ethical issues faced by judges who sympathized with the abolitionists, but at the same time were bound to uphold the law. Of particular interest is the chapter titled “Judge Loring’s Predicament” (p. 207). Edward Greely Loring was a part-time federal “Fugitive Slave Commissioner” charged with reviewing warrants for the arrest of fugitive slaves in Massachusetts (an abolitionist stronghold) and presiding over their rendition hearings. Loring was also a Probate Judge for Suffolk County, Massachusetts, and a faculty member at Harvard Law School. He was a highly respected legal scholar. He found himself in the position to rule on the rendition of Anthony Burns. Lubet sets out the details of the trial, which resulted in Commissioner Loring issuing a certificate allowing Anthony Burns’s owner to remove him from Massachusetts and return him to Virginia.

Loring became a pariah in Boston. He was hung in effigy, accosted by strangers on the street, and shunned by colleagues. There was even talk of having him tarred and feathered. Harvard chose not to renew his teaching contract. A campaign was initiated to oust him as Suffolk County Probate Judge. The Legislature conducted hearings in response to petitions filed for his ouster for being a “slave commissioner.” He filed a response stating that he had done nothing more than discharge his “painful duty” to apply the Fugitive Slave Act to the case before him, a law which had been held constitutional by the Massachusetts Supreme Court. Surprisingly, Richard Henry Dana, the attorney who had represented Anthony Burns, ended up being his most eloquent defender. Although he argued that Loring had decided the case in error and showed little humanity, he had not done so because of misconduct or corruption. He pointed out that the public was better served when judges were protected from the powers of the two other branches of government, even when they make mistakes. “We must do justice even to our enemies,” he argued (p. 224 n. 38).

Notwithstanding these arguments, the Legislature voted to remove him from office. However, the Governor was required to assent to make it final. Massachusetts Governor Henry Joseph Gardner was elected on an anti-slavery platform. He shocked everyone when he refused to assent in the action. In a statement that will warm the hearts of judges everywhere, he said:

“It may be pertinent to ask what the duty of judges is. Are they to expound the laws as made by the law-making power; or are they to construe them in accordance with popular sentiment? When the time arrives that a judge so violates his oath of office as to shape his decisions according to the fluctuations of popular feeling, we become a government, not of laws, but of men (p. 225 n. 40).

Unfortunately, three years later when a new, less sympathetic Governor took office, Judge Loring was removed from office. Lubet’s book is an interesting analysis of the importance of the Fugitive Slave Acts in the years leading up to the Civil War and the role the attorneys and judges of the time played in using it as a platform to shape the debate over slavery. The trial discussions remain relevant to today’s legal practice and Judge Loring’s story illustrates the continued need for judicial independence, especially when in opposition to popular politics.

Karen Arnold-Burger joined the Kansas Court of Appeals in March 2011 after serving since 1991 as a municipal judge in Overland Park, Kansas. She serves on the executive board of the National Conference of Special Court Judges, which is part of the American Bar Association’s Judicial Division, and previously served as president of the Kansas Municipal Judges Association. She has been an adjunct faculty member at the National Judicial College since 2000. Arnold-Burger received her J.D. from the University of Kansas in 1981.
Iowa's 2010 Judicial Election:
Appropriate Accountability or Rampant Passion?

Roy A. Schotland

The 2010 Iowa judicial elections were, as former Arkansas Governor Mike Huckabee said soon after, of an "historic nature," likely "one that . . . will give legs to a larger movement over the next few years."1 The election he referred to, in which Iowans voted against retention of three justices who had participated in their Supreme Court's unanimous decision to uphold gay marriage, surely is one of the most significant judicial elections ever. It also was the highest-visibility judicial election since 1986, when Californians voted down the retention of Chief Justice Rose Bird and two of her colleagues.2

Even before election day, the 2010 judicial election cycle was unique: never before had so many states had organized opposition to a justice up for retention—this time, six states.3 Although only in Iowa was the opposition intense and ultimately successful, the widespread efforts and the result in Iowa may well open a new era of heat in judicial elections of all types—retention-only as well as partisan and nonpartisan.

Notably, though, in the five states other than Iowa with opposition to judges in 2010, there was less support for retention, on average, than had been the case from 1998 to 2008. Support also declined even in states without organized opposition to retention.4

Unlike the impact of the 1986 California event, which had occurred because of Bird's consistent reversal of scores of capital cases and had little if any ripple effects, this time several specific reasons point toward more challenges to incumbent judges. Not only are more contests likely, but well-informed observers fear that judges' actions on the bench may reflect increased concern with possible public reactions to decisions.

In the remainder of this article, I will place the Iowa retention-election contests into context regarding how judges are selected, focusing on recent changes. I will then review what happened during the Iowa election itself. With that background in place, I will offer some personal opinions—first, regarding the Iowa campaign itself; next, regarding the likely impact of the Iowa election and its result; and last, regarding steps that might be taken to reduce the likelihood of more attacks on judges.

SOME CONTEXT ON JUDICIAL ELECTIONS

Of all state appellate judges and general-jurisdiction trial judges, 89% face some type of election.5 Facing retention-only elections are 42% of appellate judges and 19% of general-jurisdiction trial judges; facing nonpartisan elections, 20% of appellant judges, 28% of appellate judges, 23% of general-jurisdiction trial judges, and 15% of supreme court justices face organized opposition.6

Author's Note: To a number of Iowans and others, I am immeasurably indebted for their wisdom, information, and dedication to shared values in protecting and promoting our constitutional order and the rule of law.

Footnotes

1. Mike Glover, Huckabee Says Ousting of Iowa Judges Historic Move, Associated Press, Nov. 22, 2010. Huckabee was "in Des Moines courting evangelical conservatives . . . ." Id. Huckabee was not the only leading Republican to speak out in support of the electoral majority shortly after the vote. Newt Gingrich, also campaigning in Iowa at that time, said that the four justices who had not been on the ballot should resign. Kathie Obradovich, Gingrich: Remaining Iowa Justices Should Resign, DES MOINES REGISTER online commentary, Nov. 16, 2010, available at http://blogs.desmoines register.com/dmr/index.php/2010/11/16/gingrich-remaining-iowa-jus tices-should-resign/. Two other Republicans with a national profile also supported the "message being sent" by the Iowa voters—Congresswoman Michelle Bachman and former Senator Rick Santorum; both spoke on C-Span, one in a broadcast talk and the other in an interview. See Amy Gardner, Pairing Religious with Fiscal Sets Iowa Tea Party Apart, WASHINGTON POST, Feb. 3, 2011, p. A3.


In the past, organized opposition to justices in even two states in one year had occurred only twice. In 1986, organized opposition succeeded in California (see note 2 supra); also, one Nebraska justice faced some organized opposition. In 1996, a Nebraska justice was denied retention; he had authored a unanimous opinion invalidating a term-limits law and was opposed by a national organization that spent an estimated $200,000 (no disclosure was required or given). That same year, Tennessee Supreme Court Justice Penny White, the first to face a retention election there, 118 Court Review - Volume 46
late judges and 41% of general-jurisdiction trial judges; and facing partisan elections for initial terms, 33% of appellate judges and 38% of general-jurisdiction trial judges. Unlike the system of appointing federal judges, unchanged since 1789, judicial selection in the states is not only varied but also has been subject to frequent controversy and change since the early 19th century. The states started with appointment systems, but in the early 19th century many replaced appointments with partisan elections; then during several decades around 1900 many states went to nonpartisan elections; and from 1940 to the end of the 1980s many turned to “merit” systems, with screening committees sending nominations to the appointers and the appointed judges subsequently facing the voters for retention or rejection.

For present purposes, we must pay special attention to developments beginning in the 1970s. Judicial elections, whatever the system, for generations were almost always as unexciting as “checkers by mail.” The first notable change occurred in 1978 in Los Angeles County: because of rulings by some trial judges appointed by then-Governor Jerry Brown, the deputy district attorneys early in that election year literally ran an ad in the daily legal newspaper offering to support anyone who would challenge an unchallenged incumbent judge. That effort produced elections lively enough that some changes followed: e.g., judges increased their appearances at community affairs, issued “state of the court” reports, and invited jurors to visit chambers after a case.

Over the next decade in Texas, unprecedented campaign spending occurred as part of the battle between plaintiffs and defense lawyers over the conduct of tort litigation. After several Texas elections, the defense side had won that contest and spending shrunk to minor sums there. But similar big-spending contests occurred in several other states, peaking in 2000 when the national total spent by high-court candidates rose 61% over 1998; in addition, interest groups’ “independent spending” hit at least $16 million that year, far more than ever before. Since 2000, although the total sums spent nationally have fallen, in inflation-adjusted terms, from the peak spending in 2000, more and more individual states have set new records for judicial campaign spending. Obviously, the era of quiet judicial elections has ended, replaced by contests that were “nastier, noisier, and costlier.”

But significant additional change started in 2004 in Missouri, which has been famous since 1940 for being the first state to adopt a “merit” system. In 2004, for the first time in decades, a Missouri justice faced organized opposition to his retention. Several groups were active against the justice, using methods like robocalls with a message from Phyllis Schlafly. The justice won but the lesson was rich, though it drew almost no attention: while the opposition’s grassroots believed the contest was all about that justice and/or sending a message to judges generally, savvy observers believed that the opposition leaders’ actual aim was to increase total turnout of anti-judge lost after attacks on her having joined a decision that overturned a capital sentence, an attack that was a façade in order to open a vacancy for a new appointment. After she was denied retention, the state’s governor was asked, “Should a judge look over his shoulder [when making decisions] about whether they’re going to be thrown out of office?” “I hope so,” he answered. See David B. Frohnmayer, Who’s to Judge?, 58 OR. ST. B. BULL. 9 (1997). See ABA Task Force Report, note 2 supra, at 6 (1998); on the Tennessee events, see also Bert Brandenburg & Roy A. Schotland, Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns, 21 GEO. J. LEGAL ETHICS 1229, 1240 n. 48 (2008).

As for the five states other than Iowa with organized opposition in 2010:

Alaska Justice Dana Fabe won retention with 55% of the votes despite the opposition of the Alaska “political arm of the anti-abortion, pro-traditional marriage Alaska Family Council,” with funding mainly from the “national Christian group Focus on the Family.” Voters Retain Fabe as Alaska Supreme Court Justice, ANCHORAGE DAILY NEWS, Nov. 3, 2010 (available on Westlaw at 2010 WLNR 21953342).

Three Colorado justices were opposed by Clear the Bench Colorado “for [partisan] rulings on taxes and fees, congressional redistricting and eminent domain.” Felisa Cardona, The Colorado Vote: Judges Retention: Three on Supreme Court Face Effort to Remove Them, DENVER POST, Nov. 3, 2010 (available on Westlaw at 2010 WLNR 21986437). The Colorado Attorney General, a Republican, had spoken against the three to a Republican club, see Lynn Bartels, AG Regrets Court Remark: A Blog Says Suthers Told a GOP Club He Won’t Vote for Three State Justices, DENVER POST, Jan. 19, 2010 (available on Westlaw at 2010 WLNR 1152505). They won with 59%, 60%, and 62%. These percentages and the others in this footnote are from William Raftery, National Center for State Courts, NOV. 2 JUDICIAL ELECTIONS ROUNDUP, available at http://www.ncsc.org-Conferences-and-Events/Nov-2-Judicial-Elections-Roundup.aspx.

In Florida, Justices Jorge Labarga and James E.C. Perry were opposed but both won, Labarga by “the lowest approval in state history although that was still 38.9%” and Perry by 61.7%. “With little or no funding, several single-issue activist groups influenced a statewide election that normally attracts little interest—and that’s troubling to those who believe it marks the beginning of a movement that could shake the foundation of the judiciary. . . .” The opposition to the Florida justices “focused on one issue”: they had joined three other justices in keeping off the ballot a GOP-backed “measure designed to derail federal health care legislation”; the court had found the ballot language confusing. A 29-second video posted on YouTube.com, using photos of the justices, said, “Vote out the Obamacare supporters. They voted against us. Now we can vote against them.” The ad was made by a doctor and the executive director of Florida’s chapter of Ron Paul’s Campaign for Liberty. Another ad similarly posted, by the Florida Tenth Amendment Center, urged defeating the two who had denied voters “the right to vote on health care freedom.” Jane Musgrave, Florida Judges May Be on Political Hotseat, PALM BEACH POST, Nov. 13, 2010, available at http://www.palmbeachpost.com/news/state/florida-judges-may-be-on-political-hot-seat-1045961.html?printArticle=y.
people, hoping their votes would help win several nonjudicial races. And in 2006, again in Missouri, the voters defeated a trial judge in Cole County (home of the state capital, Jefferson City)—about two-thirds of Missouri’s trial judges face contestable partisan elections; the judge had been challenged because a campaign consultant deemed that judge the most vulnerable of several up for reelection; the consultant had found funding from an out-of-state deep-pocket judge-hater.13

While 2010 campaigns were particularly difficult for incumbents generally, not merely judges, for years hostility to courts has been active and rising. The 2010 judicial elections took us to a new stage, described with unusual clarity, depth, and conciseness by South Dakota’s Chief Justice David Gilbertson: . . . I think events have taken an ominous turn for the worse. For several years expensive and sometimes nasty judicial elections have gone on. However they appear to me to be mostly . . . the trial lawyers and unions vs. the chamber of commerce and insurance companies. They were wallet driven. Now the issue has changed to issues concerning personal beliefs and lifestyles. [T]he recent results in Iowa show a new anti-judicial force which is . . . able to portray itself as the defender of values and rights instead of the judiciary.14

WHAT HAPPENED IN IOWA

We turn now to the 2010 Iowa election. For starters, a blog posting shortly after the election by a Dr. Richard G. Lee provides a must-read account about the opposition’s start with seed money from Newt Gingrich, the opposition’s organization, and its activities (plus discussion of several alleged missteps by supporters of the justices).15 Several knowledgeable Iowans, though not all agreed on every alleged fact in that posting, do agree that it is generally a full and fascinating picture.

In April 2009, a unanimous Iowa Supreme Court decision had struck down Iowa’s 1998 Defense of Marriage Act in a suit brought in 2005 by six gay couples who had been denied marriage licenses.16 (The trial judge, who also had ruled for the plaintiffs, won retention in the 2010 election.) Turnout was Iowa’s highest in any non-presidential year, and the votes cast on retention set a record for Iowa and were near the highest in any state ever. Normally only a bit more than 60% of Iowa voters would cast a ballot on whether to retain a justice, but 88% did so in 2010.17 The justices won only 46% for retention. In Iowa’s prior 1,322 retention votes, four trial judges had lost (otherwise, trial judges had won with majorities ranging from about 55% to about 75%) but no appellate judges had lost; appellate judges had averaged more than 70% voting for retention in all but two elections: 2000 and 2006.

The campaign spending against the justices totaled almost $1 million, including more than $900,000 from three out-of-state organizations . . .
$1 million, including more than $900,000 from three out-of-state organizations: the National Organization for Marriage based in Washington, D.C.; the American Family Association’s AFA Action, Inc. of Tupelo, Mississippi; and the Campaign for Working Families PAC of Arlington, Virginia. The main in-state sum spent against the justices was $10,178, by the Iowa Family Policy Center ACTION.18

A similar retention contest occurred in Nebraska in 1996, when out-of-state funds flooded in to defeat one justice who had written the opinion in a unanimous decision striking down Nebraska’s term-limits statute.19

Opposition to the justices was led by Bob Vander Plaats, who had lost two Republican gubernatorial primaries and one for lieutenant governor. After losing in a 2010 primary, he put his full-time effort into the anti-retention campaign. Although the opposition funding was almost all from outside Iowa, unquestionably there was a great deal of active local support; for example, one of Iowa’s congressmen led a bus tour around the state.20 One other important aspect of the Iowa opposition was that “more than 200 churches” actively participated in the opposition.21

For the justices, $423,767 raised entirely in Iowa was spent by the Iowa-based Fair Courts for Us Committee.22 That was one of three groups supporting retention, but “Justice Not Politics” and “Iowans for Fair Courts” did not spend on direct advocacy but only on educational efforts. The group called Justice Not Politics also spent about $8,000 on such efforts.

The one radio spot supporting the justices is worth noting: “[Background noise of sports officials’ whistling and stadium crowd stirring:]” [Voice 1:] And the flags are flying! Looks like a questionable call. I think we are going to see some fans calling for these referees’ jobs.

“Paid for by Fair Courts for Us.”23 Views of that ad’s effectiveness were divided both before it ran and after . . . .

On the past 105 years’ glacial progress (which if continued will need another 160 years to end contestable elections for appellate judges and 770 years for trial judges), see Roy A. Schotland, Introduction: Personal Views, 34 Lay. L. A. L. Rev. 1361, 1366-67 (2001) (introducing “Call To Action” and papers from the National Summit on Improving Judicial Selection). In fact, we might be moving in the other direction: “Back in 1906, Roscoe Pound, a scholar at Harvard Law School, started a campaign to have judges appointed. When he spoke, eight in ten American judges stood for election. Today, the figure is 87%. “The Election of Judges: Guilty, Your Honour?, THE ECONOMIST, July 24, 2004, at 28-29; see also My Judge Is a Party Animal, THE ECONOMIST, Jan. 1, 2005, at 20.


Efforts to end contestable elections have failed for a generation (except for one Missouri county in 2008, Green County, the state’s largest jurisdiction that had not already adopted “merit” and retention). Not only are such efforts running into reality, they actually impede judicial reform by distracting from feasible steps that will reduce the problems in contestable elections, e.g. (a) steps to inform voters about the candidates and the differences between judges and other elective officials, and (b) establishing Campaign Conduct Oversight Committees. See notes 32 and 46 infra.


9. And campaigns changed. Later one judge wrote (when the California Judges Association [CJA] surveyed incumbents about campaigns): “Having learned my lesson from the 1978 up-rising, [this time] I hired a campaign manager immediately . . . . I won easily (63% to 37%) in spite of a libelous brochure put out by my opponent the week before the election. . . . It is easy for the Deputy District Attorneys, who have everything to gain and nothing to lose, to oppose an incumbent judge who has everything to lose.” The CJA held sessions on campaigning. Political consultant Joseph Cerrell, who, after 1978, worked in several hundred California judicial contests, said this: “Our senators have a political operation for use in retaliation. For the most part, judges are standing naked in the political process not knowing what, when or how to do anything.” Roy A. Schotland, Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?, 2 J.LAW. & POLy 57, 68-69, 71-72 (1985).

and talk by former United States Supreme Court Justice Sandra Day O’Connor. In September, she addressed “more than 200 elected officials and guests of the Iowa Bar Association . . . .” Praising Iowa’s judicial-selection system, she also made this powerful statement:

Justice [David] Souter and I both look at the Court as the one safe place where a person can have a fair and impartial hearing . . . and we have to keep that. [We] have to address the pressures being applied to that one safe place . . . to have it where judges are not subject to outright retaliation.25

It’s not clear, though, that Justice O’Connor’s effort had any lasting impact.

Strikingly absent or severely limited were efforts by national organizations with the mission of supporting judicial independence. Four are relevant, the largest by far being the American Bar Association, but the ABA understandably leaves local action to state and local bar associations. And what any state or local bar will do depends on who happens to be the leadership at the time and whether anyone can be recruited who has time available and the relevant experience. The Iowa Bar was alert to the situation, did come into action, and their action was substantial, but not more; it aimed entirely at explaining voting in a retention election.

Three other national organizations focus fully or largely on judicial selection systems. Newest is the Colorado-based Institute to Advance the American Legal System, started in 2006 and working with Justice O’Connor. In 2010, it gave its attention to a Nevada ballot proposition to replace their contestable election system with a “merit” appointment and retention system. Nevada twice before had defeated similar proposals, and 2010 saw it defeated a third time, this time with 58% voting against the proposal.26

The oldest of these three national organizations, the American Judicature Society, founded in 1913 and by coincidence based in Iowa, is legally barred (as a 501(c)(3) tax-exempt entity) from election activity, but its regular education programs included efforts and events in Iowa; how much, if at all, those programs affected the election seems impossible to say. Last, the most active of these entities, networked and well funded (mainly by George Soros’s Open Society Institute), is Justice at Stake, which has “partnered” with an array of other organizations such as the ABA, the National Center for State Courts, the League of Women Voters, the American Judges Association, and many reform groups. Like the American Judicature Society, Justice at Stake is barred from election activity; its president wrote an op-ed about voting in retention elections, published online in the Denver Post.27

Would the justices and judicial independence have been aided if more visitors like Justice O’Connor had come to Iowa?


12. See Margaret Ebrahim, The Bible Bench, MOTHER JONES, May-June 2006, at 54-57, 81-83. “Many on the religious right felt that the third branch of government should be accountable to the public as the legislative branch was . . . . ‘There’s nothing the matter with [judgeships] being political,’ Schlafly told the Kansas City Star.” Id. at 57.

13. The political consultant said, at a gathering of lawyers and business leaders in Kansas City shortly after the election, that “some of these [anti-judiciary] groups just want a scalp to hang on the wall.” Scott Lauck, Missouri’s Non-Partisan Court Plan May Be Best for Cole County, MISSOURI LAWYERS WEEKLY, Nov. 20, 2006 (available on LexisNexis). See also John DeMoor, Debate Reveals Rock ‘Em, Sock ‘Em Future of Judicial Politics, MISSOURI LAWYERS WEEKLY, May 28, 2007 (available on Westlaw at 2007 WLNR 26581789).

The source of funding was a New York real estate figure chairing Americans for Limited Government, which also supported Colorado and Montana ballot propositions to limit judges. See Lauck, supra; Tim Hoover, National Dollars Find, Defeat Circuit Judge, KANSAS CITY STAR, Dec. 4, 2006, at p. A1 (available on Westlaw at 2006 WLNR 20875926).

One observer believes that the consultant hoped to scare judges into hiring political consultants to stave off such attacks in the future. Other observers believe that the challenge was supported by major figures in the political branches who were displeased with recent court decisions and wanted to send a message to the judiciary.

14. Email to author, November 17, 2010.


The Los Angeles Times has reported that Gingrich “[l]ast fall . . . played a key behind-the-scenes role in an unprecedented—and successful—campaign to remove three Iowa Supreme Court judges . . . . by marking $200,000 in seed money for the effort. . . . ‘It wouldn’t have happened without Newt,’ said David Lane, executive director of Iowa for Freedom, the organization that led the campaign. ‘Newt provided strategic advice and arranged the initial seed money . . . which is what got everything started.’”

The money came from an anonymous donor whose contribution was arranged by Gingrich, Lane said. Robert L. Vander Plaats, chief spokesperson for the judicial campaign, said the former speaker provided key strategic advice.” Tom Hamburger & Matea Gold, Gingrich Courts the Religious Right, L.A. TIMES, p. 1 (available on Westlaw at 2011 WLNR 4124524).

That report was followed by two others which said the sum was $150,000. Tom Witosky, Gingrich Group Gave to Effort Against Justices, DES MOINES REGISTER, March 16, 2011, at p. A1 (available on Westlaw at 2011 WLNR 5152390); and AP, Gingrich Funnels $150K to Iowa Groups That Defeated Justices by Way of Aide’s Committee, WASH. POST, March 15, 2011.

such as former chief justices from other states who might have drawn upon experience from judicial elections in various selection systems? Such speakers might produce press coverage and meet with many groups in many locations—should that be tried in a coming election? Experienced observers in several states say that judges cannot be effective supporters of other judges; voters are likely to view the effort as self-protection. The most effective supporters are likely to be respected former high officials or other persons who enjoy strong public regard, like some media stars and the voters’ local members of the state legislature. (But former chief justices or justices with campaign experience might be invaluable sounding boards for candidates in contests.)

Many state bar associations and others do have “rapid response” plans and people ready to defend courts when judges are under inappropriate attack. Looking backward, ought responses to have been launched in Iowa shortly after the Varnum decision came under attack? More to the point, ought the next similar situation draw more early-response attention than this one did?

Two post-election gatherings in Iowa have looked back on the election usefully. In December, two focus groups met to discuss the election. According to one observer’s report:

“We heard a lot of ‘It may have been the right decision based on the Constitution, but I just don’t like it. So I voted them out.’”

A third observer said that one focus group participant commented along these lines:

Much as I oppose the court’s decision, I know so little about judges that I shouldn’t be allowed to vote on them.

And in February, at a University of Iowa Law School panel discussion about the election, Justice Michael Streit, one of the three denied retention, said that “politicians demanded judges follow the popular vote, instead of ruling on the law. . . . They kept saying it was the will of the people but who are these people?”

Very differently, Vanderbilt Law School Professor Brian Fitzpatrick said that “the only question is whose politics

For a thorough and learned analysis of the decision, see Todd Pettys, Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices, 59 U. Kan. L. Rev. (forthcoming May 2011); see also Chase D. Anderson, A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review after Perry, 60 Duke L.J. 1413, 1431-39 (Of the four states’ supreme court cases, “Only the Iowa court had a developed evidentiary record on which to base its conclusions. . . . The Iowa court’s opinion contained the strongest reasoning.”).

17. The extremely high participation in voting on retention was attributable in part to the fact that the races for Governor and for U.S. Senator were not at all close, so attention in media coverage and otherwise focused on the retention contest.


19. See note 3 supra.


22. After the National Institute report (see note 18 supra) on the Iowa spending, a late contribution raised the Fair Courts’ total by $6,500. See email to author from Linda Casey of National Institute, Feb. 15, 2011.

23. Almost no funds were raised before mid-October. The State Bar contributed $50,000 (10/18); Iowa Academy of Trial Lawyers $50,000 (mostly 10/20); Folk County Bar Assoc. $13,124 (10/29); American Bd. of Trial Advocates $5,000 (10/18); Iowa Defense Counsel Assoc. $5,000 (10/27); AFSCME $25,000 (10/18); Human Rights Campaign Equality Votes $25,000 (10/25); Fairness Fund $25,000 (10/13); Midwest Capital Group Inc. $20,000 (10/18); also, one individual contributed $50,000 (10/12). Information provided author by Fair Courts for Us Committee; and see Fair Courts’ filings on Independent Expenditure by an Organization, Iowa Ethics and Campaign Disclosure Board.

Iowa’s campaign finance disclosure, administered by the Ethics and Campaign Finance Board, seems a case study in how to frustrate any use of such information. For example, the “Independent Expenditure” reports filed by the Fair Courts committee have cover pages with total sums that differ substantially from the accompanying detailed pages; the columns of donors’ names are mostly unmatchable with the columns of contribution amounts; many donars are listed without contribution amounts, etc.

24. The ad was produced hastily because funds became available only very shortly before the election. In my view, the ad would have
Judicial elections . . . are fundamentally different from other elections because the judge’s job is so different from nonjudicial elective officials.

Des Moines Register: “[T]he campaign on one side was about education of merit selection process and about the courts, and the other side was politics. The politics won. But the conversation needs to keep going forward. . . .”

SOME OPINIONS BASED ON THE 2010 IOWA ELECTION

THE ELECTION ITSELF

Let’s begin with some thoughts directly about the Iowa election itself.

First, should the justices have campaigned? They did not, and most knowledgeable observers have faulted them for this. But I do not, for two reasons: implying absolutely no view of these justices, I stress (as I wrote several years ago) that many fine judges are not political in any sense—no surprise—and many of them do not fit comfortably into a political role. Of course, voters, if empowered to vote on judges either in contestable elections or on retention, obviously can vote on whatever grounds they wish. But power doesn’t equal right-ness. Judicial elections, whatever the type, are fundamentally different from other elections because the judge’s job is so different from nonjudicial elective officials. The differences are clear first from the array of state constitutional provisions about judges—e.g., all elective states give judges terms that are stunningly longer than any other elected officials’ terms. But been beyond criticism if only one sentence were changed, replacing “you should not fire the good referees on just one call,” with something like this: “We all know that some calls look bad to some people and look good to other people, but we know we need referees who are neutral; we can’t rely on any other kind.”


26. Valerie Miller, Ballot Measures Die on Election Day, LAW VEGAS BUSINESS PRESS, Nov. 15, 2010. The State Bar president, who had supported the measure, said, “A lot of work went into this. But this was such a negative election. Voters said ‘no’ to everything.” The final result did show support had continued rising: a July poll found 27%, an October poll found 37%. Doug McMurdo, Question 1, LAS VEGAS REVIEW-JOURNAL, Oct. 30, 2010.

Nebraska voters had rejected the change in 1972 and 1988. AM. JUDICATURE SOC’Y, Chronology, note 7 supra. In fact, Nebraska’s final result in 2010 showed more support for changing the selection system than the last generation had won in other states. Such changes have been consistently defeated for the last generation.

South Dakota voters in 2004 defeated, two to one, a proposal to have their trial judges selected in the same “merit/retention system as their appellate judges, instead of continuing to run in contestable nonpartisan elections. (However, since 1982 only 21 of 109 judgeships had been contested.) The trial judges themselves had earlier been sharply divided about their selection system, but for 2004 were unanimous in favoring the change, and the legislature was only one vote from unanimity in putting the proposal on the ballot. The opposition was summed up by one city official: “This proposal is against Motherhood and Apple Pie, it’s un-American.” Despite an active campaign supporting the change, it lost after being opposed in a major speech by James Dobson, whom the New York Times called “the nation’s most influential evangelical leader.” Russell Shorto, What’s Their Real Problem with Gay Marriage, N.Y. TIMES MAGAZINE, 34, 41 Jun. 19, 2005. Dobson was in South Dakota campaigning against Senator Daschle. A few years earlier, Dobson had discovered at an Alabama rally for their Chief Justice Roy Moore (active advocate of the Ten Commandments), what Dobson called “the depth of popular resentment of liberal court decisions.” As several supporters of the change said after losing, “the people won’t give up their vote.”

As in South Dakota, Florida’s appellate judges are in a “merit/retention system and here too the trial judges face contestable (but rarely contested) nonpartisan elections. In 2000, Floridians (yes, Virginia, there were other races on the Florida ballot that year), defeated a proposal to put their trial judges in the same system as their appellate judges. The change was defeated in every circuit with the affirmative vote averaging 32%, and in every county with the affirmative averaging 26% (the most favorable was 39%). The change had been supported by the Florida Bar, which like the ABA and most state bar associations had been urging such a system for decades.

Study of the “judicial personality” shows, as one would expect, how different it is from the “political personality.” Also, campaigning may have undermined, at least somewhat, the fundamental position at stake: that the judges’ job is different from the jobs of other elected officials.

Second (and entirely separate) is the question whether it is appropriate to vote against a retention candidate because of one decision. The raison d’être of retention elections is to reduce politics in judicial selection or retention. Whatever the system of selecting and/or retaining judges, they are accountable for their neutrality and professionalism; if they are to carry out the rule of law, they are not to be removed from office for a decision that is unpopular but, in their view, is called for by the facts and law as they understand it.

Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case.
retention elections are not only different, they are unique. To say that it is appropriate for voters in retention elections to toss out a judge because of a decision, defies the history of the retention system's adoption and its design to avoid the advocacy, heat, and range of choice that can come with competing candidates.

Let me be explicit that despite my deep disagreement with those who opposed the Iowa justices' retention, I respect their honesty. They disagreed with one decision that that court had made, their disagreement was the undeniably clear basis of their opposition, and they took advantage of an opportunity to make the justices account for what they had done.

One cannot deny that voters can use their opportunity to vote any way they wish. Nor do I fault advocates and activists who say that even for judges, elections are a proper method of accountability. But it is entirely different for academics or other supposedly detached observers to endorse that view. To ignore the differences between what judges do and what nonjudicial elective officials do is unhinging or hyper-simplistic.

Nonjudicial elective officials thrive or lose by their reading of the support they can secure by adopting positions and promising to promote them, then by how well they perform in implementing the promises. For any judge—even United States Supreme Court justices—“hot-button” issues are rare (even at the Supreme Court, only a minute fraction of their decisions). For most trial judges, such issues are non-existent. But decades of experience show that when there is organized opposition to a judge, it is rarely honest. Last year, for example, Illinois Supreme Court Justice Thomas L. Kilbride was opposed by pro-business interests unhappy with his voting to overturn a statute capping medical malpractice damages; but the opposition's TV ads focused on his record in criminal cases to portray him as “soft on crime.” Similarly, a recent West Virginia case ended in the United States Supreme Court because of the extraordinarily large independent spending against an incumbent by the president of a company with major litigation coming before that court; that opposition had focused entirely on the incumbent's role in a case about a child-abuser. In cases like those, it may well be that most voters in fact agreed with the decisions that actually led to the incumbent's being opposed, but were misled by sophisticated campaigning that relied on selling what was easy to sell. One of our wisest judges summarized the reality of judicial elections:

Every judge's campaign slogan, in advertisements and on billboards, is some variation of “tough on crime.” The liberal candidate is the one who advertises: “Tough but fair.” Television campaigns have featured judges in their robes slamming shut a prison cell door.

To oppose a judge because of her or his decisions and then
The Iowa event has several different impacts: one . . . is a likely chilling effect on future decisions in many states . . . .

The new justices appointed in 2011 to fill the three vacancies will campaign in 2012. Jens Manuel Krogstad, New Justices Will Campaign When Facing Retention Vote, Des Moines Register, Mar. 24, 2011. “The justices said that they prefer not to campaign . . . . but that they learned a lesson from last fall’s successful campaign that ousted three justices. . . . [Justice] Waterman said he didn’t like seeing the retention vote and selection process become politicized with outside money. However, he said the events provided a good springboard to discuss the importance of the judiciary.”


32. For a powerful example of voter-aimed material that “It’s Simple–Judicial Elections are Different,” see the Maryland Judicial Campaign Conduct Committee’s brochure, available at http://www.mjdcjc.org/index.html.

Consider how different is the judge’s job:

[O]ther elected officials are open to meeting—at any time and openly or privately—their constituents or anyone who may be affected by their action in pending or future matters, but judges are not similarly open; nonjudicial candidates are free to seek support by making promises about how they will perform; [o]ther elected officials are advocates, free to cultivate and reward support by working with their supporters to advance shared goals; other elected officials pledge to change law, and if elected they often work unreservedly toward change; other elected officials participate in diverse and usually large multi-member bodies; other elected incumbents build up support through “constituent casework,”

The rule of law is not in danger because of this one election. 41

That is an optimistic view, but with all respect, it is misleadingly superficial. First, it fails to note that the Iowa event has several different impacts: one, as noted, is a likely chilling effect on future decisions in many sates; another is the probability, as I note below, of a significant increase in challenges to judges in many states and in all kinds of elections; and last is this: At least until the Iowa event’s impacts do “die down,” we will suffer from some indeterminate number of fine lawyers who would make fine judges, and fine judges who are coming up for reelection or retention, who decide against being on the bench because of the job’s newly increased insecurity. Second, while of course “[t]he rule of law is not in danger because of this one election,” neither did one presidential assassination put American politics in danger. But even if some disasters die down after brief stirs, several reasons suggest that the Iowa event is likely to have lasting impact. One cannot predict just how much, but it will be enough to matter, enough to cause substantial concern.42

Because:

1. Judicial elections (until a few in recent years) were always either completely quiet or, even if lively, had no impact on other elections. Starting with Missouri’s 2004 challenge to a justice’s retention, where much of the motivation was to increase turnout in nonjudicial elections, the tail has begun to wag the dog. That is, judicial elections become lively because they can be used as a tool to affect nonjudi-
cial races. That seems bound to recur.

2. A second incentive to challenge judges emerged in Missouri’s 2006 challenge to a trial judge: the combination of a consultant eager for a client, with even a single deep-pocket individual ready to crusade against judges. Some combination of a consultant and a deep pocket seems bound to recur.

3. Iowa brings a new incentive: any politician who is either anti-judiciary, or willing to be, can secure enough support that if the effort wins or almost wins, she or he gains. Vander Plaats’ having led the Iowa effort to such success has made him a major figure, probably the state’s number three Republican after Governor Terry E. Branstad and Senator Chuck Grassley.43 There are bound to be copyists, even if Vander Plaats fails in his current effort to sell a book about Iowa’s 2010 event.44

WHAT TO DO? STEPS TO TAKE TO REDUCE THE LIKELIHOOD OF MORE ATTACKS ON JUDGES

What to do? Here, I merely list a few key possibilities worth consideration:

**Outreach**, which should be year-in, year-out and should include “audience multipliers” like Access TV, local radio, and local newspaper coverage.45

**Bench/Bar/Media** meetings at least annually, as well as columns in local newspapers by chief justices and/or other justices.

**Campaign Conduct Committees**— unofficial and with members who are representative, diverse, and distinguished.46

Readiness of the Bar and other supporters of fair and impartial courts, especially including the general councils of key organizations and corporations.

One notable observer of the Iowa events said that part of the reason it happened was that it was so hard to know the opposition was so substantial. When I mentioned that to a state chief justice who is unusually savvy about politics, he was dismissive, saying that to wait until one knows is to lose, and that the only sound course is to be ready, working constantly to help the public understand the role of the courts and how different is the judges’ job from the jobs of other elected officials.

The impacts of an event like the Iowa voters’ rejection of their justices are of three types, all severely harmful. I do not prioritize among these, but:

1. Judges everywhere (not only in elective states, but any judge who is not nearing the end of her or his career) will be unable to avoid thinking about possible popular reactions, if they have before them a high-visibility case or issue.47

2. Sitting judges, as well as lawyers willing to serve on the bench and who would be fine judges, will be more likely to stop or avoid such service because of the unpredictable insecurity that is too likely to flow from their doing their

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The impacts of an event like the Iowa voters’ rejection of their justices are of three types, all severely harmful.
job.\textsuperscript{49} And though insecurity will not worry many of the best people, they will be worse than worried by the likelihood that their colleagues will be unduly concerned about possible public reactions to high-visibility decisions. One chief justice said this of the Iowa election impact: “[T]his may be the most significant and long term damage from the election. There is no way to gauge how many attorneys decide to ‘pass’ on the judicial career because of this.”\textsuperscript{49}

3. Courts will be less able to serve in the indispensable manner in which they have served since we adopted our constitutions—as the bodies that are as insulated from public passions as we can make them, to review the acts by officials in other branches in order to assure protection of individual rights and the rule of law. \textsuperscript{50}

Although I do predict that the Iowa election is likely to mean more trouble in judicial elections, this is not predicting more defeats. Just as in California after the 1978 challenges to forums in the coming months in which “several prospective candidates have agreed . . . to participate . . . .” Jeff Zeleny, \textit{Conservative Gathering to Test G.O.P. Hopefuls}, N.Y. TIMES, Feb. 9, 2011.

45. The Florida Bar has outstanding materials (and training materials) for lawyers’ and judges’ outreach presentations, see the Benchmarks Program of the Judicial Independence Committee of the Florida Bar, http://www.floridabar.org/judicialindependence. The ABA also has excellent materials available, see ABA Standing Committee on Judicial Independence’s Resource Kit on Fair and Impartial Courts, available at: http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resource_ kit_on_fair_impartial_courts_hub.html.

For a remarkable picture of the number and types of outreach programs, see the more than 50-page annual \textit{Community Outreach Programs and Contacts: Superior Courts}, published by California’s Administrative Office of the Courts.

Surely illuminating is the fact that the Iowa court has just begun its first-ever outreach efforts. See William Petroski, State’s \textit{Justices to Take to the Radio Airwaves}, \textit{Des Moines Register}, Mar. 15, 2011; and see Krogstad, n. 30 supra (“[T]he justices will for the first time travel around the state to hear arguments.”).


47. “You cannot forget the fact that you have a crocodile in your bath-tub,” said former California Justice Otto Kaus, referring to controversial cases at election time. “You keep wondering whether you’re letting yourself be influenced, and you do not know. You do not know yourself that well.” D. Morain, \textit{Kaus to Retire from State Supreme Court}, L.A. TIMES, July 2, 1985. “Should a judge look over his shoulder [when making decisions] about whether they’re going to be thrown out of office? I hope so,” asserted Tennessee’s Governor after helping to deny retention to Justice Penny White in 1996. That quotation is the very opening of David B. Frohmayer [long-time elected Attorney General of Oregon and then president of the University of Oregon], \textit{Who’s To Judge?}, 58 \textit{Or. Sr. B. Bull.} 9, 9 (1997).

48. We cannot overemphasize that the entire point of work on judicial selection is to protect and promote the suitability of the lawyers who will enter and stay on the bench. There will never be a shortage of lawyers eager to be judges, but the size and caliber of the pool changes. To go on the bench already involves a greater—and steadily increasing—loss of income. “Judges’ Pay: A Clash Far Worse Than Realized, and Worsening,” the title of my 2007 article, 82 IND. L.J. 1273, has been downloaded incomparably more than any other product of my 26 years’ work on judicial elections and selection.

49. In my view, whether the worst impact of the Iowa event will be what it does to affect who seeks judgeships, or what it does to reduce judges’ protection of constitutional rights in unpopular matters, is hard to predict. But which is worst doesn’t matter: both are destructive departures from our constitutional order.

50. I must confess error in being focused on the election and failing to think about other developments now doing severe damage to our justice system. Iowa’s new Chief Justice Mark Cady, in his State of the Judiciary Address in January, discussed two topics: the recent election and the role of courts in constitutional review, and the Iowa courts’ recent budget cuts. On the latter, he included this:

“{In} addition, our work has grown in the past few years as a direct result of cuts in services for treating abused and neglected children and troubled youths. The following observations of Juvenile Court Officer Paul Thompson of Marshall County best describe this situation:

“The front end kids are no longer being served, or if they are, not as well. We . . . get these kids later when their problems are more firmly entrenched . . . . The schools and the police look to us for help and we are unable to provide much assistance due to the lack of manpower and funds. Due to funding problems, kids sit in detention or shelter too long while waiting for appropriate residential treatment . . . .\textsuperscript{51} It seems like we are having less success when they come back from placement. The system is certainly broken . . . . [and] the long term effects will show up years down the road.” (Jan. 12, 2011), at 5.

51. Text at note 9 supra.
Judicial settlement conferences present novel challenges to judges in assisting parties to settle their dispute rather than continue to litigate. Often, parties come to the table with cases that have festered for long periods of time and at great expense. In many instances, the judge faces the particular challenge of overcoming impasses that frequently occur during the negotiations.

Impasses arise often, and for a variety of reasons. Each side may have genuine differences in their evaluations of the merits that cause them to demand more or offer less, preventing a meeting of the minds. Strong emotions or overly aggressive negotiation strategies may impede a settlement. An impasse may also arise due to a multiplicity of issues requiring resolution, or numerous parties who must all agree.

A successful settlement judge must employ creative approaches to bring about a resolution, particularly when the negotiations appear at a dead end. The judge should be able to help the parties break through impasses with a process suggestion, additional information, or a settlement recommendation. Even if the parties appear completely deadlocked, a judge can reach into a toolbox of techniques to overcome the obstacle before everyone simply walks away from the table. Judges should therefore have a number of useful impasse-breaking techniques at their disposal.

I previously wrote an article in which I described five such techniques: (1) creating a range; (2) recommending a specific number; (3) splitting the difference; (4) clarifying objective facts; and (5) setting firm deadlines. This article describes seven more tried-and-true impasse-breaking techniques that judges may add to their settlement arsenal.

**TECHNIQUE #1: IDENTIFY MULTIPLE ISSUES AND SEEK RESOLUTION DURING THE INITIAL JOINT SESSION**

Some cases involve the sole question of how much money needs to change hands in order to settle along with a standard general release. However, in complicated cases involving more than just a dollar amount, all relevant issues should be out on the table early in the process. This is a proactive strategy a judge can use to avoid later surprises that could cause the negotiations to fall apart.

Settlement negotiations that appear to be going well can suddenly derail upon the late introduction of a “deal breaker” issue not previously discussed. Thus, parties should work together early in the process to identify each issue they need to resolve in order to settle. I generally do this in an initial joint session before I begin individual caucuses with each side. In addition, I endeavor to prioritize and resolve some of the issues in the joint session before caucusing separately. The following case study provides an example of how to implement this technique.

**CASE STUDY 1: A TRADEMARK INFRINGEMENT CASE**

In a recent case, two parties were embroiled in a trademark dispute over who could use the name associated with a business from which both sides came into existence. Although the defendant had the right to use the name for commercial purposes, the plaintiff retained the right to use it for its nonprofit research and educational pursuits. Concerned the defendant had branched out and was using the name in the education arena, the plaintiff brought suit seeking injunctive relief and monetary damages.

After reading the parties’ settlement demand and offers letters, which I require parties to exchange before the settlement conference, I could see that multiple issues were at play. In preparation for the conference, I set up a display board in the courtroom. After initial opening statements in which both parties laid out their concerns and positions, I requested that the parties identify all of the outstanding issues.

As the parties identified each issue, my law clerk wrote them on the board for a visual reference. The plaintiff began by listing its specific goals, and the defendant added areas of concern it wanted to address—particularly when and how it could use the name to educate customers about how to use its commercial products.

After the list of issues was formulated, I kept the parties together in the joint session and explained the following ground rules. We would proceed through the issues one at a time with the understanding that there was no agreement on any one issue unless there was an agreement on all. I encouraged the parties to show flexibility where they could and to hold firm where the issue was of particular importance to them. I encouraged them to reciprocate movement wherever the case settled, of course, you also need to make sure the settlement is sufficiently detailed and documented to hold up. For tips on that process, see Morton Denlow, *Concluding a Successful Settlement Conference: It Ain’t Over Till It’s Over*, Ct. Rev., Fall 2002, at 14.

Judge Denlow gratefully acknowledges the assistance of his law clerk, Janelle Skaloud.

**Footnotes**

possible. I then went through the issues one by one, intentionally starting with the “easiest” issue first and working up to the most difficult in order to create settlement momentum. I asked the parties to explain their concerns on each issue and to see if we could find a tentative agreement.

We quickly learned that the defendant was willing to concede one of the issues, which involved assigning to the plaintiff an internet domain name it was no longer using. We also reached tentative resolutions on four other less significant points. It then became apparent that the remaining issues would not be resolved until the future use of the trademarked name was addressed.

At that point, I began the separate caucus process with each side. Since the parties had prioritized their concerns, I was able to hone in on the scope of the name use because I could see it would be the linchpin of the agreement. After several rounds of caucusing with each party separately, a consensus was reached defining the boundaries of the name usage.

I then brought the parties back together to address the remaining issues, which, for the most part, fell into place because the most important question had been resolved. The defendant made concessions on steps they would take to change the name associated with their educational services, and the plaintiff was able to give up on its more unrealistic goals, including the physical relocation of the defendant’s educational facility. At the end of the day, with the non-monetary issues resolved, the case settled with no exchange of money between the parties.

An impasse was avoided, in part, by the momentum created in listing and resolving smaller issues in the opening joint session. By adopting the ground rule of no binding agreement on any one issue, unless all issues were resolved, parties could show flexibility while still preserving control over the final outcome. This method can also save time by avoiding separate caucuses on every issue.

The preceding example illustrates some of the advantages of this technique. First, it serves the basic purpose of organizing the negotiations and avoiding confusion when multiple issues are being discussed. Second, it ensures that negotiations will not fall apart by one side raising a new issue mid-conference. This approach helps in avoiding a situation where parties agree on a monetary settlement amount only to go back to the drawing board after the introduction of a term not previously discussed, such as confidentiality or the resolution of an outstanding third-party lien.

Third, it forces the parties to work together with the knowledge that they have no final agreement until they have agreed on all issues. Each side will then need to determine what is really important to them, and where they can show flexibility. This also helps me figure out at the outset where the biggest areas of contention exist. Fourth, it has the potential to create momentum that will carry the negotiations forward. When the parties see the process working, they gain confidence that they can truly reach a resolution.

This technique will not be appropriate for every case. But when the parties must resolve multiple issues in order to settle, it is the perfect place to start.

TECHNIQUE #2: USE SETTLEMENT DATABASE STATISTICS TO PROVIDE PERSPECTIVE

A settlement database is a tool a court can develop by compiling information prepared by judges following successful settlement conferences. The database should detail the types of cases that frequently come in for settlement conferences and the settlement amounts, and should add some factual information while still preserving the parties’ confidentiality. I have previously written about how to develop a settlement database.²

I keep a binder of compiled settlement conference statistics on hand in my chambers. This binder contains information concerning settlements reached before the magistrate judges in our court in employment discrimination, civil rights, intellectual property, personal injury, and consumer fraud cases.

As an impasse-breaking technique, the settlement database can be useful in a variety of situations. First, parties are often unrealistic as to the amount they expect to realize in a settlement. They may fail to understand that, even on a good day, they cannot recover through settlement what they might hope to receive if they won at trial. Parties who are emotional and feel strongly about the merits may find it difficult to take an objective, reasonable view of the case. In these instances, a review of the settlement database can provide them a realistic view of what others in similar cases have attained through settlement.

The database can also be helpful to less experienced attorneys or judges who will benefit from guidance based on other settlements. When I perceive an attorney is hesitating because he is uncertain whether to advise his client to offer more or take less, I furnish the binder in order to provide some perspective. Seeing how other cases have settled gives the attorney an idea of an appropriate ballpark, even though the individual circumstances of the case will dictate the ultimate number. The attorney not only learns what a fair settlement may look like, but also obtains peace of mind that his client’s settlement is appropriate.

Finally, the database can provide comfort to one or both parties that their settlement is in a realistic range. A defendant may want to settle, but be concerned that he is being taken to the cleaners. Likewise, a plaintiff may feel she is giving in too soon by agreeing to a lower number than she expected to receive. By consulting a compilation of similar case settlements, the parties can walk away feeling they made a fair and reasonable deal.

The settlement database is most effective when the court-

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CASE STUDY 2: A COMMISSION DISPUTE

In a lawsuit for unpaid commissions by a former salesman against his ex-employer, I discovered that the salesman and the company's owner had a long and close personal relationship and this was a dispute between two old friends. The company's business was tottering, was contesting the plaintiff's entitlement to certain commissions, and, at that time, lacked the ability to pay. The lawyers were running up fees with no end in sight and had developed a great dislike for one another.

I suggested the possibility of meeting separately with the clients, and the attorneys agreed. I then began the separate session by asking the clients to tell me about their relationship. They each discussed how troubled they were that this dispute had hurt their friendship and after a while they worked out a settlement that called for payments over time. More important, they walked out as friends.

TECHNIQUE #4: CALL UPON A LAW CLERK/EXTERN JURY

When I conduct settlement conferences, I typically invite my law clerk, courtroom deputy, and law student externs to sit in and observe the proceedings. This provides them a valuable learning experience, and I can call upon them for their reactions when I feel it would be helpful for one or both parties to receive feedback on what has been presented. I encourage the "jury" to give their honest responses in order to reflect a neutral perspective back to the parties. Generally, this helps the parties see their case as an outsider would, not as someone who has been personally embroiled in it for months or years. In some cases, the "jury" might even raise a consideration that had not previously been discussed and can help the negotiation progress.

This technique is most useful in cases that will be tried in front of a jury, if not settled. When one or both sides appear overly passionate about their case, perhaps out of proportion to its merits, third-party feedback can provide much-needed perspective. By using my staff, I preserve my neutrality and avoid becoming evaluative too early. If the plaintiff is refusing to back down, the jury might point out that, while they understand the plaintiff feels wronged, the evidence is weak and the defendant has a strong position to rebut the plaintiff's claims. In other scenarios, the extent of the damages a plaintiff is seeking may be unrealistic, even if she could win on the liability issue. Likewise, a defendant who feels he has a "slam dunk" case might be surprised to hear its weaknesses, or to hear that the plaintiff would likely make a very sympathetic witness in front of a jury.

The "jury" need not limit its reactions to how they perceive the merits of the case. In a settlement conference, unlike more formal court proceedings, the discussion will often turn to what is really going on behind the scenes. It may come out that the plaintiff is tired of litigating and just wants to put the whole experience behind him. Or the defendant might need to resolve the issue to move forward in her business. The "jury" can reflect the issues that are the driving factors for the parties, and encourage the parties to consider the economic and emotional concerns in deciding to make a move toward settlement. The use of your staff as a "jury" can provide a big assist towards bringing about settlement.

TECHNIQUE #5: ENCOURAGE PARTIES TO "LOOK FORWARD, NOT BACKWARDS"

This technique is a small but significant way to redirect settlement discussions when the parties have reached a stalemate. When one or both sides are hanging on to anger or hurt feelings over the events surrounding the litigation, they may have a hard time compromising at a number that does not feel "fair" to them. In addition, parties who have spent a lot of money in the case may have a hard time facing the prospect of settling at a "loss." Even when a party has stated he wants to settle, he may continue to bring up these grievances that impede the negotiation process.

In those instances, I ask the parties if dwelling on the past
is really the most productive way for them to move forward. The parties need to consider what they can hope to gain going forward versus what it will cost them to continue litigating. If they can truly look forward and still think litigation is the best route, then it may not be the right time for the case to settle. However, in the majority of cases, parties forced to consider the future will conclude that closure is the best thing.

For most plaintiffs, the question will turn on whether they have the time, energy, and money to continue the litigation process. They also need to consider the risks involved in facing dispositive motions and trial. A major factor will often be whether settlement will net them more in the long run than continuing to litigate. They must conduct an honest evaluation of what it will cost to continue pursuing the case and whether it is worth their while to do so. Likewise, defendants must also consider what it will cost them to move forward in the litigation, despite what they may already have spent. Although the defendant may be inclined to dwell on money already put into the case, she must realize that those costs will only mount as the case goes on. Sometimes I tell the defendant that settlement is like buying an insurance policy—they protect themselves from the possibility of being hit with a judgment, their own attorney's fees and costs, and potentially the fees and costs of the other side.

Focusing the parties on the future is an effective impasse-breaking technique with few drawbacks. More often than not, one or both parties at the table will need to let go of past events in order to settle. A change of perspective can go a long way in helping them do that. If a party is still wavering, I tell them to mark their calendars a year from the date of settlement, and to write a letter if they have any regrets at that time about settling. I tell them that in all my years conducting settlement conferences, I have never received a letter from a party regrettting a settlement. On the other hand, I have seen quite a few parties who later regretted not having settled when the opportunity presented itself.

**TECHNIQUE #6: DELIBERATE INDIFFERENCE**

Even when parties have made significant progress toward settlement and the end is in sight, they may struggle with who should make the last move to bring the negotiations to a close. One or both sides may feel they have already given up too much and may stubbornly refuse to move any further. In these situations, a judge should take care not to become too wrapped up in whether the settlement will be a “win” or “loss” for her own record. As a neutral, the judge does not have a stake in the outcome, and thus can step back from the situation. I often say to a party who refuses to make the final move that if they want to shoot themselves in the foot, I am not here to stop them. Sometimes I will tell them that I did not bring my checkbook that day, so it is going to be up to them to make something happen. This approach acts as a reality check when a party is confronted with the thought that if they walk away, all the progress they made could be for naught.

This technique is most appropriate in situations where the parties are left with a relatively minor monetary difference that they refuse to compromise. I often see cases where the parties start out at hundreds of thousands of dollars apart, and then negotiate down to a few thousand apart and become stuck. This issue also presents itself in cases with multiple issues where the major problem areas have been resolved, but the parties are hung up on a minor issue. If all sides are serious about settlement, rarely will they let so much progress go to waste when the hardest work has already been done. Acting indifferent to whether parties settle can be a powerful motivator for the parties to act to bring the deal to a close.

**TECHNIQUE #7: ONE SIDE GIVES A DIRECT “ULTIMATUM” WHERE A SMALL DIFFERENCE REMAINS**

Generally, I discourage “final offers” or ultimatums in settlement conferences, because it can have the effect of bringing negotiations to a halt. In my experience, parties using phrases such as “that’s my bottom line” or “that’s my top dollar” back themselves into a corner when in reality it may take some further movement to settle the case. They effectively put themselves in the position of either backing down from their emphatic statement or ending the negotiation process altogether.

However, in some limited occasions where the parties are extremely close but neither side will budge, it may be appropriate for one side to give an ultimatum after other impasse-breaking techniques have been attempted. This technique should not be used prematurely; rather, only when it has become clear that one side is truly ready to walk away from the table. When that happens, I invite that party to address the other side directly and explain that they have absolutely reached their limit. I do this because it is important that they gauge how serious the other party is. I then invite the party who has made the final offer to leave while I discuss it with the other party. This gives me the opportunity to keep the discussions alive.

**CASE STUDY 3: AN EMPLOYEE BENEFITS CASE**

In a recent case involving the denial of disability insurance benefits to the plaintiff, the parties started the settlement conference with over $1,000,000 difference between the plaintiff's demand and the defendant's offer. Each side had a different view of the interpretation of the insurance policy's terms as well as the strength of the plaintiff's evidence. However, both sides came to the table willing to settle, and after two hours of negotiation they made significant progress and were only $25,000 apart. At that point, however, both sides dug in their heels and said they had reached their limit. I tried some of my other techniques, but both sides refused to move and appeared ready to throw in the towel.

Since the plaintiff had made the last move and had moved significantly, I could tell she would be much less likely to move any further. I therefore proposed the “ultimatum” technique, explaining that I would bring the defendant and counsel back into the room and the plaintiff's counsel should address them directly to say that this was the take-it-or-leave-it number. The idea that the plaintiff directly address the defendant at that
point was necessary to illustrate that this truly was the end of the road—if the message came through me as the intermediary it may not have carried the same impact. To allow the defendant to consider the idea with a cooler head, I would not allow him to respond right away, but rather gave him time to consider it after the plaintiff left the room.

After the plaintiff agreed to this plan, I called the defendant in and the plaintiff’s counsel proceeded to give the defendant the ultimatum. I then explained to the defendant that they need not respond immediately, and sent the plaintiff out of the room. The defendant also left to discuss the issue privately with counsel. He came back after several minutes and told me that they would agree to meet the plaintiff’s demand. Although the number was beyond the defendant’s desired range, he truly wanted to settle the case and was not willing to sacrifice the substantial progress made that day. I then brought the parties back together and announced they had a deal.

The advantage of this “last resort” technique is that it brings a sense of finality to the discussions that forces the other party to either settle or walk away. A judge should proceed with caution—if used too early or when the parties are too far apart, this technique could backfire and end the settlement conference prematurely. However, when the parties have come a long way and are very close, it usually cannot hurt to make one last attempt at bringing them to a compromise. If settlement is the goal, this will force both sides to lay all their cards on the table and determine whether they can really make it happen.

CONCLUSION

The majority of cases filed in court settle, and judges are becoming increasingly involved in this process. Parties often need help overcoming obstacles to reach agreement. To be most effective, a judge will be fully armed with impasse-breaking techniques to move the parties to resolution. While the techniques described in this article will not be necessary or useful in every conference, one or more of them can often help turn a seemingly hopeless situation into a mutually beneficial settlement. A judge should therefore consider these techniques and whether they will be helpful to the situation at hand. Judges who are able to do so will provide a great service to the litigants who come before them.

Morton Denlow has been a magistrate judge in the United States District Court for the Northern District of Illinois, Eastern Division, in Chicago since 1996. Before his appointment, he was a trial and appellate lawyer in complex commercial litigation for 24 years. He can be contacted at morton_denlow@ilnd.uscourts.gov.
Selected Cases from the United States Supreme Court’s 2009-2010 Term

Tim J. Davis

The U.S. Supreme Court’s 2009–2010 Term ushered in both important federal law clarifications and divisive constitutional pronouncements. The Court performed much work in the realm of civil procedure, doing away with Circuit splits regarding the collateral-order doctrine and diversity jurisdiction, and also explaining what it means to make a mistake for purposes of relation back—decisions sure to affect many a federal practice. The Court also dabbled in employment law under Title VII; decided constitutional challenges to several federal statutes, including an anti-terrorism statute; and attempted to firm up the boundaries that inhere in the constitutional concepts of federalism and separation of powers. But more than any of these other significant rulings, this Term will likely be remembered for two of the Court’s decisions that have easily earned “landmark” status: McDonald v. City of Chicago,1 in which the Court held the Second Amendment applicable to the states, and Citizens United v. Federal Election Commission,2 in which the Court held that groups of people organized as a corporation are entitled to the same free-speech rights as individuals. This article attempts to illuminate the rationale and possible implications of these and other notable civil decisions from the Court’s 2009–2010 Term.

CIVIL PROCEDURE

In Mohawk Industries, Inc. v. Carpenter, the Court put to rest a disagreement among Circuits over whether “disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine.” In 2007, Mohawk Industries found itself waging legal battles on two fronts. Norman Carpenter, once a shift supervisor at a Mohawk facility, sued Mohawk on the basis that he was wrongfully terminated. Carpenter claimed it was no coincidence that he was fired after voicing concerns to human resources that Mohawk was employing undocumented immigrants. Although Carpenter had no idea, a whole class of plaintiffs shared Carpenter’s concerns, as Mohawk was at that time defending a class-action suit that claimed the company had conspired “to drive down the wages of its legal employees by knowingly hiring undocumented workers.” Mohawk higher-ups ordered Carpenter to meet with Mohawk’s defense counsel for the class-action suit, where Carpenter was allegedly asked to backtrack on his statements. Carpenter’s refusal to comply, claims, led to his firing under false pretenses.

The class of plaintiffs caught wind of Carpenter’s exit and moved for an evidentiary hearing to explore Carpenter’s complaint. In response, Mohawk claimed that Carpenter fabricated his story: the meeting with Mohawk’s counsel was in fact part of an investigation into Carpenter’s having violated company policy by attempting to have Mohawk hire an undocumented worker. Meanwhile, Carpenter’s own suit against Mohawk was entering discovery and Carpenter moved to compel Mohawk’s production of information regarding both Carpenter’s meeting with corporate counsel and Mohawk’s termination decision. Mohawk argued that the information was protected by the attorney-client privilege. The distict court agreed that the information was privileged, yet granted Carpenter’s motion to compel on the theory that Mohawk’s discovery responses in the class-action suit waived the attorney-client privilege. The court refused to certify its ruling for interlocutory appeal, but gave Mohawk time to pursue appellate review through mandamus or the collateral-order doctrine. Mohawk did just that, and after finding no success in the Eleventh Circuit, the Supreme Court granted review solely on the question of whether the district court’s disclosure was immediately appealable.

Justice Sotomayor, writing for seven other justices, analyzed the issue in traditional fashion by applying the Cohen requirements: collateral rulings that do not end the litigation may nevertheless be immediately appealable if (1) they are conclusive, (2) they resolve important questions separate from the merits, and (3) they are effectively unreviewable on appeal from a final judgment. Focusing on the third factor, the Court noted the importance of the attorney-client privilege, but explained that the “crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.” Applying this test, the Court held that the interests served by the attorney-client privilege were adequately protected by appellate courts’ ability to remedy the improper disclosure of privileged material by vacating adverse judgments and remanding for a new trial, excluding the protected material the second time around. As the Court explained it, “deferring review until final judgment does not

Footnotes
1. 130 S. Ct. 3020 (2010).
2. 130 S. Ct. 876 (2010).
4. Id.
5. Id. at 606.

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meaningfully reduce the ex ante incentives for full and frank consultations between clients and counsel.”

Further, to the extent the privilege guarantees the right not to disclose information at all—as opposed to merely protecting against its use at trial—the Court acknowledged the existence of several litigation tools that help protect this right. A party may seek immediate review through either an interlocutory appeal under 28 U.S.C. § 1292(b) or a petition for a writ of mandamus; or alternatively, parties may defy the district court’s disclosure order and appeal any sanctions upon final judgment. Also, the district court may issue protective orders to hedge against the risk that leaked information might damage the disclosing party outside of the courtroom. The fact that “a fraction of orders adverse to the attorney-client privilege may nevertheless harm individual litigants in ways that are ‘only imperfectly reparable’ does not justify making all such orders immediately appealable as of right under § 1291.”

In what may be the most interesting part of the opinion, the Court once again acknowledged that the rulemaking process is “the preferred means for determining whether and when pre-judgment orders should be immediately appealable.” In fact, this point motivated Justice Thomas’s concurrence, where he expressed his readiness to do away with the Cohen analysis altogether, characterizing the Court’s opinion as ironic because of its potential to prejudice “the very matters it says would benefit from ‘the collective experience of bench and bar’ and the ‘opportunity for full airing’ that rulemaking provides.”

In addition to Mohawk, the Court tackled another issue that was causing confusion in the Circuits in Hertz Corp. v. Friend, refining the test for determining a corporation’s “principal place of business” for purposes of federal diversity jurisdiction. In 2007, two California citizens representing a proposed class of California plaintiffs filed suit against Hertz Corporation in California state court, claiming violations of California’s wage and hour law. Hertz attempted to remove the case to federal court under diversity jurisdiction. Hertz argued it was diverse from the California plaintiffs because its principal place of business was in New Jersey, where its corporate headquarters is located and where its “core executive and administrative functions” are carried out. The district court disagreed with Hertz based on its application of the Ninth Circuit’s principal-place-of-business test. The test instructs district courts to first determine “the amount of a corporation’s business activity State by State” and then look for one state that has a significantly larger amount. Because the district court found that Hertz’s activity in California significantly outweighed its activity elsewhere, the court did not reach the second prong of the Ninth Circuit’s test, which locates a corporation’s principal place of business where “the majority of its executive and administrative functions are performed.” The Ninth Circuit agreed with the district court’s analysis and the Supreme Court granted review to resolve the disparate Circuit approaches.

In a unanimous decision, the Court began by reviewing how and why the principal-place-of-business test came to be. The Court related how many in Congress had come to doubt whether the state-of-incorporation test for corporate citizenship was serving diversity jurisdiction’s policy of “opening the federal courts’ doors to those who might otherwise suffer from local prejudice against out-of-state parties.” Although simply applied, this test had two undesirable consequences: corporations manipulated federal jurisdiction by incorporating in states where they did hardly any business at all, and the resulting amount of diversity cases caused the federal dockets to swell. Thus, in 1958, Congress modified the diversity-jurisdiction statute so that a corporation would be deemed a citizen “of the State where it has its principal place of business,” in addition to the state of its incorporation.

But, as the Court noted, lower courts encountered difficulty in trying to locate a corporation’s principal place of business. When a corporation’s activities were spread across numerous states, most courts were focusing on “the nerve center”—the place where officers direct, control, and coordinate business activities. Contrastingly, when a corporation’s activities were focused in a small number of states, many courts were examining where the actual business activities were taking place. The Court noted the inherent difficulty in applying this latter test: “Perhaps because corporations come in many different forms, involve many different kinds of business activities, and locate offices and plants for different reasons in different ways in different regions, a general ‘business activities’ approach has proved unusually difficult to apply.” This difficulty quickly snowballed into a variety of complex, multifactor tests, prone to inconsistent application. The Court noted that this complexity was likely the result of courts’ attempts to uphold the rationale of diversity jurisdiction—to find the State where a corporation is least likely to suffer local prejudice—but ultimately, “that task seems doomed to failure.” This is because local prejudice usually turns on factors that are difficult to grasp, like corporate image, history, and advertising, as opposed to the more measurable corporate business activities.

Given this futility in attempting to uphold the rationale of

6. Id. at 607.
7. Id. at 608 (quoting Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994)).
8. Id. at 609 (citing Swint v. Chambers County Comm’n, 514 U.S. 35, 48 (1995)).
9. Id. at 610 (Thomas, J., concurring) (quoting the majority opinion at 609).
11. Id. at 1186 (quoting Hertz’s Petition for Certiorari).
12. Id.
13. Id. (internal quotations omitted).
14. Id. at 1188.
15. Id. at 1190.
16. Id. at 1191.
17. Id. at 1192.
Krupski's counsel filed suit against
According to the district court, Krupski did
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The front of the ticket listed the Florida address of
But again,
knew or should have known the identity of
The Court noted three con-
The Court clarified that
Krupski to amend its complaint and add Costa Crociere as a
state of mind or lack of haste in amending pleadings could
difficult cases will continue to arise given today's Internet-
diversity jurisdiction, the Court chose the path of administrative simplicity, holding that "principal place of business" means "the place where a corporation's officers direct, control, and coordinate the corporation's activities," or, the corporation's "nerve center." The Court noted three considerations in support of its holding: (1) the nerve-center test is consistent with the diversity statute's language, which suggests the principal place of business is a singular place within a state, not a state itself; (2) the nerve-center test conserves both judicial and private resources through administrative simplicity and greater predictability; and (3) the nerve-center test aligns with the statute's legislative history, which suggests Congress intended "principal place of business" to offer a simplistic test for lower courts. The Court noted, however, that difficult cases will continue to arise given today's Internet-based business world, and that the nerve-center test might sometimes produce a result that fails to align with the policy of preventing local prejudice. As a parting shot, the Court attempted to head off a few obvious opportunities for jurisdictional manipulation, advising lower courts and parties that merely designating a principal executive office on a government form or holding an annual executive retreat in a given location will not be sufficient evidence of principal place of business.

In the last notable civil-procedure case, Krupski v. Costa Crociere S.p.A., the Court cast aside the notion that a plaintiff's state of mind or lack of haste in amending pleadings could affect relation back under Federal Rule of Civil Procedure 15. This case began in February 2007, when the plaintiff Wanda Krupski tripped on board a cruise ship, fracturing her femur. Krupski's cruise ticket stated that "Costa Crociere S. p. A., an Italian corporation," was the cruise operator, and required that any lawsuits be filed "within one year after the date of injury." The front of the ticket listed the Florida address of "Costa Cruise Lines," Costa Crociere's sales and marketing agent, and touted Costa Cruise—not Crociere—as a high-quality "cruise company." Krupski's counsel filed suit against Costa Cruise in the Federal District Court for the Southern District of Florida just three weeks before the one-year limitations period expired, alleging that Costa Cruise was the cruise operator. After the limitations period expired, Costa Cruise repeatedly argued that Costa Crociere was the proper defendant. Eventually, in July 2008, the district court allowed Krupski to amend its complaint and add Costa Crociere as a party, while at the same time dismissing Costa Cruise pursuant to the parties' joint stipulation. Costa Crociere responded by moving to dismiss on the ground that Krupski's amendment did not relate back under Rule 15, and thus her claim was untimely under the terms set out in her passenger ticket.

The district court agreed. Although the first two elements of Rule 15 were satisfied—the new claim arose out of the same transaction and Costa Crociere received timely notice such that it was not prejudiced—the court found difficulty in the third element, which requires that the newly named party "knew or should have known that the action would have been brought against it, but for a mistake concerning the property party's identity." According to the district court, Krupski did not make a mistake concerning the identity of the proper party: Rule 15's use of the word "mistake" did not encompass what the court found was Krupski's deliberate decision not to sue Costa Crociere, a party whose identity Krupski was repeatedly made aware of, yet who Krupski decided to add only after much delay. The Eleventh Circuit affirmed the district court's ruling on two grounds. First, because the cruise ticket identified Costa Crociere as the cruise operator, Krupski "either knew or should have known of Costa Crociere's identity as a potential party." Second, because Krupski waited 133 days after filing her initial complaint to seek leave to amend, and then waited another month before actually amending, the district court apparently did not abuse its discretion in "denying" relation back.

All nine Justices disagreed. Tackling the Eleventh Circuit's grounds one at a time, Justice Sotomayor first explained that by "focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point." The Court clarified that whether a plaintiff knew or should have known the identity of the proper party at the time of filing the original complaint usually holds no relevance to relation back. Rather, the third element under Rule 15 asks what the defendant knew or should have known. The Court stated, however, that the plaintiff's knowledge might still be relevant to the extent it "bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity." But even for the purposes of this narrow inquiry, the Court warned that a plaintiff's mere knowledge of a party's existence does not necessarily equate to the absence of mistake: "A plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B." The absence of mistake is instead signified by a deliberate choice to sue a given party, coupled with a full understanding of "the factual and legal differences between the two parties." But again, such deliberate and informed decisions are only relevant insofar as they affect the defendant's state of mind.

18. Id.
20. Id. at 2490 (internal quotations omitted).
21. Id.
23. Krupski, 130 S. Ct. at 2492.
24. Justice Scalia concurred in part and concurred in the judgment, as he remained true to his "textualist" method of statutory interpre-
tation, taking issue with the majority's use of Advisory Committee notes to shed light on the meaning of Rule 15. Id. at 2498–99 (Scalia, J., concurring).
25. Id. at 2493.
26. Id. at 2493–94.
27. Id. at 2494.
28. Id.
Up to this point, the Court's finely drawn line between the knowledge of plaintiffs and prospective defendants remained visible. But the Court's distinction became slightly muddled when it addressed Costa Crociere's argument that an added defendant could "reasonably believe that the plaintiff made no mistake" if a "plaintiff is aware of the existence of two parties and chooses to sue the wrong one."29 The Court responded that the "reasonableness of the mistake is not itself at issue."30 But if Rule 15 is only concerned with whether the defendant knew or should have known of the plaintiff's mistake, it would seem the reasonableness of the mistake is relevant—the more unreasonable the mistake, the more deliberate the plaintiff's decision appears, and the less likely that a prospective defendant should have known that such a mistake occurred. Indeed, this logic would be consistent with the Court's later explanation of the policy behind its ruling, "A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in reposing."31 Instead, the Court's statement suggests that, so long as a mistake actually occurred—no matter how unreasonable—the third element of Rule 15 will be satisfied.

This potential glitch in the Court's opinion might be explained in part by the facts of this particular case. The unreasonableness of Krupski's mistake may very well have been outweighed, in the Court's eyes, by the district court's unchallenged finding that Costa Crociere had constructive notice of Krupski's complaint—a complaint which plainly stated Krupski's intent to sue the company that "owned, operated, managed, supervised, and controlled" the cruise ship.32 In other words, it might have been so obvious Krupski was trying to sue Costa Crociere that even the most unreasonable actions could not justify the belief that Krupski had not mistakenly sued Costa Cruise.

The Court next turned to the Eleventh Circuit's second reason for holding that relation back was not appropriate: Krupski's lack of diligence in amending her claim. The Court handily did away with this logic, stating that Rule 15(c) does not include diligence as a prerequisite for relation back, and that courts do not have equitable discretion in making the relation-back determination.33 But once again the Court offered a caveat to its holding, noting that a plaintiff's conduct after initial filing might be relevant insofar as it affects the prospective defendant's belief about whether the plaintiff made a mistake in initially filing suit. In this case, the Court felt that Krupski's 133-day delay in seeking leave to amend was not "sufficient to make reasonable any belief that she had made a deliberate and informed decision not to sue Costa Crociere in the first instance."34

### DUE PROCESS: SELECTIVE INCORPORATION

This Term, the Court issued its inevitable follow up to the two-year old District of Columbia v. Heller,35 where the Court held that the Second Amendment guarantees citizens of the District of Columbia the right to keep handguns in their homes. In the sequel, McDonald v. City of Chicago,36 several residents and activist groups filed suits in federal district court challenging city ordinances that essentially prohibited the possession of handguns in both Chicago and its suburb Oak Park. The cases were consolidated and the district court, although acknowledging Heller, held it was bound by prior precedent to conclude that such handgun bans were constitutional. The Seventh Circuit affirmed under a privileges-and-immunities analysis, and so too declined the opportunity to predict whether Heller and the Second Amendment would become applicable to the states through selective incorporation. The Supreme Court, of course, did not pass up this opportunity.

Justice Alito, writing for the same five Justices that carried the day in Heller,37 began with a quick dispatching of the Seventh Circuit's analysis: the Fourteenth Amendment's Privileges and Immunities Clause may not impose Second Amendment limits on state governments, but its Due Process Clause may nevertheless achieve the same feat. The Court then reviewed selective incorporation's central tenet, that due process protects those rights "of such a nature that they are included in the conception of due process of law."38 After devoting much space to the Court's previous, eloquent attempts at expressing the limits of this concept, the Court ultimately concluded that the key inquiry is "whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice."39 Stated another way, whether it is "deeply rooted in this Nation's history and tradition."40 Mere inclusion in the Bill of Rights does not alone qualify a right for incorporation through the Due Process Clause.41 But the Court reemphasized that, if such rights are incorporated, they are "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."42

Applying this framework to the question before it, the Court ultimately held that the Second Amendment was incorporated into the Fourteenth Amendment's Due Process Clause. In reaching this conclusion, unsurprisingly, the Court engaged in a historical review much like the one it relied on in Heller.

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29. Id.
30. Id.
31. Id.
32. Id. at 2497 (quoting Krupski's Petition for Certiorari).
33. Id. at 2496.
34. Id. at 2497–98.
36. 130 S. Ct. 3020 (2010).
37. Chief Justice Roberts and Justices Scalia and Kennedy joined the opinion in full. Justice Thomas joined parts of the opinion, but did not agree with the plurality's analytical framework, as addressed below.
38. McDonald, 130 S. Ct. at 3031 (internal quotations omitted).
39. Id. at 3034.
40. Id. at 3036 (internal quotations omitted).
41. See id. at 3033 n.13 (listing the rights not fully incorporated).
42. Id. at 3035.
In *Heller*, the Court used history to conclude that individual self-defense is the “central component” of the Second Amendment; here, the Court used history to show why this right of individual self-defense is fundamental. Going as far back as the 17th century, the Court found it notable that the English Bill of Rights recognized a right to keep arms for self-defense, and as early as 1765, Blackstone declared this right to be fundamental. The Court explained how 18th-century American colonists shared this point of view, as evidenced by opposition to the King’s attempted disarmament of the colonies. The fundamental nature of this right was also evident in the debates of those who framed the Bill of Rights. Antifederalists feared that the federal government would disarm the people and Federalists claimed that the government’s constitutionally limited powers made infringement of this right impossible. As the Court concluded, “Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government.”44 The compromise between these two groups resulted in the Second Amendment.

In what is perhaps the most persuasive piece of historical evidence, the Court showed how concern over the right to bear arms was itself an impetus for ratification of the Fourteenth Amendment. Fast-forwarding to the mid-19th century, the Court explained how cooling Antifederalist fears were replaced by an emphasis on the right of self-defense. As the Civil War ended, droves of African-American veterans of the Union Army returned to the South only to be stripped of their firearms—both by force of law and by physical violence. The 39th Congress took note of such injustices and responded with the Freedmen’s Bureau bill and the Civil Rights Act of 1866, both of which explicitly recognized the right of all citizens to keep and bear arms, regardless of skin color. These legislative responses, the Court concluded, “demonstrate that the right was still recognized to be fundamental.”45 Ultimately, Congress felt a constitutional amendment was necessary to successfully protect this fundamental right, among others. Thus, the Fourteenth Amendment was passed, which was generally “understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.”46 As further evidence of this right’s fundamental nature, the Court offered several excerpts from congressional debates over the Fourteenth Amendment. The Court also pointed out that, at the time of the Amendment’s ratification, 22 of 37 state constitutions had already recognized the right to bear arms.

Lastly, the Court declined the municipalities’ invitation to deviate from the selective incorporation analysis it has preferred over the last 50 years. The Court made clear that a right’s incorporation does not turn on the ability “to imagine any civilized legal system that does not recognize a particular right,”47 but whether the right is fundamental from an American perspective.

The Court did not make clear, however, the standard of review that should apply to laws that burden the right to bear arms. Nor do the small clues that did make their way into the opinion offer any further enlightenment. At one point, the Court agreed with and quoted from an *amicus* brief filed by 38 states, which noted that state and local “experimentation with reasonable firearms regulations will continue under the Second Amendment.”48 The notion that “reasonable” firearm regulations will be permissible does not necessarily reek of the strict scrutiny that the Court often employs in the realm of fundamental rights. On the other hand, one might not read too much into this quote, as the Court also reaffirmed what it said in *Heller*, that Second Amendment rights should not be determined by “judicial interest balancing.”49

Given the importance of the issue, it is not surprising that this case produced voluminous concurring and dissenting opinions. Justice Scalia concurred in the Court’s result, briefly expressing his usual doubts about the origins of substantive due process, using most of his space to pick at the analytical framework forwarded by Justice Stevens’s dissent. Justice Scalia took issue with what he felt was a very subjective approach, which favors a multifactor test over the plurality’s historical, tradition-based approach. Justice Scalia summed up his qualm with this approach when he observed that the “ability of omnidirectional guideposts to constrain is inversely proportional to their number . . . even individually, each lodestar or limitation [Justice Stevens] lists either is incapable of restraining judicial whimsy or cannot be squared with the precedents he seeks to preserve.”50 But as Justice Stevens pointed out in his dissent, Justice Scalia’s historical, tradition-based approach is also vulnerable to subjectivity. Justice Thomas wrote a concurrence as well, in which he engaged in his own historical account to show why it is the Privileges and Immunities Clause, not the Due Process Clause, which guarantees state citizens the right to bear arms.

Turning next to the dissents, Justice Stevens disagreed with the plurality notion that, if incorporated against the states, constitutional rights reflect identically the scope of federal rights. In other words, he prefers the “two-track” approach. For Justice Stevens, substantive due process, not selective incorporation, presents the proper inquiry in this case—selective incorporation is merely one “subset” of substantive due process.51 Thus, under his analysis, *Heller’s* interpretation of the Second Amendment has no bearing on the question of whether the Fourteenth Amendment’s Due Process Clause guarantees state citizens the right to possess handguns in their homes. As mentioned above, Justice Stevens proposed several

43. Id. at 3036.
44. Id. at 3037.
45. Id. at 3040.
46. Id. at 3041.
47. Id. at 3044.
48. Id. at 3046 (quoting Brief for State of Texas et al. as *Amici Curiae* 23).
49. Id. at 3047.
50. Id. at 3052 (Scalia, J., concurring).
51. Id. at 3093 (Stevens, J., dissenting).
In applying this approach, it seems his principal deviation from the plurality lay in the import he took from the plurality's historical evidence: “The many episodes of brutal violence against African-Americans that blight our Nation's history . . . do not suggest that every American must be allowed to own whatever type of firearm he or she wishes—just that no group of Americans should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists.”

Lastly, Justice Breyer dissented, raising new historical evidence regarding the enactment of the Second Amendment in an attempt to cast doubt on Heller. He goes on to offer several reasons why, even taking Heller to be correct, incorporation of the Second Amendment is not appropriate. Much like Justice Stevens’s approach, Justice Breyer believes that other factors, outside of history, merit consideration for such an important inquiry.

**FIRST AMENDMENT: FREEDOM OF SPEECH**

Although McDonald’s incorporation of the Second Amendment was certainly one of the landmark decisions of this Term, it may still take a backseat to the commotion over Citizens United v. Federal Election Commission. In this case, the Court overruled two relatively recent campaign finance First Amendment precedents—McConnell v. Federal Election Commission and Austin v. Michigan Chamber of Commerce—and set off a wave of criticism among journalists and legal commentators alike.

Citizens United, a nonprofit corporation, brought this case to the Supreme Court after a federal district court ruled that the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited the distribution and advertising of its documentary, *Hillary: The Movie*. The documentary was quite critical of then-Senator and democratic presidential nominee hopeful Hillary Clinton. Citizens United planned to pay a cable company to make the documentary available through video-on-demand in all areas. When the documentary was to be released, the district court ruled that the corporation would be prevented from airing this advertisement, finding the documentary was a “political communication.”

The gist of Justice Kennedy’s answer to this question was simple enough: the First Amendment prevents the Government from silencing a group of speakers merely because they have taken on the corporate form. The Court derived this conclusion from two key cases, *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti.* According to the Court, *Buckley* held that limits on individual, independent campaign spending violated the First Amendment; *Bellotti* held that the First Amendment prohibits the Government from imposing speech restrictions based on a speaker’s corporate identity. Considering these two holdings together, the Court determined that the BCRA’s prohibition on independent corporate expenditures was unconstitutional: if *Buckley* guarantees individuals the constitutional right to make independent expenditures without limit, then *Bellotti* guarantees corporations that same right. But the Court’s opinion is more than just reliance on prior precedent; it is clear that the Court viewed this law as repugnant to the First Amendment principles so important to a functioning democracy: “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”

Despite this tension with First Amendment principles, the constitutionality of the BCRA’s prohibition might have been saved if it were the least restrictive means of achieving a compelling governmental interest. *Austin*, decided after the two aforementioned cases, forwarded such a justification, holding that the Government had a compelling interest in preventing the “‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” But according to the Court, this anti-distortion rationale was used as a means to avoid the ultimate implications of *Buckley* and *Bellotti*. Thus, the Court overruled *Austin* as an “aberration,” holding that the government has no interest in equalizing the instances of criticism.

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52. Id. at 3096 (internal quotations and footnote omitted).
53. Id. at 3100.
54. Id. at 3112 (citations omitted).
55. 130 S. Ct. 876 (2010).
59. Id. at 886.
62. Id. at 903 (citing Austin, 494 U.S. at 660).
63. Id. at 907.
Justice Stevens disagreed with the very essence of the majority's First Amendment analysis.

The majority does not disagree that even the appearance of political playing field and that it cannot limit political speech based on the amount of a corporation's wealth. The Court further noted that it does not matter that the funds used for corporate speech are accumulated from a public that might dissent from the corporate message, because even individual speakers “use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.”

For the Court, the danger of the opposite conclusion was gravely illuminated by two hypothetical situations. If the anti-distortion rationale were correct, media outlets, which are often organized as corporations, theoretically would not be able to express their political views during the specified election times. Second, although “electioneering communications” does not encompass the print medium under the BCRA, the anti-distortion rationale would theoretically allow the Government to prevent corporations from printing books. Putting these hypothetical concerns aside, the practical reality of this case is that for-profit corporations may now spend unlimited amounts of money to advocate for candidates in the key months leading up to elections. As mentioned above, this pragmatic consequence led to much ire from commentators, and no doubt it motivated Justice Stevens's spirited dissent, joined by three other Justices.

Justice Stevens began by criticizing what he felt was the majority's lack of judicial restraint in looking beyond Citizens United's as-applied challenge to reconsider Austin and McConnell. For him, the case was more appropriately resolved by holding that the BCRA's statutory prohibition on electioneering communications simply did not encompass Hillary. He took further issue with the Court’s repeated characterization of the BCRA's limit on electioneering communications as a total “ban,” pointing out that members of a corporation are free to create and fund political action committees to continue “speaking” in favor of political candidates as a group. Also, to the extent the majority doubted the ease with which corporations could implement and manage PACs, he noted that the Court’s judicial activism left “no record to show how substantial the burden really is, just the majority's own unsupported factfinding.”

In addition to questioning the posture on which the case was decided, Justice Stevens disagreed with the very essence of the majority's First Amendment analysis. The majority held that the First Amendment guarantees corporations the same speech rights as individuals, and that the democratic process will benefit from their unlettered voices. Quite oppositely, Justice Stevens argued that the First Amendment allows—and that the principles of democracy require—this distinction between human and corporation:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

Justice Stevens also expressed serious doubts about the interpretation of precedent the majority used to arrive at its decision. Most significantly, he explained that Bellotti did not in fact hold that individuals and corporations must enjoy identical parameters of free speech, especially with regard to independent expenditures. To the contrary, Bellotti involved a viewpoint-discriminatory state statute aimed at restricting business-corporation expenditures on a specific tax referendum, which “plainly offended” the First Amendment. Not only that, but Justice Stevens pointed out that Bellotti expressly stated that its holding did not apply to the “context of participation in a political campaign for election to public office.”

Lastly, Justice Stevens attacked the majority’s interpretation and under-appreciation of the compelling governmental interests forwarded by Austin. According to him, Austin's holding was not merely based on the interest in preventing some potential distortion among human and corporate speakers. Rather, that holding was justified by the broader concern over the potential corruption of the political process that such large independent expenditures might cause, of which the distortion of individual voters' voices was merely a part. Justices Stevens pointed to the massive legislative record accompanying the BCRA's passage as evidence that these broad concerns have come to fruition, with large corporate expenditures creating the appearance of political tradeoffs. As he put it, “In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.” The majority does not disagree that even the appearance of quid pro quo corruption presents a valid justification for the regulation of speech; at this point, the majority simply does not see corporate independent expenditures as creating this appearance.

64. Id. at 905.
65. The BCRA section in question, however, did contain an exception for media corporations.
66. Citizens United, 130 S. Ct. at 943 (Stevens, J., dissenting).
67. Id. at 930.
68. Id. at 959 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 68, 765, 786 (1978)).
69. Id. at 938 (quoting Bellotti, 435 U.S. at 788 n.26).
70. Id. at 965.
Ultimately, *Citizens United* displayed the stark contrast between the views of the Court’s liberal and conservative wings regarding both the political realities created by independent corporate expenditures and the implications of the First Amendment itself. Unlike *Citizens United*, the Court’s other First Amendment decisions this Term were not so hotly contested, but are perhaps equally fascinating.

In *United States v. Stevens*, the Court considered the constitutionality of a federal statute that attempted to criminalize “the commercial creation, sale, or possession of certain depictions of animal cruelty.” Robert Stevens, indicted for hawking various types of dog-fighting videos, challenged the statute as facially unconstitutional under the First Amendment’s guarantee of free speech. More than anything, the Court’s response exposed an instance of poor legislative drafting, but it also contained a bit of interesting First Amendment analysis.

Applying the overbreadth doctrine, an eight-Justice majority held that the law was capable of too many unconstitutional applications. The statute defined “depictions of animal cruelty” as “any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed” in a manner that is illegal under state or federal law. The words “wounded” and “killed,” the Court noted, did not carry any “cruel” qualifier and they do not inherently imply cruelty. Moreover, the statute’s requirement that the depicted conduct be illegal under federal or state law did not serve to narrow the statute’s focus to depictions of animal cruelty. As the Court pointed out, there are numerous state and federal laws concerning the proper treatment of animals that have no relation to animal cruelty. For instance, there exist countless nuances among the lawful methods of hunting in various states, with some states outlawing hunting altogether. Thus, the statute criminalizes videos or magazines depicting a particular type of hunting—which might be legal in some states—if possessed or sold in a state where such hunting is not legal. Given the enormity of the hunting industry, the Court concluded that the statute’s criminal prohibition was so broad as to be unconstitutional.

From a First Amendment standpoint, the Court’s overbreadth analysis is interesting in that it allowed the Court to avoid deciding whether a prohibition that strictly applied to depictions of animal cruelty would be constitutional. But despite the avoidance of this important question, the Court did venture to say that animal cruelty would not join the slim ranks of speech categories that receive no protection whatsoever under the First Amendment, such as obscenity or inciting speech. The Court acknowledged, however, that there might be other types of speech not yet recognized by the Court that belong in this group. The Justices did not provide any concrete test for singling out these types of speech, other than pointing out that other categories had been “previously recognized” by the legal community and were “long-established.” In any case, animal cruelty does not belong in this group, and therefore any speech restriction based on animal cruelty would be deemed content-based and subject to strict scrutiny. It seems likely, however, that a more narrowly drawn statute might pass strict scrutiny on the compelling governmental interest in reinforcing restrictions on the underlying conduct depicted—*i.e.*, animal cruelty.

Also this Term, the Court clarified the distinction between a First Amendment-overbreadth challenge and a Fifth Amendment Due Process-vagueness challenge. In *Holder v. Humanitarian Law Project*, the Court considered a challenge to the federal statute that prohibits individuals or groups from providing “material support” to foreign terrorist organizations. The plaintiffs sought to provide legal training—teaching the groups how to use international law and the United Nations to peacefully resolve disputes—and to engage in political advocacy on behalf of these groups.

For their first argument, the plaintiffs contended that the statute’s definition of “material support”—including the terms “training,” “expert advice or assistance,” “service,” and “personnel”—was unconstitutionally vague. For example, the plaintiffs argued it was unclear whether the statute prohibited them from providing a course on geography to members of these foreign groups. The problem with the plaintiffs’ challenge, the Court explained, was that it relied on hypothetical modes of support to illustrate the statute’s gray areas, while a person of common intelligence would clearly understand that legal training was prohibited under the statute’s definitions of “training” and “expert advice or assistance.” Thus, even when a statute’s prohibition covers speech, and “a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice.” The Court explained that such hypothetical sce-

71. 130 S. Ct. 1577, 1582 (2010).
72. Justice Alito dissented, expressing his doubts about whether the Court should apply the overbreadth doctrine without first determining whether the statute was constitutionally applied to Stevens. He also disagreed that the statute was overbroad.
73. Stevens, 130 S. Ct. at 1583 n.1 (citing 18 U.S.C. § 2339B(a)(1)).
74. See id. at 1592 (“We therefore need not and do not decide whether a statute limited to . . . depictions of extreme animal cruelty would be constitutional.”).
75. For a list of the other types of speech traditionally thought of as unprotected, see id. at 1584.
76. Id. at 1586.
77. See id. at 1592 (acknowledging the Government’s argument to this effect, implying that the justification failed in this case due to the extremely broad scope of the statute).
78. 130 S. Ct. 2705 (2010).
79. Id. at 2707 (citing 18 U.S.C. § 2339B(a)(1)).
80. Id. at 2719.
The Court concluded that “[s]uch support frees up other resources within the organization that may be put to violent ends,” . . . coordination with foreign groups that the speaker knows to be terrorist organizations.”81 Thus, to the extent the plaintiffs wanted to provide political advocacy that was not coordinated with the foreign terrorist groups, they were free to do so. But the statute did prohibit the plaintiffs from providing material support in the form of speech to these groups. In that sense, the statute was content-based and the Government had the burden of showing that it was necessary to achieve a compelling governmental interest.

Neither the parties nor the Court had any doubt that combating terrorism is “an urgent objective of the highest order;”82 the only question was whether the statute’s prohibition on material support—including, as in this case, support for a terrorist organization’s legitimate activities—was necessary to combat terrorism. Six Justices held that prohibiting even this good-intentioned support was indeed necessary. Deferring to both congressional and executive branch findings, the Court concluded that “[s]uch support frees up other resources within the organization that may be put to violent ends,” because foreign terrorist organizations do not maintain legitimate “firewalls” between their “civil, nonviolent activities” and their “violent, terrorist operations.”83 The majority was careful to note, however, that “authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals.”84

In addition to passing judgment on all of these federal statutes, the Court also entertained a pair of First Amendment cases regarding state action. In John Doe #1 v. Reed, a group of citizens challenged Washington’s Public Records Act (PRA) as an unconstitutional burden on Free Speech.85 This case began with the Washington government’s passage of a controversial bill that provided expanded benefits to registered same-sex domestic partners. The plaintiffs signed a petition to initiate a process where Washington citizens can subject any given state law to referendum approval. After the bill was put to a vote and upheld, various groups that favored the bill sought to obtain a copy of the petition, which was considered a public record and thus available for public inspection and copying under Washington’s PRA.

Given that these groups intended to post the petition on a public website in a searchable format, the plaintiff signatories challenged the PRA as unconstitutionally burdening their political expression. Before deciding the issue, the Court noted the unique scope of the question before it, stating that the plaintiffs’ claim resembled both an as-applied challenge and a facial challenge:

The claim is “as applied” in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is “facial” in that it is not limited to plaintiffs’ particular case, but challenges application of the law more broadly to all referendum petitions.86

In an interesting juxtaposition to Citizens United—where the Court looked beyond the plaintiffs’ as-applied challenge and considered the BCRA’s facial validity—the Court refused the plaintiffs’ request to construe their claim as challenging the validity of Washington’s PRA in light of its specific application to them.

The plaintiffs could not satisfy the burden that accompanied this broader “facial” challenge, failing to show that the PRA would be unconstitutional in every application to referendum petitions. The Court acknowledged the political nature of signing a referendum petition, but nevertheless applied an intermediate form of scrutiny given the PRA was merely a disclosure requirement and not a prohibition on political speech. Ultimately, the Court held that the disclosure requirement was substantially related to the important governmental interest of promoting transparency and accountability in the electoral process. This substantial relationship lies in the fact that public disclosure allows the public to supplement the state’s own efforts to verify the petition’s signatures as legitimate. Further, from a general standpoint, this governmental interest is proportional to the incidental burden on speech that might result from the fear of harassment a public disclosure of an individual’s signature could illicit. This was true for the Court given that most bills put to a referendum vote through the petition process do not involve such controversial issues, and thus the usual burdens are not “remotely like the burdens plaintiffs fear in this case.”87 Whether these specific burdens might have constitutional significance is a question the Court left to the district courts—for now.

The second case involving state action was Christian Legal Society v. Martinez.88 In this case, the Christian Legal Society (CLS), a student group at the University of California’s Hastings College of the Law, brought a § 1983 action seeking declaratory and injunctive relief from Hastings’s “admit all-comers” student-organization policy. Hastings’s policy allows

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81. Id. at 2723.
82. Id. at 2724.
83. Id. at 2725–26.
84. Id. at 2727 (quoting Justice Breyer’s dissent at 2743). The dissent’s principal disagreement with the majority seems to be whether this nonmonetary, educational-type support really is “fungible,” i.e.,
85. 130 S. Ct. 2811 (2010).
86. Id. at 2817.
87. Id. at 2821.
88. 130 S. Ct. 2971 (2010).
registered student organizations to receive certain benefits—including possible financial assistance from the law school and access to school facilities—in exchange for complying with certain policies. The plaintiff student group took issue with Hastings’s nondiscrimination policy, which the school interpreted to require all student groups to “allow any student to participate, become a member, or seek leadership positions in the organization,” regardless of status or beliefs.\(^89\) CLS interpreted its bylaws to exclude individuals who carry religious convictions that deviate from the group’s beliefs and to exclude individuals who engage in “unrepentant homosexual conduct.”\(^90\) Given these exclusive bylaws, Hastings denied CLS registered-organization status, but offered it most of the attendant benefits anyway, save for financial support from the school. This denial led CLS to challenge Hastings’s policy as an unconstitutional burden on its First Amendment free-speech and expressive-association rights.

Justice Ginsburg, writing for a 5-to-4 majority, explained that CLS’s challenge was properly analyzed under the Court’s limited-public-forum jurisprudence, and not the more demanding standard that is sometimes used to analyze associational-freedom cases. The Court reasoned that it would be inconsistent to forgo the lesser scrutiny applicable to limited public forums merely because a case involves expressive association as opposed to speech. This is especially true in cases where, as here, expressive association and speech are closely linked, and the challenged rule applies “only indirect pressure” upon groups’ membership policies, as opposed to direct compulsion.\(^91\) Thus, given that the limited-public-forum standard controlled, Hastings had the burden of showing that its restriction on access was reasonable given the purpose of the forum, and that it was not discriminating against speech on the basis of viewpoint.

The Court first summarized the various justifications offered by Hastings to support its all-comers policy, finding all of them to be reasonable: to ensure that “leadership, educational, and social opportunities” provided by registered student organizations are available to all students; to allow Hastings to police its nondiscrimination policy without inquiring into student organizations’ reasons for restricting membership; to encourage “tolerance, cooperation, and learning among students;” and finally, to advance state-law goals by choosing not to subsidize “conduct of which the people of California disapprove.”\(^92\) The Court found the all-comers policy to be all the more reasonable given the substantial alternative channels of communication made available to CLS in spite of their non-registered status, including access to school facilities for meetings and the use of bulletin boards and chalkboards for advertising. These alternative channels of communication, however, cannot save what is otherwise a viewpoint-discriminatory restriction on limited-public-forum access. But the Court had very little trouble in concluding that Hastings’s policy was viewpoint neutral: “It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers.”\(^93\) Ultimately, given its reasonableness and viewpoint neutrality, the Court held Hastings’s all-comers policy did not violate the First Amendment.

Justice Alito dissented from the Court’s opinion and was joined by Chief Justice Roberts and Justices Scalia and Thomas. Though the dissenters did disagree with the majority’s dispatching of certain precedents they felt were controlling, their main qualm seemed to lie in the Court’s interpretation of the factual record before it. While the majority was content to analyze the constitutionality of the purported all-comers policy, the dissent argued that the record exposed this policy as mere pretext, developed after litigation was initiated. For the dissent, the proper issue was whether Hastings’s written nondiscrimination policy constituted an impermissible burden on speech or associational expression. If the dissent’s interpretation of the facts is correct, its conclusion that Hastings’s policy is unconstitutional as viewpoint discriminative is difficult to deny—the written policy prohibited student groups from excluding members on the basis of religion, but not on the basis of other, secular characteristics like political affiliation.\(^94\)

EMPLOYMENT DISCRIMINATION

In addition to grappling with these difficult constitutional questions, the Court resolved a novel issue regarding the timeliness of Title VII employment discrimination suits. Though not as philosophically stimulating as some of the Court’s other writings this Term, it seems likely that Lewis v. City of Chicago will not go unnoticed in employment law circles.\(^95\) This case dates back to 1995, when the city of Chicago sought to pare down the list of some 26,000 applicants seeking employment with the City’s fire department by administering a written examination. The City released the results in January 1996 and announced that applicants who scored an 89 percent or better would be selected at random to move forward in the application process. This random selection process was repeated 11 times over the next six years until all of the top scorers were selected. In March of 1997, an African-American applicant who did not score in the top tier, and thus did not get hired, filed a discrimination charge with the Equal Opportunity Employment Commission (EEOC). The EEOC granted the right to sue, and the man filed a Title VII suit alleging that the City’s policy of selecting only from the 89-percent-or-better pool had a disparate impact on African Americans. The district court eventually certified a class of 6,000 plaintiffs consisting...
The statute allows civil commitment at 2198. Although the plaintiffs lodged numerous constitutional arguments in the district court, the only issue on review was whether Congress, in creating this civil commitment statute, exceeded its constitutionally enumerated powers. Specifically, the government petitioned the Court to decide whether Congress's enactment was justified under the Necessary and Proper Clause, which gives Congress the power to make laws that “carry[[] into Execution” its other enumerated powers. 103

Seven members of the Court agreed that the Necessary and Proper Clause justified the statute, though only four joined Justice Breyer's majority opinion. 104 The majority laid out five considerations in support of its holding. First, the Clause grants Congress broad authority to legislate, which in turn suggests a tame standard of review where the Court merely looks “to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” 105 The Court explained that as long as this rational relation exists, Congress, and not the courts, may determine how closely the means will relate to the end. It is this loose means-ends relationship that upholds the existence of the vast majority of federal criminal statutes.

The second and third considerations more or less apply this test. The Court summarized the history of Congress's mental-health-civil-commitment schemes, characterizing the statute at issue as a marginal “addition.” In other words, this statute is very similar to statutes that have long been recognized as rationally related to some enumerated power. Next, in perhaps the most provocative of the five considerations, the Court traversed the multi-leg route that connects this civil commitment statute to a constitutionally enumerated power: this statute is “reasonably adapted” to further Congress's “power to act as a responsible federal custodian,” and this federal custodian power is itself justified because it furthers “federal criminal statutes that legitimately seek to implement constitutionally enumerated authority.” 106

Moving to the fourth consideration, the Court emphasized the statute's deference to the States—the statute requires the Attorney General to inform the State where the federal prisoner is domiciled or was tried of the possibility of civil commitment, and encourage the State to assume custody. Given that the Court long ago rejected a State-sovereignty-based

**FEDERALISM AND SEPARATION OF POWERS**

While the Court was most often demarcating the fine lines that lie between the people and government, this Term also forced the Court to retrace—or redraw, depending on point of view—the line between state and federal power. In United States v. Comstock, five incarcerated individuals challenged the constitutionality of a federal statute that allowed the Department of Justice to keep the individuals civilly committed beyond the length of their sentences. 101 The statute allows a district court to order civil commitment of a federal inmate if the Government can prove by clear and convincing evidence that the individual “has engaged in sexually violent activity or child molestation in the past and . . . he suffers from a mental illness that makes him correspondingly dangerous to others.” 102 Although the plaintiffs lodged numerous constitutional arguments in the district court, the only issue on review was whether Congress, in creating this civil commitment statute, exceeded its constitutionally enumerated powers. Specifically, the government petitioned the Court to decide whether Congress's enactment was justified under the Necessary and Proper Clause, which gives Congress the power to make laws that “carry[[] into Execution” its other enumerated powers. 103

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96. The Court expressed no view on whether this was true, but assumed it for purposes of analysis. Id. at 2197 n.4.
98. Lewis, 130 S. Ct. at 2193 (emphasis added).
99. Id. at 2198.
100. Id. at 2200.
102. Id. at 1954 (citing 18 U.S.C. § 4248 and paraphrasing the requirements of § 4247(a)(5)–(6)).
103. U.S. Const. art. I, § 8, cl. 18. The Court carefully noted that it was expressing no opinion on whether this statute runs afool of some other constitutional provision; it assumed the statute to be otherwise constitutional for purposes of answering the Necessary and Proper Clause question. Comstock, 130 S. Ct. at 1956.
104. Justice Kennedy wrote separately, and briefly, to express some reservations about the Court's remarks regarding State power under the Tenth Amendment. Justice Alito wrote separately because he did not believe the Court's ambiguous five-factor test was necessary to reach its conclusion.
106. Id. at 1961.
challenge to a less deferential civil-commitment statute, it concluded there was no federalism problem here. The final consideration driving the Court’s conclusion was the narrow scope of the statute—applying only to individuals in federal custody—which cuts against the concern that the Court’s holding steps closer to creating some kind of federal police power.

Reading the Court’s opinion, this case’s impact on federalism may seem tenuous—as the majority showed, the federal statute did not overtly tread on some area of State sovereignty. Motivating the two dissenters, it seems, is the fear that such a broad reading of Congress’s power under the Necessary and Proper Clause will nevertheless chip away at the vast remnant of power meant for the States. Justice Thomas, joined by Justice Scalia, first pointed out what he felt was a critical misstep in the Court’s analysis: the Court’s failure to first make sure that the statute’s end was “legitimate,” in other words, aimed at furthering an express constitutional power. If the end is illegitimate, the means-end relationship is irrelevant. In this case, Justice Thomas could see no legitimate end, because “it is clear, on the face of the Act and in the Government’s arguments urging its constitutionality, that [the statute] is aimed at protecting society from acts of sexual violence, not toward ‘carrying into Execution’ any enumerated power or powers of the Federal Government.” Nor did Justice Thomas agree that the statute’s constitutionality could be saved by merely looking to other, valid criminal statutes and concluding that the statute at issue is related to those laws, and thus is related to an enumerated power. This rationale, Justice Thomas wrote, “if followed to its logical extreme, would result in unwarranted expansion of federal power.”

Lastly, the Court was also busy in its role as referee between the executive and legislative branches. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, an accounting firm and the nonprofit Free Enterprise Fund asked the Court to declare the Public Company Accounting Oversight Board unconstitutional and to enjoin the Board from exercising its powers. The Board, a private nonprofit corporation created by the Sarbanes-Oxley Act to regulate the accounting industry more closely, features five members who are appointed by the Securities and Exchange Commission. The plaintiffs argued unconstitutionality on the ground that the Board members, as executive officers, were too far insulated from executive review: the Commission may only remove the Board members for cause, and the President in turn may only remove the Commission members for cause, thus diluting the executive’s control over the Board members. The question for the Court, then, was whether this double layer of protection was inconsistent with the separation of powers envisioned by the Constitution.

In a 5-to-4 decision, the Court held that the Constitution could not tolerate the “dual for-cause limitations.” Chief Justice Roberts began by recalling the long-held understanding that because it is the President’s constitutional responsibility to ensure the laws are executed, he must have the resultant “power of removing those for whom he can not continue to be responsible.” This power is tempered, of course, by Congress’s ability to impose for-cause limits on the President’s removal power when some level of independence is desirable, i.e., when officers are performing quasi-legislative or quasi-judicial functions. The Court noted that a similar logic has been applied to uphold for-cause limitations on department heads’ ability to remove inferior executive officers.

But the Court explained that when both types of limitations come together in one chain of authority, it creates a situation where Board members are not removable except for good cause, and the President has no say on whether that good cause exists. “The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.” This is markedly different from the situation where the Board members are not insulated from the Commission by a for-cause standard, and the “President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.” Instead, the double for-cause standard “impaired” the President’s “ability to execute the laws [] by holding his subordinates accountable for their conduct.” For the Court, the necessity of this holding was only heightened by the fear that approving two layers would lead Congress to impose even more layers of protection in the future. Ultimately, the Court merely severed the part of Sarbanes-Oxley that imposed for-cause limits on the Commission’s ability to remove Board members, as opposed to dispatching the Board altogether.

The dissent, led by Justice Breyer, felt the Court’s opinion was too far removed from the practical realities of executive governance—any for-cause limitation will have a far lesser affect than the slew of political and administrative factors that limit the President’s power to “get something done.” The dissent also attempted to poke a large hole in the principal logic of the majority’s holding: if the President really is prevented from removing the Commissioners but for good cause

Government officials who exercise significant authority. Id. at 3148.

113. Id. at 3152.
114. Id. (citing Myers v. United States, 272 U.S. 52 (1926)).
115. Id. at 3153.
116. Id. at 3154.
117. Id.
118. Id. at 3170 (Breyer, J., dissenting).

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109. Id. at 1974.
110. Id. at 1976. Justice Scalia did not join the part of Justice Thomas’s opinion that contained this sentence, part III.A.1.b.
111. 130 S. Ct. 3138 (2010).
112. Although Sarbanes-Oxley specifies that Board members are not Government officials for statutory purposes, both parties agreed that, for constitutional purposes, Board members are
(the first layer of insulation), then, regardless of any second layer, the President will have no power to effect the removal of Board members if the Commission reasonably decides not to do so on its own. In the dissent’s words, “the majority’s decision to eliminate only Layer Two accomplishes virtually nothing.” Lastly, the dissent raised serious concerns over whether the Court’s opinion might result in the future invalidation of entire administrative agencies given that severability might not always be available as a constitutional cure.

The colossal importance of so many of the Court’s decisions this Term is undeniable. The opinions are fascinating in and of themselves, but, like all of the Court’s decisions, awaiting the repercussions (good or bad) will be the most interesting part. With decisions touching corporate freedom of speech, the right to possess handguns in the home, terrorism, animal cruelty, and executive power, the coming years should be interesting indeed.

Tim Davis is a commercial litigation associate with the firm of Bryan Cave LLP, where he works in its Kansas City office. Davis received his J.D. in 2010 from the University of Kansas School of Law, where he was editor-in-chief of the Kansas Law Review and a teaching assistant in the school’s legal research and writing program. After graduation, he served as a law clerk to the Hon. Steve Leben of the Kansas Court of Appeals.

119. Id.
WEB RESOURCES

www.ncsconline.org/coop

Since its publication in 2007, the National Center for State Courts’ manual on continuity of court operations has been used by many jurisdictions to create a continuity of operations plan. Project staff recently reviewed and updated, as necessary, all hyperlinks in the 2007 online version of this useful publication. In addition, newer publications of relevance, such as the Federal Continuity Directive 1 (Dept. of Homeland Security, 2008) are now referred to and linked in the document.

The online version of this manual is particularly convenient because of the hyperlinks to key resources on every topic. The manual is carefully structured to help courts plan for continuity in the case of various possible emergency events, including ones that come without warning. The manual takes you step by step through the planning process, the elements of a useful continuity plan, how to complete a plan, and how to maintain and practice a continuity plan once it has been prepared. Worksheets guide you through topics like how to determine what are essential functions, how to set up alternate work sites, how to handle communications, and how to inventory vital records. In addition, there are templates for continuity plans to get you started.

CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (2d ed. 2010).

Over the past decade, Indiana law professor Charles Gardner Geyh has emerged as one of the leading scholars on judicial ethics; he served as the Reporter for the American Bar Association’s most recent 2007 version of the Model Code of Judicial Conduct. His latest work is a comprehensive review of the caselaw on judicial disqualification in federal courts. And this comprehensive, 113-page review is available on the Internet.

To be sure, there are some differences between the Code of Judicial Conduct adopted in most states and the federal statutes on disqualification. But there are far more similarities than differences, and federal cases may well be persuasive when, as often happens, there are no on-point precedents in your state.

For example, 28 U.S.C. § 455(b)(1) provides for disqualification when a judge “has a personal bias or prejudice concerning a party,” and so does Rule 2.11(A)(1) of the 2007 Model Code of Judicial Conduct. Similarly, both 28 U.S.C. § 455 (a) and Rule 2.11(A) of the current Model Code provide that a judge shall disqualify himself or herself when the judge’s “impartiality might reasonably be questioned.” As we all know, there’s room for interpretation about what those words mean in specific situations. Professor Geyh devotes about 30 pages to an analysis of the cases on disqualification under this standard. In doing so, he provides both a useful framework for analysis and review of all of the relevant federal caselaw.

NEW BOOKS


Both trial and appellate judges have a difficult job handling criminal cases. For many judges, they are the bulk of the docket, and judges become familiar with a great many of the legal rules applicable to the cases. But the factual circumstances of these cases can be as varied as the human imagination, which makes the application of these rules frequently a tricky proposition.

Faced with these questions in an area encountered regularly, it can be helpful from time to time to step back so as to make sure that you don’t lose sight of the forest when noting all the trees in your path. To do this, judges should periodically review some authoritative reference work that reviews all of the United States Supreme Court cases that set the framework for consideration of issues that arise under the Fourth, Fifth, and Sixth Amendments. Five law-school professors have joined to provide an excellent new book that does a great job providing that framework for analysis.

The book is written with law-school students in mind, but that doesn’t lessen its utility for judges. For Fourth Amendment issues, for example, there are separate chapters for searches of people and for searches of cars, a chapter devoted specifically to electronic surveillance, and a chapter devoted to figuring out the proper remedy for a Fourth Amendment violation. Each chapter would be helpful to judges in making sure that the problem the judge is considering on a specific case is properly placed in the context of Supreme Court decisions and a reasonable analytical framework.

Similar coverage is provided for issues arising under the Fifth and Sixth Amendments, including separate chapters on the Miranda rule, due-process voluntariness, and the Sixth Amendment right to counsel. There also are helpful chapters on the issues involved in entrapment defenses and in eyewitness identifications.

Other separate chapters cover how to decide whether the Fourth Amendment applies at all; the rules about when a warrant is required, what’s needed to get one, and how a warrant must be executed; the rules applicable to administrative and special-needs searches; consent searches; exigent circumstance; and plain view.

The authors are working on a second volume covering the adjudicatory stage from bail to jail, including post-conviction remedies.