From the desk of the Editor-in-Chief.


All articles that appear in this volume of the Mustang Journal of Law and Legal Studies have been recommended for publication by the Reviewers/Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Reviewers/Advisory Editors for all their hard work and dedication to the Journal. Without their work, the publication of this Journal would be impossible.

This is my first year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation for all the support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Marty Ludlum of the University of Central Oklahoma, for his efforts in coordinating the entire process. The publishing of this journal is an intense educational experience which I continue to enjoy.

Congratulations to all our authors. I extend a hearty invitation to submit your manuscripts for the 2012 volume of the Mustang Journal of Law and Legal Studies, due to be released in fall, 2012.

To further the objectives of Mustang Journals, Inc., all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the authors for allowing me the opportunity to serve you as editor-in-chief of the Journal.

William Mawer
Editor-in-Chief
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BROWNFIELDS LEGISLATION IS HELPING US STAY “GREEN”

Dan Davidson*

Many urban areas contain vacant lots, abandoned buildings, and other property that appears to be poorly used or underutilized. All too often these sites also contribute to “urban decay,” resulting in blighted neighborhoods and urban eyesores. Such areas are referred to as brownfields. A brownfield is “a piece of industrial or commercial property that is abandoned or underused and often environmentally contaminated, especially one considered as a potential site for redevelopment.”

Simultaneously, these same urban areas often have growth and expansion in commercial sites that spread farther and farther from the city center, diminishing the “greenbelts” (A belt of parks or rural land surrounding a town or city) that surround most cities. This expansion frequently requires workers to commute farther to and from work, potentially increasing pollution problems and creating or worsening traffic problems or even gridlock for the community.

Is there a connection between these phenomena – the presence of underutilized and/or “abandoned” land closer to the city center and the growth and development of commercial property moving away from that same city center? Yes, there is. Businesses and developers seemingly prefer developing new areas rather than recovering and/or renovating older areas. Is there an economic reason for this expansion? There is, although it may not be the reason that most quickly comes to mind for most people. While it is true that renovating an older property may be expensive, it is also likely to be true that acquiring land on the edge of the city will be expensive. In addition the property on the outskirts may not be zoned for commercial use. Getting the property rezoned and making sure that the infrastructure the business needs is in place may be expensive and time-consuming. The expense problem is more likely to be a fear that the underutilized and/or abandoned properties – the brownfields – lying closer to the center of the city are subject to the provisions of CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act commonly known as the Superfund.

CERCLA

CERCLA was enacted in 1980 due to the presence of land that had been polluted by the dumping of hazardous wastes. Properties such as the Love Canal in New York, Times Beach in Missouri, and the Valley of the Drums in Kentucky, among others, led Congress to pass a statute that provided for cleaning up such properties and for imposing liability on the party or parties responsible for creating the risk. CERCLA is a strict liability statute, imposing liability on four

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1 Brownfield, Answers.com, found at http://www.answers.com/topic/brownfield-1.
2 wordnetweb.princeton.edu/perl/webwn
different Potentially Responsible Persons (PRPs) for the costs associated with cleaning up the property. As defined by CERCLA, these PRPs are: the current owner of the property; the person who owned the property at the time the hazardous waste disposal occurred; the person who generated the hazardous waste; and the person who transported the waste to the site. It is important to note that the current owner of a property that has been polluted with hazardous wastes can be held liable for the clean-up of that property even if the owner had nothing to do with the original polluting of the property. The owner will have joint and several liability with the other PRPs. Of course, the actual cost of that liability will depend on the current existence and financial capability of those prior parties. If they no longer exist (due to death, bankruptcy, or other reasons) or lack the financial ability to contribute, the current owner may have to bear the entire financial burden alone. The law also allows the EPA to “adopt” orphaned properties (properties where the PRPs cannot be identified or located) that require clean-ups, funding such clean-ups through the Superfund.

The Superfund Amendments and Reauthorization Act (SARA) of 1986 amended CERCLA, drawing on the experiences of the EPA during the first six years of CERCLA’s existence. SARA stressed the importance of permanent solutions to hazardous waste problems and the use of innovative technologies to address such issues, provided new enforcement tools, increased state involvement in the Superfund program, increased the focus on human health issues posed by hazardous waste sites, encouraged greater citizen involvement in the program, and increased the Superfund trust fund to $8.5 billion.

The Community Environmental Response Facilitation Act (CERFA) was passed in 1992 as an amendment to §9620(h) of CERCLA, dealing with the transfers of real estate by the federal government. Congress recognized that the closure of federal facilities can have an adverse effect on the communities in which such facilities are located and that the cost of any environmental clean-ups on such lands may worsen the impact on the communities affected by delaying the time before which the lands can be returned to productive use. CERFA provides for land owned by the Department of Defense or land that was used as a military installation, establishing that the federal government will be solely responsible for any response or remediation after the federal activities on the property cease.

In 1996, Congress passed the Asset Conservation, Lender Liability and Deposit Insurance Protection Act, providing some protection from liability for lenders who foreclose on property that contains hazardous waste as well as to governmental agencies that acquire such property involuntarily. Lenders who do not participate in the management or operation of a contaminated property but who later acquire the property through foreclosure proceedings are shielded from

5 Ibid.
7 Public Law 99–499
8 “SARA Overview,” Superfund, U.S. Environmental Protection Agency Web Site, found at http://www.epa.gov/superfund/policy/sara.htm
9 42 U.S.C. §9620(h)(4), (5) (Public Law 102-246)
CERCLA liability. However, if the lender participated in the management of the property or contributed to the pollution of the property, full potential CERCLA liability will exist.\textsuperscript{12}

The Superfund Recycling Equity Act of 1999\textsuperscript{13} provided another exception to the strict liability rules found under the original iteration of CERCLA. Under this statute certain persons who arranged for the recycling of recyclable materials were exempt from liability under §§ 107(a)(3) and (a)(4) of CERCLA. However, the burden of establishing eligibility for the exemption lies on the party alleging that he or she is a recycler, and the definition of a recycler is narrow.

While there are now some exceptions and exemptions to potential CERCLA liability, it is still a fact that the current owner of such property can be held liable for all the costs of clean-up, while also possibly incurring fines that may run to as much as $50,000 per day and that punitive damages can be imposed.\textsuperscript{14} In addition, under the Resource Conservation and Recovery Act (RCRA)\textsuperscript{15} the EPA can require an owner or operator of any property that releases hazardous waste to (a) clean up the release, and (b) clean up any solid waste management units on the property. The requirement to clean up the solid waste management unit can be imposed even if that unit does not contain any hazardous waste.\textsuperscript{16} Thus, it makes perfect sense for a businessperson to elect to expand outward rather than try to resurrect the brownfield property closer to the center of town.

Both CERCLA and RCRA include provisions for a showing of financial responsibility for some owners and operators of certain types of vessels or property. Under these provisions the EPA can require an owner or operator to provide evidence of its ability to meet any CERCLA liability, either through an insurance guarantee, a surety bond, or adequate funds to cover self-insurance. The owners and operators of facilities that handle hazardous wastes under RCRA must also provide evidence of the financial wherewithal to cover the potential costs of cleanup of the facility.\textsuperscript{17}

**BROWNFIELD REGULATIONS AND LEGISLATION**

Given the potential for significant liability under both CERCLA and RCRA, it may be more cost-efficient for a business that is looking for a new location to bypass a brownfield property (property formerly used for some commercial activity) in favor of property located in a “greenbelt” area (property previously not developed, or used only for residential or agricultural purposes) farther removed from a city center. By so doing, the purchasers can even assert that it is exercising due diligence and applying its best business judgment by avoiding the potential liability that may be attached to the brownfield property. The ethical and environmental impact of turning today’s greenbelt property into tomorrow’s potential brownfield property is likely to be ignored or underemphasized in making this sort of decision.


\textsuperscript{13} 42 U.S.C. § 9627.

\textsuperscript{14} Note 3, op cit.

\textsuperscript{15} 42 U.S.C. § 6901 et seq.

\textsuperscript{16} *Ibid.*

\textsuperscript{17} *Ibid.*
It is estimated that there are more than 450,000 brownfields in the United States.\textsuperscript{18} Such locations, if untreated, have a detrimental impact on their communities. These abandoned locations create the appearance of a neighborhood or community in decline and such a negative image discourages investments or growth. They also are thought to contribute to illness and disease, an increase in vermin, and infrastructure decay.\textsuperscript{19} The existence of brownfields also detracts from the quality of life in the communities where they are found. The negative esthetics surrounding such sites often have a “ripple effect” of sorts, causing the owners of neighboring properties to consider moving to get away from the site and thus contributing to the spread of blight throughout the neighborhood.

In response to these concerns, in 1995 the EPA began its Brownfields Program.\textsuperscript{20} This program, which got the states, the communities, and other interested and/or affected stakeholders involved in the restoration of the brownfield sites, was extremely effective. It contributed to employment, taking advantage of the existing infrastructures around the property, increased local tax bases, and helped to protect existing greenbelt areas. Initially the EPA gave relatively small grants to a number of communities that committed to participate in a two-year pilot program.

These grants provide the foundation for the EPA’s brownfield program. There are several different types of grants available, providing a variety of approaches to dealing with brownfields and their revitalization. Grants of up to $200,000 are available to provide funding for planning, environmental assessment, and community outreach.\textsuperscript{21} Clean-up grants of up to $200,000 per site are also available. These grants can be used for cleaning up sites polluted with hazardous substances, pollution, petroleum pollutants, or a combination of hazardous substances and petroleum pollutants. There is a twenty percent cost share requirement, although the twenty percent can be “in kind” (labor, materials, or services). The performance period for such grants is two years.\textsuperscript{22}

Job Training Grants have been available since 1998, primarily to non-profit organizations. These grants are intended to promote environmental workforce development by providing funding for training. Recipients recruit, train, and place workers in what are expected to be full-time sustainable positions in the environmental field. The recipient is expected to target low income and minority candidates, the unemployed or under-employed from communities that are affected by brownfields. The objectives with these grants are to provide full-time, sustainable, “green” employment; to provide clean-up of the affected areas; and to help ensure a more sustainable future for the community.\textsuperscript{23} In June 2009, the EPA reported that some 5,000 workers had completed training through these grants, with more than 3,250 being employed, at an average wage of $13.81 per hour.\textsuperscript{24}

The EPA grants are used to fund environmental assessments, site cleanups, and job training activities.\textsuperscript{25} (The cleanup grants are only given for nonprofit redevelopment projects

\begin{thebibliography}{9}
\bibitem{18} “About Brownfields,” Brownfields and Land Revitalization, found at http://www.epa.gov/brownfields/about.htm
\bibitem{19} “Brownfields,”
\bibitem{20} “About Brownfields,” note 7, supra.
\bibitem{21} “Assessment Pilots/Grants,” Brownfields and Land Revitalization, EPA Web Site, found at http://epa.gov/brownfields/assessment_grants.htm
\bibitem{22} “Cleanup Grants,” Brownfields and Land Revitalization, EPA Web Site, found at http://epa.gov/brownfields/cleanup_grants.htm
\bibitem{23} “Job Training,” Brownfields and Land Revitalization, EPA Web Site, found at http://epa.gov/brownfields/job.htm
\bibitem{24} “The Brownfields Job Training Program,” Job Training Grant Brochure (June 2009), EPA, found at http://epa.gov/brownfields/grant_info/jt/jtgrant0709.pdf
\bibitem{25} “About Brownfields,” note 7, supra.
\end{thebibliography}
that include greenspace and/or recreational uses for the property.) The EPA has distributed more than $14 billion in cleanup and redevelopment funding, creating approximately 61,000 jobs in the process.26 The success of these grants in reclaiming the abandoned or underutilized properties has also encouraged states and localities to initiate their own programs and partnerships that are revitalizing other areas. Florida, for example, has its own brownfield initiatives, including a 35% tax credit for voluntary cleanup costs, $2500 job creation bonuses for each job created in a brownfield area, and sales tax credits for building materials used in redevelopment of certain designated brownfields areas.27

A much greater emphasis was given to this program in 2002 when President Bush signed the Small Business Liability Relief and Brownfield Revitalization Act of 200128 into law. This Act removes some of the federal barriers to restoration and redevelopment of these sites while increasing both funding and flexibility for the states that participate in the program. Among other things, the Act provides restrictions on potential liability for businesses that were only responsible for a small portion of the hazardous waste and pollutants at a given site, assures potential developers of the property that they will not face actions initiated by the federal government for pre-existing pollution on the site, exempts some small businesses from Superfund liability, and provides assurances to the state governments that the federal government will not interfere with cleanup decisions made by the state under its own state programs.29

Perhaps the most interesting aspect of the Brownfield Revitalization Act is the limitations it establishes on CERCLA liability. The Act provides parties that are unable to pay or that have a limited ability to pay response costs can settle with the EPA for a smaller amount. It also provides for alternative payment methods, where appropriate.30 It provides a new exemption to liability for a person that owns real property that is or may be contaminated by a contiguous parcel of land that is owned by some other person. It also exempts a landowner whose groundwater is contaminated by some off-site source from any requirements for conducting groundwater investigations or installing any groundwater remediation systems. In these situations the EPA can issue an “assurance of no enforcement action,” and can grant contribution protection.31

Bona fide prospective purchasers (BFPP) and innocent landowners are given the protection of limited liability under CERCLA, providing that certain conditions are satisfied. A BFPP who purchases property knowing that it is contaminated or an innocent landowner will not be liable for any cleanup expenses, provided that he or she:

- Conducted “all appropriate inquiry” before the purchase occurred
- Is not potentially liable or affiliated with any person who is potentially liable
- Exercises appropriate care to stop or prevent any release of or exposure to hazardous substances on the property
- Cooperate fully in any response or restoration actions on the property
- Comply with any information requests from the government
- Comply with any land use restrictions

26 Ibid.
27 Ibid.
28 Public Law 107-118.
29 “Brownfields,” note 8, supra.
31 Ibid.
• Provides all legally required notices regarding the release of hazardous substances.\textsuperscript{32}

The Act also limits the EPA’s enforcement authority in regard to persons who are conducting “response actions” at “eligible response sites” in compliance with a state program designed to protect public health and the environment.\textsuperscript{33}

The American Recovery and Reinvestment Act of 2009 provided an additional $100 million to the brownfields revitalization program. The funds will be used for the cleanup and sustainable use of brownfields though job training, assessment, loans, and cleanup grants.\textsuperscript{34}

**URBAN RENEWAL EFFORTS**

Despite the incentives offered by the legislation, convincing a business to participate in brownfields revitalization is a difficult endeavor. A business must be convinced that undertaking such a process is in its best interests. Often this is done through state and/or local incentives such as tax breaks, guarantees of indemnification for any unanticipated expenses. One advantage that can be pointed to is that brownfields are often located in cities in which people want to live and work. It is common to find an infrastructure already in place: a plentiful pool of workers; transportation access; water, sewer, and power already in place. When a state or local economic development agency can add such incentives as tax breaks and tax credits and access to funding to help in the clean-up efforts, there are ample reasons for a firm to consider taking advantage of the opportunity. However, even with all of these incentives in place, there must be an actual real estate value before a firm will decide to accept the opportunity.\textsuperscript{35}

There are some businesses that have embraced the opportunities presented by brownfield revitalization, while other businesses shy away from these same opportunities. “If the issue is drive by the corporate attorney who wants a 100 percent guarantee, the company won’t go near it,” says Charles Bartsch, director of brownfield studies at Northeast Midwest Institute, a D.C.-based public policy research organization. Bartsch adds that much depends on the risk-management attitudes and techniques of the corporation. He cites Home Depot as business that has been aggressive is seeking brownfield locations for development and expansion, with new locations on former brownfield sites in about a dozen states.\textsuperscript{36} Firms that have taken advantage of the opportunity have reclaimed more than 15,000 sites across the country. However, with more than 450,000 sites in existence, the problem remains far from solved.

**CLEAN ENERGY SITES**


\textsuperscript{33} Ibid.


\textsuperscript{36} Id.
Another potential use for brownfield sites is as locations for clean energy sources. If private corporations are unable or unwilling to take the lead in reclaiming brownfields, perhaps public utilities can step in to the breach. In furtherance of this approach, the EPA has implemented a program called Re-Powering America’s Lands that includes the use of brownfield locations as the sites for new, clean energy sources. Such usage not only encourages a productive use for properties that have been abandoned for long periods, but it also provides energy for the community and provides a significant number of new “green” jobs. This program allows for a beneficial use of the property, an increase in employment in the community, and a lessening of reliance on the older fossil fuel technologies for energy production. These sites are typically former industrial locations that are likely to be appropriately zones and that already contain the needed infrastructure. Wind farms can be utilized on brownfield sites with very little expenditure in clean-up since there is minimal need for soil disruption, as was done at a former Bethlehem Steel Mill in Lackawanna, Pennsylvania. The Philadelphia Naval Yard built its last ship in 1970. It is now the site of a reclamation that includes 80 new businesses and a seven-acre solar energy installation that will produce 1.5 megawatts of electric energy. The Keystone Industrial Port Complex in Fairless Hills, Pennsylvania has been redeveloped at a wind and solar power manufacturing hub. The Summitville Mine site in Colorado is the location of a new hydroelectric plant that also powers a water treatment plant on the same site. A landfill outside Los Angeles now houses a treatment plant, and the plant is powered to a significant extent by a landfill gas recapturing facility that not only has eliminated the noxious odors formerly affecting the area, but also provides nearly 80% of the power for operating the plant. Such effort shows that we are not only Re-Powering America’s Lands, but helping to reclaim them, as well.

**CONCLUSIONS**

The EPA’s Brownfields Program has been successful since its inception, and the benefits to be derived should only grow under the Brownfields Revitalization Act and Re-Powering America’s Lands. According to an EPA web site “postcard,” the Brownfields Program has produced widespread environmental and economic benefits. The program provides a framework for community involvement in the reclamation of brownfields. The Revitalization Act increased the EPA’s funding authority to $200 million per year. The EPA funding has been leveraged into more than $14 billion in funding from the public and private sectors, resulting in the creation of some 61,000 jobs. This leveraging of funds means that for cleanup work at the

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39 Id.
40 Id.
41 Id.
42 Id.
44 “Brownfields Tax Incentives Fact Sheet,” U.S. Environmental Protection Agency (Nov. 2008).
sites $17.86 is generated for each $1.00 of EPA funds, and 7.5 jobs are created per $100,000 of EPA funds expended. Brownfield reclamation also leads to a reduction in vehicle miles driven and in rainwater runoff associated with the site, residential property values increase, and crime decreases in the revitalized area.

From all indications, the EPA Brownfield Program and the subsequent Brownfields Revitalization Act have produced a “win-win” situation. The reclamation of abandoned and/or underutilized properties at or near a city center can help to revitalize the city. The grants provided for the reclamation are leveraged into a significant influx of funding in the community. The grants provided for job training leading to full-time and sustainable employment at a reasonable wage, benefitting previously unemployed or under-employed low-income and/or minority individuals. Property values increase in the vicinity of the property while crime rates go down. Potential liability under CERCLA can potentially be avoided or minimized, making investment in these properties much less of a risk, as can approaching the reclamation under a state plan.

Some firms have seen opportunity in reclaiming brownfields, and have shown growth and profit arising from their efforts. Other firms prefer not to take the risks associated with such redevelopment and reclamation. An alternative use has been found for some brownfields, the production of clean energy and green jobs. Whether through the installation of wind farms or solar panels, hydroelectric power plants, waste treatment or water treatment facilities, such usage not only helps to reclaim the sites, but helps to provide clean energy to the communities, and brings green jobs where such jobs did not exist, or did not exist to the same degree, before the reclamation.

More than 15,000 sites have been reclaimed since these programs went into effect. But with an estimate of more than 450,000 brownfield sites across the country, much work remains to be done. The EPA’s efforts to provide guidance and incentives for the recovery and/or revitalization of brownfields have been positive. The benefits derived include: reclaiming land that has been abandoned, idled, or underutilized; protecting and preserving the “greenbelt” areas around cities; and the training and employment of thousands or people. This, in turn leads to an increase in property values, a decrease in crimes, and an increase in property taxes. Further, the program encourages community involvement and investment in the recovery process, which leads to an increase in civic pride and a sense of community. Taking all of this into account, it is obvious that the brownfields legislation is a significant step toward helping us to become “greener,” both environmentally and economically.
ABSTRACT

Textbooks are an integral component of the higher education process. However, a great deal of concern about the high costs of college textbooks has been expressed by those inside and outside of higher education. This paper focuses on the results of a national survey of business law professors’ criteria and use of textbooks and their reactions to some of the changes that have been implemented or may be implemented by universities, state legislatures, and publishers to combat these cost escalations. Findings indicate that business law professors appear to have strong resistance to university, legislative, and publisher actions that infringe on their options in selecting textbooks and how long they would have to use a specific textbook before replacing it with a newer edition. This was particularly true of a university policy requiring low cost textbooks be adopted and requiring instructors to keep textbooks for all classes for at least 3 years, publishers sending an invoice after a 30 day review period, and allowing only one examination per department.

INTRODUCTION

Textbooks in higher education are used by instructors in varying ways. Some instructors use the text as a supplement to other course material while other instructors who teach online may use the text as the primary source of course material. In either case, the textbook is a critical element in higher education instruction. Stein, Stuen, Carnine, and Long (2001) noted that
Textbooks are believed to provide 75 to 90 percent of classroom instruction. This central role of textbooks in the instructional process requires many college professors to spend a great deal of time selecting the appropriate text for their classes.

One factor of textbook adoption that has received a great deal of interest recently is the cost of the text (Carbaugh and Ghosh, 2005; Iizuka, 2007; Seawall, 2005; Talaga and Tucci, 2001; Yang, Lo, and Lester, 2003). For the first quarter of 2007, college textbook sales totaled $324.3 million (Educational Marketer, 2007). Additionally, the price of college textbooks has increased an average of 6% each year since the 1987-88 academic years. While this growth is twice the rate of inflation, tuition has increased at a 7% annual rate. Textbooks and supplies are estimated to cost students between $805 and $1,229 for the 2007-08 school years (National Association of College Stores). The problem has captured the interest of students, professors, and state legislators. In fact, some states have begun to mandate that instructors offer more choice in textbooks, provide the least costly option without sacrificing content, and work to maximize savings to students (Oklahoma HB 2103).

The purpose of this study was to examine the attitudes of Business Law professors toward the cost of textbooks. Specifically, we looked at attitudes toward various options that state legislatures, universities, and publishers are doing to control the ever increasing costs of textbooks. Additionally, we sought to find out the extent to which faculty understand how their university bookstores are operated and how the profit from these bookstores is allocated within the university.

The paper is organized by first presenting the textbook price problem with a review of the current literature. Then we present our findings from a survey of business law faculty. Finally, we conclude with the implications of our research for professors, students, and universities.

**The Textbook Price Problem**

Several factors contribute to the high cost of college textbooks and the perceptions of students and some faculty that these prices are unreasonable. One suspected cause of increased prices is that there are fewer textbook publishers due to consolidations in the publishing industry. Seawall (2005) refers to this consolidation as a flawed production system noting that just four firms – McGraw-Hill, Pearson/Prentice-Hall, Cengage, and Houghton-Mifflin – dominate the industry. Moreover, barriers to entry in the textbook publishing business are large. Publishers have large fixed costs in printing as well as a need for editors and reviewers. Variable costs can also be substantial depending on the amount of color used and the costs of distribution (Hofacker 2009; Seawall, 2005).

Although many students and legislators believe that publishers intentionally drive up the costs of textbooks with new editions, the production and marketing of textbooks is very complex and it is difficult if not impossible to assign blame for the higher prices (Carbaugh and Ghosh, 2005). Publishers contend that used texts and conflicts with authors over royalties contribute to reduced profit on the books that are published (Carbaugh and Ghosh, 2005; Iizuka 2001). We attempt to explain the complex relationship of authors, publishers, bookstores, and wholesalers below.
Publishers argue that new editions of texts are necessary to offset a reduced sales volume often due to students either purchasing used books or not purchasing a book at all (Carbaugh and Ghosh, 2005). In fact, Iiszuka (2007) found that, like other durable goods producers, textbook publishers engage in planned obsolescence. That is, textbook publishers come out with new editions when the supply of used books increases to the point that sales of the older version are negatively impacted by the supply of used texts. The purpose of the new version is to “kill off” the supply of used books. Publishers are aware that if new versions come out too often, the life of the book is shortened to the extent that people are unwilling to pay a high price for the book. Therefore, publishers have to find an optimal revision cycle coordinated with the supply of used texts.

The result is a distinctive competitive environment among college textbook publishers. Demand for new textbooks is depressed by the comprehensive system of buying and selling used textbooks set up by used book dealers. With less than half of students purchasing the required text, the demand for both new and used books is reduced. However, professors believe in the instructional value of textbooks and continue to assign them as required reading in courses. Further, professors make these assignments with the expectation that students will purchase the book or attain one for use during the course.

Rather than reduce costs, textbook publishers have been accused of using tactics that actually increase the cost of textbooks. For example, publishers drive up the costs of new texts with extras such as CDs, workbooks, and online material. These items are often “bundled” with the textbook so the student has to purchase these items even if they are not used in the class for which the textbook was purchased. This tactic increases the cost of texts because it requires additional investments by the publishers that have to be recouped in shorter and shorter time frames.

Another player in this picture is the used textbook wholesaler. The used textbook business thrives by purchasing used textbooks from students, college bookstores, and examination copies from professors. Used texts cost between 25% and 50% below the price of a new book and are a frequent substitute for new books. New and used texts present differing merchandising problems for university bookstores. Because of the high costs of new books charged to the bookstore by the publisher, the markup is so low that many university bookstores make no profit on textbook sales and rely on the sale of other merchandise to make a profit (Carbaugh and Ghosh, 2005). The markup for used texts is much better, but there are sourcing problems. Bookstores may have difficulty getting the correct edition of a particular text in the quantity needed. Often this process means contacting several wholesalers for one text. Further, used textbook wholesalers do not allow unsold texts to be returned while the publishers do allow returns. If a bookstore miscalculates on used texts, it could find itself with substantial unsold inventory.

Publishers have also found themselves in a difficult situation in terms of the international version of textbooks. Basically, publishers “dump” textbooks overseas by selling them for less in a foreign market than they do in the domestic market. The argument is that foreign students cannot afford to pay more than the price charged overseas and that the publisher needs to
produce the books to achieve economies of scale (Carbaugh and Ghosh, 2005). A criticism of this practice is that textbook publishers are allowing relatively affluent American students to subsidize students in other countries. In response, many students will purchase the international edition of the text in order to reduce their costs (Paul, 2007).

Authors also pressure textbook publishers to lower the price. Since the author is paid a percentage of the revenue, his or her income is maximized when more books are sold at a lower price. Publishers are more interested in profits and desire a higher price to maximize the difference between revenue and costs (Carbaugh and Ghosh, 2005).

While the textbook industry may be an oligopoly with four major firms, once the decision is made by a professor to adopt a particular text, the publisher has a monopoly for that course (Iizuka, 2007; Talaga and Tucci, 2001). Faced with a monopolistic situation, students have the option to buy new, used, or not at all. Other product variables such as quality, brand, and packaging are eliminated so students focus on the only option left – price.

Students combat the high cost of textbooks with alternative strategies. A National Association of College Stores survey found that only 43% of students buy the required books for their courses (Carlson, 2005). Students either share a textbook with another student taking the same course or borrow a textbook. Additionally, some students turn to online texts which were preferred by 11% in one survey (Paul 2007). Online books are generally less expensive than the same texts available at the university bookstore (Yang, et al., 2001). However Seventy-three percent of students still prefer traditional texts (Carlson 2005). Other strategies employed by students include renting textbooks online (Foster, 2008), swapping books online (American Association of State Colleges and Universities), and viewing the library copy of the text (Paul, 2007).

CONTROLLING THE COST OF TEXTBOOKS

Universities and faculty are exploring ways to lower the costs of textbooks. For example, the University of Dayton and Miami University use e-textbooks for some courses (Gottschlich, 2008). The faculty of Rio Salado College in Arizona print their own textbooks by picking and choosing only what they need for a course (Guess, 2007). Additionally, there are advertiser supported free textbook downloads (The Campaign to Make Textbooks More Affordable) and textbook reserve programs where texts for basic courses are purchased by the student government association and are put on a two hour reserve in the library.

Textbook publishers are not unaware of the market’s dissatisfaction and are attempting to address the problem. The methods by which textbooks are marketed also increase the costs. Publishers encourage professors to examine and adopt their books by marketing directly to them. Textbook publisher marketing budgets have increased along with efforts at more effective marketing. Examination copies drive up the cost of textbooks for students, contribute to the used book market, and involve ethical issues (Robie, Kidwell, and Kling, 2003; Smith and Muller, 1998).
As be seen from the above review, textbook pricing is a complex issue with many players and economic factors influencing the price charged for any individual book. In an effort to expand our understanding of attitudes toward some of these initiatives to control textbook prices, we conducted a survey of Business Law faculty to determine their reactions to various textbook cost issues. The details of the study and the results are presented below.

STUDY

Method

This study was conducted using Internet survey methodology. A random sample of 583 business law professors was selected from universities throughout the United States using university websites. These individuals were sent an e-mail explaining the purpose of the study and a link to click on if they were willing to participate.

The survey consisted of 17 questions addressing the topic of textbook costs and related issues. A 5-point rating scale (1 = most important; 5 = least important) was used to measure faculty reactions to various potential university, governmental, and publisher actions to control textbook cost. Additional questions dealt with the frequency of adoptions, ownership of the university bookstore, competition from non-campus bookstores, and questions about years of experience, discipline, university size, and demographic questions such as academic rank, years of teaching experience, an size of university. The final section of the questionnaire permitted respondents to make specific comments about the issue of textbook costs.

The resulting data was analyzed using SPSS. Percentages and means were calculated where appropriate and t-tests and analysis of variance were used to analyze differences in responses based on classification variables related to respondents’ rank, teaching experience, size of institution, etc.

RESULTS

Of the 583 e-mails sent, 57 were returned for various reasons such as a wrong e-mail address, insufficient e-mail address, or the e-mail was viewed as SPAM by the university’s e-mail filter system. Of the 526 e-mails that were delivered, 43 responded, yielding a response rate of 8.2%.

A typical respondent had been teaching for more than 20 years (46.5%), held the rank of full professor (46.5%), and taught at a public institution (60.5%) with an enrollment of 5,000 to 19,999 students (62.8%). Their institution offered a bachelor’s (86.0%) and/or a master’s degree (88.4%).

As is shown in Table 1, content ranked as the number 1 selection criteria, followed by cost, ancillary materials, edition of the text, and length of the text. In earlier studies by the authors, cost was the third most important consideration in textbook adoption, which may indicate increased sensitivity to cost as a selection criterion.
Table 1: Ranking of Selection Criteria

<table>
<thead>
<tr>
<th>Selection Criteria</th>
<th>Mean*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rank importance of content</td>
<td>1.21</td>
</tr>
<tr>
<td>Rank importance of cost of text</td>
<td>2.84</td>
</tr>
<tr>
<td>Rank importance of ancillary materials</td>
<td>3.40</td>
</tr>
<tr>
<td>Rank importance of edition</td>
<td>3.63</td>
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<tr>
<td>Rank importance of length of text</td>
<td>3.93</td>
</tr>
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*1= most important, 2= second most important, 3=third most important, 4=fourth most important, 5=least important

Content proved to be the most important selection criteria and length of text the least important for subgroups based on frequency of switching, whether or not the professor received complaints about textbook cost, the number of years of teaching experience, academic rank, and university enrollment. When asked about student complaints regarding textbook cost, 86.0% reported receiving student complaints about textbook cost and they estimated that only 53.5% of their students actually purchased or rented the required text for their courses.

Table 2 shows the frequency of changing textbooks. The majority of respondents changed book within 3 or fewer years. This may coincide with the cycle of new editions introduced by publishers.

Another possible explanation may be related to the nature of the business law discipline. The law changes frequently, requiring professors to adopt new texts in order to stay current. In fact, when a comparison was made between those who switched every two years or less as opposed to those who switched every three or more years, t-test results reveal that the more frequent textbook adopters were significantly more concerned with the edition of the text (p = .096).

Comparing these same two groups, a t-test indicates that the cost of the text also plays a part in more frequent adoptions (p = .088). Thus, business law professors appear to make an effort to keep course material current while remaining aware of the cost of the texts to the student.

Table 2: Frequency of Changing Textbooks

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>Once a year</td>
<td>1</td>
</tr>
<tr>
<td>Every two years</td>
<td>15</td>
</tr>
<tr>
<td>Every three years</td>
<td>17</td>
</tr>
<tr>
<td>Every four years</td>
<td>4</td>
</tr>
<tr>
<td>Every five years</td>
<td>0</td>
</tr>
<tr>
<td>Longer than five years</td>
<td>6</td>
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Most respondents reported that the university’s bookstore was outsourced (53.5%) and 88.4% reported that they did not know what the profits from bookstore operations were used for. Of those that reported that they knew how profits were utilized, they felt the profits were used for athletics or faculty salaries.

Respondents’ attitudes toward various state and university actions were measured using a 5 point scale of strongly agree to strongly disagree (1 = strongly agree; 5 = strongly disagree). High means indicate stronger disagreement with a particular action. As is shown in Table 3, there was disagreement with almost all of the potential actions measured. This was particularly true of a university policy requiring low cost textbooks be adopted and requiring instructors to keep textbooks for all classes for at least 3 years.

Not surprisingly, t-tests indicate a significant difference between those who adopt more frequently and those who don’t concerning university requirements to keep textbooks for at least three years. More frequent adopters had a higher level of disagreement with this policy (p = .024).

Table 3: Attitudes Toward Various Actions to Control Textbook Cost

<table>
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<th>Potential Action:</th>
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<tr>
<td>Univ. policy require lowest cost textbook be adopted</td>
<td>4.67</td>
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<tr>
<td>Instructors keep textbooks for all classes a minimum of 3 years</td>
<td>4.07</td>
</tr>
<tr>
<td>Legislation require publishers to unbundled textbook material</td>
<td>2.91</td>
</tr>
<tr>
<td>Require publishers to provide textbook copies on reserve in library</td>
<td>3.29</td>
</tr>
<tr>
<td>Legislation to require publishers to provide cost info.</td>
<td>3.16</td>
</tr>
<tr>
<td>Multiple courses use the same textbook</td>
<td>3.12</td>
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<tr>
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<td>3.74</td>
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Business law professors also expressed differing levels of agreement with the actions of publishers to control costs (See Table 4). The publisher practice of sending a 30-day review copy followed by an invoice to the instructor was the least favorite method of controlling costs followed by sending only one examination copy per department. There was general agreement, however, that the publisher should request the course name and number before sending an exam copy. Interestingly, business law professors appeared to ambivalent about publishers’ attempts to develop a tracking system to identify “book collectors.”
Table 4: Attitudes Toward Various Actions by Publishers to Lower Textbook Costs

<table>
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<td>30-day review period after which an invoice for the cost of book is sent to the instructor</td>
<td>3.72</td>
</tr>
<tr>
<td>Send only one examination copy per department</td>
<td>3.40</td>
</tr>
<tr>
<td>Request course name/number be sent with exam copy</td>
<td>1.67</td>
</tr>
<tr>
<td>Send parts of text rather than entire text</td>
<td>2.14</td>
</tr>
<tr>
<td>Develop a tracking system to identify “book collectors”</td>
<td>2.74</td>
</tr>
<tr>
<td>Don’t send unsolicited copies unless using previous edition</td>
<td>2.45</td>
</tr>
<tr>
<td>Offer online access or CD of new text for review instead of a hard copy of the text</td>
<td>2.00</td>
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**SUMMARY**

The concern for the cost of textbooks has led many students, faculty, universities, and some state legislatures to explore actions to reduce textbook cost. However, in this study, business law professors appear to have strong resistance to university, legislative, and publisher actions that infringe on their options in selecting textbooks and how long they would have to use a specific text before replacing it with a newer edition. This was particularly true of a university policy requiring low cost textbooks be adopted and requiring instructors to keep textbooks for all classes for at least 3 years and publishers sending an invoice after a 30 day review period and sending only one examination per department.

When faculty were asked for other comments in the survey, several trends were noted in their comments: (1) many felt that online versions of text would eventually replace hard copies of textbooks and (2) that many of the ancillaries offer by publishers increased the cost of textbook without adding real value to a student’s learning experience. Thus, new technologies and increased publisher competition may cause changes in both the way textbooks are accessed and how they are marketed.
REFERENCES


Oklahoma HB 2103, c. 368, § 2, eff. November 1, 2007.


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<tr>
<td>Every three years</td>
<td>42.4%</td>
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<tr>
<td>Every four years</td>
<td>7.7%</td>
</tr>
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JUDICIAL REVIEW OF ADMINISTRATIVE RULE MAKING

Richard J. Hunter, Jr.*

INTRODUCTION

Administrative law is certainly an important part of the fabric of the legal system in the United States.1 Whenever a governmental regulation or an administrative rule is challenged in court in the United States, an analysis of the right or principle in question must first be undertaken. In so doing, courts are confronted by a choice in either applying a strict scrutiny analysis or a rational basis analysis. In addition, in certain specific cases, a court might apply what has been termed as an “intermediary scrutiny” in resolving a problem. This article analyzes these three constitutional standards and provides a backdrop for those who are interested in looking at the process that a court in the United States will undertake in order to determine if the government possesses the power to enact the particular regulation that is being challenged on constitutional grounds.

APPLICATION OF STRICT SCRUTINY: A BRIEF RETROSPECTIVE

Strict scrutiny is the most rigorous standard utilized by the United States Supreme Court and other federal courts in exercising their role of judicial review of a statute or administrative rule or regulation. The strict scrutiny standard is a part of a descending hierarchy of standards that courts have employed in order to weigh an asserted governmental interest against an asserted constitutional right or principle. In addition to the strict scrutiny standard, courts have also employed a lower standard of review, termed rational basis review, and an intermediate level of scrutiny in certain constitutional cases.

Strict Scrutiny Applied

The notion of "levels of judicial scrutiny," including strict scrutiny, was introduced into constitutional parlance in footnote 4 to United States v. Carolene Products in 1938.2 Strict scrutiny was first applied in the controversial opinion of

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2 304 U.S. 144, 152 n.4 (1938). The original text of footnote 4 (with internal footnotes as found in the original) is revealing:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally
Justice Hugo Black in Korematsu v. United States, in which the United States Supreme Court held that racial discrimination against Japanese Americans during World War II had met the standard of strict scrutiny.

specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369-370; Lovell v. Griffin, 303 U.S. 444, 452).

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-714, 718-720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242, and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 284, or racial minorities, Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184 n 2, and cases cited.

3 323 U.S. 214 (1944). In February 1942, 120,000 U.S. residents of Japanese ancestry who were both citizens and noncitizens of the United States were ordered into resettlement camps following Japan's December 7, 1941, attack on Pearl Harbor in Hawaii. Fred Korematsu was a U.S.-born Japanese American citizen who decided to remain in San Leandro, California with his girlfriend after his parents had been removed from their home. Evidence indicated that Korematsu had knowingly violated Civilian Exclusion Order No. 34 issued by the United States Army. Korematsu contended that the Order was unconstitutional as a violation of the Fifth Amendment. The background which spawned the controversy was explained by the Court:

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was, for the same reason, a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified
The Supreme Court has determined that strict scrutiny review arises in two basic contexts:

- When a "fundamental" constitutional right is infringed—especially those rights explicitly found in the Bill of Rights and those rights that the Supreme Court has deemed to be a fundamental right protected by the allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

_id._ at 218-219 (citing Hirabayashi v. United States, 320 U.S. 81 (1943) (sustaining a conviction for a violation of a curfew order applicable only to persons of Japanese ancestry as an exercise of the power to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack).

Korematsu was tried and convicted in federal court on September 8, 1942, for a violation of Public Law No. 503, which criminalized such violations of military orders issued under the authority of Executive Order 9066. 7 Fed. Reg. 1407. He was placed on five years' probation. He and his family were placed in the Central Utah War Relocation Center situated at Topaz, Utah. Korematsu appealed his conviction to the U.S. Court of Appeals. They granted review on March 27, 1943, but upheld the original verdict on January 7, 1944. 140 F.2d 289 (9th Cir. 1943). Korematsu appealed again and brought his case to the United States Supreme Court, which granted certiorari on March 27, 1944. On December 18, 1944, in a 6-3 decision authored by Justice Hugo Black, the Supreme Court held that compulsory exclusion, though constitutionally suspect, is justified during circumstances of "emergency and peril." 323 U.S. at 220. Justice Douglas stated further:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

_id._ at 223.

Without any doubt, the Korematsu Case stands as one of the most controversial and criticized cases in the modern history of the United States Supreme Court.  See, e.g., MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES (2008). Korematsu's conviction for evading the internment order was ultimately overturned on November 10, 1983, after Korematsu challenged the earlier decision by filing for a writ of _coram nobis_. In a decision by Judge Marilyn Hall Patel, the United States District Court for the Northern District of California granted the writ and voided Korematsu's original conviction. Judge Patel found that in Korematsu's original case, the government had knowingly submitted false information to the United States Supreme Court that had a material effect on the decision of the Court.  See Korematsu v. United States, 584 F. Supp. 1406 (1984). In 1988, President Reagan declared the internment a "grave injustice" and signed legislation authorizing reparations of $20,000 each to thousands of surviving internees, including Korematsu. In 1999, President Clinton awarded Korematsu a presidential Medal of Freedom, the nation's highest civilian honor.  Korematsu died on March 30, 2005 at the age of 86. Professors Lockhart, Kamisar, and Choper comment that “Hirabayashi and Korematsu have been the last instances in which the Court has failed to invalidate intentional (or “de jure”) government discrimination against a racial or ethnic minority.”  WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPPER, THE AMERICAN CONSTITUTION 850 (1981).
“liberty” provision of the 14th Amendment (for example, the right to vote,4 the right to interstate travel,5 and the right to privacy6);

- When the government action involves the use of a "suspect classification" such as race7 or national origin8 that may render it void under the Equal Protection Clause.9

4 See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (state durational and residency requirements of one year in the state and three months in the county in order to vote failed under a strict scrutiny analysis). In San Antonio Ind. School Dist. v. Rodriguez, Justice Marshall noted: “The right to vote in state elections has been recognized as a ‘fundamental political right’ because the Court concluded very early that it is ‘preservative of all rights.’” 411 U.S. 1, 101 (1973) (Marshall, J., dissenting) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1896)). Justice Marshall continued: “For this reason, ‘this Court has made it clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.’” Id. (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (emphasis in the original)).

5 See, e.g., United States v. Guest, 383 U.S. 745 (1966). The right to travel has been held to encompass the right of citizens (1) to enter and leave another state; (2) to be treated as welcome visitors; and (3) to be treated equally if they become permanent residents of that state. See Saenz v. Roe, 526 U.S. 489 (1999). The right to international travel has been held to be part of the “liberty” guaranteed by due process. See Kent v. Dulles, 357 U.S. 116 (1958) (holding that the Secretary of State had exceeded its authority in refusing to issue passports to Communists for foreign travel). However, the right to international travel is not unqualified and may be regulated within the parameters of due process under the rational basis test. In general, this is an example of the courts deferring to the judgment of the political branches (executive and legislative) on matters relating to foreign policy. See Regan v. Wald, 468 U.S. 222 (1984). Included in rationally based restrictions have been the denial of social security benefits when recipients are outside of the United States. Califano v. Aznavorian, 439 U.S. 170 (1978); revocation of a passport of a person whose conduct in foreign countries presents a serious danger to national security. Haig v. Agee, 453 U.S. 280 (1981) (Secretary of State revocation of the passport of an ex-CIA employee who was exposing the identity of undercover CIA agents in foreign countries; imposition of reasonable “area restrictions” for passports prohibiting travel to certain countries or danger zones. Zemel v. Rusk, 381 U.S. 1 (1965) (regarding the denial of a passport to Cuba).

6 See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy is implicit in the concept of “liberty” within the protection of the Due Process Clause). The right to privacy has been held to include the right to marry. Loving v. Virginia, 388 U.S. 1 (1967) (holding that the right to marry is a “basic civil right”); the right to procreation. Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a law requiring the sterilization of habitual criminals); the right of parents to make decisions concerning the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 914 (2000); the right of related persons to live together in a single household. Moore v. City of East Cleveland, 431 U.S. 494 (1977); the right of fully consenting adults to engage in private intimate sexual conduct that is not commercial in nature. Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a state law making it a crime for members of the same sex to engage in consensual sodomy and overruling Bowers v. Hardwick, 478 U.S. 573 (1986)).

Justice Stewart, joined by Justice Black, expressed a contrary view:

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

381 U.S. at 530 (Stewart, J., dissenting).
In order to pass strict scrutiny muster, the law or policy must satisfy three prongs. First, the policy or law must be justified by a “compelling governmental interest.” Second, the law or policy must be narrowly tailored to achieve that goal or interest. Third, the law or policy must be the least restrictive means for achieving that compelling governmental interest.

RATIONAL BASIS ANALYSIS

The Supreme Court has stated that under the Fifth and Fourteenth Amendments to the U.S. Constitution, persons are entitled to equal protection of the law. In furtherance of this principle, the Supreme Court enunciated what has been termed as the rational basis test. The rational basis test is a standard of review that examines whether a legislature had a reasonable—and not an arbitrary—reason or ground for enacting a particular statute or law. The United States Supreme Court articulated the rational basis test for cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. As a practical matter, the employment of the rational basis test usually results in the court upholding the constitutionality of the law or governmental policy, because the test gives great deference and weight to decisions of the legislative branch. It provides a strong presumption that the law or policy under review is valid. The burden of proof in rational basis analysis falls on the party making the challenge to a law or policy to show that the law or policy is unconstitutional. In order to meet this burden, the party making the challenge must demonstrate by a preponderance of the evidence that the law or policy does not have a rational or reasonable basis.

The United States Supreme Court first articulated the rational basis test under the Equal Protection Clause of the Fourteenth Amendment in Gulf, Colorado & Santa Fe

7 See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880) (invalidating a law forbidding African-Americans from serving on grand or petit juries).

8 See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating the denial of laundry licenses only to persons of Chinese origins); Hernandez v. Texas, 347 U.S. 475 (1954) (concerning discrimination against Mexican-Americans in respect to service on a jury). Generally, the application of “strict scrutiny” requires that the government exhibit a discriminatory purpose. See Washington v. Davis, 426 U.S. 229 (1976) (challenging the implementation of a test that was failed disproportionally by African-Americans). Such discrimination may be shown on its face; through unequal administration; or where the legislative motive was to discriminate against racial or ethnic minorities. Id.

9 The Fourteenth Amendment provides (in part): “No State shall … deny to any person within its jurisdiction the equal protection of the laws.”


12 See, e.g., Las Lomas Land Company, LLC v. City of Los Angeles, 177 Cal. App. 4th 837, 859 (2009) (noting “Proving the absence of a rational basis can be an exceedingly difficult task. In some circumstances involving complex discretionary decisions, the burden may be insurmountable.”).
The Court stated that "it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification." However, the Court continued, it must appear that a classification is “based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.” Where a constitutionally suspect classification such as race, religion, alienage, or national origin are *not* at issue, nor are any fundamental constitutional rights at stake, "[when] the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed." In *Lindsley v. National Carbonic Gas Co.*, the United States Supreme Court outlined this rather deferential approach to most government regulation based on the rational basis standard of review:

The equal protection clause [does] not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

In addition, the Court does not require a legislature to articulate its reasons for enacting a statute, holding that "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." The Court stated that a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical

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13 165 U.S. 150 (1897).
14 *Id.* at 155.
15 *Id.* at 165-67.
17 220 U.S. 61 (1911).
18 *Id.* at 78-79.
In effect, this means that a court is permitted to find a rational basis for a law, even if it is one that was not articulated by the legislature.

The Supreme Court has explained the purpose behind an application of the rational basis test. As stated by Justice Clarence Thomas in *Beach Communications*:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.  

Justice Thomas continued: “Where there are ‘plausible reasons’ for Congress' action, ‘our inquiry is at an end.’” Justice Thomas concluded: “This standard of review is a paradigm of judicial restraint.” In *Vance v. Bradley*, the Court stated: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."  

This rather benign view of the role of the courts in a constitutional challenge to a statute, rule, or practice is not universally shared. For example, in *Royster Guano Co. v. Virginia*, the Supreme Court suggested a different role for the judiciary. The Court noted a slightly different approach and stated: “[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

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20 *Id.*


22 *Id.* (citing *Beach Communications*, 508 U.S. at 313-314); United States Railroad Retirement Bd. v. Fritz, 449 U.S. at 179).

23 *Id.* (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).


25 *Id.* at 97.

26 253 U.S. 412 (1920).
relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”

INTERMEDIATE SCRUTINY

Intermediate scrutiny is the standard under the Equal Protection Clause that federal courts utilize to assess the constitutionality of government action based on sex (gender) and illegitimacy. This type of analysis is also referred to as “heightened” or “semi-suspect” scrutiny. An application of the intermediate scrutiny standard requires that governmental action be “substantially” related to an “important” government interest. The “important government objective” which is offered to justify a categorization based on gender must be genuine—not one that is hypothetical. The government’s justification must not rely on overly broad generalizations about males and females. As an example of cases which once passed Supreme Court scrutiny before the adoption of the higher “intermediary” standard of proof, we may cite Bradwell v. Illinois, where the Court, in upholding a law denying women the right to practice law, explained: “the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life…. [The] paramount destiny and mission of women are to fulfil [sic] the noble and benign offices of wife and mother. This is the Law of the Creator.”

In Muller v. Oregon, the Supreme Court upheld a law barring factory work by women for more than ten hours a day, reasoning that “as healthy mothers are essential to vigorous offspring, the physical well-being of a woman becomes an object of public interest and care.”

27 Id. at 415.
28 83 U.S. 130 (1873).
29 Id. at 141.
30 208 U.S. 412 (1908).
31 Id. at 421. See also Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding a law denying a bartender’s license to most women, reasoning that “the fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic”); Hoyt v. Florida, 368 U.S. 57, 62 (sustaining a law placing women on a jury list only if they made special request, stating that “woman is still regarded as the center of home and family life”).

In contrast, see United States v. Virginia, 518 U.S. 515 (1996) (invalidating a state military school’s policy of admitting only men); Reed v. Reed, 404 U.S. 71 (1972) (invalidating a state law that preferred men over women as between persons otherwise equally qualified under state law to administer estates); Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a federal statute limiting a servicewoman’s right to a dependency benefit for her husband by requiring proof of actual dependency upon her for support, whereas a serviceman could obtain similar benefits for his wife without such proof). Justice Brennan framed the issue quite differently than did the Court in Bradwell, Cleary, and Muller: “[O]ur nation has had a long and unfortunate history of sex discrimination. Traditionally, such
Intermediate scrutiny differs from both strict scrutiny and rational basis scrutiny in determining whether governmental classifications under the Equal Protection Clause pass constitutional muster. Intermediate scrutiny analysis dates from 1976, and may be found in the United States Supreme Court's decision in *Craig v. Boren,*\(^{32}\) where the Court stated: “… to withstand constitutional challenge, … classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”\(^{33}\)

Justice Sandra Day O’Connor wrote the opinion and cast the deciding vote in *Mississippi University for Women v. Hogan,*\(^{34}\) making it clear that the Equal Protection Clause of the Constitution provides strong protection against sex discrimination in government policies and programs. Justice O’Connor, considered by many as the leading proponent of the “heightened scrutiny” standard, reaffirmed the standard of “heightened scrutiny” for sex discrimination. Justice O’Connor emphasized the Court’s prior decisions holding that a law discriminating on the basis of sex requires “an exceedingly persuasive justification.”\(^{35}\) The Court ruled 5-4 that this standard was not met by a state university that excluded men from admission to its nursing school based on gender stereotypes.\(^{36}\)

**CONCLUSION**

Before any challenge to an administrative regulation or rule can be undertaken, it is important to understand the method of analysis that courts in the United States—especially the United States Supreme Court—will take in conducting this analysis. While the lines between the various rights pressed are not completely drawn, there are patters that implicate how a court will decide the difficult underlying issues. Because administrative law is such an important part of the development of law in the United States, these issues are critically important.

discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage….” *Id.* at 684.

\(^{32}\) 429 U.S. 190 (1976) (invalidating a law that authorized the serving of beer to females over 18 years of age old but not to males over 21 and announcing that sex-based classifications were subject to stricter standards of review under the Equal Protection Clause of the Fourteenth Amendment). Noted the Court in *Boren:* “Decisions following *Reed* [have] rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.” *Id.* at 198 (citing *Reed*, 404 U.S. 71 (1972)).

\(^{33}\) *Id.* at 197.

\(^{34}\) 458 U.S. 718 (1982).

\(^{35}\) See *id.* at 724 (1982) (citing Kirchberg v. Feenstra, 450 U.S. 455 (1981)).

\(^{36}\) *Id.* at 731 (“The burden is met only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”) (citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).
USING THE CURRENT PUSH FOR REGULATORY REFORM OF THE INSURANCE INDUSTRY TO ASSESS AND DEVELOP STUDENT’S CRITICAL THINKING SKILLS

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Abstract
Assuring that students are learning and internalizing discipline-specific knowledge is of critical importance in the continuous improvement process that all programs in collegiate business schools should practice. However, it is equally important that broader non-discipline specific learning goals be developed as well. One of the often chosen goals when looking at the broader goals of undergraduate business education is the development and improvement of critical thinking skills. Obviously, before any serious claims of improving critical thinking skills can be made, critical thinking must be assessed. This article describes an assignment that can be used not only to give students a grounding in the regulatory framework underpinning the insurance industry, but it also provides an opportunity to obtain a baseline and determine at what level a student’s critical thinking skills are.

Introduction
In the current accreditation environment, business school courses must serve dual purposes of developing discipline-specific knowledge that employers value as well as playing their part in meeting the accreditation standards that various accrediting agencies have placed on business schools. This has been a process that has been twenty years in the making. In 1985, the Department of Education, under the guidance of William Bennett, determined to make higher education assessment a higher priority than it had been in the past. In a compilation of articles published in 1985, William Bennett argued the thought that at that time, American higher education was for the most part sound and many students did in fact receive an excellent education. Additionally, without the implementation of standards pertaining to student and faculty performance, as well as institutional achievement, the quality of higher education would deteriorate. In fact, Bennett argued that both anecdotal evidence and an examination of GRE score slippage between 1964 and 1982 provided fairly conclusive evidence that educational standards had, in fact, deteriorated. Bennett further argued that the Department of Education...
should take the lead in encouraging the incorporation of regular assessment into the higher education environment. While one may question the wisdom of importing the methodology and culture of an educational establishment that has produced the obvious and demonstrable failure that K-12 education has become into higher education, it is clear that accrediting agencies sanctioned by the Department of Education have responded to this pressure. One need look no further than the accrediting guidelines of AACSIB or ACBSP or recall recent experiences with regional accrediting organizations to conclude that accrediting agencies are placing an increasing emphasis on assessment. One supposes that the current attitude towards assessment is best expressed in a recent article entitled *Curriculum Embedded Performance Assessment: Maximum Efficiency Minimum Disruption.* This article is written with the intent to provide an illustration of how efficiency can be maximized and disruption minimized in carrying out mandated assessment.

Susan Wolcott has developed a schema for assessing critical thinking that is based on a five step model that assess the critical thinking level of students. Students operating at step 0 are able to repeat or paraphrase information and reason to a single “correct” solution. These students have the foundation to develop critical thinking skills, but have not developed the ability to deal with issues requiring any meaningful cognitive complexity. Students at step 1 are able to identify a problem, acknowledge that some uncertainty may exist and perhaps a single correct solution does not exist, and identify relevant information and notice uncertainties that are embedded in the question. These students are able to reason through problems that can be solved using a low level of cognitive complexity. Step 2 represents a student who is able to function at a moderate level of cognitive complexity. These students are able to perform all of the tasks in step 0 and step 1 as well as recognize and control for their own biases, articulate underlying assumptions, and qualitatively interpret evidence from multiple points of view. Students at step 3 are able to analyze issues at a relatively high level of cognitive complexity in addition to the skills that students at previous steps can exercise. They are also able to develop thorough analysis and a reasonable framework for prioritizing factors used to consider possible solutions. In addition to this, they should be able to implement conclusions efficiently and recognize when others should be involved. A student at step 4 is functioning at the highest level of cognitive complexity and should be aware of and acknowledge the limitations to the solution they endorse, and their solution should contain a mechanism that creates a feedback loop for monitoring the solution's effectiveness and altering or revising the proposed solution.

A properly phrased question can be used to give students at all levels an opportunity to answer the question in a way that, from a rubric, it becomes clear relatively quickly just exactly at what level of critical thinking they are functioning. Using this rubric as one is grading an assigned set of essays, it is also easy to fairly quickly and efficiently assess the critical thinking level of a student. In order to avoid the inefficiency associated with assessment, one need only find facts relevant to a particular course that can also be used to format the proper type of open-ended question. The push for regulatory reform in the insurance industry provides this

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7 Addlemand editing Bennett pp4-22
opportunity. The relevant set-off facts that can be given to students is described below and followed by a suggested open ended question for an assessment rubric.

**Facts Pattern Concerning Regulatory Reform in the Insurance Industry**

Between 1907 and the mid 1940s, the issue of whether the insurance industry is best regulated at the federal level or by the individual states was of significant academic interest. Interestingly enough in 1941, the Journal of the American Association of University Teachers of Insurance, devoted an issue primarily to a discussion of this issue. However, since this time, academic interest seems to have been limited and such literature as specifically addresses this issue seems to be fairly limited and is either devoted to highly specialized niches such as lease financing or an examination of historical trends in the area.

Initially, this interest in the issue of whether insurance is best regulated by state or federal government was a function of debates that began during the more aggressive antitrust enforcement under Thurman Arnold during the New Deal. The issue came to a head when, in the case of U.S. vs. South Eastern Underwriters Association, the U.S. Supreme Court ruled that, in fact, insurance is interstate commerce and falls under the antitrust actions and other federal statutes justified by the commerce clause. This case provoked a congressional reaction in 1945 and was essentially overruled with the passage of the McCarran-Ferguson Act which stated that insurance regulation should remain the province of the states and federal acts would not preempt state insurance law unless the federal act specifically mentioned the insurance industry. With this statute in place, insurance regulation has essentially remained under state control. The industry has been successful in ensuring that the McCarran-Ferguson Act has remained essentially unaltered.

Prior to very recently, the current regulatory regime impacting the insurance industry faced no significant challenge and has thus not been a particularly productive area of academic inquiry. However, recent events seem to indicate that revisiting this issue is warranted.

The federal intervention that was required in order to avoid AIG’s bankruptcy has created a situation where it is inevitable that federal regulation of the insurance industry will become a significant issue again. This paper will investigate the proposals that are currently being discussed in Washington to federalize or reform insurance regulation.

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12 See No. 1 Volume * of the Journal of the American Association of Insurance Teachers

13 See No. 1 Volume * of the Journal of the American Association of Insurance Teachers


16 For example, when reform of the McCarran-Ferguson Act was considered in the mid 1980’s, Rober Singler, a lobbyist for the auto industry, noted that the industry was successful in keeping the act unchanged. *Insurance Regulation: State vs. Federal Oversight 6/15/2006*
The Policy Making Process

Before beginning an examination of the proposed reform of the insurance industry, it is perhaps worth a brief detour into the political science literature to lay the foundation for the process out of which any new regulation will likely emerge. The current financial crisis has created what political scientists call a policy window, which is essentially a brief period of time that can allow for the enactment of a particular idea that has been percolating in the policy process for years. Cohen, March, and Olsen probably explained the phenomena as well as any others with their "garbage pail" model of organizational choice. This model argues that policy comes from a garbage pail they describe as "a collection of choices looking for problems, issues and feelings looking for decisions, situations in which there might be aired solutions to issues for which there might be an answer, and decision makers looking for work." Their "garbage pail" theory is based on the following criteria: first, a series of inconsistent and ill-defined preferences; second, unclear technology based on a process not fully understood by its members; and third, fluid participation with participants varying over time. Thus, one viewing public policy as a result of this sort of process would then see public policy-making as a haphazard process and have little faith that public policy will ultimately bear a significant relationship to the problem that it was originally designed to address.

The federal government attempting to deal with the current financial crisis and the role that insurance regulation, or the lack thereof, may or may not have played in this process clearly meets the three criteria defined above. The preferences of both the public and the policy makers are clearly inconsistent and ill-defined. Take the issue of underwriting standards, for example. Rigorous adherence to actuarially sound underwriting standards tends to produce insurance that is affordable to those who are deemed insurable, but they also create a pool of individuals who are either not insurable or are insurable only at high rates. Wide availability of many insurance products and relatively low rates are both goals that many in charge of regulating the industry support, but the two goals are often in conflict. The current financial crisis, its causes, and what role the insurance industry has played in this crisis are at this time not fully understood. Finally, it is clearly a fluid group of actors that are part of this particular process. For example, state insurance commissioners, the Treasury Department, various trade associations representing different segments of the industry, the Federal Trade Commission, the Securities and Exchange Commission, both state and federal courts, and elected political actors at both the state and federal level have all proposed and taken positions on various policy proposals over the last several years. Thus, all the conditions for the "garbage pail" theory of public policy-making to hold are all present.

Put simply, varying interested parties have preferences for particular actions by government and they throw these particular "solutions" into the milieu of policy options that are discussed. If they are lucky, at some point a problem comes along that is significant enough to briefly grab public attention and a particular solution that has been in the garbage pail for years will be chosen. Once this is accomplished, and the brave new world begins, attention will shift to the next perceived problem in search of a solution. It is unlikely that public attention will remain fixed on insurance companies for any length of time. First, press attention, and thus public attention, rarely remains focused on a single issue long enough for anyone the public to

17 Kingdon, John W. Agendas Alternatives and Public Policies, 168-169
19 Ibid @ 1-25
actually become educated on the issue, and, secondly, once a symbolic solution is implemented, policy makers at the top level will quickly shift their focus to other issues. As we shall see in the next section of this paper, as there are many "solutions" that have been thrown into the garbage pail by the insurance industry over the years. The interesting question then is which solution will be chosen.

The Law and Economics of Regulation

It is well documented in economic theory that economic regulation can determine winners and losers and result in significant transfers of wealth and competitive advantage. It has also been noted that government regulation does tend to form coalitions who are willing to expend significant resources in order to drive regulation in the direction in which they perceive their interests. The effectiveness of various industries in successfully lobbying for and passing this form of special interest legislation and the special exemptions to the various antitrust laws are a useful example. For example, agriculture, export activities, insurance, labor, fishing, defense contractors, professional sports, newspapers, certain joint ventures, and

20 Kingdon, @97-105 and 128
23 Cooperative Marketing Association (Capper-Volstead) Act, 7U.S.C.§§291-92 (2000) (allowing persons engaged in the production of agricultural products to act together for purpose of “collectively processing, preparing for market, handling, and marketing” their products and permitting cooperatives to have “marketing agencies in common”); Cooperative Marketing Act, 7U.S.C.§455 (2000) (authorizing agricultural producers and associations to acquire and exchange “past, present, and prospective” pricing, production, and marketing data); Agricultural Marketing Agreement Act of 1937, 7U.S.C.§608-08c (2000) (providing the U.S. Secretary of Agriculture authority to enter into (1)marketing agreements with producers and processors of agricultural commodities, and (2)marketing orders, except for milk, that control amount of an agricultural product reaching the market and thus serve to enhance the price); 15U.S.C.§17 (2000) (permitting, inter alia, operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit).
26 Fishermen's Collective Marketing Act, 15U.S.C.§§521-22 (2000) (permitting “persons engaged in the fishing industry, as fishermen... [to] act together...in collectively catching, producing, preparing for market, processing, handling, and marketing” their products)
27 Defense Production Act of 1950, 50App.U.S.C. §2158 (2000) (providing that the President or his delegate, in conjunction with the Attorney General, may approve voluntary agreements among various industry groups for development of “preparedness programs” to meet potential national emergencies). The Act further provides that
local government all enjoy special statutory exemptions to antitrust law. Nor has the insurance industry itself been unsuccessful in lobbying for and ensuring passage of acts that are favorable to it. The case of the Federal Trade Commission (FTC) and the insurance industry is particularly instructive in this regard. In the late 1970's, a staff economist from the Bureau of Economics at the Federal Trade Commission conducted a study that concluded that, for the most part, whole life insurance was not a good buy for consumers. Obviously, life insurance is a profitable product; one need only examine the incentives and commission structure for the sales of life insurance from most personal lines carriers and it quickly becomes intuitively obvious that life insurance is a product most carriers are very interested in selling. As a result, the industry lobbied Congress and a law was approved that banned the FTC from studying the insurance industry in the absence of a specific mandate from Congress specifying the issue to be studied.

In the pantheon of independent government agencies in Washington, the FTC is well respected. Banning them from researching an entire industry barring a special act of Congress authorizing the examination of a particular question concerning the industry is evidence of the significant political power wielded by the industry.

As has been discussed above in this paper, when the courts initially ruled that the sale of insurance was interstate commerce in the 1940s, at that time the industry preferred that insurance regulation remain the purview of the states. As a result of their lobbying, the McCarran-Ferguson Act became law. In many ways, this act has served the industry well and generally preempted deep federal involvement in the regulation of the industry. The McCarran-Ferguson act itself basically holds that federal law should not be construed to preempt state law "regulating the business of insurance". It has also been noted by the courts many times that since the term "business of insurance" is not followed by any modifying or limiting language, the term is to be given a very expansive reading and is meant to cover most aspects of the industry, even those persons participating in such an agreement are immunized from the operation of antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under agreement.


30 Newspaper Preservation Act of 1970, 15U.S.C.§§1801-04 (2000) (granting limited exemption for joint operating arrangements between newspapers to share production facilities and combine commercial operations, provided that newspapers retain separate editorial and reporting staffs, determine their editorial policies independently, and so long as one newspaper party to the joint venture is classified as failing).

31 Small Business Act, 15U.S.C.§§631-57 (2000) (granting the Small Business Administration authority to, after consultation with the Attorney General and the Chair of the FTC, and with the Attorney General's prior written approval, approve any agreement between small business firms providing for a joint program of research and development if the Administrator finds that such program will "strengthen the free enterprise system and the economy of the Nation"). To the extent the President has delegated his authority under section 640, the DOJ may also be asked to approve--on the Attorney General's behalf-- proposed voluntary agreements or programs among small business concerns to further objectives of the Small Business Act found to be in the public interest as contributing to national defense.


35 15 USC § 1012(b) at 47(B)
aspects only tangentially related to the actual issuance or sale of insurance policies. After the passage of the act, there was some argument as to how and to exactly what extent the McCarran-Ferguson Act goes in preempting federal law in favor of state law and whether dormant commerce clause scrutiny could be used in order to apply federal laws that were silent as to the insurance industry. This doubt was essentially definitively resolved in 1981 when the Supreme Court ruled that the meaning of the words,

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States,

eliminated all room for dormant commerce clause analysis and henceforth, in the absence of specific language by Congress indicating that a particular statute was meant to address the insurance industry, a federal statute does not reach the industry. Since that time, McCarran-Ferguson has been successfully used to preempt Racketeer Influenced and Corrupt Organizations Act (RICO) actions brought against insurance companies, and actions brought under the Employee Retirement Income Security Act (ERISA). Even situations where state insurance regulation has arguably interfered with foreign policy, state law preempts federal policy, and it has been held to place the contractual arrangements between insurers and foreign reinsurers beyond the reach of federal statutes, taxes deliberately designed to burden interstate commerce, federal tax liability for the benefit of policyholders, and federal consumer protection statutes. One of the few areas where the McCarran-Ferguson has not favored state law over federal law is where one of the subsections of the act itself specifically empowers banks in small towns to sell insurance products, and this section of the act has been held to preempt state law that forbid such a practice. A careful examination of this case points out the significance of whether regulation occurs at the state level or the federal level. Whether banks in small towns sell insurance is probably of no great significance to the financial well being of the United States. The state law in question probably had more to do with a desire by independent insurance agents to limit potential competition created by that financial regulation. However, whether or not banks in small towns are able to sell insurance may actually be of great significance to small town independent insurance agents and certain bankers. Arguably, this particular law indicates that bankers had more significant political leverage in Washington DC, while independent insurance agents had more influence in state capitals.

As can be seen from above, this state-based regime of insurance regulation that began in 1871 has essentially remained intact. Whether this is beneficial or harmful is a debatable

37 15 USC § 1011
43 General Motors Corp. v. Tracy, 519 US 278 (1997)
44 U.S. Department of the Treasury vs. Fabe, 508 US 491 (1994)
point, as one could argue that this regulatory competition will produce a race to the top, as perhaps the consensus view among corporate law commentators holds occurred in the competition for corporate charters, which Delaware seems to have won, or one could argue that it has produced a chase to the bottom, as other commentators argue has occurred in the field of trust law.\textsuperscript{48} Whether one wishes to view insurance regulation as the product of a robust competition between regulators or as a chase to the bottom, there are certain unique features to this type of regulatory regime that must be acknowledged. First, it has placed the regulation of a very significant industry squarely in 50 various state capitals, and secondly, by law, states are allowed to regulate for the benefit of certain companies, and to the detriment of others.\textsuperscript{49}

The continuation of this nineteenth (19\textsuperscript{th}) century policy has several significant outcomes. First, it does have the advantage for the industry of protecting them from the potentially ruinous damages that can come from a RICO prosecution. However, many of the abuses of civil RICO applications, such as using it in conjunction with divorce actions, has been curbed. So this protection may be of less value that it was in the 1980s and 1990s. Whether an insurer is better off under state or federal laws concerning consumer protection is a question that is probably answered differently in fifty different states. However, it does seem to create a regulatory regime that can significantly increase the transactions costs for an insurer doing business in multiple states. As has been pointed out by several commentators, the failure to finance a significant lobbying arm has been highly detrimental to several companies and has forced them to recover from significant adverse rulings. Maurice Stucke details the story of Microsoft and their almost complete lack of any lobbying activity prior to the antitrust allegations that were made against them, and the extremely well funded and financed lobbying arm they now deploy.\textsuperscript{50} The choice to generate the bulk of the federal insurance regulation at the state level forces an insurer that does business in multiple states to finance and deploy multiple lobbying efforts. It is also not at all unlikely or difficult to imagine that state insurance regulators are not adverse to manipulating regulation in such a way as to support small local insurers to the detriment of large national insurers.

Various Proposals for Insurance Regulation Reform the Players and Their Positions

In attempting to assess the various proposals for insurance reform, we begin by assuming that those attempting to influence the regulatory process are rational and aware of their interests. Therefore, we will assume that the coalitions that form around varying different proposals exist because the proposals advance the interests of the constituencies supporting them.\textsuperscript{51} We also assume that the actors have weighed out the various costs and benefits of the proposals as opposed to existing law and have made a rational choice as to support the status quo or push for change.

Beginning with these assumptions, we have identified three basic proposals backed by three different constituencies. First, the insurance commissioners and state regulators back the


\textsuperscript{49} Compare here Western and Southern Life Insurance Company v. California State Board of Equalization 451 U.S. 648 (1981) to Metropolitan Life Ins. Co. v. Ward, 470 US 869 (1985) Showing the limits of this doctrine, while a law may discriminate in favor of one class of insurance over others a legitimate state purpose must be shown for this discrimination, too simply favor instate companies over out of state companies is not a legitimate state purpose

\textsuperscript{50} Stucke, Maurice, Better Competition Policy, St. John's University Law Review, vol.82 952 at 955-958 (2008)

\textsuperscript{51} This is very standard assumption made in the studying the political economy of any regulatory regime for a fuller discussion see Mancur Olson, The Logic of Collective Action
continuance of the status quo. Second, a series of proposals that would establish an Office of National Insurance in the Department of the Treasury which would essentially federalize the regulations of the insurance industry and allow nationwide operation subject to a federal charter. Third, a proposal for the allowance of dual chartering in which an insured could either opt for state chartering or receive a national charter.

There are multiple forces aligned behind the maintenance of the status quo. It seems the two biggest classes of players in this area are the various different state insurance regulators and those who benefit in a particularly significant way from selling insurance products that require protection from federal regulation of one sort or another. For example, if my product barely skirted the RICO laws, a firm might be comfortable in selling this product in low liability states such as Montana, but might be far less comfortable selling this product on a national level. One would suspect that for the most part, these particular companies are not extremely well financed and will probably not be major players in this particular game. One also suspects that certain smaller insurers who at the current time benefit from some form of favorable regulation in a particular state will also oppose change. These firms will mainly be those that benefit from various regulations that tend to close certain markets or segments of markets to larger competitors. Again, for a firm that this type of protection is of critical importance, the cost of the lobbying game in Washington will probably make it difficult for them to play. However, the National Association of Insurance Commissioners is also opposed to significantly altering the status quo. There is no surprise here as bureaucrats rarely see any great benefit in reducing the significance of their agency. Some of the hardest fought battles in the world of antitrust have very little to do with policy of antitrust enforcement, and have much more to do with a battle between the FTC and the Department of Justice over which agency will take the lead in enforcing and developing antitrust policy. One can expect a skilled and significant opposition from the current state-level insurance regulators. Nor should this opposition be taken lightly. It should be remembered that this organization was founded in 1871, and even succeeded in blunting the New Deal drive to federalize the regulation of the insurance industry. As members of both parties hold the position of insurance commissioner, it should also be noted that this organization has significant influence in both political parties. For these individuals, this is essentially a fight about turf protection and one should expect them to put up a significant fight.

It has been detailed in the literature before that larger insurers have not always been solid opponents of federal preemption in regard to the regulation of the industry. This inclination is thought to be primarily motivated by a desire to ease compliance burdens by being subject to one uniform set of regulations rather than 50 varying regulatory regimes. This theory of the benefits has often been contested by those espousing the theory of regulatory competitions, which has arguably produced a superior body of corporate law developed in the state of Delaware.

53 For an example of this type of proposal see S.2509
54 See Treasure Department OFC Proposal of March 31, 2008
Framing a Proper Open Ended Question

What is critical here is that a question about the above facts be framed such that a student who has achieved a relatively high level of cognitive functioning will be able to display this and, at the same time, a student with a relatively low level of cognitive functioning will be able to understand the question. The question must be one that allows students to display a grasp of the various skills required at the different levels. This is a more difficult task than it might at first seem. An essay question that can be answered by simply repeating the information above will give no chance for a student operating at a higher level to demonstrate his ability to do so. It is often useful to give specific instructions that relate to each and every level of the model described in the introduction. Examples of questions that could be asked are described in the table below.

Table 1

<table>
<thead>
<tr>
<th>Step 0</th>
<th>Step 1</th>
<th>Step 2</th>
<th>Step 3</th>
<th>Step 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the McCaran-Ferguson Act?</td>
<td>What have you learned about insurance</td>
<td>What assumptions and biases impact your</td>
<td>What priorities do you give to the various</td>
<td>As you attempt to develop a answer to the</td>
</tr>
<tr>
<td></td>
<td>regulation?</td>
<td>decision?</td>
<td>factors used in making your choice of</td>
<td>question, &quot;Should the regulatory structure of</td>
</tr>
<tr>
<td></td>
<td>When was the act passed?</td>
<td>Evaluate the above evidence and explain the</td>
<td>solutions?</td>
<td>the insurance industry be changed?&quot; what</td>
</tr>
<tr>
<td></td>
<td>Is insurance regulation done by the states</td>
<td>issue from a variety of perspectives?</td>
<td>Why do you believe these are the appropriate</td>
<td>additional information would you want to</td>
</tr>
<tr>
<td></td>
<td>or the federal government?</td>
<td></td>
<td>priorities?</td>
<td>gather?</td>
</tr>
<tr>
<td>What proposals exist for changing</td>
<td>What theories and evidence were described</td>
<td>What are the various perspectives about</td>
<td>Do you anticipate any disagreement with</td>
<td></td>
</tr>
<tr>
<td>insurance regulation?</td>
<td>above to help you reach your conclusion?</td>
<td>reforming insurance regulation?</td>
<td>your proposal?</td>
<td></td>
</tr>
<tr>
<td>What is the Federal Charter Option?</td>
<td>Why might different parties have different</td>
<td>How did you organize your analysis to reach</td>
<td>How would you deal with different</td>
<td></td>
</tr>
<tr>
<td></td>
<td>opinions on this issue?</td>
<td>your conclusion?</td>
<td>assumptions and biases of the other</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>interested parties?</td>
<td></td>
</tr>
</tbody>
</table>

As you attempt to develop a answer to the question, "Should the regulatory structure of the insurance industry be changed?" what additional information would you want to gather?

Why does this additional information matter?

What might cause you to change your position?
A question can then be formulated that asks, based on the information described above, "Should the regulatory structure of the insurance industry be changed?", combining one or two questions from the above table. For example, a question might read, "Based upon the above information should the regulatory regime faced by the insurance industry be changed and how? In answering this question, be sure to explain what the McCarran-Ferguson act is, when it was enacted, what you learned about insurance regulation from the information, what different parties will be concerned about the issue of whether insurance regulation should be changed, what assumptions and biases impact your decision, what are the varying perspectives concerning insurance regulation, what factors did you use in reaching your conclusion, why did you prioritize the factors the way you did in reaching your conclusion, how would you deal with the assumptions and biases of the other interested parties, and what additional information would you need to make your decision and why does it matter?" One need not be concerned about giving too large a hint to students as they are not able to answer questions that require critical thinking skills beyond their cognitive functioning level and they will recast the questions at their level.

An instructor is free to assign whatever weight he/she wishes to the various parts of the question above and need only develop a rubric where he/she can mark whether each part of the above question was answered satisfactorily. The grading rubric might look like the one presented below in table 2.
As can be seen from the above, as an instructor is grading one of the essays, it is quite simple to mark whether a student has adequately dealt with each part of the question above. It is important to note that undergraduates will typically not do well on anything beyond step 2, so the instructor can weight each portion of the question appropriately to make the grade reasonable. A student's placement on the Steps to Better Thinking matrix and their grade on the paper need not be linked.

**Conclusion**
This paper is meant to illustrate how some information that it is useful for students in
insurance programs to learn can also be linked to critical thinking assessment, and, hopefully, the
goal that was meant to be achieved in the beginning of this paper has been met. This method
was designed to achieve useful and mandated baseline data on our students and at the same time
make sure the gathering of this information does not adversely impact the teaching of discipline
specific course knowledge.
CASE STUDY IN THREATS OF WORKPLACE VIOLENCE FROM A NON-SUPERVISORY BASIS

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Abstract

Workplace bullying literature and attribution theory approach workplace incidents as stemming from a supervisory origination; however, the high incidents of workplace violence in the media in recent years indicate that this topic should be explored from a peer basis as well. This case study explores legal and ethical issues concerning employees who bring weapons to work and the psychological effect of that on other employees. Appropriate managerial action and the risk of inaction when this occurs is also broached in the literature review. Violence prone employment scenarios are highlighted, and potential negligent hiring and negligent retention causes of action are discussed. Proactive solutions such as training annually are recommended.

Questions to promote further thought and discussion are provided in the appendix.

Keywords: peer bullying, threats of workplace violence

Overview

Peer bullying and threats of workplace violence are examined in this case study. The consequences of inaction by management when faced with a threat of violence at work and

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negligent hiring, negligent retention, and other potential causes of action due to employer negligence are discussed. Proactive solutions such as training to prevent violence and preventing negligent hiring are offered, and employment scenarios that are particularly vulnerable to violence are identified. This case study and accompanying literature review suggests that threats of violence from female employees towards male employees may frequently be ignored because of gender stereotyping.

**Workplace Violence**

Although this case study involves a female employee threatening a male coworker, Chavez (2003) reviewed a 280 case sampling of internal workplace violence incidents and confirmed in that workplace violence is a vengeful act overwhelmingly carried out by men. The author posited that workplace violence has continued because employers have failed to address some of the more obvious organizational factors that could prevent this activity. These include “weak and nonexistent policy against violence; inadequate employee acquisition, supervision, and retention practices; inadequate training on violence prevention; and no clearly defined rules of conduct” (p. 6) amongst other inept practices. Workplace violence represents the extreme instances of workplace issues that can traumatize individuals and organizations with longstanding personal and professional effects.

**Legal Issues and Solutions Concerning Workplace Bullying**

Connolly (2006) confirmed that an employer can sometimes be found liable for claims relating to bullying, harassment, and stress. This holds when an employer knew or ought to have known that the workplace was unsafe or that the employee was at risk and did not do anything to intervene.
Von Bergen et al, (2006) confirmed that the legal implications of workplace incidences such as bullying are in its early stages but making progress in terms of lawsuits and prospective legislation in the U.S.

The information and opinions in the following paragraphs regarding legal issues and solutions do not constitute legal advice. Laws vary based on jurisdiction and can change rapidly as new legislation or a new court decision could change the law or the way the law is interpreted. Consultation with an attorney licensed in the appropriate jurisdiction is highly encouraged if an incident of workplace bullying occurs. The victim and the employer should hire separate legal representation.

Case Scenario: “Mrs. Z”, Threats of Workplace Violence

Mrs. Z. worked at a law firm in downtown Memphis, Tennessee and frequently brought a gun to work in her purse because she worked late hours and had to walk to her car alone in the dark. She was the lowest producer of billable hours in the law firm. Shawn was the highest producer and was likely to be made partner soon. One day, she noticed that Shawn was working late, too. As she walked by his office, she commented that if he produced any more billable hours for the day, she would shoot him with the gun that was in her purse. Shawn reported the exchange to his supervisor, a partner in the law firm. After an investigation, the partner discovered that Mrs. Z. did have a gun in her purse at the time. Mrs. Z. claimed that she was joking with Shawn. The partner told her not to bring her gun to work anymore. No further action was taken against Mrs. Z. Shawn stopped working late, produced fewer billable hours, and began locking his office door during business hours. Other co-workers also started locking their doors. Instead of remaining at the law firm and becoming a partner, Shawn changed jobs within a few months.

The scenario above is based on an experience observed by one of the authors while working in a legal office environment. Names and some details were changed to protect identities. In this
section of the paper, the authors will explore how the scenario could have been handled better and the employers’ options in trying how best to manage office bullies and the rights of employees who are the victims.

The information and opinions in the following paragraphs regarding legal issues and solutions are not intended to be a source of legal advice. Anyone who is considering creating a training course for dealing with legal issues concerning workplace violence or is experiencing problems like those discussed in this article should seek legal counsel with an attorney licensed to practice law in the applicable jurisdiction.

**Consequences of Inaction by Management**

First, the authors posit that an employer has to act quickly to address issues of workplace bullying. Perhaps in the above scenario, the employer should have increased security or installed metal detectors to make other employees feel comfortable. Instead of doing this, the employer created a rule that no guns were allowed at work. Without a way to determine enforcement, this rule was not that helpful to Shawn. In fact, he still feared that Mrs. Z. had a gun in her purse at work. As the scenario indicates, one of the risks of doing nothing or not doing enough to make the other employees comfortable at work is that the best employees might leave because no one will want to work in a stressful office environment where physical harm is possible.

Also, as noted by Viollis et al. (2005), “…numerous federal and state statutes [including the Violence Against Women Act and the Occupational Safety and Health Administration Act of 1970] establish a duty of care on the part of [some] employers with respect to workplace violence” (p. 65). Therefore, an employer who fails to act promptly upon receiving notice of a
threat of violence risks liability if an incident occurs. Ideally, an employer should be prepared before violence or problematic behavior occurs.

Could the lack of inappropriate managerial reaction in the case study also be attributed to the gender of the aggressor? Chavez (2003) found that acts of violence are usually committed by males. The authors posit that threats of violence by women may not be taken as seriously in the workplace because of gender stereotyping.

**Training to Prevent Violence**

Taylor (2007) suggested “workplace violence prevention training” (p. 29) for all employees and especially for managers. She also recommends prompt responses to all threats or violent actions. Training such as this would have helped prepare the partner in the law firm to respond better to Shawn’s concerns. When a mechanism to deal with violent threats is in place beforehand and all employees are trained on the definitions and consequences of inappropriate behavior, such as bullying, the management and the victim will feel more comfortable. These employees may be more likely to remain with the employer than if they were left to deal with the situation on their own. The training should cover issues such as: How can an employer deal with an office bully in an equitable fashion? What if the employer is afraid of the bully too? When is termination necessary? What are the consequences to all parties (the bully, the victim, the manager, and the morale of other co-workers)? What are the rights of employees who are the victims of office bullying? What remedies will management offer victims of office bullying and other forms of harassment to increase their morale? (Examples could include a transfer of the bully or victim to a different department or increased security personnel or security cameras.)
A Canadian Perspective

Canadian employers are also concerned about workplace bullying and the legal issues surrounding these incidents. According to Viollis et al (2005), a 2003 law punishes employers who are negligent in taking “reasonable steps to prevent workplace accidents and violence” (p. 67) with criminal sanctions including jail time. To address this, Heeney (2007) recommended that Canadian employers create a policy that deals with harassment issues such as “gossiping, bullying, and inappropriate behavior towards coworkers/subordinates” (p. B15). He also advocated for training for both management and employees and for processing employee complaints through an investigative point of contact.

Preventing Negligent Hiring

Employers can also proactively avoid instances of workplace violence and harassment by using a vigilant hiring process. Negligent hiring on this issue has become a source of liability for employers. Therefore, if employers ignore this liability while hiring new employees, it can lead to increased costs down the road if injured employees, customers, or tenants sue the employer (Viollis et al, 2005). Beyond worker’s compensation or damages for physical and psychological injuries, costs could include “business interruption, consultant fees for added security crisis communications, critical incident stress management, executive protection, pre-litigation support interviews, and organizational rehabilitation” (p.70).

This author also posits that societal anxiety and stress rise upon hearing about incidents involving workplace violence even if they occur at another place of employment or in another state. Instead of focusing on work or improving their lives, people worry about critical incidents happening to them or to their family members. The cost to productivity at a societal level is
difficult to capture but could increase or impact more people each time an incident occurs and is publicized. Hypothetical examples would be the Columbine High School bombing in Colorado impacting a middle school teacher in Florida who is suddenly afraid to go to work, the New Life Church shooting in 2007, also in Colorado, affecting a minister in New Hampshire who begins carrying a panic button while at work to call the authorities if needed, or the University of Alabama-Huntsville 2010 shootings at a faculty department meeting prompting an increase in anxiety among college faculty who read about the story in the newspaper.

**Negligent Retention and Other Causes of Action**

Beyond negligent hiring, employer liability for injuries due to negligent retention should also be a concern. According to Viollis et al. (2005), continuing to employ someone after “the employer becomes aware or should have become aware of problems with an employee that indicated his or her unfitness” (p. 66) could be grounds for negligent retention. They also suggested that other grounds for liability include “negligent supervision of employees, improper or inadequate training regarding workplace violence, or the negligent failure to provide adequate security or maintain a safe work promises” (p. 66).

**Violence-Prone Employment Scenarios**

Certain employment situations are more at risk than others for critical incidents. According to Kondrasuk et al (2001), employees who, during the course of their employment, often interact with people are more at risk if they have a history of committing violence. Examples include “police officers, nursing home care givers, daycare attendants, or housing inspectors” (p.187). To expand on Kondrasuk et al’s conclusions, the authors posit that those who work with children,
dependant adults, or the elderly should be carefully screened prior to employment for previous acts of violence because children, dependant adults, or elderly citizens may not be able to report incidents of violence or may fear retribution from the attacker or others if they report it. Another employment scenario at high risk for violence, according to Viollis et al. (2005), occurs when employees are terminated and are asked to train their “overseas replacements” (p. 66) before leaving. This involves people who are being fired actually training the persons who will replace them because the replacements have less knowledge about the job and are ironically unable to do the work without this help.

**Summary Statement**

In conclusion, all employers should be prepared for workplace violence by having a training system in place for employees and management (Taylor, 2007). Certain fields or jobs may be more at risk, so employers whose employees deal with the public should be especially vigilant. (Kondrasuk et al. 2001; Viollis et al. 2005) Complaints should be dealt with promptly and any threats responded to quickly so that employers can avoid potential liability and increased costs associated with workplace violence. A study by Van der Ploeg et al. (2003) showed that experiencing chronic stress at work can lead to either growth or morbidity at an individual level. Could the risk of morbidity also apply to institutions or work groups as a whole if nothing is done when faced with threats of violence at work? The authors recommend that employers should consult with legal counsel when planning a training program on this issue and when complaints of possible workplace violence are received. No workplace is immune to violence, so employers should be ready to respond to threats of violence before they occur to limit potential liability and disruption of the work environment.
References

Appendix
Case Scenario: “Mrs. Z”, Threats of Workplace Violence
Application for Curriculum Integration
To use this scenario in class, the instructor could use the following questions for small group discussion or ask students individually:
1. If you were the partner in the scenario, how would you have addressed the situation with Mrs. Z.?
2. How would you have helped Shawn deal with the threat against him?
3. Would you have taken the threat seriously or as a joke?
4. What additional measures, if any, would you have taken to make the workplace environment safer? If you were Shawn, what would you have done?
5. Do employees have a right to bring a gun to work to protect them when walking to and from work? What about employees who keep guns in their cars? What weapons, if any, would be permissible? What about pepper spray?
6. Do employers and/or employees have the right to arm themselves or to keep a gun at work to protect themselves from angry clients, abusive spouses, or the public? In what situations would this be appropriate? Examples could be a divorce law attorney, the director of a battered women’s shelter, or someone who works in a bar or strip club.
7. Is there a difference between a manager and an owner keeping a weapon in the office for security or an employee bringing a weapon to work? Why or why not?
8. If an employee has a black belt in a martial art, would that be similar to bringing a weapon to work? Why or why not?
9. Should employers ban guns from the premises including the parking lots even if the office is located in a bad neighborhood?
10. Have you ever experienced a similar scenario at work? Do you know of co-workers who bring weapons to work or leave weapons in their cars? Have you ever brought a weapon to work or left one in your car? If so, what type of weapon did you bring? Why?

11. What jobs or scenarios would be at high risk for a critical incident?

12. What are the costs of workplace violence listed above? Can you think of additional costs of workplace violence?

**Small Group Activity: Workplace Violence Prevention Training**

To design a training program educating employees on the prevention of workplace violence, include answers to the following questions:

1. How can an employer deal with an overt or latent office bully in an equitable fashion? What if the employer is afraid of the bully, too?
2. When is termination necessary?
3. What are the consequences to all parties (the bully, the victim, the manager, the morale of other co-workers)?
4. What are the rights of employees who are the victims of office bullying?
5. What remedies will management offer victims of office bullying and other forms of harassment to increase their morale?
6. To whom will complaints be submitted? What is the process and timeline for investigating a complaint?
7. What methods will you use to reduce the liability of your company to instances of workplace violence?
THE SUPREME COURT’S RECENT RETALIATION RULING
AND THE IMPLICATIONS FOR EMPLOYERS

Richard Coffinberger*

Beginning in 2006 when the Supreme Court broadly defined actionable retaliation under Title VII as any employer conduct that is so "materially adverse" to a plaintiff that it would "dissuade" a reasonable employee from pursuing a discrimination claim\(^1\) and also in 2009 when the Supreme Court ruled that the anti-retaliation provision of Title VII extends to people who speak out, not just on their own initiative, but when prompted by an employer's internal investigation\(^2\), the Supreme Court of the United States has continually expanded the reach of Title VII to protect workers from employer retaliation in the workplace. In its current term, the Court was provided another opportunity to expand the reach of Title VII prohibitions against employer retaliation.\(^3\)

The anti-retaliation Title VII of the Civil Rights Act of 1964 states:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."\(^4\)

All four of the U.S. Circuit Courts of Appeal that have considered the issue have held that Title VII does not permit third parties to file suit under this provision.\(^5\) However this year on January 24\(^{th}\), the U.S. Supreme Court unanimously held in that an employee who does not directly engage in protected activity can still assert a claim for retaliation under Title VII of the

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\(^3\) 131 S. Ct. 863 (2011).


Civil Rights Act. This paper examines the Court’s ruling in Thompson v. North American Stainless, LP\(^\text{6}\) and its implications for employers.

**CASE BACKGROUND**


Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging illegal gender discrimination by her NAS supervisors. On February 13, 2003, the EEOC notified NAS that Regalado had filed a gender discrimination charge against her supervisors. Approximately three weeks later, on March 7, 2003, NAS terminated Thompson’s employment. When Thompson was terminated by NAS, it was widely known that he was engaged to Regalado. Thompson claimed that he was terminated in retaliation for his then-fiancée’s EEOC charge. Conversely, North American Stainless contended that Thompson’s termination was based upon performance deficiencies.

Thompson filed a Title VII retaliation charge with the EEOC\(^\text{7}\), which conducted an investigation and found “reasonable cause to believe that NAS violated Title VII.” After attempting unsuccessfully to get the parties to conciliate their dispute, the EEOC issued a right-to-sue letter to Thompson and then he filed suit against North American Stainless. NAS filed a motion for summary judgment which was granted by the United States District Court for the Eastern District of Kentucky.\(^\text{8}\) The district court concluded that as a matter of law Title VII does not permit third-party retaliation claims.\(^\text{9}\)

After a panel of the Sixth Circuit initially reversed the District Court citing the EEOC’s Compliance Manual, which provides that a person claiming retaliation need not be the individual

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\(^{6}\) 131 S. Ct. 863 (2011). Hereinafter referred to as *Thompson*.

\(^{7}\) *Id.*

\(^{8}\) 435 F. Supp. 2d 633 (ED Ky. 2006).

\(^{9}\) *Id.*, at 639.
who conducted the protected activity. Subsequently, the Sixth Circuit granted a rehearing en banc and affirmed the lower court’s decision by a 10-to-6 vote. The court reasoned that because Thompson did not “engag[e] in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado,” he “is not included in the class of persons for whom Congress created a retaliation cause of action.

Thompson appealed to the U.S. Supreme Court which granted certiorari and then unanimously reversed the Sixth Circuit and remanded the case to the trial court.

THE SUPREME COURT'S REASONING

The Supreme Court based its decision on the assumption that NAS fired Thompson in order to retaliate against Regalado for filing a charge of discrimination. It then explained the reasoning behind its ruling by case answering the following questions in order: first, “did NAS’s firing of Thompson constitute unlawful retaliation?” and second, “if it did, does Title VII grant Thompson a cause of action?”

In answering the first question, the Justices relied upon its 2006 holding in Burlington N. & S. F. R. Co. v. White in which it held that Title VII’s anti-retaliation provision prohibits any employer action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The Court then stated “we think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.” While not disputing that Thompson’s termination met the standard established by the Court in its Burlington decision, NAS argued that permitting third parties to sue for retaliation would “lead to difficult line-drawing problems concerning the types of relationships entitled to protection.” and would place an “employer at risk any time it fires any employee

10 Thompson v. N. Am. Stainless, LP, 520 F.3d 644, 647-48 (6th Cir. 2008).
11 567 F. 3d 804 (2009).
12 Id., at 807–808.
14 The decision was 8-0. Justice Elena Kagan did not participate in this case.
16 548 U. S. 53 (2006),
17 Id., at 68.
19 Id.
who happens to have a connection to a different employee who filed a charge with the EEOC”\(^\text{20}\). The Court acknowledged NAS’ point but countered that “we do not think it justifies a categorical rule that third-party reprisals do not violate Title VII.”\(^\text{21}\) The Court then expanded on its reasoning by stating “given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII’s anti-retaliation provision is simply not reducible to a comprehensive set of clear rules.”\(^\text{22}\)

The Justices then addressed what it called the more difficult question of whether or not Thompson could sue NAS for its alleged violation of Title VII’s anti-retaliation provisions. The court first noted that, for Title VII standing purposes, the term “person aggrieved” must be construed more narrowly than the outer boundaries of standing under Article III of the U.S. Constitution\(^\text{23}\). However, limiting “person aggrieved” to the person who was the subject of unlawful retaliation is an artificially narrow reading.\(^\text{24}\)

The Court said that adopting a common usage of the term “person aggrieved” avoids both of these extremes. It went on to note that the Administrative Procedure Act\(^\text{25}\) which authorizes litigation to challenge a federal agency by any person “adversely affected or aggrieved” within the meaning of a relevant statute, establishes a regime under which a plaintiff may not sue unless he “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” The Court held that Title VII’s term “aggrieved” incorporates that “zone of interests” test enabling suit by any plaintiff with an interest arguably sought to be protected by the statute while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to Title VII’s statutory prohibitions.

Applying the “zone of interests” test to the case at hand, the Court concluded that Thompson falls within the zone of interests protected by Title VII. The Court then noted that “Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from

\(^{20}\) Id.
\(^{21}\) Id.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Id.
\(^{25}\) 5 U. S. C. §551 et seq.,
their employers’ unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an
accidental victim of the retaliation. To the contrary, injuring him was the employer’s intended
means of harming Regalado. Hurting him was the unlawful act by which the employer punished
her. In those circumstances, we think Thompson well within the zone of interests sought to be
protected by Title VII. He is a person aggrieved with standing to sue.”

**IMPLICATIONS FOR EMPLOYERS**

In January of this year, the United States Equal Employment Opportunity Commission (EEOC) released statistics which confirm that more discrimination charges were filed in fiscal
year 2010 than in any previous fiscal year in the EEOC's history. Concurrently, retaliation
claims in the workplace have increased dramatically since the Supreme Court’s decision in
*Burlington Northern v. White* The EEOC’s 2010 statistics reveal that, for the first time,
retaliation claims surpassed race discrimination claims to become the most common type of
claim made when a charge is filed with the EEOC. Retaliation claims constituted 36.3% of the
charges filed with the EEOC in 2010. This dramatic increase in retaliation claims should be
particularly disconcerting for employers because retaliation claims carry with them damages
essentially identical to primary discrimination claims. In addition, since an employee can lose
his or her primary discrimination claim while prevailing on a retaliation claim, retaliation claims
provide another attractive option for employees to pursue in the effort to recover monetary
damages from their employers.

The Supreme Court emphasized that Title VII prohibits “a broad range of employer
conduct,” and as a result that Title VII prohibits any employer conduct that “well might have
dissuaded a reasonable worker from making or supporting a charge of discrimination.” The
Court then explained that because it was “obvious” that an employee would not file a charge if
she knew her fiancé would be fired, the fiancé could sue the employer for retaliation even though

26 *Id.*
27 The fiscal year for 2010 ran from October 1, 2009 through September 30, 2010. EEOC statistics on retaliation
28 In total, the EEOC reports that 99,922 discrimination charges were filed with the agency during that time frame.
30 Examples include discrimination claims based upon race, gender and disability.
32 *Id.*
he had not actually filed a charge himself. However, the Court acknowledged that not every case would be so obvious. “Perhaps retaliating against an employee by firing his fiancé would dissuade the employee from engaging in protected activity,” the Court wrote, “but what about firing an employee’s girlfriend, close friend or trusted co-worker?” Since these types of relationships are common in the workplace, the answer to this question is critical to guide employers as they approach employee terminations and discipline as a result of the Thompson decision. Nevertheless, the Court declined to provide employers with anything but the most generic answer to the question, noting only that “firing a close family member will almost always” qualify as unlawful retaliation under Title VII, while “inflicting a milder reprisal on a mere acquaintance will almost never do so.”

With nothing more than this broad generalization for guidance, employers must wait for the lower courts to sort out the Supreme Court’s ruling to obtain more definite guidance on the scope the rule. Unfortunately, that process will take years. Until then, when disciplining or preparing to terminate an employee whose close relative has filed a charge, employers should use the same degree of caution they would use when taking action against an employee who had actually filed a charge. Employers should exercise similar caution when taking action against an employee who is a friend or confidant of an employee who filed a charge, as the stronger the relationship between the two employees, the more likely it is that an employee can assert a third party retaliation claim under the Supreme Court’s test.

33 Id.
34 Id.
35 Id.
36 Id.
COLORADO’S 2010 UPDATE TO THE MEDICAL MARIJUANA LAW: THREE PROBLEMS, THREE SOLUTIONS

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Abstract

In this paper, we will discuss the 2010 changes made to Colorado’s medical marijuana law. To that end, we will first discuss the history of marijuana use. Next we will briefly discuss the history and current trend in federal marijuana regulation. We will then examine Colorado’s recent modifications to their medical marijuana law. Next we will examine the possible costs and benefits of these changes. We will conclude with expectations for the future and a call for action.

Marijuana has a long history. That history got a lot more interesting in the last two decades. In 1996, California legalized marijuana for medical reasons (Behring, 2006). Colorado followed in 2000 (Perez-Pena, 2009; Segal, 2010). The premise: marijuana is an effective treatment for some people with chronic illness. Those patients should be able to choose marijuana as an alternative to more expensive medicines. The premise was simple. Writing a law which achieved that goal has turned out to be very difficult. In 2010, Colorado’s medical marijuana laws were amended for the first time (Livio, 2010).

In this paper, we will discuss the 2010 changes made to Colorado’s medical marijuana law (HB-10-1284). To that end, we will first discuss the history of marijuana use. Next we will briefly discuss the history and current trend in federal marijuana regulation. We will then examine Colorado’s recent modifications to their medical marijuana law. Next we will examine three key changes and the possible costs and benefits of these changes. We will conclude with expectations for the future and a call for action.

History of Marijuana Use

Despite popular belief, marijuana was not discovered in the 1960s. Marijuana has been used for thousands of years without a fatality (Cohen, 2009; Parloff, 2009; Walker & Huang, 2002; Welch & Martin, 2003). In that way, marijuana is safer than alcohol or aspirin. Numerous studies confirm effectiveness of marijuana as a pain reliever (Cohen, 2009). Marijuana creates a euphoria and relaxation, which is the reason it is so frequently used for recreational purposes. Many patients who suffer from chronic pain would benefit from medical marijuana just as they would from other pain medicines without the high cost or side effects of traditional painkillers.

Besides being a general pain reliever, marijuana has secondary effects which have special medical uses. Marijuana’s main chemical (THC) has a side effect of increasing hunger. Among recreational users, this is described as “the munchies,” an increased appetite which results in weight gain. This side effect has a great benefit for patients with wasting diseases like cancer, HIV, or multiple sclerosis (MS). Marijuana relieves nausea and improves appetite for those getting chemotherapy or other treatments (Gardiner, 2010). As a result, marijuana helps patients keep their food intake high so their bodies can continue to fight the illness. For example, medical marijuana advocate Aaron Scheible has lived three decades with HIV, and has stopped taking medicines except for marijuana (Livio, 2010).
However, marijuana has many harmful effects. Obviously, the influence of marijuana is like that of alcohol for those driving or operating machinery. Additionally, the prolonged consumption of marijuana is harmful to fertility (Brown, 2009). The effects/problems that did exist are now exacerbated. As a result of plant breeding, marijuana now is five times stronger than in 1970s (Economist, 2009a). As a result of these worries and others, rather than legalization, most advocates have favored heavy regulation of marijuana. For example, conservative icon William F. Buckley Jr. favored legalized but regulated marijuana (Vlahos, 2009).

The legal history of marijuana has also been a cultural myth. Many people assume marijuana has always been illegal. This is not the case. Many early Americans and Founding Fathers grew forms of hemp. In 1851, marijuana was regarded as a legitimate medical compound in America (Pharmacopoeia, 1851). Marijuana was sold in many compounds, often in liquid form to avoid the taboo of smoking. Even pharmaceutical giant Eli Lilly sold cannabis in early 1900s as a painkiller (Parloff, 2009).

The prohibition against marijuana did not start until 1937 (Vlahos, 2011) with the controlled substances laws. For three decades, marijuana was illegal but had little popular use and saw a low level of concern. That all changed with the drug culture of the 1960s. The prohibition dramatically increased with Nixon’s War on Drugs. America is in the fourth decade of the War on Drugs, and victory seems even more elusive. Marijuana and other drugs are more abundant and more inexpensive than before, the exact opposite of the goals of prohibition.

History of U.S. Marijuana Regulation

While nearly all Americans know that marijuana is illegal, most are surprised to learn that the federal government has and continues to give away marijuana to a select group of patients. The federal compassionate use of marijuana program has existed for a couple of decades. By 1991, due to political pressure, the program stopped admitting new patients. Today just four patients are left, and continue to get free, federally grown marijuana each month (Parloff, 2009). The University of Mississippi has the only federally approved marijuana plantation (Gardiner, 2010). Their supplies are sent to the four remaining approved patients.

In order to allow the benefits of marijuana use, but still proceed with the War on Drugs, the FDA encouraged the development of synthetic marijuana-like compounds. In 1985, FDA approved Marinol, a prescription pill of THC, the active ingredient in marijuana (Gardiner, 2010; Parloff, 2009). However, this medicine has a slow response (several hours after ingestion), is very expensive (over $1000/month), and takes a treatment period to work (often several weeks). Medical marijuana could save health care money, as pot is less expensive, reacts quickly, and patients respond on the first use (Parloff, 2009).

Current Federal Marijuana Regulation

Obama's administration promised to relax prosecution of medical marijuana cases (Dickinson, 2009). This might be the demise of our War on Drugs. Despite our forty year War on Drugs, the flow of drugs remains undiminished (Dickinson, 2009). And the collateral costs have continued to rise. Incarcerated drug offenders have increased 1200% since 1980 (Dickinson, 2009). Another unintended consequence of the War on Drugs is the enrichment of violent drug cartels. It has been estimated that legalized drugs would cut off 65% of Mexican drug cartel income (Dickinson, 2009). It is difficult to find a complete and utter failure than the War on Drugs.

Legally, medical marijuana remains in limbo. At a federal level, marijuana is a Schedule 1 drug, illegal to grow, purchase, sell or consume. During the Clinton and Bush Administrations, several states...
allowed sale of medical marijuana under various reasons. However, it remained illegal under federal law, and illegal under a majority of states. This left federal agents arresting marijuana sellers who were acting legally in their state. The conflict between state and federal powers continued until 2008. President Obama has decided to relax enforcement of the drug laws related to medical marijuana. Currently, medical marijuana is still illegal under federal law, it is just not being enforced by the federal authorities (Welch, 2009b). Enforcement has recently renewed, as federal authorities have initiated over seventy raids on medical marijuana clinics in fifteen states (Adams, 2011; Yardley, 2011). This makes the future of medical marijuana law impossible to predict.

**Colorado’s Medical Marijuana**

In the marijuana debate, there have been two opposing sides. One favored complete legalization, allowing commercial sale to anyone for any reason. The opposing side, reflected in federal law, prohibited all possession and sale of marijuana. California, Colorado, and a dozen other states sought a middle ground, allowing medical marijuana for patients with approved conditions while keeping it illegal for the general population. At least that was the theory behind Colorado’s law in 2000. Intentions are often difficult to translate into legislation.

From noble intentions, the current state of medical marijuana in Colorado is less respectable. Denver’s High Times, a marijuana supporting newspaper, has just initiated a Medical Cannabis Cup, similar to a state fair for marijuana (Ingold, 2011). Dispensaries are flourishing, and the internet is full of ads for easy doctor referrals.

Since 2000, Colorado’s law has led to three severe problems which will be discussed in this paper. First, the law allowed the number of dispensaries to grow without limits. Second, the doctor referral program was abused, leading to the impression that it had become de facto legalized. Finally, Colorado worried about a sea of untaxed money circulating in the state economy. Each of these problems was addressed by the 2010 amendments.

**Too Many Dispensaries**

Marijuana has certainly been a growth industry in Colorado. We will offer two examples to demonstrate this growth, Denver and Boulder. Denver has 279 medical marijuana dispensaries (Livio, 2010). By comparison, Denver has four times more dispensaries than Starbucks (Livio, 2010; Dokoupil, 2010). This does not count many “unofficial” dispensaries, which lack the official license to sell.

Boulder has over 100 dispensaries (Reuterman, 2010). Boulder has more medical marijuana dispensaries than Starbucks and liquor stores combined (Segal, 2010). This abundance has been a recent phenomena since there were no dispensaries until the 2000 law.

With the heightened competition, merchants are getting creative (Welch, 2009a). Now dispensaries are selling marijuana laced products like carmel corn, chocolate covered cherries, rice cake treats, and frozen pizzas. Dispensaries offer marijuana laced ice cream in dozens of flavors and enhanced soft drinks (Reuterman, 2010). Some medical marijuana dispensaries operate like bakeries, selling cookies, candy bars, muffins, even milk-shakes (Segal, 2010).

With intense competition selling identical products, dispensaries fight for market share. Many dispensaries are offering loyalty cards, with discounts and free products after a certain number of purchases (Segal, 2010). The Denver newspaper started a column to review to dispensaries for their readers, and got 400 applications for the journalistic job (Newman, 2010). The entire industry did not
exist (legally) until 2000, and now has become a huge impact on Colorado, leading many to complain of overcrowding in the market.

The web is filled with dispensary ads, with such names as Mile High Medical Cannabis, Ganja Gourmet, and Herbal Cure. An internet search for Denver dispensaries yielded 3,410,000 hits on August 31, 2011. Any reasonable person would conclude the market is very saturated.

**The Abuse of Doctor Referrals**

When the medical marijuana law was enacted, the expectations were that a small percentage of Colorado residents, those truly ill and in need would seek a recommendation for medical marijuana from their doctors. If only the truly needy patients were buying medical marijuana, the hundreds of dispensaries could not stay in business. With a large number of dispensaries, they must be selling to someone. Obviously there have been a large and growing number of patients. Two factors contribute to the rapid increase in medical marijuana patients. First, the recreational users of marijuana would seek fraudulent means to obtain legal marijuana, and avoid the risk of jail. Second, doctors who provide the recommendations are in a for-profit industry. As a result, they have a financial incentive to recommend medical marijuana, and gain more patients and income.

As of last year, there were 80,000 legal medical marijuana patients in Colorado (Livio, 2010). A large number, 53,000, work full time despite their “condition” (Potter, 2010a). No one on either side of the debate believes there are 80,000 terminal cancer patients in Colorado. The system is being abused, and it will only get worse. Colorado receives 1000 new patient medical marijuana applications each day (Livio, 2010; Reuterman, 2010; Segal, 2010). Nearly 55,000 applications are still pending, which would nearly double the number of legal pot buyers (Potter, 2010b). Because of backlog of applications, Colorado has allowed a person to use a notarized doctor approval as a substitute for state approval if the application is more than 35 days old (Potter, 2010b). With the large backlog, anyone can make an application and buy medical marijuana in the interim. Colorado’s system of screening and licensing legitimate patients has been abused and overwhelmed by sheer numbers.

How do potential patients convince doctors to write the recommendation? Use vague symptoms. Over 90% of patients cite “severe pain” as a justification (Livio, 2010). The pain does not have to documented, previously treated, or tied to any diagnosed condition. Severe pain has been the “magic words” that have allowed medical marijuana to flourish.

There are numerous other conditions which lack a definitive test to justify treatment. The newest growth area for medical marijuana is post-traumatic stress disorder (PTSD) (Frosch, 2010b). New Mexico has already approved medical marijuana for PTSD, and now it is the most common condition justifying the referral, even more than cancer (Frosch, 2010b). Even if the “severe pain” loophole would be closed, those who desire medical marijuana will find another vague term in the system to justify their treatment.

**No Tax Money for Colorado.**

This problem is fairly straightforward. Colorado, like most states, struggles for funds. The original medical marijuana law did not predict many people using the program. As a result, tax generation was not considered. Seeing 80,000 patients and for profit 400+ dispensaries, there is a great deal of tax revenue to be collected. Predictions vary widely, because the industry has emerged and grown all in the last decade. There are no long term data to make any estimates as far as potential tax
revenue. However, if there are more dispensaries than Starbucks, it is certain that a substantial tax on medical marijuana would generate significant revenue for the state.

The 2010 amendments to Colorado’s medical marijuana law were attempts to stop these three problems. The amendments addressed many other issues, which would beyond the scope of this paper. Those are discussed in the call for further research. We will now examine the design of the new amendments to see if they can achieve their goals.

**Limit the Number of Dispensaries**

The new amendments limit who may own a dispensary (C.R.S. 12-43.3-307). Felons are now prohibited from owning dispensaries (Segal, 2010). Limitations also include denying a license to anyone who does not have good moral character, the latter not being defined (C.R.S. 12-43.3-307-b). While the criminal record ban is intuitive, the undefined good moral character clause seems ripe for subjective enforcement.

Additionally, anyone who either makes recommendations (a physician) (C.R.S. 12-43.3-307-d) or works in law enforcement (C.R.S. 12-43.3-307-j) cannot operate a dispensary. These restrictions are an attempt to avoid an obvious conflict of interest in operating the medical marijuana dispensary. Interestingly, despite record abuse of prescription drugs, neither prohibition applies to owning traditional pharmacies.

Some of the restrictions seem to make little sense in order to limit or regulate the growth of medical marijuana. For example, a person who is behind on child support (C.R.S. 12-43.3-307-g-V) or student loans (C.R.S. 12-43.3-307-g-IV) cannot operate a dispensary. Nothing in published reports indicate a rash of child support deadbeats operating dispensaries, so it seems this was added more as a political statement than to fix an existing problem.

One significant limit on new dispensaries is to prevent any new residents of Colorado from owning one. Any owner must have been a Colorado resident for at least two years before applying for a dispensary license (C.R.S. 12-43.3-307-m). Is state residency an operational definition of “good moral character”? Is living out of state, then, by definition, bad moral character? These are interesting questions, however, they are outside the scope of this paper.

If a dispensary license is denied or lost, no one can apply for a license in that location or within 1000 feet of that location for a period of two years (C.R.S. 12-43.3-308-a). By denying a license, the state effectively makes that area a dispensary-free-zone for two years. Repeatedly denying licenses can effectively carve out a region of a city. Similar restrictions used against residences for sexual predators have effectively locked them out of certain cities. It is easy to see the potential of this happening in Colorado. Denver has recently denied a third of all dispensary applications (Livio, 2010).

Another attempt to limit dispensaries denies a license to anyone within 1000 feet of the primary campus of a college or university (C.R.S. 12-43.3-308-d). However, this restriction is more a nuisance than a restriction. A college in Denver could name their campus in Iowa as their “primary campus” and declare the Denver campus as a “satellite.” As a result, a Denver college could have a medical marijuana dispensary on every corner of campus with a simple name change. While we seriously doubt the Regents of the University of Denver are making such plans, it does demonstrate who easily these statutes can be circumvented by a creative dispensary advocate.
A large group of Coloradans desire to eliminate all medical marijuana. One section of the new amendments have made that a possibility. Under the new amendments, a Colorado city can restrict or completely prohibit dispensaries inside their city limits (C.R.S. 12-43.3-310-1). City governments have jumped into action to ban dispensaries in their communities (Ingold, 2010) (NPR, 2010). Vail has already banned dispensaries (Ingold, 2010). Aurora and Greenwood Village are considering ballot initiatives to ban dispensaries (Ingold, 2010).

Allowing a city-option of banning dispensaries seems to be an easy political compromise. Some state legislators might lack the convictions to ban dispensaries so they are passing that decision to the cities. By making the issue a city option, the state legislators do not have to pick a side on the medical marijuana debate. They can claim to support dispensaries (allowed at the state level) and claim to oppose dispensaries (allowing them to be banned by each city) at the same time.

Make Doctor Referrals Meaningful

One assumption of the original law was that doctors would be serious about restricting medical marijuana to those who were seriously in need. The overwhelming majority of Colorado doctors behaved in a responsible way. A small number of doctors account for nearly all the medical marijuana recommendations. One physician, Dr. Boland, saw 7000 medical marijuana patients in one year, working just three days a week (Segal, 2010). At this rate, it would only take eight doctors to make all the medical marijuana referrals in Colorado.

The new law prohibited doctors from having any financial relationship with a marijuana dispensary (Frosch, 2010a). It is interesting that this prohibition, which seemed so obvious in the marijuana issue, is ignored in other areas of medical practice. Nothing prevents a doctor from having financial relationships with medical equipment manufacturers or pharmaceutical firms. Only medical marijuana has prohibited this conflict of interest.

The 2010 amendments also required a bona fide doctor relationship (NPR, 2010). This was to avoid several internet based “medical offices” which briefly interviewed patients online and emailed them a recommendation, provided the patient paid the fee (around $200). With 131,000 active medical marijuana patients in Colorado in 2011, the medical community is competing for these patients (Pugh, 2011).

Searching the internet for Colorado medical marijuana doctors yielded 559,000 hits on August 31, 2011. Prices have dropped to a mere $60 for a medical visit for a marijuana diagnosis.

Stopping the internet medical offices may be an easy task. However, designing a regulation to stop the handful of questionable doctors physically located in Colorado who recommend medical marijuana to every patient they quickly shuffle through their office will be more difficult.

Generate Tax Money for Colorado.

One easy change was to make medical marijuana subject to the state sales tax. The city of Boulder made $74,000 in one quarter through the tax on medical marijuana (Reuterman, 2010). The ability to generate sales tax seems high. Again, predictions are difficult with an industry only in existence for ten years, but it should generate a significant amount of money.
Cities have also started licensing fees, similar to permits required for other industries. The City of Denver will gain $1.4 million in annual licensing fees ($5000 per dispensary) from medical marijuana dispensaries (Livio, 2010).

Along with the taxes are significant expenditures for regulating the industry. Without any history, it difficult if not impossible to predict whether medical marijuana would be a net gain or loss for the state. It is difficult to find a historical example where taxing an item then regulating it resulted in a net loss to the state. In those instances, most states respond by raising the tax. However, this is not a guarantee of revenue gain for Colorado. Only time will tell.

Nationally, sales of marijuana are estimated at $1.7 billion in 2011 (Pugh, 2011). Even a modest tax on this large an amount could generate significant funds. The current system is an improvement financially. At first, the industry was regulated but did not generate any revenue, so it was a net loser for the state. At least now the industry can at least be self-sustaining. Seeing the high demand for marijuana and the rapid desire of many to sell the product, there must be significant profit and therefore resulting in large tax revenues to be gained by Colorado.

Conclusion

If Colorado or other states wish to proceed with medical marijuana program, they should heed these problems and adopt workable solution. First, Colorado needs to limit the number of dispensaries. The market is far too saturated to exist on only the truly terminally ill patients. Second, Colorado needs to make doctor referrals meaningful. The relationship between the physician and the patient should be real and long lasting, based on concern for the patient, not an exchange of a referral for a price. Lastly, the medical marijuana system must be self-funding. Taxes should pay for the regulation and inspection of medical marijuana facilities, as well as maintaining and auditing the records for legitimate use.

If Colorado or any other state wishes to succeed with a medical marijuana program, it must learn from the mistakes of the early states. Without these changes, they will repeat the same mistakes, and suffer the same problems.

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THE CHALLENGES OF EMPLOYEES’ PARTICIPATION IN INDUSTRIAL SAFETY MANAGEMENT: A STUDY OF DREDGING INTERNATIONAL, PORT HARCOURT, NIGERIA.

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ABSTRACT
The study was a systematic investigation of the extent of employee participation in safety management in the service industry. It also examined the level of employee participation and the prospect of practicing safety in our work place. In carrying out the study, a representative sample size of thirty (40) personnel in the organization was used. They were administered with questionnaire. This provided the relevant data that are presented in tables using sample percentage as analytical technique. The findings are: (1) Employees in dredging international have shown very great concern for participation in safety management. (2) They are primarily interested in participation at all level. (3) The problems of employee participation are fear of status sharing, workers over demanding for industrial economic gains. Based on the foregoing, it was recommended that integrative participation is most expedient just as managerial regulation with consultation or joint consultation would serve a better decision making system.

Key Words: Industrial Safety, Employee participation, Dredging International, Nigeria.

INTRODUCTION
For most companies in the industrialized areas of the world, the time lost from injuries that occur off the job constitutes a greater problem than that lost from accidents while at work. A great majority of highway and non-occupational accidents, on the other hand are not homogeneous with regard to common variables. In addition most of such causes make it more difficult to introduce preventive measures. Consequently, in these areas, the impact of safety engineering has not yet been so great. However, the word safety has no single definition as it would vary from one situational application to another with respect to the working environment. According to Uchegbu (1998) safety is the state of being safe from danger of accident, injury, serious physical harm or some other form of injury or it is a state which every body would want to maintain at any time. Hence we apply certain rules and precautions in the public, homes and industrial environments. Similarly, Purdon (1990) in one of his modern approaches to safety affirms that safety is considered as a contact with source of energy such as electrical, chemical kinetic, thermal or ionizing radiation. Such an approach lends itself to control methodology. In this way, safety activities can be directed to pre-contact, contact and post contact stages of accident control. Logically, this means a safe place with greater stress on pre-control phase and stresses a close relationship of safety and environmental health disciplines.

As a corollary to the above assumptions, The Industrial Accident Prevention Association (2006), National Safety Council (1979) ascribed the various definitions of Industrial Safety as follows:
(a) Industrial Safety is the freedom from hazards or conditions that tend to cause harm, injury or damage in a production environment.
(b) Industrial or Engineering Safety could also be defined as the scientific analysis of the causes of accidental deaths and injuries in a given working environment and their elimination or reduction.
Since an industry more often than not consist of an engineering environment where scientific and technological knowledge are applied with tools, machines and materials for the production of goods and services for the consumption of the society safety concerns remain auspicious. Thus, an industry comprises of trained personnel (employees or workers) materials and machine or equipment, and therefore the need for employees keying into participation in Industrial Safety Management comes to play, since the trained personnel (employees) takes charge of total control or handling of the materials and machines or Equipments for the company operation to produce goods and services.

Graves (1986) also tries to elucidate further. In his view, employees’ participation in safety management in the manufacturing and allied industries is a developmental fact since the employees participation is concerned with checks to avert possible harm and damage to both lives, property and machinery.

There is a system of informing and educating staff on company's safety and environmental management performances. There is a good level of safety awareness evident in safety posters and signs being pasted at strategic places in the premises of Dredging International. In-house and external training are carried out quarterly. The theme for the third quarter of the year 2004- in the case of in-house are safe lifting using cranes and safe handling of gas cylinders", while that of external training involved "first aiders and fire fighters". There has been training programmes evident in the training schedule drawn for years 2001 and 2004. Generally, the safety consciousness of the generality of staff (employees) was judged to be good. The company has a written contingency plan and command structure in case, of emergency (see. HSE document)

National safety council (1979) reaffirm that Training exercises are the most important tool in keeping a contingency plan functionally up to-date. There have been simulated fire and hazardous material spill training exercises where emergency response personnel act out their duties. The exercises may be realistic enough, so equipment is deployed and communication gear is tested. These training exercises already established should be continued along with their frequency and means of evaluating their effectiveness.

A few general observations can be made concerning direct employee (worker) participation. One of the most interesting is that taken by certain groups of employees on safety management as reported by National Safety Council (1979) that safety management is the task of managers or safety officers. This view is apparent in the attitude of some union. It is termed the "safety implication of employees (workers) in the making of management decisions and junior staff employee doing a management job for no extra money.

In this sense, employee participative in safety management is largely behavioral rather than a structural organizational innovation. One of the primary influences on the success or failure of the system is, and will remain the willingness of safety managers to let it work (Rostentein 1983). In the same vein, Payne (1981) believed that setting working parties representing all grades of employees (workers) is more of participation. Their assertion infers participation at level of safety management, which confers full participatory characteristics on employees especially in direct form.
In view of the aforesaid views, and having attempted some conceptual clarifications, industrial safety management and employee participation could be described as,

1. The employee being trained to acquire knowledge and skill for carrying out his job effectively in the service industrial or
2. The act of an employee capable of managing all safety rule effectively to minimize personal injury and accident by way of personal contact between man and hazard in any working environment.

These considerations have influenced the establishment of safety in the service industries, Government parastatals and the multi-national companies around the world including Nigeria. Dredging international company in line with this development and employee training to meet the task ahead is done quarterly (Dredging International Company Safety Journal, 2006).

In the same vein, the rate of accidents in the manufacturing and allied industry in relation to man-hours worked declined by almost 80% actually in recent years in the advanced world apparently because proper safety control measures. This is not so in Nigeria with poor safety standards. Accidents occur in the industry without any pre-information, thus, it become necessary to put in place pre-incident measures to prevent injuries, death, property lost and damages within the working environment and outside the industrial premises. Such act leading to industrial accidents are given below:

1. Unsafe working practice, such as working with plant or heavy duty machines without clearance or permit from any supervisor or team leader, because the job could be a servicing machine while it is still rotating.
2. Failure to use personal protective equipment such as safety boot, eye Goggle, face shield, Helmet etc while working this can lead to greater risk on the employees, life.
3. Improper use of equipment, such as welding machine being use near working generator. For instance the lighting from the welding machine can Ignite the flames from the generator to cause out-break of fire.
4. Wrong Installation of electrical equipment can cause fire outbreak. (National Safety Standards, 2006).

Where an unsafe act is observed in a working environment, the only way to avert any accident is to stop the action, investigate the act, and instruct the employee on what to do, provide the correct protective equipment (PPE), send the employee for re-training on safety programme or change the employee. Unsafe condition is a condition at work which can lead to damage, injury or both. Such unsafe conditions include; the use of incorrect or bad tools and equipment, bad designs, bad clothing, unsafe work place, hazardous procedures etc. Against the backdrop of the aforementioned, this study is a concise attempt aimed at ascertaining the extent to which employees are allowed fully participate in the safety management in a typical service industry-Dredging International operating in Port Harcourt, Nigeria.

PURPOSE OF THE STUDY
The main purpose of this study is to ascertain the extent and level of employees’ participation in safety Management in the service industries. Generally, the broad objectives of industrial safety management and employee participation include the following:

- To examine the extent to which unsafe working practice could achieve the goals of accident-free and safe working environment.
- To determine the level of failure to use personal protective equipment and the rate
it affects industrial operations.

- To examine the level of improper use of equipment and determining ending ways of proper use of equipment
- To determine/recommend proper ways of electrical installation in service industries.

In conclusion, dredging international services Nig. Ltd is a multinational company rendering a wide range of integrated services to companies in the oil/gas and petrol-chemical industry in Nigeria.

Its range of services includes; Dredging, piling, Earth movement, slope protection, pipeline laying and outfalls while the operations undertaken at Port Harcourt base include: metal fabrication, loading and offloading operations to and from project sites, berthing of vessels and maintenance of Equipment. It is a limited liability company, which has its origin in Nigeria in 1992 when it was duly incorporated and is ISO certified (ISO 9000).

As one of the three major dredging companies operating in Nigeria, Dredging International services limited head office is based in Lagos with operational logistics base in Port Harcourt.

SIGNIFICANCE OF THE STUDY
The information in this research will provide or be of great importance to our homes, individuals, both national and international companies, and Government parastatals. The result of this study therefore will be useful in the following ways:

- The research study will explain policy of Dredging international company and the dividend in working on smooth and efficient safe working environment.
- The study will highlight the nonchalant attitudes of employee operators in the industries to be safety conscious.
- The study will make it possible for the government parastatals to have in depth knowledge of unusual safety practice by training employees, when compared with Dredging International Company.
- The research will provide ways for effective management of industrial safety problem.
- It will also be useful in the school laboratory, kitchen, and in the farm etc because equipment such as knife, matched and dangerous chemical in the laboratory are suppose to be handling with safety precautions.
- The study is going to benefit all Nigerians and including Dredging International Company Nig. Ltd.

RESEARCH QUESTION/HYPOTHETESSES
Having stated the problems of this study, it is important that certain basic research questions be raised. This will guide the work towards achieving the objective. The research questions will therefore include the following:

- Does unsafe working practice influence employee participation of Industrial Safety Management?
- Does failure to use personal protective equipment help the employees in Industrial Safety Management?
- What are the effects of improper use of equipment to the service industries?
In the same vein, having known the sub-problems from the main problems and formulated research question, it is necessary to formulate research or theoretical hypothesis and deduce a null or statistical hypothesis from it. These include the following:

1. There is no significant difference between unsafe working practice and employee participation.
2. There is no significant difference between failure to use personal protective equipment and the employee participation.
3. There are no significant differences between improper use of equipment and Hazard.

The above hypotheses can be also expressed mathematically.

\[ M_1 = n_2 \]

But \[ M_1 - M_2 = 0 \]

RESEARCH METHODOLOGY

This section of the work presents the method used in carrying out this research Work. It shows the various processes used in obtaining, analyzing and interpreting data acquired from the fieldwork. It is of importance that a study of this nature be procedurally conducted to achieve desired objectives. Its content shall include research design, population and sampling procedure, data source(s) and analytical design.

RESEARCH DESIGN

There are different research designs; a chance is made on the most suitable one that directs the research work towards achieving its objectives. Kaplan (1980) summarily outlined them as: the longitudinal design which has to do with the studying of same people or phenomenon over an extended Period of time, the cross sectional design which borders on the measurement of the characteristic of a phenomenon we have for the purpose of our study, we adopted the survey approach because it affords us the opportunity of doing an in-depth study of the phenomenon enquired using larger sample for generalization.

POPULATION AND SAMPLING PROCEDURE

The Population of the study includes top level management and employees of Dredging international Nigeria Limited Port Harcourt. Omiligbe (2006) observed that the Population of a research works is the universe of some group of people or object, which a researcher is interested. For the purpose of convenience proximity and economy, Dredging international company operating in Port Harcourt was chosen for specific study. This company has a well-established trade union organization even as it operates within the industry – wide union. More so, though a stratified quota sampling method, i picked the actual workers that will provide appropriate data while making a proper representation, this was in addition to the union leaders who were representative of the workers. My sample, size of the study is forty (40) that was picked from the organization. I wish to state again that my sample was selected in a manner that permits representativeness and this saved me the time and financial strains and produced a much more quicker results than combining the entire population of the company.

SOURCE(S) OF DATA

There exist two major sources of data for research works namely, primary and secondary sources. Primary data are acquired in order to solve a particular problem at hand. For the purpose of this study, primary data were obtained from the field through the use of questionnaire method within sampled elements. The data so acquired enabled me find answers to the research questions.
posed. Secondary data or the other hand, are data acquired from work of other authors, which includes text books, journals newspapers, Magazines and unpublished works.

DATA COLLECTION METHOD
As earlier noted, the field work was carried out in Dredging international Company within Port Harcourt metro-polis. The main data collection of our questions in the questionnaire were drawn in a manner that afforded respondents the opportunity of objective contributions. In other words, there were close ended questions.

METHOD OF DATA ANALYSIS
The data collected were presented and analyzed in order to bring out the meaning in them. This was done through the use of tables, sample percentages and averages were necessary. Mode of analysis was non-parametric, which ensures summary of information gathered in the field for easy comprehension.

DATA PRESENTATION AND ANALYSIS

Table 1 TABLE SHOWING ADMINISTRATION AND RETRIEVAL OF QUESTIONNAIRE

<table>
<thead>
<tr>
<th>No of organization used</th>
<th>No of personnel used</th>
<th>No of questionnaire administered</th>
<th>No of questionnaire retrieved</th>
<th>% of success</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>40</td>
<td>40</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

SOURCE: FIELD STUDY 2010

The above table 1 was drawn to show data on the administration and retrieval of questionnaire used in the study. From the table, it was shown that one (1) organization was used for the study from where forty (40) personnel of the organization constituted the sample elements.

On retrieval, forty (40) of the administered were retrieved from the respondents. This implies 100% rate of success, which I considered very appropriate for my research work. From Dredging International Nig. Ltd. Port Harcourt base

Table 2 DEMOGRAPHIC DATA OF RESPONDENTS

<table>
<thead>
<tr>
<th>No of years in company</th>
<th>No of Respondents</th>
<th>%</th>
<th>Academic qualification</th>
<th>No of Respondents</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-5</td>
<td>5</td>
<td>5</td>
<td>WAEC/OND</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>6-10</td>
<td>12</td>
<td>43</td>
<td>HND/B.SC.</td>
<td>21</td>
<td>57%</td>
</tr>
<tr>
<td>11-15</td>
<td>6</td>
<td>15</td>
<td>MBA/M.SC./MED</td>
<td>12</td>
<td>41%</td>
</tr>
<tr>
<td>16-20</td>
<td>7</td>
<td>14</td>
<td>PhD.</td>
<td>7</td>
<td>2%</td>
</tr>
</tbody>
</table>
The researcher through the table 2 above sought to know the number of years that employees have worked in the organizations and their academic qualification. The essence was to know if those used as sample element are knowledgeable enough either by virtue of years spent with the organization or the academic knowledge to understand the question and issues raised in the questionnaire. Through such knowledge, objective and rationale response will be given to my questions, which will form the basis of my final inference.

From the table above, it was shown that six (6) of the personnel interviewed have worked in the organization for between 11-15 years. 7 of them have equally worked within the range of 16-20 years. The 6-10 years range has 12 workers that have served in the organization. 10 and 5 of respondent fell within 20 and above and 1-5 years brackets respectively as period they have been in the organization.

As for their academic qualification, 21 (57%) of the respondents have the HND or B.SC. degrees. Another 12 (41%) have second degree, while 7(2%) have PhD.

From the data, it is believed that my respondents are quite knowledgeable either as a result of long service or academically to give reasonable and objective responses to our questions in the questionnaire.

### Table 3  EXISTENCE OF TRADE UNION IN THE FIRMS

<table>
<thead>
<tr>
<th>RESPONSES</th>
<th>NO OF RESPONDENT</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>40</td>
<td>100</td>
</tr>
<tr>
<td>No</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

**SOURCE: FIELD STUDY 2010**

The above table 3 was drawn to show if trade union exist in the organization. There was an over whelming 100% response that confirms the existence of trade union in the service firms. This show that a labor employer relational Machinery is in place for the purpose of industrial peace.

**ALLOWING EMPLOYEES PARTICIPATE IN SAFETY**

**Table 4 MANAGEMENT AT ALL LEVEL**

<table>
<thead>
<tr>
<th>RESPONSES</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
</table>
The researcher through table 4 elicited data on whether employees are allowed participation in safety management at all level.

The "NO" options had an overwhelming 22 (77%) respondents who claimed they do not participate the "At time and Yes" option have 11 (13%) and 7 (10%) respondents respectively.

Table 5. EMPLOYEES INTEREST IN PARTICIPATION IN SAFETY MANAGEMENT

<table>
<thead>
<tr>
<th>RESPONSES</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly agree</td>
<td>28</td>
<td>79</td>
</tr>
<tr>
<td>Agree</td>
<td>8</td>
<td>16</td>
</tr>
<tr>
<td>Undecided</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Disagree</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

What we sought to know is that workers have shown interest in participation in safety management decision - making using data in table 1.

There was an overwhelming response in favor of the strongly agree option. 28 (79%) of the respondent are in favor of the option. Those with agree and undecided options have 8 (16%) and 4 (5%) respondents respectively.

Table 6. COLLECTIVE BARGAINING A BETTER FORM OF PARTICIPATION

<table>
<thead>
<tr>
<th>RESPONSES</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly agree</td>
<td>22</td>
<td>51</td>
</tr>
</tbody>
</table>
In order to know if collective bargaining is preferred as a better form of participation by the employees of the company, the above table 6 was drawn. The table showed that 22 (55%) of the respondents strongly agree with collective bargaining. While 10 (25%) of respondents, respond to Agree option. The undecided had 6 (8%) respondent and 2 (3%) had the Disagree option. This implies preference for collective bargaining as a form of participation.

Table 7. JOINT CONSULTATION - A BETTER FORM OF PARTICIPATION

<table>
<thead>
<tr>
<th>Responses</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly Agree</td>
<td>22</td>
<td>55</td>
</tr>
<tr>
<td>Agree</td>
<td>10</td>
<td>25</td>
</tr>
<tr>
<td>Undecided</td>
<td>8</td>
<td>20</td>
</tr>
<tr>
<td>Disagree</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Strongly disagree</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

SOURCE: FIELD STUDY 2010

The research sought further to know if joint consultation will equally be seen as a better form of employee participation in safety management using data in table 7. It was shown that 22 (55%) of respondent strongly agreed to its use. Another 10 (25%) of the respondents took the Agree option. This equally infers that workers will be more interested in a participatory form where opinion sought will be used in reaching decisions.

The difference between Agree and strongly Agree is that the respondent hold tenaciously on the answer of agreed firmly while the respondent of the agreed answer is partial.

Table 8. SAFETY DECISION-MAKING SYSTEM OF THE COMPANY
The researcher sought to know the safety decision-making systems of the company with table 8 above the data elicited showed that 21 (55%) of the respondent responded that managerial regulation is the basic system used. 11 (31%) of the respondents favored the blend of managerial regulation with consultation option. The joint regulation system had 7 (14%) respondents.

The rule pattern adopted may go a long way to show why management has arrogated largely safety decision-making to itself in the company.

Table 9. FLOW OF SAFETY MANAGEMENT INFORMATION IN THE COMPANY

<table>
<thead>
<tr>
<th>FLOW</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vertical</td>
<td>20</td>
<td>50</td>
</tr>
<tr>
<td>Horizontal</td>
<td>20</td>
<td>50</td>
</tr>
<tr>
<td>Either of the above</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

SOURCE: FIELD STUDY 2010

In order to know the direction which safety information flows in the company, the above table 9 was drawn. From the table, it was obviously indicated that 20 (50%) of the respondents favor the vertical flow of safety information in words, it flows from top management to subordinates or from managers to lower level employees while horizontal indicated 20 (50%) of the respondent flow of the information from top management to subordinates.

Table 10 EXTENT TO WHICH JUNIOR EMPLOYEES INFLUENCE THE GOALS AND ACTIVITY OF THE DEPARTMENT

<table>
<thead>
<tr>
<th>Responses</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Managerial regulation</td>
<td>21</td>
<td>55</td>
</tr>
<tr>
<td>Managerial regulation with consultation</td>
<td>11</td>
<td>31</td>
</tr>
<tr>
<td>Joint regulation</td>
<td>*j</td>
<td>14</td>
</tr>
<tr>
<td>Any other</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>
The extent to which junior employees influence goals and activities of the department was relying as shown on data presented in table 10 above. It has shown that 19 (44%) of the respondent favored the Great extent option. The very great has 9 (23%) respondent that responded to it. The moderate and low extent has 8 (22%) and 4 (11%) respectively. The response pattern here shows that employees are to a great extent involved in influencing safety goals at the departmental level of the company.

Table 11 GAINS OF PARTICIPATION IN INDUSTRIAL SAFETY

<table>
<thead>
<tr>
<th>Results</th>
<th>No. of Respondents</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee motivation</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Employee acceptance of safety decision outright</td>
<td>8</td>
<td>19</td>
</tr>
<tr>
<td>Employee meeting target</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Safety management effectiveness</td>
<td>8</td>
<td>19</td>
</tr>
<tr>
<td>Job satisfaction</td>
<td>7</td>
<td>16</td>
</tr>
<tr>
<td>Psychological boost</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Laying to rest industrial discontent</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>
The above table was drawn to elicit data on what employees generally think will be the gains of participation in safety management decision. From the table, there was an overwhelming agreement to the fact that safety management effectiveness will be attained through the practice. The option had a response of 8 (19%) respondents. Employee Acceptance of Decision out rightly was also seems as another important benefit with 8 (19%) respondents. It is a common knowledge that, if they were allowed to have participated, there would be no reason to have fear or doubt about organizational actions.

Table 12. PROBLEMS ASSOCIATED WITH EMPLOYEE PARTICIPATION IN SAFETY MANAGEMENT IN THE COMPANY

<table>
<thead>
<tr>
<th>Problems</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees interest in economic gain of the coy</td>
<td>11</td>
<td>22</td>
</tr>
<tr>
<td>Rumour mongering</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Late time keeping</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Feeling cheated by employee generally</td>
<td>5</td>
<td>18</td>
</tr>
<tr>
<td>increased agitation for increased pay and benefits</td>
<td>5</td>
<td>18</td>
</tr>
<tr>
<td>Feeling of employees sharing managerial roles</td>
<td>*</td>
<td>20</td>
</tr>
<tr>
<td>Status sharing</td>
<td>6</td>
<td>19</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

I was also interested in knowing the problems Associated with employee participation in safety management in the company. Using data in table 12 above, 11 (22%) of the respondents are of the opinion that workers interest in economic gains of the company for the basic problem, why management will not want employees participation in decision making. Coming closely is the feeling that employees will be sharing managerial roles and
status sharing which they think are conventionally reserved for them. These had a response of 7 (20%)
and 6 (18%). Feeling cheated by employees with response 6 (19%). There were however other problems.

<table>
<thead>
<tr>
<th>Responses</th>
<th>No of Respondents</th>
<th>% of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>No</td>
<td>36</td>
<td>93</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>100</td>
</tr>
</tbody>
</table>

d 6 (18%). Feeling cheated by employees with response 6 (19%). There were however other problems.

Table 13  EXISTENCE ASSOCIATION EMPLOYEE-MANAGEMENT

SOURCE: FIELD STUDY 2010

I also sought to know if employees-management association exists in the company-using table 13 above. It was observed that 36 of the respondend which implies 93% of the response respondent to No option while 2 of them took the yes option meaning 7%. The essence of such a union was to boost the relation activities of the company towards harmonious and efficient production of goods.

DISCUSSION, SUMMARY CONCLUSION AND RECOMMENDATIONS

DISCUSSION OF FINDINGS
The theme, industrial safety management and employee participation has contemporarily won its way into the minds of both industrial experts, and industrial operators alike. There has been awakened interest to have on industrial society from industrial accident, crises and under utilization of production resources.

While the more cautious contributions would probably be skeptical towards the claim, they might also be willing to preserve something of the same metaphor by agreeing at least, that the level of interest in the subject has deepened and widened considerably from the low ebb to a conscious plane (Omiligbe 2006).

Olishifski, B. Julian (1979) argued that, it transcends to ameliorating industrial accident discontent between employers and employees rather it contributes to improved safety standard and morale that enhances productivity and attainment of objectives at work. In other words, employee participation in industrial safety management appeal to a number of different interests and this explains why personnel representing different department have combined to support it. In today's Nigeria, the role of service industry cannot be overstressed and it accounts for why its industrial relations must be well attended for the purpose of the gains exuberated Omiligbe (2006). This study also showed a growing concern for managerial function against the trend where the employer's reserved such positions for only their foreign colleagues. So far, my interview*with some personnel showed that reasonable level of success had been made in this regard. Which points to the fact that prospect exists for employee participation in industrial safety management in Dredging International company.

SUMMARY OF FINDINGS
For easy comprehension of result of this study, the basic findings are summarized as follows:

1. The workers in Dredging International Company have shown very great interest in participation in safety management decision-making. This according to Omiligbe (2006) would not only help to overcome some of the problems of bureaucracy, but will also help to improve the employee morale towards attainment of goals.

2. The employees of the company are interested in participation primarily at the senior level and would equally want it at the junior level.

3. The decision making system of the company is the managerial regulation where decision making is purely a management tools with consultation in the absence of full participation, as noted in my interview with the workers.

4. The basic problems that have characterized employee participation are that of fear of sharing industrial gains with management and status sharing. There is also fear of agitation for increased wage.

CONCLUSION
The major focus of the study once again is to scientifically examine the level of employee participation in safety management in the service industry. Efforts were made to find out the prospect for the practice in our work place where unitary system of making rules and managing the organization is predominant. Austin (2006) noted that democracy cannot be restricted to our political life. There is and must be a place in economic life which is centrally sought in organizations.

From the research data available, the company employees have shown their quest and interest for full participation in safety management either at junior level or managerial level of the company. More so, there are unions, which serve as their representative machinery whose effectiveness cannot be expressly established rather it is sectorial. This equally suggests that though collective bargaining is practiced through union representative, which would have a good medium for participation, they are limited to certain issues. Further more, the pluralist approach to decisions at work was conspicuously missing as managerial regulation stands out as the decision-making level of the organization in the company.

From the foregoing, I candidly believe that, since a representative machinery exist, which to some extent creates a favourable industrial relations and accident-free atmosphere within the industry, it points to a bright future for participation. It is hoped that their participational scope would be enlarged to take all that it means to define employees’ participation as offered. Omilegbe and Austin (2006).

In addition to the points already highlighted in the executive conclusion, the following can be drawn from the Audit study of Dredging International Services Nig. Ltd. (DI).

- The staff strength of Dredging International Services Nig. Ltd. at Borikiri is 10%. The oil and Gas industries exploring oil in the Niger Delta employ the services of DI. Mostly in the civil construction works offshore. Other services rendered by the company include: dredging, piling, earth moving, slope protection, pipe laying, out falls, etc, but the base operations include: fabrication, loading arid off-loading of materials to project sites.

- Although most of its activities are offshore, its Port Harcourt Base serves as its main logistics support base where a lot of pre construction activities are carried out including storage and supplies of offshore materials. Another important aspect of the DI base operations is the constant movement of its vessels on the various access ways. But caution must be exercised here, as Dredging International Services Nig. Ltd. is not the only company with boat activities on the water ways. The water front is shared by many other companies whose activities are also capable of generating impact on the surface water. Hence,
they should equally maintain a high degree of safety rules, so that others can emulate from her.

- The audit findings show that there is no noise problem emanating from generator area. Mean noise level at this location reaches 84.8db, which is, less than the 90db National allowable limit. This is in contrast to high noise levels which usually characterize generator area operations.

- The medical examination shows good medical facility in place at the base and retainership with Competent Medical Clinics. Epidemiological examination shows malaria and body/waist pain as major complaints, which can be caused by mosquito bite and physical exertion-staff should be encouraged to leave in mosquito free environment and also to employ less strenuous work method. Other medical complaints gathered include abdominal pains, amoebasis, fever, cough etc, which are not occupational diseases. Safe work operation should be tough to the workers and the use of protective device should be a habit that will strictly be obeyed among the technical staff.

- Dredging International Base operations have made positive impacts on the people. Identifiable impacts include transfer of knowledge to some Nigerians who have benefited from their training programmes in pursuit of their business interest. The presence of DI base operations have also led to capital flow of money into the Nigerian economy through employment of many Nigerians, purchases via contracts, leases and taxes collected by the various levels of government. Employment opportunities have also been provided to otherwise jobless Nigerian. The urban Borikiri people enjoy free water borehole made available by the company to the public. Social vices like stealing has also reduced due to the presence of security guards from the companies in the area including DI base.

- There is no odor problem in the base premises, which could constitute a nuisance at the base or to neighbors. The general housekeeping within the base needs to be improved (e.g handling of spent oil and debris from the construction of warehouse and canteen needs to be removed) in accordance with good industrial sanitation demands. The generator house was dry and it makes low noise. This is commendable.

- The company has a written policy on Health, safety and Environment (HSE) commitment expected from both management and workers. There is a safety officer to co-ordinate safety matters.

RECOMMENDATIONS

In order to improve the health of the employees, the following is necessary.

- Reduction of occupational and environmental hazards, which promotes good business and productivity in the company.

- Safety promotional posters should continue to be displayed in the company premises.

- Every staff should be trained on the following programs:
  - Fire Fighting Technique
  - General HSE
  - Defensive Driving
  - Environmental protection and waste management
  - First Aid
  - Preventive Health care e.g. "Roll Back Malaria"
  - Emergency fire drills should be started to test response and effective use of fire extinguishers
The problem of noise from machines that disturb staff should be addressed before it becomes a serious health problem. Personnel in high noise area should be made to wear ear muff and the area sign-postal.

Protective safety devices such as ear muffis, eye-goggles, uniform overalls, helmets and gloves, etc should continue to be provided and worn regularly by the employees as barriers against health hazard.

The safety officer should conduct safety surveys to make sure that proper safety practices and procedures are being followed and that a work environment is maintain that assures maximum safety for his colleagues.

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THE LONG ROAD TO SOCIAL HOST LIABILITY IN ILLINOIS
FOR THOSE PROVIDING ALCOHOL TO MINORS:
LEGISLATIVE AND CASE HISTORY AND FUTURE CONCERNS

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Introduction
Imagine the “cool parent,” whose philosophy is, “I know these kids are going to drink; better they do it in my home where I can control things and make sure nothing bad happens. I’ll even provide the beer.” Unfortunately, during one such gathering, the parent falls asleep and two drunken teens depart in a car to pick up some food, with tragic results to themselves and the driver of the car they hit. In Illinois, prior to October 2004 there was no civil remedy against the parent who provided the alcohol. Should there be? If there should, is it more appropriate that the state’s legislature craft the legislation or should courts create liability as an extension of the common law?

The focus of this paper is to detail the path taken by one state, Illinois, on the road to social host liability. In doing so, it will touch on the interplay between the courts and legislature, which in this instance provides a unique and fascinating example of the differences between activist and restraintist judicial philosophies. The paper begins by defining the term, “social host liability.” It then discusses the history of major Illinois legislation and cases related to liability for serving alcohol to customers and guests who subsequently cause harm to themselves or others. Next, the Illinois social host statute, adopted in 2004, will be set out in detail. Then, cases settled and / or decided after 2004 will be discussed. Finally, the paper will address future concerns that remain as a result of the new law and cases decided in its aftermath.

Social Host Liability Defined
A social host is an adult who serves or provides alcohol to persons who subsequently kill or cause harm to themselves or others.1 The typical case in which social host liability will attach involves a defendant host who provides alcohol to a minor or to an intoxicated adult guest, who then departs by car and is involved in an accident which causes harm to himself and / or others.2 Under most state laws, if the supplier is a commercial vendor, liability would be covered by

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1 University of Minnesota, Alcohol Epidemiology Program, Community Action Kit (2009).
More recently, however, states have imposed liability on homeowners or other social hosts, recognizing the harm caused by intoxicated motorists. The first state to utilize social host liability was Oregon, in 1971. This was done through the courts in *Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, in which the plaintiff was injured in a car accident. The car was driven by a minor, who had been served alcohol at a fraternity event. The court, using basic negligence considerations, decided that serving alcohol to a minor guest was unreasonable.

The trend toward social host liability has continued. Thirty-two states hold social hosts liable for harm caused by their guests, either by statute or judicial fiat. This paper traces the legislative and judicial history of one such state, Illinois.

**Illinois Legislative History**

The common law provided no cause of action against a person who supplied alcohol to another who subsequently harmed himself or others. It tended to analyze such situations in terms of proximate cause, the idea being that it wasn’t the serving of the alcohol that caused the harm, but rather the actions of the intoxicated person. In *Cunningham v. Brown*, which involved serving alcohol to an insane person, the Illinois Supreme Court noted that “the common law provided no remedy for the mere sale of alcoholic liquor to the ordinary man.”

Illinois passed a Dram-shop Act in 1872 as a result of the temperance movement. The Act was directed at bars and saloons, imposing liability upon them for providing alcohol to persons who then injure others. Despite amendments to the Act, it has not really changed and according

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4 Id.

5 Id. at 847.


7 Id. at 23.

8 See Smith at 847, 848.


12 Id. at 27, with the court writing, “After the Civil War a great wave of temperance reform, spearheaded to a great extent by women, swept the nation.” Id.

13 See supra note 9, at 2. The Dram-shop Act can be found at Ill. Rev. Stat. ch. 43 (1874).

14 Id. at 3.
to the 1961 *Cunningham* decision, it was not “intended to complement a common-law remedy against the tavern owners and operators.”15 The Court held “that section 14 of article VI of the Liquor Control Act16 provides the only remedy against tavern operators and owners of tavern premises for injuries to person, property or means of support by an intoxicated person or in consequence of intoxication.”17 Thus, though a plaintiff could receive a remedy under the Dram-shop provisions, more significant common law remedies were deemed unavailable.

**Illinois Case History**

Illinois has forged a fascinating path in the social host realm, beginning in 1889, with *Cruse v. Aden.*18 The case concerned a man who died after falling off of a horse. He had been given two drinks in a social setting by the defendant prior to the accident.19 The court determined that social host liability did not exist under the Dram-shop act, writing “We concur in the conclusion of the Appellate Court,20 that section 9 of the Dram-shop act does not apply to persons who are not, either directly or indirectly, or in any way or to any extent, engaged in liquid traffic, and that the right of action by said section to one injured in her means of support is not intended to be given against a person who, in his own house, or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness, and without any purpose or expectation of pecuniary gain or profit.”21 *Cunningham*, decided in 1961 and discussed above, also held that social hosts were not liable for the actions of the intoxicated person.22

*Miller v. Moran*, a 1981 decision, went a step further than *Cunningham*, suggesting that any change to Illinois law with respect to social host liability should come from the legislature and not from the courts.23 The court looked favorably to a Wisconsin Supreme Court case, *Olson v. Copeland*,24 where the Wisconsin court reasoned, “a change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis of all the relevant considerations. The type of analysis required is best conducted by the legislature using all of the methods it has available to invite public participation.”25

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15 Cunningham at 28.

16 235 ILCS 5/6 (West 1994).

17 Id. at 30-31.

18 127 Ill. 231 (1889).

19 Id. at 234-235.

20 Aden v. Cruse, 21 Bradw. 401.

21 See supra note 18, at 239.

22 22 Ill. 2d 23 (1961). The Court decided not to create a common law remedy in addition to that provided under the Dram-shop Act.


24 90 Wis. 2d 483 (1979).

25 Id. at 491, cited in Miller at 600-601.
The next significant social host liability case in Illinois, *Coulter v. Swearingen* was decided by the Third Circuit Court of Appeals in 1983. The case is noteworthy because it dealt with an adult providing alcohol to a minor (emphasis added), who then caused injuries to the plaintiff as the result of a car accident. The court phrased the issue as “whether the trial court was correct in holding that John Swearingen, a minor who permitted another minor to drink intoxicating liquor in the Swearingen home, and Vernon and Phyllis Swearingen, parents who permitted accessibility to the liquor in their home, are guilty of common law negligence.” The court ruled that the fact that one defendant was a minor and the other two were adult social hosts did not open the door to liability. It noted that Illinois cases make no distinction whether the intoxicated person is an adult, minor or corporate defendant. Finally, the court addressed the issue of whether it should change the law and make social hosts liable because of a judicial trend in that direction. The court refused, stating that such a change should come from the legislature and not through judicial fiat.

In a major departure from the above precedents, the First District Court of Appeals ruled in 1991 that social hosts could be liable for injuries caused by their intoxicated minor guests. The case, *Cravens v. Inman*, involved the death of the Cravens’ minor daughter, Joleen, who was a passenger in a car driven by a friend who was also a minor. The two had allegedly been served alcohol at the adult defendant’s home and were allowed to leave in an intoxicated state. The court addressed the issue of whether the facts alleged give rise, under Illinois common law, to claims for defendant’s negligence liability with respect to the injuries sustained by plaintiff and her deceased daughter. The court, in deciding to create common law liability in Illinois despite one hundred years of contrary precedent, wrote, “common law is of judicial origin and must be adjusted to reflect the changing needs of society” asserting that the “judiciary has an obligation to change precedent that is not consonant with the current needs of society.”

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27 Id.

28 Id. at 651.

29 Id. at 564.

30 Id. at 562-563.

31 Id. at 654.

32 Id.


34 Id. at 1062.

35 Id. at 1064.

36 Id. at 1073.

37 Id. at 1075. The court listed a majority of states that adopted social host liability either by statute or judicial opinion.
response to the argument that such a change in the law would create havoc the court took a utilitarian approach, writing that “in our view, the concerns suggested by defendant are greatly outweighed by the economic and social devastation on society that occurs when social hosts, as alleged in the instant cause, knowingly permit minor guests at a social gathering to consume alcohol to the point of inebriation, and allow the minor guests to depart from the gathering by driving a motor vehicle while intoxicated.”

A similar result was obtained in Charles v. Seigfried, a 1993 Third District appellate opinion. The defendant host, an adult, allegedly provided alcohol to minors attending a party at his home. The victim left the party in a state of extreme intoxication and died after crashing her automobile. In determining that social host liability was appropriate under the circumstances of the case, the court found the reasoning from Cravens to be persuasive, thus becoming the second of five Illinois appellate districts to embrace social host liability.

The Charles case set the stage for the Second District to adopt the reasoning from Cravens in a 1994 opinion, Bzdek v. Townsley. In 1995, the Illinois Supreme Court took up the matter in its review of Charles v. Seigfried (Charles II).

At the time Charles II was decided by the Illinois Supreme Court two of Illinois’ five appellate districts, the fourth and fifth maintained that Illinois law did not allow for social host liability, while the first, second and third permitted it. The Supreme Court sided with its earlier rulings and reversed Charles. In doing so the Court firmly laid the matter at the feet of the Illinois legislature. It first gave great credence to Illinois precedent, noting that “for over one century, this court has spoken with a single voice to the effect that no social host liability exists in Illinois.” Next it cited Cunningham for the proposition that the legislature had “preempted the entire field of alcohol-related liability through its passage and continual amendment of the Dram shop Act.” It noted that the Illinois legislature had amended the Dram shop Act numerous times.

38 Id.
40 Id. at 1059-1060.
41 See supra notes 33-38.
42 Id. at 1063. The court noted that Cravens was limited to the situation where “(1) a social host has knowingly served alcohol, and permits the liquor to be served, to youths under 18 years of age at the social host’s residence, (2) the social host permits the minors’ consumption to continue to the point of intoxication, and (3) the social host allows the inebriated minors to depart from the residence in a motor vehicle.” Id. at 1064, citing Cravens at 1076.
44 165 Ill. 2d 482 (1995).
45 Id. at 504.
46 Id. at 486.
47 Id. at 488.
times and never saw fit to expand it to impose liability on social hosts.\textsuperscript{48} Finally, the court wrote that any change in the law should come from the legislature and not the courts.\textsuperscript{49} It felt that the legislature is in a much better position than a court to “weigh and properly balance the many competing societal, economic, and policy considerations involved,”\textsuperscript{50} whereas courts are “ill-equipped to fashion a law on this subject that would best serve the people of Illinois.”\textsuperscript{51}

Eight years after \textit{Charles II} was decided, \textit{Wakulich v. Mraz}\textsuperscript{52} became the tipping point for the Illinois legislature. In this 2003 decision the Illinois Supreme Court reiterated its position that any change in social host liability must come from the legislature.\textsuperscript{53} The case involved a sixteen-year-old girl, Elizabeth Wakulich, who drank a quart of Goldschlager while at the home of the defendants Michael Mraz and Brian Mraz, 21 and 18-years-old respectively, and their father, Dennis Mraz.\textsuperscript{54} According to the complaint, the victim was encouraged to drink the alcohol by Michael and Brian and eventually lost consciousness.\textsuperscript{55} After refusing to drive Elizabeth home or seek medical help the boys were later ordered to remove Elizabeth from the home by their father. Later that day, she died.\textsuperscript{56}

The plaintiffs sought to have the court reconsider its \textit{Charles II}\textsuperscript{57} opinion and create common law liability.\textsuperscript{58} The Supreme Court refused to do so and explained why at length. It restated the reasoning from \textit{Charles II} that any change should come from the legislature.\textsuperscript{59} It then noted that after \textit{Charles II} was decided in 1995 the Illinois legislature had taken up the issue of social host liability in cases where the victim is a minor, and chose not to act.\textsuperscript{60} It discussed judicial construction, pointing out that when a legislature refuses to act after a court has interpreted a statute that the presumption is that the legislature has acquiesced to the court’s interpretation.\textsuperscript{61} It finally considered the implications of creating a new tort in Illinois, writing:

\textsuperscript{48} \textit{Id}. at 492.
\textsuperscript{49} \textit{Id}. at 493.
\textsuperscript{50} \textit{Id}. at 493.
\textsuperscript{51} \textit{Id}. at 494.
\textsuperscript{52} 203 Ill. 2d 223 (2003).
\textsuperscript{53} \textit{Id}. at 236.
\textsuperscript{54} \textit{Id}. at 226-227.
\textsuperscript{55} \textit{Id}.
\textsuperscript{56} \textit{Id}. at 227.
\textsuperscript{57} \textit{See supra} notes 44-51.
\textsuperscript{58} \textit{Id}. at 230.
\textsuperscript{59} \textit{Id}. at 236.
\textsuperscript{60} \textit{Id}. at 233.
\textsuperscript{61} \textit{Id}., \textit{citing} Zimmerman v. Village of Skokie, 183 Ill. 2d 30 (1998) and Miller v. Lockett, 98 Ill. 2d 478 (1983).
The adoption of social host liability would likewise raise numerous questions to which the flood of litigants would demand answers. Should social hosts be liable only for “knowingly providing alcohol to minors, or should the social host’s conduct be judged by what he or she “should have known”? For example, should parents be liable for the consumption of alcoholic beverages in their home if they “should have known that their 17-year-old child would have a party in their absence? What measures should parents take to ensure that access to liquor in the home is sufficiently restricted in order to avoid liability for illegal activities that occur in their absence? Should liability attach outside the home to social gatherings such as picnics, weddings and other events?  

In the wake of this decision the Illinois legislature took up the challenge of crafting a statute creating social host liability in Illinois.

The Illinois Statute
One year after *Wakulich*, Illinois passed the Drug or Alcohol Impaired Minor Responsibility Act in 2004. The Act created social host liability for any person over the age of 18 who willfully supplies alcohol or illegal drugs to a person under the age of 18. Liability attaches if the supplier willfully provides the substance or willfully permits the consumption of such substances on non-residential premises that they own or control. The Act entitles the victim to recover economic damages, such as medical expenses and loss of economic or educational potential, non-economic damages, including physical and emotional pain, disfigurement and loss of enjoyment and also attorneys’ fees and costs of the lawsuit. The Act specifically excludes comparative and contributory negligence as defenses.

Post Act Cases
The first reported settlement under the social host legislation occurred in September 2007. Melissa Wolkomer, 16 years-old, attended a Halloween party co-hosted by Kelly’s on 41 Equestrian Center in Wadsworth, Illinois and Patch 22, Ltd., a hay ride company. She went to the party with three friends, all of whom were minors. At the party Melissa and her friends were allowed to drink without showing identification. Shortly before midnight, they left in a car driven by one of the group, Angela Curtis, who was also 16-years-old. Curtis consumed two beers at the party. While driving after the party Curtis made an illegal turn and was hit by a tractor-trailer truck. Wolkomer suffered serious injuries as a result. A breath test showed Curtis to have a BAC of .08. The incident took place just four days after the passage of the Act. A

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62 *Id.* at 235. Despite ruling against social host liability, the Supreme Court let stand allegations that liability might exist due to a voluntary undertaking theory because of actions taken or not taken by the defendants who were with the victim. *Id.* at 241-247.

63 See *supra* notes 52-62.

64 740 ILCS 58/1 *et seq.* (West 2004).

65 *Id.*

66 *Id.*
settlement was reached for $1.625 million, with Kelly’s paying $1 million and Patch 22 paying the remaining $625,000.67

This case serves as an example of precisely how the new statute should work. Persons over the age of 18 willfully provided or at least allowed alcohol to be served to a person under the age of 18, who then caused harm. The following case attempted to impose liability on homeowners via a variation on social host liability.

A recent Illinois Supreme Court case, *Bell v. Hutsell*,68 decided in May, 2011, may prove to be of great significance in the state. In *Hutsell*, the Court addressed the voluntary undertaking of duty theory of liability it discussed previously in *Wakulich*.69 The case involved the death of Daniel Bell, age 18, who died in a single-car accident after attending a party hosted by the defendant’s son, Jonathon. The deceased had allegedly consumed alcoholic beverages at the party. Though alcohol was not provided by the defendants, the complaint stated that the they were aware that underage drinking had occurred at their home during previous parties and that on the night in question they knew that alcohol was brought to their home and it was drunk in their presence by minors.70 The Hutsells allegedly did not object to the drinking nor provide consequences to those who were consuming alcohol despite having told their son that “alcohol consumption would not be tolerated and that they would monitor the party to see that the underage partygoers did not possess or imbibe alcoholic beverages.”71 According to the complaint, defendant Jerry Hutsell told underage drinkers on several occasions to not drive when leaving the party. Daniel Bell, who was alleged to have drunk alcohol in “full and open view of the defendants,” left the party and drove his car into a tree, resulting in his death.72

The Supreme Court’s opinion focused on the voluntary undertaking counts of the complaint, which alleged that, based on the above facts, the Hutsells voluntarily took on a legal duty to prevent the minor partygoers from drinking alcoholic beverages, which would make them liable despite their not being social hosts under the Illinois statute.73 These counts were dismissed by the trial court, but were reinstated by the Second District Court of Appeals.74 The Supreme Court reversed.75


68 No. 110724, 2011 Ill. LEXIS 777 (May 19, 2011).

69 See supra notes 52-62.

70 No. 110724, 2011 Ill. LEXIS 777 at 2.

71 Id.

72 Id. at 3.

73 Id. at 3-4.

74 Id. at 4.

75 Id. at 24.
The Supreme Court first set out the relevant sections of the Second Restatement of Torts, which read as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other’s reliance upon the undertaking.76

Next, the Court responded to the defendant’s contention that the voluntary undertaking counts were merely a method to sidetrack the Court’s previous rulings forbidding social host liability. This argument was rejected by the Court, citing *Wakulich*77 for the proposition that under appropriate circumstances, a voluntary undertaking theory would lead to liability separate from social host liability.

The Court, however, distinguished the facts in this case from those in *Wakulich*, pointing out that what was dispositive in *Wakulich* was that the “defendants took complete and exclusive charge of Elizabeth’s care after she became unconscious.”78 The Court compared this to the situation in which a host allows a guest to “sleep it off,” which normally would not create a duty of care. In the present case, the defendants did not, by their actions, take on such a duty.79 The Court also was concerned that imposing liability in situations such as these might deter people from voluntarily assisting others.80 It noted that there was no evidence that the warning given to their son was communicated to the other guests and that merely saying they would monitor the guests for alcohol use was insufficient to create liability under the voluntary undertaking of duty theory.81 The defendants took no affirmative steps to prevent drinking that indicated they had taken control of the drinking that occurred. As a result, the Supreme Court reversed the Second District’s decision.

**Remaining Issues**

Several issues remain. First, though the term “willful” implies that one is acting with a set purpose, there are still concerns. For example, assume that parents of a 16-year-old leave their child at home for a weekend while they take a short trip. The teen invites fifty of his / her closest friends over for a party where alcohol, both from within the house and brought by the guests, is consumed in large quantities. If harm results, it is clear that the parents should not be liable. Would the same result ensue if the parents were to go away for another weekend after having

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76 Id. at 9, citing Restatement (Second) of Torts Section 323 (1965).

77 See supra notes 52-62.


79 Id. at 13.

80 Id. at 23.

81 Id. at 18-21.
been made aware of the first situation? It would appear that once again the answer should be negative, but it is not too difficult to imagine a court adapting an expansive definition of “willful” and imposing liability, especially if it possessed a judicial disposition similar to that displayed by the First, Second and Third Illinois District appellate courts, which adopted the social host theory of liability despite one hundred years of precedent to the contrary.82

The voluntary undertaking of duty cases from Illinois provides another avenue for plaintiffs to pursue claims. There is a wide expanse of potential factual situations between that present in *Wakulich*, in which the defendants prevented the victim from receiving help,83 and *Bell*, in which a parent merely warned the minor partygoers that he would be monitoring their drinking.84 What if the Hutsells had sent a clearly intoxicated minor home in a cab but let others stay who were not quite as intoxicated? What if they had gone down to their basement, taken an alcoholic beverage away from a minor, announced that they wanted the drinking to stop, and then didn’t stop it? The result might have been different. Finally, if the voluntary undertaking of duty theory can be applied to situations involving drinking by minors and it certainly can be according to *Bell* and *Wakulich*, how long before attempts are made to apply it to instances in which all of the drinking is done by adults?

**Conclusion**

With the adoption of social host liability in situations in which minors are served alcohol by adults, Illinois has taken a positive step in the direction of preventing needless deaths and harm as the result of under age drinking. It was appropriate that the legislature be the body that developed the law as opposed to its being created out of whole cloth by an appellate court. Though concerns remain as to the potential liability of those who provide and / or permit alcohol to be consumed by minors and adults, the 2004 statute should encourage more responsibility by adults in their dealings with alcohol and minors. Whether Illinois courts will expand the statute beyond what appears to be its intent remains to be seen, though it will no doubt be interesting to follow.

82 *See supra* notes 33-42.

83 *See supra* note 78.

84 *See supra* note 71.
Today, people generally think that the federal government has the Constitutional authority to regulate everything including all aspects of business no matter how big or small the business, or how tenuous the connection to interstate commerce. Because they have not been adequately taught about their American Constitutional history, they seem to believe that this has always been the case and is proper. Compliance with the law is becoming an ever-increasing and burdensome artificial cost of doing business. This article is designed to (1) examine our founding philosophy regarding the proper role of the judiciary in protecting us against federal regulatory overreach and (2) to argue the appropriateness of covering this subject in a business law course.

INTRODUCTION

The law has a very important impact on how business is transacted and even, whether or not a person or group of people decide to go into business in the first place. The law is used to regulate human behavior, but as it expands ever outward requiring people to know and apply more and more rules (instead of trusting business people to exercise independent moral and business judgment) it tends to discourage business activity by promoting fear of potential legal problems for violating an obscure rule or regulation.

When the law becomes as expansive as it has become, it effectively provides impediments and disincentives to transact what otherwise would be useful economic activity contributing to our overall economic prosperity as a country.

At the beginning of most business law textbooks, is a chapter on Constitutional law which discusses the power of the federal government to regulate business activities. Most of these textbooks only focus on the most recent expressions of judicial philosophy in this regard. However, in my opinion, business students should study how our federal judicial philosophy has significantly changed over the years regarding the scope of federal regulatory authority, since (1) the legal/regulatory environment will significantly impact all businesses by way of heavy compliance costs, and (2) the predominant judicial philosophy that exists in our federal courts at any particular point in time will have a significant effect on the perceived limits on federal regulatory authority over business.

The logical starting point for such a discussion would be to give the students a sense of our original founding philosophy regarding the intended role of the federal judiciary so they can see how that perceived role has changed dramatically over the years. This would cause the students to think more deeply about our judicial system and become more interested in taking proactive steps to create the optimal legal environment in which to do business.

JUSTIFICATION FOR COVERAGE

To see the need for such a discussion, consider our Great Depression. I have always puzzled over why the Great Depression lasted so long. We had abundant natural resources, factories, machinery, and people who wanted to work, so why couldn’t all those things be combined to produce a healthy and growing economy? As we will see shortly, there were too many impediments imposed by the federal government that effectively, though unintentionally, discouraged risk taking and the investment of capital.

I was always taught that FDR saved us from the Great Depression, through all of the government agencies he created and laws he passed and I simply believed what I was told by my teachers.
Before our Great Depression, we had experienced several “depressions” but they only lasted for a few years before things turned around and the economy returned to a path of growth. So why was our Great Depression (which consumed the entire decade of the 1930s) so long and so deep by comparison? Several books make the argument that the heavy federal regulation and taxation of business started by Herbert Hoover and accentuated by Franklin D. Roosevelt provide the answer. In past depressions the federal government stayed out of the way of businesses as they tried to adjust to those economic downturns by cutting costs. In contrast, during the Great Depression the federal government tried to micromanage the economy and did a very poor job of it.

Before the Great Depression, companies were able to adjust to declining economic conditions by laying off some of their workforce. While it is true that this caused great hardships on those thrown out of work, it had the benefit of keeping the companies healthy and able to survive the downturn so that they could be in a position to rapidly increase their workforce once the economy began to recover.

To use a naval analogy, before the Great Depression, the prime objective of the federal government during economic downturns was to save the ships (businesses and the economy) at the sacrifice of some of the sailors (workers)—knowing that if the ships sank all the jobs would be lost rather than just those few that had to be sacrificed to save those ships. And a sunken ship would be permanently lost to all potential future usage and benefit.

In contrast to our prior history, at the start of the Great Depression, rather than allowing employers to adjust to the deteriorating economic conditions by laying off employees and lowering their costs, Pres. Hoover pressured the captains of American industry to pledge that they would bear the brunt of the economic pain by keeping employment up and wages high in hopes of maintaining the purchasing power of workers so that they would keep spending and thereby turn the economy around. But by requiring businesses to sustain heavier costs under such a policy, their financial statements showed even bigger losses than they otherwise would have, which, in turn, accentuated the heavy declines in the stock market the country had already seen.

In other words, to return to my prior analogy, the federal government tried to save every sailor without much concern for the water-tightness of the various ships on which they sailed. Consequently, many ships sank and the economic downturn deepened.

Soon after FDR was sworn into office, he passed the National Industrial Recovery Act which set up the National Recovery Administration (NRA) under the direction of General Hugh Johnson.

When the NRA proposed various codes to regulate most of our industries, FDR would implement them by executive order. By differing accounts, in all there were somewhere between 550 and 700 such codes administered by the National Recovery Administration ranging from the production of lightning rods to the manufacture of corsets and brassieres. They covered more than 2 million employers and 22 million workers. There were codes for the production of hair tonic, dog leashes, and even musical comedies. They sought to regulate the amount and quality of output, set prices, dictate wage rates, etc.

These codes were applied in a mandatory manner but if a company voluntarily agreed in writing to comply with its applicable code, it was entitled to display a newly created “Blue Eagle” insignia. Critics

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1 Apparently economic downturns were traditionally called “depressions” until after the Great Depression of the 1930s. Since then we have used the word “recession” to call such downturns since nothing after the Great Depression has ever approached its depth and length. “Depressions” occurred in 1819, 1839-1843, 1873-1879, 1895-1897, and 1920-1921. Hans F. Sennholz, “Cyclical Unemployment,” The Freeman: Ideas on Liberty, Vol.36, No.4, April 1986 published by the Foundation for Economic Education (http://www.ffe.org).


4 Amity Shlaes, Ibid., pp.92-94.

5 Powell, p.122.

6 Flynn, p.40; Powell, p. 121; Lawrence W. Reed, Great Myths of the Great Depression, Mackinac Center for Public Policy, p.11.

derisively called it the “Blue Buzzard,”8 “Roosevelt Buzzard,”9 and/or “Soviet Duck.”10 General Johnson orchestrated a massive public relations blitz to sell the program to the American people.11 He said that people could do their part to help the country recover from depression by only buying from those who displayed the Blue Eagle and warned: “May Almighty God have mercy on anyone who attempts to trifle with that bird.”12

After naming a famous battlefield of WWI, he said that our American men won that war for us. Then he said that this time around, in our war against the economic depression, our American women would win the battle for us by only allowing products sold under the Blue Eagle to enter their homes.13

Henry Ford refused to sign the code that applied to his industry and embarrassed the government when bids were requested by the Civilian Conservation Corps (CCC) from the various car companies to buy a fleet of trucks. Ford’s bid was $169,000 less than the other car companies which had signed on to their applicable code. Of course that number would be much more impressive to us today were it adjusted for inflation. The CCC accepted Ford’s low bid and in response, FDR signed an Executive Order prohibiting the federal government in the future from buying from those who refused to sign on to their applicable code.14

Apparently the general public appreciated Ford’s refusal to submit to the government’s attempt to micro-manage his company since his sales increased rather than decreased despite (1) General Johnson’s pleas for the public not to buy from anybody who did not display the Blue Eagle and (2) Ford’s loss of all government contracts for vehicles because of his refusal to sign on to the code.15

A prime objective of such codes was to keep wages and prices up on the theory that high wages and prices drive a healthy economy instead of the other way around.16 Consider a few examples of the minute level of regulatory micro-management and intrusiveness of the various NRA codes.

The code applicable to those who slaughtered chickens was so detailed as to prohibit the customer from choosing the live chicken he wanted to buy and have slaughtered. The butcher was required to randomly pick the first chicken he happened to grab from the pen and sell that one to the customer.17 Apparently, since the federal government was implementing price controls over goods and services, it wanted to do away with the notion of price differentiation based upon differences in perceived quality on the part of the consumer.18

A N.J. dry-cleaner was jailed for 3 months for charging 35 cents instead of the code-mandated 40 cents to press a pair of trousers under the NRA code that applied to his industry.

The federal government had to resort to such heavy-handed enforcement tactics because people were becoming fed up with all of the business interference being directed at them through the various NRA codes. They started looking at the prospect of voluntary law-breaking as a morally justified reaction to what they thought was an over-reaching federal government.19

The universal price fixing associated with the codes hurt small businesses by destroying their ability to compete with big business through price cutting competition.20

Some economists have estimated that trying to comply with all the rules and reporting requirements dictated by the various NRA codes added about 40% to the cost of doing business.21 One could not reasonably expect economic recovery to transpire when the federal government was imposing so many

8 Powell, pp.120, 124-125.
9 Powell, p.120.
10 Flynn, pp.40-41.
11 Flynn, pp.40-41; Powell, pp.119-120.
12 Flynn, p.40; see slightly different version in Powell, p.120.
14 Powell, pp.120, 125-126.
15 Powell, pp.126-127.
16 Shlaes, pp. 92-94.
18 This is consistent with the later policy of the Office of Price Administration that sought to do away with all quality differentiation. See Flynn, pp.290-291.
19 Flynn, p.41; Powell, pp.121-122.
20 Powell, pp.119-120 & 123.
21 Reed, p.11.
artificial legal costs onto struggling businesses. What FDR tried to do for the workers in the various industries through the NRA codes, he tried to duplicate for the farmers through the Agricultural Adjustment Act (AAA).

American farm production increased shortly after WWI in order to help feed a starving Europe whose fields had been destroyed during the war. To do this, farmers had to plow a lot of new ground. But as reconstruction progressed in Europe and their agricultural production went up, this foreign market for American farmers started drying up and creating a problem with over-production by our farmers. This overproduction caused prices to drop radically which threatened the livelihoods of many American farmers. A bushel of wheat sold for $1 in 1929 but later only sold for 30 cents in 1932.

Through the AAA, FDR tried to come to their rescue by paying farmers to plant less acreage in hopes of forcing market prices up for them. Price subsidies were given to farmers through the Commodity Credit Corporation. But by trying to micro-manage the farm economy in this way, he created scarcity and price hikes for food at a time when people were hungry and had very little money to pay for food.

Law is designed to affect human behavior, but it is rarely the case that it affects human behavior in just one way. Usually it causes a multiplicity of human behavioral responses the sum total of which may, on net, be bad rather than good despite the motives and intents of the policy makers to the contrary. 

Under the first AAA, farmers were paid to take a portion of their farming operations out of production with respect to just 6 controlled crops (cotton, corn, wheat, rice, peanuts and tobacco). That left more than 100 other crops uncontrolled. Farmers responded by (1) taking their least productive acreage out of production and intensively cultivating the remaining acreage with the controlled crop, and/or (2) using the newly fallowed acreage to produce other non-controlled crops thus increasing their overall production, lowering prices, and hurting those farmers who relied solely upon producing those other non-restricted crops. And who can say how many farmers fraudulently told the government they cut back on their productive acreage when they really didn’t?

Because of all the perverse incentives and unintended side-effects of this program, at least in the case of cotton, rather than supply diminishing like the federal government wanted, supply increased instead. The Secretary of Agriculture, Henry Wallace, ordered 6 million piglets slaughtered. Healthy cattle, sheep, and pigs were slaughtered and buried in mass graves. The meat was purposefully wasted at a time when many Americans were hungry in an effort to raise prices for the farmers.

The government’s quick attempts to micro-manage the economy prompted conflicting programs and results. For example, trying to save the farmers through the AAA by propping up their prices hurt everybody else who had to buy food; and trying to help everybody else through strict price-fixing and forced wage increases through the NRA codes, hurt the farmers who had to buy from those companies. Limiting business output for the sake of raising prices stopped employers from hiring new employees. So too did the artificial forcing up of wages which encouraged automation.

The goal of recovery slowly morphed into the goal of reforming the capitalist system along more socially just lines.

Not only was heavy federal regulation discouraging to business, but extremely high tax rates further discouraged risk-taking. Businessmen and investors saw themselves as being under attack on multiple occasions.

22 Powell, p.129.
23 Reed, p.7.
24 Powell, p.131.
25 Powell, pp.136 & 140.
26 Powell, p.137.
28 Powell, pp.138 & 140.
29 Powell, p.134.
30 Reed, p.10.
31 Flynn, p.117; Powell, pp.119-120, 123, & 139.
32 Powell, p.117.
33 Powell, pp.131, 136-137.
34 Powell, pp.119 & 123.
35 Powell, p.119.
36 Flynn, pp.380-381, 395-396, & 402; Powell, pp.100, 228, 247-248; Shlaes, pp.270 & 272.
At one time the highest individual marginal tax rate was 94%. The corporate excess profits tax hit 95%. FDR wanted to tax all individual incomes above $25,000 at a 100% tax rate, but Congress refused. As this all demonstrates, redistribution of wealth for the sake of promoting social justice became a reform goal to be implemented though a confiscatory tax system.

At one point in 1937, FDR said: ‘We are beginning to wipe out the line that divides the practical from the ideal; and in so doing we are fashioning an instrument of unimagined power for the establishment of a morally better world.’

The tax code did not allow taxpayers to carry back or forward business losses to be able to offset them in otherwise profitable tax years. The practical result of this was that if one were a wealthy capitalist and risked his capital in a particular venture that happened to be successful, Uncle Sam insisted upon becoming his partner to the tune of 94% of his net income above a certain threshold with him keeping only the remaining 6%. But if he lost his shirt in the venture and had no other business income that year against which to offset his losses, Uncle Sam would refuse to be his partner in loss and make him absorb all of it himself.

In the years when the top marginal tax bracket was not that high, the investment and risk-taking disincentives would not be as extreme, but still very discouraging. At no time during the Great Depression did the top marginal tax bracket drop below 63%.

FDR passed an undistributed profits tax on corporations to force them to pay out their after-tax net earnings in dividends to their shareholders so that the government could tax that income again when received as dividend income by the shareholders. This hurt small companies whose prime source of capital for future expansion was retained earnings. Companies like Ford Motor Company were able to innovate and expand their production by reinvesting their retained earnings rather than paying them out in dividends to their shareholders.

Moreover, if a company was stripped of its retained earnings, it lost the buffer it would otherwise have to continue paying workers even in bad times when the company was losing money. Without that buffer, companies were quicker to lay off employees when losses started accumulating.

The constant uncertainty spawned by the ever-changing tax and regulatory codes, increased perceived risk and thus stifled needed business investment. Not generally being risk-takers themselves, those who believe in heavy social regulation generally seem to be oblivious to the importance of legal certainty and predictability to business people when deciding whether or not to put their capital at risk either in developing new businesses or expanding existing businesses.

FDR blamed business for the depression. In addition to the foregoing federal policies, FDR’s constant public vilification of business further discouraged business. In his 1933 inaugural speech he called them “unscrupulous money changers.” In accepting the 1936 Democratic presidential nomination, he “lashed out against ‘economic royalists...the privileged princes of these new economic dynasties, thirsting for power, [who] reached out for control over government itself.’ In FDR’s view, ‘They created a new despotism and wrapped it in the robes of legal sanction. In its service new mercenaries sought to

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37 Powell, pp.80, 84, & 87.
38 See the Tax Foundation website at http://www.taxfoundation.org for the years 1944 & 1945 in their report that historically tracks income tax rates.
39 Powell, p.245.
40 Powell, pp.245-46; Reed, p.14.
41 Powell, pp.79-80.
42 Shlaes, p.299.
43 Powell, pp.78, 83-84.
44 Since it was a graduated income tax system, not every dollar of taxable income would have been taxed at a 94%--just that portion above the various lower marginal tax rate levels.
45 See the Tax Foundation website at http://www.taxfoundation.org in their report that historically tracks income tax rates.
46 Powell, pp.80-81.
47 Shlaes, pp.21 & 272.
48 Shlaes, pp.252 & 334.
49 Powell, p.x.
51 Reed, p.9.
regiment the people, their labor, their property...this [was a] new industrial dictatorship....Against economic tyranny such as this, the American citizen could only appeal to the organized power of government...we seek to take away their power.”

Businessmen saw FDR as moving us steadily towards socialism and refused to invest as a result. Without that investment, job creation slowed down and even reversed. While he said that he was only “priming the pump” to get business back on its feet, when his massive federal spending slackened, another stock market crash occurred and the depression returned in full force in 1938. Unemployment rates were quickly approaching what they were when he first took office.

Connecting the foregoing discussion to the focus of this article, how did the U.S. Supreme Court react to such attempted micro-management of the U.S. economy by the federal government? In the 1935 Schechter Poultry Corp. case the Court held the National Industrial Recovery Act to be unconstitutional since it did not fall within the powers delegated to the federal government under the U.S. Constitution. For the same reason, in the 1936 Butler case, it ruled the Agricultural Adjustment Act to be unconstitutional.

The federal government tried to win both those cases arguing that the federal government had power to regulate all the foregoing things by virtue of the Commerce Clause found in Article 1, Section 8 of the U.S. Constitution. That clause reads: “Congress shall have power…to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” But holding true to prior case precedent, the Court effectively held that the federal government was unconstitutionally trying to regulate what amounted to only intrastate commerce rather than interstate commerce sufficient to fall within the meaning of the Commerce Clause. Federalist #17 specifically used agriculture as an example where the power to regulate resided solely with the states and not the federal government.

Regarding the Agricultural Adjustment Act, the government attorneys further tried to constitutionally justify the federal regulation under the government’s delegated power to tax and spend. Under the AAA, the farmers were paid to take their fields out of production. And where did the money come from to pay them not to grow certain crops? It came from a tax imposed on the middlemen between the farmer and the end consumer.

The Supreme Court rejected the government’s argument by saying: “A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.”

That holding was consistent with a prior 1829 Supreme Court case which held:

“That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be justified in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention....[A] different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with

52 Powell, p.82.
53 Shlaes, pp.343-344.
54 Flynn, pp.90 &108; Powell, pp.227-228.
55 Flynn, p.105.
56 Flynn, p.90.
57 Flynn, pp.106-107; Powell, p.226.
58 Flynn, pp.105, 109, 384, & 391-392.
61 Ibid.
just principles, by every judicial tribunal in which it has been attempted to be enforced.”

Obviously the Supreme Court’s interpretation of the meaning of the word “tax” must have changed over time in order to find our various modern federal welfare programs to be constitutional, since in essence, taxes are being extracted from some citizens in order to cut checks to other citizens as was done under the first Agricultural Adjustment Act.

Also of interest to students in a business law class would be FDR’s political response to the Schechter and Butler cases and its ultimate effect upon the federal judiciary.

President Roosevelt was infuriated by what the Supreme Court did to his various federal programs by those holdings and decided to play hardball. In one of his famous “fireside chats,” he accused the U.S. Supreme Court of destroying the Constitution. He compared the federal government to a wagon or sled being pulled by three horses, two of which (i.e. the legislative and the executive branches) were trying to pull forward to get the country out of its economic problems while the third horse (i.e. the judiciary) was pulling in the opposite direction.

To correct this problem, he proposed a plan to “pack the court” (in the vernacular of his political opposition.) The Constitution does not prescribe the number of Justices who are to sit on the Supreme Court -- Congress determines that. The Justices who kept voting against his legislation were seventy years old and older. A law had already been passed to provide retiring federal judges with lifetime pensions. But when this did not effectively encourage the older Justices on the Supreme Court to retire, the President proposed that for each sitting Justice who was seventy years old or older and who would not voluntarily retire, the number of Justices on the court would increase by one. There were six Supreme Court Justices who fit into this category. Thus, if such a law had been passed and none of those six had decided to retire, then the membership of the Supreme Court would have risen from nine to fifteen Justices. Of course, the President would have handpicked nominees for those new positions who would have interpreted the Constitution exactly the way he wanted which would effectively have nullified the effectiveness of those older judges, virtually ensuring that the Supreme Court would have allowed the President and the Congress to do whatever they pleased.

Franklin D. Roosevelt’s constitutional philosophy was as follows:

“The United States Constitution has proved itself the most marvelously elastic compilation of rules of government ever written.”

He wanted Justices who were equally expansionist in their constitutional philosophy regarding what authority had been delegated to the federal government.

His fireside chat is very interesting to read. When I read it the first time, I sat in stunned amazement. It reminded me of a scene from Alice in Wonderland: “‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’” Or to use another analogy, it smacked of “Orwellian doublespeak” in his book 1984. By this I mean that many of FDR’s statements sounded good to those who believed in judicial restraint but upon closer analysis, were mere subterfuge for FDR’s preferred type of judicial activism.

Apparently his proposal to pack the Supreme Court was perceived to be too bold of an attack on the Judiciary even to his own party which controlled Congress, for they refused to pass his proposal. Nevertheless, apparently two justices buckled under the political pressure and changed sides effectively shifting the majority block in favor of the President’s view of constitutional interpretation. What used to

64 Address as Governor of New York, March 2, 1930. Reproduced at: http://www.lexrex.com/enlightened/writings/fdr_address.htm
65 According to Flynn, when FDR’s own party bucked his proposal to change the make-up of the U.S. Supreme Court for their ruling much of his legislation to be unconstitutional, he set about to punish those who opposed him by supporting competing candidates in the next primary elections. According to a Senate investigation, FDR’s people pressured those on public assistance to change political sides effectively shifting the majority block in favor of the President’s view of constitutional interpretation. What used to
66 Justices Hughes and Roberts. See Powell, pp.210-11.
be a 6:3 majority-block which opposed his federal programs on constitutional grounds, turned into a powerless 4:5 minority-block. Deflated, the old judges started retiring and over his 3-plus terms as President, FDR had eight appointments to the Supreme Court. It is no wonder that the predominant philosophy of the Supreme Court changed radically in favor of federal authority-expanding judicial activism in the latter part of the 1930’s. They reinterpreted the Commerce Clause to grant the federal government regulatory authority over virtually everything.

For example, FDR passed a second Agricultural Adjustment Act which limited the amount of acreage farmers could use to produce certain crops. When a farmer named Filburn was caught growing eleven acres too much of a certain type of grain, he was fined by the federal government for violating the Act. No doubt emboldened by the above-referenced Supreme Court precedents declaring much of the New Deal to be unconstitutional, Filburn defended on the ground that the federal government had no constitutionally delegated authority to pass such an Act. For the reasons just discussed, by the time this case was heard by the U.S. Supreme Court in 1942, the predominant judicial philosophy of the Court had dramatically changed.

Even though the farmer was growing his crop for internal consumption and neither bought nor sold any of it through interstate commerce, the Court held that there was a sufficient interstate commerce connection to meet the requirements of the Commerce Clause since, if he would not have produced the crop to satisfy his personal needs, he would have bought the grain from some other party to meet those needs, and that other party might have been an out-of-state producer.

The farmer also argued that eleven acres was an insignificant amount of acreage when compared to the productive capacity of the country as a whole, and thus did not merit federal regulatory oversight. However, this *de minimis* argument also fell upon deaf judicial ears since the court said that if every other farmer had done what this one had done, it would have a significant cumulative effect on the price of grain throughout the country.

Under that type of judicial thinking, virtually everything would have an interstate commerce connection sufficient to justify federal regulation and the federal government could no longer be viewed as having only limited delegated authority to regulate business. Under that logic, wouldn’t Congress be deemed to have the Constitutional authority to prohibit people from growing backyard gardens?

This judicial buckling reminds us of what Alexander Hamilton observed:

“But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the majority voice of the community.”

In response to the change in philosophic outlook of the majority of the court, somebody made a joke out of the old saying “a stitch in time, saves nine.” They changed it to read “a switch in time saved nine” to explain why the Supreme Court was still comprised of only nine members rather than fifteen.

To further illustrate the need to discuss the importance of judicial interpretation in a business law class, consider the national health care bill passed in 2010. Let’s just consider two aspects of the law, namely, (1) its requirement that everyone buy health insurance and (2) its prohibition against insurance companies denying coverage on the basis of pre-existing conditions.

When the Speaker of the House, Nancy Pelosi, was asked where the U.S. Constitution delegated authority to the federal government to regulate such matters, the question was met with an indignant refusal to even answer saying that it was a ridiculous question. In effect, she was saying that it was absurd to think that the federal government could not regulate anything it wanted to regulate.

One of the arguments made to justify such federal regulatory authority is the taxing and spending power. It has been argued that the penalty imposed upon those who refuse to buy their own health insurance is nothing more than a tax that falls within Congress’ general taxing and spending power. This is similar to the argument made by the government in the *Butler* case discussed earlier. It is further argued that the Commerce Clause supplies the necessary delegated authority under the Constitution. Depending upon how the Supreme Court will interpret these powers, American business will either be forced to submit to the costly burdens of complying with this new law, or will be relieved from having to do so. Let’s consider the potential costs that will likely be foisted upon them through the force of federal law should the Court find that act to be constitutional.

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69 *Federalist* #78, paragraph 21.
Fundamentally, health insurance is a contract between the insurance company and the insured whereby the insurance company agrees to assume a certain portion of the financial risks associated with the natural risks of life regarding one’s health. The insurance company is not a charitable organization that is in the business of trying to lose money. Through complicated actuarial calculations used to quantify risk, it agrees to insure only against certain pre-defined risks while excluding coverage for everything else. After defining the risks it is willing to insure, it sets forth its required premium to make the whole venture worthwhile to it from a business perspective. If the prospective insured party is not willing to pay the designated annual premium—considering it to be too high relative to the risks the insurance company is willing to bear in the proposed contract—then no contract is entered and the parties go their separate ways with the person effectively deciding to take on all the economic risks that might be associated with whatever potential health problems he might later face in life.

It is very easy to understand the insurance company’s need to define various policy exclusions like exclusions from coverage regarding pre-existing conditions. After all, agreeing to insure a healthy 25-year-old is far less risky and costly to the insurance company than insuring a 25-year-old who has already been diagnosed with terminal cancer or some other terminal disease which will generate huge treatment expenses that will far exceed the premiums the insurance company will expect to receive from the insured prior to his death.

Forcing insurance companies to ignore pre-existing conditions in health insurance policies would be like forcing an insurance company to retroactively issue, at regular rates, an automobile insurance policy to cover an accident that occurred before the policy was even put in place.

If by the force of federal law, the insurance company can no longer determine policy premiums on the basis of pre-existing medical conditions like this, then it will have but one of two choices, namely, either (1) raise the price of premiums across the board for all policy holders, or (2) refuse to sell any new health insurance policies or renew any existing ones.

While the politicians who imposed this new burden on the insurance companies will probably try to convince the public that the only reason insurance companies will raise their insurance premiums in response to the new health care law, is because they are heartless, selfish, greedy, mean-spirited, etc., the insurance companies will have little choice in the matter if they are to stay in business.

How the Supreme Court chooses to interpret the extent of federal regulatory authority in this context will be very important not only to the insurance industry in particular, but also to every business that pays health insurance premiums for its employees. If the Court rules that the mandatory health insurance law is constitutional, then the costs and risks of doing business in America will have been forced upwards.

The foregoing discussion illustrates the importance of judicial interpretation in protecting business and the economy from excessive and damaging government regulation. It also illustrates the need for business students to become more engaged politically since so many of the changes in judicial interpretation that have had an effect upon business can be tied to the political nature of the judicial appointment process.

To further justify this type of coverage and discussion in a business law course, consider what college students are being exposed to in their other classes around campus. In classes such as sociology, political science, English, etc., a hot topic for discussion will always be our various social problems. They will discuss such topics with the likely conclusion being that we ought to pass more regulatory laws to address such problems to promote “social justice.” But neither the professors in those fields who lead those discussions, nor the students in those majors will ever have to directly pay the price of such costly regulations. Rather, it is our business students who will be called upon to bear those burdens since the direct costs and burdens of complying with such resulting regulations will largely fall upon their future businesses.

People who push for social justice through the force of law seem to think there is no limit to the extent to which they can foist costly regulatory burdens onto business—they just seem to assume that no matter what Congress does, business people will always be willing to risk their time and capital in starting new business ventures and expanding existing ones here in America.

According to a Wall Street Journal article, during the first decade of the 21st century, U.S. multinational corporations moved a lot of jobs offshore. Their American workforce shrank by 2.9 million jobs while their overseas jobs increased by 2.4 million. I suspect that the foregoing dynamic is a major contributor to such decisions. I will say more about this when I later talk about the genius of federalism.

We have been told that our recent recession officially ended some time in 2009, but it has been called

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by many as being a “jobless recovery” since our unemployment numbers are still so painfully high even
two years later. Could it be that during the good economic times when business and the economy were
rapidly expanding, business was able to absorb the costs of government regulation, but that the cumulative
effects of all that regulation are currently causing a heavy drag on our ability to rebuild a robust economy?
Could it be that capital will continue to flee America to be invested in emerging markets around the world
at least partly driven by the hopes of gaining some measure of regulatory relief from such things as the
foregoing health care bill and our extensive federal employment laws discussed later? Is it possible that the
resulting job losses will diminish the prospects for economic prosperity for our posterity? Is it possible that
the economic costs of trying to make business be good and act in socially responsible ways through the
force of law, are just too high?—That perhaps moral persuasion and natural free market pressures might
turn out to be more effective approaches after all things are considered? These are important questions
which should be discussed in a business law class.

Allowing our business students to become familiar with Federalist #78 will help them evaluate the
propriety of what they see playing out in our federal court system regarding such things and encourage
them to exercise political influence with their elected officials in such a way as to ensure a healthy business
environment in which people will be willing to take business risks, which willingness is a necessary
prerequisite for further economic growth and prosperity for our country. So let’s see what the Federalist
Papers are and what Federalist #78 said about the proper role of the federal judiciary.

**Federalist Papers**

I discovered the Federalist Papers long after my graduation from law school. Once discovered,
however, I wondered why I was never required to read them during my formal schooling—especially as
part of my Constitutional Law class.

When the drafting of the Constitution was finally completed in Philadelphia and sent to the national
and state congresses for adoption, about five states were considered to be critical to success. If any one of
the five refused to adopt the Constitution, it was feared that other states would follow and the whole effort
would fail. One of these states was New York and the Governor of that state was publicly opposed to the
proposed document.

Alexander Hamilton, one of the delegates from New York, took it upon himself to try to sway New
York opinion in favor of adoption. He started submitting articles to the New York papers under the pen
name of "Publius". This series of articles analyzed the language of the Constitution and indicated what it
would do and not do. Hamilton did not write all of the articles. By one count, John Jay wrote 5, James
Madison 26, Alexander Hamilton 51, and Hamilton and Madison together wrote 3 of the set of 85 letters.

Initially, nobody knew who the authors were but the articles generated much debate in New York and
in the various other states where the articles were reprinted. They were eventually compiled as a set and
called The Federalist Papers or just The Federalist. The group of people who were in favor of adoption
were called "Federalists" while those who were against passage were called "Anti-Federalists." Much of
the space in those papers was devoted to refuting the various arguments made by the Anti-Federalists
against adoption.

The Federalist Papers were, in effect, the intellectual sales pitch behind adoption and were quoted
widely by the Supreme Court during our first 150 years of nationhood. Such quoting, however, became
much rarer from the New Deal period onwards as the Court started veering dramatically away from its
original constitutional moorings.

When one reads the Federalist Papers, one cannot help but be impressed with the genius of their
authors. Hamilton’s Federalist #78 is the main focus of this article as it relates to the judiciary. In modern
times, Hamilton is always used to support an expansionist view of constitutional authority. See what you
think about that assessment when you read his quotations which follow.

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71 This was after Publius Valerius Publicola who was described as saving a republic by Plutarch, the Greek
biographer and essayist. Leo Strauss and Joseph Cropsey, History of Political Philosophy, 3rd Ed., (The

72 Clinton Rossiter, The Federalist Papers (New American Library of World Literature, Times Mirror,
1961, 10th printing), xi; in his introduction, Rossiter gives credit for this conclusion of authorship to
Professor Douglass Adair.
Whenever I mention paragraphs with no other reference, I am referring to Federalist #78. As I discuss what he said, compare his sentiments with what we have seen in the U.S. Supreme Court over the last several decades. It seems as though we have done exactly the opposite of what Hamilton and the other founders intended.

Alexander Hamilton

In the sixth paragraph, Hamilton said:
“According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior [today we say “life and good behavior”]…[This] is an excellent barrier…to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”

How it will serve as a check on the encroachments of the representative body will be discussed later.

In the last paragraph of Federalist #62, Madison observed: “No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.” The required “steadiness” and “stability” would be impossible if the judges were to exercise their own wills as proscribed by Hamilton in the 7th paragraph of Federalist #78 where he said:
“The judiciary…has…no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment.”

So the Executive has the “force,” the legislature has the “will,” while the judiciary only has “judgment.”

In the eighth paragraph, Hamilton said the judiciary:
“is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”

As we will see in a moment, he is at least talking about “public security” from the other branches of the federal government. His meaning of judicial “independence” will be clarified in a moment.

In the ninth paragraph, he says that the duty of the courts of justice:
“must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”

In other words, the concept of a limited national government would fail and the national government would eventually usurp all power unto itself unless the judiciary performed the foregoing function. The eleventh and twelfth paragraphs go on to read:
“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid.”

“…the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”

The principal argument made by the Anti-Federalists to discourage adoption of the Constitution was that too much authority was being given to the federal government. To refute that argument, there is probably no more prominent theme throughout the Federalist Papers than that the federal government is a government of only limited delegated powers and that whatever authority was not delegated by the Constitution to the federal government, nor prohibited by it to the states, was reserved to the people of the states to regulate or not regulate, as they saw fit. The 10th Amendment is the clearest enunciation of that principle.

But today most people seem to accept the notion that the regulatory authority of the federal government is virtually limitless so long as it does not violate any individual rights protected in the Bill of Rights. However, that is not the type of federal government the founders intended to create. As we will see in a moment, not only were our federal judges given life tenure to protect our individual rights, but also to keep
the federal government within the bounds of its limited delegated authority.

Madison issued special cautions about Congress when he noted that "the legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex....[I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." The foregoing Hamilton quotes from Federalist #78 said this was a prime responsibility of the federal judiciary—to hold Congress within the limits of its delegated authority.

While this article focuses on the direct negative effects on business regarding federal regulation falling outside the scope of Congress’ constitutionally delegated authority, there are also important indirect negative effects on business regarding federal social programs that fall outside of Congress’ constitutionally delegated authority, but a detailed discussion of those things is beyond the scope of this article.

In the thirteenth paragraph, Hamilton said:

“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law.”

This would mean that they too, were bound by it and not allowed to change it under the guise of “interpretation.”

The sixteenth paragraph says:

“...whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”

The seventeenth paragraph reads:

“It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature....The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.”

There was some debate about whether or not the judiciary should be a separate branch of government or rather, be placed under one of the other branches. Hamilton observed: “In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature....” While some states did the same, nine had independent judiciaries.

In Federalist #78 & 81, Hamilton argued for judicial independence since it was expected that the judiciary’s role would not be to exercise its own “will” like that of the legislature, but rather, would only exercise “judgment” in impartially applying the law as per the intents (or wills) of the legislature when it acted within the scope of its constitutionally delegated authority.

If the judiciary is going to exercise its own will rather than enforce somebody else’s, then by inference, it should be a part of the legislature and be subject to the normal democratic forces that they face; namely, let them be subject to the regular election cycles that the legislators face and thereby face the potential wrath of an angry public when they overstep their bounds.

Early on, the Supreme Court recognized the principle that our federal judges are not supposed to be some sort of super-legislators when it said:

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.”

The eighteenth and nineteenth paragraphs read:

“If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against

73 Federalist #48.
74 Federalist #81, paragraph 3.
75 Federalist #81, paragraph 4.
76 Federalist #81, paragraph 7.
legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

“This independence of the judges is equally requisite to guard the Constitution and the rights of individuals....”

So giving our federal judges life tenure was thought necessary to give them the judicial backbone or “independent spirit” necessary to accomplish two very important things, namely, (1) protecting the people from an over-reaching legislature trying to exercise powers it was not given and (2) protecting the people’s rights from encroachment by the federal government. The clear implication is that they do not deserve life tenure if they are not willing to perform these two indispensible functions.

It is obvious from what Hamilton said throughout the rest of Federalist #78, that he did not intend the term “independent spirit” to imply that it was proper for federal judges to impose of their own personal wills in determining public policy.

The twentieth paragraph commands:
“Until the people have, by some solemn and authoritative act, annulled or changed the established form [i.e. the Constitution and the form of government it created], it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act.”

From the totality of Federalist #78, and all the others in the Federalist Papers taken together, it is inconceivable that the founders would have sanctioned the possibility of the Constitution being changed under the guise of “interpretation” by the judiciary.

Opponents of the proposed Constitution argued that:
“The power of construing the laws according to the spirit of the Constitution, will enable that court to mould them into whatever shape it may think proper....This is...dangerous....[T]he errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.”

In attempted refutation of that concern, Hamilton said:
“This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact. In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution....”

Then Hamilton said that the ultimate check on the judiciary would be Congress’ impeachment power. So if the judiciary overstepped its bounds and started exercising “will” instead of “judgment,” Congress would be justified in impeaching them. In other words, Congress would be justified in impeaching activist judges who sought to change the Constitution through the exercise of their own personal “wills.” But can you image how people would respond to any such attempt today? They would probably think that part of the Supreme Court’s “independence” includes the power to change the Constitution and that Congress would be acting improperly to try to stop them through the impeachment power.

Hamilton’s statements imply that the Constitution is supposed to be interpreted as per its letter and not its spirit. In other words, the judiciary had no license to turn the Constitution into what has euphemistically been called a “living document” — they were not installed for the purpose of changing what was supposed to be an immutable legal base for the American republic. If changes were to occur, they were only to occur through the formal amendment process requiring strict supermajorities at both the national and state levels. Most certainly, such changes were not to be allowed at the hands of only five people creating a majority block on the Supreme Court!

But as it turns out, Hamilton’s refutation turned out to be very weak and the Anti-Federalists turned out to be quite prescient regarding what the Court would likely do under the guise of “interpretation.” After all, is it reasonable to expect Congress to impeach the judiciary when they simply end up going along with Congress’ attempt to usurp authority? Wouldn’t the Court more likely be met with Congressional cheers than threats of impeachment, when the Court refuses to exercise the independent spirit Hamilton referred to

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78 Federalist #81, paragraph 4.
79 Federalist #81, paragraphs 4 & 5.
80 Federalist #81, paragraph 9.
regarding such Congressional usurpation?

_John Marshall and George Washington_

Chief Justice John Marshall’s words in _Marbury v. Madison_ are instructive here:

“That the **people** have an original right to establish, for their future government, such principles as, in their opinion, shall most conduces to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right [i.e. the creation and adoption of the Constitution itself] is a very great exertion; nor can it, nor ought it to be frequently repeated. **The principles, therefore, so established, are deemed fundamental.** And as the authority, from which they proceed [i.e. the people], is supreme, and can seldom act, **they are designed to be permanent.**”

In other words, all authority regarding the Constitution emanates from the people themselves from the bottom-up, and the principles contained in the Constitution are deemed to be fundamental and permanent. Why? – Because (1) the people, through great exertion, have set forth their desired form of Constitutional government – and the limits applying thereto and (2) the formal democratic amendment process set forth in the Constitution itself is so difficult that it cannot occur very often. This implies that nobody – and this includes the judiciary – is allowed to tinker with those principles other than the people themselves as a collective and democratic super-majoritarian whole.

In George Washington’s farewell address, he admonished us that the Constitution must be “sacredly maintained.” Said he:

“The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the Constitution which at any time exists, **till changed by an explicit and authentic act of the whole people,** is sacredly obligatory upon all.

* * *

“It is important…that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to **confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another.** The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism….If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; though this may in one instance be the instrument of good, it is the customary weapon by which free governments are destroyed.”

So both Washington and Marshall would agree with the sentiments expressed by Hamilton in _Federalist #78._

_Stare Decisis_

Arguing in favor of _stare decisis_, the twenty fourth paragraph of _Federalist #78_ reads:

“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them...”

This is a further proscription against a judge trying to impose his own personal will concerning what the law should be at any particular point in time.

_Joseph Story_

Joseph Story wrote one of the first treatises on the Constitution. He was a Supreme Court Justice for thirty four years alongside John Marshall. So prominent a legal scholar was Mr. Story that he was called “the American Blackstone.” In his treatise on the Constitution published in the early years of our republic,


82 Yale Law School, The Avalon Project, [http://avalon.law.yale.edu/18th_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp)
he dedicated a whole chapter to the Rules of Interpretation regarding the Constitution. Several excerpts from that chapter follow:

“The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties [who drafted them.]”\(^{83}\)

“...the constitution of the United States is to receive as favorable a construction, as those of the states. Neither is to be construed alone; but each with reference to the other. Each belongs to the same system of government; each is limited in its powers; and within the scope of its powers each is supreme. Each, by the theory of our government, is essential to the existence and due preservation of the powers and obligations of the other. The destruction of either would be equally calamitous, since it would involve the ruin of that beautiful fabric of balanced government, which has been reared with so much care and wisdom, and in which the people have reposed their confidence, as the truest safeguard of their civil, religious, and political liberties.”\(^{84}\)

“The Constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred...[He then argued that any government must be given some amount of discretionary powers in order to accomplish its objects and purposes. But then, to avoid the implication that he was arguing for unlimited federal authority, he next observed:]

“On the other hand, a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. If they do not choose to apply the remedy, it may fairly be presumed, that the mischief is less than what would arise from a further extension of the power; or that it is the least of two evils. Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is...the establishment of a new constitution. It is doing for the people, what they have not chosen to do for themselves. It is usurping the functions of a legislator, and deserting those of an expounder of the law.”\(^{85}\)

“...the state governments would clearly retain all the rights of sovereignty, which they before had, and which were not...exclusively delegated to the United States.”\(^{86}\)

“...There can be no doubt, that an affirmative grant of powers in many cases will imply an exclusion of all others. As, for instance, the constitution declares, that the powers of congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretensions to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended.”\(^{87}\)

This last sentiment is remarkably similar to what James Madison said in his attempted refutation of the claim made by the Anti-Federalists that the taxing & spending power and General Welfare clause found in Article 1, Section 8 would be read to give the federal government power to exercise whatever authority it wanted. Effectively it says that “Congress shall have power to...[tax and spend] to...provide for the...general welfare of the United States...” Then all of the specific delegations of regulatory authority to Congress follow that clause. Article 1, Section 8 is but one long sentence with only one period at its end. In refutation of that Anti-Federalist argument, Madison said:

“Shall the more doubtful and indefinite terms [i.e. the General Welfare clause] be retained in their full extent, and the clear and precise expressions [i.e. all the specific enumerations of authority set forth in that section] be denied any significance whatsoever? For what purpose could the


\(^{84}\) Ibid. Sec. 187, pp.138-39.

\(^{85}\) Ibid. Sections 188, 190, 192-93, pp.139-144.

\(^{86}\) Ibid. Sec. 199, pp.148-49.

\(^{87}\) Ibid. Sec. 207, p.155.
enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity...”

In other words, he argued that if the people really intended no limitation on the meaning of the term “general welfare” and intended no limitation on Congressional authority, they could have saved a lot of unnecessary and confusing verbiage by simply placing a period after the word “welfare” and deleting all the specific enumerations of authority which followed.

It should be noted, however, that the Supreme Court in the earlier-discussed 1936 case of *U.S. v. Butler*, held that the taxing and spending power given to Congress is *not* limited to the specifically enumerated powers found in Article I, Section 8, but rather, can be used to promote whatever nebulous notion of “general welfare” Congress can conjure except the taking of money from Party A for the purpose of giving it to Party B. So effectively, contrary to the sentiments expressed by Story, Madison, Hamilton, Washington, Marshall, etc., through the guise of “interpretation,” the Court has re-written the Constitution to allow Congress to regulate everything it wants indirectly through its “taxing and spending” power.

For example, for about twenty years after the Arab oil embargo of the early 1970s, Congress effectively forced a 55 mph speed limit on all of the states indirectly through the use of its taxing and spending power. It required the states to collect federal gas taxes at the pump and then turned around and offered to give those taxes back to the various states for all their highway building projects but only on the condition that they lower their speed limits to 55 mph. Unsurprisingly, every state complied—even Nevada. I remember as a teenager loving to drive through Nevada during our summer vacations because there were no posted speed limits. That all stopped when the federal government used its taxing and spending power to “encourage” Nevada to post a 55 mph speed limit on all of its wide open freeways. As they say, even at the state level, “money talks!”

Returning to Joseph Story’s rules of Constitutional interpretation, he said:

“...The constitution is not to be subject to... fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, today, and forever.”

“...every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or juridical research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.

“But in the next place, words, from necessary imperfection of all human language, acquire different shades of meaning....No person can fail to remark the gradual deflections in the meaning of words from one age to another; and so constantly is this process going on, that the daily language of life in one generation sometimes requires the aid of a glossary in another....We must resort then to the context....”

So the Constitution was not supposed to change through verbal gymnastics or verbal evolution. Until formally changed by the amendment process, it was supposed to have a fixed and common sensical meaning. If, over time, the meaning of some of the words used in the Constitution change, we are to refer to the meanings of those words as understood at the time of its adoption if we are to preserve its “fixed, uniform, [&] permanent” meaning.

88 *Federalist* #41.
91 Ibid. Sections 210-11, pp.157-59.
Thomas Jefferson

Jefferson warned:

“It has long, however, been my opinion, and I have never shrunk from its expression,... that the
germs of dissolution of our federal government is in the constitution of the federal judiciary; an
irresponsible body, (for impeachment is scarcely a scare-crow,) working like gravity by night and
by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief,
over the field of jurisdiction, until all shall be usurped from the States, and the government of all
be consolidated into one. To this I am opposed; because, when all government, domestic and
foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will
render powerless the checks provided of one government on another, and will become as venal and
oppressive as the government from which we separated.”

“Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper
by construction [interpretation].”

“On every question of construction [of the Constitution] let us carry ourselves back to the time
when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of
trying what meaning may be squeezed out of the text, or intended against it, conform to the
probable one in which it was passed.”

Some Contemporary Expressions of These Principles

In discussing our departure from these principles, David Lowenthal observed:

“For it is what we want--not what reasoning from a common and objective constitutional
document requires, that has become the new first principle of judicial interpretation....

“[This] novel principle...is an invitation to chaos and the end of the American constitutional
system. For if the judges, in the constitutional opinions they render, are merely stating what they
think they themselves or the country want, they have become makers of policy and ought to be
elected for limited terms, like all other policy-makers, to insure their accountability to the will of
the people. The only alternative...held that a judge, by the very definition of his function, takes a
law he did not make and applies it to particular situations in the manner the lawmaker intended and
indicated by the wording of the law....This view allows for reasoning about what the founders
intended, about their meaning, about their political philosophy, about the intrinsic needs of
republican government--with all the difficulties this often entails--but without ever surrendering
the principle that it is their meaning, rather than our ‘wants,’ that must bind judges....

“The judge is the intelligent mouthpiece of the original legislator, nothing more....[H]e is not the
savior of society, armed with a discretionary prerogative, unbound by law, to alter even the
supreme law of the land as he wishes. According to this understanding, the popular notion of the
Constitution as a supreme, overarching, and fixed basic law may be preserved; interpretations of
the law have a common objective ground that is in principle capable of being discovered; the rule
of precedent may serve as a saving lifeline between the founders’ intentions and all later
generations. Absent this understanding, the constitutional links binding the country together are
bound to dissolve, with interpretations of law becoming variable, chaotic, idiosyncratic,
overbearing, and tyrannical--or merely subject to fashion and temporary popular whim.

92 Letter from Thomas Jefferson to Charles Hammond, August 18, 1821, Works 7:216; reproduced at
p.419.
94 Thomas Jefferson to Justice William Johnson, 1823. ME 15:449. Reproduced at
“http://etext.virginia.edu/jefferson/quotations/jeff1020.htm”
“The unspoken premise of the new libertarian philosophy is that it constitutes an intellectual underpinning for liberal democracy vastly superior to that of the founders and framers. This view is rarely stated by sitting judges in their written opinions: they know admitting publicly to changing the Constitution through interpretation would arouse a public furor.”

Justice Antonin Scalia, a current member of the Supreme Court once said:

“What secret knowledge, one must wonder, is breathed into lawyers when they become justices of this court? ....Day by day, case by case, [this court] is busy designing a Constitution for a country I do not recognize.” (emphasis added)

Gary McDowell observed:

‘Interpretation is no easy business.... 'The use of words,' James Madison once noted 'is to express ideas....But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many [words] equivocally denoting different ideas. Hence it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which they are delivered.' As a result, it is essential to sound government that interpretation of the law not be merely the arbitrary personal predilections of the judge. In order to rise above being arbitrary, legal interpretation must have some moorings outside the judge himself. To allow a judge to make the words 'mean nothing at all, or what he pleases' [John Lock], would be in effect to abandon interpretation properly understood. We would have judgments but we would no longer have law in any meaningful sense. The Anglo-American legal tradition has always sought the necessary mooring of interpretation in the intention that originally underlay the law in question.”

Robert H. Bork observed:

“The idea that the Constitution should be interpreted according to that original understanding has been made to seem an extreme position. That is convenient for those who want results democracy will not give them, but the truth is that violation of original understanding ought to be the extreme position....Democratic theory requires that a judge set the majority's desires at naught only in accordance with a superior law -- in our case, the written Constitution. A judge who departs from the Constitution... is applying no law other than his will. Our country is being radically altered, step by step, by Justices who are not following any law.

* * *

“The illegitimacy of the Court's departures from the Constitution is underscored by the fact that no Justice has ever attempted a justification of the practice. At most, opinions have offered, as if it solved something, the observation that the Court has never felt its power confined to the intended meaning of the Constitution. True enough, but a long habit of abuse of authority does not make the abuse legitimate. That is particularly so when the representative branches of government have no effective way of resisting the Court's depredations.”

That expression of solidarity with the founding philosophy regarding the proper role of the judiciary, may shed some light on why Bork failed to garner enough votes in his Senate confirmation hearing to sit as a Justice on the U.S. Supreme Court.

THE OPPOSING VIEW

The particular focus of his article is the amount of authority delegated to the federal government under the Constitution to regulate business. Either there are effective limits or there are none.

Chief Justice John Marshall, easily the most prolific writer of opinions in the early years of the

Supreme Court, observed for a unanimous court:

“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained?...The Constitution is either a superior paramount law, unchangeable by ordinary means...[or it is an] absurd attempt, on the part of the people, to limit a power in its own nature illimitable....The framers of the Constitution contemplated that instrument as a rule for the government of the court, as well as the legislature.”

Inasmuch as the last eighty years or so of jurisprudence has shown the Supreme Court to be unwilling to impose any significant limits on the Congressional reach for power, unfortunately, in the words of Marshall, it has effectively turned the Constitution into an “absurd attempt, on the part of the people, to limit a power [which] in its own nature [appears over time to have become] illimitable.”

The Commerce Clause Interpretation

As mentioned earlier, the prime fear of the Anti-Federalists was that the Constitution would create a central government that was too strong. They had just successfully fought the Revolutionary War over the denial of their rights by a strongly centralized British government, and did not want to make a similar mistake by creating an overly powerful central government of their own. When the proposed Constitution was available for comment, they carefully examined it looking for any hint of excesses in the powers to be delegated to our federal government. Whenever they found potential problems along those lines, they wrote critical articles in the newspapers all around the country attempting to sway public opinion away from adoption.

In explaining what the Constitution would and would not do, the writers of the Federalist Papers often addressed those various complaints to convince people such fears and complaints were without any reasonable foundation.

Thus, it is interesting to learn that the Anti-Federalists saw no potential federal excesses to be derived from the Commerce Clause which I quoted and discussed earlier. Regarding it, in Federalist #45 Madison said: "The regulation of Commerce it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained." Consequently, he didn’t take any time to analyze that clause.

So when the Commerce Clause was later interpreted by the Supreme Court to effectively give the federal government the authority to regulate virtually anything it wanted to, that interpretation was contrary to the clear intent of those who drafted and adopted the Constitution. If their intents are not binding on future generations, then the Constitution has effectively become a meaningless piece of paper—old and interesting, but meaningless.

The Meaning of Silence

The opposing view favors the notion that the federal government can regulate whatever it wants to regulate without any limitations or prohibitions other than those specifically contained within the Constitutional text. So the thinking goes that not only can it regulate in areas specifically delegated to it under the Constitution, but can also regulate in areas concerning which the Constitution is silent. So in their mind, silence implies the existence of Constitutional authority.

However, this is not what the framers intended as the following incidents will illustrate. When George Mason proposed that the Constitution be prefaced with a Bill of Rights, it was voted down. In a similar attempt, two days later Elbridge Gerry and Charles Pinckney moved to insert a declaration “that the liberty of the Press should be inviolably observed.” Roger Sherman opposed it saying that it was unnecessary because “the power of Congress does not extend to the Press.” Sherman’s argument won the day and the

proposal was voted down in the Convention.

Similarly, in Federalist #84, Hamilton argued against the need for a federal Bill of Rights by saying: “For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” So in Hamilton’s view, supported by a majority at the Constitutional Convention, silence implies a lack of federal authority.

Again, if the framers really intended that silence implied the existence of federal authority, they could have made the document much shorter by putting a period after the term “General Welfare” in Article 1, Section 8 and done away with all the specific enumerations of federal congressional authority. But if they had done that, the states would never have voted to adopt a document containing such open-ended federal authority at the expense of their beloved state sovereignties.

Thomas Jefferson said it best when he observed:

“I consider the foundation of the Constitution as laid on this ground: That ‘all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people’ (10th Amendment). To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible to any definition.” 102

The Genius of Federalism

When regulatory power predominantly resided with the states, businesses could flee what they perceived to be government repression by moving to a different state to gain some measure of regulatory relief, thus keeping the associated jobs here in America.

For example, according to a Wall Street Journal article, because of regulatory and taxing overreach, over the last three years (2008-2010), California lost 1.2 million jobs while over that same period, Texas gained 165,000 jobs. On average during 2010, California businesses relocated out of California at a rate of 3.9 businesses per week. However, during the first quarter of 2011, that average loss rate increased to 4.7 businesses per week. 103 As Americans, wouldn’t we rather see those businesses move to other states like Texas rather than overseas?

When regulatory power becomes ever more centralized in the federal government and businesses suffer from what they think is regulatory repression, fleeing from one state to another will provide no relief. Rather, they are tempted to flee offshore for relief which effectively exports American jobs overseas as discussed earlier.

It is much more difficult to correct over-regulation at the federal level than at the state level. Political corrections are too hard to achieve since all regulations are motivated by good intentions, and if someone were to try to repeal damaging regulations he would be made to look evil on the nightly national news and become a political punching bag.

For example, consider the aggressiveness of the federal Consumer Product Safety Commission. This commission has the power to order product recalls when it deems various products to be unsafe. On its website 104 one can view its various actions with respect to particular products and companies on a month by month and year by year basis. Consider the CPSC’s recall of the magnetic dart board sold by Family Dollar in February of 2008. 105

According to that release, there were a quarter million of these dartboards made. In justifying its forced recall of this product, the CPSC said that it was possible for the little magnets to become detached from the ends of the darts and swallowed by little children. Theoretically, if several magnets detached at the same time and were swallowed by the same child, they could combine through magnetic attraction, and damage the intestines of the child as they passed through the child’s digestive tract.

The release went on to say that no injuries had been reported by anybody before the recall order was issued. So in effect, it forced the company to recall all of its dartboards on a mere theoretical possibility rather than in response to any actual problems with the product.

104 cpsc.gov
105 CPSC Release 08-201.
If one were to randomly peruse the various CPSC recall notifications over the years, one would find similar recalls based upon mere possibilities, to be quite common. Even when recalls are based upon actual problems, the reported complaints are miniscule compared to the number of products produced. It is almost as if the CPSC is demanding absolute safety which is probably impossible to achieve regarding any product.

In comparing the magnetic dartboards with the sharply pointed metal darts they were intended to safely replace, it seems the magnetic version represented an advancement in overall safety. But apparently they were not safe enough in the opinion of the CPSC.

Consider the costs Family Dollar was required to absorb as a result of this recall order. To bring a product such as this to market, a company would have to do marketing studies to see if there would be sufficient consumer demand to justify the creation of a new product and to see if the product could be produced profitably relative to consumer price demands. If the company decided that it would be profitable to produce the product, it would incur design costs, manufacturing costs, advertising costs, distribution costs, transportation costs, etc.

Then when the CPSC forced a recall of the product, in addition to absorbing all the foregoing costs, the company would incur re-collection costs, transportation costs, disposal costs, consumer refund costs, and lost expected profits on the entire product line, not to mention the reputational costs it would suffer in the eyes of the public.

In a given week I usually see at least one or two CPSC recalls covered by my local news channels. The general impressions given were that the recalled products were very unsafe when in reality, the risks of harm were usually very small.

To see how difficult it would be to correct the excesses of the CPSC, consider the motives behind creating that commission in the first place. The commission was created to save consumers from unreasonably dangerous products. Who could argue with the morality of that motive? Considering our political environment, it is very easy to anticipate that if anyone were to try to cut back on the CPSC’s powers, he would be accused of not caring for American consumers—that he would care more for the greedy and selfish corporations who are willing to put their own profits ahead of consumer safety. Few politicians would be willing to fight that battle and expose themselves to such public vilification.

In my opinion, the needs of business and the economy are not given as much consideration when crafting legislation at the federal level as they are at the state and local levels. At the federal level it seems far more likely that businesses will be vilified for the sake of mollifying sentimental emotions and idealism no matter what the price. At that level the national press tends to pressure politicians towards that type of thinking whereas the state press corps seems a little more reasonable and sympathetic to the needs of their local economies. State and local governments seem to be better at seeing the interconnectivity of things and are more willing to make reasonable tradeoffs to promote a multiplicity of public policy goals, many of which are not so emotionally charged.

In regards to the idea discussed earlier of excessive centralized regulatory authority driving American jobs offshore, consider all of our various federal employment laws. The main purpose for having a corporate human resource department is to keep the company out of court over those laws. Incurred all the associated regulatory compliance costs virtually guarantees that those companies will have to charge higher prices for the various goods and services they produce for the marketplace. This will put them at a competitive disadvantage to their foreign competition.

Consider the artificial costs forced upon American businesses through Title VII of the Civil Rights Act of 1964. Under it employers cannot discriminate on the basis of race, color, national origin, sex, or religion. Proponents of that Act claimed that their law would never become a quota system based upon mere demographics. But consider how the federal Equal Employment Opportunity Commission (EEOC) and the courts have interpreted that law.

There are two types of prohibited discrimination on those bases, namely, intentional discrimination (called “disparate treatment” discrimination) and unintentional discrimination (called “disparate impact” discrimination.) The plaintiff’s burden of proof is very difficult regarding intentional discrimination but is relatively easy regarding unintentional discrimination.106

The easiest way for the plaintiff to meet his or her burden of proof regarding a claim for unintentional discrimination is to show that the employer violated EEOC’s “4/5ths” or “80%” rule regarding relative

hiring rates.

To illustrate the application of that rule, assume that a particular company received 30 applications from white male applicants and hired 6 of those applicants. 6 divided by 30 = a 20% hiring rate among that group of people. 20% x 4/5s (or 80%) renders a 16% target hiring rate for all minority classes of applicants. So if at least 16% of every other minority class of applicants were not hired, this would be deemed to be prima facie evidence of unintentional discriminatory hiring practices by the employer. This would shift the burden of proof over to the employer to justify its practices, procedures and/or tests. It could do this by proving that a particular minority class did not have as many qualified applicants as the comparative majority class, but this is easier said than done.

For example, consider how difficult the EEOC has made it for employers to justify the use of test results to serve this purpose.

According to Fred Schwarz, in 1991 Ford Motor Company expended significant resources to develop a written test to measure basic arithmetical and cognitive skills to compare applicants for their apprentice program for electricians, machinists, and pipefitters. It hired psychologists and statisticians to demonstrate the relevance of every question on the test to the various positions under consideration. The test results showed sharp differences in the comparative pass rates between white and black applicants. At first, when Ford used these test results to determine who should be accepted into its apprentice program, the EEOC found no problem with the process. However, in 1998 the EEOC changed its mind. It didn’t find anything wrong with the inherent fairness of the test. Rather, it refused to continue to accept Ford’s usage of the test simply because Ford had not proven that such usage was the least-bad option it could have chosen to distinguish between the various applicants. At that point, a class action law suit was filed against Ford. After spending about seven years fighting within the EEOC and in court over the matter, Ford finally bought its way out of the litigation with a $10 million settlement.107

To further complicate matters for employers, it is the EEOC’s position regarding ability tests that (1) a “passing score” must be set at the lowest level that is consistent with the criteria listed in the job analysis, (2) those criteria can only include “critical or important” duties, and (3) once a group of people have passed such a validated ability test, the employer cannot discriminate among the passers on the basis of the highness of their test scores relative to each other.108 In other words, if a passing score were set at 75, and one person scored an 80 while another scored a 90, the company could not choose to hire the one with the score of 90 over the one with the score of 80 simply on the basis of the higher score.

With such interpretations of our federal anti-discrimination laws, and the almost mortal fear of being called a “racist,” “sexist,” “bigot,” etc., it appears those laws have in fact morphed into quota systems based upon mere minority classifications for it appears the only way an employer could safely negotiate all of the treacherous legal shoals surrounding this area is to make sure the demographics of its American workforce perfectly match the demographics of the American populace at large. In such an environment, it is very difficult for employers to effectively hire the best American workers to help them compete against foreign companies that produce the same goods and services.

Besides Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, color, national origin, sex or religion, there are many other federal laws that make it very expensive to hire American workers. These would include federal laws dealing with sexual harassment, age discrimination, disabilities discrimination, union protection laws, workplace safety laws, worker’s compensation laws, unemployment compensation laws, family medical leave laws, etc.

The founding generation would not have envisioned the federal government as having any delegated authority under the Constitution to pass any such legislation. Again, it would be hard to argue against the moral motivations behind all of that legislation, but one cannot escape the conclusion that all such legislation creates significant legal compliance costs on the part of American companies which create significant legal and economic incentives to move production facilities and jobs off shore as the prior Wall Street Journal article says is happening.

The broad and open-ended “police powers” regarding health, safety, morals, welfare, etc., were originally left to the states and not to the federal government. Why not let the states experiment with different approaches and let the best ones raise to the top? When we try to nationalize everything and impose a “one size fits all” regulatory approach, we lose the ability to see the effects of many different alternatives. If the “one size fits all approach” turns out to be sub-optimal, it is much more difficult to

108 Ibid.
correct a mistake at the federal level than at the state level because of the comparative inertial masses—it is much easier to turn around a ski boat than an air craft carrier.

Those who want to nationalize everything would argue that if regulatory control were largely left to the individual states, businesses would flee the “good” or “moral” states that aggressively exercised their police powers, to those states that did not have as extensive or idealistic a regulatory bent. So, the thinking goes, by nationalizing the rules, it will become more effective at making bad people become good by limiting their ability to move to other states to escape the reach of “the long arm of the law.” But by such an argument, wouldn’t they be admitting that an aggressive federal regulatory social regime would effectively drive jobs off-shore as business people seek greater freedom from national regulatory micromanagement?—That social legislation can actually carry significant negative economic consequences?

The Relative Isolation of Federal Politicians Diminishes Accountability, Thus Encouraging More Regulatory Laws and Less Freedom

When we nationalize everything, we tend to diminish the ability of ordinary people to influence their politicians on pending regulatory matters. We regularly see our state legislators in our local stores, church meetings, theaters, etc. and can easily “bend their ear” when we happen to cross their paths in public. But our national legislators tend to become isolated and protected from such day to day accountability while esconced in the marble corridors of Washington DC. In that environment, in order to have any effective input, people have to hire lobbyists but the national press strongly frowns upon lobbying.

Without having to face their constituents on a daily basis, federal politicians seem inclined to pass more laws rather than protect economic freedom. They seem to be emboldened by their colleagues who all want to prominently wear their good intentions on their sleeves by passing more and more regulatory laws to try to force people to be good. Since no state will gain any advantage over another regarding federal legislation, and they are all acting largely in unison, they do not seem to be as sensitive as they should be to all the perverse incentives and unintended side effects they cause in the process.

Passing More Laws that Overlap and Conflict with One Another and Which Combine into a Huge, Unintelligible and Unpredictable Regulatory Mass, Breeds Disrespect for the Law and Discourages Voluntary Self-Compliance by the People

Using legal force (which seems to be a federal propensity) rather than moral persuasion (which seems to be a state and local propensity), tends to expand legal complexity and encourages conflicts within our ever-expanding mass of legal rules. This, in turn, diminishes predictability by blurring the various legal lines. And when people cannot clearly discern where the various legal lines are—making it difficult for them to safely plan their affairs from a legal perspective—they lose their respect for the law which, in turn, diminishes their willingness to voluntarily comply with it.

As the law expands inappropriately and/or out of proportion, and consequently my general respect for it diminishes, I find myself becoming more aggressive in liberally interpreting particular laws in my favor—even when I understand and agree with the purposes behind those laws. My attitude tends to become more: “What do I want and how can I manipulate the law to get my way?” rather than “What does the law require of me? I need to comply as an obligation of citizenship.” Let me give an example to illustrate my point.

Some states have agricultural inspection stations posted at their borders to try to stop the inward migration of various pests and diseases that might threaten the state’s agricultural crops. Arizona used to have such an inspection mechanism. While living in Phoenix, my family and I drove to Utah to attend a college football game one fall. While driving around my brother’s house in Utah, I passed a farmer’s house that had stacks of apple boxes out front for sale. Loving apples, I bought a box before heading back to Phoenix.

When I got to the inspection station in Arizona, the man asked me if I had any fresh produce. I said that I did. He then asked: “Did you buy it in a store?” Before answering him, the following thoughts quickly raced through my mind: “If I say ‘no’ to that question, I will probably lose my box of apples since he will probably not believe they have been adequately inspected for diseases and pests. I don’t want that to happen so how can I honestly say ‘yes’ to that question and keep my apples?” In my mind I then waxed philosophic and asked myself: “What -- is a ‘store?’” “Well,” I silently answered to myself, “a store is any physical location where a seller sells and a buyer buys goods. Certainly that farmer’s front yard would fall
within that liberal conceptualization of the word ‘store.’” After going through that mental exercise of rationalization in a split second’s time, I answered the inspector: “yes, I bought them in a store.” He responded: “Very well sir, have a good day.”

My wife was in the passenger seat and as I drove down the road after that encounter the atmosphere in our car thickened. After about ten miles of very loud silence from my wife, she turned to me and said: “I can’t believe you did that!” I responded: “You know what? Neither can I!” I was obviously in the midst of a moral slide in behavior regarding my willingness to voluntarily comply with the law.

As I drove down the road towards Phoenix, I pondered what I had just done. Ten years prior I would have answered “no” to that question and been willing to sacrifice my apples from the greater good of society. What caused my change in attitude?

As I considered various alternatives, the one that made the most sense to me was this: Before going to law school, I figured that the law was pretty much black and white and that after studying it non-stop for three years in law school, I would be a walking legal encyclopedia able to answered everyone’s legal questions definitively and correctly off the top of my head without any need for research. But being subjected to the socratic method of teaching in law school, where one’s personal conclusions are never verified by the professor but only questioned and criticized, the law seemed to be more gray than black and white. The legal lines always seemed to be blurred. You were never quite certain of your conclusions for fear of missing the application of some overriding rule, principle, or law of which you may or may not have even been aware.

Then the predictability problem was compounded when I finally started to practice law on behalf of clients. It seems that no matter what the legal issue, when I tried to research the matter, I could find conflicting precedents that made it very difficult to reasonably predict the legal outcome. This lack of certainty angered me. As more and more legal rules came into being, like the Venn diagrams we used in our math classes, we saw more and more confusing overlaps between the various laws and regulations. If rule number one prevailed in application over rule number two, then that would result in a legal outcome that differed greatly from what would have resulted if instead, rule number two had prevailed in application over rule number one. Because of such dilemmas, we were taught to never give definitive statements about what the law was or wasn’t. Rather, we were taught to preface all legal comments with the phrase: “In my opinion….”

The situation became even more confused as the law tried to promote the notion of social justice where the sphere of freedom and moral persuasion shrank as the sphere of legal force expanded in our quest to make people be affirmatively good to one another in addition to the traditional legal focus of prohibiting them from harming one another. In other words, when the law went beyond its historical anti-intrusory focus and started mandating affirmative positive action, people started questioning the morality of the use of such legal force. Freedom of choice seemed to be ever narrowing as the force of law expanded. The old French political economist, Frederic Bastiat, coined a very interesting term to describe this process using terms that people would not normally connect together. He used the term “philanthropic tyranny”109 to describe the law being used to force people to be affirmatively good to one another.

So as I pondered why I was willing to selfishly define the term “store” the way I did with that Arizona Agricultural Inspector, my conclusion was that I had lost my moral respect for the law and thus, felt little moral compulsion to voluntarily comply with it when my self-interests were threatened by it.

In order for a free people to remain free, they must respect the law enough to voluntarily comply with it even in situations where there is no civil authority present to force compliance. I would argue that we can try to do too much through the law and jeopardize the prospects for voluntary compliance. I would further argue that as we try to nationalize everything and diminish our former rights to local self-government under the notion of federalism and guaranteed to us under the 10th Amendment, we should expect to see more lawlessness exhibited throughout society as our national regulatory overreach causes more widespread disrespect for the law. Our founding generation revolted from centralized tyranny, and wanted to make sure that we didn’t create similar problems here in America. The key mechanism for accomplishing that was to only delegate limited authority to the federal government and reserve the rest of the authority to the individual states to make the various political and economic tradeoffs as they saw fit.

Even If Originalism is Imperfect, it is Better than the Alternative

Another argument has been made by those who do not feel compelled to interpret the Constitution as per the intents of those who drafted and ratified it. They argue that since resorting to an “originalist” interpretation does not answer every question imaginable, we shouldn’t feel constrained to resort to it at all in interpreting the Constitution. They argue that by divorcing ourselves from originalist meanings and intents, we can interpret the Constitution in such a way as to more easily meet modern social needs.

But in doing that, aren’t those who hold that view effectively admitting that we no longer have a Constitution in any meaningful sense?—that by the terms “constitutional” and “unconstitutional” what we really currently mean is that we can either get a majority of five or more sitting Justices to agree with a certain legal policy or we can’t?

If the current Justices are not constrained by stare decisis to rule consistently with the Justices who preceded them, haven’t we allowed them as a very small group to effectively become our ever-morphing Constitution?—That the document itself has become irrelevant? If that is what we want, then wouldn’t it be more appropriate and honest to use the terms “Supreme court-able” and “Un-Supreme court-able” to openly admit that we have decided to live by the rule of five or more politically appointed judicial oracles rather than by the “rule of law” handed down from generation to generation?

If the attraction to judicial activism is the ease and quickness with which societal changes can be made, such changes can turn out to be major social blunders on net rather than net improvements. And such blunders can become almost impossible to reverse when they are expressed in terms of constitutional mandates or rights.

If it is sufficient to discard originalism because of its imperfections, shouldn’t the imperfections of all the other alternatives likewise disqualify them from consideration as well? Since we obviously must use some sort of imperfect approach, we are reduced to comparing the relative pros and cons of the various alternatives.

In my opinion, the originalist approach explained in Federalist #78 is the best alternative since (1) it is more objective in nature compared to the judicial activism alternative which amounts to the subjective exercise of personal judicial will and which usually amounts to just a minority view amongst the general populace; (2) it gives the law stability and predictability which is necessary to garner public respect of, and voluntary self-compliance with, the law; (3) it preserves our original Lockean Compact Theory of bottom-up (rather than top-down) government; (4) it preserves majority (as opposed to minority) rule; (5) its slowness of change guarantees that all perspectives are seriously and carefully considered before any significant changes are made thus lowering the possibility for costly blunders and the need for backtracking to undo the mistakes; (6) it improves the chances for producing gracious losers rather than angry revolutionaries who are frustrated by the prospects of being declared permanent losers by the court when it rules against them by calling something either a “Constitutional mandate” or “Constitutional prohibition” rather than simply a potentially short-lived democratic policy choice on the part of the people which can be democratically undone as easily as it was originally done; and (7) it better protects the prospects of economic freedom which is a necessary pre-requisite for national prosperity and opportunity.

CONCLUSION

As one can see from the foregoing discussion, the issue of judicial interpretation regarding what authority has or has not been delegated to our federal government by the U.S. Constitution, has a significant impact on business and is thereby worthy of discussion in a Business Law course.

The founding generation seems to be passed off so easily by comparing their agrarian society to our technologically and scientifically advanced industrial society. There seems to be a tacit assumption, that the principles of government and law back then are outdated for our modern society. But, while it is true we have made tremendous scientific and technological advancements since our founding era, has basic human nature changed? If not, then perhaps their rules of government and law are as applicable today as they were back then. When I read the Federalist Papers, I do not get the impression that I am reading philosophic Neanderthals, but rather, our philosophic superiors. If you have not read those essays, I highly recommend them to you—it is a very enlightening experience.

In my opinion, business students of all sorts should be exposed to their own American history concerning what was originally perceived to be the proper role of the federal judiciary. They need to have this foundational basis to both (1) judge what the U.S. Supreme Court and other federal courts are doing at any particular point in time, and (2) exert their own individual political influence in the way they think best
calculated to ensure a healthy and encouraging legal environment within which they can do business.

It is unreasonable to expect them to get this important foundational understanding in their other classes outside their schools of business since the bias which seems to permeate the other parts of a typical college campus could fairly be portrayed as being both anti-business and pro-regulation.

I do not believe this very important aspect of our American Constitutional history is taught with much respect on many campuses since it is no longer believed by most of the faculty who teach political science, history, English, sociology, etc. If it is going to have any sort of respectable coverage, it will probably have to happen in our business law classes or not at all. At least that is my assessment after 26 years of teaching at my institution and I suspect you would probably find the case to be the same at yours.

You personally might agree with the way the federal judiciary has moved away from the foregoing principles over the last eighty years or so, and you may wish to make that argument to your students, but wouldn’t the most intellectually honest approach to the debate logically begin with the expressed philosophies of those who were the prime movers in the creation of our Constitutional form of government?

110 The views expressed in the various quotations above from the founding era would probably be categorized as “conservative” today. But as a general rule, academia is staffed by those of the liberal persuasion. During the 2004-05 school year, faculty at public universities reported the following political orientations: “far left” (9.5%), “liberal” (49.5%), “middle of the road” (26.3%), “conservative” (14.3%), and “far right” (0.4%). That means that it was almost 24 times more likely that a faculty member would describe him- or herself as “far left” than “far right;” and about 3.5 times more likely to describe him- or herself as “liberal” than “conservative.” (Almanac, CHRON. OF HIGHER EDUC., Aug. 29, 2008, vol. LV, no. 1, at 26.)