OF ORPHANS AND VOUCHERS: NEVADA'S "LITTLE BLAINE AMENDMENT" AND THE FUTURE OF RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS

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In December 1875, President Ulysses S. Grant delivered his last annual message to Congress. He warned of "the dangers threatening us" and the "importance that all [men] should be possessed of education and intelligence," lest "ignorant men . . . sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft."[1] He recommended as "the primary step" a constitutional amendment "making it the duty of each of the several States to establish and forever maintain free public schools adequate to the education of all of the children" and "prohibiting the granting of any school funds, or school taxes . . . for the benefit of or in aid . . . of any religious sect or denomination."[2] There was no mistaking what President Grant referred to when he mentioned "demagogue," "priestcraft," and "religious sect" in connection with public education. Since the Civil War, the political influence of Catholics had become an important force in America, and in many states Catholics had sought public funding for their schools and charities.

Congress responded promptly. Within a week, Representative James Blaine, the powerful former Speaker of the House, introduced an amendment that would become known as "the Blaine Amendment," which provided that "no money raised by taxation in any State for the support of public schools . . .

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[1] 4 CONG. REC. 175 (1875).

[2] *Id.*

shall ever be under the control of any religious sect."[3] In August 1876, the House of Representatives approved the bill with the necessary two-thirds vote.[4] The proposal, however, received a majority but not a two-thirds vote in the Senate and failed.[5]

Although Congress never sent the Blaine Amendment to the states for ratification, the states reacted to the national attention paid to the question of public financing of sectarian schools by adopting their own "Little Blaine Amendments." Between 1840 and 1875, nineteen states adopted some form of constitutional restriction on sectarian institutions receiving state funds; by 1900, sixteen more states, plus the District of Columbia, had added such provisions.[6] Nevada was no exception. In 1877, the Nevada Legislature proposed amending the Nevada Constitution to provide that "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes."[7] The amendment, Article 11, Section 10, became final in 1880.

Like the Little Blaine Amendments states adopted across the United States, Nevada's Little Blaine Amendment responded to controversy in Nevada over public funding of Catholic institutions. For years the legislature had funded the Nevada Orphan Asylum, the largest orphanage in the state, operated by the Sisters of Charity in Virginia City. In 1882, in *Nevada ex rel. Nevada Orphan Asylum v. Hallock*,[8] the Nevada Supreme Court held that the new amendment barred the legislature from making any future contributions to the orphanage. No Nevada court has had occasion to construe Section 10 since *Hallock*.

Attention has again focused on public funding of sectarian institutions, including schools and charitable activities. For example, in 1996 Congress enacted the "Charitable Choice Act," which allows states participating in certain federally funded programs "to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement [under these programs]."[9] And President Bush has announced his interest in encouraging faith-based solutions in partnership with the federal government.[10] Additionally, a number of states have begun experiments with

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[3] 4 CONG. REC. 205 (1875).

[4] Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 942 (1951).

[5] *Id.* at 944.

[6] *See* Lemon v. Kurtzman, 403 U.S. 602, 647 (1971) (Brennan, J., concurring).

[7] NEV. CONST. art. XI, § 10.

[8] 16 Nev. 373 (1882).

[9] Charitable Choice Act of 1996, Pub. L. No. 104-193, tit. 1, § 104, 110 Stat. 2161 (1996) (codified at 42 U.S.C. § 604(b) (1996)).

[10] Marvin Olashy, *First, Aim for That Compassionate Agenda*, WASH. POST, Dec. 17, 2000, at B1; Dana Milbank & Hamil R. Harris, *Bush, Religious Leaders Meet President-Elect Begins Faith-Based Initiative, Reaches for Blacks*, WASH. POST, Dec. 21, 2000, at A6; Dana Milbank, *Bush's Faith-Based Group Initiative Will Meet Resistance*, WASH. POST, Jan. 27, 2001, at A10; Editorial, *"Faith-Based" Charities*, LAS VEGAS REV.-J., Jan. 29, 2001, at 6B; Dana Milbank, *Bush Unveils "Faith-Based" Initiative Effort Will Team Agencies, Nonprofits on Social Issues*, WASH. POST, Jan. 30, 2001, at A1; Laurie Goodstein, *Nudging Church-State Line, Bush Invites Religious Groups to Seek Federal Aid*, N.Y. TIMES, JAN. 30, 2001, at A18; Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2001, § 6, at 40; Laura Meckler, *Bush Promotes Plan to Widen Religious Role in Social Services*, LAS VEGAS REV.-

school vouchers, and those may find support in the Bush administration as well.[11] More importantly for Nevada, in 1999, the legislature authorized cities

J., Jan. 31, 2001, at 4A; Marc Lacey & Laurie Goodstein, *Bush Fleshes Out Details of Proposal to Expand Aid to Religious Organization*, N.Y. TIMES, Jan. 31, 2001, at A15; Dana Milbank, *New Director for Faith-Based Office: Bush Taps Jim Towey, a Veteran of the Hill and Mother Teresa's Ministry*, WASH. POST, Feb. 1, 2002, at A4; Caryle Murphy, *Religious Leaders Cautious on Bush Plan – Some Fear Dependency and Too Much Scrutiny*, WASH. POST, Feb. 1, 2001, at B1; J.R. Labbe, *Undermining Religion's Theme*, LAS VEGAS REV.-J., Feb. 11, 2001, at 1D; Kenneth L. Woodward, *Of God and Mammon*, NEWSWEEK, Feb. 12, 2001, at 24; Martha Minow, *Vouching for Equality: Religious Schools Can Rank Among the Choices*, WASH. POST, Feb. 24, 2002, at B5; Laurie Goodstein, *Bush's Charity Plan is Raising Concerns for Religious Right*, N.Y. TIMES, Mar. 3, 2001; Editorial, *Public Interests: Faith and Parking*, N.Y. TIMES, Mar. 6, 2001; Elizabeth Becker, *Aid on Track to Religious Charities, Official Says*, N.Y. TIMES, Mar. 14, 2001; Laurie Goodstein, *Support for Religious-Based Plan is Hedged*, N.Y. TIMES, Apr. 11, 2001; Laurie Goodstein, *Battle Lines Grow on Plan to Assist Religious Groups*, N.Y. TIMES, Apr. 12, 2001; Editorial, *Why Not Try Vouchers*, N.Y. TIMES, Apr. 27, 2001; Elizabeth Becker, *Bush's Plan to Aid Religious Groups is Faulted*, N.Y. TIMES, Apr. 27, 2001; Elizabeth Becker, *Senate Delays Legislation on Aid to Church Charities*, N.Y. TIMES, May 24, 2001; Mike Allen, *Bush Aims to Get Faith Initiative Back on Track: Stricter Rules to be Added for Use of Funds by Groups*, WASH. POST, June 25, 2001, at A1; Juliet Eilperin, *For N.Y. Minister, a Faith-Based "No" to U.S. Aid*, WASH. POST, June 26, 2001, at A2; Editorial, *The Reality of Faith-Based Programs*, WASH. POST, July 7, 2001, at A22; Richard Morin & Claudia Deane, *Conflict Resolution Starts on Faith-Based Plan*, WASH. POST, July 10, 2001, at A19; David S. Broder, *More Risk Than Reward?*, WASH. POST, July 11, 2001, at A19; Dana Milbank, *Bush Drops Rule on Hiring of Gays: Democrats – "Faith-Based" Initiative at Risk*, WASH. POST, July 11, 2001, at A1; Editorial, *The Faith-Based Problem*, WASH. POST, July 15, 2001, at B6; Dana Milbank, *House to Take Up Faith Initiative*, WASH. POST, July 18, 2001, at A4; Editorial, *Bad Bill in the House*, WASH. POST, July 19, 2001, at A26; Juliet Eilperin, *Faith Initiative Hits Snag in House: GOP Moderates' Bias Concerns Postpone Vote*, WASH. POST, July 19, 2001, at A1; Juliet Eilperin, *Faith-Based Initiative Wins House Approval*, WASH. POST, July 20, 2001, at A1; Jill Zuckman, *Bush Victory: House Oks Faith-Based Initiative*, LAS VEGAS REV.-J., July 20, 2001; Steve Tetreault, *Bush Allows Religious Groups to Bid for Federal Funds to Run Social Programs*, LAS VEGAS REV.-J., July 22, 2001; E.J. Dionne, Jr., *Faith-Based Defense*, WASH. POST, July 27, 2001, at A31; Hamil R. Harris, *Congregation Wins Credit Union Charter in Temple Hills, Bush Administration Lobbies for Support of Faith-Based Initiative*, WASH. POST, Aug. 1, 2001, at B3; Dana Milbank, *Senate Faith Initiative Backer to Drop Disputed Provisions*, WASH. POST, Aug. 2, 2001, at A2; E.J. Dionne, Jr., *Not Just Faith Is at Work Here*, WASH. POST, Aug. 7, 2001, at A15; Mike Allen, *"Faith-Based" Backup Plan: Agencies Look to Lower Barriers to Social Services Contracts*, WASH. POST, Aug. 17, 2001, at A2; Dana Milbank, *DiIulio Resigns from Top "Faith-Based" Post: Difficulties with Initiative in Congress Marked Seven Months at White House*, WASH. POST, Aug. 18, 2001, at A4; Dana Milbank, *Bush Urges Senators to Act on Faith Bill*, WASH. POST, Aug. 19, 2001, at A4; John A. Clahoun, *Faith and Funding Simplified*, WASH. POST, Aug. 29, 2001, at A21; David S. Broder, *Bush's Domestic Agenda Takes Back Seat: Education Reform, Faith-Based Initiatives Vie for Attention with Terrorist Fight*, WASH. POST, Oct. 15, 2001, at A4; Dana Milbank, *Charity Bill Compromise is Reached*, WASH. POST, Feb. 6, 2002, at A1; Dana Milbank, *Bush Endorses Compromise in Senate on Aid to Charities*, WASH. POST, Feb. 8, 2002, at A4.

[11] Florida enacted a voucher program in 1999. *See Florida Set to Provide Education Vouchers*, LAS VEGAS REV.-J., Apr. 28, 1999, at 13A. This program was challenged in the Florida courts, and is currently remanded to the trial court level. *See* Bush v. Holmes, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000). Maine, Vermont, Cleveland, and Milwaukee also have voucher programs for public education. *See* Catherine L. Crisham, Note, *The Writing Is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs*, 89 GEO. L.J. 225, 233-34 (2000).

and counties to donate money or supplies to nonprofit organizations "created for religious, charitable or education purposes."[12]

The U.S. Supreme Court has shown increased disposition to approve creative programs under which sectarian institutions or religiously motivated persons can participate on an equal basis in public programs.[13] This term, the Supreme Court has heard arguments in a challenge to the constitutionality of the Cleveland school voucher program.[14] As courts hear challenges to the constitutionality of these programs under the First Amendment to the U.S. Constitution, they have also had to confront – many for the first time – the legacy of post-reconstruction anti-Catholicism: Little Blaine Amendments.

In this article we consider the effect of Article 11, Section 10, of the Nevada Constitution on any "charitable choice," school voucher, or similar program that might be proposed in Nevada. We begin in Part I with a review of the context for the federal Blaine Amendment and the resulting state efforts to adopt their own such amendments. In Part II, we provide background on the dispute over state funding of the Nevada Orphan Asylum, the adoption of Section 10, and the Nevada Supreme Court's decision in *Hallock*. Although no Nevada courts have considered Section 10 since *Hallock*, the Nevada Attorney General has issued many opinions citing Section 10 and relying on *Hallock*. We review these decisions as well in Part II. In Part III, we discuss recent developments in the U.S. Supreme Court's First Amendment jurisprudence, explaining why those developments will permit states to look to their own First Amendment-type restrictions, including Little Blaine Amendments. We conclude in Part IV with some thoughts on how Section 10 might be construed in future cases in Nevada.

I. Catholic Schools, Political Influence and the Blaine Amendment Before Congress and the States

A. *Catholics, Schools, and Public Funding*

The Blaine Amendment struck deep at America's religious tolerance and exposed a growing rift between Catholics and Protestants involving not only schools, but politics, language, and culture. At the time of the founding, the United States was overwhelmingly Protestant. Questions of religious tolerance were largely questions of tolerance among competing Protestant sects; colonial Americans "accepted some diversity in the beliefs of other Protestants, and barely tolerated Catholicism and Judaism."[15] The framers had recognized the possibility that the Free Exercise Clause would apply to Muslims, Hindus, and

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[12] Nev. Rev. Stat. 244.1505, 268.028 (1999).

[13] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Bowen v. Kendrick, 487 U.S. 589 (1988); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986).

[14] Zelman v. Simmons-Harris, Nos. 00-1751, 00-1777, 00-1779 (argued Feb. 20, 2002).

[15] Office of Legal Policy, *Report to the Attorney General: Religious Liberty Under the Free Exercise Clause* 23 (1986).

"pagans,"[16] but at the time none of these groups represented any serious threat to Protestant-homogenous Americans.

By the middle of the nineteenth century, however, things had changed. Catholic immigration and evangelization had swelled the numbers of American Catholics. At the time of the founding, less than one percent of Americans were Catholics; by the end of the Civil War, that figure was more than ten percent.[17] Catholics increased their representation in the U.S. population generally, and their influence was concentrated largely in northern cities, in some of which they constituted a majority.[18] As their numbers grew, Catholic political influence increased as well, and by 1876, it was generally assumed that the Catholic vote had "determined the results of elections since 1870."[19] The Vatican Decree of Papal Infallibility of 1870 added to the anti-Catholic sentiment during this time.[20]

Perhaps the greatest source of friction between the Protestant majority and the Catholic minority was the public school system. In the colonial era, education was the domain of the church. The states either supported the church-established schools or claimed no role in education. These roles reversed in the nineteenth century as Jacksonian populists insisted that states provide a free public education to all people. In 1852, Massachusetts adopted the first compulsory education law in the United States; other states followed after the Civil War.[21] The first public schools, although not devoted to the teachings of any particular denomination, embraced the notion of a "civic religion." The schools taught fundamental principles that emphasized the common ground between the various Protestant sects, rather than their differences.[22] The public schools routinely required pupils to pray, sing hymns, and read from the Bible, practices that the U.S. Supreme Court ended in the 1960s.[23] The public education movement reached its apex in the 1920s in state laws *requiring* a public education.[24]

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[16] 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (J. Elliot ed., 1836) (statement of James Iredell).

[17] Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 135 (2000).

[18] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42-43 (1992).

[19] Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 32 (1957).

[20] *See* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 329 (1964).

[21] ORVILLE H. ZABEL, GOD AND CAESAR IN NEBRASKA: A STUDY OF THE LEGAL RELATIONSHIP OF CHURCH AND STATE, 1854-1954, at 86-87 (1955). *See also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 238-40 & n.7 (1963) (Brennan, J., concurring).

[22] *See* Green, *supra* note 18, at 45 n.46, 56 n.115.

[23] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (state-prescribed prayers); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (state-supported Bible readings).

[24] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding unconstitutional Oregon's compulsory public education law). *See also* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child As Property*, 33 WM. & MARY L. REV. 995, 1017-18 (1992) ("The guiding sentiment [for the compulsory public education movement] . . . seems to have been an odd commingling of patriotic fervor, blind faith in the cure-all powers of common schooling, anti-Catholic and anti-foreign prejudice, and the conviction that private and parochial schools were breeding grounds of Bolshevism.").

From the Catholics' perspective, public schools were Protestant schools. Catholics took offense at the form of the prayers offered in public schools, the nature of the hymns, and that students read from the King James Version rather than the preferred Catholic text, the Douay translation of the Bible.[25] Catholics responded to these developments by demanding public funding for their own schools, insisting that school boards stop religious exercises, and bringing suits to halt what they regarded as Protestant indoctrination.[26] Although Catholics had successfully obtained some public funding for their schools and had long obtained public funds for their charitable activities,[27] their attacks on the public schools brought an enormous backlash in the form of Protestant calls for prohibitions on public funding of religious education and charitable institutions.

B. The Blaine Amendment

The Catholic question had been fomenting for a long time before President Grant called for a constitutional amendment. As early as 1871, members of Congress, including Nevada Senator William Stewart, had proposed amending the U.S. Constitution to prohibit federal, state, and local governments from funding sectarian schools.[28] Four years later, the President entered the debate. At a convention in Iowa, President Grant urged that Americans "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools . . . [E]very child growing up in the land [should be afforded] the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas."[29] Three months later, in December 1875, President Grant requested that Congress consider a formal amendment:

> I suggest for your earnest consideration – and most earnestly recommend it – that a constitutional amendment be submitted to the Legislatures of the several States for ratification making it the duty of each of the several States to establish and forever maintain free public schools adequate to the education of all the children in the rudimentary branches within their respective limits, irrespective of sex, color, birthplace, or religions; forbidding the teaching in said schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds, or school taxes, or any part

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[25] Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 666 (1998). *See also* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 20, 23 (1994).

[26] Green, *supra* note 18, at 41, 44-47; Viteritti, *supra* note 25, at 670. *See also* Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000, § 6 at 40. *See generally* LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 (1974).

[27] Green, *supra* note 18, at 43.

[28] CONG. GLOBE, 41st Cong., 3d Sess. 592 (1871) (statement of Sen. Warner; presenting a petition from citizens in Indiana); CONG. GLOBE, 42d Cong., 1st Sess. 730 (1870) (proposal of Sen. Stewart). Stewart's proposed amendment read in part:

> There shall be maintained in each State and Territory a system of free common schools; but neither the United States nor any State, Territory, county, or municipal corporation shall aid in the support of any school wherein the peculiar tenets of any religious denomination are taught.

Id. The Senate never acted on the proposal. *See* CONG. GLOBE, 42d Cong., 2d Sess. 206 (1871); CONG. GLOBE, 42d Cong., 2d Sess. 3892 (1872).

[29] *Quoted in* Green, *supra* note 18, at 47.

thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination . . . .[30]

A week later Representative James Blaine of Maine introduced in the House of Representatives what would have become the Sixteenth Amendment and became known as the "Blaine Amendment."[31] The proposed amendment came before the House in August 1876, where it occasioned relatively little debate.[32] The debate began in the Senate about the same time, but was far more extensive.[33] We will not recount all of the debate, which has been reviewed elsewhere, for its import (if any) on the question of whether the Fourteenth Amendment made the First Amendment applicable to the states.[34] For our purposes, we wish to review briefly the concerns senators expressed over the amendment's application (or not) to sectarian charitable causes as well as to sectarian schools.

The Blaine Amendment, as recommended by the House, was difficult to decipher. The amendment forbade tax money or public lands devoted to "the support of public schools" from being "divided between religious sects or denominations." Did that mean that money that had not been earmarked for use by public schools could be spent on sectarian education? Or did it mean that no public funds could be used in support of sectarian education, but public funds might be used in other sectarian activities? What, precisely, was the scope of the Blaine Amendment? According to Senator Frelinghuysen, the amendment proposed by the House "only applie[d] to a school fund . . . . There is not a word in the amendment that prohibits public money from being appro-

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[30] 4 CONG. REC. 175 (1876). At the end of his state of the union report, President Grant repeated that "No sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community." *Id.* at 181.

[31] The amendment stated:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id. at 205.

Blaine had served as Speaker of the House from 1866 to 1874, when the Republicans lost control of the House of Representatives. Although Blaine introduced the proposed amendment as a member of the House, by the time either house considered it, Blaine had assumed a seat in the Senate. Blaine aspired to run for the presidency in 1876, and when he failed to secure the nomination, he lost interest in the amendment and did not even vote on the proposal. Green, *supra* note 18, at 53, 67-68.

[32] 4 CONG. REC. 5189-92 (1876) (The final vote was 180 to 7, with 98 not voting.).

[33] *See* 4 CONG. REC. 5245-46, 5357, 5453-61, 5561-62, 5580-95 (1876).

[34] *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 256-58 (1963) (Brennan, J., concurring); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 169-70 (1986); Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1596-98 (1995); Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1137-39 (1988); Green, *supra* note 18; William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1208-11 (1990); Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 186-94 (1965).

priated to theological seminaries, to reformatories, to monasteries, to nunneries, to houses of the Good Shepherd, and many kindred purposes."[35] But Senator Christiancy argued that the amendment did not prohibit "the States raising any amount of money . . . to the support of private schools for instruction in the religion of any sect."[36]

In response to these concerns, the Senate Judiciary Committee proposed a much broader substitute, one that banned federal and state governments from using any "revenue . . . or loan of credit . . . for the support of any school, education or other institution under the control of any religious or anti-religious sect, organization, or denomination."[37] Curiously, it specifically provided that the amendment "shall not be construed to prohibit the reading of the Bible in any school or institution."[38] As we might have expected, the latter provision stirred debate over whether reading the Bible was a religious activity or a sectarian activity and whether it was consistent with the Establishment Clause.[39] Two things were clear from the subsequent Senate debates: the Blaine Amendment was part of a larger Catholic-Protestant debate,[40] and, as amended in the Senate, the Amendment would have applied to orphanages and other charities.[41] In the end, the Blaine Amendment failed – barely – in the Senate, twenty-eight to sixteen.[42]

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[35] 4 CONG. REC. 5245 (1876) (statement of Sen. Frelinghuysen).

[36] *Id.* (statement of Sen. Christiancy). *See also id.* at 5246 (statement of Sen. Morton).

[37] *Id.* at 5453. The proposal read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, education or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.
>
> Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.

[38] *Id.*

[39] *See, e.g., id.* at 5562 (statement of Sen. Frelinghuysen), 5588 (statement of Sen. Edmunds), 5590 (statement of Sen. Bogy), 5593 (statement of Sen. Eaton).

[40] *See, e.g., id.* at 5455 (statement of Sen. Randolph), 5562 (statement of Sen. Frelinghuysen), 5585 (statement of Sen. Morton), 5589-90 (statement of Sen. Stevenson), 5590-91 (statement of Sen. Bogy), 5593 (statements of Sens. Eaton and Morton).

[41] *See, e.g., id.* at 5561 (statement of Sen. Frelinghuysen), 5582 (statement of Sen. Kernan), 5585 (statement of Sen. Kernan), 5592 (statement of Sen. Eaton). Senator Eaton of Connecticut, for example, pointed out that in Hartford there were two asylums, one Catholic and one Protestant, with about five hundred children. "Hartford . . . by this amendment cannot give a thousand dollars a year to each of those two asylums although by doing it they should save $20,000 a year. It is absurd." *Id.* at 5592.

[42] *Id.* at 5595.

C. *"Little Blaine Amendments" and the States*

What Congress failed to adopt for the nation, most of the states enacted for themselves. The movement to adopt "Little Blaine Amendments" actually predated President Grant's call for a constitutional amendment, although the controversy over the federal amendment surely reinforced state activity. According to one count, by 1876 fourteen states had adopted some kind of constitutional restriction on funding sectarian education.[43] During the 1870s, including the period following the debates over the Blaine Amendment, some nine additional states (including Nevada) adopted Little Blaine Amendments.[44] Additionally, Congress began requiring new states, as a condition of their entering the union, to include some kind of Little Blaine Amendment in their constitution.[45] Whether by their own hand or by congressional mandate, by 1890, at least twenty-nine states had some kind of constitutional prohibition on the use of public funds for sectarian education or other purposes.[46]

Some of the state provisions applied quite specifically to schools. California, for example, provided in its constitution of 1879:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.[47]

Other provisions adopted during this period reflected a somewhat broader prohibition. The Illinois Constitution of 1870 prohibited the use of public funds for church controlled schools and "anything in aid of any church or sectarian purpose."[48] The Illinois provision applied to more than churches, but was not clear whether "sectarian purpose" included schools and charitable institu-

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[43] Green, *supra* note 18, at 43.

[44] Viteritti, *supra* note 25, at 673 n.78. Professor Viteritti lists the states as Colorado, Illinois, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, and Texas. Inexplicably, he omits Nevada.

[45] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 220 n.9 (1948) (Frankfurter, J., concurring).

[46] *See* Green, *supra* note 18, at 43; Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 146 (1996); Viteritti, *supra* note 25, at 673-75. Congress also required states entering the union after 1890 to adopt some kind of provision guaranteeing public schools free from sectarian control. *See* Kotterman v. Killian, 972 P.2d 606, 636 (Ariz. 1999) (Feldman, J., dissenting); Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-67 (1988).

There are some inconsistencies in the estimates of the number of states enacting Little Blaine Amendments. *See* Heytens, *supra* note 17, at 123 n.32. As we have already noted, *supra* note 44, Nevada is often omitted from such lists. We have not attempted to reconcile the numbers. The current state provisions are listed, and many are discussed, in Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1 (1997).

[47] CAL. CONST. art. IX, § 8 (1879), *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 432 (Francis Newton Thorpe, ed. 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. The current version is CAL. CONST. art. 16, § 5.

[48] ILL. CONST. art. VIII, § 3 (1870), *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 1035.

tions. Furthermore, the phrase "sectarian purpose" begged the question raised during the Blaine Amendment debates whether educational instruction could be religious without being "sectarian." A provision of the Florida Declaration of Rights, adopted in 1885, simply prohibited aid to "any church, sect, or religious denomination or . . . any sectarian institution."[49] It seems more likely that Florida's provision would have prohibited aid to charitable institutions, so long as they were maintained by a sect or religious denomination. South Dakota was even more specific: "No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."[50] Although the states adopted various Little Blaine Amendments, it is at least clear that the states generally intended to forbid the use of public funds in sectarian schools; and in some cases, it appears that the amendments extended to other sectarian institutions as well.

II. THE NEVADA CONSTITUTION, RELIGION, AND PUBLIC EDUCATION

A. *The Nevada Constitution and Sectarian Instruction in Public Schools*

When Congress authorized the people of the Territory of Nevada to adopt a constitution and seek admission to the Union, it required as a condition that Nevada secure "perfect toleration of religious sentiment" and that "no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."[51] Nevada adopted a provision, identical to California's provision, protecting "free exercise" and "liberty of conscience."[52] The Nevada Constitution does not expressly prevent religious establishment, although the Attorney General has so construed the free exercise provision.[53]

The Nevada Constitution placed special importance on education and devoted Article 11 to the issue. Consistent with the nationwide movement underway in the 1860s, the Nevada Constitution instructed the legislature to provide for a "uniform system of common schools" and "to secure a general attendance of the children in each school district upon said public schools."[54]

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[49] FLA. DECL. OF RTS. § 6 (1885), *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 733.

[50] S.D. CONST. art. VI, § 3 (1889), *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 3370.

[51] *An Act to enable the People of Nevada to form a Constitution and State Government*, § 4, 13 Stat. 31 (1864). Congress placed similar restrictions in the enabling acts for the constitutions of Arizona, Idaho, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming. *See* STOKES & PFEFFER, *supra* note 20, at 158.

[52] NEV. CONST. art. I, § 4. The provision reads:

> The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of conscience hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.

See CALIF. CONST. art. I, § 4 (1849), *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, supra note 47, at 391. California's provision follows closely a provision in the New York Constitution of 1777. N.Y. CONST. art. xxxviii (1777), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 47, at 2636-37.

[53] Op. Nev. Att'y Gen. 320 (Mar. 3, 1954).

[54] NEV. CONST. art. XI, § 2.

Although the original Nevada Constitution did not contain a formal Establishment Clause, Article 11, Section 2 stated that any school district allowing "instruction of a sectarian character" could be deprived of its portion of public school funding. As if for further emphasis, Section 9 repeated that "No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution."[55] Although these provisions applied only to public institutions, they raised, but left unanswered, an issue brought up during the congressional debates over the Blaine Amendment: Is "sectarian instruction" the same as "general religious instruction"?

Little guidance on this question is available from the constitutional debates. One delegate stated that "[t]his matter of religious and sectarian influence in the public schools, is, of all things, most calculated to arouse suspicious and jealousies in the public mind, and if the enemies of the Constitution can see anything in our action on that subject to carp at, they will be sure to make the greatest possible amount of capital out of it."[56] Some members argued that the Section 2 provision did not represent a positive prohibition against imparting sectarian instruction, and therefore called for an addition to the section or perhaps an entirely new provision to do that.[57] The delegates settled on the idea of a new section, as this would allow coverage of all levels of state-financed education, including universities and colleges, which were not covered by Section 2. As Mr. Brosnan, the sponsor of the bill, stated, "let my amendment apply to all the schools."[58] Brosnan's amendment became Section 9.[59]

B. The Nevada Constitution and the Nevada Orphan Asylum

In the same year that Nevadans adopted their constitution, Father Manogue and the Sisters of Charity organized the Nevada Orphan Asylum.[60] They chose Virginia City as the site for the Asylum, probably because Storey County had the largest population of any county in Nevada at that time and because the high-risk nature of mining created a local need for an orphanage.[61] Despite the advent of such safety enhancements as square-set timbering and improvements in other machinery used in the Comstock mines, the danger of cave-ins, fire, falling timber within the mines, defective cables and other machinery continued to make life in the mines hazardous.[62] The Asylum took

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[55] NEV. CONST. art. XI, §§ 2, 9. *See also* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 565 (1866) [hereinafter OFFICIAL REPORT OF THE DEBATES]. This Article was originally titled Article 12, but in the final form of the Nevada Constitution became Article 11.

[56] OFFICIAL REPORT OF THE DEBATES, *supra* note 55, at 566.

[57] *Id.* at 660-61.

[58] *Id.* at 661.

[59] NEV. CONST. art. XI, § 9.

[60] HUBERT HOWE BANCROFT, HISTORY OF NEVADA 1540-1888, at 301 (1981).

[61] The census data from 1860 for Nevada are incomplete, as the territory was not organized until 1861. However, in 1870 the state had a population of 42,491, of which 11,359 lived in Storey County. The next largest county, Ormsby, had a population of 3,668. *See* U.S. Census 1900, 30.

[62] RUSSELL R. ELLIOTT, HISTORY OF NEVADA 144 (1973). As an example of this danger, in the year 1878 there were twenty-six fatal accidents on the Comstock: "four from caving, four from premature explosion of powder, six from falls unconnected with hoisting machin-

in not only children without parents, but also those of single parents who felt they could not adequately provide for the rearing of the child.[63] The first building consisted of a single room for the sisters and the twelve orphans that constituted the original population.

A number of immigrant groups formed the backbone of the laboring class on the Comstock, including the Welsh, who constituted the largest such group,[64] the Germans, French, Italians, Hispanic, and the Cornish.[65] Many of the Cornish and Welsh were still in the area as a result of the California gold rush. In 1870, the foreign-born residents of Virginia City outnumbered the native-born residents, and even as late as 1880, when the mines had begun to decline, there were almost four times as many foreign-born members of the labor force as native-born.[66] The major religious denominations of the area were the Catholics, the Methodists, and the Episcopalians, with smaller groups of Presbyterians and Baptists.[67] Many of these groups held religious services in the immigrants' native languages.[68]

By 1866, the Nevada Orphan Asylum had debts of over $8,000, and legislators raised the question of public funding to aid the Asylum.[69] Senator Sumner introduced a bill in January 1866 to appropriate $10,000 to the Asylum.[70] The *Virginia Daily Union* called the bill "most meritorious," adding that the benefits would be felt "more or less, throughout the State, and in equal proportion as they are felt in our own vicinity."[71] A petition from local businessmen in support of the bill stated that the original hope that the Asylum could be funded with local contributions had faded due to "the general depreciation of the business interests of this section of the State," and that this downturn necessitated some state support to allow the Asylum to continue operating.[72]

The Senate Committee on State Affairs visited the Asylum, filed a report on the general conditions found there, and recommended passage of the requested appropriation. The Committee concluded that it would be financially impossible for the state to construct and maintain its own home and, therefore, the state should fund the Asylum.[73] The report summarily dismissed concerns that an appropriation to the private institution would violate Article 11, Section 9 of the state constitution: "For numerous reasons, too obvious to require men-

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ery, one from being crushed by a cage in motion, three from defective machinery in shaft works, six from heat, and two from hoisting machinery."

[63] Anne M. Butler, *Mission in the Mountains: The Daughters of Charity in Virginia City*, *in* COMSTOCK WOMEN: THE MAKING OF A MINING COMMUNITY 156-57 (Ronald M. James & C. Elizabeth Raymond eds., 1998). These one-parent children were often called "half-orphans." *See* REPORT OF THE BOARD OF DIRECTORS OF THE STATE ORPHANS' HOME FOR THE ELEVENTH AND TWELFTH FISCAL YEARS (1877).

[64] ELLIOTT, *supra* note 62, at 148.

[65] Butler, *supra* note 63, at 159.

[66] ELLIOTT, *supra* note 62, at 141.

[67] *Id.* at 373. The Church of Jesus Christ of Latter-day Saints, or Mormon Church, was the first to organize in the area, but by about 1857 that group had withdrawn to Utah territory.

[68] *Id.* at 148.

[69] *A Law That Should Pass*, VA. DAILY UNION, Feb. 8, 1866, at 2.

[70] Nev. Senate Journal and Appendix, Second Session 30 (1866).

[71] *The Sisters of Charity*, VA. DAILY UNION, Jan. 20, 1866, at 2.

[72] *The Orphan Asylum Bill*, CARSON DAILY APPEAL, Feb. 3, 1866, at 2.

[73] Nev. Senate Journal and Appendix, *supra* note 70, at 112.

tion, this section is wholly inapplicable as against the appropriation asked in this case."[74]. When the bill came up for a final vote, Senator Lockwood attempted to insert a section incorporating the language of Section 9, that "no sectarian instruction shall be imparted or tolerated in any school or university that may be established or maintained under this Act." This attempt failed, and the bill passed the Senate and went to the Assembly.[75]

The Assembly also weighed the costs of Nevada establishing its own orphanage versus the funding of the church-operated Asylum. The Committee of Ways and Means recommended rejecting the Asylum bill, along with another bill that would have funded an Episcopal Parish school, on the grounds that both bills would enable the institutions to "train up the children in the tenets or religious belief of the respective churches."[76] The Committee also expressed concern that the funding would be used "in defraying the ordinary current expenses" of the Asylum, thereby increasing the likelihood that the Asylum would require an annual appropriation.[77] A minority report argued that the cost to the state of establishing its own orphanage would be "not less than four times the amount here asked," and questioned whether the "injunction . . . [to] feed and clothe and expend wearisome labor and undergo painful solicitude in the care of little orphan children" belonged to any one sect.[78] Representative Hinckley entered a protest against the bill, "considering it the first step toward uniting Church and State" in Nevada.[79] Despite the Committee's recommendation, the Assembly passed the bill and sent it to the Governor.[80]

Governor Henry Blasdel vetoed the bill based on Article 8, Section 9, of the state constitution.[81] This section mandated that the state could only donate money to "corporations formed for educational or charitable purposes" and, the Governor argued, the Asylum did not meet this requirement because it had not been incorporated.[82] The Governor remarked that the framers of the constitution wisely included this as a debt control measure, and that, because of its debts, the state was "not in a condition to make this donation, or any such, however laudable."[83] The Senate attempted but failed to override the veto.[84] The actions of the Governor drew both criticism and praise from local newspapers. The *Virginia Daily Union* opined that "Governor Blasdel is a conscientious man and is possessed of constitutional venerance gratifying to behold, in fact . . . he would experience a happy dissolution could he quietly enfold himself within the pages of a ponderous Constitution and gently dissolute."[85] The *Carson Daily Appeal* supported the Governor's decision and criticized Senator

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[74] *Id.* at 113.
[75] *Id.* at 147.
[76] Nev. Assembly Journal and Appendix, Second Session 208 (1866).
[77] *Id.*
[78] *Id.* at 248-49.
[79] *Good God!*, VA. DAILY UNION, Feb. 28, 1866, at 2.
[80] *Two Important Bills Passed*, CARSON DAILY APPEAL, Feb. 27, 1866, at 2.
[81] *The Governor's Veto of the Orphan Asylum Bill*, CARSON DAILY APPEAL, Mar. 2, 1866, at 2.
[82] *Id.*
[83] *Id.*
[84] Nev. Senate Journal and Appendix, *supra* note 70, at 253.
[85] *Truly Unfortunate*, VA. DAILY UNION, Mar. 1, 1866, at 2.

Sumner for having sponsored the Asylum bill for "his own advancement with the Irish (whom he seems to be anxious to encourage in their clanishness)" and for placing the Governor in the position of having to veto the legislation, thereby diminishing his chances at being renominated for the governorship.[86]

During the next legislature session, Senator Sumner introduced a similar bill to fund the Asylum. In the meantime, however, the Sisters of Charity had incorporated the Asylum, thereby curing the Governor's previous objection to state funding.[87] The bill passed the Senate with little fanfare, but there was again a protest over the possible connection of church and state.[88] A Select Committee reported favorably on the bill, arguing that the state "has not, and is not likely in the near future, to provide a separate institution."[89] The Assembly agreed with the Senate and voted to provide $5000 to support the Asylum over a two-year period. The bill, however, required that "in receiving or rejecting applicants for admission into said Asylum, no distinction or preference shall be made or given on account of the nationality or religion of the applicant, or his or her parents."[90]

In the 1869 legislative session, the battle over the Asylum heated up. Senator Grey introduced Senate Bill 12, requesting $6000 in financial support for the Asylum, which the Senate approved.[91] There was only modest discussion of the sectarian purpose for this appropriation, and Senator Grey commented that he "was glad to find that bigotry had narrowed itself down to a very small compass."[92] In the meantime, Assemblyman Potter introduced Assembly Bill 108, requesting funding for a State Orphan Home including $8000 to build or purchase a suitable building in Carson City and $7000 for the support of the orphans.[93] The Senate and Assembly approved both Senate Bill 12 and Assembly Bill 108, and the Governor signed both.[94]

The legislature had determined both to establish a state orphanage and to continue funding the Asylum. Any doubt as to the legislature's intentions was dispelled by Section 13 of the act establishing the State Orphan Home, which provided:

> On or before the first day of October, A.D. 1870, it shall be the duty of the Board of Directors of the State Orphan Home to notify the Trustees of the Nevada Orphan Asylum that they will receive all orphans in their charge, and will bear all the necessary expenses in their removal.[95]

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[86] *Governor Blasdel and the Orphan Asylum Bill*, CARSON DAILY APPEAL, Nov. 1, 1866, at 2.

[87] Butler, *supra* note 63, at 153.

[88] Nev. Senate Journal and Appendix, Third Session, 176 (1867).

[89] Nev. Assembly Journal and Appendix, Third Session, 222 (1867).

[90] 1867 Nev. Stat. 130-31.

[91] Nev. Senate Journal, Fourth Session, 21, 104 (1869); *Senate – Ninth Day*, TERRITORIAL ENTERPRISE, Jan. 13, 1869, at 2.

[92] *Thirty-Second Day – Senate*, TERRITORIAL ENTERPRISE, Feb. 5, 1869, at 2.

[93] *House – Forty-fourth Day*, TERRITORIAL ENTERPRISE, Feb. 18, 1869, at 2. The act required that the citizens of Ormsby County donate ten acres of land within Carson City. *The Orphans' Home*, CARSON DAILY APPEAL, Oct. 7, 1869, at 3.

[94] Nev. Assembly Journal, Fourth Session, 164-65, 281 (1869); Nev. Senate Journal, *supra* note 91, at 284.

[95] 1869 Nev. Stat. 168.

Any orphans in the charge of, or supported by, the state were to be removed from the Asylum and placed in the State Orphans Home. It seems obvious that if the state established its own orphanage and removed orphans it was supporting from the Asylum that the legislature would no longer fund the Asylum, and it might be forced to close. Perhaps the point was too obvious for words, because there was no such discussion in the legislative debates.

The State Orphan Home apparently opened as scheduled in 1870. The legislature, nevertheless, continued funding the Asylum in the 1871 term.[96] In the 1873 term, the Assembly considered funding the Asylum, but the bill was withdrawn at the request of Sister Frederica, head of the Sisters of Charity at the Asylum, who believed that the Asylum lacked support for further funding: "[O]f late, a hostile feeling has risen against [the orphans]. If we are not entitled to the appropriation in justice, we do not look for it in charity."[97] She also charged that the enemies of the Asylum had approached legislative candidates and informed them that their support in the election depended on the candidates' opposition to further funding for the Asylum.[98] She felt the loss of funding was evidence of a larger anti-Catholic sentiment.[99]

The legislature eventually funded the State Orphan Home and directed that orphans housed in the Asylum at state expense could be transferred "at any time desired by the Trustees of the Nevada Orphan Asylum."[100] This provision was a minor change from the 1869 act, which directed that all orphans receiving state support should be transferred from the Asylum to the Home. Although Nevada had established its own orphanage, it continued to fund the Asylum, despite increasing controversy over the Asylum.[101]

C. *The Passage of Nevada's Little Blaine Amendment*

1. *Section 10 Before the Assembly and the People*

In February 1877, just six months after Congress considered the Blaine Amendment, Assemblyman W.H. Botsford, representing Storey County, proposed amending Article 11 of the Nevada Constitution.[102] The proposed Section 10 read: "No public funds, of any kind or character whatever, State, county, or municipal, shall be used for sectarian purposes."[103] In order to amend the Nevada Constitution, the resolution had to pass both houses of the legislature in two succeeding legislative sessions, and then be approved by the voters of the state.[104] The Assembly adopted the Joint Resolution unanimously

[96] Nev. Journal of the Senate, Fifth Session, 101, 109 (1871); Nev. Journal of the Assembly, Fifth Session, 103, 158, 319 (1871). The Act appropriated $5000 to the Asylum for two years.

[97] Butler, *supra* note 63, at 156. *See also* Nevada State Archives and Records Management, *State Children's Home History*, *at* http://dmla.clan.lib.nv.us/docs/nsla/archives/archival/exec/orphange.htm (last visited June 14, 2000); Nev. Journal of the Assembly 138, 202, 224 (1873).

[98] *Id.*

[99] *Id.* at 159.

[100] 1873 Nev. Stat. 103-04.

[101] There was no legislation concerning the Nevada Orphan Asylum in 1875.

[102] *Nevada Legislature*, EUREKA DAILY REPUBLICAN, Feb. 20, 1877, at 2.

[103] 1877 Nev. Stat. 221.

[104] NEV. CONST. art. XVI, § 1.

on the day it was introduced,[105] and the Senate passed the measure a week later with only two dissenting votes.[106] The *Nevada Daily Tribune* praised Assemblyman Botsford for introducing the legislation and implied that the amendment had its origins in the same anti-Catholic fervor sweeping the rest of the nation.

> This is a move in the right direction and will, we trust, meet with the hearty approval of every citizen of Nevada . . . for this is a stepping stone to the final breaking up of a power that has long cursed the world, and that is obtaining too much of a foothold in these United States.[107]

Ironically, at the same time the legislature was considering the amendment, Senator Frank Stewart of Storey County introduced a bill requesting a "fund for the relief of the several orphan asylums" in the state.[108] The Senate passed the bill easily.[109] The Assembly, however, rejected the bill on the first reading.[110] The *Territorial Enterprise* supported the appropriation, arguing that the State Orphan Home was full and that it would be less expensive for the state to house any remaining orphans at other institutions within the state rather than having to ship them to shelters in other states, the "other institutions" being the Asylum operated by the Sisters of Charity in Virginia City. The *Enterprise* urged that "[i]t is no appropriation of money for a sectarian purpose and by no fair construction can be so esteemed. It is simply a matter of bread and clothes for the children of Protestants, Catholics, Jews, and others who had no religion but whose children need protection."[111]

The irony continued during the following legislative session. The Assembly again approved the proposed amendment unanimously, and this time the Senate did as well.[112] The proposal to amend the Constitution to prohibit public funding of sectarian purposes could now be placed on the ballot in the 1880 general election. Just one month later, Senator Farrell, who had voted in favor of the proposed amendment, introduced a bill authorizing funding for the Asylum.[113] When the Senate Standing Committee on Judiciary recommended rejection of the bill, the Senate voted to table the bill.[114]

Question Two in the 1880 Nevada general election gave the voters their chance to approve Section 10, which they did overwhelmingly by a vote of 14,216 to 672.[115] At that time, there were 62,266 people living in Nevada, with 16,115 of those living in Storey County, home to the Asylum.[116] There is

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[105] Nev. Journal of the Assembly, Eighth Session, 238 (1877). Unfortunately, there are no extant records of the debate, if any, over the Joint Resolution.
[106] Nev. Journal of the Senate, Eighth Session, 272 (1877).
[107] *A Much Needed Amendment*, DAILY NEV. TRIB., Feb. 21, 1877, at 3.
[108] Nev. Journal of the Senate, *supra* note 106, at 233.
[109] *Id.* at 293-94.
[110] Nev. Journal of the Assembly, *supra* note 105, at 330.
[111] *The Orphan Bill*, TERRITORIAL ENTERPRISE, Feb. 25, 1877, at 2.
[112] Nev. Journal of the Senate, Ninth Session 77, 79 (1879).
[113] *Id.* at 252.
[114] *Id.* at 263, 311.
[115] The vote meant that 95.5 percent approved the measure and only 4.5 percent rejected it. DEAN HELLER, POLITICAL HISTORY OF NEVADA 269 (10th ed. 1997). The bill was mistakenly placed on the ballot in some counties in 1878, prior to its having been approved twice by the legislature as required.
[116] U.S. Census 1900 at 30.

some question as to how much interest this question received in other parts of the state. Several years after the passage of this Section 10, G. R. Alexander, Superintendent of Schools for Lincoln County, stated that his district was experiencing problems with sectarianism in their schools. Apparently some teachers were using *The Book of Mormon* as a reader. His proposed solution to this problem was that "every teacher should take the Constitutional oath, as our Constitution provides, and that there should be a non-sectarian clause in addition."[117] While this is far from conclusive evidence of a lack of statewide interest or knowledge of this amendment, it may help demonstrate the localized nature of the concern generated by the activities of the Asylum.

2. Section 10 Before the Nevada Supreme Court

During the first legislative session following the approval of the amendment, Assemblyman Mooney of Storey County introduced Bill 87, which once again appropriated funds "for the relief of the several orphan asylums of this State."[118] The Assembly referred the bill to the Committee on State Institutions, which recommended passage.[119] The Committee of the Whole also recommended passage, and the bill passed by a vote of thirty-seven to two.[120] The *Carson Daily Index* warned that passage of the bill threatened to make the Asylum "a mere branch of the State Orphans' Home, so far as participation in the funds of the State is concerned."[121] The *Daily Index* went on to state that any money granted to the Asylum "is in contravention to the principle that no moneys [sic] should be appropriated from the State Treasury for religious or sectarian purposes."[122] A few days later, the same newspaper stated that "[t]his State has a charity of its own for which to provide, in the care of orphan children. So long as the State expends its money in that direction, it ought not to be called upon to support private sectarian charities of a similar nature."[123] Despite the editorial pressure, the Senate passed the measure by a nineteen to four vote,[124] and the Governor signed it into law.[125] A *Daily Index* editorial stated that "[t]he disbursement of this money will be clearly for sectarian purposes, contrary to the amendment to the Constitution that was adopted at the last general election," adding that the State Controller, Treasurer, or Governor could refuse to release the payment or that legal proceedings could be undertaken "to restrain the payment of the monies, although we have not been advised of any."[126]

In July 1881, the Asylum attempted to collect the first installment of the funding approved by the legislature.[127] From the Governor to the Controller,

[117] BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF NEVADA, 1883-1884, at 10.
[118] Nev. Journal of the Assembly, Tenth Session, 125 (1881).
[119] *Id.* at 205.
[120] Nev. Journal of the Assembly, Tenth Session, 213-14 (1881).
[121] *The Catholic Asylum Bill*, CARSON DAILY INDEX, Feb. 20, 1881, at 2.
[122] *Id.*
[123] *News of the Day*, CARSON DAILY INDEX, Feb. 23, 1881, at 2.
[124] Nev. Journal of the Senate, Tenth Session, 265 (1881).
[125] *Catholic Orphan Asylum*, CARSON DAILY INDEX, June 3, 1881, at 3.
[126] *Id.*
[127] *That Sectarian Bill*, DAILY NEV. ST. J., Aug. 3, 1881, at 3.

Nevada's executive officials doubted whether they could fund the Asylum consistent with the Nevada Constitution. Governor John Kinkead signed the bill, but stated that, in his view, the bill conflicted with the state constitution. "This I believe is beyond the power of the Board of Examiners to determine and must be settled by judicial decision."[128] Secretary of State Jasper Barcock also signed the bill, but stated that he doubted the constitutionality of the bill.[129] Attorney General M. A. Murphy declined to sign the bill "because I believe it to be appropriating money for sectarian purposes, which we are forbidden to do by Section 10 of Art. XI."[130] State Controller J. F. Hallock refused to sign or pay the warrant for the same reasons.[131]

When Hallock refused to release the Asylum's funds authorized by the legislature, the Asylum filed an original action in the Nevada Supreme Court, seeking a writ of mandamus against the state controller to compel payments of $1,279.79.[132] In *State ex rel. Nevada Orphan Asylum v. Hallock*, the Nevada Supreme Court, in a unanimous opinion by Chief Justice Orville Leonard, denied the writ on the grounds that the Asylum was a sectarian institution, and therefore could not obtain state funding under Section 10.

Counsel for the Asylum offered a two-fold argument. First, they argued that the term "sectarian" referred to those Christian doctrines upon which various Christian denominations disagreed. By contrast, they argued, the word "sectarian" did not include "the teaching of any doctrines upon which all Christian denominations agree . . . . Christianity [being] a part of the common law of the state of Nevada."[133] To the extent that the Asylum taught Protestant children Christian doctrines, the Asylum was not engaged in "sectarian" activities.[134] Second, counsel for the Asylum contended that, in any event, monies received from the state were used for housing and feeding children. Accordingly, even if the Nevada Orphan Asylum were a "sectarian institution," state monies were not being used for "sectarian purposes."[135] The Attorney General denied that Christianity was part of Nevada's law. He further argued that "sectarian" meant "all religious denominations."[136] Since the Nevada Orphan Asy-

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[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] State *ex rel.* Nev. Orphan Asylum v. Hallock, 16 Nev. 373, 376 (1882).
[133] *Id.* at 374 (argument for counsel for the Asylum).
[134] There was conflicting testimony given at the hearing about the daily prayers. Sister Vibianna testified that only Catholic children received Catholic instruction, while other children could read works from the library during this time. She also stated that non-Catholic children could attend the church of their choice if accompanied by a responsible party. Testimony of Sister Vibianna at 5, Nev. Orphan Asylum v. Hallock, 16 Nev. 373 (1882). Ida Morgan, who had attended the Asylum school as a child, testified that no religious instruction occurred during her time at the Asylum. Testimony of Ida Morgan at 1, *Hallock*. However, Mary Elizabeth Stewart testified that the Sisters would not allow her to repeat the prayers her mother taught her as a child, and that the Sisters required her to learn the Catechism. Testimony of Mary Elizabeth Stewart at 2, *Hallock*. Clara Kenney also stated that the Sisters required her to learn the Catechism, and that when she failed to repeat a portion of it upon request from Sister Frederica, she was "whipped with a strap." Testimony of Clara Kenney at 1-2, *Hallock*.
[135] *Hallock*, 16 Nev. at 375 (argument for counsel for the Asylum).
[136] *Id.* at 376 (argument for the Attorney General).

lum by its nature was a "sectarian institution," it was barred from receiving state funding for any purposes.[137]

The Supreme Court characterized the issue as whether "the Nevada Orphan Asylum [was] a sectarian institution, and would the payment of its claim be using the state's funds for sectarian purposes."[138] The court observed that "it [was] not plain, from the amendment itself, what the people meant by the words 'sectarian purposes,'" and that the court would examine the history of state appropriations. The court found that, "with one exception, [the Nevada Orphan Asylum] has been, and is the only applicant for state aid, where the question of sectarianism could have been raised."[139] From the fact that the Nevada Orphan Asylum was the only institution "of a sectarian character" to have applied and received state funds, the court deduced that "in the minds of the people, the use of public funds for the benefit of [the Asylum] and kindred institutions, was an evil which ought to be remedied."[140] Indeed, the court said, "[the Asylum's] continued applications greatly, if not entirely, impelled the adoption of the constitutional amendment."[141]

The court thus suggested that the term "sectarian" had to be understood against the background for the Amendment. If the Amendment did not apply to the Asylum then, the court reasoned, it is not clear that it applied to any other applicant for or recipient of state funds; the Amendment would have been anticipatory, but would have had no relevance to any current problem. Since the only party to which the Amendment could conceivably have applied was the Nevada Orphan Asylum, the Asylum's activities must be the "sectarian purposes" referred to in the Amendment.

The court addressed and rejected the Asylum's argument that "sectarian" meant the matters of doctrine that divided religious denominations. Instead, the court adopted a broader reading – the court called it the "popular sense" – in which a religious sect defines a "distinct organization or party . . . . The framers of the constitution undoubtedly considered the Roman Catholic a sectarian

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[137] *Id.* at 375-76 (argument for the Attorney General). The Attorney General's argument to the Court demonstrates that the Attorney General did not believe that the Constitution forbade moral instruction, or even prayer in school:

> The only institutions that are entitled to receive any portion of the State appropriation under the Act of 1881, are those that are not controlled by any religious sect, are not confined to any one class, are not presided over by any one religious sect or denomination. It must be open to all, and no particular creed or religion be taught therein, but each and every inmate thereof is to be permitted to say prayers that their mothers taught them, or need not say any if they do not feel so disposed, nor should be they be required to be present while others are saying their's, should they not be so inclined. This is the only construction that can be placed upon the Act, in face of Section ten, Article Eleven of our Constitution.

Brief for Respondent at 9, *Hallock*.

[138] *Hallock*, 16 Nev. at 378.

[139] *Id.* at 380. *See also id.* at 383. The court quoted extensively from the 1866 report of the "senate committee of ways and means." *See id.* at 381. The report was prepared by the Ways and Means Committee in the Assembly. *See supra* text accompanying notes 76-80.

[140] *Hallock*, 16 Nev. at 383. The court's mention of "kindred institutions" probably referred to the St. Mary's school, which the Sisters of Charity operated next to the Asylum. *See id.* at 375 (argument of the Attorney General).

[141] *Id.* at 383.

church."[142] It was therefore irrelevant whether "*Protestant* children are taught only those things which are common to all Christian people." Nor did it matter that

> Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether their parents wish it or not . . . . It is what is taught, not who are instructed, that must determine this question.[143]

Finally, the court rejected the Asylum's claim that, even though it was a sectarian institution, the funds went to non-sectarian purposes. For the court, the state funds "would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes . . . [I]t is impossible to separate the legitimate use from that which is forbidden."[144]

In 1897, the Asylum and the St. Mary's school closed.[145]

D. Subsequent Decisions in Nevada

Since the *Hallock* decision, no Nevada court, so far as we can determine, has cited either *Hallock* or Section 10 for their substance. In fact, *Hallock* has been cited exactly once by Nevada courts for any purpose. In *State v. Grey*, the Nevada Supreme Court cited *Hallock* as evidence of the proper manner in which to amend the Nevada Constitution.[146] Thirteen other courts have cited *Hallock*,[147] most notably Justice Brennan in his concurring opinion in *Lemon v. Kurtzman*,[148] a case dealing with a constitutional challenge to state aid to non-public, parochial schools.

Despite this dearth of additional judicial explanation of Section 10, the Nevada Attorney General's office has published a number of opinions citing Section 10 and referring to *Hallock*. These opinions, although quite uneven, may add to our understanding of how Section 10 should be interpreted and applied.

1. Religious Use of Public Facilities

In 1954 and 1955, public officials in Clark County requested the Attorney General's opinion on whether religious groups could use public buildings. In the first of these opinions, six religious denominations had applied to use "school buildings for religious purposes, with or without rent for the prem-

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[142] *Id.* at 385.
[143] *Id.* at 386.
[144] *Id.* at 388.
[145] Butler, *supra* note 63, at 163.
[146] State v. Grey, 32 P. 190, 193 (Nev. 1893) (Bigelow, J., concurring).
[147] *See* Roberts v. Bradfield, 12 App. D.C. 453, 474 (1898); Bowker v. Baker, 167 P.2d 256, 259 (Cal. Ct. App. 1946); Bennett v. City of La Grange, 112 S.E. 482, 485 (Ga. 1922); Cook County v. Chicago Indus. Sch. for Girls, 18 N.E. 183, 187 (Ill. 1888); Knowlton v. Baumhover, 166 N.W. 202, 211 (Iowa 1918); Craig v. Mercy Hosp.-St. Mem'l, 45 So. 2d 809, 820 (Miss. 1950); Synod of Dakota v. State, 50 N.W. 632, 635 (S.D. 1891); State *ex rel.* Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton, 44 N.W. 967, 980 (Wis. 1890); *In re* Cummins, 20 Haw. 518, 525 (1911); Bd. of Ed. of Balt. County v. Wheat, 199 A. 628, 631(Md. 1938); Chance v. Miss. State Textbook Rating & Purchasing Bd., 200 So. 706, 715 (Miss. 1941); State v. Weedman, 226 N.W. 348, 359 (S.D. 1929).
[148] 403 U.S. 602, 649 (1971) (Brennan, J., concurring).

ises."[149] The opinion advised that the school board had "no authority under the Constitution to let school buildings for religious purposes, with or without rent for the premises."[150] The Attorney General referred to various provisions of the Nevada Constitution and *Hallock*, but relied, in large measure, on broad principles derived from recent U.S. Supreme Court decisions. The following year, however, the Attorney General issued a "clarification." Noting the lack of municipal auditoria throughout the state, and the fact that, in smaller communities, the only structure capable of housing a large gathering was the school gymnasium, the Attorney General opined that the Nevada Constitution would not be violated if a "school board [rented] a school auditorium or gymnasium to a religious group for the purpose of presenting an exhibition or show, open to the general public, which in no way attempted to impart, promulgate or disseminate religious teachings or doctrines."[151] The Attorney General also observed that churches had requested permission to use schools and other public buildings after hours for church services; the opinion, however, did not address this question directly. The ruling neither forbade nor approved use of public property for church services, but the opinion contemplated that such groups would pay rent for use of the facility.

In 1993, the Attorney General had occasion to reconsider those opinions when she was asked whether the Clark County School District could open "its limited public forum facilities to sectarian groups for religious teaching or purpose."[152] The Attorney General found that such use would be permissible under the Establishment Clause of the U.S. Constitution. With respect to Section 10, however, the Attorney General concluded that

> [i]f worship services were permitted in the limited public forum free of charge, Nev. Const. art. 11, § 10 would clearly be violated. However, if the use of the facility was conditioned upon a rental fee reflecting the cost to the school district for the proposed use, no public funds would be expended for the sectarian purpose.[153]

The opinion was notable because the Attorney General admitted that Section 10 imposed constraints not found in the Establishment Clause, namely, that religious organizations using public facilities must pay for such use.

2. *Accommodation of Religious Practices in Public Programs*

The Attorney General issued several opinions on the relationship between public and parochial schools. In 1948, the Attorney General concluded that public school officials had the discretion to dismiss children from school at their parents' request in order to receive religious instruction.[154] By 1954, however, the Attorney General disapproved of a "release time" proposal under

[149] Op. Nev. Att'y Gen. 316 (1954).
[150] *Id.*
[151] Op. Nev. Att'y Gen. 14 (1955).
[152] Op. Nev. Att'y Gen. 93-2 (1993).
[153] *Id.* This opinion reversed Op. Nev. Att'y Gen. 316 (1954), discussed above. The question of access to public facilities continues. *See* Glenn Puit, *City Will Permit Praying; Policy Changes After Interfaith Council Protests Ban From Public Facility*, LAS VEGAS REV.-J., Feb. 26, 2001, at 1B (City of Las Vegas initially refused permission to an interfaith group to use a public center because the tribute to Dr. Martin Luther King would have included prayers; the city reversed itself).
[154] Op. Nev. Att'y Gen. 684 (1948).

which children in public schools could attend religious instruction off campus during their study hall.[155] The opinion cited Section 10 and other provisions of the Nevada Constitution as evidence that Nevada had "effectively erected 'a wall of separation between Church and State,'" but largely tracked U.S. Supreme Court decisions. The Attorney General also opined that Section 10 barred the school district from providing educational services to parochial students who were ill and at home.[156] In 1965 the Attorney General disapproved a "shared time" arrangement under which parochial students would enroll in public school courses not offered in their private school.[157]

The Attorney General subsequently considered whether state funds could be used to hire a Chaplain for the Nevada Youth Training Center at Elko. Under the proposal, the chaplain would not hold formal church services, but would provide "religious instruction covering faith without referral to sect, creed, or denomination."[158] He would also interview each new inmate of the Center to determine "religious interests, training and background and other information concerning the family constellation."[159] The Attorney General ruled that such instruction would violate state and federal constitutions, stating that there was no demonstration as to how the "religious counselling [sic] and advice" or "religious instruction" contemplated by the contract "can be free of sectarian indoctrination of some kind and to some degree."[160] The Attorney General also expressed concern over the captive nature of the audience; "the element of coercion is indubitably present."[161] The Attorney General concluded, however, that his opinion would not forbid the "mere reading of the Bible without comment of any kind."[162]

The Attorney General revisited the issue again in 1963, when the office reviewed the constitutionality of NRS 209.050, which authorized the Nevada State Prison to pay for chaplain services. The Attorney General stated that Section 10's prohibition dealt primarily with "preventing sectarian religious instruction in the public schools."[163] This concern grew in part from the captive nature of the school audience, and the receptiveness of the children's minds to religious thought. As long as attendance to religious services was not compulsory, the Attorney General had no objection to a prison chaplain conducting services or to the state paying for the chaplains.

Section 10 also arose in the context of state employees taking leave with pay in order to attend "Good Friday" services. The Attorney General ruled this unconstitutional, stating that "attendance of Good Friday services would most likely be viewed as a 'sectarian purpose' within the meaning" of the state con-

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[155] Op. Nev. Att'y Gen. 320 (1954).

[156] Op. Nev. Att'y Gen. 56-209 (1956).

[157] Op. Nev. Att'y Gen. 278 (1965).

[158] Op. Nev. Att'y Gen. S-16 (1962).

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* The Attorney General relied on language from *Engel v. Vitale*, 370 U.S. 421, 442-44 (1962).

[163] Op. Nev. Att'y Gen. 67 (1963).

stitution.[164] The Attorney General added that it would be permissible for a state employee to take leave without pay to attend such services, or attempt to adjust their working hours to allow such attendance.

3. *Public Funds and Religious Institutions*

In 1941, the Attorney General considered whether state funds could be used to support the hospitalization of crippled children at St. Mary's Hospital in Reno. The Attorney General ruled that this use would not violate the state constitution, as there would be "no attempt to instruct or guide these patients in religious tenents [sic]" during their stay at the hospital, in contrast to the "children in the orphan asylum [in *Hallock*, who] were given definite religious instruction."[165] Section 10 was not intended to "prevent necessary hospitalization in sectarian hospitals where no instruction of any kind was imparted."[166]

In 1965, the Superintendent of Public Instruction asked if the State Department of Education could accept federal funds under the Elementary and Secondary Education Act.[167] One section of the Act allotted funds to state education agencies to meet the needs of "educationally deprived children . . . from low-income families." The law specifically included such children enrolled in private schools. The Attorney General opined that the federal requirement that state agencies provide for children in private schools might "easily result in a violation of Article XI, Sections 2 and 10 [of the Nevada Constitution]."[168] Unfortunately, having made such a portentous statement, the opinion offered no further analysis of those sections. Instead, quoting from *Hallock* and referring generally to prior Attorney General opinions, the Attorney General concluded, unhelpfully, that the Department of Education could accept federal funds so long as the Department maintained "'separate the legitimate use (of funds) from that which is forbidden.'"[169]

In 1970, the Nevada Educational Communications Commission began a program of providing instructional television broadcasts to schools within the state, charging a flat fee for the service. The Commission asked the Attorney General if it would be constitutionally permissible to offer these services to private and parochial schools under the same fee schedule. The Attorney General ruled that this plan conformed to the state constitution, as the costs of the programming would not increase due to the larger distribution, and in fact the costs to the public schools would actually decline. The state was not providing benefits to the parochial schools on account of their religious orientation.[170]

The Attorney General opinions we have considered span nearly sixty years. It is difficult to make generalizations about Nevada's Little Blaine

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[164] Op. Nev. Att'y Gen. 79-A (1979). Curiously, the Attorney General borrowed the definition of the term "sectarian" not from *Hallock*, but rather from *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936).

[165] Op. Nev. Att'y Gen. B-40 (1941).

[166] *Id.*

[167] Elementary & Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27. *See* Agostini v. Felton, 521 U.S. 203 (1997).

[168] Op. Nev. Att'y Gen. 276 (1965).

[169] *Id.* (quoting State *ex rel.* Nev. Orphan Asylum v. Hallock, 16 Nev. 373, 388 (1882)).

[170] Op. Nev. Att'y Gen. 668 (1970).

Amendment because the Attorney General's opinions (with a couple of exceptions) make little effort to distinguish Section 10 from the federal Establishment Clause. Thus, while frequently citing Article 11, Section 10, the opinions largely reach conclusions that reflect the then-current views of the U.S. Supreme Court. This is understandable, of course, but it does not help us understand what, if anything, Section 10 adds to the Establishment Clause. Only recently has the Attorney General recognized that Section 10 serves a role independent of the Establishment Clause jurisprudence.

In general, the Attorney General has concluded that Section 10 does not bar state subsidies to sectarian institutions, such as hospitals or parochial schools, where the purpose for the expenditure can be clearly identified and is not sectarian in nature; the Attorney General has thus made some effort to distinguish legitimate from illegitimate purposes. The Attorney General has also held, generally, that Section 10 does not bar reasonable accommodations to state employees or state prisoners. By contrast, the Attorney General, in various opinions dealing with after-hours use of public facilities, remains focused on the idea that use of public facilities subsidizes religious purposes; the Attorney General has reached a similar conclusion with respect to offers of services to religious institutions. In these instances, the Attorney General has made clear that religious institutions must pay a reasonable fee for the use of public buildings or receipt of government services and that this is a requirement imposed by Section 10 of the Nevada Constitution and not necessarily by the federal Establishment Clause. Accordingly, there does appear to be an area in which Section 10 stands as a constraint independent of the U.S. Constitution.

III. Religious Participation in Public Programs: Some Recent Trends

The states' Little Blaine Amendments have lain dormant for many years. So far as we can determine, until very recently, no state has had the occasion to decide any matter under its Little Blaine Amendment. Furthermore, the U.S. Supreme Court has never had before it a challenge to the constitutionality of a Little Blaine Amendment. Either no state had considered programs that might run afoul of the amendments, or the Supreme Court's views of the Establishment Clause of the U.S. Constitution precluded, as a practical matter, the need to consider state legislation under the Little Blaine Amendments.

The time may have arrived when state and federal courts will have to reexamine the application and constitutionality of the Little Blaine Amendments. There has been a clear shift in the Supreme Court's Establishment and Free Exercise Clause jurisprudence. At one time hostile to any notion of government funding of educational or charitable activities that were religiously sponsored, the Court has become more solicitous of innovative partnerships between governments and religious institutions. The Court's recent decisions suggest that the Establishment Clause may not impede new government programs that involve religious institutions. The question becomes, do the Little Blaine Amendments stand as such an impediment and, if so, are the Little Blaine Amendments themselves constitutional?

A. *Religion, Liberty, and Equality*

Professor Kurland once noted that the proper division between church and state was an issue destined "to generate heat rather than light."[171] In this section, we review some of the recent trends in the religion clause cases in the Supreme Court. What follows is an effort to make sense of some perceptible changes in the Court's approach during the past decade. It is not an effort to reformulate the Constitution's norms, but an effort to describe what the Court has done.

Prior to 1990, the Supreme Court's religion clause jurisprudence employed "religious liberty" as its guiding principle. For the Free Exercise Clause, this meant that the First Amendment prohibited government from regulating religious beliefs.[172] Additionally, government could not interfere with religious practices unless the government had a compelling interest and its regulation was narrowly tailored to that interest. As announced, this was a very religion-protective standard. For example, in *Sherbert v. Verner*,[173] South Carolina refused unemployment benefits to a Seventh-day Adventist who quit because her employer required her to work on her Sabbath. The Court held that South Carolina violated her Free Exercise rights: "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[174] By denying her benefits, South Carolina had "penalize[d]" her free exercise and "constrained[ed]" her to abandon her religious convictions.[175] *Sherbert* and the cases that followed it[176] appeared to require governments to exempt religiously motivated persons from the laws. Unfortunately, the Court had an easier time announcing the principle than enforcing it. The Court rejected most free exercise claims, even where the government's actions interfered with religious practices.[177]

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[171] PHILLIP KURLAND, RELIGION AND THE LAW 15 (1962).

[172] Reynolds v. United States, 98 U.S. 145 (1878).

[173] 374 U.S. 398 (1963).

[174] *Id.* at 404.

[175] *Id.* at 406, 410.

[176] *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (applying *Sherbert* to unemployment compensation claimant who refused to work on Sunday, though not a member of a recognized sect); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (applying *Sherbert* to unemployment compensation claimant who adopted new religious beliefs after she began work and then refused to work on her Sabbath); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that Indiana violated the Free Exercise Clause when it denied unemployment benefits to a Jehovah's Witness who quit his job in plant manufacturing military equipment); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Wisconsin violated the Free Exercise Clause by sanctioning Amish parents who refused for religious reasons to send their children to school); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that South Carolina violated the Free Exercise Clause when it denied unemployment benefits to Seventh Day Adventist who refused to work on Saturdays).

[177] *See, e.g.*, Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (denying a Free Exercise claim by various Indian tribes that a Forest Service plan for harvesting timber would destroy an area sacred to the tribes); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying a Free Exercise claim by Muslim prisoners that a Pennsylvania work-release policy interfered with their required worship services); Bowen v. Roy, 476 U.S. 693 (1986) (denying a Free Exercise claim by Native Americans that the use of a social security

On the Establishment Clause side, the Court regularly disqualified religious organizations from participating in many government programs, even as a means of accommodating the religiously inclined.[178] For example, in *Aguilar v. Felton*,[179] the Court struck down Title I of the Elementary and Secondary School Act of 1965 insofar as it authorized financial assistance to private schools serving at-risk students in low-income areas. New York had implemented Title I by providing remedial reading and mathematics services to parochial school students; the classes were taught by public school teachers who volunteered to teach in the parochial schools. The Court concluded that the program "inevitably result[ed] in the excessive entanglement of church and state."[180]

There was a certain logic and symmetry to the "liberty" theme in the Court's religion cases. The Court came down hard on cozy relationships between government and organized religion, but it also intervened to shield religionists from especially intrusive government actions, particularly those that trampled minority religious practices. While the Court barred organized religions under the Establishment Clause from participating in many governmental programs, the disability was balanced out on the Free Exercise side because the Court privileged religionists whose practices conflicted with the requirements of the law. Religious affiliation was both benefit and curse under this scheme. Indeed, the scheme was very conscious of religion.

The Court had difficulty maintaining the "liberty" model. The Court had a terrible time distinguishing between government actions that directly benefited religion and those that incidentally benefited religion. As a result, the Court's Establishment Clause jurisprudence was a mess. On the other hand, the Court, for all of its professed admiration for religionists forced to choose between their religious practices and government programs, had a hard time figuring out how to exempt religionists from the laws.

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number to obtain AFDC benefits violated their religious beliefs); Goldman v. Weinberger, 475 U.S. 503 (1986) (denying a Free Exercise claim by a Jewish serviceman that Air Force policy would not allow him to wear his yarmulke).

[178] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (holding unconstitutional a Louisiana statute requiring public schools to teach "creation science" if they taught the theory of human evolution); Aguilar v. Felton, 473 U.S. 402 (1985) (holding unconstitutional a federal program providing remedial education to deprived children attending parochial schools), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (holding unconstitutional a Michigan program in which parochial school teachers were paid with public monies to conduct evening community education classes at the parochial school), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional an Alabama statute requiring schools to have a moment of silence at the beginning of the day); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding unconstitutional a New York statute giving direct money grants for building repair and maintenance to schools, public or private, that served low-income areas); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding unconstitutional a Rhode Island statute reimbursing nonpublic schools for teachers' salaries and textbooks used in certain secular courses); Illinois *ex rel.* McCollum v. Bd. of Educ. 333 U.S. 203 (1948) (holding unconstitutional an Illinois program releasing public school students to attend religious classes conducted at the public school).

[179] 473 U.S. 402 (1985), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[180] *Id.* at 409.

In 1990, without overruling any of its prior cases, the Court made a dramatic shift away from the theme of "religious liberty" to one of "religious equality." Some cases decided during the 1980s under the Establishment Clause presaged the shift,[181] but the change was most obvious in *Employment Division v. Smith.*[182] In *Smith*, Oregon denied unemployment benefits to two members of the Native American Church who were fired as drug rehabilitation counselors for their use of peyote, a controlled substance. The Court held that the Oregon decision did not violate the counselors' Free Exercise rights because it had not singled the counselors out for their religious beliefs. In other words, so long as Oregon dealt with all peyote-ingesting persons in the same way, it would not violate the Free Exercise Clause; the Clause was violated when a state prohibited acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display."[183] The Court refused to excuse the counselors, on the basis of their religiously motivated conduct, from Oregon law: "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation."[184] *Smith* caused a firestorm because it appeared to be a reversal of course.[185] In fact, "the constitutional history of the free Exercise Clause is almost completely against religious exemptions . . . [T]he aberrations are *Sherbert* and [*Wisconsin v.*] *Yoder*, not *Smith.*"[186]

Smith put the Court in an uncomfortable position, one that appeared hostile to religion. If the Court followed its "liberty" cases, the Establishment Clause prevented religious institutions from participating in certain government programs on the same basis as secular institutions. On the other hand, after *Smith*, there was no *quid pro quo* on the Free Exercise side; so long as the

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[181] *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (Adolescent Family Life Act, which authorized federal grant recipients to involve "religious and charitable organizations," did not violate the Establishment Clause on its face); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a Minnesota tax deduction for tuition at private schools (including parochial schools)); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986) (upholding a Washington program which paid for vocational rehabilitation services for a blind student who used the grant at a Christian college to study for the ministry); Widmar v. Vincent, 454 U.S. 263 (1981) (holding unconstitutional a University of Missouri-Kansas City rule forbidding student organizations from using university facilities for religious worship or teaching).

[182] 494 U.S. 872 (1990).

[183] *Id.* at 877. Following *Smith*, the Court held in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that the City of Hialeah had singled out a religious group when it enacted a city ordinance barring the ritual slaughter of animals. The ordinance barred only ritual slaughter, not slaughter for other purposes, such as consumption.

[184] *Smith*, 494 U.S. at 876 (quoting Employment Div. v. Smith, 485 U.S. 660, 872 (1988)).

[185] *See, e.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). *Smith's* defenders were slow to defend the Court's opinion, even as they defended the result. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[186] Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 561-62 (1998). *See also* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887, 927-29 (1996) (explaining why *Yoder* was "long on rhetoric and short on substance" and had "limited impact").

government had not singled out religionists, they were to be treated the same as everybody else. This appeared to be a very religion-hostile turn.

The Court closed this gap with a series of cases in which it held that religious institutions might participate in government programs on the same basis as other institutions. The Court held, for example, that the Establishment Clause does not forbid a university from funding student magazines, even if one of the magazines was religious in nature.[187] A state may fund, under a broad program to assist handicapped students, a signer for a deaf child, even though the child attends parochial schools.[188] More recently, in *Agostini v. Felton*, the Court approved federal programs that offer public diagnostic and remedial services, even if the services are provided to parochial students at school.[189] And, in *Mitchell v. Helms*, the Court approved a Louisiana program that loaned educational materials such as computers, projectors, and VCRs, to private schools, including sectarian institutions.[190] In both *Agostini* and *Mitchell*, the Court overruled several of its Establishment Clause decisions that religionists had long derided as religion-hostile.[191]

In sum, although the norm has shifted, once again there is symmetry and logic to the Court's cases. In general, the Free Exercise Clause means that the law may not discriminate against religionists; it does not mean that religionists enjoy preferred status. On the Establishment Clause side, it means that the First Amendment does specially disable religious institutions; they may participate in broad government programs on the same basis as non-sectarian institutions. If the "liberty" model was religion-intensive, the Court's "equality" model prefers to ignore religion. The shift also makes the religion clauses easier to administer because it reduces the courts' need to balance government's impact on religious practices, or religious institutions' influence on government.

B. Religion, Liberty and "Charitable Choice"

The shift in the Court's approach to religion cases has two important consequences for our discussion. First, it makes it more likely that the Court will approve of some form of "charitable choice" provisions or educational voucher programs in which religious institutions seek to participate on an equal basis in government programs. Second, if the Establishment Clause no longer bars these programs, it makes it more likely that state courts will have to construe their own constitutions, including their Little Blaine Amendments. The Court's shift from "liberty" to "equality" in the Religion Clauses will place new empha-

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[187] Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[188] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). *See also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[189] Agostini v. Felton, 521 U.S. 203 (1997).

[190] Mitchell v. Helms, 530 U.S. 793, 825-29 (2000) (plurality opinion of Thomas, J.).

[191] *Agostini* overruled *Felton* and *Ball*. *See Agostini*, 521 U.S. at 236. The *Mitchell* Court overruled *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977). *See Mitchell*, 530 U.S. at 835 (plurality opinion of Thomas, J.); *id.* at 837 (O'Connor, J., concurring in the judgment).

sis on state free exercise and establishment clause provisions.[192] Although a number of states have already construed their own establishment clauses or Little Blaine Amendments to place greater restrictions on religious institutions' participation in vouchers or other public programs,[193] the Court's recent jurisprudence raises the possibility that such religion-restrictive provisions are themselves unconstitutional.[194]

Cases from Washington and Arizona provide an interesting context in which to view these issues because the state supreme courts were construing identical Little Blaine Amendments. Larry Witters was legally blind and qualified for vocational assistance under Washington law. Washington, however, denied his request for assistance because he would have used the assistance to study at a Bible college in preparation for the ministry. The Washington Supreme Court, construing the First and Fourteenth Amendments to the U.S. Constitution, stated that "[i]t is not the role of the state to pay for the religious education of future ministers" and held that providing assistance to Witters

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[192] *See, e.g.*, Heytens, *supra* note 17, at 117; Linda S. Wendtland, Note, *Beyond The Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985).

[193] *See, e.g.*, Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) (finding that the Ohio Pilot Scholarship Program violated the Establishment Clause of the First Amendment), *cert. granted*, Nos. 00-1751, 00-1777, 00-1779 (argued Feb. 20, 2002); Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) (upholding Maine statute authorizing direct grants for tuition reimbursement for students attending non-sectarian high schools), *cert. denied*, 528 U.S. 931 (1999); R.I. Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980) (finding unconstitutional under Establishment Clause of First Amendment a state statute allowing for a state income tax deduction for expenses incurred by citizens having children in private schools); Pub. Funds for Pub. Sch. of N.J. v. Byrne, 590 F.2d 514 (3d Cir. 1979) (holding that state statute allowing state income tax deduction for taxpayers with children attending non-public schools unconstitutional under Establishment Clause of First Amendment); Columbia Union Coll. v. Oliver, 2000 U.S. Dist Lexis 13644 (D. Md. Aug. 17, 2000) (allowing for private, religiously affiliated college to receive state funds under state's Sellinger Program); Opinion of the Justices, 616 A.2d 478 (N.H. 1992) (advisory opinion finding unconstitutional proposed legislation allowing parent to send child to state approved school, including sectarian schools, with state funding offsetting at least some of the tuition, as violative of Part I, art. 7 of state constitution); People *ex rel.* Klinger v. Howlett, 305 N.E.2d 129 (Ill. 1973) (holding that state program providing state grant for partial expenses to parents of children attending non-public schools unconstitutional under Establishment Clause of First Amendment); Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999) (upholding state education tuition program statute that excluded religious schools from receipt of funds under program), *cert. denied*, 528 U.S. 947 (1999); Exeter-West Greenwich Reg'l Sch. Dist. v. Pontarelli, 460 A.2d 934 (R.I. 1983) (affirming ruling that school district which did not maintain its own high school, but paid tuition for its students to attend named high school, did not have to pay high school student's tuition to attend religiously affiliated school of student's choice); Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999) (finding a tuition reimbursement scheme in violation of Ch. I, Art. 3 of state constitution), *cert. denied*, 528 U.S. 1066 (1999); Campbell v. Manchester Bd. of Sch. Dir., 641 A.2d 352 (Vt. 1994) (finding no Establishment Clause violation resulting from program where school board paid costs of high school student attending sectarian school as a result of district not having its own high school); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (upholding constitutionality of Milwaukee Parental Choice Program), *cert. denied*, 525 U.S. 997 (1998).

[194] Heytens, *supra* note 17, at 125-31.

would violate the Establishment Clause.[195] The U.S. Supreme Court reversed. "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,'" and is in no way skewed towards religion."[196] The Court remanded the case, however, for consideration under the Washington Constitution. On remand, the Washington Supreme Court held that funding Witters's education would violate Washington's Little Blaine Amendment.[197] Witters's petition fell "precisely within the clear language of the state constitutional prohibition against applying public moneys to any religious instruction."[198] Three justices dissented. They would have held that "in granting Mr. Witters money for his vocational training, the state is neither appropriating nor applying funds for religious instruction. The state is merely appropriating public funds for a neutral vocational rehabilitation program."[199] The U.S. Supreme Court denied the petition for certiorari.[200]

Contrast *Witters* with a recent decision of the Arizona Supreme Court construing an identical provision in the Arizona Constitution. In *Kotterman v. Killian*,[201] the petitioners challenged an Arizona statute that allowed a state tax credit of up to $500 for a donation to a "school tuition organization," insofar as such donations went to sectarian schools. Construing Arizona's Little Blaine Amendment,[202] the Arizona Supreme Court held that the tax credit did not constitute "public money" under its Little Blaine Amendment. A dissenting justice identified Arizona's provision as identical to Washington's and noted their connection to the larger debate over the federal Blaine Amendment and Catholic education. He would have concluded that "the history and text of Arizona's religion clauses make it clear that the delegates to the 1910 [Arizona constitutional] convention were well aware of the recent sectarian battles and the resulting Blaine Amendment and did not intend to give the Legislature the power to subsidize a private, sectarian school system."[203]

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[195] Witters v. State Comm'n for the Blind ("*Witters I*"), 689 P.2d 53 (Wash. 1984), *rev'd sub nom.*, Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986).

[196] *Witters I*, 474 U.S. at 487-88 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).

[197] WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."); *see Witters I*, 689 P.2d at 64-65 (Utter, J., dissenting) (discussing the anti-Catholic origins of the Washington provision).

[198] Witters v. State Comm'n for the Blind ("*Witters II*"), 771 P.2d 1119, 1121 (Wash. 1989), *cert. denied*, 489 U.S. 850 (1989).

[199] *Id.* at 1125 (Utter, J., dissenting).

[200] 489 U.S. 850 (1989).

[201] 972 P.2d 606 (Ariz. 1999).

[202] ARIZ. CONST. art. II, § 12 ("No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."). *See Kotterman*, 972 P.2d at 624-25 (discussing the Blaine Amendment and the history of the Arizona provision); *Kotterman*, 972 P.2d at 631-38 (Feldman, J., dissenting) (same). *See also* ARIZ. CONST. art. IX, § 10 ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation"); art. XI, § 7 ("No sectarian instruction shall be imparted in any school or State education institution that may be established under this Constitution.").

[203] *Kotterman*, 972 P.2d at 639 (Feldman, J., dissenting).

The cases are not necessarily irreconcilable, but the contrasts are striking. Arizona took a broader, more forgiving view of its Little Blaine Amendment, even as it drew a narrow distinction between tax credits and "public money." Washington took a much harder view of its Little Blaine Amendment, construing its provision to be narrower than the Establishment Clause of the U.S. Constitution. Although the Supreme Court denied the petition for a writ of certiorari in *Witters II*, little can be read into that action. The U.S. Supreme Court has since built upon its *Witters* decision in *Bowen*, *Zobrest*, *Lamb's Chapel*, *Rosenberger*, and *Mitchell*. These not only reaffirm *Witters*, but also may suggest that it would violate the First Amendment for Washington to refuse to allow Larry Witters to participate in a state program because of his religious activities.

IV. NEVADA'S "LITTLE BLAINE AMENDMENT" AND THE FUTURE OF RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS

All of this leads to the ultimate question: What does Section 10 mean today? What does it mean for a charitable choice or educational choice system in the state of Nevada? The question does not simply invite speculation. Although Nevada has not adopted a school voucher program nor, so far as we are aware, have any affirmative steps been taken in that direction,[204] vouchers have been the subject of much discussion in the recent presidential election, and new proposals may be forthcoming. Aside from the question of vouchers, however, Nevada has adopted a charitable choice provision. During the 1999 legislative session, the legislature passed Assembly Bill 318, which revised provisions granting city and county authorities to expend money and convey property to nonprofit organizations. Nev. Rev. Stat. 244.1505, for example, currently provides that a county commission "may expend money for any purpose which will provide a substantial benefit to the inhabitants of the county. The board may grant all or part of the money to a nonprofit organization created for religious, charitable or educational purposes to be expended for the selected purpose."[205] County commissions may also donate certain "[c]ommodities, supplies, materials, and equipment" to nonprofit organizations, including religious ones.[206] When making the grant, the county commission must specify the purpose for the grant or donation and any conditions on the expenditure or use of the property.[207] Does Section 244.028, authorizing the "grant . . . [of] money to a nonprofit organization created for religious . . . purposes" violate Section 10, which prohibits the use of "public [County] funds . . . for sectarian purposes?"

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[204] A bill to establish a voucher program in Nevada died in committee during the 1999 legislative session. *See* Jennifer Crowe, *Nevada Playing Catch-Up in Public School Alternatives*, RENO GAZETTE-J., Dec. 5, 1999, *available at* http://www.rgj.com/news_old/stories/reno/ 944373450.htm.

[205] NEV. REV. STAT. 244.1505.1 (1999). The legislature granted similar authority to cities. NEV. REV. STAT. 268.028 (1999).

[206] NEV. REV. STAT. 244.1505.2(a) (1999). *Cf.* NEV. REV. STAT. 268.028.2 (1999) (similar authority granted to cities).

[207] NEV. REV. STAT. 244.1505.3 (1999). *Cf.* NEV. REV. STAT. 268.028.3 (1999) (similar requirement for cities).

In this final part we discuss how Nevada courts might construe Section 10. We do not consider how the U.S. Supreme Court would view Nevada's charitable choice program, aid to the Nevada Orphan's Asylum, or any other Nevada program. We will, however, refer to U.S. cases as an aid to understanding how Nevada courts might interpret Section 10 and to comprehending how, if at all, decisions under the U.S. Constitution might inform that judgment.

A. Section 10 and the Meaning of "Public Funds"

Section 10 prohibits the use of "public funds," whether the funds originate with the state, a county or a municipality, in support of sectarian purposes. First, we should note that Nevada's Little Blaine Amendment is at least a constraint on state *spending*. Not everything that state government does involves "public funds," but spending covers substantial territory; nearly every program administered or supported by the state can be said to involve state funding. Does Section 10 apply broadly to all matters in which "public funds" played some role, or is it a more narrow constraint on line item spending? To illustrate: Is there a difference between direct state funding of the Nevada Orphan's Asylum, which was religiously-sponsored, and state funding of public buildings, which might subsequently be made available to religious organizations on a non-discriminatory basis? The Attorney General, at least, has taken the position that the use of public buildings comes within Section 10's restriction on the use of "public funds."[208]

The Attorney General's expansive construction of Section 10 may have significant collateral consequences for state and local administration. Suppose that state and local governments were willing to make public property such as schools or community and recreation centers available for occasional use by private groups. Under the Attorney General's reading of Section 10, Nevada must charge religious groups a fee for the use of the property. May Nevada charge religious groups for the use of the property if it does not charge non-religious groups? Such a policy would likely violate either the Free Exercise Clause or the Equal Protection Clause of the federal constitution,[209] and might even violate the Liberty of Conscience Clause of the Nevada Constitution.[210] If so, Section 10 has become a much broader constraint on state activities, because Nevada will have to choose between charging all groups for the use of public property or not making public property available at all, neither of which it was inclined to do in the first place.[211]

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[208] *See* Op. Nev. Att'y Gen. 93-2 (Mar. 16, 1993).

[209] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (striking down a school rule that permitted secular use of school property, but forbidding use for religious purposes); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (invalidating university policy that authorized payment for student publications, but forbid payment for student publications that promoted belief in deity or an ultimate reality).

[210] NEV. CONST. art. I, § 4 ("The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and . . . the liberty of conscience hereby secured . . . .").

[211] *See* Op. Nev. Att'y Gen. 93-2 (Mar. 16, 1993) (noting that under Clark County School District rules some uses of school buildings were permitted free of charge, while others required a fee; concluding that Section 10 requires sectarian groups to pay the cost associated with the use of the building).

Furthermore, Article 11, Section 10, is not just a constraint on *state* spending. By its literal terms, Section 10 prohibits a particular use of "public funds." We should note that Section 10 is phrased in the passive voice, thereby disguising the party(ies) to which it applies.[212] We assume that the various branches of state and local government are barred from using public funds for sectarian purposes, but Section 10 is not limited to state actors. Had that been the framers' intention, they could easily have forbidden the legislature from appropriating, and the executive from spending, funds for sectarian purposes. Instead, the framers of Section 10 simply constrained the "use[ ]" of public funds, a restriction that applies to private, as well as public, entities.

At what point do public funds cease to be the public's funds, so that Section 10 no longer constrains their use? Suppose Nevada awarded a block grant to the United Way to support efforts to feed the homeless, and the United Way then devoted some part of the grant to Catholic Charities? Or suppose that an individual donated foodstuffs purchased with state-issued food stamps to the Salvation Army? Aside from the question whether feeding the homeless constitutes a religious purpose, are the funds still public? Must the state place conditions on the further use of state funds?[213] In the education context, could Nevada issue vouchers to parents, who could then use the voucher at a private religious school? Can the parents act as a filter to avoid the restrictions Section 10 might impose on direct aid to a religious school? Or, consider Nevada's new charitable choice provision. Suppose a county donated "[c]ommodities, supplies, materials and equipment that the [county] determines to have reached the end of their useful lives"[214] to religious nonprofit organizations. The commodities, supplies, materials and equipment are not, strictly speaking, "public funds," but they are likely items that the county purchased with public funds. Is the donation subject to the Little Blaine Amendment? From an economic perspective, there is no difference between donating funds and donating commodities, but government might have greater concerns over contributing money than contributing commodities.[215] From a historical perspective, there is, of course, an explanation for why Section 10 refers to "public funds": At the time Nevadans adopted Section 10, their immediate concern was the line-item grant of public funds, not public commodities, to a Catholic orphanage.

B. Section 10 and the Meaning of "Sectarian Purposes"

Nevada's Little Blaine Amendment revives a question raised during the debates in Congress over the Blaine Amendment: Does the phrase "sectarian"

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[212] *See* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and A Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 319-21 (2000) (discussing the use of passive voice and active voice in the U.S. Constitution). *See also* David M. Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 PUGET SOUND L. REV. 221, 224-45 (1985) (discussing the implications of use of passive voice in the Washington Constitution).

[213] *See* Mitchell v. Helms, 530 U.S. 793, 815-19 (2000) (discussing "direct" and "indirect" aid to religious institutions) (plurality opinion).

[214] NEV. REV. STAT. 244.1505.2(a), 268.028.2 (2001).

[215] *See Mitchell*, 530 U.S. at 818-20.

refer to various religious sects or to religious denominations generally?[216] If "sectarian" refers to religious sects, then Section 10 is largely a non-discrimination provision. It would not prevent Nevada from enacting a law that benefited all private schools, including religious ones, because the law would not serve "sectarian purposes." But it would forbid the state from picking and choosing among religious sects – refusing to fund Baptist schools, for example, or funding only Lutheran schools. On the other hand, if "sectarian" refers to religion generally, then Nevada could not enact a program under which private schools might participate if that includes parochial schools.

There is language in *Hallock* that might be read to support either reading of "sectarian." The court stated, somewhat ambiguously, that Section 10 means that "public funds should not be used, directly or indirectly for the building up of any sect,"[217] which suggests that Section 10 would bar public funding of a program that benefited any religious sect or denomination, irrespective of whether the legislature made the program available on a nondiscriminatory basis to all sects or denominations.[218] Elsewhere in *Hallock*, however, the court read "sectarian" in its "popular sense" as a body of number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people."[219] The latter reading is consistent with Section 10's history. As the court noted in *Hallock*, the Nevada Orphan Asylum's "continued application greatly, if not entirely, impelled the adoption of the constitutional amendment."[220] Section 10 was a silver bullet, a constitutional fix for a particular problem: "the use of public funds for the benefit of [the Asylum] and kindred institutions [St. Mary's School], was an evil which ought to be remedied."[221]

Given a choice, Nevada courts may wish to construe Section 10 to bar state aid that is targeted to specific religious sects, and not to bar more inclusive measures. In *Mitchell*, the plurality noted the "shameful pedigree" of state and federal hostility to aid that found its way to religious institutions.

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to

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[216] *See supra* text accompanying note 39. The term "sectarian" appears in two other provisions of the Nevada Constitution; neither sheds light on this question. *See* NEV. CONST. art. 11, § 2 (the legislature shall provide for a uniform system of common schools . . . and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund") and § 9 ("No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution.").

[217] State *ex rel.* Nev. Orphan Asylum v. Hallock, 16 Nev. 373, 387 (1882).

[218] *See also* Op. Nev. Att'y Gen. 685 (Oct. 4, 1948) (citing *Hallock* and concluding that "the reading of the Bible . . . singing of religious hymns, or the . . . introduction in the schools of books, tracts, or papers of a *sectarian or denominational* character is forbidden by . . . the Constitution of the State.") (emphasis added).

[219] *Hallock*, 16 Nev. at 385.

[220] *Id.* at 383.

[221] *Id.*

> Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."[222]

The Nevada courts may cure this latent hostility by reading Section 10 to mean that the state cannot fund the purposes of a single religious sect, but that Section 10 does not disqualify religious institutions from receiving state aid or participating in state programs under a neutral scheme.

Second, what constitutes a sectarian "purpose"? Are all purposes for which a sectarian institution might receive state funds, by definition, sectarian? This is a difficult question. If everything a sectarian institution does serves a sectarian purpose, then Nevada's charitable choice statutes are unconstitutional on their face. In *Hallock*, the court was unwilling to separate the purely religious activities of the Asylum from those more generic activities such as housing, feeding, and clothing the orphans. The court found that, since at least some part of any funds granted to the Asylum would support sectarian purposes, that fact was sufficient to bring the funding with the Little Blaine Amendment. "[I]t is impossible to separate the legitimate use from that which is forbidden."[223] By contrast, the Attorney General has indicated a greater willingness to separate legitimate and illegitimate uses of state funds by religious organizations.[224]

For federal Establishment Clause purposes, the U.S. Supreme Court has taken a different approach. The Court once asked if the recipient of funds was "pervasively sectarian," that is, whether state aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[225] The Court expressed concern, as did the Nevada Supreme Court in *Hallock*, that an institution might be "so permeated with religion that the secular side cannot be separated from the sectarian."[226] Yet even prior to *Mitchell*, the Court had noted that not every act by a religious institution was necessarily religious: "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected."[227] The Court had upheld government grants to religious institutions. In *Bradfield v. Roberts*, the U.S. Supreme Court upheld a grant to a Catholic hospital for building construction. Even though the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital," the hospital had a limited mission and the Court declined to inquire into "the individual beliefs upon religious matters of the various incorporators."[228] And in *Bowen v. Kendrick*,[229] the Court held that the Adolescent Family Life Act did not violate the Establishment Clause on its face. The Act authorized the funding of demon-

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[222] Mitchell v. Helms, 530 U.S. 793, 828 (2000).
[223] *Hallock*, 16 Nev. at 388.
[224] *See, e.g.*, Op. Nev. Att'y Gen. 276 (Nov. 5, 1965).
[225] Hunt v. McNair, 413 U.S. 734, 743 (1973).
[226] Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 759 (1975).
[227] *Hunt*, 413 U.S. at 742.
[228] Bradfield v. Roberts, 175 U.S. 291, 298 (1899).
[229] 487 U.S. 589 (1988).

stration grants for services and research in the area of adolescent sexual relations and pregnancy and required that grant applicants demonstrate how they would, as appropriate, "involve religious and charitable organizations."[230] "[It] is clear from the face of the statute that the [Act] was motivated primarily, if not entirely, by a legitimate secular purpose – the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood."[231] The Court had "never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[232]

More recently, in *Mitchell*, the plurality discarded the "pervasively sectarian" terminology as "born of bigotry," "unnecessary," and "offensive."[233] It was also inconsistent with the way the Court had historically and more recently applied the Establishment Clause to government partnerships with religious institutions. Lower courts, however, have been slow to embrace the point because there was no majority opinion in *Mitchell*.[234]

These cases also help point a significant difference between the U.S. Supreme Court's construction of the Establishment Clause and the text of Section 10. Under the Supreme Court's traditional (and controversial) "*Lemon* test,"[235] the Court asks whether a statute has a "secular legislative purpose," whether "its principal or primary effect . . . [is] one that neither advances nor inhibits religion," and whether the statute fosters "excessive government entanglement with religion."[236] Note that under the *Lemon* test, the U.S. Supreme Court asks whether the legislation has a *secular purpose*; it does not ask whether the legislation might also serve some *sectarian purpose*. For the Establishment Clause, it is sufficient if there is secular purpose, so long as any other sectarian purpose does not result in the legislation's "principal or primary effect" fostering religion. Section 10, by contrast, bans the use of public funds for any "sectarian purpose" – apparently, irrespective of whether the uses of

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[230] 42 U.S.C. § 300z-5(a)(21).

[231] *Bowen*, 487 U.S. at 602.

[232] *Id.* at 609.

[233] Mitchell v. Helms, 530 U.S. 793, 828 (2000). Justice Thomas, almost a year prior to his plurality opinion in *Mitchell*, stated that the Court should discard the "pervasively sectarian" test "and reaffirm that the Constitution requires, at a minimum, neutrality not hostility towards religion." *See* Columbia Union Coll. v. Clark, 119 S. Ct. 2357, 2358 (2000) (mem.) (Thomas, J., dissenting from the denial of certiorari).

[234] *See* Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville & Davidson County, 117 F. Supp. 2d 693 (M.D. Tenn. 2000) (finding that the "pervasively sectarian" test still applicable in the wake of the plurality opinion in *Mitchell*); Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682 (Va. 2000) (same); Columbia Union Coll. v. Oliver, 2000 U.S. Dist. Lexis 13644 (D. Md. Aug. 17, 2000) (same).

[235] Lemon v. Kurtzman, 403 U.S. 602 (1971). For background on the controversy over whether *Lemon* remains good law, see Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795 (1993), and the responses thereto; Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865 (1993); Ira C. Lupu, *Which Old Witch: A Comment on Professor Paulsen's* Lemon *is Dead*, 43 CASE W. RES. L. REV. 883 (1993); Richard S. Myers, *A Comment on the Death of* Lemon, 43 CASE W. RES. L. REV. 903 (1993).

[236] *Lemon*, 403 U.S. at 612-13. In *Mitchell*, the Court applied two criteria: whether the government's conduct advanced or endorsed religion. *See* Mitchell, 530 U.S. at 835.

public funds would also serve a legitimate public purpose.[237] Unless the Nevada Supreme Court reads Section 10 to bar only the use of public funds that serve "[*principally*] sectarian purposes," Section 10 is a more religion-hostile constraint than the Establishment Clause.[238]

C. *Section 10, Liberty and Equality*

In the previous section, we suggested that there are a number of ambiguities in the terms "public funds" and "sectarian purposes" that Nevada courts may have to resolve. The choices Nevada courts have to make in construing Section 10 fall along a broad continuum between "religion-hostile" and "religion friendly." Although, as we pointed out in the contrast between Washington's and Arizona's approaches to their own identically-phrased Little Blaine Amendments, Nevada has some leeway under the U.S. Constitution in its interpretation of Section 10, not all choices that Nevada could conceivably make will pass muster under the federal Constitution. In its most recent decisions, the U.S. Supreme Court has plainly favored treating religion on the same basis as competing institutions – neither specially favored, nor specially disabled under the federal constitution.

Suppose that Nevada construed Section 10 – in every respect – against religious participation in public programs. Could Nevada fund private education institutions through a voucher program if it excluded religious institutions in order not to violate its Little Blaine Amendment? The Court's decisions in *Witters*, *Zobrest*, *Agostini*, and *Mitchell*, suggest that a state *may* adopt neutral programs that benefit religious institutions or persons participating in the program. But *Lambs' Chapel* and *Rosenberger* further suggest that a state violates some combination of the Free Speech, Free Exercise, or the Equal Protection Clauses when it creates public programs from which it excludes religious institutions or persons because of their manifest religious affiliation. Does this mean that when a state creates a program, it *must* include religious persons or institutions in the program?

We are not yet prepared to say that the Supreme Court will demand that states permit religious institutions to participate in public programs to the same extent as other private, secular institutions. There are too many nuances in the public programs, public participation, and religious worship to make such a sweeping statement. Indeed, even as the Court approved a Louisiana program loaning education materials and equipment to parochial schools, the plurality warned that there are "'special Establishment Clause dangers' when money is

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[237] *Mitchell*, 530 U.S. at 827 (plurality opinion) ("the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose").

[238] If the Little Blaine Amendment applies to funding of any sectarian organization (because their purposes must likewise be sectarian), then it is far more restrictive than the Establishment Clause, because the federal programs approved in *Agostini* and *Mitchell* would surely run afoul of a provision that forbid spending that benefited any sectarian purpose. Such a construction, moreover, would be inconsistent with the Nevada Attorney General opinions approving of chaplain services in Nevada prisons. *See supra* text accompanying notes 158-62.

given to religious schools or entities directly rather than . . . indirectly."[239] Moreover, both *Lamb's Chapel* and *Rosenberger* involved religious institutions excluded from programs because of the context of things they wished to say or publish. Thus, both cases arose in the context of suppression of expression in a limited public forum; charitable choice programs need not arise in such a context. If the Court's Free Exercise and Equal Protection decisions would forbid strict application of Section 10, the Court's Establishment Clause decisions might inform any remaining applications, thus making Section 10 coextensive with Establishment and Free Exercise Clauses of the U.S. Constitution. There is sufficient ambiguity in the federal Constitution to make the construction of Section 10 important, but it is also not clear how much room the U.S. Supreme Court's most recent pronouncements have even left Nevada (or any other state) to maneuver.

Finally, Nevada could adopt the path of least resistance and announce that, although Nevada has no formal Establishment Clause, the combination of the Little Blaine Amendment and the Conscience Clause means that Nevada's provisions are largely coextensive with federal protections found in the First and Fourteenth Amendments.[240] This argument is plainly ahistorical, since the Conscience Clause predates the Fourteenth Amendment and the Little Blaine Amendment, although adopted after the adoption of the Fourteenth Amendment, and was adopted at a time when incorporation was controversial and long before the U.S. Supreme Court recognized the doctrine.[241] It is an argument that is born of pragmatism, however. Perhaps, in the long view, it is the most workable view of the Nevada Constitution. It would mean that there is no effective gap between the federal and the state constitutions; Nevada will simply follow the lead of cases construing the U.S. Constitution.

V. CONCLUSION

The Bush Administration's focus on "charitable choice" programs, together with a national trend towards innovative educational programs such as vouchers, makes it likely that the Nevada courts will have to revisit Article 11, Section 10 in the near future. And when the courts do, they will have to decide how to construe an amendment that was drafted in a different era and for a relatively narrow purpose, one goal of which to inhibit the influence of Catholicism. Our history is replete with examples of laws motivated by prejudice. Many such laws remain on the books, typically because those laws are no longer enforced. Ironically, Nevada's Little Blaine Amendment found early enforcement and fell into desuetude for more than a century. As faith-based groups seek access on an equal basis to public programs and facilities, Section 10 may enjoy something of a revival. Nevada's courts will face some demand-

[239] *Mitchell*, 530 U.S. at 818-19 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1994)).

[240] *See* Op. Nev. Att'y Gen. 320 (Mar. 3, 1954) (citing NEV. CONST. art. 1, § 4 and concluding that "the Nevada Constitution, aside from the Fourteenth Amendment . . . prohibits the Legislature from making any law respecting the establishment of religion or prohibiting the free exercise thereof").

[241] *See* Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1596-604 (1995).

ing interpretive challenges as they seek to give modern meaning to its Little Blaine Amendment.

MISSING PERSONS

Steven D. Smith*

Discussions about "rights" lie at the center of constitutional discourse, and those discussions are in turn heavily influenced by an approach to rights questions – I will call it the "persons and rights" approach – practiced by theorists such as John Rawls and Ronald Dworkin. This discourse often claims a sort of moral superiority over a different, more consequentialist (and to some more vulgar) mode of thought – an approach that seems more ascendant in nonconstitutional areas of law and that is most conspicuously manifest in law-and-economics theorizing.[1] The supposed superiority of the persons and rights approach lies in its reputed proclivity to respect the sanctity of persons,[2] and to avoid the counterintuitive or even monstrous conclusions to which a utilitarian or consequentialist approach can notoriously lead in particular (often hypothetical and far-fetched) circumstances.[3]

My purpose in this essay is to show that the persons and rights approach suffers from its own variety of moral obtuseness. More specifically, the persons and rights approach routinely ignores the momentous implications of what I will call "the logic of unrealized value" – a logic that we understand and routinely accept in many domains of life and that a more consequentialist approach has no difficulty in understanding. In ignoring or misunderstanding that logic, the persons and rights approach is guilty, on a colossal scale, of what in other contexts we would promptly recognize as demonstrable irrationality – and at huge moral cost. Though this failure is not limited to any particular moral question, it is perhaps most strikingly manifest in the context of the "beginning of life" questions such as abortion and contraception. Reflection on the implications of the logic of unrealized value for such questions suggests that current debates about these issues are profoundly misconceived, and that the most common arguments on all sides of the questions, both "pro-choice" and "pro-life" arguments, are tainted by that misconception.

It should already be apparent that my principal thesis will be mainly, and sweepingly, critical in nature. But lawyers and legal scholars are often interested primarily in the "bottom line." They read the last chapter first; often they read *only* the last chapter (which is supposed to say "who's right and who's wrong," and especially to explain "what to do" about the problem). So to antic-

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[1] *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 29 (5th ed. 1998) ("Another common criticism is that the normative underpinnings of the economic approach are so repulsive that it is inconceivable that the legal system would embrace them.").

[2] John Rawls, for example, rejects the consequentialist or utilitarian approach in favor of a more rights-based position in part because "[u]tilitarianism does not take seriously the distinction between persons." JOHN RAWLS, A THEORY OF JUSTICE 27 (1971).

[3] *See infra* notes 6-8 and accompanying text.

ipate where this discussion may lead, and to save such single-minded readers some time, let me confess at the outset that my objective is not to take any particular side in specific controversies over, say, abortion; nor is it to nudge constitutional discourse in the direction of consequentialist ethics. On the contrary, though my criticism is directed mainly against the persons and rights approach, and though consequentialism is indeed more receptive than the persons and rights approach to the logic of unrealized value, that logic raises daunting moral and legal questions that neither approach seems competent to address. If there is a normative conclusion that follows from my discussion, it may be that "reason," or rationality (whether of the consequentialist or more Kantian varieties), does not and cannot play anything like the preeminent role in moral and legal thinking that it has traditionally played. Humans are, as Pascal recognized at the opening of the era of modern rationalism, far more creatures of imagination than of reason, and our legal and moral choices are determined more by the concrete pictures we see, or can conjure up, than by our theories or "Philosophers' Briefs."

I happen to think that a more vivid recognition of the limitations of reason would have implications for constitutional law; it would subvert one of the major justifications often given for letting constitutional law override more pragmatic and democratic decision-making.[4] But so far as I can see, nothing follows in any purely deductive way from the present argument for any particular constitutional controversy.

I. THE "PERSONS AND RIGHTS" APPROACH

A quick review of how the moral stage is currently set will serve as a necessary preliminary for my more specific argument. We can begin by recalling that the bulk of modern moral thinking, especially within the legal academy, belongs to two sprawling and sometimes feuding families that sometimes go under the surnames of Bentham and Kant.[5] In many legal and public policy discussions the Benthamite approach seems to predominate; thus, at least since Holmes, legal scholars have yearned to convert law into a "policy science" that would be utilitarian or at least consequentialist in some sense or another. The law and economics movement is probably the most visible manifestation of this consequentialist tendency. As noted, though, utilitarian moral thinking is often accused of ignoring the sanctity of persons, or of leading to counterintuitive or even monstrous conclusions.[6] For example, from an unqualified utilitarian standpoint Peter Singer seems on solid ground in arguing that there is nothing

[4] This suggestion is developed at length in STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON (1998).

[5] These two contrasting outlooks are represented, at least in a rough sense, in the acrimonious exchange provoked by Judge Richard Posner's 1997 Oliver Wendell Holmes Lectures. *Compare* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) *with* Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

[6] J.J.C. Smart, though defending utilitarianism, concedes that "[i]t is not difficult to show that utilitarianism could, in certain exceptional circumstances, have some very horrible consequences." J.J.C. Smart, *An Outline of a System of Utilitarian Ethics, in* UTILITARIANISM: FOR AND AGAINST 69 (1973).

inherently immoral about infanticide[7] – a conclusion that many find appalling. And at the other end of life, it seems quite plausible to suppose that a hard-headed (and perhaps hard-hearted) utilitarian "felicific calculus" might justify liquidating large numbers of elderly people who no longer enjoy good physical and psychological health and who are unproductive or perhaps a net drain on society. These conclusions are not certain, of course – given our inability actually to perform the necessary quantifications and computations of utility, *no* moral conclusion is *certain* in a utilitarian scheme – but efforts to avoid them on utilitarian assumptions (by invoking factors like "anxiety," for example) often have a "rigged" feel about them.[8]

Indeed, the moral awkwardness might go much farther. The venerable philosopher A. J. Ayer observes that most of the people in the world today lead stunted, deprived lives in which pain and misery may far exceed happiness, so that it is not rational for them "to wish their miseries prolonged."[9] In utilitarian terms, these people represent a net deficit. If Ayer is right about this, and if we are in truth morally bound to achieve the maximum amount of happiness and the minimum amount of pain, then it might seem that the only moral course is to relieve these people of the burden of living. Probably the reform could be carried out quietly and painlessly while the "deficit" people are asleep.

Macabre meditations of this kind may shock us into the Kantian corner. So we may shun the consequentialist calculus in favor of a familiar strategy for addressing moral and legal questions that I am calling the "persons and rights" approach – an approach that, as noted, seems especially influential in constitutional discourse. This approach can be described in terms of two central premises. One premise asserts that among all the various things that compose or inhabit the universe, there is one class of entities – usually we call them "per-

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[7] *See, e.g.*, PETER SINGER, RETHINKING LIFE AND DEATH 128-31 (1994).

[8] *Cf.* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 58 (1983):

> [U]tilitarianism can lead to monstrous results. Were there a group of people at once so few relative to the rest of society, so miserable, and so hated that their extermination would increase the total happiness of society, the consistent utilitarian would find it hard to denounce their extermination, although he would be entitled to note the anxiety costs that might be imposed on people who feared they might be exterminated next.

Posner seeks to avoid such monstrous results by advocating a different form of consequentialism in which what is maximized is not utility or happiness but rather "wealth." To critics, however, this approach may seem even more monstrous, among other reasons because it causes the abjectly poor to disappear from the calculation of value altogether. *See id.* at 61 ("The individual who would like very much to have some good but is unwilling or unable to pay for it – perhaps because he is destitute – does not value the good in the sense in which I am using the term 'value.'").

[9] Ayer reports that life has been and continues to be a net benefit *for him* because of "[o]pportunities for travel, for acquiring pictorial skills and visiting galleries, for making and listening to music, for reading a wide variety of books . . . ." But most people do not enjoy these opportunities, so the calculation comes out differently:

> The vast majority of the human race, in Asia, in Latin America, in Africa, in the so-called underclasses of the more affluent Western societies, are far too fully occupied in waging a losing struggle to achieve a tolerable standard of living for it to be rational for them to wish their miseries prolonged. Perhaps they do wish it, nevertheless. . . . I claim only that they can have no good reason to wish that life were longer than it is.

A. J. AYER, THE MEANING OF LIFE 187 (1990).

sons"[10] – that have an inherent dignity and preeminent moral status. This status is sometimes expressed by saying that "persons" must be treated as "ends" not "means,"[11] or that persons are "sacred," or "inviolable,"[12] or perhaps (in a nontechnical but familiar locution) "infinitely precious."[13] The second premise asserts that because persons are sacred or inviolable, they enjoy certain "rights" that others, including government officials, are obligated to respect. "Rights" may not be overridden on merely utilitarian grounds.

These two premises mean, in turn, that discussions in the "persons and rights" approach will revolve around two central questions. Perhaps the most common question is, "what rights do persons have?" So we argue about the existence and nature of rights to express ourselves, marry, procreate, act on conscience, be free of torture, and so forth. But of course there is a prior question – one brought most sharply into focus by "borders of life" controversies such as abortion or "mercy killing" of those who are permanently comatose – about "who counts as a 'person'?"

This latter question generates a huge variety of responses, of course, but the leading responses are sometimes classified into two main groups.[14] One kind of response emphasizes genetics and biology; so it urges that even a fetus, even a zygote, is a "person" because it is alive and possesses the full genetic endowment of a human being. The other set of responses selects certain distinguishing characteristics or capacities of the mature human being – self-consciousness, for example, or rationality, or linguistic capacity, or the ability to enter into relationships with others – and uses these characteristics to define what a person is.[15]

Of course, each of these approaches provokes familiar objections. For example, the more biological approach suggests that there is no moral difference between terminating the life of a fetus and killing a newly born baby; either action takes the life of a "person" and hence should be regarded as murder. Those who believe that abortion is not inherently immoral, or at least that

[10] More precisely, Kant argued for the preeminent moral status of "rational" agents, but in modern moral discourse this category is treated as being pretty much coterminous with human beings or "persons": other kinds of ostensible rational beings, such as angels, do not figure prominently in contemporary academic reflections.

[11] *See, e.g.*, Bernard Yack, *The Problem with Kantian Liberalism*, *in* KANT & POLITICAL PHILOSOPHY: THE CONTEMPORARY LEGACY 224, 224 (Ronald Beiner & William James Booth eds., 1993).

[12] *See* RONALD DWORKIN, LIFE'S DOMINION 24-25 (1994).

[13] *Cf.* Antony Flew, *Tolstoi and the Meaning of Life*, *in* THE MEANING OF LIFE 209, 213 (E.D. Klemke ed., 2d ed. 2000) (quoting Pierre-Henri Simon) ("a life ephemeral but infinitely precious"). The phrase cannot be taken too literally: it is easy to show that we do not treat life as *infinitely* valuable, and that in fact we routinely engage in calculations and tradeoffs involving sacrifices of life in favor of other kinds of values, even including convenience. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 17-18 (1970).

[14] James Walters describes these two approaches to the question as "physicalism" and "personalism." JAMES W. WALTERS, WHAT IS A PERSON? AN ETHICAL EXPLORATION 17-53 (1997).

[15] *See id.* at 41-50. Ronald Dworkin describes a "complex set of capacities: to enjoy or fail to enjoy, to form affections and emotions, to hope and expect, to suffer disappointment and frustration." He adds that "it is these more complex capacities, not the capacity to feel pain, that ground a creature's interests in continuing to live." DWORKIN, *supra* note 12, at 17-18.

there is a vast moral difference between abortion and infanticide, will thus find the biological approach problematic. They may adopt the capacities-based approach, consequently, and argue that a fetus is not in any meaningful sense a "person": it does not speak, reason, or consciously form relationships, which are the essential qualities of personhood.[16] But this response may seem to prove too much, because the newborn baby also lacks these qualities.[17] So it might seem that the capacities approach leads us back to what we might call the "Peter Singer problem": it leaves us with no objection *in principle* to infanticide (though of course we might come up with *practical* reasons – the need for "bright lines," for example – for prohibiting the killing of babies).

Advocates of the capacities approach sometimes attempt to deflect this objection by seizing upon the notion of "potential personhood" or, as James Walters puts it, "proximate personhood."[18] Neither a fetus nor a newborn exhibits the qualities of personhood, Walters argues, and so neither can be said to have "maximal moral status," or to possess the rights of actual "persons." But each *approximates,* to differing degrees, personhood; so each should have a corresponding moral status. "[T]he more a fetus, a newborn, or an infant approximates – or is proximate to – personhood, the greater his or her moral value and hence the greater the implicit claim to life."[19]

The Supreme Court took a somewhat similar position in *Roe v. Wade*. A fetus is not a person, the Court held, and accordingly enjoys no rights under the Constitution. Nonetheless, states have an interest in protecting "the potentiality of human life," and this interest becomes more compelling as the fetus grows and approaches birth.[20] The Court's pronouncement in *Roe* amounted to little more than an intuition that remained notoriously bare of justification.[21] But Ronald Dworkin, among others, has attempted a more sustained justification of the Court's intuition about the increasing value of "potential" persons. Indeed, Dworkin has extended the intuition into a more elaborate argument for what we might call a "sliding scale" of personal value – or of the loss of value when a given life is terminated – based on a notion of lost "investment."[22]

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[16] *Cf.* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 127 (1980) ("A liberal community . . . asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal polity. The fetus fails the dialogic test – more plainly than do grown up dolphins.").

[17] *Id.* at 129 (asserting that "a day-old infant is no more a citizen than a nine-month fetus").

[18] WALTERS, *supra* note 14, at 54-77.

[19] *Id.* at 63.

[20] Roe v. Wade, 410 U.S. 113, 163 (1973).

[21] Mark Tushnet has described "Justice Blackmun's opinion in *Roe* as an innovation . . . the totally unreasoned judicial opinion." MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 54 (1988).

[22] *See* DWORKIN, *supra* note 12, at 84-89. Dworkin explains the basic claim in this way:

> It is a waste of the natural and human creative investments that make up the story of a normal life when this normal progression is frustrated by premature death or in other ways. But how bad this is – how great the frustration – depends on the stage of life in which it occurs, because the frustration is greater if it takes place after rather than before the person has made a significant personal investment in his own life, and less if it occurs after any investment has been substantially fulfilled, or as substantially fulfilled as is anyway likely.

Id. at 88.

The effort to avoid morally monstrous results by asserting the value or the claims of "potential" persons provokes a serious objection, however, the whole argument may appear to turn on a blatant *non sequitur*. Rights belong to *persons,* after all, and "potential persons" are by definition not actual persons; so why do they have any "implicit claim to life," as Walters contends? As non-persons, why do they have any rights at all? Joel Feinberg offers an analogy: "In 1930, when he was six years old, Jimmy Carter did not know it, but he was a potential president of the United States. That gave him no claim *then,* not even a very weak claim, to give commands to the U.S. Army."[23] By the same token, the mere *potential* of a fetus (or, for that matter, a newborn) to acquire the capacities needed to constitute a person does not seem to support even a weak claim to the moral or legal rights of "persons."

There may be a plausible rejoinder to this objection but, as I will shortly discuss, the rejoinder leads to an even more disconcerting perplexity that is central to my purpose in this essay. To see how this happens, we need to look more closely at one prospect for vindicating the "potential persons" position.

II. THE LOGIC OF UNREALIZED VALUE

In many contexts, we *do* recognize (at least when we are paying attention to the question) that the loss of a *potential* good – or the failure to realize a potential good[24] – is as real a detriment as the loss of a previously-acquired good. The twenty-dollar bill that was given to me yesterday but fell out of my pocket is neither more nor less valuable than the twenty-dollar bill that I failed to notice on the sidewalk. Each is worth twenty dollars; consequently, each misfortune leaves me exactly twenty dollars poorer than I would otherwise have been. "Realizable but unrealized" value, in short, is as substantial a harm as "temporarily realized but then lost" value.

Economists are perfectly comfortable with the logic of unrealized value; indeed, under the heading of "opportunity costs," they insist upon it.[25] Let us say I decide to start a photography business. My "costs" include not just the time and money I put into that business, but also the profits I would have earned if I had devoted my resources to writing a steamy romance novel instead. These unrealized benefits (whatever they would have been) are not as visible and consequently not as quantifiable as the debits in my checkbook reflecting the purchase of cameras and film, but they are just as real – just as much "costs" – as the more visible expenditures. And insofar as I fail to take them into account in making a business decision, I am behaving "irrationally." I am being a foolish businessperson, in other words; I am failing to achieve my purpose of maximizing economic gain.

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[23] *Quoted in* WALTERS, *supra* note 14, at 66.

[24] I will usually use the term "loss" in this essay in the way in which lawyers speak of "lost profits" – that is, as including failures to realize potential gains that would have been obtained, and not merely as the loss of already acquired "goods in hand." Readers who insist on a narrower usage and who associate the term "loss" only with the latter kind of misfortune – with "out of pocket" loss – are free to substitute some other term, such as "deprivation," "forfeiture," "sacrifice," "cost," or "failure to realize."

[25] For a brief explanation of the concept, see C. E. FERGUSON & S. CHARLES MAURICE, ECONOMIC ANALYSIS: THEORY AND APPLICATION 215-16 (3d ed. 1978).

To be sure, this kind of irrationality is pervasive. In a much discussed series of studies, psychologists Daniel Kahneman and Amos Tversky discovered that people respond very differently to objectively identical choices depending on whether the alternatives are described in terms of losses or, conversely, of unrealized potential gains. An option that people will reject when it is described as involving a loss, that is, will often be chosen when it is redescribed as a potential but unrealized gain.[26] Reactions to such choices thus depend heavily on "the vagaries of framing,"[27] and those vagaries in turn reflect the presence or absence of imagination in visualizing the goods in question – goods to be gained, or not gained, or lost – as real or merely possible. "An individual's experience of pleasure or frustration may therefore depend on an act of imagination that determines the reference level to which reality is compared."[28]

This observation resonates with everyday experience. The twenty-dollar bill that I touched, rubbed, and put into my pocket entered into my consciousness and figured in my plans: so I feel its loss. But the largish green bill that I failed to notice (or knew about but never actually held or owned) was not part of my life anyway, so I am less inclined to miss it. "Out of sight is out of mind." Appreciating the loss involved in a potential but unrealized gain would require a conscious act of *imagination*, a picturing of *what could have been*, while the loss of what was already ours requires no similar mental effort. The difference in required mental effort produces the kind of distortions in judgment that Tversky and Kahneman describe as "biases of imaginability."[29]

So one might say that "reason" is the slave not (or at least not only) of the "passions," as Hume famously observed, but of "imagination." Pascal remarked in this vein that imagination is "the dominant faculty in man, master of error and falsehood," against it, "[r]eason may object in vain."[30] A corollary is that rationality is constrained by *lack* of imagination. Thus,

> [w]ho would think himself unhappy if he had only one mouth and who would not if he had only one eye? It has probably never occurred to anyone to be distressed at not having three eyes, but those who have none are inconsolable.[31]

These reflections may help to account for our subjective reactions to different forms of lost value. But they do nothing to show that the failure to

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[26] Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, SCI. AM., Jan. 1982, at 160.

[27] *Id.* at 172.

[28] *Id.* at 170. *See also* POSNER, *supra* note 1, at 20 (footnotes omitted):

> [W]e are prone to succumb to the "endowment effect" – valuing what we have more than we would value the identical thing if we didn't have it. For example, we might refuse to sell for $100 a wristwatch for which we would not pay more than $90. We also engage in "hyperbolic discounting"; that is, we weigh present pains and pleasures more heavily than future ones to a degree that is irrational, as when we overeat (present pleasure) knowing that we will soon regret it (future pain). We also give too much more weight to immediate vivid impressions than to what we read about (the "salience heuristic").

[29] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 38, 47-48 (Hal R. Arkes & Kenneth R. Hammond eds., 1986).

[30] BLAISE PASCAL, PENSEES 38-39 (number 44) (A.J. Krailsheimer trans., Penguin ed. 1966).

[31] *Id.* at 59 (number 117).

realize a potential benefit is not a real loss – or to negate the observation that ignoring such benefits in our calculations is a kind of irrationality. Nor is it to the point (though it is probably accurate) to say that "objective" gains or losses in *economic* value may not correlate with gains or losses in "subjective" or *actually experienced* happiness; that is because the logic of unrealized value applies in either domain – the "objective" or the "subjective." An unrealized (subjective) happiness that "might have been" is still a loss of happiness, that is, even for one who did not contemplate the possibility of what went unrealized – just as the (objective) loss of a twenty-dollar bill that we did not notice is a loss of twenty dollars. In each case the loss is real, even if we are not aware of it.

With this logic in mind, let us return to the problem of "potential persons." The "persons and rights" approach assumes that personhood is a valuable good – indeed, a good so valuable that adjectives like "sacred" or "infinitely precious" are commonly invoked to give a sense of its magnitude. Moreover, it is surely not merely "personhood" as some sort of ethereal or abstract universal that is deemed valuable, but rather *persons* – or the instantiation of personhood (person by person) in individuals. Each individual person is a separate locus of value, so that the loss of any person (through untimely death, for example) is a loss of that value – even when there is no overall shortage of persons.

These observations are mundane enough. But now the logic of unrealized value kicks in to suggest that if personhood is a valuable good, and if each individual person reflects distinct and "infinitely precious" or "sacred" value, then every failure to realize that value is as much a loss as the extinguishing of an existing instantiation of personhood. The failure to bring into being a person who *could have* enjoyed existence (but did not) represents a loss just as real as that entailed by the termination of a person who *could have continued* to enjoy existence but does not (through untimely death). Indeed, if anything the former loss is *greater,* because total, than the latter.

To be sure, this conclusion still may not permit us to say that potential or "proximate persons" have the *rights* enjoyed by actual persons already in being. But the conclusion does let us say something that seems to have approximately the same practical and moral force: that there is a huge moral loss, a sort of moral catastrophe, in choices that prevent the "sacred" or "infinitely precious" value of a person from being realized.

III. Rights and the Moral Imagination

Why then do we rarely lament or even notice this loss of value? One reason, most likely, is that to accept the logic of unrealized value in this domain would have very disturbing implications. Some of these implications are probably already apparent. I will consider them shortly, and so I ask you to defer those difficulties for a moment. For now, let us notice one powerful reason for our failure to notice this problem: as a psychological matter we are subject in this context to the same limitations that we have already noticed in more mundane domains. That is, the person who is born and lives for a time is readily visible; she becomes a part of our world and our life, and so when she dies we notice and lament her absence. By contrast, it would require an act of imagina-

tion to appreciate the value that could have been realized with a potential person who never actually came into living, breathing existence. Rarely do we exercise that sort of imagination.

In this respect, our failure to lament the non-existence of potential persons is akin to the familiar phenomenon whereby we overlook or devalue the lives and deaths of persons not readily present to us *as persons* – foreigners, or enemy soldiers or civilians in war, or members of racial or socioeconomic classes removed from our own.[32] Nazi concentration camp officials devised a variety of techniques to avoid noticing that the subject matter of their genocidal activities consisted of *human beings*; they concentrated on describing and viewing their actions in terms not of "killing" but rather of "checking lists, driving vehicles, flipping switches, giving instructions, and the like."[33] In this way they were often able to look past the humanity of their victims, and thus to live what were in many other respects regular and even decent lives in relative equanimity.[34] "Out of sight is out of mind."

This observation permits us to appreciate a different dimension of the discourse of "rights." As discussed above, one motive for adopting the "persons and rights" approach is the desire to avoid the morally monstrous consequences that might attend a straightforward utilitarian approach to moral questions. But a discourse of rights has its own morally numbing propensities. Insofar as we treat "rights" as something attaching to a restricted class of existing "persons," a focus on "rights" allows us to insulate ourselves against the fact of losses in value, losses that might amount to moral catastrophes, because those losses do not come attached to any "person" within the restricted class.[35] So slaves may suffer, foreigners may starve, and animals may be afflicted with awful cruelties; but these losses can be depreciated or ignored because the sufferers do not belong to the class of those who enjoy "rights." Neglect of the loss of value associated with "potential persons" seems to be an even more momentous manifestation of the capacity of a focus on "rights" to deaden our moral sensibilities.

I have been suggesting that our failure to appreciate the colossal loss associated with unrealized "potential persons" reflects a failure of our moral imagination. But in this case the failure is so severe – so overwhelmingly successful, so to speak – that it is difficult even upon reflection to accept the logic of unrealized value in this context. We are tempted to believe that there must have been some mistake, or some conceptual confusion in the preceding analysis of the problem. Some theorists, Ronald Dworkin for instance, assert that there *is* a conceptual flaw in the analysis. So before proceeding, it is worth

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[32] *See* ROY F. BAUMEISTER, EVIL: INSIDE HUMAN VIOLENCE AND CRUELTY 314-16 (1999).

[33] *Id.* at 339.

[34] Rudolph Hess and Albert Speer were notorious examples of people who, by adopting techniques to avoid noticing the humanity of their victims, were able to combine the incongruous roles of mass executioner and loving family man. *Id.* at 336-37; MIKE W. MARTIN, SELF-DECEPTION AND MORALITY 38 (1986).

[35] *Cf.* Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 69, 72 (1990) (contrasting "the atomistic focus on rights characteristic of Western liberal legalism" with a "Havelian" emphasis on "living in truth" – an ideal that would foster the "communitarian virtues of compassion, sympathy, fellow-feeling, and love").

retracing our steps to see whether the path really leads to the current embarrassment.

IV. Logic and Persons

Consider three likely objections to the foregoing argument. The first two objections can be addressed quite quickly, I think; the last requires lengthier consideration. One objection insists that the value of "persons," unlike the value of the sorts of "opportunity costs" economists usually consider, is not quantifiable in dollars, or in numbers. This assertion seems right, but also irrelevant. There is an understandable reluctance (which I entirely share) to quantifying the value of a person, or to treating a person as a "commodity."[36] But nothing in the logic of unrealized value depends on whether or how a particular unrealized value can be quantified; what is crucial, rather, is only that what goes unrealized *is* something of value. A valid analytical point does not lose its force merely because economists, or consequentialists, happen to acknowledge and use it. So you can apply whatever concept or adjective you like to describe the value of a person ("sacred," or "infinite," or whatever label seems appropriate). The fact remains that when a person who could have come into existence does not, that value remains unrealized. And unrealized value, by whatever label, is a real loss.

Ronald Dworkin attempts to deflect the logic of unrealized value with a different argument, which consists of a distinction supported by examples. More specifically, Dworkin distinguishes between "instrumental value" and what he calls (somewhat oddly[37]) "sacred" value. His highly idiosyncratic definition of "sacred" value is crucial to his argument.

> The hallmark of the sacred as distinct from the incrementally valuable, is that the sacred is intrinsically valuable *because – and therefore only once – it exists*. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted.[38]

Dworkin goes on to support this distinction by offering examples of various good things – great paintings, great lives, national flags – which we value when they exist even though we may not want more of them. For example, he declares: "I do not myself wish that there were more paintings by Tintoretto than there are. But I would nevertheless be appalled by the deliberate destruction of even one of those he did paint."[39]

This pronouncement amounts to a flat denial of the logic of unrealized value within the realm of what Dworkin calls the "sacred." But Dworkin does

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[36] *See* Margaret Jane Radin, Contested Commodities 56 (1996) (arguing that "[t]o understand [the qualities of personhood] as monetizable . . . is to do violence to our deepest understanding of what it is to be human"). *Cf.* Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 Cornell L. Rev. 765, 775 (1987) (arguing that "applying a market value approach to such matters merely appears grotesque or obtuse").

[37] For a critical examination of Dworkin's use of the term "sacred," see Michael J. Perry, The Idea of Human Rights 25-29 (1998).

[38] Dworkin, *supra* note 12, at 73-74 (emphasis added).

[39] *Id.* at 74.

not identify any error or limitation in that logic. Rather, his argument amounts to an attempt to defeat the logic of unrealized value by definitional fiat – by simply declaring into existence a kind of good that is said to be valuable only if and because it has been realized. Dworkin provides no reason to believe, however, that goods with this peculiar quality exist; he offers no account of how or why something would be "valuable because, and therefore only once, it exists."

Nor do Dworkin's examples strengthen his case. We can take it as a true report, I suppose, that Dworkin himself would be appalled by the loss of an existing Tintoretto painting but cares not at all that Tintoretto did not leave us with more paintings. In the same way, we can take it as a true report that many people regret losing a twenty-dollar bill they already had but do not regret failing to notice the bill they could have had – or that the less than astute business person notices the "out of pocket" costs but not the "opportunity costs" of his or her business. As noted, the phenomenon is perfectly common, and it simply reflects what Tversky and Kahneman call "biases of imaginability." Moreover, this is a bias that many people manage to overcome. It is hardly uncommon for people to lament, for example, that Mozart or Chopin died at such young ages, thereby depriving the world of masterpieces that they might have composed.

A more challenging objection would acknowledge the force of the logic of unrealized value with respect to many potential but unrealized goods – Tintoretto paintings for example – but deny that this logic can properly be applied to potential but unrealized *persons*. Value, the objection asserts, does not exist impersonally or in the abstract. Rather, value exists only *to persons*.[40] "A good state of the world must be good to *someone*," as Arthur Leff argued.[41] So, the failure to realize a business profit, or the premature death of a Mozart, represents a real loss because the unrealized potential goods – more money, more symphonies – are losses to persons – or *to us*. But the failure to bring potential persons into existence is not a real loss because the persons in whom value would have adhered are not real; they are mere abstractions, or illusions.[42]

Though some thinkers have resisted the premise of this objection – namely, that we can only talk meaningfully about value to persons[43] – the premise seems to me sound. Indeed, I have elsewhere argued for it.[44] But the conclusion seems a *non sequitur*. After all, the potential goods that we are considering *are* (potential) persons. There should be no difficulty in accepting, first, that those persons (or some of them) *can* as a practical matter be brought into being and, second, that *if* they are brought into being then they will have

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[40] The objection would be unaffected, I think, by expanding the category of "persons" to include animals, for instance, or perhaps "sentient beings."

[41] Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1239 (1979).

[42] I am grateful to Michael Perry, who in correspondence has vigorously pressed this objection. I have tried to state the objection as accurately as I can even though, obviously, I remain unconvinced by it (and perhaps have not fully understood it).

[43] *See, e.g.*, Michael S. Moore, *Good Without God, in* NATURAL LAW, LIBERALISM, AND MORALITY 221, 238-41 (Robert P. George ed., 1996).

[44] Steven D. Smith, *Review Essay: Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AM. J. JURIS. 299, 310-16 (1997).

value. It follows of necessity that if they are *not* brought into being, that value will go unrealized.

Suppose we have a choice between *a* and *b*; *a* but not *b* will produce result *X*, which (at least once *X* is realized) will admittedly have value. It follows that choice *a* will produce the value associated with *X*, and there is no way to avoid the conclusion that choice *b* will entail the loss of that value. If *X* is a person, and if choice *b* represents a choice not to bring that person into existence, then there is no avoiding the conclusion that the value of *X* has been lost.

In this respect it is misleading to say that *X* (or the "potential persons" that we could choose to bring into existence) are mere abstractions. In a sense they *are*, at present, abstractions – just as *all* realizable but unrealized goods are abstractions. The crucial point is that these are abstractions that *can be made real*. So in acting to avoid realizing those abstractions, we inescapably lose the value associated with them.

In sum, there seems no good way of deflecting the logic of unrealized value in the context of potential persons. Nonetheless, I expect that this logic will continue to seem counterintuitive. The objection that potential persons are mere abstractions, though it does not defeat the logic of unrealized value, surely does identify a limitation in our ability imaginatively to apprehend what is at stake. And my own discussion to this point may have inadvertently reinforced this tendency to discount or ignore the losses of value that can be perceived only by an (uncommon and difficult) act of imagination. My discussion, that is, has employed bland or abstract terms – *a*s, *b*s and *X*s, "instantiations of personhood," "unrealized value," "losses," "opportunity costs" – and this bloodless vocabulary might tempt us to dismiss the argument thus far as a merely "theoretical" or "academic" point (and a very counterintuitive point at that). Before proceeding with the argument, therefore, it may be helpful to consider the problem in a more concrete and human context in which we sometimes *do* at least come close to appreciating the staggering loss associated with unrealized "potential persons."

V. What Might Not Have Been

I have argued above that we often fail to appreciate the logic of unrealized value, especially the unrealized value of potential persons, because we usually do not engage in the imaginative appreciation of what "might have been."[45] But we come close to such an imaginative exercise with a more familiar sort of counterfactual reflection that is easier to perform. We sometimes pause to reflect, that is, about what "might *not* have been." With considerable uncertainty, maybe, you decide to take a job in Peoria rather than one in Cleveland, and as a result you meet someone who becomes a close friend, or perhaps even your spouse. Every once in a while, perhaps, you find yourself wondering, "What if I hadn't taken that job . . . ?" And so you imagine your life unfolding

[45] Occasionally we *do* engage in this sort of exercise. As I was completing this essay, I happened to see the movie "The Family Man," in which the character played by Nicholas Cage engages in just the sort of counterfactual imagination I am interested in here.

without that person, and you ponder what a wealth of experience and understanding and mutual affection would have been missed.[46]

To be sure, this sort of familiar reflection still falls far short of the kind of imaginative exercise required to appreciate the unrealized value associated with potential persons. The person you would not have met if you had moved to Cleveland would still have *existed,* after all, even if *you* had never met him. Moreover, by taking the Cleveland job you would probably have met other people who might have become friends. Perhaps your life would have been even happier with them.

So do we ever engage in reflection about the lost value associated with a person who might never have existed at all? Rarely, I suppose; but we sometimes do this. One not so fanciful case begins with a couple trying to decide whether to have a child. *Ex ante*, the couple may think about the question largely in terms of costs and benefits to themselves. These costs and benefits will inevitably be abstract. They include the reputed joys of seeing a child grow, taking care of her, teaching her, playing with her. But these anticipatory joys will have a hazy, impersonal aspect; there is no actual child with a particular giggle, with dimples and unruly hair and a homely toothless grin, for the couple's reflections to distill around. On the debit side, there will be expenses and time commitments, not to mention unpleasant things like diapers and lost sleep and, later on, quarrels and loud music with screeching electric guitars. Though in some respects more susceptible to quantification, these prospective burdens are likewise, for the most part, indistinct and immune to measurement.

Suppose that the couple decides, with deep misgivings perhaps, to have a child. Ten or twenty years pass. What began as an *ex ante* assessment of indistinct benefits and burdens now assumes a totally different aspect. In part, of course, the difference is that both the costs and benefits are now much more concrete. They will almost certainly be completely different in magnitude from what was anticipated: both benefits and burdens, joys and sorrows, will likely far outstrip anything the couple could have anticipated. And the relative proportions of each may be different as well.

But these observations fall far short of capturing the radically different aspect of the *ex post* reflection. Now, if the parents pause to think about the matter, it will be wonderfully (or perhaps painfully) clear that it is not simply a question of value *to them*. Now there is another, real person in the picture – a person who is, once again, "sacred," or "infinitely precious." If the couple had invested in IBM and the investment had turned out to yield consistent losses, they could have unloaded it without compunction. But they would be aghast if anyone were to suggest similar loss cutting with a child who turns out (if they are candid) to bring more sorrow than joy. Such an action would be unthinkable – *not* just because the law creates obstacles or because the child has "inter-

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[46] Of course, the personal relationship that "might *not* have been" sometimes involves current, acute misery, not realized happiness. ("If only I hadn't gone to that party, . . . I'd never have met the creep.") Indeed, some studies suggest that "counterfactual thinking is more likely to follow negative outcomes than positive outcomes." Neal J. Roese & James M. Olson, *Counterfactual Thinking: A Critical Overview, in* WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING 1, 19 (Neal J. Roese & James M. Olson eds., 1995).

ests" or "rights," but because such an action would be a moral atrocity. It would be an absolutely unconscionable negation of value – of the value that we try to express with terms like "sacred" or "infinitely precious."

Yet it is true that this same sacrifice of value would have occurred if, ten or twenty years earlier, the parents had decided (as perhaps they almost did – or ineffectually did) not to have the child in the first place. Some parents do on occasion think back and wonder, perhaps with a mixture of horror and relief, "What if we'd decided not to have her . . .?" (Or, perhaps, "Imagine, if we'd been more careful . . . ?") And for a moment they glimpse the possibility of a different unfolding of events – one in which not only their own lives but indeed the cosmic economy itself may seem incomparably poorer, tragically bereaved.

This tragic counterfactual might easily have been the actual, of course, and if it had been they conceivably might now ask the converse counterfactual question: "What if we'd decided to have a child . . . ." Realistically, though, this counterfactual question about "what might have been" is less likely to arise, or to arise with any vividness of feeling, because the potential value that was there to be realized or, as things in fact turned out, not realized is harder to imagine and appreciate in that context.[47] Once again, it is far easier to visualize what was at stake when the concrete particulars – the first steps and the birthday parties and the heart-to-heart talks – are actual memories and not just conceptual possibilities.

This is why the occasional counterfactual reflection of the parents who might not have been parents is helpful, I think – because it may be easiest in that context to appreciate that the logic of unrealized value is not merely an abstract academic point, even (or perhaps especially) where persons are concerned.

VI. Intolerable Implications

The argument thus far has suggested that the logic of unrealized value, which we readily accept in more mundane contexts, applies with equal force to the issue of "potential persons," and that this is not merely an academic point but rather a valid one that in some contexts we actually come close to appreciating. But I have been deferring the really difficult problem – which is that in this context the logic of unrealized value also appears to have implications that no one (not even the most extreme or deeply committed pro-life activist) seems prepared to accept.

Probably the most immediately obvious implication is that abortion, at any stage of pregnancy, is as much a deprivation of the sacred value of life, and so presumably as immoral, as the killing of a child (or, for that matter, the killing of a teenager or an adult). Some "pro-lifers" already believe this, of course. But notice that from this perspective the immorality of abortion does not rest on the more common argument that a fetus has the full genetic endowment of a human being and hence is a "person." Abortion is immoral, rather, because *whether or not* we classify the fetus itself as a "person," the occurrence of an

[47] *Cf. id.* at 29 (describing research indicating that "it is easier to generate counterfactuals based on the deletion of a factual action than it is to imagine an action that was not in fact performed"). *But cf. id.* at 30-31 (discussing complexities and contrary data).

abortion prevents the realization of the "sacred" or "infinite" value of a human person.

For many, this conclusion will already provoke ardent resistance to the logic of unrealized value in this domain. But of course that logic produces the same disquieting conclusion when it is applied to the question of contraception. Contraception, that is, prevents a person who could have come into existence from doing so, and thereby results in the loss of the value of a person. So if the logic of unrealized value erases the moral line between abortion and infanticide, it wipes out the moral line between abortion and contraception as well. Contraception, it seems, is as immoral as abortion.

Even pro-life advocates who already equate abortion with infanticide may balk at this further implication. But the argument has not yet run its troublesome course. We might pause to admire the absurdities (or what to our conventional assumptions and common sense will seem absurdities). By the logic of unrealized value, every time a human being *could* but deliberately does not act so as to bring a new person into existence, he or she makes a conscious choice in favor of the same sacrifice of value that occurs when someone dies or is killed. Suppose you and your partner decide to have only two children, or only twelve, when as a matter of physical possibility you could have more: you have brought about the same diminution of value as a murderer does. Or you decide not to be a parent in order to devote yourself to pursuing the life of an artist, or a scholar, or a priest; your decision makes you responsible for the same sacrifice of "sacred" or "infinite" value, the same moral calamity as someone who throws a bomb into a crowded room. Celibacy becomes as morally costly as serial murder.

To be sure, even the logic of unrealized value would have *some* limits in this realm. At some point – and people will disagree about when that point is reached – the earth would become so saturated with human beings that not one could be added without subtracting someone else. At that point the moral duty to procreate would end. But it seems clear that no one, not pro-lifers or the most conservative Catholics, will endorse a duty that comes anywhere near such a "break even" point.[48] In short, no one seems willing to follow the logic of unrealized value to its logical conclusion, or even to follow it very far along its route.

So what should we make of this awkward situation? It would seem intellectually lazy and morally irresponsible just to remark that no one accepts the results of this logic and then leave the matter at that. After all, we *do* acknowledge the force of the logic of unrealized value in many contexts. To be sure, we understand that due to "biases of imaginability" people often fail to appreci-

[48] In addition, as noted, we do not in fact treat life, or persons, as *infinitely* valuable; rather, we make trade-offs between lives and other kinds of goods. *See supra* note 13. The present argument does not speak to whether or how such "life vs. other values" trade-offs should be made. The argument suggests only that when and if such trade-offs occur, there is no adequate justification for ascribing high value to persons-in-existence while ignoring (or ascribing minimal value to) unrealized but realizable persons. But even this conclusion is radically incongruent with our usual approach to such matters: people who regard the achievement of an optimal population level through the use of contraceptive measures as morally unproblematic would likely be horrified at the suggestion that the same optimum level be reached by liquidating the "excess" population.

ate or act on that logic; but we say these biases produce distortions in judgment.[49] So how do we account for our flagrant defiance of the logic of unrealized value here?

VII. BLOCKED ESCAPE ROUTES

It would be tempting at this point to retreat into the safe, reassuring discourse of "persons and rights." So we might just reiterate that "potential persons" have no "interests," or no "rights."[50] But the discourse of "rights" does nothing to disclose any fallacy in the logic of unrealized value; it simply provides a convenient way of shifting our attention away from that disconcerting logic. As discussed earlier, moreover, we know that the discourse of rights *can* be used, and sometimes *is* used, to induce a kind of moral numbness.[51] So I submit that merely to assert at this point that "potential persons" have no "right" to life, or to be born, is simply to close our eyes to the problem.

Is there any other way to explain what is wrong with the logic of unrealized value as applied to potential persons? I think there is, but the possible explanations carry objectionable features of their own. For example, we might rethink and then relinquish our assertions about individual persons having "maximal moral status" or "sacred" value. These time-honored assertions might be reclassified as mere sentimental pieties, or as manipulative devices employed by some to secure their own interests in a world that is *really* a Darwinian struggle for survival.

We *could* solve the problem in this way. But nothing in the preceding discussion warrants this nihilistic conclusion. The discussion has emphasized what seems to be one major limitation or blind spot in the persons and rights approach, but it has not criticized that approach for its positive claims – for its claims, that is, that persons have sacred value, or that persons have rights. The criticism, in essence, has asserted that the persons and rights approach has failed to ponder its own commitments to persons seriously enough, *not* that those commitments are flawed in themselves. Hence, to respond to the predicament presented by "potential persons" by abandoning the commitment to the sacred value of persons would be like curing a problem of nearsightedness by gouging out our eyes.

There are also more exotic solutions to the problem of "potential persons." For instance, we might adopt the sort of mystical or pantheistic view, offered in different forms in religious texts like the *Bhagavad-Gita* and by philosophers like Spinoza, which suggests that even if *life* (or perhaps something like "being") has great moral worth, what we perceive as *individuals* (or individual "persons") are really evanescent manifestations or glimpses of some larger and unified being, like the sparkles of moonlight on a rippling lake. So whether any particular manifestation, any particular "person," comes into or passes out of existence seems of slight moral consequence.

Or we might avoid the problem by adopting the common belief in what might be called "the anterior substantial soul." We could hypothesize, that is,

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[49] *See supra* notes 25-31 and accompanying text.

[50] *Cf.* DWORKIN, *supra* note 12, at 18-19.

[51] *See supra* note 35 and accompanying text.

that the soul is a sort of "spiritual substance," existing before birth and independent of the body, that joins with the body to form a person. On this assumption, it seems that decisions for celibacy or contraception do not prevent any potential person from coming into existence. Instead, these decisions mean that a soul that might have achieved personhood by joining with a particular body at one time and place will instead become a person by uniting with a different body at a different time and place. Such decisions have important consequences, to be sure: they alter the cast or at least the placement of characters in the human drama. But they do not prevent the realization of any person who might but does not achieve existence. Or, if you prefer, such actions prevent the realization of one particular person who might have existed, but in doing so permit the realization of a different person who otherwise would not have existed. So there is, so to speak, a sort of moral set-off.

These more exotic possibilities, we should note, have seemed plausible to millions or probably billions of people over the course of human history wholly independent of any concern about the conundrum we are considering here. For example, religions and philosophies that accept the idea of reincarnation – Hinduism, Buddhism, Platonism, and Pythagoreanism – have endorsed the idea of the anterior substantial soul. Nor is that notion necessarily tied to reincarnation. It might be that the soul exists before a person's conception and birth but that each soul passes through this temporal sphere only once, like a leaf that waits all summer for its one fluttering journey from branch to earth. The Mormon religion currently teaches something like this idea. And an occasional person will come to this conclusion without the assistance of any particular religious teaching. For example, through poetic reflection and introspection, William Wordsworth developed a conviction that "the soul that rises with us, our life's star, hath had elsewhere its setting, and cometh from afar"[52] (though in his later years, as he gravitated toward Christian orthodoxy, Wordsworth became more tentative about this assertion).[53] Any of these positions would avoid the conundrum under consideration here – and without defying the logic of unrealized value or denying that logic's application to persons.

Still, the plain fact is that these solutions will be unacceptable in our current academic environment, which rigorously (if sometimes witlessly) enforces the law of parsimony in metaphysical matters. Almost a century ago, William James observed that "souls are out of fashion,"[54] and the dictum still holds. For example, the idea of the anterior substantial soul seems unavoidably to entail "substance dualism," and as Richard Swinburne observes, "few philosophical positions are as unfashionable as substance dualism."[55]

So although most people in the world's history might have had easy ways to avoid the conundrum of "potential persons" (and although even now most people not burdened by the metaphysical restrictions that obtain in academic

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[52] William Wordsworth, *Ode: Intimations of Immortality from Recollections of Early Childhood.*

[53] *See* MELVIN RADER, WORDSWORTH: A PHILOSOPHICAL APPROACH 166-74 (1967).

[54] *Quoted in* WILLIAM MCDOUGALL, BODY AND MIND xxiv (Bacon Press 1961) (1911).

[55] RICHARD SWINBURNE, THE EVOLUTION OF THE SOUL ix (rev. ed. 1997). Swinburne nonetheless defends that position, though perhaps not in a version that would avoid the conundrum of "potential persons" discussed here.

settings might have no difficulty with that conundrum), there is no very convenient way for academicians to avoid the difficulty.

VIII. CONCLUSION: THE REIGN OF IMAGINATION

So what are we left with? It seems to me that if we are candid, we should begin by acknowledging a profound dissonance – it might not be too strong to say a gaping incoherence – in our leading approaches to central moral questions. We concede and indeed proclaim the logic of unrealized value in many domains. We have no very good explanation for why that logic should not apply in the matter of "potential persons." We nonetheless cannot accept the implications of that logic in this context. And we have no very satisfactory account that would reconcile these disparate convictions and judgments.

If this admission of incoherence in such central matters operates to shake our confidence in our prevailing ways of addressing vital moral questions, perhaps that would not be such a bad thing. In a related context, the philosopher Richard Swinburne suggests that "if in some sense it is a mystery how [the mind or soul relates to the body] . . . then we should be humble and accept that there just are some things we cannot understand. . . ."[56] Or, once again, Pascal: "Reason's last step is the recognition that there are an infinite number of things which are beyond it. It is merely feeble if it does not go so far as to realize that."[57] If that recognition meant that academicians became less self-assured about writing prevailing moral theories into "philosophers' briefs" to be submitted to the Supreme Court (directly or indirectly, through legal scholarship), or that the Court became a bit more hesitant than it sometimes has been about forcibly imposing the conclusions of those moral theories on society, those results might not be such a bad thing either.

More generally, the failure of our moral theories with regard to the momentous problem of "potential persons" might lead us to question the entrenched assumption, central to moral theories of both the consequentialist and Kantian varieties, that our central and defining feature is "reason," or that our species is cogently described as that of the "rational animal." It may be time to cope with the fact that, as Pascal said, we seem to be driven less by reason than by imagination.

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[56] *Id.* at xiii.

[57] PASCAL, *supra* note 30, at 85 (number 188).

INSUBSTANTIAL QUESTIONS AND FEDERAL JURISDICTION: A FOOTNOTE TO THE TERM-LIMITS DEBATE

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In *U.S. Term Limits, Inc. v. Thornton*,[1] the Supreme Court held that the Qualifications Clauses[2] prevent the states from restricting the length of service of members of Congress.[3] Some states have sought unsuccessfully to evade this result by seeking to compel candidates for the House of Representatives and the Senate to support a constitutional amendment permitting congressional term limits.[4]

Recently, the U.S. Court of Appeals for the Ninth Circuit relied on *Term Limits* to invalidate a California law requiring congressional candidates to be registered voters in the state when they file nomination papers, a requirement that prevented a Nevada resident who asserted an intention to relocate to the Golden State from running in a special election to fill a vacancy in the House of Representatives.[5] The California law required congressional candidates to

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[1] 514 U.S. 779 (1995).

[2] U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

[3] The Court reached this conclusion despite the state's characterization of the restriction at issue as a limitation on ballot access rather than on eligibility for continued membership in the federal legislature. This was, according to the majority, a distinction without a difference. *See Term Limits*, 514 U.S. at 829–31.

[4] Under these proposals, the ballot would contain a statement noting which candidates had refused to support such an amendment. The prospect of a pejorative ballot description labeling them as disdainful of the voters' hostility toward career politicians presumably would supply an incentive for candidates to promote term limits. The Supreme Court recently invalidated one of these measures. *See* Cook v. Gralike, 531 U.S. 510 (2001). Every other court that considered the issue before the Supreme Court's ruling also found this approach to be unconstitutional under the Qualifications Clauses or other provisions. *See* Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999), *aff'd*, 531 U.S. 510 (2001); Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999); Barker v. Hazeltine, 3 F. Supp. 2d 1088 (D.S.D. 1998); League of Women Voters of Me. v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997); Donovan v. Priest, 931 S.W.2d 1119 (Ark. 1996); Bramberg v. Jones, 978 P.2d 1240 (Cal. 1999); Morrissey v. State, 951 P.2d 911 (Colo. 1998); Advisory Opinion to the Att'y Gen. re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998); Van Valkenburgh v. Citizens for Term Limits, 15 P.3d 1129 (Idaho 2000); Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997); *In re* Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996).

[5] *See* Schaefer v. Townsend, 215 F.3d 1031 (9th Cir. 2000), *cert denied sub nom.* Jones v. Schaefer, 532 U.S. 904 (2001).

establish residency before the election, whereas the applicable Qualifications Clause mandates only that Representatives be state inhabitants at the time of the election.[6]

The term-limits debate has not been confined to federal offices. Many jurisdictions have adopted restrictions on the tenure of state and local legislators, executives, and judges. While the case law involving state curbs on tenure in federal offices is consistently hostile, the picture with respect to voter-imposed term limits for state and local offices is decidedly mixed. Term limits for state and local officials have survived challenges based on federal law,[7] although some of those efforts have foundered on the shoals of state law.[8]

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[6] *See id.* at 1034. On the possible constitutional significance of the difference between "inhabitant" and "resident," see Sanford Levinson, *2 Texans, Not 1*, N.Y. TIMES, Aug. 4, 2000, at A27 (noting Republican vice-presidential nominee Richard Cheney's attempt to establish himself as an inhabitant of Wyoming after many years' residence in Texas, the home of Republican presidential candidate George W. Bush, to avoid conflict with the Twelfth Amendment). *Cf.* Jones v. Bush, 122 F. Supp. 2d 713 (N.D. Tex.) (dismissing, for lack of standing, an action by three Texas voters who invoked the Twelfth Amendment in an effort to enjoin Texas electors from casting their votes for both Bush and Cheney on the ground that both men were inhabitants of Texas, and concluding on the merits that Cheney was not an inhabitant of Texas), *aff'd mem.*, 244 F.3d 134 (5th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001).

[7] *See, e.g.*, Citizens for Legislative Choice v. Miller, 144 F.3d 916 (6th Cir. 1998) (state legislators); League of Women Voters v. Diamond, 965 F. Supp. 96 (D. Me. 1997) (state legislators and executive officers); Dutmer v. City of San Antonio, 937 F. Supp. 587 (W.D. Tex. 1996) (members of city council); Miyazawa v. City of Cincinnati, 825 F. Supp. 816 (S.D. Ohio 1993) (members of city council), *aff'd*, 45 F.3d 126 (6th Cir. 1995).

Perhaps the only exception to this statement is *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997), in which a divided panel found term limits for California legislators invalid under the United States Constitution. The panel ruling was reversed when the case was reheard en banc. *See* Bates v. Jones, 131 F.3d 843 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1021 (1998).

[8] *See, e.g.*, Alaskans for Legislative Reform v. State, 887 P.2d 960 (Alaska 1994) (per curiam) (holding that term limits could be enacted only through constitutional amendment, not by statute or initiative); Allred v. McLoud, 31 S.W.3d 836 (Ark. 2000) (invalidating locally adopted term limits for county officials); Polis v. City of La Palma, 12 Cal. Rptr. 2d 322 (Ct. App. 1992) (concluding that state law preempted municipal term-limit ordinance); Chicago Bar Ass'n v. Ill. State Bd. of Elections, 641 N.E.2d 525 (Ill. 1994) (per curiam) (finding improper a proposed constitutional amendment limiting terms of state legislators); Minneapolis Term Limits Coalition v. Keefe, 535 N.W.2d 306 (Minn. 1995) (concluding that term limits for city officials would violate state constitution); Cottrell v. Santillanes, 901 P.2d 785 (N.M. Ct. App.) (finding term limits for members of city council inconsistent with state law), *cert. denied*, 900 P.2d 962 (N.M. 1995); Lehman v. Bradbury, 37 P.3d 989 (Or. 2002) (striking down term limits for state legislators and state executive officers for failure to comply with the separate-vote requirement for the adoption of amendments to the state constitution); Gerberding v. Munro, 949 P.2d 1366 (Wash. 1998) (rejecting proposed initiative that would have imposed term limits on state constitutional officers).

At the same time, many term limits for state and local officials have survived challenges based on state constitutions and statutes. *See, e.g.*, Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999) (upholding term limits for state legislators and cabinet officers while severing invalid term limits for members of Congress); City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. Dist. Ct. App. 2000) (per curiam) (upholding term limit for clerk of municipal court), *review granted*, 786 So. 2d 1184 (Fla. 2001); Pinellas County v. Eight Is Enough in Pinellas, 775 So. 2d 317 (Fla. Dist. Ct. App. 2000) (upholding term limits for county officers), *review granted*, 786 So. 2d 1188 (Fla. 2001); Abramowitz v. Glasser, 656 So. 2d 1332 (Fla. Dist.

In two of the cases involving term limits for state legislators, there have been suggestions that the federal courts lack subject-matter jurisdiction. A Ninth Circuit concurring opinion in *Bates v. Jones*[9] was based on this premise. Similarly, the Sixth Circuit panel in *Citizens for Legislative Choice v. Miller*[10] took note of this argument but ultimately put it aside because the state failed to raise a jurisdictional defense at any stage of the litigation.[11] Both suggestions were based on the Supreme Court's summary dismissal, "for want of a substantial federal question," of the appeal in *Moore v. McCartney*,[12] a case involving a state constitutional provision limiting the governor of West Virginia to two consecutive terms.

The suggestions concerning the absence of jurisdiction were not dispositive in either case, but they are nevertheless significant because both cases were decided by federal courts of appeals. They are also noteworthy because they misperceive the concept of a "substantial federal question." These judicial statements reflect confusion between the precedential weight of the Supreme Court's summary disposition of an appeal and the power of lower federal courts to hear cases involving the same or similar issues. Although the Court's docket now consists almost exclusively of certiorari cases rather than appeals, there are enough summary dispositions of appeals to cause mischief if district and circuit judges share the confusion shown in these two term-limits cases. At a time of increased judicial sensitivity to federalism,[13] that confusion might lead to mistaken refusals to hear cases on jurisdictional grounds.

Ct. App.) (upholding term limits for elected city officials), *review denied*, 664 So. 2d 248 (Fla. 1995); Maddox v. Fortson, 172 S.E.2d 595 (Ga. 1970) (upholding term limit for governor); Rudeen v. Cenarrusa, 38 P.3d 598 (Idaho 2001) (upholding term limits for statewide officers, state legislators, and county elected officials); Nev. Judges Ass'n v. Lau, 910 P.2d 898 (Nev. 1996) (upholding term limits for judges but noting that ballot summary must be clarified so that voters would understand the full ramifications of approving judicial term limits). *Cf.* Woo v. Superior Ct., 100 Cal. Rptr. 2d 156 (Ct. App. 2000) (narrowly construing term limits in a newly adopted city charter to comport with the outcome of an earlier referendum on municipal term limits); Kuryak v. Adamczyk, 705 N.Y.S.2d 739 (App. Div. 1999) (holding municipal term limits to be prospective only).

[9] 131 F.3d 843, 847-48 (9th Cir. 1997) (en banc) (O'Scannlain, J., concurring in the result), *cert. denied*, 523 U.S. 1021 (1998).

[10] 144 F.3d 916 (6th Cir. 1998).

[11] *See id.* at 919-20.

[12] 425 U.S. 946 (1976).

[13] *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (concluding that Congress had not validly abrogated the states' Eleventh Amendment immunity in Title I of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the civil rights remedy provision of the Violence Against Women Act for exceeding federal power under the Commerce Clause and the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (finding that Congress had not validly abrogated the states' Eleventh Amendment immunity in extending the protections of the Age Discrimination in Employment Act to employees of state and local governments); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not commandeer state executive officials to implement a federal regulatory program); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate the states' Eleventh Amendment immunity in furtherance of its Article I powers); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act for exceeding federal power under the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not commandeer state legislatures into enacting federally dictated laws).

This article seeks to clear up the confusion over "substantial federal questions." Part I provides an overview of the Supreme Court's jurisdiction, distinguishing between appeal and certiorari. Part II examines the precedential weight of the Court's summary dispositions, contrasting summary disposition of appeals with denials of certiorari. Part III explains why the suggestions that the lower courts lack jurisdiction over cases presenting issues in which the Supreme Court has dismissed appeals "for want of a substantial federal question" are mistaken.

I. APPEAL, CERTIORARI, AND THE SUPREME COURT

Today, virtually all of the Supreme Court's appellate docket is discretionary.[14] That is, the Court decides for itself whether to hear a case that was decided by a lower federal court or the highest state court in which review was available. A party seeking Supreme Court review generally has no right to appeal but must instead obtain a writ of certiorari.[15]

Despite the dominance of certiorari, this procedure is of comparatively recent vintage. The Court's certiorari jurisdiction was not created until 1891, in the statute that also established the federal courts of appeals.[16] The availability of certiorari was expanded incrementally in several stages that culminated in the passage of the Judges' Bill in 1925.[17]

The other, now rare, means of securing Supreme Court review is by direct appeal, which is a matter of right in certain types of cases. The appeal mechanism existed virtually from the Court's beginning. The Judiciary Act of 1789 provided for review by writ of error in several classes of cases.[18] Specifically, section 13 gave the Court appellate jurisdiction over decisions of the old circuit courts and state courts.[19] Section 22 authorized the Court to review decisions of the circuit courts in civil cases and equitable suits involving amounts in excess of $2,000. Section 25 empowered the Court to review rulings by state courts involving certain federal questions, particularly those in which a federal statute or treaty was ruled invalid or in which a state law or policy was upheld against a challenge based on the Constitution or other federal law.[20] A 1914 statute expanded the Court's power to review state rulings that upheld a federal law or

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[14] I use "appellate" here in contrast with "original" jurisdiction. *See* U.S. CONST. art. III, § 2 (dividing the Supreme Court's jurisdiction into these two categories).

[15] *See* 28 U.S.C. §§ 1254, 1257-59 (1994).

[16] *See* Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828. *See generally* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1233-36 (1979).

[17] *See* Act of Feb. 13, 1925, ch. 229, 43 Stat. 936; *see also* Webb Act, ch. 448, 39 Stat. 726 (1916); Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. These provisions were codified in Title 28 by the Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869. *See generally* Linzer, *supra* note 16, at 1237-44.

[18] *See* Act of Sept. 24, 1789, ch. 20, §§ 1, 13, 22, 25, 1 Stat. 73.

[19] One sentence of § 13 was later found to have impermissibly expanded the Court's original jurisdiction. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[20] The validity of § 25 was upheld in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (holding that § 25 gave the Court jurisdiction to review state criminal cases). The Supreme Court did not get jurisdiction over federal criminal cases until 1889, and then only in proceedings involving capital crimes. *See* Act of Feb. 6, 1889, ch. 113, 25 Stat. 655. The new courts of appeals were given

invalidated a state law that was challenged on constitutional or other federal grounds.[21] In 1928 Congress eliminated the writ of error, denominating the nondiscretionary cases coming before the Court as appeals.[22] Almost all appeals were eliminated in 1988; since then cases that previously arose as appeals have become part of the Court's discretionary docket and are handled through writs of certiorari.[23]

Why does the distinction between appeal and certiorari matter? If the Court accords plenary consideration to a case and issues a formal opinion, it makes no real difference whether the case reached the docket as a matter of right or through the exercise of judicial discretion. A ruling on the merits binds the parties to the case and serves as a precedent for future disputes.

The question arises because the Court cannot and does not accord plenary consideration to every case. Indeed, the whole point of certiorari was to allow the justices to refuse to hear cases that do not warrant further review. Even before the adoption of the certiorari process on a wide scale, the Court also developed mechanisms to give less than full treatment to appeals. This summary treatment of appeals arose from the same concerns that led to the creation of the circuit courts of appeals and the use of certiorari: the Court's docket was being overwhelmed by an excessive number of cases.[24] As a result, the justices necessarily exercised a measure of discretion in deciding which appeals warranted plenary consideration, and they did so in ways that blurred the distinction between appeal and certiorari.[25]

A denial of certiorari, the Court has often explained, has no precedential weight. This "orthodox view" of certiorari denials[26] is reflected most famously

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jurisdiction over criminal cases in 1891. *See* Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828.

[21] *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. Such cases were placed within the Court's certiorari, or discretionary, jurisdiction rather than within its appeal, or mandatory, authority. This particular change was made in response to a state-court decision invalidating New York's pioneering worker's compensation law. *See* Ives v. S. Buffalo Ry., 94 N.E. 431 (N.Y. 1911). Supreme Court review was impossible because § 25 limited the Court's jurisdiction over state decisions to cases in which the federal claim was rejected, whereas in this case the federal claim was upheld and resulted in the abrogation of the state law. *See* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 82–84 (1994); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4012, at 217-18 (2d ed. 1996). Earlier, Congress had amended § 25 in less substantial ways. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

[22] *See* Act of Jan. 31, 1928, ch. 14, 45 Stat. 54. *See generally* WRIGHT ET AL., *supra* note 21, §§ 4002, 4006.

[23] *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

[24] For example, the Court's docket nearly quadrupled between 1860 and 1880, and the 1890 term began with a backlog of more than 1,800 cases. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 60, 86 (1928); Francis J. Ulman & Frank H. Spears, *"Dismissed for Want of a Substantial Federal Question": A Study in the Practice of the Supreme Court in Deciding Appeals from State Courts*, 20 B.U. L. REV. 501, 508 (1940).

[25] *See* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12, 14 (1930).

[26] *See* Linzer, *supra* note 16, at 1251, 1255, 1260, 1302.

in Justice Frankfurter's opinion "respecting the denial of the petition for writ of certiorari" in *Maryland v. Baltimore Radio Show*:[27]

> Inasmuch . . . as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.[28]

If denials of certiorari are not precedents and the Court has treated appeals analogously to certiorari cases, we might then wonder whether dispositions of appeals with less than plenary consideration also have no precedential significance. That is the subject of the next section.

II. THE PRECEDENTIAL VALUE OF SUMMARY DISPOSITIONS OF APPEALS

The Supreme Court could summarily dispose of appeals in several ways. The two most common methods were summary affirmance and dismissal "for want of a substantial federal question." Traditionally, the Court reserved summary affirmances for appeals coming from federal courts when the ruling in question was correct and the case presented no legally troublesome issue; if a case came from a state court in similar circumstances, the appeal was "dismissed for want of a substantial federal question."[29]

Whether appeals came from federal or state courts, the overwhelming majority received summary treatment.[30] The precedential weight (if any) to be accorded to summary dispositions generated widespread uncertainty. Justice Clark, sitting by designation on the Fourth Circuit after his retirement, thought that such rulings should have minimal weight. He opined that, during his tenure on the Supreme Court, summary dispositions of appeals were "treat[ed] simi-

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[27] 338 U.S. 912 (1950).

[28] *Id.* at 919. For other statements of the orthodox view, see, e.g., Singleton v. Comm'r, 439 U.S. 940, 942-45 (1978) (Stevens, J., respecting the denial of the petition for writ of certiorari); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 364 n.1 (1973); Parker v. Ellis, 362 U.S. 574, 576 (1960) (per curiam), *overruled on other grounds by* Carafas v. LaVallee, 391 U.S. 234 (1968); United States v. Shubert, 348 U.S. 222, 228 n.10 (1955); Sunal v. Large, 332 U.S. 174, 180 (1947); House v. Mayo, 324 U.S. 42, 48 (1945) (per curiam), *overruled on other grounds by* Hohn v. United States, 524 U.S. 236 (1998). *But see* United States v. Kras, 409 U.S. 434, 443 (1973) (finding "not without some significance" dissents from a denial of certiorari); Linzer, *supra* note 16, at 1277-91 (discussing *Kras* and other cases in which certiorari denials have been accorded precedential value).

[29] *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 266 (7th ed. 1993). We will also briefly consider a third approach, dismissal "for want of jurisdiction." *See id.* at 267-68. *See also infra* Part III. A fourth technique for summarily disposing of appeals was the "adequate state ground," under which appeals from state courts were dismissed without plenary consideration where the decision rested on nonfederal grounds that were sufficient to resolve the case. *See* STERN ET AL., *supra* at 267-68. *See generally* WRIGHT ET AL., *supra* note 21, §§ 4019-33. The adequate-state-ground doctrine is beyond the scope of this article.

[30] *See* STERN ET AL., *supra* note 29, at 210, 211; Ulman & Spears, *supra* note 24, at 523-24, n.112; Pamela R. Winnick, Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, 76 COLUM. L. REV. 508, 517-18 n.52 (1976); Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts*, 63 COLUM. L. REV. 688, 694 n.54 (1963). *See also* Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 708, n.9 (1956).

lar[ly]" to certiorari denials.[31] Leading scholars disagreed about the question. Some argued that summary dispositions were entitled to precedential weight because the Court had a constitutional obligation to reach the merits of every case within its appellate jurisdiction.[32] Others maintained that summary dispositions reflected prudential concerns as much as substantive ones and therefore should not count as precedents.[33]

The Supreme Court resolved the debate in favor of treating summary dispositions as precedents in *Hicks v. Miranda*,[34] a 1975 decision involving the validity of the California obscenity statute. The owner of an adult theater who was prosecuted for showing the movie "Deep Throat" filed a First Amendment challenge to the statute.[35] A three-judge federal district court invalidated the statute under the standard established in *Miller v. California*.[36] Before that ruling became final, however, the Supreme Court dismissed, for want of a substantial federal question, an appeal from a state-court ruling upholding the same statute under the *Miller* test.[37] On direct appeal from the district court in *Hicks*, the Supreme Court held that the summary dismissal constituted a binding precedent. Justice White's majority opinion explained that "[t]he three-judge court was not free to disregard this pronouncement."[38] Because that appeal presented a federal question, the Court "had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction"; the justices "were required to deal with its merits," and lower courts were obliged to follow this summary disposition.[39]

Concluding that summary dispositions in appeals have precedential value does not resolve the question of how much weight these rulings have. The Court provided its answer the year before *Hicks*, concluding in *Edelman v. Jordan*[40] that appeals decided summarily have less "precedential value" than do cases resolved after plenary consideration and a full opinion.[41] *Edelman* involved a class action alleging that Illinois welfare officials had improperly administered public assistance programs and wrongfully withheld benefits from eligible recipients.[42] The officials asserted an Eleventh Amendment defense,

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[31] Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975) (Clark, J., concurring), *cert. denied*, 428 U.S. 913 (1976).

[32] *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues" – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10-13 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959).

[33] *See* Alexander M. Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). For additional sources on both sides of the scholarly debate, see United States *ex rel.* Epton v. Nenna, 318 F. Supp. 899, 906 n.8 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 363 (2d Cir. 1971), *cert. denied*, 404 U.S. 948 (1971).

[34] 422 U.S. 332 (1975).

[35] During the pendency of these proceedings he was also charged with violating the same obscenity statute for showing "The Devil in Miss Jones." *See id.* at 341 n.10.

[36] 413 U.S. 15 (1973).

[37] *See* Miller v. California, 418 U.S. 915 (1974).

[38] *Hicks*, 422 U.S. at 344.

[39] *Id.*

[40] 415 U.S. 651 (1974).

[41] *See id.* at 671. This conclusion was anticipated and more fully elaborated in David W. Brown, Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. REV. 373, 407-10 (1972).

[42] *See Edelman*, 415 U.S. at 653-55.

arguing that any payment of back benefits would come from the state treasury even though the state was not named as a defendant.[43] The Court accepted this argument despite the existence of three district-court rulings awarding similar relief that had been summarily affirmed on appeal over Eleventh Amendment objections.[44] Because those cases did not explicitly address the Eleventh Amendment, they could not of their own force control the disposition of *Edelman*.[45]

The Court took a similar approach in *Caban v. Mohammed*,[46] which invalidated a New York law that allowed the mother of a child born to unmarried parents to give unilateral consent to the child's adoption. The state relied in part on *Orsini v. Blasi*,[47] which had dismissed an appeal, for want of a substantial federal question, from a state-court ruling upholding the same statute. The Court explained that *Orsini* "was a ruling on the merits, and therefore [was] entitled to precedential weight,"[48] but was "not entitled to the same deference given a ruling after briefing, argument, and a written opinion."[49] Full consideration of the issue on the merits led to the conclusion that *Orsini* should be overruled.[50]

There are other cases in which appeals decided summarily have not been followed,[51] but they are the exception rather than the rule. This is quite predictable. Summary dispositions typically reflect the Court's views on the merits, and "the Justices are not likely to change their minds after they have once come to such a conclusion."[52] But establishing that summary decisions have at least limited precedential value does not resolve the matter. Whatever weight sum-

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[43] *See id.* at 668.

[44] *See id.* at 670, n.13 (citing Sterrett v. Mothers' & Childrens' Rights Org., 409 U.S. 809 (1972); State Dep't of Health & Rehabilitative Servs. v. Zarate, 407 U.S. 918 (1972); Wyman v. Bowens, 397 U.S. 49 (1970)). The Court also noted that the Eleventh Amendment was raised, but not discussed in the opinion, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), which upheld an order for retroactive welfare payments to recipients who had been denied assistance under an unconstitutional residency requirement. *See Edelman*, 415 U.S. at 670-71.

[45] *See Edelman*, 415 U.S. at 671.

[46] 441 U.S. 380 (1979).

[47] 423 U.S. 1042 (1976).

[48] *Caban*, 441 U.S. at 389 n.9 (citing Hicks v. Miranda, 422 U.S. 332, 344 (1975)).

[49] *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 671 (1974)).

[50] *See id.* ("Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.").

[51] For other instances, see, e.g., Boggs v. Boggs, 520 U.S. 833, 849 (1997) (refusing to treat dismissal for want of a substantial federal question of a state ruling on ERISA preemption as dispositive of the preemption question in a later case); Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 920 (1990) (per curiam) (refusing to regard a dismissal for want of a substantial federal question as "the 'overruling [of] clear past precedent on which litigants may have relied'") (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (brackets in original)); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981) (treating summary affirmances and dismissals for want of a substantial federal question of appeals from rulings upholding billboard regulations as having less precedential weight than full opinions on the merits).

[52] STERN ET AL., *supra* note 29, at 217. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366-67 n.16 (1975) (emphasizing the precedential value of a summary affirmance in a case raising almost identical Establishment Clause issues), *overruled on other grounds by* Mitchell v. Helms, 530 U.S. 793 (2000); Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (relying in part

mary dispositions of appeals should receive, there remains the problem of determining exactly what such rulings decided. Because they contain little or no reasoning, this can be a most daunting task. The Court has struggled with this problem on several occasions.

The leading case on the subject is *Mandel v. Bradley*,[53] a challenge to Maryland's ballot-access rules for independent candidates. The three-judge district court gave dispositive weight to the summary affirmance of a decision invalidating Pennsylvania's access rules for independents.[54] The Supreme Court held that the lower court erred in doing so. The Pennsylvania law required independents to obtain their signatures within a twenty-one day window and submit them 244 days before the general election.[55] The Maryland law required independents to file their signatures almost as far in advance but did not restrict when the signatures had to be collected.[56] The summary affirmance in the Pennsylvania case did not necessarily control the Maryland dispute because the Free State's access rules differed somewhat from the Keystone State's.

The summary disposition, in other words, "affirm[ed] the judgment but not necessarily the reasoning by which it was reached."[57] The Court added that "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the *specific challenges* presented in the [jurisdictional] statement [and] prevent lower courts from coming to opposite conclusions on the *precise issues presented and necessarily decided* by those actions."[58] Such rulings do not "break[ ] new ground" but simply "apply[ ] principles established by prior decisions to the particular facts involved" in those cases.[59] The Court has repeatedly endorsed this restrictive view of the precedential effect of summary dispositions of appeals.[60]

Determining the "specific challenges" presented and the "precise issues" that were "necessarily decided" in a summary disposition can be quite difficult.[61] The task can be especially daunting with respect to dismissals for want of a substantial federal question, because such dispositions might be viewed as either substantive or jurisdictional in nature. Indeed, the term-limits cases dis-

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on two summary affirmances in rejecting a constitutional challenge to laws disenfranchising convicted felons).

[53] 432 U.S. 173 (1977) (per curiam).

[54] *See id.* at 175 (citing Tucker v. Salera, 424 U.S. 959 (1976)).

[55] *See id.*

[56] *See id.* at 177. Maryland's filing deadline could be as much as 240 days before a presidential election. *See id.* at 174.

[57] *Id.* at 176 (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)).

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

[59] *Id.*

[60] *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-83 (1979); Wash. v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979).

[61] This analysis presumably requires access to "most if not all of the appeal papers in the earlier proceedings." STERN ET AL., *supra* note 29, at 220. *See also* Winnick, *supra* note 30, at 528-29 (discussing factors relevant to determining the "reach and content" of a summary disposition).

cussed at the outset suggest that the jurisdictional interpretation retains vitality. For that reason, we now turn to this subject.

III. Untangling the Meaning of "Substantial Federal Question"

Corrigan v. Buckley,[62] an early case involving racially restrictive covenants,[63] demonstrates how the Supreme Court has elided the distinction between jurisdiction and the merits when the substantiality of a federal question is at issue. Irene Corrigan, a white woman, agreed to sell her home in Washington, D.C., to an African American woman named Helen Curtis. The property was subject to a covenant prohibiting its sale, occupancy, lease, or gift to "any person of the negro [*sic*] race or blood."[64] A white neighbor, John Buckley, sought to enjoin the transaction, and Corrigan moved to dismiss his complaint. The trial court denied the motion and was affirmed by the United States Court of Appeals sitting as the highest local court for the District of Columbia.[65] Corrigan then appealed to the Supreme Court.

Corrigan argued that the covenant violated the Fifth, Thirteenth, and Fourteenth Amendments as well as various Reconstruction-era civil rights statutes. A unanimous Court, in an opinion by Justice Sanford, concluded that the constitutional claim was "entirely lacking in substance or color of merit"[66] because the case involved only private rather than governmental action. The statutory argument was "equally unsubstantial" for the same reason.[67] Because neither contention raised a substantial federal question, the appeal was "dismissed for want of jurisdiction."[68] Despite this formal statement of the grounds for disposition, it is difficult to avoid the conclusion that the Court had rejected the claim on the merits. The jurisdictional defect was intimately connected to the flaws of the substantive claim.

The *Corrigan* Court's invocation of jurisdiction as a basis for dismissing an appeal that was regarded as weak on the merits reflected common practice at the time. That approach differs from cases like *Moore v. McCartney*, where the appeals were summarily dismissed for want of a substantial federal question, because *Corrigan* was dismissed after a detailed analysis of the merits. Understanding how this practice arose can nonetheless help us more clearly understand the correct meaning of summary dismissals for want of a substantial federal question. That understanding emerges from both early case law (all of which comes from cases with reasonably detailed opinions) and the evolution of the Supreme Court's rules. This article considers each of these topics, then examines the Court's more recent summary dispositions of appeals.

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[62] 271 U.S. 323 (1926).

[63] As the following text explains, *Corrigan* rejected the challenge to the racial covenants at issue. This ruling was effectively circumvented in *Hurd v. Hodge*, 334 U.S. 24 (1948), which held that judicial enforcement of such covenants violated the Fifth Amendment. *See also* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that enforcement of similar covenants by state courts violated the Fourteenth Amendment).

[64] *Corrigan*, 271 U.S. at 327.

[65] *See id.* at 328-29; 299 F. 899 (D.C. Cir. 1924).

[66] *Corrigan*, 271 U.S. at 330.

[67] *Id.* at 330-31.

[68] *Id.* at 332.

A. *Early Cases*

The Supreme Court first announced that a substantial question was necessary to invoke its jurisdiction on appeal in *Millingar v. Hartupee*,[69] an 1867 case that had its roots in the Union blockade of the Confederacy during the Civil War. Hartupee sued Millingar in a Pennsylvania state court for the value of cotton that Millingar had sold. The cotton was seized by the federal government during the Union blockade and released to Millingar by the United States District Court for the Northern District of New York. Hartupee had earlier obtained a judgment against a man named Gearing and claimed that Gearing was the true owner of the cotton. Millingar denied Gearing's interest, but the state courts ruled for Hartupee.[70] Millingar then appealed to the Supreme Court, contending that the state courts had denied effect to the federal district court's release of the cotton to him and that this brought the case within the Court's jurisdiction.[71]

Hartupee successfully moved to dismiss the appeal. Chief Justice Chase found nothing in the federal district court's order that addressed the ownership of the cotton; the order simply released the government's claim.[72] Accordingly, there was no federal action involved in the dispute between Millingar and Hartupee. "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court," Chase explained.[73] Because there was not even a colorable claim of federal action, the Court lacked jurisdiction over the appeal and granted the motion to dismiss.[74]

The next development, in 1872, was actually a slight detour from *Millingar*. In *Pennywit v. Eaton*,[75] the Court denied a motion to dismiss for want of jurisdiction despite a strong suspicion that the appeal lacked merit. Seeking to enforce a Louisiana judgment, Eaton had sued Pennywit in an Arkansas state court. Pennywit contested the validity of the judgment on the ground that the Louisiana judge had been appointed by the military governor at the height of the Civil War. This arrangement, Pennywit claimed, violated Article III (in that the Louisiana court had not been created by Congress) and the Appointments Clause (in that the President had not nominated the judge and the Senate had not confirmed him).[76] The Arkansas state courts rejected Pennywit's arguments. The Supreme Court, in a brief opinion by Chief Justice Chase, concluded that Pennywit had raised a federal question, "though somewhat obscurely," and therefore declined to dismiss the appeal on jurisdictional grounds despite its obvious weakness.[77]

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[69] 73 U.S. (6 Wall.) 258 (1867).

[70] *See id.* at 259.

[71] *See id.* at 260.

[72] *See id.* at 262.

[73] *Id.* at 261.

[74] *See id.* at 262.

[75] 82 U.S. (15 Wall.) 380 (1872).

[76] *See id.* at 380-81.

[77] *Id.* at 381. After hearing arguments on the merits, the Court dispatched Pennywit's claim in a single paragraph and assessed him damages because the appeal seemed to have been prosecuted only for delay. *See* Pennywit v. Eaton, 82 U.S. (15 Wall.) 382, 384 (1872).

The Court overcame its reluctance to dispatch frivolous appeals in *City of Chanute v. Trader*.[78] This 1889 case still reflected uneasiness over treating substantively weak cases as jurisdictionally flawed, however. Trader won a lawsuit in a federal court against the city for overdue payment of municipal bonds, then prevailed in a second action to compel satisfaction of that judgment.[79] The city appealed to the Supreme Court, and Trader moved to dismiss or affirm. In a unanimous opinion written by Justice Blatchford, the Court concluded that the case was technically within its jurisdiction but that the appeal was patently frivolous. Exercising "its inherent power and duty to administer justice," the Court affirmed the lower court's ruling without briefs or arguments on the merits.[80]

Two years later, the Court returned to *Millingar's* jurisdictional approach. *City of New Orleans v. New Orleans Water Works Co.*[81] dealt with an alleged violation of the Contracts Clause. Although the 1877 statute chartering the company purported to give the city free water service, an 1884 law required the city to pay for water.[82] When the state courts rejected the claim that the 1884 action breached a contract embodied in the 1877 legislation, the city appealed to the Supreme Court. Relying on *Millingar*, the Court dismissed the appeal on the company's motion. Justice Brown explained that the 1877 statute did not create a legal contract.[83] Accordingly, the "bare averment" of a contract was entirely insufficient to invoke the Contracts Clause and thereby bring the appeal within the Court's jurisdiction.[84] In the absence of a properly presented federal question, the motion to dismiss was granted.[85]

The cases discussed so far all dealt with extremely weak, if not frivolous, claims. Even in those situations, the Court was sometimes reluctant to treat clearly fanciful contentions as jurisdictionally defective. Early in the twentieth century, however, the *Millingar* approach came to be applied to plausible but ultimately unpersuasive arguments, especially ones that had been addressed in earlier cases. The first example of this phenomenon was *New Orleans Waterworks Co. v. Louisiana*,[86] a challenge to the forfeiture of the charter of the same company that was involved in the *City of New Orleans* dispute a decade earlier. The state contended that the company had failed to provide pure water to its customers and had charged excessive rates for its services.[87] After the state courts upheld the forfeiture, the company appealed to the Supreme Court on the grounds that the state had impaired its contractual rights and taken its

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[78] 132 U.S. 210 (1889).

[79] *See id.* at 211.

[80] *Id.* at 214.

[81] 142 U.S. 79 (1891).

[82] *See id.* at 80-81, 84.

[83] *See id.* at 88-89, 92 (explaining that the state courts had held the alleged contract *ultra vires*, the city had repudiated whatever contract might have existed, and the Contracts Clause does not protect municipalities because their charters are subject to revision or revocation by the state legislature at any time).

[84] *Id.* at 87.

[85] *See id.* at 93.

[86] 185 U.S. 336 (1902).

[87] *See id.* at 338.

property without due process.[88] After invoking *Millingar* for the view that the Court's jurisdiction cannot arise from the "mere claim" of a federal question,[89] Justice Peckham devoted six pages to discussing several cases that foreclosed the company's claims[90] and almost four more to applying those precedents to the facts of the case.[91] This extensive analysis led to the conclusion that the company's federal claims were "so clearly without color of foundation that this court is without jurisdiction in this case," so the appeal was dismissed.[92]

A few months later, the Court combined its analysis of dismissal and affirmance in substantively weak appeals. The move came in *Equitable Life Assurance Society of the United States v. Brown*,[93] a dispute over a life insurance policy. After the policy owner died, competing claims were filed: one on behalf of his daughter in a Hawaii territorial court, and another by a relative of the decedent in New York. The company refused to pay the daughter, the legal heir, because of the pendency of the New York action. The territorial courts ruled in favor of the daughter, and the company appealed to the Supreme Court.[94] Her representative moved to dismiss or affirm.

The Court concluded that the company's position had been squarely rejected in a previous case.[95] Like *New Orleans Waterworks Co. v. Louisiana*, therefore, this appeal involved "a question adequate, abstractly considered, to confer jurisdiction," but that question was "so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy."[96] The federal question, then, was "devoid of any substantial foundation or merit," and this case was controlled by the *New Orleans Waterworks Co.* rule.[97]

In other words, the dispositive motion should be granted, but which disposition was appropriate? Then-Justice Edward White explained that "it [was] obvious that on this record either the motion to dismiss should be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other will . . . finally dispose of this controversy."[98] Jurisdiction and the merits were inextricably intertwined: "the unsubstantiality of the [f]ederal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing."[99] The Court chose to grant the motion to dismiss, because "the better practice is to cause our decree to respond to the question which arises first in order for decision."[100]

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[88] *See id.* at 343-44.

[89] *Id.* at 344.

[90] *See id.* at 346-51 (quoting extensively from Chicago Life Ins. Co. v. Needles, 113 U.S. 574 (1885)).

[91] *See id.* at 351-54.

[92] *Id.* at 354.

[93] 187 U.S. 308 (1902).

[94] *See id.* at 309-10.

[95] *See id.* at 312 (discussing New Eng. Mut. Life Ins. Co. v. Woodworth, 111 U.S. 138 (1884)).

[96] *Id.* at 311.

[97] *Id.* at 314.

[98] *Id.* at 315.

[99] *Id.*

[100] *Id.*

The Supreme Court followed a similar approach in *Zucht v. King*,[101] a 1922 case that would be included for many years afterward in the Court's rules. This was a challenge to a San Antonio ordinance requiring children to provide proof of vaccination as a prerequisite for attending school. Although Rosalyn Zucht properly raised constitutional objections to the ordinance, her contentions were plainly foreclosed by *Jacobson v. Massachusetts*,[102] which had upheld an almost identical requirement.[103] Under the circumstances, Justice Brandeis wrote, the federal questions were not substantial, so the Court had no jurisdiction over the appeal.[104] Like *Equitable Life Assurance Society*, then, the jurisdictional issue was closely connected to the merits. A dismissal for want of a substantial federal question in these cases meant that the claim lacked merit because it was either very weak or foreclosed by precedent. As a practical matter, such a dismissal amounted to an affirmance on the merits.

We can observe the close relationship between dismissal for want of a substantial federal question and affirmance on motion by examining the evolution of the Supreme Court's rules. Those rules came to embody a pattern that emerged from the cases: appeals dismissed for want of a substantial federal question came from state courts,[105] whereas those affirmed on motion came from federal courts.

B. Supreme Court Rules

The Supreme Court's general rules relating to disposition of appeals on motion date from the 1870s. In 1878 the Court amended paragraph 5 of what was then Rule 6 to provide:

> There may be united, with a motion to dismiss a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.[106]

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[101] 260 U.S. 174 (1922).

[102] 197 U.S. 11 (1905).

[103] *See Zucht*, 260 U.S. at 176.

[104] *See id.* at 177. The Court conceded that Zucht had raised a substantial equal protection question, but that question entailed a claim that the ordinance was unconstitutional as applied. Unfortunately, such a claim was then reviewable only on certiorari, *see id.*, and her certiorari petition had been dismissed for failure to comply with the rules for such petitions, *see id.* at 176.

[105] *Equitable Life Assurance Society* came from a territorial court, but the rules governing appeals from that court were the same as those applicable to appeals from state courts. *See* Equitable Life Assurance Soc'y of the U.S. v. Brown, 187 U.S. 308, 309 (1902).

[106] 97 U.S. vii (1878). The 1878 amendment built on similar language that had been adopted two years earlier. That language governed writs of error to state courts. *See* 91 U.S. vii (1876). The 1878 amendment extended the provision to cover appeals from federal courts.

The Court concluded that the appeal in *City of Chanute* was "frivolous, and that it was taken for delay only," City of Chanute v. Trader, 132 U.S. 210, 214 (1889), but found that the circumstances of the case did not warrant invocation of Rule 6. *See id.*; Ulman & Spears, *supra* note 24, at 512. The ruling therefore rested on the Court's inherent power. *See City of Chanute*, 132 U.S. at 214. As we have seen, even before the adoption of Rule 6 the Court invoked its inherent power to assess damages against a party who had prosecuted an appeal only for delay. *See* Pennywit v. Eaton, 82 U.S. (15 Wall.) 382, 384 (1872).

This provision was slightly reworded in ways that had no substantive effect in the Court's 1911 rules.[107] Of particular significance, this provision suggests that the Court lacks jurisdiction over frivolous or dilatory appeals. Paragraph 5 incorporates the *Millingar* approach, under which an appeal that has no basis whatever can be dismissed without plenary consideration. The language does not explicitly reach appeals that are foreclosed by prior decisions, such as *New Orleans Waterworks*, *Equitable Life Assurance Society*, or *Zucht*, and none of those cases mentioned Rule 6. The next revision of the rules, in 1925, changed the word "frivolous" to "unsubstantial."[108]

Significant change came in 1928, when the Court promulgated a new set of rules. The new Rule 12 required appellants to file a statement "particularly disclosing the basis on which it is contended this court has jurisdiction to review on appeal the judgment or decree below."[109] Specifically, the statement had to "distinctly refer to the statutory provision believed to sustain the jurisdiction"[110] and "the cases believed to sustain the jurisdiction."[111] Appellees could file a responsive statement "disclosing any matter making against the jurisdiction asserted by the appellant."[112] Nothing in Rule 12 specified that jurisdiction depended on the existence of a substantial federal question, although new Rule 7 retained the essence of the 1925 amendment of old Rule 6, authorizing motions to dismiss any appeal where the determinative question was "so unsubstantial as not to need further argument."[113]

The requirement of a substantial federal question was added to Rule 12 in 1936, with a specific reference to *Zucht v. King*. The revised paragraph 1 of Rule 12, describing the contents of the jurisdictional statement, continued to require a distinct reference to "the statutory provision believed to sustain the jurisdiction."[114] There followed this inserted language:

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[107] The revised provision read, in relevant part, as follows:

> The court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ [of error] or appeal was taken for delay only, or that the questions on which the decision of the cause depend [*sic*] are so frivolous as not to need further argument.

SUP. CT. R. 6(5), 222 U.S. (App.) 10 (1911).

[108] The relevant portion of the revised rule then read:

> The court will receive a motion to affirm on the ground that it is manifest that the writ [of error] or appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

SUP. CT. R. 6(5), 266 U.S. 657 (1925).

[109] SUP. CT. R. 12(1), 275 U.S. 603 (1928).

[110] SUP. CT. R. 12(1)(a), 275 U.S. 603 (1928).

[111] SUP. CT. R. 12(1)(d), 275 U.S. 603 (1928).

[112] SUP. CT. R. 12(2), 275 U.S. 604 (1928). This rule was revised four years later. Most of the changes were unrelated to the matters discussed here. The only relevant change for our purposes was the addition of the following language immediately after the passage quoted in text: "There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm." SUP. CT. R. 12(3), 286 U.S. 603 (1932).

[113] SUP. CT. R. 7(4), 275 U.S. 599 (1928). This paragraph provided, in relevant part:

> The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. . . . A motion to affirm may be united in the alternative with a motion to dismiss.

[114] SUP. CT. R. 12(1), 297 U.S. 733 (1936).

> The [jurisdictional] statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on, including a statement of the grounds upon which it is contended the questions involved are substantial (*Zucht v. King*, 260 U.S. 174, 176, 177), and shall cite the cases believed to sustain the jurisdiction.[115]

The amended rule did not provide any further insight into the definition of a substantial question, but the reference to *Zucht* (as well as the retention of the paragraph in Rule 7 about cases involving questions that were "so unsubstantial as not to require further argument")[116] made clear that the Court welcomed motions to dispose of appeals where the issues were foreclosed by prior decisions.[117]

Any doubt that the decision to dispose of an appeal on motion implicated the merits should have evaporated with the promulgation of the Court's 1954 rules. The new Rule 15 distinguished between appeals from state courts (which were governed by paragraph (1)(e)) and appeals from federal courts (which were governed by paragraph (1)(f)). A careful reading shows that all appeals received similar treatment whether they came from state or federal courts.

Rule 15(1)(e) provided:

> If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht v. King*, 260 U.S. 174, 176, 177), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on [as required by Rule 15(b)(iii)] and the cases cited to sustain the jurisdiction [as required by Rule 15(b)(iv)], and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.[118]

Rule 15(1)(f) provided:

> If the appeal is from a federal court, there shall similarly be included a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.[119]

The most striking feature of these provisions is the more expansive concept of substantiality. Indeed, they use the word "substantial" in two different senses. First, all appellants, whether seeking to overturn state or federal judicial rulings, must demonstrate that the question presented is sufficiently important to justify plenary consideration. Second, appellants from state courts must also satisfy the traditional requirement, embodied in the reference to *Zucht v. King* in Rule 15(e), that the issue not be frivolous or foreclosed by precedent.[120] To

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[115] *Id.*

[116] SUP. CT. R. 7(4), 286 U.S. 598 (1932).

[117] *See* SUP. CT. R. 12(1), 297 U.S. 733 (1936). Rule 12 was revised again in the Court's 1939 rules. The requirement of demonstrating the existence of a substantial question remained, as did the reference to *Zucht v. King*, but the new version of the rule applied only to cases involving appeals from state courts. *See* SUP. CT. R. 12(1), 306 U.S. 694 (1939). That limitation was removed in 1942, and a reference to appeals from federal courts was added to the one to *Zucht*. *See* SUP. CT. R. 12(1), 316 U.S. 715 (1942).

[118] SUP. CT. R. 15(1)(e), 346 U.S. 962 (1954).

[119] SUP. CT. R. 15(1)(f), 346 U.S. 962 (1954).

[120] *See* Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 786-87 (1968). The reference to original sin is from Walter Wheeler Cook, *"Substance" and "Procedure" in the*

understand the implications of these two meanings of "substantial" in Rule 15, we need to examine the procedures for disposing of appeals without plenary consideration.

Rule 16 authorized motions to dismiss or affirm appeals. The rule denominated such motions differently depending on whether the appeal was from a state or a federal court, but the differences in nomenclature could not conceal the fundamental similarity of the legal consequences of granting the motion.[121] In an appeal from a state court, Rule 16(1)(b) allowed the appellee to move to "dismiss" because the case "does not present a substantial federal question."[122] In an appeal from a federal court, Rule 16(1)(c) allowed the appellee to move to "affirm" because "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."[123]

These provisions remained on the books unchanged for more than a quarter-century.[124] In 1980, Rule 15(1) was rewritten to make clear that appeals from state and federal courts received the same treatment. The 1980 version removed the reference to *Zucht* and the requirement that appellants from state courts demonstrate the substantiality of the federal questions presented. Instead, all jurisdictional statements, regardless of the court from which the appeal came, had to include "[a] statement of the reasons why the questions presented are so substantial as to require plenary considerations, with briefs on the merits and oral argument, for their resolution."[125] The relevant portions of Rule 16, governing motions to dismiss or affirm appeals, were retained with only cosmetic changes.[126] All of these provisions were superseded by the rules adopted following the effective elimination of the Court's appeals docket in 1988 and the transfer of almost everything that had previously been dealt with on that mandatory docket to the discretionary certiorari docket.[127]

Conflict of Laws, 42 YALE L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

[121] Rule 16(1) contained a provision authorizing motions to dismiss, whether the appeal came from a state or a federal judgment, if the Supreme Court lacked jurisdiction because the appeal was not taken consistently with a relevant statute or other provisions of the Court's rules. *See* SUP. CT. R. 16(1)(a), 346 U.S. 963 (1954).

[122] SUP. CT. R. 16(1)(b), 346 U.S. 964 (1954). The appellee could also move to dismiss because "the federal question sought to be reviewed was not timely or properly raised, or expressly passed on [in state court]; or [because] the judgment rest[ed] on an adequate non-federal basis." *Id.*

[123] SUP. CT. R. 16(1)(c), 346 U.S. 964 (1954).

[124] *See* SUP. CT. R. 15(1)(e)-(f), 16(1)(b)-(c), 388 U.S. 944-45 (1967); 398 U.S. 1026-28 (1970).

[125] SUP. CT. R. 15.1(h), 445 U.S. 999 (1980).

[126] *See* SUP. CT. R. 16.1, 445 U.S. 1000-01 (1980).

[127] *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; *supra* note 23 and accompanying text. Under this statute, the few cases that remain within the Court's mandatory appeals jurisdiction (as opposed to the discretionary certiorari jurisdiction) arise from United States district courts. The Court's post-1988 rules governing appeals appear in Rule 18. This new rule eliminated most of the details specifying that the jurisdictional statement demonstrate the necessity for plenary consideration, saying only that the statement must "follow, insofar as applicable, the form for a petition for a writ of certiorari." SUP. CT. R. 18.3, 493 U.S. 1118 (1990). The provision about motions to dismiss or affirm contains no

C. Implications

This background shows why we should reject the suggestions in *Bates v. Jones* and *Citizens for Legislative Choice v. Miller* that the dismissal, for want of a substantial federal question, of the appeal in *Moore v. McCartney* means that the federal courts lack subject-matter jurisdiction over challenges to state term limits.[128] The case law and the Supreme Court's rules governing appeals evolved in parallel fashion. That evolution shows that dismissals of Supreme Court appeals for want of a substantial federal question do not have broader jurisdictional implications.

Early cases, notably *Millingar v. Hartupee*, spoke in terms of jurisdiction as the basis for rejecting substantively weak appeals from state courts.[129] Weak appeals from federal courts, on the other hand, were affirmed on motion. This practice is exemplified by *City of Chanute v. Trader*.[130] It is unclear why the Court used jurisdictional language to dispose of marginal appeals from state courts but not from federal courts. After all, one of the early cases discussed above, *Pennywit v. Eaton*, affirmed a state-court ruling rather than dismissing a substantively weak appeal on the merits.[131] The leading treatise on Supreme Court procedure observes that "[o]nly history would seem to have justified this distinction."[132] The problem was accentuated when the Court began to dismiss plausible but legally foreclosed arguments, granting motions to dismiss appeals from state courts in cases like *New Orleans Waterworks Co. v. Louisiana*, *Equitable Life Assurance Society of the United States v. Brown*, and *Zucht v. King* when the questions presented were controlled by prior rulings.[133]

Meanwhile, the Court's rules also contained language that appeared to combine jurisdiction and the merits in certain appeals. Old Rule 6, dating from the 1870s, provided for dismissal on jurisdictional grounds for frivolous appeals; the 1925 revision of that rule explicitly introduced the notion of substantiality into the process for disposing of appeals without plenary consideration.[134] The 1936 amendment to Rule 12 of the 1928 rules and the 1939 rules specifically required appellants to demonstrate the existence of a substantial federal question in the jurisdictional statement.[135]

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details on the grounds for such motions. *See* SUP. CT. R. 18.6, 493 U.S. 1119 (1990). These provisions were retained verbatim in the 1995 and 1999 versions of the rules. *See* 515 U.S. 1216, 1218 (1995); 525 U.S. 1210, 1212 (1999).

[128] Judge O'Scannlain's suggestion that the court of appeals had no jurisdiction "to *review* this case," Bates v. Jones, 131 F.3d 843, 847 (9th Cir. 1997) (O'Scannlain, J., concurring in the result) (emphasis added), *cert. denied*, 523 U.S. 1021 (1998), looks like a slip of the pen. The federal courts of appeals have power to review all final judgments of the district courts. *See* 28 U.S.C. § 1291 (1994). If the Ninth Circuit had no jurisdiction, the district court could not have had jurisdiction, either. Accordingly, the discussion proceeds on the assumption that Judge O'Scannlain meant to suggest that no federal court had jurisdiction over the challenge to term limits for state legislators.

[129] *See supra* notes 69-74 and accompanying text.

[130] *See supra* notes 78-80 and accompanying text.

[131] *See supra* notes 75-77 and accompanying text.

[132] STERN ET AL., *supra* note 29, at 266.

[133] *See supra* notes 86-104 and accompanying text.

[134] *See supra* notes 106-08 and accompanying text.

[135] *See supra* notes 114-17 and accompanying text.

If this were all that we had to go on, it might make sense to view the dismissal of an appeal from a state court for want of a substantial federal question as implying that the federal courts lacked subject-matter jurisdiction over cases presenting similar issues. There is language in many cases suggesting that the federal courts may not hear cases involving frivolous or foreclosed claims.[136] But this approach, which the second Justice Harlan characterized as "more ancient than analytically sound,"[137] confuses jurisdiction with the merits. As then-Justice Rehnquist explained, a complaint that lacks all merit should be dismissed at the threshold for failure to state a claim, not for want of subject-matter jurisdiction.[138]

Treating dismissals for want of a substantial federal question as jurisdictional could also raise doubts about the precedential value of summary dispositions of appeals, which in turn could imply that the Court got it wrong in *Hicks v. Miranda* and other cases that treat such dispositions as having some, albeit limited, precedential effect.[139] If the absence of a substantial federal question means that federal courts have no jurisdiction, then presumably a Supreme Court dismissal for want of substantiality would not be a ruling on the merits and could not bind other courts.[140] It would also prompt questions about the need for this category of disposition when the Court dismisses other appeals "for want of jurisdiction."[141] Those other jurisdiction-based dismissals do not decide the merits and therefore have no precedential weight.[142] Conflating jurisdiction and the merits therefore would add unnecessary complexity to an already difficult field of law.

One last consideration counsels against treating dismissals for want of a substantial federal question as having jurisdictional implications. If we take seriously the notion that such a dismissal means that the federal courts have no authority to hear cases presenting the same questions, we will effectively – and unnecessarily – freeze the development of legal doctrine in the federal courts. All such cases would have to be dismissed for lack of subject-matter jurisdic-

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[136] *See* Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 524 U.S. 436, 440 (2002); Hagins v. Lavine, 415 U.S. 528, 536-38 (1974) (collecting cases). *See also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3564 (1984 & Supp. 2001).

[137] Rosado v. Wyman, 397 U.S. 397, 404 (1970).

[138] *See* Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157, 1160-61 (1982) (Rehnquist, J., dissenting from denial of certiorari). *See also* Bell v. Hood, 327 U.S. 678, 682 (1946). *Compare* FED. R. CIV. P. 12(b)(1) (dismissal for lack of jurisdiction over the subject matter) *with* FED. R. CIV. P. 12(b)(6) (dismissal for failure to state a claim upon which relief can be granted).

[139] *See supra* notes 34-49 and accompanying text.

[140] *See* J. Timothy Eaton et al., *Petitions for Writ of Certiorari from the United States Supreme Court to the Illinois Courts (28 U.S.C. § 1257), in* ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, ILLINOIS CIVIL APPELLATE PRACTICE § 31.12 (1997).

[141] *See, e.g.*, Moore v. Dupree, 510 U.S. 1068 (1994); Watkins v. Fordice, 507 U.S. 981 (1993). The categories "for want of a substantial federal question" and "for want of jurisdiction" are not coterminous. Some appeals dismissed for want of jurisdiction were filed out of time or have some similar procedural defect that does not go to the existence of a substantial federal question. *See* STERN ET AL., *supra* note 29, at 267. On the other hand, appeals from state-court rulings that rested on an adequate nonfederal ground have also been dismissed for want of jurisdiction, even though the nonfederal ground might suggest the absence of a substantial federal question in the particular case. *See id.* at 267-68.

[142] *See, e.g.*, Hopfman v. Connolly, 471 U.S. 459, 460-61 (1985) (per curiam).

tion. To be sure, these claims could be asserted in state courts, with Supreme Court review ultimately available. It is far from clear that the Supreme Court has the practical ability to monitor interpretations of federal law in the state courts, and some commentators have raised efficiency objections to such an arrangement.[143]

More important, actual practice is inconsistent with the no-jurisdiction scenario described in the previous paragraph. On several occasions, the lower federal courts have entertained claims involving issues that were seemingly resolved by summary dismissals of Supreme Court appeals for want of a substantial federal question. Perhaps the most notable example is *Minersville School District v. Gobitis*,[144] the first compulsory flag-salute case. Despite several cases in which the Supreme Court had dismissed, for want of a substantial federal question, appeals from state courts upholding requirements that schoolchildren salute the flag,[145] the Supreme Court addressed the merits of the case without the slightest hint that the lower courts had erred in exercising jurisdiction.[146] The difficulty of the flag-salute issue is also shown by the brief life of *Gobitis*, which was overruled only three years later in *West Virginia State Board of Education v. Barnette*.[147]

Even if there were more basis for the view that a dismissal for want of a substantial federal question has jurisdictional implications, the Supreme Court's summary dispositions are open to a very different interpretation. We can see this from Rule 15(1)(e) adopted in 1954, which reflected the Court's previous practice and remained on the books without meaningful revision until after the elimination of appeals from state courts in 1988.[148] That rule governed the contents of jurisdictional statements.

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[143] *See, e.g.*, Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1820 (1998).

[144] 310 U.S. 586 (1940). The challenger's name was misspelled in the official report. The correct spelling is "Gobitas." *See* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 338 (1999).

[145] *See* Hering v. State Bd. of Educ., 303 U.S. 624 (1938), *dismissing appeal for want of a substantial federal question from* 194 A. 177 (N.J. 1937); Leoles v. Landers, 302 U.S. 656 (1937), *dismissing appeal for want of a substantial federal question from* 192 S.E. 218 (Ga. 1937). The Court had also summarily affirmed an appeal from a federal court on the same question. *See* Johnson v. Town of Deerfield, 306 U.S. 621 (1939), *summarily aff'g* 25 F. Supp. 918 (D. Mass. 1939). In all of these cases, the Court cited *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), which upheld a military-training requirement for university students over religious objections.

[146] The opinion, by Justice Frankfurter, did note the conflict between the rulings by the district court and court of appeals in *Gobitis* and the earlier summary dispositions. *See* 310 U.S. at 592 n.2. In light of Frankfurter's long record as a student of the Court's jurisdiction even before his appointment to the bench, *see, e.g.*, FRANKFURTER & LANDIS, *supra* note 24; Frankfurter & Landis, *supra* note 25, the failure even to allude to a possible jurisdictional problem cannot be regarded as a judicial oversight.

[147] 319 U.S. 624 (1943). For other examples of situations in which the Supreme Court considered issues that had previously arisen in appeals that had been dismissed for want of a substantial federal question, see Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 818-19 (1983); Comment, *supra* note 120, at 788.

[148] *See supra* notes 124-27 and accompanying text.

As explained earlier, Rule 15(1)(e) used the word "substantial" in two distinct ways.[149] First, appellants from state courts were expected to show that "the federal questions are substantial"; this instruction was accompanied by a reference to *Zucht v. King*. Second, appellants had to explain "why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Identical language appeared in Rule 15(1)(f), which was directed at appellants from federal courts. Appellants in cases coming from state courts who sought a ruling upholding the judgment below without plenary consideration were instructed by Rule 16(1)(b) to file a motion to dismiss for want of a substantial federal question, while Rule 16(1)(c) told appellants from federal courts to move to affirm.[150]

If the Court granted a Rule 16(1)(b) motion to dismiss for want of a substantial federal question, then, the grounds for the summary disposition of the appeal from a state court would remain ambiguous. Perhaps the case presented a frivolous or foreclosed question, in which event the dismissal might have jurisdictional implications for the lower federal courts. But the terms of Rule 15(1) made it equally plausible to infer that the motion to dismiss had been granted because the questions presented, while not utterly lacking in merit, were not sufficiently important to justify the time, energy, and expense of plenary consideration.[151] Because summary dismissals typically appear in one-sentence orders unaccompanied by even a citation, let alone a skeletal explanation, it is impossible to tell why an appeal from a state court was dismissed. If we cannot tell the grounds for decision, we cannot determine, as the Court explained in *Mandel v. Bradley*, "the precise issues presented and necessarily decided" by the summary dismissal for want of a substantial federal question.[152] This in turn militates against reading too much into such a disposition.

To return to the suggestions of jurisdictional problems in *Bates v. Jones* and *Citizens for Legislative Choice v. Miller*, there were neither citations nor reasoning in the order dismissing the appeal in *Moore v. McCartney*.[153] For this reason, we have no way of knowing which concept of substantiality prompted the Court to dismiss the appeal summarily. The federal question might have been frivolous or foreclosed, but it might also have been regarded as less urgent than other matters on the Court's docket that warranted plenary consideration. We are left to speculate about the grounds for the disposition. With no clues from the Supreme Court's unadorned dismissal order, there is no justification for treating the order as resting on some jurisdictional defect. Accordingly, the notion that the challenges to term limits for state legislators may be heard only in state court (with the possibility of discretionary review by the Supreme Court) should be rejected.

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[149] *See supra* notes 118-20 and accompanying text.

[150] *See supra* notes 122-23 and accompanying text.

[151] Chief Justice Warren made this point explicitly in a speech to the American Law Institute shortly after the 1954 rules were promulgated. *See* Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954). The rules were promulgated on April 12, 1954. *See* 346 U.S. 943 (1954). The Chief Justice's talk took place on May 19. *See* Wiener, *supra*, at 50 n.135.

[152] *See supra* text accompanying note 58.

[153] *See* 425 U.S. 946 (1976).

IV. CONCLUSION

With the effective elimination of the mandatory appeal jurisdiction in 1988, it is easy to lose sight of the meaning of summary dismissals for want of a substantial federal question. These dismissals, in appeals from state courts, were the equivalent of summary affirmances of appeals from federal courts. In other words, the questions presented by such appeals did not require plenary consideration. Summary dismissals for want of a substantial federal question therefore should have no jurisdictional implications for subsequent cases presenting the same issues in federal district courts. If the same issue is subsequently presented in a federal district court and there is no reason to believe that intervening doctrinal developments have undermined the summary dismissal, the correct response is to dismiss the new complaint for failure to state a claim, not for lack of subject-matter jurisdiction.

Before closing, however, we should briefly consider the Supreme Court's most recent dismissal of an appeal for want of a substantial federal question. In *Department of Commerce v. United States House of Representatives*,[154] two sets of plaintiffs challenged the Census Bureau's plan to use statistical adjustment to correct for undercount in determining the population used for apportioning congressional seats among the states. After upholding one set of plaintiffs' statutory challenge to the plan,[155] the Court turned to the claims asserted by the House. Concluding that the legal issues raised by the House had been resolved in the companion case, the Court determined that the House's case "no longer present[ed] a substantial federal question" and dismissed the appeal.[156]

At first blush, the disposition of the appeal in the House's case is remarkable. Unlike the typical appeal that is dismissed for want of a substantial federal question, the House's case came up on appeal from a federal court, not from a state court.[157] This novel procedural gambit can best be explained as a creative judicial response to the extraordinarily sensitive jurisdictional issue lurking in the case. It is not clear that the House of Representatives had standing to bring its lawsuit in the first place. After many years of avoiding the issue,[158] the Court only recently had concluded that individual members of Congress generally lack standing to challenge laws or policies of dubious constitutionality or legality. That ruling came in *Raines v. Byrd*,[159] a challenge to the Line Item Veto Act. That statute was invalidated the following year in *Clinton v. City of*

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[154] 525 U.S. 316 (1999).

[155] *See id.* at 343.

[156] *Id.* at 344.

[157] *See* U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76 (D.D.C. 1998) (3-judge court).

[158] *See, e.g.*, Burke v. Barnes, 479 U.S. 361 (1987) (declining to determine the standing of members of Congress because the case had become moot); Bowsher v. Synar, 478 U.S. 714, 721 (1986) (avoiding a ruling on the standing of a congressional plaintiff because another challenger clearly had standing to sue); Goldwater v. Carter, 444 U.S. 996 (1979) (directing the dismissal of a complaint filed by members of Congress but not specifying the basis for that ruling). *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (allowing a member to challenge his exclusion from the House of Representatives).

[159] 521 U.S. 811 (1997).

New York,[160] a case brought by other parties. *Raines v. Byrd* did not resolve whether either or both chambers of Congress could ever have standing, but the decision at least implied the plausibility of that potentially difficult question. Stretching the "substantial federal question" doctrine to the House's appeal from a federal court in the census case enabled the justices to avoid a possible confrontation with a coequal branch if they ruled that the House lacked standing while at the same time resolving the substantive question on the merits in the case brought by the other plaintiffs.

We should not, therefore, read more into this unusual ruling than the unique circumstances of the case justify. At a general level, the confusion over the meaning of summary dismissals of appeals for want of a substantial federal question further attests to the wisdom of the effective elimination of the Supreme Court's mandatory appeal jurisdiction in favor of discretionary certiorari review. Unfortunately, as the misleading jurisdictional suggestions in *Bates v. Jones* and *Citizens for Legislative Choice v. Miller* demonstrate, we continue to live with the mischief caused by the former procedures.

[160] 524 U.S. 417 (1998).

WHAT MARC ANTONY, LADY MACBETH, AND IAGO TEACH US ABOUT THE FIRST AMENDMENT

Michael Vitiello*

I. INTRODUCTION

During the summer of 1999, I was working on an article about *Planned Parenthood v. American Coalition of Life Activists,*[1] a case in which Planned Parenthood and several abortion providers sued a radical anti-abortion group and some of its members for violating the Freedom of Access to Clinic Entrances Act. I presented my preliminary thesis to a group of colleagues. My thesis was and is that the defendants' conduct is not entitled to First Amendment protection.

My thesis produced a strong, negative reaction from many of my colleagues. One colleague, frustrated by what he no doubt thought was a seriously misguided position, asked, "on your theory, Marc Antony would not be entitled to First Amendment protection?" Taken aback, I dodged the question like a first year law student stumped by a hypothetical that seemed to trap him in his own illogic. Had I hit a dead end in my thesis? My colleague, a Constitutional law scholar and First Amendment expert, seemed to suggest that the law was settled that Marc Antony would indeed be entitled to a First Amendment defense for his funeral oration.

I survived the evening with my colleagues, refined my thesis to address some of their objections, finished my article[2] and went on to other topics. But I continued to reflect on my colleague's question about Marc Antony. When Professor Carl Tobias asked me whether I might submit an article to the *Nevada Law Journal*, I decided to take the opportunity to consider the question posed by my colleague in more depth than was possible in my earlier article. As a Criminal Law professor, I began considering the question by reflecting on what two other Shakespearean characters tell us about the First Amendment.

This essay develops my thoughts about Iago, the villain in *Othello*, and Lady MacBeth, obviously one of the villains in *MacBeth*. To do so, I first discuss principles of accomplice liability. No competent lawyer in America would argue that either Iago or Lady MacBeth was entitled to a First Amend-

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[1] 41 F. Supp. 2d 1130 (D. Or. 1999), *vacated by* Planned Parenthood v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).

[2] Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO STATE L.J. 1175 (2000).

ment defense. In fact, our legal system would find both of them guilty of murder despite the fact that their only conduct involved speech.[3] While Marc Antony may appear to have a more plausible First Amendment defense, I argue that, consistent with the Supreme Court's First Amendment case law, he could nonetheless be found guilty of inciting violence or encouraging murder.

II. SPEECH AS CRIME

Under traditional criminal law doctrine, a person may be guilty of a crime based only on speech in a number of settings.[4] In examining the possible criminal conduct of Iago, Lady MacBeth, and Marc Antony, this section focuses on principles governing accessory or accomplice liability.

As stated by Professor Dressler in his leading criminal law treatise, "a person may be held accountable for the conduct of another person if he assists the other in committing an offense."[5] Accomplice liability has posed some of the most interesting analytical problems in the criminal law and has become the topic of a number of important scholarly articles.[6] Somewhat anomalous in the criminal law, a person becomes an accessory based upon another's conduct, rather than one's own chosen acts.[7] Instead, if a person associates himself with the acts of another person, he derives liability from the actor.[8] Liability is for the act that the accomplice has encouraged the principal to commit.[9]

A person may become an accomplice in innumerable ways. One might provide a murderer with the murder weapon or serve as a lookout or getaway driver for a robber.[10] But as long as evidence of an intent to aid is sufficient, a person may become an accomplice merely by offering words of encourage-

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[3] In *Macbeth*, after Lady MacBeth exhorts her husband to kill Duncan, the King, she tells him that she will get the King's guards drunk, allowing him to get past the guards. While that assistance alone would also make her an accomplice, as discussed in this essay, she would be liable for murder as an accomplice based on her speech alone. *See* WILLIAM SHAKESPEARE, MACBETH, act 1, sc. 7 (John F. Andrews ed., GuildAmerica Books 1990) [hereinafter *MacBeth*].

[4] Solicitation and conspiracy are two obvious examples. The Model Penal Code states that a person is guilty of a criminal offense if "he causes an innocent or irresponsible person to engage in such conduct" or "with the purpose of promoting or facilitating the commission of the offense, he solicits such other person to commit it." MODEL PENAL CODE § 2.06.

[5] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.01, at 427 (2d ed. 1995) (citation omitted).

[6] *See, e.g.*, Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

[7] Dressler, *supra* note 6, at 103; *see also* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702 (1930).

[8] Kadish, *supra* note 6, at 337-42.

[9] *Id.*

[10] *See, e.g.*, People v. Hughes, 161 P.2d 285 (Cal. App. 2d 1945) (serving as a lookout sufficient to be liable for the crime committed by the principal); *see also* DRESSLER, *supra* note 5, § 30.04, at 435-36 (giving examples of the kinds of conduct that may lead to liability of an accomplice).

ment.[11] Hence, shouting "attaboy" as an offender prepares to shoot his victim, or cheering a person who is committing an offense, may be sufficient to make the offender an accomplice.[12]

A variety of interesting analytical problems arise because liability is derivative. For example, at common law, a person who aids an undercover police officer will not be guilty of the underlying offense because the principal (the officer) will not be guilty of a crime.[13] Hence, despite obvious culpability, the accomplice escapes liability. Similar problems exist at common law if the principal is acquitted of the underlying offense.[14] Because to the formalistic mind an accomplice cannot derive liability from an acquitted principal, the accomplice must also go free. Similar conundrums abound in the common law's treatment of accomplices.[15]

While the common law, at times, acquits dangerous accomplices on formalistic grounds, the common law and modern accomplice liability law, at times, criminalize those whose role seems quite minor. Remember that the accomplice has the same liability as the principal, even if the accomplice's role is minor. A wife, who provides her husband dinner, fortifying him to commit serious felonies, may be equally liable for his completed crimes.[16] Leading criminal law texts include a case that routinely outrages law students, *Wilcox v. Jeffery*,[17] in which the defendant paid for a ticket to a concert where Coleman Hawkins, famous American jazz musician, performed in England without securing proper work papers. Wilcox, according to the court,

> paid for his ticket. Mr. Hawkins went on the stage and delighted the audience by playing the saxophone. The appellant did not get up and protest in the name of the musicians of England that Mr. Hawkins ought not to be here competing with them and taking the bread out of their mouths and the wind out of their instruments. It is not found that [the appellant] actually applauded, but he was there having paid to go in, and, no doubt, enjoying the performance . . . .[18]

Unfortunately, cases like *Wilcox* may give accomplice liability a bad name.

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[11] Hicks v. United States, 150 U.S. 442 (1893) (reversing conviction for murder because evidence of intent was ambiguous; but the Court stated that words of encouragement may be sufficient to sustain a conviction).

[12] *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 647 (6th ed. 1995). The answer to their hypothetical, a variation of the facts of *Hicks*, 150 U.S. 442, is almost certainly that, had Hicks shouted "attaboy" as Rowe threatened his victim, he would have been guilty as an accomplice to murder.

[13] *See, e.g.*, Vaden v. State, 768 P.2d 1102 (Alaska 1989) (relying on "the long-standing common law rule that the act of a feigned accomplice may never be imputed to the target defendant for purposes of obtaining a conviction").

[14] *See* DRESSLER, *supra* note 5, § 30.03[B][5], at 434 (citing the common law to the effect that acquittal of the principal meant that an accessory could not be prosecuted).

[15] *See, e.g.*, Kadish, *supra* note 6, at 339-41. *See also* MODEL PENAL CODE § 2.06, cmt. 9 (dealing with cases involving whether a victim, for example, a victim of extortion, becomes an accomplice).

[16] State v. Duran, 526 P.2d 188 (N.M. 1974) (holding perpetrator's child while he commits the crime is sufficient assistance); Alexander v. State, 102 So. 597 (Ala. App. 1925) (delivering dinner to husband while he is engaged in a felony is sufficient aid to make the witness an accomplice, requiring state to corroborate her testimony).

[17] 1 All E.R. 464 (K.B. 1951).

[18] *Id.* at 466.

Accomplice liability is also anomalous in the criminal law because a prosecutor does not have to prove that an accomplice caused the crime to occur.[19] Indeed, were causation a requirement, a prosecutor would face formidable theoretical and practical constraints. As a theoretical matter, as developed in Professor Kadish's important article on accomplice liability, the criminal law generally refuses to treat one person's act as the cause of another's conduct. That is so because of the criminal law's insistence that we are all free-will actors.[20] Hence, the accomplice does not cause the principal to act when she encourages his conduct; the principal remains free to choose to commit the crime. As a practical matter, requiring a prosecutor to prove that, but for the accomplice's encouragement, a principal would not have committed a particular crime is almost certainly a matter of pure speculation, not subject to proof beyond a reasonable doubt.

Despite hard cases like *Wilcox*, perhaps better described as the result of the poor judgment of an excessively zealous prosecutor, and despite ways in which accomplice liability departs from traditional criminal law doctrine, accomplice liability serves an important role in the criminal law. As is the case with co-conspirators, accomplices increase the danger that a crime will be committed.[21] Accomplices may provide the necessary encouragement to push the doubting principal to the point of action and may provide meaningful assistance that allows the crime to be completed.[22]

Some of the debate about accomplice liability understates the protection the law provides those accused of accomplice liability. Unlike many areas of the criminal law, accomplice liability turns on proof of intent.[23] Typically, an accomplice must intend to promote or facilitate the actual offense; knowledge that his words or actions may aid the commission of the offense is insufficient.[24]

That requirement has, at times, raised concerns in particularly hard cases. In first proposing that knowledge be sufficient, the first tentative draft of the Model Penal Code cited a variety of examples where a person might provide substantial aid, but lack criminality because of the intent requirement. For example, the drafters cited the case of "[a] lessor [who] rents with knowledge that the premises will be used to establish a bordello. A vendor [who] sells with knowledge that the subject of the sale will be used in the commission of a crime. . . ."[25]

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[19] *See* SANFORD KADISH, *A Theory of Complicity, in* ISSUES IN CONTEMPORARY LEGAL PHILO-SOPHY: THE INFLUENCE OF H.L.A. HART 288 (1987). *See also* Dressler, *supra* note 6 (criticizing the absence of a requirement of causation).

[20] KADISH, *supra* note 19.

[21] Fuller v. State, 198 So. 2d 625, 630 (Ala. App. 1966) (accomplices' presence may encourage by adding numbers). *See also* DRESSLER, *supra* note 5, § 29.03[B], at 395.

[22] *Fuller*, 198 So. 2d at 630.

[23] In many areas of the criminal law, even if a statute requires the state to prove "intent," the mens rea element is satisfied if the state proves that the defendant knew that the harm would result. *See* DRESSLER, *supra* note 5, § 10.04, at 105-06, for examples.

[24] *See* MODEL PENAL CODE § 2.06(3) (requiring "purpose" as the mens rea) and § 2.06, cmt. 6(c) (discussing the intent requirement and reasons why the Code rejected "knowledge" as sufficient mens rea).

[25] *Id.*

The Model Penal Code eventually rejected the extension of liability to those who lacked purpose, but knew their conduct would result in the furtherance of the underlying offense.[26] Commentators have offered various justifications for the position taken by the drafters of the Code. For example, Professor Fletcher has argued that extending liability to those who act with knowledge, but not purpose, is akin to asking whether to impose a duty to act to prevent impending harm.[27] Typically, the criminal law imposes no such duty. Others have emphasized concern about imposing unfair inconvenience to legitimate business transactions.[28] For various reasons, courts tend to retain the stringent intent or purpose requirement.

The strict mens rea requirement also serves an important role in cases involving accomplice liability where the accomplice's conduct consists only of words of incitement or encouragement.[29] The criminal law does not articulate concern about the First Amendment as a rationale for the strict mens rea requirement. However, modern First Amendment law has imposed a similar strict mens rea requirement on cases where a speaker interposes a credible First Amendment defense.[30] Courts developing accomplice liability may not have been influenced by First Amendment concerns. At least as a matter of history, the law imposed a strict mens rea requirement in accomplice liability cases long before the Supreme Court imposed a similar mens rea requirement in its modern case law.[31] My point here is that at least some concerns about imposing proper limitations on accomplice liability are answered when we focus on the mens rea requirement. The mens rea requirement allows an accomplice a plausible defense in many cases. For example, in the kind of case that troubles Professor Dressler,[32] a wife who aids her husband by serving him dinner to fortify him to commit his criminal offense, may force the state to prove not only that she knew that her husband was going to commit the offense but that she encouraged that offense, i.e., that she actively desired that he commit the offense and that is why she provided the aid. Passive acquiescence is insufficient to demonstrate intent. Or where a speaker's words incite a mob to violence, he can force the state to prove not just that he was aware that his words might incite the crowd but also that he spoke the words with the desire that his speech would produce that result.[33]

These background principles of the criminal law help develop my thesis, that Marc Antony would not only be subject to prosecution for inciting the mob's murder of Brutus and his co-conspirators, but also that he should be subject to prosecution. To develop my thesis, I want first to explore how the

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[26] *Id.*

[27] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 676 (1978).

[28] *See, e.g.*, GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 369-70 (2d ed. 1961).

[29] *See infra* discussion at notes 94-99.

[30] *See infra* discussion at notes 94-99.

[31] *See* Dressler, *supra* note 6, at 96-97 (discussing legislative reform of accomplice liability, beginning in the mid-nineteenth century). By contrast, a specific intent requirement, as part of the Supreme Court's First Amendment case law, emerged in the late 1960s and early 1970s. *See infra* discussion at notes 131-38.

[32] Dressler, *supra* note 6, at 102.

[33] *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973).

traditional principles play out for Iago and Lady MacBeth where, as in Antony's case, the offenses consisted solely of words.

III. IAGO AND LADY MACBETH

Iago is not just pure evil; he is a criminal. And yet, his conduct consists of nothing but words. Despite that, under modern criminal law doctrine, he would be guilty of murder.

For those unfamiliar with Shakespeare's *Othello,* Iago is a false friend to Othello, a successful warrior and Moor of Venice.[34] Iago intentionally turns Othello against his faithful and loving wife, Desdemona.[35] He does so by convincing Othello that Desdemona is carrying on an affair with Cassio, one of Othello's faithful lieutenants.[36] In the end, Othello murders Desdemona.[37]

In their leading criminal law textbook, Professors Kadish and Schulhofer use the facts of Othello to explore issues of accomplice liability. They ask, "If Othello would be guilty of no more than manslaughter, should it follow that Iago cannot be convicted of first-degree murder?"[38]

A word of explanation is necessary to understand both why Othello may be guilty of manslaughter instead of murder, and then why Iago's precise crime – murder or voluntary manslaughter – is open to question. The law has long recognized provocation as a partial defense to murder. Sufficient provocation reduces murder to voluntary manslaughter. The formal argument is that provocation negates the malice necessary for the killing to be murder.[39] As a matter of policy, courts view the provoked actor as less culpable than the actor who acts rationally.[40]

At common law, courts limited cases in which a defendant might interpose a provocation defense.[41] Quite typically, for example, a defendant could not raise the partial defense unless he witnessed his wife in the act of intercourse.[42] Modern courts have rejected such narrow definitions of the defense and have allowed it in a far wider range of cases.[43]

Obviously, Othello never saw the faithful Desdemona *in flagrante delicto* with Cassio. Iago arranged for Othello to witness Desdemona and Cassio talking intimately together.[44] He also arranged for his wife to take a scarf that Othello gave Desdemona and then had the scarf planted among Cassio's possessions.[45] Even though those events would be insufficient to provide Othello

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[34] WILLIAM SHAKESPEARE, OTHELLO (John F. Andrews ed., GuildAmerica Books 1990) [hereinafter *Othello*].
[35] *Id.*
[36] *Id.*
[37] *Id.* at act 5, sc. 2.
[38] KADISH & SCHULHOFER, *supra* note 12, at 680.
[39] *See, e.g.*, State v. Thornton, 730 S.W.2d 309 (Tenn. 1987).
[40] *See* Maher v. People, 10 Mich. 212 (1862), *overruled on alternative grounds by* People v. Woods, 416 Mich. 864 (1982).
[41] *See* DRESSLER, *supra* note 5, § 31.07[2][a], at 491.
[42] *See, e.g.*, Holmes v. Pub. Prosecutions, 2 All E.R. 124 (K.B. 1946).
[43] *See, e.g.*, *Maher*, 10 Mich. at 212; Commonwealth v. Berry, 336 A.2d 262 (Pa. 1975); People v. Berry, 556 P.2d 777 (Cal. 1976); People v. Casassa, 404 N.E.2d 1310 (N.Y. 1980).
[44] *Othello*, *supra* note 34, at act 3, sc. 3, ln. 1-38.
[45] *Id.* at ln. 293-319.

a provocation defense at common law, were Othello charged with murder in a jurisdiction following more modern rules governing provocation, he might be found guilty of voluntary manslaughter if the jury found that a reasonable person would have been provoked under similar circumstances.[46]

Iago's criminal liability poses interesting legal questions. Almost certainly, a prosecutor would charge Iago with murder based on principles of accomplice liability. Accomplice liability poses courts with some of the most interesting analytical questions in the criminal law. As discussed above, the criminal law criminalizes the accomplice because, by encouraging a particular crime, he adopts the criminal conduct as his own. Accomplice liability is derivative liability. At common law, the accomplice could be found liable only for the same crime as the principal because the accomplice derived liability from the principal.[47]

Scholars have questioned whether Iago might be guilty of murder even if Othello would be guilty only of voluntary manslaughter.[48] If Iago is guilty as an accomplice, i.e., he derives his liability from Othello, he would be guilty only of voluntary manslaughter despite his intent that Othello kill. That result, perhaps not troubling to formalistic thinkers, is anomalous to modern criminal law theorists. Professor Kadish has explained how the criminal law may avoid the anomaly of punishing Iago for only voluntary manslaughter despite his premeditation and malice; Othello's actions are not fully volitional because Iago has rendered him partially incapacitated by his poisonous words. Despite the law's hesitation to treat one person as the cause of another's conduct, this would be a case in which Iago would be treated as the cause of Desdemona's death because he has rendered Othello incapable of acting with malice.[49]

For my analysis of the First Amendment and the criminal law, the above example is especially important. The example represents one in which the law recognizes the extraordinary power of words alone. Words may render a free-will actor incompetent. Despite the criminal law's resistance to finding one person the cause of another's criminal conduct, in this situation, words alone may be sufficiently powerful to do just that.

No competent criminal lawyer would attempt to interpose a First Amendment defense on behalf of Iago.[50] Too much case law has established that the accomplices whose conduct consists entirely of encouraging words may be found guilty along with the principal. Where commentators have objected to accomplice liability, their objections have usually focused on concerns about whether an accomplice's punishment is proportional to the underlying, and occasionally fairly minor role that he may have played, rather than on concerns

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[46] *See, e.g.*, *Maher*, 10 Mich. at 212; *Commonwealth*, 336 A.2d at 262; *Berry*, 556 P.2d at 777.

[47] *See supra* discussion at notes 13-15.

[48] *See* KADISH & SCHULHOFER, *supra* note 12, at 680.

[49] SANFORD H. KADISH, BLAME AND PUNISHMENT 183 (1987); *see also* WILLIAMS, *supra* note 28, at 391; GLANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW 374 (2d ed. 1983).

[50] Even in their extremely critical assessment of the Supreme Court's First Amendment case law, David R. Dow and R. Scott Shieldes suggest that when a speaker overwhelms or controls the will of the listener, the state may properly convict the speaker. Dow & Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1219 (1998).

about whether the offender ought to be criminalized at all.[51] And even then, I doubt that those scholars would disagree with Professor Kadish that Iago would be and should be guilty of murder.[52]

One might object that my example does not prove very much about the state's ability to criminalize an offender whose conduct consists only of speech. Iago's words are false and the law gives less protection to those who lie than those who tell the truth.

For example, despite limiting the ability of a state to impose liability for defamation because of First Amendment concerns, the Supreme Court has found that false statements are entitled to less protection than true statements. Cases like *New York Times v. Sullivan*[53] require a plaintiff to make a higher showing than state law might otherwise require, if the plaintiff is a public official or public figure.[54] The Court is concerned with assuring vigorous debate on matters of public concern and with preventing government from stifling criticism of its policies.[55] But the Court leaves the states free to allow such suits and imposes few restrictions on the states if the plaintiff is not a public figure. States may legitimately protect a person's reputation from falsehoods.[56] Thus, one could argue that a state may legitimately prosecute Iago or other false swearers with little concern about the First Amendment because the First Amendment's protection of intentionally false statements is non-existent.

Perhaps. But in other areas, the criminal law has fully criminalized speakers whose crime consisted of truthful statements. Here, Lady MacBeth provides a helpful example. Early in *MacBeth*, three witches hail MacBeth as the future king.[57] He and Lady MacBeth agree that he will kill Duncan, the King, so that MacBeth can fulfill the prophecy.[58] But in his memorable soliloquy, MacBeth suffers from momentary doubts about whether he should commit murder.[59] When Lady MacBeth learns that her husband has lost his resolve, she delivers one of the most famous speeches in all of Shakespeare,[60] a speech

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[51] Dressler, *supra* note 6. Dressler also argues that ignoring the general requirement that the state must prove that a defendant caused a particular result before he may be found guilty leads to disproportionate punishment. *Id.* at 103-08.

[52] For example, Professor Dressler would impose liability for acts done by others if the accomplice caused the actor's conduct. *Id.* at 120-30. *See also* Dow & Shiledes, *supra* note 50, at 1219.

[53] 376 U.S. 254 (1964).

[54] While the Court has extended First Amendment protection to public figures, it has more often than not found that the particular plaintiff was not a public figure. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1970).

[55] *Sullivan*, 376 U.S. at 270.

[56] *See, e.g.*, *Gertz*, 418 U.S. at 347-48 (recognizing a state's interest in protecting individuals from injury to their reputations).

[57] *Macbeth*, *supra* note 3, at act 1, sc. 3, ln. 46-48, 60-67.

[58] *Id.* at act 1, sc. 7.

[59] *Id.* at act 1, sc. 7, ln. 1-28.

[60] When Macbeth tells his wife that he has changed his plans, she counters with:

> What Beast was't then/That made you break this Enterprise to me?/When you durst do it you were a Man;/And to be more that what you were, you would/Be so much more the Man. Nor Time, nor Place/Did then adhere, and yet you would make both./They've made themselves, and that their Fitness now/Does unmake you. I've given Suck, and know/How tender 'tis to love the Babe that milks me;/I would, while it was smiling in my Face,/Have pluck'd my Nipple from his

which demonstrates why we criminalize conspiracy and aiding and abetting. The single actor may lose his resolve; the presence of additional parties increases the likelihood that a planned crime will take place. In response to her exhortation to "screw your courage to the sticking-place,"[61] MacBeth announces that "I am settl'd."[62] Thereafter, he commits the crime.[63] Unlike Iago's speech, hers is not false.

As discussed above, accomplice liability is demonstrated by a showing that the accomplice assisted the commission of the crime.[64] Assistance is defined broadly to include mere encouragement of the crime. In theory, an accomplice derives her liability from the actor. By encouraging the act, the accomplice makes the act her own. As a result, unlike the law governing conspiracy,[65] she is not guilty of a separate offense of aiding and abetting. She is fully liable for the completed, intended offense.[66]

Commentators have raised a variety of criticisms of accomplice liability.[67] But the *MacBeth* hypothetical is an easy case in which, despite criticism of accomplice liability generally, critics of accomplice liability should have no trouble recognizing that criminalizing Lady MacBeth is an appropriate result. One might hesitate to criminalize an accomplice because in some cases the accomplice's intent may be uncertain. In this case, however, Lady MacBeth's forceful speech leaves no doubt about her intent.[68]

Commentators also express concern that the encouragement or assistance provided by the accomplice is often insignificant and may be provided by one who has little choice but to acquiesce. For example, Professor Dressler raises issues of proportionality in a case involving a wife who serves her criminal husband dinner which fortifies him to commit his crimes.[69] The aid provided seems insignificant – for example, her aid seems quite remote and irrelevant to whether her husband would have committed the crime anyway – but nonetheless leads to her conviction for the completed crime as long as the prosecutor can show that she intended to aid the criminal conduct. In addition, if the law criminalizes accomplices because they demonstrate their dangerousness by endorsing the actor's crime, this may not apply in the case of the wife who may have few options but to serve her husband. She may be trapped in an abusive relationship and have few skills that would let her leave him even if she had the resolve to do so.

Boneless Gums/And dash'd the Brains out had I so sworn as you/Have done to this . . . We fail?/ But screw your Courage to the Sticking-place/And we'll not fail . . . ."

Id. at act 1, sc. 7, ln. 47-61.

[61] *Id.* at ln. 59-60.

[62] *Id.* at ln. 79.

[63] *Id.* at act 2, sc. 2.

[64] *See supra* notes 6-17 and accompanying text.

[65] *See* DRESSLER, *supra* note 5, § 29.03, at 395-96 (discussing approach to conspiracy and concluding that in most states, a conspiracy to commit a felony is punished less severely than the target offense).

[66] Dressler, *supra* note 6, at 92.

[67] *See, e.g.*, Dressler, *supra* note 6; Dow & Shieldes, *supra* note 50.

[68] *Macbeth*, *supra* note 3. *See also supra* note 60.

[69] Dressler, *supra* note 6, at 102.

Lady MacBeth hardly resembles the wife in *Alexander v. State*.[70] Her encouragement is forceful, unequivocal, and rhetorical, delivered at a moment when MacBeth's resolve wanes.[71] But for the criminal law's hesitation to say that one person causes another person (with his own free will) to act,[72] one might be tempted to argue that Lady MacBeth's words did cause her husband to act. Quite unlike the wife in *Alexander*, Lady MacBeth is no shrinking violet, unable to escape a domineering husband. She is a forceful participant in a dangerous plot that results in murder.

Again, as in Iago's case, competent counsel would not dream of interposing a First Amendment defense on behalf of Lady MacBeth, even if her crime consists of nothing but words. In both cases, society may justly punish both offenders even though another person committed the immediate act leading to death. The two examples demonstrate ample historical precedent that we do criminalize offenders whose conduct consists only of words, and, while some cases raise moral questions about the appropriateness of punishing accomplices, Iago and Lady MacBeth's cases prevent no hard moral questions. Their punishment is deserved.

IV. MARC ANTONY

In the 1920s, Judge Learned Hand and Professor Zechariah Chafee, Jr. first discussed whether Marc Antony would be entitled to a First Amendment defense if he was charged with inciting violence for his funeral oration for Caesar.[73] Here, I develop the setting in which Antony delivered his oration which led to the mob's action against Caesar's assassins and why we may be disinclined to criminalize Antony. Thereafter, I summarize some of the leading First Amendment cases that bear on whether Antony's conduct is criminal and then, after I conclude that the Supreme Court case law does not provide a definitive answer about whether his speech would be protected, I explore why he should not be entitled to a First Amendment defense as a matter of law. Despite the fact that Antony's crime consisted entirely of speech, even if possibly construed as political speech, he would not be entitled to a judgment of acquittal as a matter of law.

Brutus, one of Caesar's trusted friends, joins a conspiracy to murder Caesar when his co-conspirators convince him that Caesar intends to become a king and a tyrant.[74] Even before the murder, Brutus convinces his co-conspirators they should not murder Caesar's close friend, Marc Antony.[75] After Brutus murders Caesar, he again convinces his co-conspirators that they need not fear Antony, that he, Brutus, should give the funeral oration to convince the

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[70] *See* cases *supra* note 16.

[71] *See supra* note 59.

[72] KADISH, *supra* note 49.

[73] Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 729 n.41 (1975) (letter from Zechariah Chafee Jr. to Learned Hand).

[74] WILLIAM SHAKESPEARE, JULIUS CAESAR, act 1, sc. 2 (William Montgomery ed., Penguin Books 2000) [hereinafter *Caesar*].

[75] *Id.* at act 2, sc. 1, ln. 181-83.

people of Caesar's plan to become a tyrant.[76] Confident he can defuse the crowd's desire for vengeance for Caesar's death, Brutus convinces his cohorts that they can then allow Antony to address the crowd as part of appropriate burial rites.[77]

Brutus miscalculated his own persuasive powers and underestimated Antony's. In one of the most famous of all Shakespearean speeches, Antony plays the crowd to perfection.[78] Like the successful trial lawyer, he opens with a powerful theme: Brutus is an honorable man, as are his cohorts.[79] And so what Brutus said must be so. But, while he repeats his refrain, that Brutus is an honorable man and so his statements must be so, he undercuts each one, first by reference to Caesar's treatment of him,[80] and eventually by evidence found in Caesar's will, evidence of Caesar's concern for the common people.[81]

As Antony works the crowd, members of the crowd, not Antony, cry out for the blood of the traitors. He disclaims his desire to stir up the crowd; for example, at one point, he states, "Good friends, sweet friends, let me not stir you up/To such a sudden flood of mutiny."[82] Antony consciously avoids explicit words urging revenge against the conspirators. Members of the crowd begin early in his oration to call for revenge upon the traitors and in the end, when the crowd leaves to do so, again members of the mob, not Antony, speak the explicit words of vengeance: "Come, away, away!/We'll burn [Caesar's] body in the holy place,/And with the brands fire the traitors' houses. . . ."[83] Not surprisingly, members of the mob route out the conspirators and kill them.[84]

Why might we be inclined to grant Antony a First Amendment defense? Within the play, Antony is the hero and seeks justice against a group that has committed a *coup d'etat*. Still, whether he and the mob might be justified in killing the conspirators would be determined by principles of necessity, not, in Antony's case, a defense grounded in the First Amendment.[85]

From my perspective, as a Criminal Law professor, Antony's liability resembles that of Lady MacBeth and Iago. Despite his protestations to the

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[76] *Id.* at act 3, sc. 1, ln. 238-44.
[77] *Id.*
[78] *Id.* at act 3, sc. 2, ln. 73-244.
[79] *Id.* at ln. 82-83.
[80] *Id.* at ln. 178-79.
[81] *Id.* at ln. 235-43.
[82] *Id.* at ln. 204-05.
[83] *Id.* at act 3, sc. 2, ln. 245-47.
[84] *Id.* at act 4, sc. 2, ln. 225-32 & act 5, sc. 5.
[85] In most jurisdictions, necessity does not provide a defense in cases involving murder. Under narrow circumstances, the Model Penal Code would recognize such a defense. "Conduct that the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that: the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . ." MODEL PENAL CODE § 3.02. The necessity defense way also apply to homicide, though in most cases the evil to be prevented is likely less than or equal to the evil of an intentional murder. Yet, the comments state that "it would be particularly unfortunate to exclude homicidal conduct from the scope of the defense." MODEL PENAL CODE § 3.02, cmt. 3. However, many states have explicitly excluded intentional homicide that would otherwise be a murder from the defense. *Id.*

contrary, he is a forceful orator who plays his audience brilliantly. Unlike Iago, Antony did not render his audience incompetent. As a result, the criminal law would not treat Antony as the cause of the mob's violence.[86] But, as developed above, the criminal law does not require a prosecutor to prove that an aider and abettor caused the actors' conduct; it is enough that the speaker encouraged the conduct (and thereby demonstrated a desire to take the actors' conduct as his own).[87] Both before and after his oration, Antony makes clear that his goal is to produce the very result that his words produce.[88] Like Lady MacBeth, his powerful rhetoric results in murder.

Antony's is a difficult case for reasons that relate more to the embarrassing history of our First Amendment case law than with sound principles of criminal law. Many of the leading First Amendment cases were decided during the "Red Scare" after the First World War and, later, during the "Red Scare" that followed the Second World War with the beginning of the Cold War.[89]

Many of those cases involved what today we would call nothing more than political speech, entitled to the greatest First Amendment protection. At the time, political dissent could lead to serious consequences. *Debs v. United States*,[90] especially for those of us who remember the powerful anti-war rhetoric during the Vietnam war, is a low water mark, even in an era of bad First Amendment law. The Supreme Court affirmed Debs' conviction for violating the Espionage Act of 1917.[91] His conduct amounted to what can fairly be characterized as an anti-war speech.[92] Relying on earlier precedent, *Debs* found that the state must prove only that the defendant's words represented a clear and present danger that they will produce a harm that Congress may prevent.[93] Further, it upheld a jury's determination that Debs' "natural and intended effect" was to frustrate the war effort.[94]

During the 1920 term, for the first time, Justice Holmes, joined by Justice Brandeis, began to dissent in a number of cases in which the defendants' "conduct" was, at least in large part, political speech. For example, they dissented in *Abrams v. United States,* a case in which several Bolshevik sympathizers dropped leaflets onto the streets of New York.[95] The leaflet opposed United States support of anti-Soviet forces in the Russian revolution and called for a strike to prevent shipment of weapons to those forces.[96] The Supreme Court affirmed their conviction based on the Espionage Act, which was amended in 1918 to make it unlawful to urge curtailment of military production with an

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[86] *See* KADISH, *supra* note 49.

[87] *See supra* notes 6-12 and accompanying text.

[88] *Caesar*, *supra* note 74, at act 3, sc. 1, ln. 257-300, & act 4, sc. 1, ln. 29-47.

[89] For a more detailed discussion of this point, see Vitiello, *supra* note 2, at 1199-217.

[90] 249 U.S. 211 (1919).

[91] Espionage Act of June 15, 1917, ch. 30, § 30, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. § 2388(a) (1994)).

[92] See *Debs*, 249 U.S. at 213-14 for the text of Debs' speech.

[93] *Id.* at 213-14, 216-17.

[94] *Id.* at 215.

[95] 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

[96] *Id.* at 620-23.

intent to hinder the war against the Germans.[97] According to the majority, imputing knowledge to the defendants that the strikes they urged would necessarily harm the war effort against the Germans satisfied the intent element.[98]

Justice Holmes' dissent argued that the First Amendment prevented Congress from forbidding "all efforts to change the mind of the country."[99] As a result, the First Amendment required a showing that the defendants had a specific intent to cause the harm that Congress sought to prevent. While Holmes read the Espionage Act to require specific intent, he found the evidence of that intent insufficient.[100] Without more, knowledge that one's speech or conduct may bring about a particular harm is not enough to demonstrate that the speaker intended that result.

Elsewhere, Justices Holmes and Brandeis continued to object when a state or the national government criminalized a person's abstract advocacy. For example, they objected to the Court's affirmance of Anna Whitney's conviction for criminal anarchy and syndicalism based on nothing more than her presence at a Communist Labor Party Convention where the party adopted a resolution supporting the revolutionary working class movement in America.[101] Among other concerns, Justices Holmes and Brandeis argued that the Court improperly deferred to the California legislature's determination that the result advocated by the Convention was a clear and present danger.[102] Instead, they would have required proof of that fact at trial. As a result, the statute might lead to conviction, as appeared to be the case before the Court, for mere abstract advocacy. More must be required because of the risk of stifling all political dissent. That risk exists because "[e]very denunciation of existing law"[103] increases the probability that the law will be violated. In their view, the First Amendment allows dissenting voices to challenge existing laws without fear of prosecution.[104]

Holmes and Brandeis insisted that, as a matter of substantive law, a legislature can only criminalize speech when the danger is clear and present.[105] In their view, as a matter of procedure, a court is not bound by a legislature's determination that a danger is clear and present and has a greater than normal role in reviewing a jury's determination that a harm is sufficiently imminent and that a speaker has the requisite intent.[106]

Judge Learned Hand contemporaneously struggled with the same dilemma, how to protect society without suppressing political dissent. In *Masses Publishing Co. v. Patten*, the publisher of a revolutionary journal sought an injunction to compel the postmaster to accept plaintiff's journal for

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[97] *Id.* at 624. Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219, *amended by* Act of May 16, 1918, ch. 75, 40 Stat. 553 (Comp. St. 1918, § 10212(c)).

[98] *Abrams*, 250 U.S. at 621-22.

[99] *Id.* at 628 (Holmes, J., dissenting).

[100] *Id.* at 628-29 (Holmes, J., dissenting).

[101] Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[102] *Id.* at 378-79 (Brandeis, J., concurring).

[103] *Id.* at 376 (Brandeis, J., concurring).

[104] *Id.*

[105] *Id.*

[106] *Id.*

mailing.[107] The postmaster's defense rested on his claim that the journal violated the Espionage Act of 1917.[108] For example, the postmaster argued that political cartoons and text expressing sympathy for conscientious objectors violated the act's provision making it unlawful to cause "insubordination, disloyalty, mutiny or refusal of duty in the military."[109]

Hand sought to draw a clear line between protected and unprotected speech.[110] Even the Holmes-Brandeis interpretation of the clear and present danger test left the speaker guessing when First Amendment protection began. Depending on how imminent the harm might be, the same speech might be protected in one setting but not in another. Unlike Holmes and Brandeis, who focused on the effect of the speech, Hand focused on the content of the speech.[111] For Hand, under the Espionage Act, a speech was not criminal unless it directly counseled the listener to resist the draft, even if the speech motivated the listener to resist the draft.[112] Words did not become criminal unless they were a "direct incitement to violent resistance."[113]

The Second Circuit reversed Hand's decision in *Masses Publishing*.[114] Hence, neither the Holmes-Brandeis view nor the Hand view became the law, at least until the late 1960s. But certainly from today's view of the First Amendment, Holmes, Brandeis, and Hand deserve credit for their efforts to limit the government's ability to criminalize political dissent. At least as developed in these cases, the defendants did nothing more than speak out in opposition to policies of the state or federal government. As applied by the Supreme Court, the First Amendment did not go very far in protecting unpopular speech.

While the Holmes-Brandeis and Hand approaches both offered greater protection than the Court did at that time, their approaches differed in significant ways. In fact, the Marc Antony example served to demonstrate that difference. Under the Holmes-Brandeis approach, a court would have to determine, based on an independent review of the record, whether he intended his speech to result in the unlawful killing of the conspirators and that the risk of harm was imminent.[115] As developed in more detail below, Antony planned the very harm that took place, and he expected it to take place immediately, allowing him little protection under the Holmes-Brandeis approach.[116]

In correspondence with Judge Hand, Professor Chafee posed the Antony example.[117] Like a true Socratic professor, Chafee posed the example to demonstrate the weakness of Hand's approach in *Masses Publishing*.[118] While

[107] 244 F. 535, 536 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).
[108] Act of June 15, 1917, ch. 30, 40 Stat. 217.
[109] *Masses Publ'g.*, 244 F. at 539.
[110] *Id.* at 540.
[111] Gunther, *supra* note 73, at 720-21.
[112] *Id.*
[113] *Masses Publ'g*, 244 F. at 540.
[114] 246 F. 24 (2d Cir. 1917).
[115] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
[116] *See infra* notes 184-87 and accompanying text.
[117] Gunther, *supra* note 73, at 729 n.41.
[118] *Id.* In one of his letters to Hand, the comment is made that "your test is certainly easier to apply although our old friend Marc Antony's speech is continually thrown at me in discussion. After all, we ought to take the best test we can find, even though it will sometimes break down." *Id.* at app. 1, doc. 16.

Hand's approach did not subject the speaker to "the mercy of fact-finders reflecting majoritarian sentiments hostile to dissent,"[119] his approach "could not easily deal with the indirect but purposeful incitement of Marc Antony's oration over the body of Caesar."[120] While Hand recognized the social harm posed by the indirect inciter, focusing on the literal meaning of the speaker's words allowed a speaker to escape criminal liability through clever manipulation.[121]

The difference between the two approaches is especially important today because of their influences on modern First Amendment law. First, before the Cold War, the Holmes-Brandeis approach gained acceptance,[122] as the Supreme Court began strengthening its clear and present danger test.[123] Second, after a significant step backwards in *Dennis v. United States*,[124] the Court again gave teeth to the First Amendment in a series of cases interpreting the Smith Act,[125] the 1940 legislation used during the 1950s to target members of the Communist Party. For example, in *Yates v. United States*,[126] the Court interpreted the Smith Act to require the jury to distinguish between advocacy of abstract doctrine, protected by the First Amendment, and incitement or advocacy of action, unprotected by the First Amendment.

While cases like *Yates* demonstrate increased awareness that the First Amendment must protect political dissent,[127] the Court's approach to the First Amendment issues changed even more markedly during the 1960s. For example, the Court decided *Brandenburg v. Ohio*[128] at the height of the Vietnam anti-war and civil rights movements.

Brandenburg, a Ku Klux Klan leader, invited news reporters to a poorly attended Klan rally.[129] There, he was captured on film giving a speech at a cross burning.[130] His speech was remarkably temperate for a Klansman. In fact, it is hard to determine whether Brandenburg threatened illegal action at all. He stated, for example, that "[w]e are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."[131] Brandenburg was subsequently convicted of violating Ohio's criminal syndicalism statute which made it unlawful to advocate the duty, necessity, or propriety of crime, sabotage, or violence as a means

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[119] *Id.* at 721.
[120] *Id.* at 729.
[121] *Id.*
[122] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-9, at 841-45 (2d ed. 1988).
[123] *Id.* at 845-49.
[124] 341 U.S. 494 (1951).
[125] Smith Act of 1940, 54 Stat. 670 (1940) (current version at 19 U.S.C. § 2385 (1994)).
[126] 354 U.S. 298 (1957).
[127] *See* Noto v. United States, 367 U.S. 290 (1961) (defendant's conviction for violating the membership clause of the Smith Act was reversed, on the ground that the evidence introduced at trial was insufficient to show that the Communist Party engaged in actual advocacy of governmental overthrow).
[128] 395 U.S. 444 (1969).
[129] *Id.* at 445.
[130] *Id.* at 446.
[131] *Id.*

to accomplish political reform. In the Supreme Court, Brandenburg contended that his conviction under that law violated the First Amendment.

The Court found that the statute was unconstitutional because it purported to punish mere advocacy.[132] It read its earlier case law as establishing that the First Amendment protected advocacy of the use of force unless that advocacy was aimed at inciting or producing imminent lawless action when that advocacy is likely to produce such action.[133] The Court had no occasion in *Brandenburg* to decide whether the defendant's conduct was protected by the First Amendment.[134]

In the more than thirty years since *Brandenburg*, the Court has shed little additional light on the line drawing required by its decision. In *Hess v. Indiana*,[135] a sheriff and his deputies were clearing the streets of anti-war protesters when Hess, one of the protesters, said, "[w]e'll take the fucking street later," or "[w]e'll take the fucking street again."[136] Two witnesses testified that Hess was not urging the crowd to take the street back and that "his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area."[137]

In a per curiam opinion, the Court overturned Hess's conviction for disorderly conduct. To overturn his conviction, the Court conducted an independent review of the record, not bound by the trial court's factual determination. Apparently placing on the state the burden of demonstrating that Hess's speech was not protected by the First Amendment, the Court found the evidence of both an intent to incite and a call for immediate action insufficient.[138] As observed by the Court, the evidence of an intent to incite lawless action was at most ambiguous.[139] The evidence did not reveal whether Hess was making a call for moderation or, at worst, a call for illegal action at some future time.[140] Further, the state failed to show any specific action or any imminent violence urged by Hess.[141]

The only other case decided in reliance on the *Brandenburg* test was *NAACP v. Claiborne Hardware*.[142] There, the African-American community staged a boycott against white merchants in a small Mississippi town.[143] White merchants sued various defendants for the economic losses occasioned by the

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[132] *Id.* at 449.

[133] *Id.* at 447.

[134] The Court did not address that issue because it found that the statute was unconstitutional on its face and did not reach the separate question whether Brandenberg's conduct was protected by the First Amendment. That issue would arise only after Ohio passed a properly narrowed statute and sought to convict Brandenburg for similar behavior. Then the Court would have to address whether his conduct amounted to a direct incitement or to mere abstract advocacy.

[135] 414 U.S. 105 (1973).

[136] *Id.* at 106-07.

[137] *Id.* at 107.

[138] *Id.* at 108.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 109.

[142] 458 U.S. 886 (1982).

[143] *Id.* at 889.

boycott.[144] Most of the damages suffered were caused by lawful conduct, the decision of those participating in the boycott not to patronize white owned stores.[145] However, the lower court found the NAACP and Charles Evers, its local leader, liable for the full amount of harm caused by the boycott.[146] Their liability was based on three speeches that Evers gave.[147]

Members of the boycott formed an "enforcement" group and collected names of African-Americans who violated the boycott.[148] The trial court found that supporters of the boycott committed ten acts of violence against African-Americans who patronized white owned businesses.[149] Some of those acts of violence took place after speeches by Evers.[150] In those speeches, Evers made statements that might have inspired members of the audience to use violence against members of their community who were violating the boycott.[151] Because, according to the trial court, Evers was responsible for some African-Americans being intimidated from patronizing white businesses, Evers was also responsible for the harm suffered by the white plaintiffs.[152] Rather than finding the NAACP and Evers liable only for the part of the damages that resulted from his arguably illegal speeches, the trial court found the defendants liable for the entire amount of the plaintiffs' losses, even though most of those damages were the result of lawful conduct by members of the community.[153]

Again in a per curiam opinion, the Court reversed the judgment against the NAACP and Evers. In finding that Evers' speech was protected by the First Amendment, the Court discussed three possible theories by which Evers might be found liable for the conduct of the enforcement group: if he authorized, directed, or ratified specific tortious activity; if his speeches were likely to incite his listeners to commit unlawful acts within a reasonable amount of time; or if he gave specific instructions to carry out violent acts or threats.[154] The Court rejected the lower court's finding that Evers did ignite the violent acts of boycott supporters. It did make clear that, had Evers' strong language "been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct."[155]

Review of these three cases, *Brandenburg v. Ohio*, *Hess v. Indiana*, and *NAACP v. Claiborne Hardware*, allows a few generalizations. Consistent with the Holmes-Brandeis view, when the defendant has a First Amendment defense, an appellate court has a greater than normal role in reviewing the facts found in the trial court.[156] In effect, trial court findings are entitled to little or no deference. In addition, while the Court seems to give greater substantive

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144 *Id.*
145 *Id.* at 893.
146 *Id.*
147 *Id.*
148 *Id.* at 894-95.
149 *Id.* at 901-06.
150 *Id.*
151 *Id.*
152 *Id.* at 893.
153 *Id.*
154 *Id.* at 927.
155 *Id.* at 928.
156 *See generally id.*

First Amendment protection to political dissent than did the Court in the "Red Scare" cases, the extent of that protection is uncertain.

Here, the Marc Antony example demonstrates the uncertainty about the substantive rule articulated in *Brandenburg*; uncertainty that remains after the Court's decisions in *Hess* and *Claiborne*. How would that case be resolved under *Brandenburg*?

Professor Gunther has argued that *Brandenburg* combines the best of the Holmes-Brandeis approach and of Hand's approach in *Masses Publishing*.[157] Specifically, according to Professor Gunther, "[u]nder *Brandenburg*, probability of harm is no longer the central criterion for speech limitations. The inciting language of the speaker – the Hand focus on 'objective' words – is the major consideration."[158]

If Professor Gunther is correct, Marc Antony could not be found guilty of aiding and abetting murder or inciting violence against the co-conspirators. As developed above, he carefully avoids any direct exhortation, any explicit call for violence. For example, after the crowd calls for "Revenge! – About! – Seek! – Burn! – Fire! – Kill! – Slay! Let not a traitor live!," Antony "appeals" to the crowd, "let me not stir you up/To such a sudden flood of mutiny. . . ."[159] If *Brandenburg*, in fact, requires words of incitement as a necessary condition for prosecution, Antony would have to be acquitted despite the fact that the other requirements of the Court's test would otherwise be met. That is, the harm is imminent – the crowd rushes away from Caesar's funeral and kills the conspirators immediately, Antony's intent is not in doubt, and, although not definitively resolved, if the Court requires that the harm threatened must be a grave one, the killing of another obviously qualifies.

In neither *Hess* nor *Claiborne* did the Court indicate whether words of incitement are necessary before a defendant may be prosecuted. Certainly, in *Claiborne*, Evers used words of incitement – for example, he told one audience that "any 'Uncle Toms' who broke the boycott would 'have their necks broken' by their own people."[160] Evers was not liable because the evidence was insufficient to show that his words caused the harm suffered by the white merchants.[161]

Hess's words might or might not have been words of incitement.[162] The record did not support an inference of his intent – did he intend to call for moderation or did he intend to urge some future criminal conduct – and it did not support a finding that harm was imminent, again because, even if his words were a call to action, the record did not indicate when the illegal conduct might take place.[163] The Court did not have independent evidence of Hess's intent beyond his words.[164] The additional evidence cited by the Court supported an absence of an intent to bring about the feared harm.[165]

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[157] Gunther, *supra* note 74, at 755.
[158] *Id.*
[159] *Caesar*, *supra* note 74, act 3, sc. 2, ln. 199-200, 204-05.
[160] *Claiborne*, 458 U.S. at 900.
[161] *Id.*
[162] Hess v. Indiana, 414 U.S. 105, 108 (1973).
[163] *Id.*
[164] *Id.* at 109.
[165] *Id.* at 107.

Hence, since *Brandenburg*, the Court has not elaborated on whether words of incitement are a necessary condition for conviction or if, absent words of incitement, a defendant has a First Amendment defense as a matter of law. We are left only with the Court's language in *Brandenburg* to try to divine whether words of incitement are in fact a necessary condition for conviction.

The text is ambiguous. The Court stated that the First Amendment protects a speaker unless the speaker's advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[166] Professor Gunther's position, that *Brandenburg* adopts Judge Hand's view, is supported by its self-conscious use of the term "inciting," suggesting that words of incitement are a necessary condition.[167] No doubt, the Court was aware of Judge Hand's use of that term. But, of course, the Court did not state explicitly that a speaker has a First Amendment defense. Rather, it used an additional term, advocacy directed to "producing" the imminent criminal conduct. Arguably, unless the "producing" language was merely surplusage, the Court recognized that language not explicitly inciting lawless conduct may nonetheless be sufficiently dangerous that it should be criminalized.

Absent clear resolution in the Supreme Court case law, one ought to ask whether the policies that support the First Amendment suggest that we ought to protect speakers like Marc Antony. Most of the cases discussed above have involved political dissent where the speaker has attacked governmental policies. While scholars have suggested that the First Amendment advances a number of policies, most recognize that, at its core the First Amendment protects political speech necessary in a free society. Majoritarian sentiment against dissenting voices is likely to be high, demanding prosecution for unpopular ideas. In addition, even if majoritarian sentiment does not demand prosecution, those in power may want to silence dissent in order to cement their own power. Certainly, cases like *Brandenburg*, *Hess*, and the Espionage Act and Smith Act cases all demonstrate the legitimacy of those concerns. Allowing the state to prosecute a political dissenter creates a chilling effect on the vigorous debate necessary in a free society.

Supreme Court doctrine in a number of areas creates a zone in which a speaker may advocate without fear of civil liability or criminal prosecution (or confident that he or she has a defense if the speaker is prosecuted). A speaker who criticizes a public official or public figure may not be found liable unless the person claiming to be defamed can demonstrate that the speaker acted with knowledge that the statements were false or made with reckless disregard of the truth.[168] That burden is not easily met.

Brandenburg and *Hess* require that the state demonstrate that the speaker had an intent to incite violence and that the unlawful conduct was imminent.[169] Unlike earlier precedent, the Court's current cases do not allow the legislature to determine whether the harm is imminent; that must be demonstrated on a

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[166] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[167] Gunther, *supra* note 73, at 755.

[168] New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

[169] NAACP v. Claiborne Hardware, 458 U.S. 886, 928 (1982); *Hess*, 414 U.S. at 109.

case-by-case basis.[170] The case law also demonstrates a commitment to full judicial review in cases involving First Amendment defenses, apparently based on a mistrust of jury determinations of fact since those determinations may be motivated by the passions of the moment.[171]

Those are significant protections. For example, in *Hess*, the Court overturned a finding that Hess intended to incite the crowd because his statement to the effect that the protesters would take the streets back later did not allow a clear inference of his intent to bring about the feared harm.[172]

The Holmes-Brandeis approach has been criticized because the First Amendment defense seemed to depend on events beyond the control of the speaker and because it was so susceptible to the passions of the moment.[173] For example, the clear and present danger test did little to protect the defendants in *Dennis v. United States*,[174] a prosecution of Communists during the height of the Cold War.[175]

I have argued elsewhere that many of the "Red Scare" cases, including *Dennis*, would come out differently today, under *Brandenburg* and more recent First Amendment cases.[176] Specifically, the intent requirement and the lack of deference shown to findings in the trial court place a significant burden on the prosecution. In addition, the modern cases force the prosecutor to show a meaningful risk of actual harm following the defendant's speech.[177] No longer would a federal court sustain a conviction for aiding the Germans under a statute like the Espionage Act if a defendant merely encouraged resisting efforts to ship arms to forces opposing the Bolsheviks. The prosecutor would have to show that the defendants intended to frustrate the war effort against the Germans. Knowledge that their conduct might have that effect is not enough under *Brandenburg's* intent requirement. Similarly, a prosecutor could not rely on a defendant's membership in an organization like the Ku Klux Klan or the Communist Party to sustain a conviction; more would be necessary to show that the defendant intended to support the illegal goals of the organization.[178] That is, earlier cases that seemed so ripe for criticism because they allowed prosecution of political dissenters without more do not seem to have survived *Brandenburg*.

One might argue, if *Brandenburg* did not adopt the additional requirement of words of incitement, the objective approach urged by Judge Hand in *Masses Publishing*, that the Court should do so. That argument would be grounded on the need to provide the prospective speaker with certainty of the difference between protected speech and criminal incitement.

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[170] This is shown by the Court's review of the trial record, with little deference given and a high degree of emphasis placed on the facts. *See generally Claiborne*, 458 U.S. 886; *Hess*, 414 U.S. 105.

[171] *Claiborne*, 458 U.S. at 915 n.50; *Hess*, 414 U.S. at 108.

[172] *Hess*, 414 U.S. at 108.

[173] Gunther, *supra* note 73, at 749-50.

[174] 341 U.S. 494 (defendant convicted for violation of Smith Act).

[175] *Id.*

[176] Vitiello, *supra* note 2.

[177] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978).

[178] *See supra* notes 38-55, 63-71 and accompanying text.

A close examination of Marc Antony's speech helps show why that should not be the case. Before examining Antony's First Amendment defense, one ought to consider how his conduct would be judged but for the fact that he gave his speech in a public place. As discussed above, when Lady MacBeth urges MacBeth to murder the King or when Iago deceives Othello into a murderous rage, neither Lady MacBeth nor Iago would have a First Amendment defense despite the fact that their conduct is exclusively speech. Were Lady MacBeth charged with murder, the prosecution would not have to prove any express words of encouragement. It would be enough to show that whatever words used (or any other aid) were intended to encourage the crime.[179] In addition, an appellate court would give no special deference to factual findings in the lower court. Similarly, if Antony delivered his powerful encouragement behind closed doors, it is inconceivable that a court would seriously consider a First Amendment defense. Antony obviously encouraged the murder of the co-conspirators.

Once he speaks in public, he seems to be entitled to First Amendment protection. I find nothing in the case law which explains why that is so. I suspect that it is so because those encouraging murder usually do not do so in a public forum and because people speaking in public are more likely to be engaging in political discourse than in a criminal conspiracy.

That seems implicit in cases like *Brandenburg* and *Claiborne*. Certainly there is something sound in that position. While some sane people are willing to admit openly their intent to commit crimes, most people speaking in a public forum would not do so, suggesting that in fact, even harsh rhetoric is intended as political dissent.

While scholars have differed about the theory underlying the First Amendment, cases involving political dissent are the ones in which First Amendment protection is most important.[180] Government officials are most likely to have an interest in suppressing speech in such cases.[181] Whether one believes that the First Amendment is intended to assure our ability to engage in self government, or that its protection is based on distrust of governmental determinations of truth, cases where criticism of government is involved pose the greatest challenge for the courts.[182]

Despite his feigned praise of Brutus and the other co-conspirators, Antony's speech certainly could be construed as criticism of the government (now that the co-conspirators have usurped power). Antony's false praise shares some of the characteristics of satire, a common form of political commentary in tyrannical regimes.[183]

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[179] DRESSLER, *supra* note 5, § 30.04, at 436-38.

[180] *See Vitiello*, supra note 2, at notes 342-47 and accompanying text, at 1221; *see also* FREDERICK SHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 34 (1982).

[181] *See Vitello*, *supra* note 2, at notes 342-47 and accompanying text, at 1221.

[182] *Id.*

[183] *See* DUSTIN GRIFFIN, SATIRE, A CRITICAL REINTRODUCTION 138 (1994) (rebutting the contention that satire requires freedom of speech as an essential condition and observing that "[i]n the late twentieth century [satire] has appeared not in the liberal West but in Russia and Eastern Europe.").

But does the fact that Antony speaks in public and *may* be engaged in political discourse create a risk sufficient to require an additional protection, to find his conduct criminal only if he uses words of incitement? And here, I assume that Judge Hand would have required a defendant like Antony to use words like, "yes, be stirred to mutiny."

I think the additional requirement of words of incitement would be unfortunate and unnecessary. Any marginal gains in First Amendment protection would be outweighed by the grave social danger. Under this reading of *Brandenburg* and its progeny, that Antony did not use words of incitement would provide him with a defense, if that is the only evidence of his intent to incite the crowd to murder the conspirators. He consistently protests, urging the crowd to desist from mutiny when members of the audience begin to demand revenge. Like Hess's "[w]e'll take the fucking streets later,"[184] Antony's intent should not be inferred from words that allow competing rational inferences. If Antony were convicted, an appellate court, acting in accord with *Hess* would exercise independent review of the record, and would have to find unambiguous evidence of intent.

Antony is unlike the defendant in *Hess*. Both before and after his funeral oration, Antony makes his intent clear. Hence, neither the fact finder nor an appellate court would have to guess whether Antony meant to incite the crowd. In light of unambiguous admissions of his intent, the risk of criminalizing a person advocating some abstract and future harm is non-existent. The requirement of a clear showing of intent goes a long way to protect against criminalizing political dissenters while protecting society against dangerous offenders.

IV. Conclusion

Thinking about the First Amendment in the context of Shakespearean characters may suggest that the issues discussed in this essay are not serious, contemporary problems. But as I have argued elsewhere, the Internet has opened new avenues of speech, allowing dangerous speakers to share information and to encourage social misfits to commit serious crimes.[185] Iago, Lady MacBeth, and Marc Antony have a great deal to teach us about speech and crime.

Speech is powerful and may be dangerous. The criminal law has long recognized that fact and, in numerous settings, criminalizes offenders whose speech may consist of nothing but words.[186] Iago and Lady MacBeth more than amply demonstrate the need to criminalize those whose conduct may consist entirely of speech.

Obviously, speakers whose words may involve political dissent must have strong First Amendment protection. However, I question whether the Supreme Court has required, or should require, explicit words of incitement. As argued above, leaving a speaker like Marc Antony free to manipulate others to commit serious crimes, simply through the expedience of choosing his words carefully

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[184] Hess v. Indiana, 414 U.S. 105, 106-07 (1973).

[185] Vitiello, *supra* note 2.

[186] *See supra* note 4.

is shortsighted and unnecessary.[187] Forcing the prosecutor to make a clear showing of the speaker's intent would give political dissenters protection while allowing society to protect itself against dangerous offenders.

[187] *See supra* notes 180-87 and accompanying text.

INDIANAPOLIS V. EDMOND: ROADBLOCK TO FOURTH AMENDMENT EROSION OF INDIVIDUAL SECURITY

Samuel Bateman*

The text of the Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

Generally, under the guidance of the Fourth Amendment, every search or seizure by a government agent must be reasonable. The Supreme Court interpreted this requirement to mean that an arrest or search must be based on probable cause and executed pursuant to a warrant.[2] Courts have created a number of exceptions to the warrant and probable cause requirements of the Fourth Amendment, such as investigatory detentions, seizures of items in plain view, warrantless arrests, inventory searches, administrative searches, border patrol searches, vehicle searches, and special needs searches.[3]

However, in balancing these exceptions, the Court has traditionally required some level of individualized suspicion to justify government intrusion on an individual's privacy.[4] In the absence of individualized suspicion or probable cause of wrongdoing, a search or seizure is ordinarily unreasonable.[5] One area in which courts have upheld suspicionless searches is that of the roving police checkpoint.[6] In the context of such roadblocks, the Court has tradition-

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[1] U.S. CONST. amend. IV.

[2] *See* Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948).

[3] *See* Terry v. Ohio, 392 U.S. 1, 22-24 (1968) (held that a police officer may stop an individual reasonably suspected of criminal activity); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view justified the seizure of an object); South Dakota v. Opperman, 428 U.S. 364 (1976) (held that inventory searches following the lawful seizures of automobiles were constitutional); Michigan v. Clifford, 464 U.S. 287 (1984) (warrantless entry justified to preserve evidence from destruction); United States v. Martinez-Fuerte, 428 U.S. 543, 556-62 (1976) (warrantless stop of vehicle at fixed checkpoint to question occupants about citizenship is constitutional); Chambers v. Maroney, 399 U.S. 42 (1970) (held that warrantless search of vehicle valid because police had probable cause); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (special needs of government can justify searches without warrant or probable cause).

[4] *See, e.g., Terry*, 392 U.S. at 27; United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (holding that a roving police unit could not stop a motorist without individualized suspicion of wrongdoing).

[5] *See* Chandler v. Miller, 520 U.S. 305 (1997).

[6] *See Martinez-Fuerte*, 428 U.S. 543; Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

ally used the *Brown v. Texas* balancing test.[7] *Michigan Dept. of State Police v. Sitz*, a roadblock case in which the *Brown* test was utilized, is a recent example of the Court favoring the government's interests over the interests of the individual.[8] The Court used the *Brown* test to uphold sobriety checkpoints in *Sitz* and border patrol checkpoints in *Martinez-Fuerte*, where the government's interests in protecting the United States border trumped the privacy rights of the individual.[9] A recent case, *Indianapolis v. Edmond*, has finally eliminated questions as to the constitutionality of drug interdiction roadblocks.[10]

Prior to *Edmond*, state and federal courts were divided.[11] Many courts used the holding in *Sitz* to justify other types of checkpoint stops lacking reasonable, individualized suspicion.[12] In fact, Fourth Amendment jurisprudence in recent years has significantly reduced the public's Fourth Amendment rights in a number of search and seizure areas.[13] In the area of drug interdiction roadblocks, however, the Court finally attempted to leave behind the old, all-inclusive reasonableness test for a different, more appropriate test. Under the new test, a preliminary inquiry into the program's purpose must be made before the court will apply an all-out balancing based on the *Brown* three-part test.[14] The aforementioned test is nearly analogous to the standard special needs analysis, in which it is appropriate to decide first whether there is a "special need beyond law enforcement" before engaging in the three-part balancing test.[15] The Court in *Edmond* recognized a need for guidance and standardization of the law pertaining not only to roadblock cases but Fourth Amendment cases in general.

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[7] *See* Brown v. Texas, 443 U.S. 47 (1979) (the *Brown* test weighs the state interests, the degree to which the program furthers that interest, and the intrusion on the individual privacy interests).

[8] *See Sitz*, 496 U.S. at 450.

[9] *See Martinez-Fuerte*, 428 U.S. 543.

[10] Indianapolis v. Edmond, 531 U.S. 32 (2000) (held that because the checkpoint program's primary purpose was standard law enforcement and criminal activity detection, the checkpoints violated the Fourth Amendment).

[11] *Compare* State v. Damask, 936 S.W.2d 565, 567 (Mo. 1996) *and* Merrett v. Moore, 58 F.3d 1547, 1548 (11th Cir. 1995) (both upholding the constitutionality of a drug interdiction roadblock), *with* United States v. Morales-Zamora, 974 F.2d 149, 153 (10th Cir. 1992), *and* United States v. Huguenin, 154 F.3d 547, 549 (6th Cir. 1998) (holding that a drug interdiction roadblock violates the Fourth Amendment).

[12] *See, e.g*, Romo v. Champion, 46 F.3d 1013, 1020 (10th Cir. 1995) (individual suspicion not required to stop car at roadblock on public thoroughfare); United States v. O'Mara, 963 F.2d 1288, 1291 (9th Cir. 1992) (individual suspicion not required because police utilized highway roadblock to stop all cars leaving national park); United States v. McFayden, 865 F.2d 1306, 1310 (D.C. Cir. 1989) (individualized suspicion not required because conducted for principle purpose of traffic enforcement).

[13] *See* Chris K. Visser, Comment: *Without A Warrant, Probable Cause, Or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?* 35 HOUS. L. REV. 1683 (1999); *See generally*, Douglas K. Yatter, David E. DePianto, Marisa L. Megur & Karin Scherner-Kim, *Twenty-Ninth Annual Review Of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: Warrantless Searches and Seizures*, 88 GEO. L.J. 912 (2000).

[14] *See Edmond*, 531 U.S. 32.

[15] Chandler v. Miller, 520 U.S. 305, 313-14 (1997).

Section I addresses the facts and circumstances of the law leading up to *Indianapolis v. Edmond*. Section II explains the facts of *Edmond* and the holding of the Court. Lastly, Section III explains why the holding by Justice O'Connor was correct and just in time to stop or at least slow a continuing erosion of Fourth Amendment rights.

I. BACKGROUND

Probable cause has long been the standard for upholding searches and seizures without warrants. Although the Court, in some situations, has allowed certain searches or seizures to occur without individualized suspicion, it has consistently found that in those cases the primary purpose of the search and seizure was not one of standard criminal investigation.[16] This line between criminal and non-criminal stops is critical. Since 1967, the Supreme Court has recognized limited exceptions based on this distinction.[17] These exceptions are as follows:

A. *Administrative and Regulatory Searches*

Camara v. Municipal Court involved administrative inspections to enforce building codes.[18] Courts have upheld such inspections based on administrative warrants not supported by individualized probable cause.[19] The Court specifically found this type of search to be non-criminal in nature: "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety."[20]

While administrative search warrants are generally required for fire, health, or safety inspections of residential or private commercial property,[21] regulatory schemes and exigent circumstances may be used to do away with the warrant requirement.[22] Often, specific evidence of an existing regulatory violation or a reasonable regulatory scheme will justify issuance of an administrative warrant;[23] however, the scope of the search must be reasonable in light of the

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[16] *See infra* text accompanying notes 18-71.

[17] *See infra* text accompanying notes 18-71.

[18] Camara v. Municipal Court, 387 U.S. 523 (1967)

[19] *See id.* at 531-32.

[20] *Id.* (can uphold administrative searches where the search may turn up evidence of a criminal violation).

[21] *See, e.g.*, Michigan v. Clifford, 464 U.S. 287, 291-95 (1984) (warrant required for an administrative search of dwelling to investigate the cause of fire because owners had an expectation of privacy in partially destroyed home); Irving v. United States, 162 F.3d 154 (1st Cir. 1998) (warrant required for an administrative search of a business for occupational safety hazards); Platteville Area Apartment Ass'n v. City of Platteville, 179 F.3d 574, 577-80 (7th Cir. 1999) (warrant required for an administrative search to check for housing code violations). *But see* Michigan v. Tyler, 436 U.S. 499 (1978) (warrant not required to re-enter partially destroyed commercial property because the search was a continuation of the original authorized search which was stopped due to hazardous conditions).

[22] *See Tyler*, 436 U.S. 499; *Clifford*, 464 U.S. 287.

[23] *See, e.g.*, See v. City of Seattle, 387 U.S. 541 (1967) (warrant needed prior to health and safety inspections of dwellings and commercial premises); *Camara*, 387 U.S. 523 (same).

circumstances.[24] In *Michigan v. Tyler*, firefighters entered a building in an attempt to fight a fire without first obtaining a warrant.[25] Ultimately, the exigency associated with fighting fires and the need to stay after the fire is contained sufficed to dispense with the usual warrant requirement.[26] Notably, the Court stated that to stay after the fire was contained and investigate if the cause of the fire was arson would require a warrant.[27] The Court in *Clifford* reiterated the distinction between searching the premises of a fire for the cause versus having a criminal cause in mind such as arson.[28] The relevant difference, according to the Court in *Clifford*, is that one is a regulatory search – where an administrative warrant may not be necessary – and the other is a criminal investigatory search, requiring a warrant.

Administrative searches mark the first clear delineation of a difference between types of searches and the requirement of a warrant. The Court allows these types of warrantless searches on the presumption that the purpose of the search is other than criminal investigation.

B. Inventory Searches

Courts have generally found inventory searches to be constitutionally valid as long as they are not motivated by a criminal investigatory purpose.[29] Inventory searches are allowed to protect police against claims of misconduct, to give a general blanket of protection to police from potential dangers, and to protect the property while it is in the custody of the police.[30]

In *South Carolina v. Opperman*, the Court held that an inventory search following the constitutional search and seizure of an automobile was constitutional regardless of whether the search was performed absent individualized suspicion.[31] The Court commented on the lack of a necessity for probable cause, since the "probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions."[32] The Court found the search reasonable because the search was conducted pursuant to standard police procedures, which related to an inventory search, not a crimi-

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[24] *See, e.g., Tyler*, 436 U.S. 499; *Clifford*, 464 U.S. 287. *But see, e.g.*, Trinity Indus. v. Occupational Safety & Health Review Comm'n, 16 F.3d 1455 (6th Cir. 1994) (an OSHA inspection was not justified merely by an employee complaint that alleged limited violations).

[25] *See Tyler*, 436 U.S. at 512.

[26] *See id.*

[27] *See id.*

[28] *See Clifford*, 464 U.S. at 294

[29] *See infra* text accompanying notes 29-35.

[30] *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. Lage, 183 F.3d 374 (5th Cir. 1999) (an inventory search of a vehicle is valid to protect against danger and false claims for lost property); United States v. Lewis, 3 F.3d 252, 254 (8th Cir. 1993) (an inventory search of an engine compartment deemed valid because defendant had cocaine in his pocket when arrested); United States v. Kornegay, 885 F.2d 713 (10th Cir. 1989) (an inventory search valid because police required to secure vehicle's contents).

[31] *See Opperman*, 428 U.S. 364.

[32] *Id.* at 370 n.5.

nal search.[33] Ultimately, the search must be conducted in good faith and only if it can be justified by a legitimate inventory purpose.[34]

The distinction between criminal versus investigatory inventory searches was reinforced in *Colorado v. Bertine*, where police regulations allowed for but did not require the police to search the arrestee's backpack.[35] One might think this distinction could give police a license to rummage through one's property in an attempt to find incriminating evidence; however, the Court now requires that all inventory searches be undertaken according to either permissible or required standardized criteria.[36]

Therefore, the purpose behind the inventory search must be investigatory in nature, not criminal, and must have a component of standardized care and procedure. Without these components, the inventory search becomes nothing more than a judicially rubber-stamped criminal investigation, violating the Fourth Amendment.

C. *Automobile Searches*

Generally, the warrant requirement of the Fourth Amendment does not apply to searches of automobiles so long as the probable cause requirement is satisfied.[37] The automobile exception eliminates the need for a warrant based on the impracticability of obtaining one, often due to exigent circumstances surrounding the use of an automobile and the reduced privacy involved in the regulation of automobiles.[38]

The Court has deemed vehicle searches constitutional in some cases even when exigent circumstances have lapsed, as long as they existed at the time of

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[33] *See id* at 370.

[34] *See, e.g.*, United States v. Marshall, 986 F.2d 1171 (8th Cir. 1993) (an inventory search deemed invalid since officers indicated the purpose of search was to find evidence of criminal activity); United States v. Blaze, 143 F.3d 585 (10th Cir. 1998) (same). *But see, e.g.*, Colorado v. Bertine, 479 U.S. 367 (inventory search deemed valid because government did not act in bad faith or for the purpose of investigation). *See also* United States v. Castro, 166 F.3d 728 (5th Cir. 1999) (inventory search by officer deemed valid when standard procedures were followed).

[35] *See Bertine*, 479 U.S. at 376 (police discretion should be "exercised according to standard criteria and on the basis of something other than suspicion of criminal activity").

[36] *See* Florida v. Wells, 495 U.S. 1, 5 (1990); United States v. Lumpkin, 159 F.3d 983, 987 (6th Cir. 1998) (inventory search did not violate Fourth Amendment because it was conducted pursuant to standard operating procedure); United States v. Patterson, 150 F.3d 382 (8th Cir. 1998) (same); United States v. Rivas, 157 F.3d 364 (5th Cir. 1998) (same). *But see, e.g., Marshall*, 986 F.2d at 1175 (inventory search deemed invalid because no standardized procedure existed).

[37] *See, e.g.*, Maryland v. Dyson, 527 U.S. 465 (1999) (probable cause only requirement for search); Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of a vehicle valid because probable cause based on description of car involved in a robbery); Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of vehicle valid because officers had probable cause to believe there was contraband or other evidence of criminal activity in the vehicle). *But see, e.g.*, United States v. Best, 135 F.3d 1223 (8th Cir. 1998) (warrantless search of vehicle invalid because no probable cause existed to substantiate search of a vehicle's door panels for drugs).

[38] *See, e.g.*, California v. Acevedo, 500 U.S. 565 (1991) (probable cause enough for search since expectation of privacy is lower in vehicle); New York v. Class, 475 U.S. 106 (1986) (same).

the initial stop.[39] Further, with regards to automobile mobility creating exigent circumstances, courts will not use their hindsight to invalidate a search just because exigent circumstances, in actuality, did not exist at the time of the stop.[40]

In sum, a warrant is needed in vehicle search cases unless obtaining a warrant is impracticable. Since such impracticality usually exists, as long as individual suspicion and probable cause are present, in combination with exigent circumstances, a warrant is not required. However, in *Edmond*, there was no probable cause. The lack of probable cause in *Edmond* takes it out of the "automobile exception," necessitating a warrant.

D. Special Needs Searches

Special needs cases follow in the same vein as the previous search types, in that a clear line has been drawn between criminal investigatory searches and seizures, requiring probable cause, and non-criminal searches and seizures, not requiring probable cause. In a growing number of situations, the Court has allowed the state to avoid the normal warrant and probable cause requirements of the Fourth Amendment when a "special need . . . beyond the normal need for law enforcement" exists that would be jeopardized if the normal individualized suspicion requirement were held applicable.[41] Additionally, if the government interest addresses a vital problem that can be handled effectively through the proposed search, the requirements of probable cause or a warrant may be dismissed.[42] Finally, the government's interest is balanced against the individual's privacy interests on a case-by-case basis, which is heavily fact-specific.[43]

There exists some debate over the methodology used in the "special needs" arena. While the Court has traditionally begun the balancing test by first deciding whether the search was reasonable and applying the balancing

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[39] *See, e.g.*, Michigan v. Thomas, 458 U.S. 259 (1982) (drugs discovered during an inventory search of the glove compartment justified a more extensive warrantless search at later date); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) (same).

[40] *See Thomas*, 458 U.S. at 261; United States v. Johns, 469 U.S. 478, 484 (1985); (warrantless search of automobile valid because probable cause existed even though automobile was impounded); United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1993) (warrantless search of automobile valid because probable cause existed even if defendant was not likely to flee).

[41] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (The Court noted that "our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant . . . . ").

[42] *See id.*

[43] *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649-50 (1995) (special needs of the public school system in discouraging drug use by school children justifies suspicionless drug testing of students participating in athletics); Griffin v. Wisconsin, 483 U.S. 868 (1987) (special needs of state in operating probation system justify warrantless searches of probationers' homes in accordance with terms of probation). *But see, e.g.*, Chandler v. Miller, 520 U.S. 305 (1997) (special needs of state insufficient to allow suspicionless drug testing of candidates for public office; however, the Court found it was required to "undertake a context-specific inquiry" to determine whether special needs search is justified).

test, the *Edmond* Court[44] ruled that the appropriate approach is to first look to the purpose of the search or program.[45] If the court found the purpose of the search appropriate, then, and only then, would the court balance the interests of the parties involved.[46]

The Court has found special needs searches permissible when there is drug testing in the employment context based on public safety concerns;[47] in the public school arena, where the students' privacy interests are diminished in favor of order and discipline;[48] in situations where individuals are under government control or supervision, eliminating the need for probable cause;[49] and in the area of public employment where the government's interest in an efficient workplace is great.[50]

In *Skinner v. Railway Labor Executives Ass'n*, the Court allowed suspicionless drug tests when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[51] To do this, the Court used a test similar to the *Brown* test, which balanced the interests of the government against the privacy interests of the individual in connection with the nature of the overall intrusion.[52] However, the drug tests could only be upheld if the government interest or "special need" was "beyond the normal need for law enforcement." The term "beyond law enforcement," suggests that the need at issue is not law enforcement at all; rather, an administrative, inventory, or other similar need.[53]

E. Immigration Checkpoints

While certain government officials are statutorily obligated to conduct border searches and immigration checkpoints, the Fourth Amendment does not require a warrant to protect the United States from illegal immigration and ille-

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[44] *See supra* note 8 and accompanying text.

[45] *See* Recent Cases, *Constitutional Law – Fourth Amendment – Seventh Circuit Holds That Drug Interdiction Roadblocks Violate the Fourth Amendment* – Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999), 113 HARV. L. REV. 828 (2000); *See also* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258 (2000).

[46] *See* Dodson, *supra* note 45.

[47] *See* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) (warrantless and suspicionless drug testing of railroad employees permitted so long as it is conducted pursuant to government regulations); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (warrantless and suspicionless drug testing of Customs Service employees permitted when applying for a promotion). *But see Chandler*, 520 U.S. 305 (statute requiring candidates for public office to pass drug test before being eligible to run for election deemed invalid).

[48] *See Vernonia*, 515 U.S. 646 (public school officials are permitted to exercise "a degree of supervision and control that could not be exercised over free adults"); New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrantless search of student's purse by school authorities valid).

[49] *See* Griffin v. Wisconsin, 483 U.S. 868 (1987) (warrantless search of probationer's home valid if conducted pursuant to state regulation); Portillo v. U.S. Dist. Court for Dist. of Ariz., 15 F.3d 819 (9th Cir. 1994) (probationers and parolees have a diminished expectation of privacy).

[50] *See Skinner*, 489 U.S. 602.

[51] *See id.*

[52] *See id.* at 617-22

[53] *See generally* Dodson *supra* note 45.

gal importation and exportation.[54] What can be searched without a warrant, probable cause or suspicion are persons, luggage, personal effects, and vehicles.[55] Immigration checkpoint stops are often routine and follow a certain regulatory scheme.[56] However, if the stop is not routine in nature, probable cause or individualized suspicion is again necessary.[57] The court should consider the intrusive nature of the stop and the surrounding circumstances when deciding whether probable cause is needed.[58]

Interestingly, as in *Martinez-Fuerte* where the immigration checkpoint was operated some distance away from the border itself, the so-called "border search" exception can be construed to apply to an area that is the practical or "functional equivalent."[59] Government officials must look to a variety of criteria to determine what constitutes the "functional equivalent" of the border and when such a search can be conducted.[60]

In *Martinez-Fuerte*, the Court balanced the individual's privacy interests against the government's interests in conducting the search.[61] In the end, the Court allowed the roadblock, even without individualized suspicion, based on the government's interest in protecting its borders.[62] After *Martinez-Fuerte*, immigration and border checkpoints could be operated for brief primary and secondary questioning without probable cause or individualized suspicion, but any detention beyond that point must be supported by probable cause.[63]

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[54] *See, e.g.*, 8 U.S.C. § 1357(c) (1999) (immigration officials may conduct warrantless routine searches); 19 U.S.C. § 1496 (1994) (customs officials may inspect the luggage of persons arriving in United States). *See also* United States v. Montoya De Hernandez, 473 U.S. 531 (1985) (executive branch has authority to conduct warrantless routine searches).

[55] *See, e.g.*, *Montoya De Hernandez*, 473 U.S. 531; United States v. Charleus, 871 F.2d 265 (2d Cir. 1989) (probable cause not required for customs officials to conduct routine searches of personal effects); United States v. Ezeiruaku, 936 F.2d 136 (3d Cir. 1991) (no probable cause required for search of luggage at border); United States v. Machuca-Barrera, Jr., 261 F.3d 425 (5th Cir. 2001).

[56] *See* United States v. Martinez Fuerte, 428 U.S. 543 (1976).

[57] *See Charleus*, 871 F.2d 265 (probable cause required for nonroutine border search); Saffell v. Crews, 183 F.3d 655 (7th Cir. 1999) (same).

[58] *See* United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998).

[59] *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border search exception applies to search at functional equivalent of border); *Rivas*, 157 F.3d at 367 (same).

[60] *See* Yatter, DePianto, Megur & Scherner-Kim, *supra* note 13

> To determine whether a search occurs at the functional equivalent of a border: 1) a reasonable certainty that the person or thing crossed the border, 2) a reasonable certainty that there was no change in the object of the search since it crossed the border, and 3) that the search was conducted as soon as practicable after the border crossing . . . . The search may be conducted if 1) the officials have "reasonable certainty" or a "high degree of probability" that a border was crossed; 2) they also have "reasonable certainty" that no change in the object of the search has occurred between the time of the border crossing and the search; and 3) they have "reasonable suspicion" that criminal activity was occurring.

See id. at 971.

[61] *See Martinez-Fuerte*, 428 U.S. at 562.

[62] *See id.*

[63] *See id.* at 556-63 (warrantless stop of a vehicle at a checkpoint to question occupants valid and the vehicle may be referred to secondary inspection even without probable cause as long as no pretext); s*ee also* Norwood v. Bain, 166 F.3d 243, 251 n.6 (4th Cir. 1999) (further questioning requires probable cause).

The Court distinguished regulatory searches from criminal searches, in that criminal prosecution is not the principal or ultimate goal of the regulatory search. Even though those who violate border controls were subject to arrest and prosecution, the primary purpose of the checkpoint was to decrease illegal immigration and increase the deportation of such individuals. In fact, *Martinez-Fuerte* focused on the purpose behind the roadblock and plainly called it "legitimate and in the public interest."[64]

Even before *Martinez-Fuerte*, the Court noted that immigration checkpoints were "undertaken primarily for administrative rather than prosecutorial purposes."[65] The Court stressed the difference between searches designed to gain evidence of criminal wrongdoing and the United States' authority to conduct a search was based "on its inherent sovereign authority to protect its territorial integrity."[66] A court, having before it an immigration related search, should balance interests only after the true purpose of the program is ascertained and adjudged not to be investigatory in nature.

F. Traffic Safety Checkpoints and Drunk Driving Roadblocks

The Supreme Court has implied that states could stop vehicles absent individualized suspicion in a programmatic manner, if designed for the non-investigatory purpose of insuring traffic safety based on driver compliance with licensing, registration, and inspection requirements.[67] However, the plan or program must be neutral when dealing with privacy concerns and individual officer discretion.[68] The *Brown* balancing test was constructed for just these situations,[69] because again, generally speaking, some degree of cause is necessary for a search and seizure under the Fourth Amendment to take place.[70]

The court deemed the brief sobriety checkpoint as operated in *Sitz v. Michigan Department of Police* constitutional, based on the State's interest "in

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[64] *See Martinez-Fuerte*, 428 U.S. at 562.

[65] Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973).

[66] *Id.*

[67] *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (All these requirements "are essential elements in a highway safety program.").

[68] *See id.* Holding that:

> [E]xcept in those situations in which there is at least articuable and reasonable suspicion that a motorists is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

Id.

[69] *See* Brown v. Texas, 443 U.S. 47, 50-51 (1979) ("Consideration of the constitutionality of such seizures involves a weighting of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interests, and the severity and interference with individual liberty.").

[70] *See* Dunaway v. New York, 442 U.S. 200 (1979) (arrest and confession were found unconstitutional because the defendant had been arrested without probable cause); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (lawful pat down based on reasonable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Court reversed a conviction because the defendant was wrongfully stopped).

preventing drunken driving."[71] Like *Sitz*, the Court has found license and registration stops constitutional, which are primarily instituted for public safety, not for criminal investigation.[72] It is important to note that even though the *Brown* balancing test was used in this case, the Court implicitly applied a primary purpose inquiry as well.[73]

In the end, the Court has not instituted a sobriety or traffic safety "checkpoint exception" to the warrant requirement. Instead, the Court has first looked for probable cause and individualized suspicion. Then in their absence, the Court focused on the purpose of the program, and only after that balanced the various interests involved. In fact, the Supreme Court has acknowledged that searches conducted without probable cause have been upheld only "in certain limited circumstances."[74]

Importantly, the "vehicle" or "automobile" exception only dispenses with the warrant requirement of the Fourth Amendment in cases where probable cause exists.[75] A driver maintains his or her privacy interests unless he or she encounters a sobriety or traffic safety checkpoint where the purpose is not investigative in nature and where the seizure is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of officers."[76]

In conclusion, before a balancing test can be applied – before the Court can look at the government's interest, the effectiveness of the program, or the interests of the motorist, be they diminished or fully intact – the Court must ask if it is appropriate to use the balancing test based on the nature or purpose of the investigation.

II. *CITY OF INDIANAPOLIS v. EDMOND*

While the Supreme Court has intimated that certain roadblocks initiated to check for licenses and registration or general traffic safety could be considered constitutionally valid, provided they adhere to some basic principles (such as non-discretionary action by government officers),[77] the Court has implicitly stated that these roadblocks cannot exist for the purpose of standard crime control.[78] In 1998, the City of Indianapolis had a different idea. They began to operate random roadblocks or checkpoints in an effort to halt the influx of illegal drugs.[79] Approximately thirty officers were stationed at the checkpoints, which were located throughout the city, and operated at six different times.[80] Approximately 1,161 cars were stopped and asked to render their licenses and registration.[81] The drivers were told the nature of the stop, while a

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[71] Sitz v. Mich. Dep't of Police, 496 U.S. 444, 455 (1990).
[72] *See Prouse*, 440 U.S. at 663.
[73] *See id.*
[74] *See Sitz*, 496 U.S. at 455.
[75] *See* Maryland v. Dyson, 527 U.S. 465 (1999); California v. Carney, 471 U.S. 386 (1985).
[76] *See* Brown v. Texas, 443 U.S. 47, 51 (1979).
[77] *See supra* notes 67-73 and accompanying text.
[78] *See supra* notes 67-73 and accompanying text.
[79] *See* Indianapolis v. Edmond, 531 U.S. 32 (2000).
[80] *See id.*
[81] *See id.*

drug-sniffing dog was walked around the automobile.[82] The officer looked for signs of impairment and conducted a "plain view" inquiry of the contents of the vehicle.[83] If the dog detected narcotics in the car, the police would then search the vehicle.[84] The dog provided the officers with the requisite probable cause needed to search the car.[85]

The checkpoints were operated with little discretion on the part of the police officers.[86] Officers were to stop a particular number of drivers through a pre-determined sequence.[87] Also, the locations of the stops were determined based on crime statistics and traffic flow, and ultimately, the stops were to be kept to five minutes or less.[88]

The program resulted in fifty-five drug-related arrests and forty-nine arrests for unrelated offenses.[89] The hit rate for drug-related arrests was five percent and the total hit rate, including the remainder of the arrests, resulted in a total of nine percent.[90]

After James Edmond and Joell Palmer were stopped at one of these roadblocks, they filed a lawsuit on behalf of themselves and all other motorists similarly stopped. The lawsuit had the support of the Indiana Civil Liberties Union and challenged the searches on Fourth Amendment grounds.[91]

The United States District Court ruled that the roadblock program was constitutional and that the City of Indianapolis did not have to discontinue the program.[92] In a 2-1 vote, a divided Seventh Circuit Appeals Court panel reversed the decision on grounds that the purpose of the roadblock was criminal in nature, violating motorists' Fourth Amendment rights to be free from unreasonable search and seizure.[93]

Judge Posner wrote, "Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. . . . Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime."[94] While the majority was "not enthusiastic about the use of the Constitution to squelch experiments in dealing with serious social problems," Posner wrote that, "[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend . . . the Constitution is not a suicide pact. But no such urgency has been shown here."[95]

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[82] *See id.*
[83] *See id.*
[84] *See id.*
[85] *See id.*
[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] *See id.*
[91] *See* Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999).
[92] *See id.*
[93] *See id.*
[94] *See id.* at 664.
[95] *See id.* at 663, 666.

Judge Posner explicitly stated what the Supreme Court had been implicitly stating for some time: the purpose of the program or search must be realized and passed on before any balancing can be done.[96] He went further to identify four situations in which the purpose of the search was constitutional.[97] First, a roadblock may be instituted to catch a fleeing criminal, since these stops would necessarily have to be made absent individualized suspicion.[98] The stops would not include an attempt to infiltrate criminal activity on the part of motorists; rather, its only purpose would be to identify the fleeing criminal.[99] A second constitutional roadblock would be one designed around an urgent consideration of public safety. The example used by Judge Posner would be a tip to police that a car carrying a substantial amount of dynamite was entering the city with sinister motives.[100] Thirdly, an administrative search, not centered on detection of criminal activity, could be constitutional.[101] Lastly, the overall prevention of illegal importation of either people or goods, the purpose of which would not be for criminal prosecution, would be constitutional.[102] The Indianapolis checkpoint, as the majority found, failed to fall into any of these categories.

In Judge Easterbrook's dissent, he focused on the effects of the roadblock rather than the purpose, stating, "[o]ver and over, the Supreme Court says that the reasonableness inquiry under the Fourth Amendment is objective; it depends on what the police do, not on what they want or think."[103] Judge Easterbrook conceded the law in this area is at best inconsistent, but insisted that the only check on such roadblocks is the political process and the ability to "throw the bums out" if they become too tyrannical.[104]

On November 28, 2000, the Supreme Court decided this case in favor of the respondents.[105] Writing for the majority, Justice O'Connor agreed that the Court has never approved a checkpoint program whose primary purpose was detection of standard criminal activity.[106] The majority's decision rests primarily on two points: 1) an interpretation of the primary purpose of the roadblocks as investigatory in nature; and 2) the urgent nature of addressing issues directly related to *traffic safety* and border control such as curbing drunken driving, checking for licenses and registration, and indicting illegal aliens and goods within purview of the border.[107]

The petitioners suggested that since, in the cases of sobriety stops and border stops, individuals could be, and were subject to criminal charges and prosecution, that those cases primarily involved curbing criminal wrongdoing

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[96] *See id.*
[97] *See id.* at 665.
[98] *See id.* at 666.
[99] *See id.*; *see, e.g.*, United States v. Davis, 143 F. Supp. 2d 1302 (E.D. Ala. 2001).
[100] *See Edmond*, 183 F.3d at 663.
[101] *See id.* at 666.
[102] *See id.*
[103] *Id.* at 667.
[104] *See id.* at 668, 671 ("If this [Indianapolis' roadblock scheme] strikes the wrong balance, the people may throw out of office those who adopted it.").
[105] *See* Indianapolis v. Edmond, 531 U.S. 32 (2000).
[106] *See id.* at 41.
[107] *See id.*

and were indistinguishable from *Edmond's* checkpoint scheme.[108] However, the majority dismissed this argument, stating:

> If we were to rest this case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.[109]

Next, Justice O'Connor used roadway safety concerns to distinguished the roadblocks both in the present case along with the former border patrol cases, from the sobriety checkpoint and license and registration checkpoints in *Sitz* and *Prouse*.[110] She stated that the connection in *Martinez-Fuerte*, "is very different from the close connection to roadway safety that was present in *Sitz* and *Prouse*."[111] She also distinguished the border patrol case of *Martinez-Fuerte* stating that "[w]hile the difficulty of examining each passing car was an important factor in validating the law enforcement technique employed in *Martinez-Fuerte*, this factor alone cannot justify a regime of suspicionless searches or seizures."[112]

The majority did not let the problem of illegal drugs affect its decision nor would it analogize the case to the immediate traffic safety problems existing in *Sitz*, or the difficulties presented in *Martinez-Fuerte*.[113] Additionally, petitioners' argument that including a secondary constitutional purpose to the search, such as checking for license and registration, would thus convert the illegal search to a constitutional one was soundly rejected by the Court on the grounds that "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."[114]

Chief Justice Rehnquist's dissent suggested that checkpoint programs can be instituted "if they are 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.'"[115] He also believed that the majority took a new and unprecedented approach to dealing with roadblock and checkpoint problems, by looking first at the primary purpose of the program before balancing the reasonableness of the program.[116]

However, the majority's approach is not unprecedented, and instead puts Fourth Amendment jurisprudence back on track, lending some badly needed substance to search and seizure protections.

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[108] *See id.* at 42.

[109] *Id.*

[110] *See id.* at 42-43.

[111] *Id.* at 43.

[112] *Id.*

[113] *See id.* at 42. Stating that:

> Petitioners also emphasize the severe and intractable nature of the drug problem as justification for the checkpoint program. There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude. The law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spin-off crime that it spawns.

Id. (citations omitted).

[114] *Id.* at 46.

[115] *Id.* at 49 (citing Brown v. Texas, 443 U.S. 47, 51 (1979)).

[116] *See id.* at 52-56.

III. ANALYSIS

It is well established that "[a]n unconstitutional seizure may render an otherwise constitutional search invalid under the Fourth Amendment if the search resulted from the illegal seizure or detention."[117] It is also "well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment."[118] If a government official performs a warrantless search or seizure without probable cause and it does not fall within one of the specified exceptions, the court will likely find the search or seizure invalid. While "[t]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment,"[119] this principle only applies to individual police conduct based on legitimate probable cause. It does not apply to programs designed and operated by law enforcement for suspicionless criminal investigation.[120] Obviously, if the suspicionless search characterized as non-investigatory is nothing more than a pretext for criminal investigation, it cannot stand. To conclude whether a search is a pre-text, a court must engage in a purpose-inquiry before any other analysis.

As discussed in Part II, the Court's own precedent suggests that a "purpose inquiry" must be made. In *Colorado v. Bertine*, an inventory search that disclosed narcotics was upheld because "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation."[121] In *South Dakota v. Opperman*, marijuana was found after a routine inventory search was conducted and the search was deemed proper because "there [was] no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive."[122] In *Michigan v. Clifford*, an administrative search, conducted after a fire, was allowed; however, the Court had to determine, "whether the object of the search [was] to determine the cause of the fire or to gather evidence of criminal activity."[123] Again, the Court suggested the necessity for a purpose in *New York v. Burger*. In *Burger*, a statute authorizing searches of auto junkyards was deemed constitutional since the statute was not a "'pretext' to enable law enforcement authorities to gather evidence of penal law violations."[124] Even in the context of the "plain view" doctrine, the Court was careful. In *Texas v. Brown*, after a motorist was

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[117] United States v. Arreola-Delgado, 137 F. Supp. 2d 1240, 1245 (D. Kan. 2001).

[118] *Edmond*, 531 U.S. at 40.

[119] Bond v. United States, 529 U.S. 334, 339 n.2 (2000).

[120] *See* Whren v. United States, 517 U.S. 806, 811-12 (1996) ("[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes.").

[121] Colorado v. Bertine, 479 U.S. 367, 372 (1987).

[122] South Dakota v. Opperman, 428 U.S. 364, 376 (1976).

[123] Michigan v. Clifford, 464 U.S. 287, 293 (1984) ("The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined.").

[124] New York v. Burger, 482 U.S. 691, 716 n.27 (1987).

stopped and the officer asked for the motorist's license, the officer noticed narcotics in the car.[125] Chief Justice Rehnquist noted there was "no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses."[126]

While none of these cases explicitly instructed lower courts in how to conduct an appropriate analysis, they did recognize the necessity for courts to look first to the purpose of the roadblock and determine if the program itself was a pretext to discover evidence of criminal law violations.

Thus, the Court created a blueprint to help lower courts determine the legality of a search and/or seizure. First, other than the standard exceptions, all other searches and seizures must be supported by probable cause or individualized suspicion. Secondly, and intrinsically connected to the first, the Court must determine the purpose of the search or seizure in light of the type of search and/or seizure in question. In doing this, the overall government program must be examined to decide if probable cause is necessary.

The Supreme Court in *City of Indianapolis v. Edmond* did precisely this. Chief Justice Rehnquist's dissent accused the Court of "lifting" a "non-law-enforcement primary purpose test" from another area of Fourth Amendment jurisprudence, namely searches of homes and businesses, which are afforded more protection.[127] Of the three dissenters, Justice Scalia did not join in this part of the dissent's opinion.[128] It seemed that the dissent was particularly rankled by the majority's decision not to apply the *Brown* balancing test, which as the dissent suggested, was used in *Sitz* and *Martinez-Fuerte*.[129] The dissent's admonishment to follow stare decisis, however, is a bit over-the-top, as jurisprudence in this area is random and arbitrary in nature.[130] In an attempt to lend force to its argument, the dissent suggested the Court already "rejected an invitation to apply the non-law-enforcement primary purpose test" in *Treasury Employees v. Von Raab*.[131] However, in *Chandler v. Miller*, the majority noted that *Von Raab* should be read narrowly and "in its unique context."[132] These types of inconsistencies can be found in a variety of areas, especially in the area of "special needs."[133]

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[125] *See* Texas v. Brown, 460 U.S. 730, 743 (1983).

[126] *Id.*

[127] Indianapolis v. Edmond, 531 U.S. 32, 53 (2000).

[128] *See id.* at 48.

[129] *See id.* at 52-53. ("These stops effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they only minimally intrude upon the privacy of the motorists.").

[130] *See generally* Dodson, *supra* note 45; Michael S. Vaughn & Rolando v. del Carmen, *"Special Needs" in Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L.J. 203 (1993).

[131] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (In Rehnquist's dissent, he states that this case cites with approval *Martinez-Fuerte* and further states that it was "in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways.").

[132] Chandler v. Miller, 520 U.S. 305, 321 (1997).

[133] *See* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991) (suggesting special needs has been utilized in an inconsistent manner).

Prior to the publication of the Supreme Court decision in *Edmond*, a number of articles were written on the circuit court's opinion. One scholar suggested that a purpose inquiry would be difficult to manage and would open the door to further confusion and erosion of Fourth Amendment rights.[134] Additionally, that scholar argued that an important governmental interest, such as the interest existing in *Chandler*, was to be the basis of the analysis, not the overall purpose of the program.[135]

Another publication suggested the majority's analysis showed a relation to "special needs" analysis, where the "special need" or purpose must be "beyond the normal need for law enforcement."[136] Of the two theories, the latter is the most useful; however, it is interesting that nowhere in Justice O'Connor's analysis of the present case does she elude to special needs.[137] Instead Justice O'Connor engages in a step-by-step analysis of case law in the search and seizure arena, alluding to various aspects and highlights, but never lumping all areas such as administrative, inventory, and the like together in one category.[138] After noting these areas and their relevance in Fourth Amendment jurisprudence, she suggests there is a theme running throughout the precedent case law: primary purpose.[139]

The dissent counters that the primary purpose inquiry is common place for home and business intrusions but not automobiles, because of the reduced privacy interests while driving.[140] The dissent's distinction is irrelevant and one that Justice Thomas astutely questions in his separate dissent, stating his "doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."[141]

The fact of the matter is that the "non-law-enforcement primary purpose" test is the only test that should be used in special needs and roadblock contexts. The Court has contoured the "reasonableness" test over time, expanded it in the late 1980s with *National Treasury Employees Union* and *Skinner*.[142] Strangely enough, the results of this "reasonableness" test have almost always been in the state's favor.[143] This phenomenon would seem to suggest that privacy interests

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[134] *See* Shannon S. Schultz, Note, Edmond v. Goldsmith: *Are Roadblocks Used to Catch Drug Offenders Constitutional?*, 84 MARQ. L. REV. 571, 583-84 (2000) (arguing that while Fourth Amendment rights should not be eroded further, the Circuit Court, "in an unprecedented move," failed to use the *Brown* reasonable test, thus "opening itself up to a more subjective analysis . . . opening the door for abuse").

[135] *See id.* at 582.

[136] *See* Recent Cases, *supra* note 45, at 831-33 (suggesting that the Circuit Court's analysis poses a "threshold inquiry" into the "special need" for the program with the "purpose" of the program).

[137] *See* Indianapolis v. Edmond, 531 U.S. 32 (2000).

[138] *See id.*

[139] *See id.* at 39-40. ("[W]hat principally distinguishes these checkpoints from those we have previously approved is their primary purpose.").

[140] *See id* at 53.

[141] *Id.* at 56.

[142] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[143] *See, e.g.*, Am. Fed'n of Gov't Employees v. Roberts, 9 F.3d 1464 (9th Cir. 1993) (upheld drug testing of federal prison guards); Int'l Bhd. of Teamsters v. Dep't of Transp.,

in this country, are not particularly important to the Court when weighed against the government's interests. In fact, other than *Chandler v. Miller*, where political candidates were forced to submit to drug testing, the Court has never invalidated a search program under the special needs balancing test prior to *Edmond*. Interestingly and perhaps clairvoyantly, the *Chandler* Court, refrained from using the balancing test until a preliminary showing of a "special need" was made.[144] Nonetheless, the "special needs" test should be scrapped and replaced with a primary purpose test. By employing a "primary purpose" test, the Court can provide some predictability to what formerly existed as "special needs" and roadblock searches.

Since the Court has not defined what a "special need" is, the Court has allowed lower courts to arbitrarily weigh governmental interests against virtually non-existent private interests, essentially condoning continued violations of the Fourth Amendment.[145] Usually, the government interest is the publicly supported and popular "war on drugs."[146] In fact, Justice Marshall's dissent in *Skinner*, argued against the "special needs" balancing test and pointed out that courts have allowed, "basic constitutional rights to fall prey to momentary emergencies."[147] The Court adopted Justice Marshall's view in the case of *Ferguson v. City of Charleston*,[148] where the Court struck down a South Carolina hospital's policy of turning over urine samples showing cocaine use in pregnant women to the authorities. While the lower court attempted to rationalize the Fourth Amendment violations away as nothing more than special needs, the Supreme Court did not.[149] Not only did the majority dismiss the so-called urgency of the drug problem, it also followed *Edmond's* test and other precedent, ultimately deciphering the program's purpose and finding an unconstitutional investigatory purpose.[150]

Like with drugs and "special needs," the Court has used public safety as an excuse to disregard Fourth Amendment protections, specifically in the context of roadblock cases.[151] Courts have upheld "special needs" searches based on public safety in some circumstances; however, there is nothing particularly "special" about public safety laws.[152] In fact, the "special needs" doctrine developed from public education cases, where the Court considered school discipline a "special need." Public education cases, however, did not deal with the kinds of public safety laws that subsequent cases have, such as criminal laws, traffic laws, and others.[153] Using public safety as an inroad to destroy Fourth

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932 F.2d 1292 (9th Cir. 1991) (upheld drug testing of commercial truck drivers); Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (upheld drug testing of airline employees).

144 *See* Chandler v. Miller, 520 U.S. 305 (1997).

145 *See* Dodson, *supra* note 45.

146 *See id.*

147 *See Skinner*, 489 U.S. at 635.

148 532 U.S. 67 (2001).

149 *See id.*

150 *See id.*

151 *See* Delaware v. Prouse, 440 U.S. 648 (1979) (roadblock stops would be lawful in terms of highway safety); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoint constitutional since it was aimed at reducing traffic hazards created by drunk drivers).

152 Dodson, *supra* note 45, at 272.

153 *See id.* at 271-72.

Amendment rights will result in legislatures passing laws allowing warrantless searches and seizures, and will require courts to uphold these laws based on public safety needs.[154] This slippery slope argument is particularly strong in the "special needs" arena because it has, for the most part, come true. "Special needs" has become a complete authorization of judicial tolerance towards government entities violating Fourth Amendment protections.

If public safety concerns always override Fourth Amendment requirements in the Court's collective view, it is worth questioning, as Justice Thomas did in his dissent,[155] whether *Sitz* was decided correctly given the only difference between *Sitz* and *Edmond* is the distinction between traffic safety and criminal investigation.

Justice Thomas rightly questioned the border cases such as *Martinez-Fuerte*,[156] where the primary purpose behind the search in *Martinez-Fuerte* was a criminal investigation using immigration laws against the transporters of undocumented immigrants and the immigrants themselves.[157] It is true that individuals who violated the border controls were subject to arrest and prosecution, just as those who violated other regulatory schemes were subject to arrest and prosecution. In fact, the Court has said that as long as there is a legitimate non-investigatory purpose, and evidence of a crime is found in the process of the so-called legitimate search, then that evidence can be used against the individuals for criminal prosecution.[158]

This result demonstrates the Court's willingness to manipulate the "reasonableness" test in order to obtain the outcome it wants, and is why "special needs" tests should be abandoned entirely and replaced with a primary purpose test. Some might argue that the primary purpose of the programs in *Sitz*, *Prouse*, and *Martinez-Fuerte*, was not criminal law-enforcement. However, if government officials collect evidence of criminal wrongdoing, and that evidence can be used in a criminal proceeding, then the Fourth Amendment requirements of warrant and/or probable cause should be followed unmercilessly.

Roadblocks are conducted largely for the purpose of investigating criminal activity, and courts have readily followed that premise in their decisions.[159] As previously noted, it is not inconsistent with precedent to look at the purpose of the program before conducting a reasonableness analysis.[160]

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[154] *See id.* at 274.

[155] *See* Indianapolis v. Edmond, 531 U.S. 32, 56 (2000).

[156] *See id.*

[157] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[158] *See id.*; Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

[159] *See, e.g.*, Wrigley v. State, 546 S.E.2d 794 (Ga. Ct. App. 2001) (roadblock held constitutional because its primary purpose was not to interdict illegal drugs); United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998) (evidence seized at roadblock unconstitutional because the primary purpose of the program was to interdict illegal drugs); United States v. Morales-Zamora, 974 F.2d 149 (10th Cir. 1992) (seizure of drugs unconstitutional regardless of the fact that the stop checked licenses as well). *But see* State v. Damask, 936 S.W.2d 565 (Mo. 1996) (roadblock designed to interdict drugs upheld); United States v. Yousif, 2000 WL 1916534 (E.D. Mo. 2000).

[160] *See* Chandler v. Miller, 520 U.S. 305 (1997).

Moreover, there is no confusion about whether a program can have a valid secondary purpose, overriding its invalid primary purpose as some have worried the circuit court left open.[161] The City of Indianapolis unsuccessfully argued that the checkpoints in this case had a valid secondary purpose, checking licenses and registrations. This regulatory purpose, possibly valid under *Prouse*, would then validate the roadblock program and invoke the *Brown* balancing test. The Circuit Court left this question open, suggesting that only one of the purposes need be constitutional;[162] however, both parties in *Edmond* stipulated that the purpose of the primary program was to interdict drugs.[163] There is further objective evidence referred to in the opinion by Justice O'Connor, dispelling any doubt about the primary purpose of the roadblocks.[164] Use of a drug-sniffing dog would hardly be helpful in identifying unlicensed and unregistered drivers.

Even if the City had a valid secondary purpose, checking licenses and registration – which could pass the *Brown*-balancing test – the majority answered the question as to whether a valid secondary purpose is enough to deem the entire program constitutional. If secondary purposes could justify illegal primary purposes, the Court noted that "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety checkpoint."[165] Therefore, the only way to combat such a situation would be to first evaluate the primary purpose of the program. While the majority, "recognize[d] the challenges inherent in a purpose inquiry," they also suggested that, "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful."[166] Therefore, a secondary purpose that is valid after balancing the governmental interests against the private interests, simply will not override the primary and unconstitutional purpose of conducting drug-interdiction roadblocks.

Since Indianapolis' purpose is clearly to catch drug traffickers, a standard criminal investigation, continuing the analysis to the *Brown* balancing test is not appropriate. Thankfully, in *Edmond*, determining the purpose was not particularly difficult. The dissent suggested that looking into the subjective inten-

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[161] *See* Schultz, *supra* note 134, at 583-84.

[162] *See* Edmond v. Goldsmith, 183 F.3d 659, 665 (7th Cir. 1999). Stating that:

> If the purpose of the roadblock program were to discover such violations, and if a program having such a purpose could be justified under the cases that allow searches and seizures without individualized suspicion of wrongdoing, then the seizure, in the course of such searches, of drugs that were in plain view would be lawful.

Id.

[163] *See* Indianapolis v. Edmond, 531 U.S. 32, 39-40 (2000).

[164] *See id.*

> In their stipulation of facts, the parties repeatedly refer to the checkpoints as "drug checkpoints" and describe them as "being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis." In addition, the first document attached to the parties' stipulation is entitled "DRUG CHECKPOINT CONTACT OFFICER DIRECTIVES BY ORDER OF THE CHIEF OF POLICE."

Id. (citations omitted).

[165] *See id.* at 46.

[166] *See id.* at 46-47.

tions of personnel is impracticable and not warranted based on case law.[167] However, looking into the mental state of those establishing the program is certainly no more impracticable than balancing undefined state interests against apparently non-existent individual privacy interests.

At the end of the day, while drugs are of serious concern in today's environment, a checkpoint exception to the Fourth Amendment must not be created, nor should any other exceptions. Prior cases have made the argument that the urgency of the drug problem should produce some leeway in the requirements of the Fourth Amendment,[168] but the Court has been leery to explicitly state such a proposition.[169] The Court should also be mindful that "'the reasons for creating an exception in one category can, relatively easily, be applied to others,' thus, allowing the exception to swallow the rule."[170] While the Court may be ready to create a "traffic safety exception," it should be cognizant of the fact that the drug problem does not directly relate to traffic safety in the same way that sobriety checkpoints and license and registration checkpoints do. If, at the dissent's insistence, the *Brown* balancing test were to be the start of the analysis, the balancing test could continue to be used as a weapon against individual rights, and would most certainly, in the case of drugs, weigh in favor of the government. On the other hand, if the program's primary purpose is the starting point, the Court would acknowledge the illegality of schemes such as Indianapolis' roadblocks, irrespective of the societal problems that substance abuse creates.

IV. CONCLUSION

With the Court's inclination to balance factors in favor of the government in a substantial amount of Fourth Amendment cases, and with the "war on drugs" supplanted firmly in the minds of several of the Justices, the majority in *Edmond* reached a prudent decision. Realizing the inconsistency in prior decisions, the Court has set forth a roadmap which lower courts are able to follow and has taken a step forward in re-establishing the Fourth Amendment.

Fourth Amendment jurisprudence has become nothing more than a hodgepodge of policies, rules, and exceptions, rarely working in a cooperative fashion. Further, readers of the Fourth Amendment who suggest that reasonableness be the standard, fail to realize that with few exceptions, the government's

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[167] *See id.* at 50-51.

[168] *See generally* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[169] *See* Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 474 (1979). Stating that:

> Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizure simply because of a generalized urgency of law enforcement.

Id.; Richards v. Wisconsin, 520 U.S. 385, 392 (1997) ("It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment.").

[170] *See* Florida v. J.L., 529 U.S. 266, 273 (2000) (quoting *Richards*, 520 U.S. at 393).

interest outweighs that of the individual especially when the warrantless search and seizure occurs outside the home or inside the car.

In *Indianapolis v. Edmond*, the Court explicitly stated what for years had been the obvious underlying theme of many cases involving search and seizures: that the underlying purpose cannot be one of a criminal investigation. If that purpose were the case, it is unreasonable in this context to seize motorists without individualized suspicion and search their automobiles through the use of plain view tactics and drug-sniffing dogs, to look for drugs and drug paraphernalia. Not only is the conduct unreasonable, for those who read the warrant requirement of the Fourth Amendment as controlling, it is even more unreasonable because no warrant was obtained for any stop. One might argue that it is impracticable for the police to secure warrants for all cars being stopped in what is a random roadblock. And since the automobile exception cannot be extended without probable cause, the only option is to develop a "checkpoint exception" or deem these stops constitutional. The Court chose the latter.

LAW OF THE CASE IN NEVADA: CONFUSING RELATIVES

Scott Doney*

Law of the case belongs to the family of preclusion doctrines including, collateral estoppel, res judicata, and stare decisis.[1] Under the law of the case doctrine, when an issue is decided in a particular case, the parties of that case cannot relitigate the same issue in any subsequent proceeding.[2] For example, consider Lenny, a defendant in a criminal case who is convicted of murder and decides to appeal an evidentiary ruling of the trial judge. Once the appellate court decides that particular issue on appeal, Lenny cannot relitigate that same issue in a petition for post-conviction relief in the trial court below, or in any further proceeding in the appellate court. The decision of the first appeal becomes the "law of the case" precluding further consideration of that issue. The purpose of the doctrine is to ensure efficient resolution of issues.[3] Once a court decides a legal issue, it is generally "inefficient" to reconsider that issue.[4] "Simplicity is achieved by narrowing the scope of review" of issues presented to courts in subsequent proceedings.[5]

Jurisdictions vary on how strictly they apply the doctrine. Some jurisdictions *absolutely* refuse to consider an issue once decided regardless of the reason.[6] This Note refers to this view as the "no power theory," meaning the court has no power to reconsider the issue.[7] Hence the nickname, "the right or wrong doctrine," signifying adherence to the prior ruling even though the court believes the ruling was wrongfully decided.[8] In other jurisdictions, the doctrine is less strict, providing departures in certain circumstances.[9] These jurisdictions reject the no power theory in favor of correcting a possible erroneous outcome.[10]

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[1] Joan Steinman, *Law of the Case: A Judicial Puzzle In Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 598 (1987).

[2] *Id.* at 597-98; Note, *An Alternative Analysis of Law of the Case: Rethinking* Loveday v. State, 44 MD. L. REV. 177, 180 (1985).

[3] Brett T. Parks, McDonald's Corp. v. Hawkins *and "The Law of the Case" Doctrine in Arkansas*, 50 ARK. L. REV. 127, 136-37 (1997).

[4] Steinman, *supra* note 1, at 602.

[5] Parks, *supra* note 3, at 127.

[6] E.H. Schopler, *Erroneous Decision As Law of the Case On Subsequent Appellate Review*, 87 A.L.R.2d 271, §§ 3(a), 6 (1999).

[7] Wright v. Carson Water Co., 39 P. 872, 874 (Nev. 1895).

[8] Parks, *supra* note 3, at 136.

[9] Schopler, *supra* note 6, § 3(a).

[10] *Id.* §§ 3(a), 6.

Depending on the particular view adopted, courts compare their interpretation of law of the case to a related preclusion doctrine.[11] Some courts explain law of the case as res judicata; other courts explain law of the case as stare decisis.[12] Law of the case is related to stare decisis because both entail conformity of law to prior decisions: law of the case applying to the immediate case between the parties, and stare decisis covering any future case as well.[13] Another commonality between the two is the principle of departure, which permits courts to overrule erroneous decisions.[14]

Res judicata[15]on the other hand, is generally not subject to departure principles.[16] Law of the case also differs from res judicata because it lacks the "necessary to the judgment" standard required by res judicata.[17] Law of the

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[11] Parks, *supra* note 3, at 130-31 (comparing law of the case with res judicata, collateral estoppel, and stare decisis) (for examples of cases dealing with these issues, see the endnotes on these pages). Res judicata holds that a party may only sue on a single claim once. Collateral estoppel prevents relitigation of issues litigated and decided in the first case. Finally, stare decisis, also known as the doctrine of precedent, requires that all future decisions follow a particular rule of law set forth by an appellate court. RICHARD D. FREER & WENDY C. PURDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 647-48 (2d ed. 1997). For an historical perspective concerning the family of preclusion doctrines, see SPENCER BOWER, THE DOCTRINE OF RES JUDICATA (1924).

[12] *See* Schopler, *supra* note 6, § 1(a) (discussing cases that mesh law of the case with the preclusion doctrines res judicata and stare decisis).

[13] Parks, *supra* note 3, at 131.

[14] Steinman, *supra* note 1, at 599 n.10; Greene v. Rothschild, 402 P.2d 356 (Wash. 1966).

> Under the doctrine of stare decisis, the court is not obligated to perpetrate its own errors. This doctrine means that the rule laid down in any particular case is applicable to another case involving identical or substantially similar facts . . . . We see no reason why this principle should not apply where the allegedly erroneous decision is one which was rendered on a prior appeal of the same case.

Id.

[15] Throughout this note, res judicata will refer to both res judicata and collateral estoppel. Res judicata actually encompasses both doctrines. Citizens for Prot. of N. Kohala Coastline v. County of Hawaii, 979 P.2d 1120, 1128 (Haw. 1999); *In re* the Marriage of Mallon, 956 P.2d 642, 644 (Colo. Ct. App. 1998); *In re* Estate of Hinderliter, 882 P.2d 1001, 1004 (Kan. Ct. App. 1994); Babcock v. State, 768 P.2d 481, 486-87 (Wash. 1989).

[16] FREER & PURDUE, *supra* note 11, at 648-49; Schopler, *supra* note 6, § 3(a) ("There is a difference between the principle of the law of the case and the doctrine of res judicata: the former 'directs discretion,' the latter 'supersedes it and compels judgment'; in other words, the latter is 'a question of power,' the former one 'of submission.'") (citing S.R. Co. v. Clift, 260 U.S. 316, 319 (1922) to discuss the difference between res judicata and law of the case); Greene v. Rothschild, 402 P.2d 356 (Wash. 1966) (distinguishing res judicata, a "uniform rule," from law of the case, a "discretionary rule") (citing United States v. U.S. Smelting Refining & Mining Co., 339 U.S. 186 (1950)). The Ninth Circuit, in Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833-34 (9th Cir. 1982), provided that:

> [t]he law of the case principle is analogous to, but less absolute a bar than, res judicata. [citation omitted]. Although the law of the case rule does not bind a court as absolutely as res judicata, and should not be applied "woodenly" when doing so would be inconsistent with "considerations of substantial justice," . . . the discretion of a court to review earlier decisions should be exercised sparingly so as not to undermine the salutory policy of finality that underlies the rule.

Id.

[17] Steinman, *supra* note 1, at 598 n.8; Harris v. Harris, 591 P.2d 1147, 1148 n.1 (Nev. 1979) (describing the "essential to the judgment" element under collateral estoppel); Clark v. Clark, 389 P.2d 69, 71 (Nev. 1964) (stating that under collateral estoppel an issue must be "necessarily determined").

case may apply to any issue presented, deliberated, and decided while res judicata requires a decisive issue.[18] For this reason, res judicata is more narrowly applied.[19]

The preclusion doctrine to which courts relate law of the case is significant to litigants. An example illustrates this significance. Consider Lenny, the convicted murderer who appealed his conviction. The appellate court decided against his claim of error on the evidentiary ruling in the trial court. Suppose on that issue, the court decided that hearsay is admissible if the hearsay is a victim's written statement about the defendant. Suppose, however, the same court heard that issue again only a year later, in a different case, and held to the contrary – a victim's written statement about the defendant is hearsay and inadmissible. Meanwhile, after hearing the outcome of this case, Lenny filed a second appeal again raising the issue of the victim's written statement. Facing these contradictory opinions, the court must decide how to treat Lenny's second appeal.

Whether law of the case operates like stare decisis or res judicata is vital in this hypothetical. If law of the case operates like stare decisis, the court may recognize the erroneous conclusion and reconsider Lenny's issue. On the other hand, if the law of the case operates like res judicata, the court would simply estopp Lenny from raising the issue.

This note argues that law of the case in Nevada should operate more like stare decisis than the other preclusion doctrines and allow for instances of departure from prior rulings. Currently this is not so. In Nevada, "[t]he law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same."[20] Moreover, the Nevada Supreme Court claims it has no power to revisit prior issues already decided.[21] Hence, even if the prior ruling is erroneous, no longer sound, or might work a manifest injustice, the court refuses to reconsider the issue.[22] In Nevada, law of the case is treated like res judicata.[23] Law of the case, however, should be treated like stare decisis; the court should have the discretionary power to overrule.

If Nevada's version of law of the case is applied to Lenny's situation, he loses miserably. Even if the Nevada Supreme Court openly admitted that its prior decision was wrong, it could not entertain the issue on Lenny's second appeal since it claims to have no power to do so. Also unfortunate is the fact that the court's intervening ruling, which changed precedent under the second appeal, will not be applied to Lenny's case for the same reason. Both of these results are unfair to Lenny.

Part One of this Note tracks law of the case as it developed in Nevada and discusses why the court adopted the no power theory. The history of law of the case in Nevada illustrates the inconsistencies prevalent in the doctrine. Part

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[18] *Compare Clark*, 389 P.2d at 71, *with* State v. Loveless, 150 P.2d 1015, 1017-18 (Nev. 1944).

[19] *Id.*

[20] Hall v. State, 535 P.2d 797, 798 (Nev. 1975).

[21] *Loveless*, 150 P.2d at 1017 (quoting Walker v. State, 455 P.2d 34, 38 (Nev. 1969)).

[22] The litigant's only recourse lies in a petition for rehearing, which, for all intents and purposes, is meaningless in the above hypothetical. *See id.* at 1017; NEV. R. APP. P. 40.

[23] Cartan v. David, 4 P. 61, 65 (Nev. 1884).

Two summarizes the main elements of Nevada law of the case doctrine, then offers a critique of the Nevada approach, which highlights some of these inconsistencies and provides an alternative approach.

I. LAW OF THE CASE IN NEVADA: THE FOUNDATIONAL CASES

Interestingly, in early Nevada law, the Nevada Supreme Court had the opportunity to treat law of the case like stare decisis. Instead, the court chose to adopt the no power theory.

A. *Linn v. Minor*

The 1869 case, *Linn v. Minor*,[24] was one of the first cases to discuss stare decisis in Nevada. In this case, the court was called upon to consider (1) whether a particular act of the Nevada legislature was repugnant to an act of Congress, and (2) if not, whether the court should overrule cases that say the Nevada act is repugnant to the act of Congress. On the first issue, the court found that the Nevada act was not repugnant to the Congressional act.[25] It therefore, with some reservation, overruled prior cases that said otherwise. "[A] decision once made upon due deliberation ought not to be disturbed by the same Court, except upon the most cogent reasons and upon undoubted manifestation of error."[26] The court discussed the need for the finality of the issue, yet argued that finality and stability of the law should sometimes capitulate to progress in the law.[27] "[E]ven this backwardness to interfere with previous adjudications does not require us to shut our eyes upon all improvements in the science of the law, or require us to be stationary while all around us is in progress."[28] Ripe before the court was the struggle between finality of decision and correctness of decision. The court did not employ a rule that unduly restricted its review of these competing principles, but rather, the court preferred treating these cases on an *ad hoc* basis.[29] "Circumstances of each particular case . . . whether it may only be doubtful or clearly against principle, whether sustained by some authority or opposed to all: these are all matters to be judged of *whenever* the Court is called on to depart from a prior determination."[30]

The court's foregoing admonition necessarily includes law of the case. The court, however, did not heed the admonition. Instead, it chose to restrict its power to revisit an issue already decided.

A few years later, in *Winston*,[31] the petitioner sought relief from his conviction of gaming on the Lord's Day. The petitioner argued that a law passed in 1869 repealed an 1861 law that empowered criminal prosecution for gaming

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[24] 4 Nev. 462 (1869).
[25] *Id.* at 463.
[26] *Id.* at 465-66.
[27] *Id.*
[28] *Id.* at 466.
[29] *Id.* at 466-67.
[30] *Id.* (emphasis added).
[31] 9 Nev. 71 (1873).

on the Lord's Day.[32] The court held that the petitioner's writ for habeas corpus was not the same as a writ of error.[33] The justice of the peace, by expressed provisions, had *jurisdictional* authority to determine whether the 1869 law repealed the 1861 law.[34] Having found that it did not, the appropriate remedy for petitioner was a writ of error to the district court, not a re-determination of the issue already decided by a competent magistrate with jurisdictional power.[35] "The judgment of a court of record, whose *jurisdiction* is final, is as conclusive on all the world as the judgment of this Court would be."[36] The court held that a habeas corpus petition to the Nevada Supreme Court is tantamount to asking the court to rehear that legal issue. Law of the case precluded revisitation because the court "ha[d] no power to say whether it is right or wrong."[37]

By restricting its power to revisit issues, the court threw a blanket of approval over past decisions whether rightly or wrongly decided. The "right or wrong" view of law of the case is a public policy notion rooted in principles of finality and efficiency.[38] As such, law of the case in Nevada drifted from its brother stare decisis and followed its cousin res judicata.[39] In *State v. Consolidated Virginia Mining Co.*,[40] the appellant argued that the doctrine better resembles res judicata than stare decisis because it is not triggered by strength or correctness of argument, but by applicability of estoppel principles to bar successive issues.[41] Two years later, in *Cartan v. David*,[42] the Nevada Supreme Court deemed law of the case – "*res judicata* between the . . . parties."[43]

B. Wright v. Carson Water Co.

Before 1895, the court failed to articulate with any depth, its reasons and policies for adopting a stricter construction than called for in *Linn v. Minor*. This all changed with the seminal cases – *Wright v. Carson Water Co. I*[44] and *Wright v. Carson Water Co. II*.[45] In the original case of *Wright v. Carson Water Co.* [hereinafter *Wright I*], Wright brought an action in the Nevada courts to enforce a promissory note allegedly executed by the president and secretary of Carson Water Co.[46] The trial court, in a bench trial, awarded

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[32] *Id.*
[33] *Id.* at 75.
[34] *Id.* at 76.
[35] *Id.* at 78.
[36] *Id.* at 76.
[37] *Id.* at 75.
[38] Parks, *supra* note 3, at 136-37.
[39] *Id.* at 131 n.36; Allen D. Vestal, *Law of the Case: Single-Suit Preclusion*, 12 UTAH L. REV. 1, 2 (1967) (referring to law of the case as twin brother of stare decisis).
[40] 16 Nev. 432 (Nev. 1882).
[41] *Id.* at 432.
[42] 4 P. 61 (Nev. 1884).
[43] *Id.* at 65.
[44] 39 P. 872 (Nev. 1895) [hereinafter *Wright I*].
[45] 42 P. 196 (Nev. 1895) [hereinafter *Wright II*].
[46] *Wright I*, 39 P. at 873.

Wright judgment on the note.[47] The district court granted a new trial and Wright's estate (Wright was by then deceased) appealed.[48] The Nevada Supreme Court affirmed the ruling of the district court.[49] In the second trial, this time by jury, Carson Water Co. moved to exclude the note from evidence.[50] The trial court excluded the note and Wright's estate appealed the judgment.[51]

Wright argued that since a witness did not testify in the second trial they should be allowed to reargue the issue of the note's validity.[52] The court found that the issue was "properly presented, argued, and contested on the former hearing."[53] Furthermore, the decision "went to the essence of the case."[54] After establishing that the doctrine is applicable to a distinct set of facts adjudicated between distinct parties, the court addressed the binding nature of the prior decision on all future decisions:

> [T]he law of the case [is] not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart. The supreme court has no power to review its own judgments in the same case, except upon petition for rehearing, in accordance for the rules established for the purpose. Such are the decisions of more than two hundred cases, decided in more than thirty states of the Union, besides a great number of the federal courts, including the Supreme Court of the United States.[55]

Important to note from this excerpt is that the court reaffirmed its no power stance regarding revisitation of issues.[56] It adopted this construction from the majority view at the time, as outlined in a book by Herman entitled, *Estoppel and Res Judicata*.[57] This book indicates that some two hundred cases favored the no power theory.[58]

The Nevada Supreme Courts' fixation on this construction will be shown in later cases throughout the twentieth century until today.[59] This occurred despite the fact that many of the jurisdictions Nevada relied upon in *Wright I* abandoned the no power theory.[60]

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47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.* at 873-74.
56 *See Ex parte* Winston, 9 Nev. 71 (1873).
57 *Wright I*, 39 P. at 874 (citing HERMAN ON ESTOPPEL AND RES JUDICATA).
58 *Id.*
59 *See* State v. Loveless, 150 P.2d 1015, 1017 (Nev. 1944); Sherman Gardens Co. v. Longley, 491 P.2d 48 (Nev. 1971); Emeterio v. Clint Hurt and Assoc., Inc., 967 P.2d 432 (Nev. 1998).
60 For example, the federal circuits and the U.S. Supreme Court abandoned this view. United States v. Paquette, 201 F.3d 40 (1st Cir. 2000); Counsel of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999); United States v. Aramony, 166 F.3d 655 (4th Cir. 1998); Gates v. Shell Offshore, Inc., 881 F.2d 215 (5th Cir. 1989); Holloway v. Brush, 220 F.3d 767 (6th Cir. 2000); Creek v. Vill. of Westhaven, 144 F.3d 441 (7th Cir. 1998); Little

In the sequel, *Wright v. Carson Water Co.* [hereinafter *Wright II*], Wright's estate filed a petition for rehearing to the Nevada Supreme Court arguing that the second appeal disclosed a different set of facts from the set of facts disclosed on the first appeal.[61] The court evidently found the basis for its decision concerning the note, which it skimmed over in *Wright I*, and went into depth on the ratification process to form an implied contract absent express authorization of corporate board members.[62] The court held that law of the case precluded revisitation of the issue because the new alleged facts, immaterial at best, *related to* decisive issues presented in the first appeal.[63]

In his dissent, Chief Justice Bigelow criticized the majority's decision concerning law of the case on two points. First, he asserted that law of the case only binds decisive issues presented before the court, not dicta.[64] On the first appeal, the decisive factor was review of the district court's grant of a new trial.[65] Conversely, the decisive factor presented in the second appeal was the court's ruling on an evidentiary matter.[66] He, therefore, found the decision on the first appeal was "uncalled-for expressions of opinion" not binding in the second appeal.[67] Second, he stated that whether the corporation's conduct amounted to an implied contract was a question of fact for the jury to decide.[68] "It is upon questions of law, and not upon questions of fact, that the decision of the court becomes law of the case."[69] Evidence surrounding the validity of the note should not be precluded by law of the case, when appellants are arguing mutated facts.[70]

II. DEVELOPMENT OF THE DOCTRINE IN THE TWENTIETH CENTURY

Not much has changed in the years following the *Wright* cases. The court has worked on fine-tuning the doctrine. The heated discussion about applying the doctrine lingered and although the court started making exceptions, it left the rule essentially intact.

Earth of United Tribes, Inc. v. U.S. Dep't of Hous. & Urban Dev., 807 F.2d 1433 (8th Cir. 1986); Coleman v. Calderon, 210 F.3d 1047 (9th Cir. 2000); Greene v. Safeway Stores, Inc., 210 F.3d 1237 (10th Cir. 2000); Royal Ins. Co. v. Latin Am. Aviation Serv., Inc., 210 F.3d 1348 (11th Cir. 2000); Gould, Inc. v. United States, 67 F.3d 925 (Fed. Cir. 1995); Kimberlin v. Quinlan, 199 F.3d 496 (D.C. Cir. 1999); Arizona v. California, 460 U.S. 605 (1983).

[61] Note that the court is revisiting its decision in *Wright I* because of the nature of the petition. This is not a subsequent appeal to the Nevada Supreme Court, but a petition for rehearing. In *Wright I*, the court allowed revisitation of issues upon a petition for rehearing. 39 P. at 874.

[62] *Wright II*, 42 P. 196, 197-98 (Nev. 1895).

[63] *Id.* at 198.

[64] *Id.* at 200 (Bigelow, C.J., dissenting).

[65] *Id.* at 200-01.

[66] *Id.*

[67] *Id.* at 200.

[68] *Id.* at 201.

[69] *Id.*

[70] *Id.*

A. *Law of the Case & Dictum*

One important mid-century case discussed the posture of law of the case on issues of dicta. In *State v. Loveless*,[71] the jury convicted the defendant of murder.[72] The defense appealed the judgment, and the Nevada Supreme Court reversed sua sponte rather than by points brought on appeal.[73] The court refuted, in all respects, the points raised by the defense.[74] The jury again convicted the defendant on the identical charge, and again the defense appealed.[75] This time, in conjunction with oral argument, the state moved to strike points made by the defense on the first appeal.[76] The defense responded by arguing that issues rejected in the first opinion were merely dictum, as the court ultimately raised the decisive issue, and should be heard again.[77] In response to the defense's claim, the court defined obiter dictum as "an opinion expressed by a Judge on a point not necessarily arising in a case."[78] Such issues relate to "some point not discussed at bar."[79] Distinguished are those types of issues for which actual questions were raised in the former appeal which "the court deliberately considered and decided."[80] Since issues were briefed, argued, deliberated upon, and decided in the first appeal, they were not obiter dictum and therefore amenable to law of the case.[81] This was true despite the fact that reversal occurred on different grounds.[82] The issues decided on the first appeal were necessary "to establish the law of the case on all points involved, and for the guidance of the lower court."[83]

Necessarily then, some dictum binds a subsequent appeal. True, obiter dictum will not carry authority to the next appeal, and hence is not part of law of the case. However, *judicial dictum* will. While obiter dictum relates to collateral matters not raised on appeal, judicial dictum relates to questions raised and decided on appeal albeit having no bearing on the outcome of the case.[84] Logically, issues decided by an appellate court must transmit to the lower court as mandatory authority for guidance purposes.[85] If so, then the same issues ought to bind any subsequent appeal.

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[71] 150 P.2d 1015 (Nev. 1944).
[72] *Id.* at 1016.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Chief Justice Bigelow argued similarly. *See supra* notes 64-70 and accompanying text.
[78] 150 P.2d at 1018.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *See* Lanigir v. Arden, 450 P.2d 148 (Nev. 1969) (holding that the issue raised on the second appeal is not precluded because it was only indirectly mentioned in the first appeal, and the issue was not "specified" as error); Sherman Gardens Co. v. Longley, 491 P.2d 48 (Nev. 1971) (holding that the trial court cannot imply from the previous opinion "law of the case" unless the issue was presented, considered, and deliberately decided).
[85] This is probably the most valuable component of the doctrine. If a district or trial court on remand were able to sidestep the higher courts instructions, chaos would ensue. This occurrence, interestingly, is not infrequent. *See, e.g.*, LoBue v. State, 554 P.2d 258 (Nev.

Stare decisis differs from law of the case because it arguably implicates neither type of dictum. In other words, only decisive issues would fall under stare decisis analysis. Law of the case, on the other hand, abounds under judicial dictum and the decisive issue in the case. Therefore, law of the case tends to be broader in application. *Loveless*, however, changed this distinction:

> We are aware that it has been held that judicial dictum is not of equal binding force as an authority, as the point on which the decision of the case turned. But we think this is a rule too rigid to be recognized as the law of this jurisdiction . . . . "So it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in the fullest extent."[86]

Because the court put judicial dictum and the decisive issue of the case on the same level, there is no real fundamental difference between stare decisis and law of the case. Hence, cases establishing the law of the case doctrine should have followed the principles outlined in *Linn v. Minor*. If the court is to be consistent, there is no reason why the case at bar deserves stricter treatment regarding principles of departure than future cases with similar issues. Law of the case should not apply in erroneous decisions.

B. The Family Feud Continued

The debate regarding the integrity of law of the case continued in *Hotel Riviera, Inc. v. Short*,[87] wherein the majority held to its nineteenth century roots.[88] Upon reversal of summary judgment for defendants on a particular theory of law, the trial continued on remand and a jury awarded compensatory and punitive damages for plaintiff.[89] Defendants appealed.[90] The court found that the facts remained substantially the same from the summary judgment ruling to the end of the trial.[91]

On appeal, defendants claimed, inter alia, that the rule of law adopted from the appeal of the summary judgment was erroneous and should be overruled.[92] Plaintiff responded stating, "the prior ruling was not so 'clearly and palpably erroneous' and the alleged error was not 'so unjust' as to justify this court to reverse the ruling in that decision."[93] The plaintiff largely based his argument on *stare decisis* principles from the cases cited in the opinion.[94] The plaintiff's counsel improvidently equated Nevada law pertaining to stare decisis with law of the case, conceding that the court may have power to overrule a prior decision in the same case.[95] Fortunately, for the plaintiff, the court better

1976); Molino v. Asher, 618 P.2d 878 (Nev. 1980); Andolino v. State, 662 P.2d 631 (Nev. 1983); State v. Alper, 706 P.2d 139 (Nev. 1985).

[86] 150 P.2d at 1019 (quoting in part 1 BOUVIER'S LAW DICTIONARY 83 (3d ed.)).

[87] 396 P.2d 855 (Nev. 1964).

[88] *Id.*

[89] *Id.* at 856.

[90] *Id.*

[91] *Id.* at 856.

[92] *Id.* at 859.

[93] *Id.* at 861.

[94] *Id.*

[95] *Id.*

understood the Nevada doctrine and held in his favor.[96] Distinguishing law of the case from stare decisis, the court commented, "[t]his weight falls even more heavily in the present case, for our ruling in the previous case became the law of this case."[97] Apparently, the court loosely interpreted the strict construction of *Wright I*, as it seemed to describe the difference between stare decisis and law of the case as only a matter of degree.

The dissent, written by Justice Thompson, criticized the majority's use of law of the case. Justice Thompson argued that the doctrine "should never be invoked to require the perpetuation of error."[98] He continued, "[a] court need not be ashamed to acknowledge its mistake and correct it before damage results. Though embarrassing, it is the only honorable course."[99] The argument was of course, nothing new. Peculiar to Justice Thompson's approach, however, was that for the first time since *Wright I*, an often-cited publication supported the argument. This publication, written by E.H. Schopler, was an annotation entitled, *Erroneous Decision As Law of the Case On Subsequent Appellate Review*.[100] This annotation contained the divergent views regarding law of the case, and especially important, the numerous jurisdictions' departure from the no power theory.[101] If the court in 1895 adopted the no power theory because of federal and sister court recognition, the Nevada Supreme Court should not continue with the antiquated no power theory in light of a majority shift to a less rigid standard.

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[96] *Id.* at 861-62.

[97] *Id.* at 866.

[98] *Id.* (Thompson, J., dissenting).

[99] *Id.* at 866 (Thompson, J., dissenting).

[100] *See supra* note 6.

[101] The Annotation explains the divergent views in some detail. The following excerpt portrays the Nevada interpretation.

> On the one hand are cases which hold the doctrine of the law of the case applicable, irrespective of whether the decision on the former appeal is right or wrong, and apply this rule even in situations in which the court, upon the later appeal, specifically finds or strongly intimates that the decision on the former appeal was erroneous. Cases of this kind express the view that the doctrine of the law of the case is inflexible, that an appellate court, having lost its jurisdiction over the case and its former decision constituting a final adjudication, has no power to revise its own decision on a former appeal, that this decision is "res judicata," and that the only remedy available to correct the error is a petition for rehearing seasonably made after the decision on the former appeal.

Id. § 3(a).

The argument on the other side is that law of the case is more of a principle of adherence than a principle of estoppel. Notice from the following excerpt how law of the case better resembles stare decisis than res judicata.

> [T]he doctrine of the law of the case as applied to appellate courts is not an inexorable or absolute command, and not inflexible; that the doctrine is founded upon expediency, and not upon the principle of estoppel by former adjudication, and is subject to exceptions. Under this view the doctrine of the law of the case, as applied to appellate courts on successive appeals, is a mere rule of practice, but not a limitation on the courts' power. It is, however, recognized that an appellate court's power to depart from its own ruling on a former appeal may be invoked not as a matter of right, but of grace and discretion, and should be exercised only sparingly or rarely, and for cogent reasons, after careful consideration of the situation involved in individual cases, or, more specifically, in a clear case under extraordinary or exceptional circumstances, in the interest of justice.

Id.

C. *A More Detailed Argument Or Different Facts?*

An appellant losing on the first appeal may try to refine the issue or somehow bolster the argument for another try at the court. This occurred in *Hall v. State*,[102] where the defendant in a murder case cleverly raised the issue of lack of competence to enter a guilty plea a second time. In the first appeal, the court found the defendant competent to enter a plea.[103] In the second appeal, the defense failed to apprise the court of the previous hearing as required by Nevada Revised Statute 177.335.[104] On appeal from his denial of petition for post-conviction relief, the defense fine-tuned the competence argument.[105] Having discovered the first appeal, the court barred the issue, and held that "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."[106]

This case may appear trivial, but it introduced an important element in Nevada law of the case. The defendant did not add facts or evidence or argue different issues on the second appeal; instead, defendant placed more emphasis on an issue already argued in the first appeal. "The law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same."[107]

This leaves the question of whether *new facts* are barred under law of the case. The Nevada Supreme Court examined this issue in *Paine v. State*,[108] in which Paine was convicted of murder in two robbery operations. Paine killed a cab driver and wounded another.[109] The court decided on the first appeal that Paine committed murder at random and without apparent motive, which the court found an aggravating circumstance for capital punishment purposes.[110] On the second appeal, Paine argued that "new evidence" adduced at the second penalty hearing indicated that the murders were necessary to accomplish the robberies.[111] Hence, no aggravating circumstances should carry.[112] The court found that the new evidence fell under law of the case principles because the new evidence "[was] not substantially different from that which was introduced at the first penalty hearing."[113] Accordingly, the court found that it "need not reconsider" the issue.[114]

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[102] 535 P.2d 797 (Nev. 1975).
[103] *Id.* at 798.
[104] *Id.* at 798 & n.1. NEV. REV. STAT. 177.335 (1991) *repealed by* Acts 1991, ch. 44, § 31, p. 92 (at the time stating in pertinent part, "The petition must identify any previous state or federal court proceedings taken by the petitioner to secure relief from his conviction or sentence").
[105] *Hall*, 535 P.2d at 798.
[106] *Id.* at 799.
[107] *Id.* at 798 (quoting Walker v. State, 455 P.2d 34 (Nev. 1969)).
[108] 877 P.2d 1025 (Nev. 1994).
[109] *Id.* at 1026-27.
[110] *Id.* at 1026.
[111] *Id.* at 1028.
[112] *Id.* at 1028-29.
[113] *Id.* at 1029.
[114] *Id.* As pertaining to "new evidence," law of the case does not control. Usually newly discovered evidence is only allowed under Nevada Rule of Civil Procedure 60 on motion at the trial judge's discretion. New facts argued on appeal are generally not allowed because

D. *Inconsistencies in the Doctrine*

The *Paine* court's consideration of the substantially similar facts element is not the only principle derived from the case. It also presents a clear break from prior rulings on the law of the case doctrine and, therefore, provides a segway into some of the inconsistencies the Nevada Supreme Court introduced into the doctrine. After ruling on the "new evidence" issue, the court elected to revisit prior issues of the case because of the gravity of Paine's sentence.[115] The court, notwithstanding its reservations about weakening the doctrine, decided to revisit an issue even though it supposedly had no power to do so.[116] In so doing, the court departed from its long-standing no power theory.

In its later cases, the court engaged in efforts almost simultaneously to (1) uphold the integrity of the no power doctrine and (2) ignore departures from the doctrine. In addition, the court struggled with law of the case, a judicially created doctrine, and legislatively enacted procedural bars. Interestingly, the legislative procedural bars provide exceptions for departure while law of the case does not.[117] In a very convoluted case, the court provided examples of these phenomena.

1. *Lozada v. State*

In *Lozada v. State*,[118] a jury convicted Lozada of four controlled substance violations.[119] Lozada failed to perfect an appeal.[120] Subsequently, Lozada filed a petition for post-conviction relief in the state district court, arguing that his counsel was ineffective for failing to inform him of the right to appeal.[121] The district court denied Lozada's petition and the Nevada Supreme Court dismissed his subsequent appeal.[122] Lozada then filed a petition for writ of habeas corpus in the federal district court.[123] After his petition failed in the Ninth Circuit, the U.S. Supreme Court granted certiorari and remanded to the Ninth Circuit because two circuits recognized a presumption of prejudice in Lozada's case.[124] The Ninth Circuit agreed with the U.S. Supreme Court that prejudice is presumed when a petitioner establishes that counsel's failure to file a notice

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the appellate court cannot look outside the record. Carson Ready Mix, Inc. v. First Nat'l Bank, 635 P.2d 276, 277 (Nev. 1981).

115 *Paine*, 877 P.2d at 1029.

116 *Id.* at 1028-29.

117 NEV. REV. STAT. 34.810(2) (1985) provides: "a second or successive petition must be dismissed if . . . the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Id.* § 34.810(3) requires petitioners to establish good cause for rearguing issues that have been rejected on their merits in a previous petition. NEV. REV. STAT. 34.726(1) (1991) requires good cause for failing to file a petition within one year of the final resolution of the direct appeal, or conviction if no appeal was taken.

118 871 P.2d 944 (Nev. 1994).

119 *Id.* at 945.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

of appeal was without the petitioner's consent.[125] The Ninth Circuit remanded to the federal district court for a determination of whether Lozada's trial counsel failed to pursue an appeal without Lozada's consent.[126] Lozada filed a notice of appeal in the Nevada Supreme Court pursuant to the instructions of the federal district court. The court found that it lacked jurisdiction on Lozada's direct appeal because the notice of appeal was filed well after the thirty-day appeal period prescribed by Nevada Rule of Appellate Procedure 4(b) (despite the Ninth Circuit's offer to allow a delayed appeal).[127] However, the court decided to *change* its ruling on the appeal of the petition for post-conviction based on the U.S. Supreme Court's decision.[128] The court noted, however, that the appellant must first overcome certain procedural bars to be able to file a petition for writ of habeas corpus (post-conviction) in the district court.[129] Each required a showing of good cause for the successive or belated issues.[130] The court stated that Lozada met the good cause requirement:

> Because Lozada filed a timely petition for post-conviction relief, his claim of ineffective assistance of counsel was properly presented to the district court. If that claim had merit, the denial of relief by the district court, and the subsequent denial of relief by this court, would constitute an impediment external to the defense that would excuse appellant's default in presenting the same claim in a successive petition. Therefore, we must determine whether appellant presented a viable claim for relief in his petition for post-conviction relief.[131]

Law of the case doctrine is not mentioned *at all* in the court's opinion.[132] If the court had applied its construction of the law of the case doctrine, Lozada would not have been able to file a petition for writ of habeas corpus (post-conviction) in the district court.[133] The first decision made on the appeal of the petition for post-conviction relief *must* stand according to the Nevada law of the case doctrine.[134]

It is entirely inconsistent in law to provide a detour around legislative procedural bars for good cause while the court leaves its judicially created procedural bar without exception. Only by not considering one could the court reconcile the two. The *Lozada* court may have chosen the favorable statutory procedural bars over the judicial doctrine because of the formers' flexibility. In this way, the court could hold tight to its rigid construction for the doctrine law of the case, but limit its scope to cases it deemed proper.

Limits in the doctrine's applicability came not only from arbitrary decisions like *Lozada*, but also from restrictions on who may invoke the doctrine. In *Winston*,[135] the court held that as long as a court has absolute jurisdiction

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[125] *Id.*
[126] *Id.*
[127] *Id.* at 945-46.
[128] *Id.* at 946.
[129] *Id.* at 946; *see* NEV. REV. STAT. 34.810(2), 34.810(3), and 34.726.
[130] *Lozada*, 871 P.2d at 946.
[131] *Id.* at 946.
[132] *Id. passim.*
[133] *Cf.* Mazzan v. Whitley, 921 P.2d 920 (Nev. 1996) (equating law of the case with the statutory procedural bars allowing both an exception for a showing of "good cause").
[134] *See Wright I*, 39 P. 872, 873-74 (introducing the no power theory).
[135] 9 Nev. 71 (1873).

over an issue, its decision is the law of the case from which even a higher court cannot deviate. This did not mean that the higher courts had no jurisdiction for appellate review. But *Winston* stood for the proposition that higher courts' review was restricted to certain appellate functions.[136] At that time, Nevada law of the case had not fully developed and the issue of its applicability lingered. Did law of the case apply to horizontal and vertical appellate court treatment, binding the subsequent appellate court and the trial court below? Or could law of the case bind horizontal trial courts as well?[137] Would the court cling to its ruling in *Winston*, where a trial court binds an appellate court? The language employed in *Wright I*, provided clues on this issue. The court stated that the "ruling of an appellate court" is a "final adjudication."[138] Did that statement overrule *Winston*?

2. *McKague v. Whitley*

The scope of law of the case remained an issue until *McKague v. Whitley*.[139] In that case, a jury convicted McKague of murder and he was sentenced to death.[140] McKague appealed and the court affirmed the conviction.[141] He then filed a petition for post-conviction relief in the district court arguing ineffective assistance of counsel.[142] The district court denied the petition and McKague's counsel failed to perfect an appeal of the denied petition.[143] Thereafter, the court dismissed McKague's untimely appeal.[144] McKague filed another post-conviction petition for a writ of habeas corpus.[145] The district court dismissed the petition with prejudice invoking law of the case doctrine.[146] On appeal from that decision, the court held that the doctrine is

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[136] *Id.* at 75.

[137] For an elaborate article on the application of law of the case in various court settings see Vestal, *supra* note 39. In his article, Professor Vestal first discussed an appellate court binding an inferior court. *Id.* at 5. In such cases, the higher court's mandate carries the strictest requirement of observance. *Id.* The lower court generally has no power to deviate from the instructions given. *Id.* In this situation, problems generally do not arise other than deciphering the instructions to be followed or an inconsistent mandate. *Id.* at 6-10. Next, he covered an appellate court binding itself. *Id.* at 10. As discussed previously, there are two prevailing views: one favoring the no power theory and the other interpreting law of the case as a flexible rule of adherence. Next, he discussed a trial court binding a trial court. *Id.* at 10-11. Some courts treat horizontal authority at the lower level as binding. *Id.* at 15. However, most courts view the first trial court's decision non-binding to a subsequent trial court on the same issues. *Id.* A number of variables shape this view: "(1) whether there has been an intervening, inconsistent or controlling decision; (2) whether the same or different judge is involved; (3) whether rehearing en banc is authorized." *Id.* at 15. Finally, he discussed the anomalous inferior court binding an appellate court. *Id.* at 20. These situations involve lack of objection in the lower court or improper appellate review of the issues. In other words, the lower court has general jurisdiction and the remedy sought by appellant is not an appellant remedy. *See Ex parte* Winston, 9 Nev. 71 (1893) discussed in text.

[138] *Wright I*, 39 P. 872, 874 (Nev. 1895).

[139] 912 P.2d 255 (Nev. 1996).

[140] *Id.* at 256.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

inapplicable to horizontal trial court decisions "because *only* appellate court decisions may constitute the law of the case."[147] However, the court stressed that trial court decisions are still given weight because statutory procedural bars are applicable in such cases.[148]

The result achieved in *McKague* is inconsistent with *Lozada*. Why did the court stress overcoming the statutory procedural bars in Lozada's case without considering the equally weighted judicial procedural bar of law of the case? Unlike *McKague*, *Lozada* involved an appellate court decision. Some explanations are possible. Either law of the case was purposefully omitted from inquiry in *Lozada* in the interests of efficiency or the court did not think to consider employing the doctrine to the facts of the case. However, a third more remote explanation is possible. Perhaps the court was attempting to steer away from its rigid construction to a more liberal view of law of the case. Consider the following cases.

3. *Murray v. State*

In *Murray v. State*,[149] a jury convicted Murray on two counts of attempted robbery with the use of a deadly weapon.[150] Murray then filed a direct appeal, which the court dismissed.[151] Murray filed a post-conviction petition for a writ of habeas in the district court challenging the sentence.[152] The district court found merit in Murray's claim and "remanded" to its fellow district court to resentence Murray.[153] The court of remand refused to alter the sentence and Murray appealed.[154] On appeal, the state argued that Murray's claim was barred under law of the case because it involved a decided issue – the validity of Murray's sentence.[155] The court held on the earlier appeal that Murray's sentence was "within the statutory limits,"[156] but refused to apply law of the case for two reasons. First, the issue apparently was not entirely the same as argued on the second appeal.[157] Second, and more interesting, a case decided

[147] *Id.* at 259 (emphasis added).
[148] *Id.* at 259-60.
[149] 803 P.2d 225 (Nev. 1990).
[150] *Id.* at 226.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* This decision pre-dated *McKragué*. Perhaps the district court did not feel law of the case bound it to the decision of its fellow court. The law proved inconclusive as yet on this issue. If law of the case did weigh against the court, on "remand" several factors are relevant according to Professor Vestal: "the distaste judges have for repeated work which has already been done; the general respect that one judge has for another; [and] the desire for stability in the law." Vestal, *supra* note 39, at 16-17. In this case, however, the first district court has no power to remand to a fellow district court so law of the case is inapplicable. Murray v. State, 803 P.2d 225, 226 (Nev. 1990). In a dissenting opinion in a case written by Justice Springer, a district judge reconsidered and overruled a prior district judge's decision. Masonry & Title Contractors Ass'n of S. Nev. v. Jolley, Urga, & Wirth, Ltd., 941 P.2d 486 (Nev. 1997) (Springer, J., dissenting). The judge refused to adhere to law of the case because, according to the judge, the decision was clearly erroneous. *Id.* at 492. Ironically, the judge was clearly erroneous in his interpretation of Nevada law of the case!
[155] *Murray*, 803 P.2d at 226.
[156] *Id.*
[157] *Id.*

between Murray's first appeal and his second appeal offered clarity or, in the court's words, "explained the law."[158] Arguably then, a decision of law fixed between two appeals in a case, not appertaining to the case or its proceedings, might offer clarifying or explanatory rules that govern the second appeal.[159] This rationale sounds too much like the law of the case as a principle of adherence as opposed to the no power theory of Nevada law of the case.[160] A shift was occurring. Applying this rationale to the hypothetical illustrated in the Introduction, Lenny might argue on a second appeal that "explanatory law" changed the result on the hearsay issue and, therefore, the court should reconsider the issue. This result might defeat a practical efficiency interest, but it favors the right decision.

4. *Mazzan v. Whitley*

In *Mazzan v. Whitley*,[161] the court continued to find exception to law of the case. In 1979, Mazzan was convicted of murder and sentenced to death.[162] Several petitions and appeals followed this conviction.[163] The court noted it had already decided a few of Mazzan's assertions in previous proceedings.[164] The court then introduced the normal statutory bars like the ones used in *Lozada* and other cases, namely Nevada Revised Statute 34.810(2) and (3).[165] These statutes require a showing of good cause.[166] Mixed in with these statutes, the court injected law of the case doctrine as an additional procedural element Mazzan must overcome.[167] Not present in the discussion, however, are any distinguishing factors from these statutory bars and law of the case.[168] It appeared from the reading that Mazzan overcame *all* his procedural hurdles by a showing of "good cause."[169]

E. Summary of Nevada Points on Law of the Case

From the foregoing analysis of the history of law of the case, several points about the Nevada doctrine are apparent. A list of these points will facilitate the following section entitled Criticism and An Alternative Route.

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[158] *Id.* at 227.

[159] Indeed, if two cases are positioned on the same point of law but with inconsistent results and without significantly varied facts, it would seem quite logical that "neither is the law of the case." Greene v. Rothschild, 402 P.2d 356 (Wash. 1966) (citing Gage v. Downey, 29 P. 635 (Cal. 1892)); *In re* Estate of Walker, 181 P. 792 (Cal. 1919) (emphasis in original).

[160] *Cf.* Barrett v. Thomas, 809 F.2d 1151 (5th Cir. 1987); Counsel of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999).

[161] 921 P.2d 920 (Nev. 1996).

[162] *Id.* at 920.

[163] *Id.* at 920-21.

[164] *Id.* at 922.

[165] *Id.*

[166] *Id.*

[167] *Id.* Note the similarity produced in this case and *Lozada*. However, the *Lozada* court failed to implicate law of the case while *Mazzan* did.

[168] *Id. passim.*

[169] *Id.* at 922.

1) Nevada courts associated law of the case with res judicata under principles of estoppel as opposed to stare decisis under principles of correct application of rules.[170]
2) Nevada courts adopted the no power theory of law of the case, meaning, once the court rules it cannot depart from that prior rule except upon a motion for rehearing.[171]
3) The scope of law of the case in Nevada is limited to only appellate decisions.[172]
4) Law of the case applies to any issue on appeal properly raised, deliberated, and decided.[173]
5) Nevada law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.[174]
6) Law of the case applies to all issues where the facts are substantially the same.[175]

III. Criticism and an Alternative Route

This section of the note will compare the law of the case doctrine in Nevada with the current federal framework. As the court adopted the "no power theory" from outside cases back in 1895, it is appropriate now to contrast the Nevada view with current cases. In *Wright I*, the court stated that it looked to the opinions of its sister courts, federal courts, and the U.S. Supreme Court. A complete analysis calls for comparison of the Nevada interpretation with those jurisdictions from which Nevada adopted its interpretation. However, for sake of brevity and to facilitate concentration on current doctrine, this note will limit comparison to the current federal framework.

One might argue the significance of equating law of the case to res judicata or stare decisis. These doctrines indeed share similar characteristics and are sometimes confused with one another.[176] Generally speaking, however, courts that adopt the no power theory associate law of the case to res judicata, a strict preclusion doctrine blind to any hindsight.[177] On the other hand, other

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[170] Cartan v. David, 4 P. 61 (Nev. 1884); *Wright I*, 39 P. 872 (Nev. 1895).
[171] *Wright I*, 39 P. 872; State v. Loveless, 150 P.2d 1015 (Nev. 1944).
[172] McKague v. Whitley, 912 P.2d 255 (Nev. 1996).
[173] *Loveless*, 150 P.2d 1015.
[174] Hall v. State, 535 P.2d 797 (Nev. 1975).
[175] *Wright I*, 39 P. 872; Walker v. State, 455 P.2d 34 (Nev. 1969).
[176] In *Swanson v. Swanson*, 5 P.3d 973 (Idaho 2000), the court equated law of the case to stare decisis. The court, speaking of law of the case noted, "[l]ike stare decisis it protects against relitigation of settled issues." *Id.* at 977. This equation is disingenuous to principles of stare decisis since a court may decide the issue mistakenly on the first appeal. Such a case is not settled. Idaho is one of the few states like Nevada that adhere to the no power theory. The court should have related its interpretation of law of the case to res judicata.
[177] *See supra* note 16; *see also* United States v. ITT Rayonier, 627 F.2d 996, 1004 (9th Cir. 1980) ("The doctrine of res judicata does not depend on whether the prior judgment was free of error. If it did, judgments would lack finality, the very rationale of the rule of res judicata.") (citing Milliken v. Meyer, 311 U.S. 457 (1940)); Thompson v. Sawyer, 678 F.2d 257, 270 (D.C. Cir. 1982) ("[T]he doctrine of the law of the case, unlike res judicata but like stare decisis, does not preclude reconsideration of erroneous decisions.").

courts view law of the case as a rule of adherence, like stare decisis, allowing departure under certain circumstances.[178]

In the classic case, *Linn v. Minor*, the court left the following instruction: "*whenever* a court is called upon to depart from a prior determination" it must take into account "all improvements in the science of the law."[179] However, only a few years later the court failed to follow that instruction and instead followed a path set by other jurisdictions.[180] The court in *Wright I* and other decisions characterized law of the case as kin to res judicata.[181]

Law of the case ought to operate more like stare decisis. It cannot act like res judicata since the doctrine is not limited to decisive issues. Law of the case extends to a multitude of issues presented, deliberated, and decided in one case.[182] To mandate strict preclusionary effect to all these issues is an uncomfortable prospect. A court might be prone to lackadaisically dismiss a collateral issue with little forethought if it is not the determinative issue. This does not mean that all judicial dictum of the Nevada Supreme Court is flagrantly cursory. But, given the court's extremely pressing burden, overlooking a few collateral issues is not an implausible occurrence.[183]

The *Loveless* court cautioned that a decision is only authority if "there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in the fullest extent."[184] Does that mean that only carefully considered judicial dictum is binding under law of the case? Is the issue of "careful consideration" a presumption, an irrebuttable presumption? If law of the case extends to a multitude of issues, a power of departure is warranted. Law of the case ought to operate like stare decisis. Its overreaching effect should demand flexibility. In this way, law of the case and stare decisis share the same aim, to ensure a consistent body of law. For example, the hypothetical in the Introduction would allow Lenny to reargue the issue of hearsay before the court. This result is sound since the litigant in the intervening case received beneficial treatment on the issue.

In addition to this noted exception to law of the case, the case law is replete with categorical exceptions including allowing departure when a past decision is erroneous or would work a manifest injustice.[185] These cases fully

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[178] Schopler, *supra* note 6, § 3(a) and cases cited therein; *see also*, Steinman, *supra* note 1, at 598-99 nn.8-10.

[179] 4 Nev. 462, 466-67 (1868).

[180] State v. Loveless, 150 P.2d 1015, 1018 (Nev. 1944).

[181] *Id.* at 1017-18; *Wright I*, 39 P. 872 (Nev. 1895).

[182] *Loveless*, 150 P.2d at 1019.

[183] There is no doubt that Nevada is one of the fastest growing states in America. Consequently, litigation in Nevada is on the rise. In a matter of just five years, cases appealed to the Nevada Supreme Court increased dramatically. Susan Wilson, *Proper Person Litigation In The Nevada Supreme Court*, 6 NEV. LAW. 24 (1998). A growing state provides an additional reason to abandon the no power theory. Within a matter of time, Nevada may augment its court system with intermediate appellate courts. Complications may ensue regarding applicability of the law of the case doctrine. *See* Greene v. Rothschild, 402 P.2d 356 (Wash. 1966) (citing Note, *Law of the Case*, 5 STAN L. REV. 751 (1953)).

[184] *Loveless*, 150 P.2d at 1019.

[185] Steinman, *supra* note 1, at 599; Schopler, *supra* note 6, § 6 and cases cited therein.

elaborate why efficiency must capitulate to accuracy.[186] A quick review of such decisions extols the reasons behind the rule.

Most if not all federal jurisdictions hold to the view that law of the case is not an "inexorable command."[187] Perhaps one of the most respected and foundational cases espousing this view is *White v. Murtha*.[188] There, the court faced the question of whether it should adhere to a former decision. In reviewing the case law pertaining to law of the case, it summarized the competing principles as follows:

> The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof. While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.[189]

This interpretation of the doctrine is found in many recent federal court opinions.[190] The Second Circuit takes an even more relaxed approach to the doctrine.[191] In *Rezzonico v. H & R Block, Inc.*,[192] the court explained that law of the case is a discretionary doctrine and not a mandatory one. The doctrine applies, according to the court, absent "cogent or compelling" reasons.[193] This is by far the most liberal approach to law of the case as it vests the court with room for reason; however, the majority of circuits limit departure to the categories established in *Murtha*.[194]

This interpretation is a far cry from Nevada's strict construction. Nevada saw fit long ago to adopt the current interpretation; it is now years behind the

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[186] Schopler, *supra* note 6, § 6 and cases cited therein.

[187] *See, e.g.*, Craft v. United States, 233 F.3d 358, 363 (6th Cir. 2000); Greene v. Safeway Stores, Inc., 210 F.3d 1237, 1241 (10th Cir. 2000).

[188] 377 F.2d 428, 431 (5th Cir. 1967).

[189] *Id.* at 431-32.

[190] United States v. Paquette, 201 F.3d 40 (1st Cir. 2000); Counsel of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999); United States v. Aramony, 166 F.3d 655 (4th Cir. 1998); Gates v. Shell Offshore, Inc., 881 F.2d 215 (5th Cir. 1989); Holloway v. Brush, 220 F.3d 767 (6th Cir. 2000); Creek v. Vill. of Westhaven, 144 F.3d 441 (7th Cir. 1998); Little Earth of United Tribes, Inc. v. U.S. Dep't of Hous. & Urban Dev., 807 F.2d 1433 (8th Cir. 1986); Coleman v. Calderon, 210 F.3d 1047 (9th Cir. 2000); Greene v. Safeway Stores, Inc., 210 F.3d 1237 (10th Cir. 2000); Royal Ins. Co. v. Latin Am. Aviation Serv., Inc., 210 F.3d 1348 (11th Cir. 2000); Gould, Inc. v. United States, 67 F.3d 925 (Fed. Cir. 1995); Kimberlin v. Quinlan, 199 F.3d 496 (D.C. Cir. 1999); Arizona v. California, 460 U.S. 605 (1983).

[191] Steinman, *supra* note 1, at 614-15.

[192] 182 F.3d 144 (2d Cir. 1999).

[193] *Id.* at 149.

[194] *See* cases cited in *supra* note 185.

existing view in the federal system. Nevada should adopt the *Murtha* view. Adoption of the categorical exceptions presented in *Murtha* would require Nevada to overturn the no power theory, but such a sacrifice is justified. In fact, adopting the Murtha categorical exceptions to law of the case will harmonize the law of the case doctrine with *Murray*, *Mazzan*, and *Lozada*.

The first categorical exception in *Murtha* is that law of the case does not apply if controlling authority has since made contrary decisions.[195] If a decision on a first appeal is altered, clarified, or changed by intervening law,[196] and the second appellate decision factors in the intervening law, harmony is struck producing a general consistency in the law. Applying this principle to *Murray*, the court could have changed its decision on the second appeal with *Odoms v. State*,[197] an intervening decision, regardless of whether law of the case precluded the issue. Here, the *Murtha* exception applies. The court decided that the issue presented on the second appeal differed from the first justifying a departure from the doctrine.[198] But had the issue been the same, under the *Murtha* exception, the court could follow the *Odoms* decision. Conversely, under the no power theory, the court could not account for the intervening *Odoms* decision if the issue presented in the first appeal is substantially similar to the second appeal. Therefore, to ensure consistency in the Nevada case law, Nevada courts should overrule the no power theory in favor of the *Murtha* exception.

The second *Murtha* categorical exception to law of the case provides for departure from the doctrine if adherence would result in an erroneous decision or work a manifest injustice.[199] This principle echoes the underlying theory of overruling the wrong decision in stare decisis. The Nevada Supreme Court decisions of *Lozada* and *Mazzan* apply these principles in direct violation of Nevada's law of the case interpretation. In *Lozada*, the court did not mention law of the case, yet changed a prior decision because it reached the incorrect result.[200] In *Mazzan*, the court mentioned law of the case, yet applied the doctrine because plaintiff failed to show "good cause" for disregarding the doctrine. In both cases, the Nevada legislature drafted procedural bars, and in so doing, created an exception upon a showing of "good cause."[201] If the Nevada Supreme Court will adopt the *Murtha* exceptions, harmony would not only result in the case law, but also between the Nevada Supreme Court and the Nevada Legislature. Good cause would allow the court to depart from an erroneous ruling. The court must overrule the no power theory. Otherwise, a continual friction between the legislature and the court will prevail.

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[195] 377 F.2d at 431-32 (5th Cir. 1967).

[196] *See, e.g.*, Barrett v. Thomas, 809 F.2d 1151 (5th Cir. 1987); *see also Hooks*, 179 F.3d 64.

[197] 714 P.2d 568 (Nev. 1986).

[198] Murray v. State, 803 P.2d 225, 226 (Nev. 1990).

[199] 377 F.2d at 431-42.

[200] 871 P.2d at 944.

[201] *See supra* note 117.

IV. CONCLUSION

Nevada should restructure law of the case to account for recent developments in the doctrine. The old theory is outdated. The Nevada Supreme Court adopted the "no power theory" of law of the case as a result of existing case law prevalent at the time from various jurisdictions, including the federal circuits. Since then the entire federal system changed its scheme to discount the no power theory. Categorical exceptions employed by the federal courts provide a practical solution to the unforgiving result of the no power theory. If a decision on the first appeal is changed, altered, or clarified by an intervening decision, or if the first decision on the case is clearly wrong or works a manifest injustice, law of the case should not hold to perpetuate error. Therefore, the Nevada Supreme Court should apply the *Murtha* categorical exceptions. In doing so, the court will provide not only a workable standard, but also ensure the integrity of the law of the case remains well within defined limits.

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ADMINISTRATIVE LAW

Banegas v. State Indus. Ins. Sys.
19 P.3d 245 (Nev. 2001)

Co-habitant not entitled to death benefits under Nevada statutory law where not legally recognized as a dependent.

Annabelle and Robert Banegas were unmarried cohabitants. Annabelle relied on Robert for financial support. Robert was killed in a work-related accident, and Annabelle sought death benefits from the State Industrial Insurance System (SIIS). SIIS denied her application, and Annabelle brought suit in district court under Nev. Rev. Stat. 616C.505(8), arguing that the statute "in all other cases" was a catchall that allowed non-factual dependants to claim benefits. The district court denied Annabelle's claims and Annabelle appealed.

The Nevada Supreme Court held that the legislature only intended to provide death benefits to persons in legally recognized relationships with the deceased. By reference to the title of the statute and other subsections, the court concluded that a cohabitant was not entitled to death benefits under Nev. Rev. Stat. 616C.505(8).

City of Las Vegas Downtown Redevelopment Agency v. Crockett
24 P.3d 553 (Nev. 2001)

No formal amendment of a redevelopment plan is required for an administrative interpretation constituting a fair construction of the original plan.

In order to facilitate the transfer of land to the Stratosphere Hotel and Casino for development, the City of Las Vegas Downtown Redevelopment Agency (Agency) filed eminent domain complaints against several landowners. Two of these owners opposed and moved to dismiss the complaint, arguing that the Agency's actions were beyond the scope of its mandate. The district court, using a "materiality" test to determine if the Agency was required to amend its redevelopment plan, found that the proposed actions were substantial and required the Agency to amend its plan. The district court subsequently dismissed the Agency's complaint, and the Agency appealed.

The Nevada Supreme Court held that vacating streets and relocating a park did not constitute a material deviation from or change to the redevelopment plan such that a formal amendment of the plan was mandated. The court noted that, while an approved redevelopment plan must be formally amended if materially changed, formal amendment is not necessary for an administrative interpretation of the plan's details. Redevelopment that is consistent with the approved redevelopment plan's express language or a fair construction of that language

does not require a formal amendment, given that there is no deviation from or change to the plan's general import.

City of North Las Vegas v. Pardee Constr. Co. of Nev.
21 P.3d 8 (Nev. 2001)

A City of North Las Vegas fee, which passes on the costs of Southern Nevada Water Authority Improvements, is a "cost-based fee" and not a "development impact fee."

Plaintiff Pardee Construction Company (Pardee) signed a development agreement with the City of North Las Vegas (City), wherein the City agreed not to impose any additional development-impact fees, and Pardee agreed to pay existing development-impact fees and any new cost-based fees. Subsequently, the City participated with six other southern Nevada municipalities to create the Southern Nevada Water Authority (SNWA). The SNWA developed a capital improvements plan in order to broaden existing water supply and provide for increasing demand. The SNWA passed its costs on to the City, and the City passed its costs directly to its consumers, including plaintiff. Plaintiff asserted that such costs are related to development, and are therefore prohibited under the City-Pardee agreement.

In ruling that the City's fee was "cost-based," the Nevada Supreme Court noted that the fee was based on actual costs, and that only actual costs were being passed onto consumers. In addition, the definition of "impact fees" must involve reference to Nev. Rev. Stat. 278B, which allows the City to charge impact fees to developers only after complying with numerous statutory provisions and in accord with a capital improvement plan. Here, no such plan was contemplated, and the court ruled the SNWA's improvements were not sufficiently related to the City's efforts to strengthen or build its own infrastructure.

City of Reno v. Civil Serv. Comm'n of the City of Reno
34 P.3d 120 (Nev. 2001)

Civil Service Commission approval is not required to lay off a city employee who can no longer fulfill an essential job requirement.

In 1996, the United States Congress amended the Gun Control Act of 1968, making it illegal for individuals convicted of domestic violence to carry firearms. An arbitrator allowed the City of Reno to lay off police officers that could no longer carry firearms as a result of this amendment. When the Civil Service Commission of the City of Reno refused to approve the layoffs, the City of Reno filed a writ of mandate, petition for judicial review, and complaint for declaratory judgment. The district court denied the writ of mandate and petition for judicial review, but granted declaratory judgment for the City. The City of Reno appealed and the Civil Service Commission cross-appealed.

The Nevada Supreme Court held that the City was not required to gain approval from the Civil Service Commission to lay off officers in this circumstance. The court found that, while the Civil Service Commission has authority over layoffs resulting from reductions in staff, the Commission's authority does not extend to layoffs of police officers who could no longer fulfill a job qualification, such as being unable to carry a firearm under federal law.

Chief Justice Maupin dissented, joined by Justice Agosti. The dissent asserted that the action constituted a dismissal, not a layoff, which can be appealed to the Civil Service Commission under section 9.050 of the City Charter. The City Charter gives the Commission authority over the selection, appointment, and promotion of employees in the civil service and gives employees the right to appeal regarding dismissals, demotions, suspensions, and disciplinary actions.

Clark v. Columbia/HCA Info. Servs., Inc.
25 P.3d 215 (Nev. 2001)

Immunity under the Health Care Quality Improvement Act (HCQIA) does not extend to a hospital and its peer review board when decisions are not made in furtherance of quality health care.

Appellant Clark was a child psychiatrist who practiced intermittently at Truckee Meadows Hospital (now known as West Hills Hospital). Clark was concerned that the hospital was not following established procedure in that it discharged patients prematurely, providing deficient child psychiatric care. Clark wrote letters and provided reports to outside agencies in an effort to bring the hospital's practices to light. He also complained that the hospital used his superior credentials to qualify an affiliate facility for accreditation, though the hospital knew that Clark was not employed there. The hospital reacted by holding peer review board meetings and subsequently revoking Clark's hospital privileges. The hospital alleged that Clark engaged in "activities or professional conduct which are disruptive to Hospital operations."

Clark filed an action in United States District Court, alleging violation of various antitrust provisions and claims based on state tort and contract law. The hospital filed a motion for summary judgment. The motion was granted on federal antitrust claims, stating that Clark did not produce evidence to support his claims and, even if he had, the defendants were immune under the Health Care Quality Improvement Act, 42 U.S.C. §§11111-11112.

A three-judge panel of the Nevada Supreme Court reversed and remanded. Defendants petitioned for rehearing, and the case was transferred for en banc consideration.

The Nevada Supreme Court held that the defendants were not immune because the peer review decision to revoke the plaintiff's staff privileges was not made in furtherance of quality health care. The court determined that Clark's privileges were revoked because of his whistle-blowing activities, which did not meet the objectives of § 11112 (a)(1).

Diamond v. Swick
28 P.3d 1087 (Nev. 2001)

A manufactured home dealer violates Nevada law by providing false information to a lender, even in the absence of dealer fraud or actual reliance by the lender.

Diamond, the administrator of the Nevada Manufactured Housing Division (Division), filed a complaint against the employees of Silver State Mobile Homes, Inc., seeking to revoke their dealer licenses for submitting false information to lending institutions by representing dealer rebates as actual cash

down payments on credit applications. On seventy-three credit applications, Silver State represented all, or part of, a dealer's rebate as a cash down payment. The applications were submitted to three lending institutions, only one of which was unaware of Silver State's practice.

The hearing officer concluded that knowledge of the information's falsity precluded a lender from receiving "false" information under Nev. Rev. Stat. 489.401(7). Furthermore, because of the lender's knowledge, the financing statements did not contain fraudulent information that would lead a lender to finance a home sale it would not otherwise have financed. The district court affirmed the administrative determination and denied the Division's petition for judicial review. The Division then appealed, contending the hearing officer based his decision on an error of law.

The Nevada Supreme Court first addressed the question of whether a manufactured home dealer's submission of a contract to a lender, which represented a dealer rebate as a cash down payment, would be deemed "false" for purposes of the statute, even if the lender knew of the falsity of the information. The court concluded that a plain reading of the statute does not require fraud or reliance because the statute was designed to protect all lenders, including those in the secondary market. Thus, by misstating the actual cash down payment, interest rate and credit standards would differ, artificially affecting the lending market.

Second, the court considered whether the Division was required to establish that the dealer intended to defraud, or that the lender relied on the incorrect information. The court concluded that neither intent nor reliance were necessary elements because the misrepresentations alone could result in increased lender losses, which would in turn result in higher interest rates on future loans, thereby affecting the integrity of the entire mobile and manufactured home lending system.

Employers Ins. Co. of Nev. v. State Bd. of Exam'rs
21 P.3d 628 (Nev. 2001)

A state entity's lease-purchase agreement is not a public debt where the lease contains a nonappropriation clause, limits recourse to the leased property, and does not create a long-term obligation binding future legislatures.

The State Board of Examiners (Board) decided not to review the merits of Employers Insurance Company of Nevada's (EICON) lease-purchase agreement with the State Department of Administration Buildings and Grounds Division (Department). The Board contended that the agreement was a public debt, and that it improperly lent the state's credit in violation of the Nevada Constitution. EICON, the lessor, disagreed, and petitioned the Nevada Supreme Court for a writ of mandamus compelling the Board to review the agreement.

The court ruled that the writ of mandamus application was an appropriate method to challenge the Board's decision, because the petition presented legal issues that implicated the Nevada Constitution and public policy. The court noted that although mandamus is an extraordinary remedy, it is appropriate when an important issue of law needs clarification and invocation of the court's original jurisdiction serves public policy, even though other remedies might be available. The court granted EICON's petition and ordered a writ of manda-

mus to be issued, finding that the agreement did not violate the Nevada Constitution.

The court first examined whether the lease-purchase agreement was a "public debt" and thus prohibited by Article 9, Section 3 of the Nevada Constitution. The court defined a public debt as an obligation that binds future legislatures to successive appropriations. The disputed agreement contained provisions specifically tailored to avoid binding future legislatures. For example, the EICON lease-purchase agreement contained an express nonappropriation clause, providing that, in the case of future nonappropriation, EICON could retake the office space. The agreement also provided that no recourse was available against the state or its agencies in the event the legislature should fail to appropriate necessary funds. Based on these provisions, the court held that the agreement was not a public debt in violation of Article 9, Section 3. The court overruled *State ex rel. Nevada Building Authority v. Hancock*, 468 P.2d 333 (Nev. 1970) and expanded on its more recent reasoning in *Business Computer Rentals v. State Treasurer*, 953 P.2d 13 (Nev. 1993), holding that, as a general rule, similar lease-purchase agreements will be upheld where the lease: (1) contains a nonappropriation clause; (2) limits recourse to the leased property; and (3) does not create a long-term obligation that is binding on future legislatures.

The court then addressed the Board's second assertion that the agreement lent the state's credit in violation of Article 8, Section 9 of the Nevada Constitution. This contention stemmed from a provision allowing EICON to assign its right to receive lease payments from the Department in order to obtain financing. The Board argued that this effectively placed the state's credit behind EICON's ability to obtain financing. The court ruled that the state violates Article 8, Section 9 only when it acts as a surety or guarantor for the debts of a company, corporation, or association. Here, no such situation existed, because the agreement did not make the state legally liable for EICON's debts.

Kintzler v. IRS
2001 U.S. Dist. LEXIS 15266 (D. Nev. 2001)

Where taxpayers failed to follow appropriate procedures in challenging an Internal Revenue Service levy, summary judgment was appropriate for a resulting civil rights violation complaint.

Taxpayers requested a Collection Due Process (CDP) hearing in a timely fashion after notification of penalties assessed for filing frivolous tax returns. Following receipt of the Notice of Determination from the CDP hearing officer, the taxpayers filed an appeal in Tax Court rather than filing the appropriate petition in United States District Court. The Tax Court dismissed the action for lack of jurisdiction. The taxpayers then filed suit, claiming violation of civil rights because the CDP hearing officer refused to discuss the merits of the levy with them at the hearing.

The district court granted the Internal Revenue Service's motion to dismiss, holding that CDP hearings offer a taxpayer the opportunity to request judicial review of process, not a review on the merits. Therefore, the hearing officer acted appropriately. Further, plaintiffs had ample opportunity to prove

the penalties were improper or, in the alternative, to refile corrected returns, and failed to do so.

McClanahan v. Raley's, Inc.
34 P.3d 573 (Nev. 2001)

An administrative officer's decision that is supported by substantial evidence is not open to appellate review by a district court.

Plaintiff McClanahan slipped and fell while working for the defendant. As a result, he developed avascular necrosis, a deteriorating hip condition, and filed a worker's compensation claim. In total, the parties sought four medical opinions regarding the cause of the hip condition. Two of these concluded that the fall was the cause of defendant's condition and two said the cause of the condition could not be determined.

Raley's denied McClanahan's claim, but an appeals officer decided that the claim was supported by substantial evidence. This decision was then overruled by a state district court. The district court reweighed the evidence and held that the claim was not supported by a preponderance of the evidence, since the medical opinions were evenly divided. McClanahan appealed.

The Nevada Supreme Court reversed the district court's opinion, holding that the court could only reweigh the evidence if the administrative officer's decision was not supported by substantial evidence. The court found that, although the number of medical opinions was evenly split, the preponderance of the evidence does not rely on the number of witnesses. Further, the administrative officer also relied on other witnesses, including the plaintiff's supervisor, whom he found to be credible. The court held that the evidence supporting the administrative officer's decision met that standard.

Rogers v. Heller
18 P.3d 1034 (Nev. 2001)

Initiative petition, which seeks to make an appropriation or to require expenditure, must also seek to constitutionally raise such funds.

Several businesses challenged an initiative petition that sought to increase the state's funding for elementary and secondary public schools. The initiative petition called for setting the level of funding for such schools at fifty percent of the state's projected revenue for the year. The initiative sought to raise the funds through a proposed four percent tax on the taxable income of each Nevada business. Plaintiffs sought declaratory and injunctive relief in district court, claiming both deficiencies in the initiative's qualification process and substantive constitutional deficiencies in the initiative itself. The court denied relief, holding that the initiative was intended as a supplement to school funding and, thus, not clearly unconstitutional. Plaintiffs appealed.

The Nevada Supreme Court held that Article 19, Section 6 of the Nevada Constitution requires that any proposed statute or amendment that includes an appropriation or expenditure of funds impose a tax or other constitutional method of raising revenue sufficient to fund the proposal. The court found the proposed four percent tax would only raise about $270,000,000, while fifty percent of the state's general fund amounts to about $750,000,000. Although the new tax would raise sufficient funds to increase current educational spend-

ing to the proposed level, the court held that the legislature is not required to fund at the current level. If the legislature were to allot less money to education, then the four percent tax would not be sufficient. Therefore, the court held that the initiative would have to include a proposal to raise enough revenue to sufficiently fund the entire financial requirement ($750,000,000).

Justice Rose dissented, assertng that this would require any initiative petition to identify an independent source of revenue in order to be constitutional. He argued that this was too strict a holding for a process that should be liberally construed to preserve the will of the petitioners.

United States v. State Eng'r, State of Nevada
27 P.3d 51 (Nev. 2001)

The Bureau of Land Management may be granted water permits without actually holding livestock grazing permits in its own name.

Plaintiff, the Bureau of Land Management (BLM), applied to the State Engineer of Nevada (Engineer) for permits to create nine livestock watering holes in various locations. The BLM did not claim to actually have any livestock; it wanted only to grant the rights to individuals seeking grazing permits from the BLM. The Engineer denied the permits on the basis that the BLM was not legally considered an individual authorized to graze livestock on public land under Nev. Rev. Stat. 533.503. BLM petitioned for district court review of the Engineer's decision. The district court denied the petition and BLM appealed.

BLM asserted that the phrase "legally entitled" in the statute means either the landowner or the person with permission to graze livestock on the land. The Engineer argued that only those with permits to graze livestock were legally entitled and that BLM did not possess grazing permits.

The Nevada Supreme Court agreed with the petitioner that there was only one reasonable interpretation of the statute, and that the Engineer's interpretation, requiring the BLM to issue itself a permit, was illogical and unreasonable. The court reversed, holding that the Engineer had exceeded his authority by ignoring the plain meaning of the statute.

Justice Becker asserted that the statute was ambiguous, claiming that the legislature intended "legally entitled" to be interpreted in the manner that the Engineer read the statute. Justice Becker nonetheless concurred in the judgment, finding that the legislature's intent in Nev. Rev. Stat. 533.503 would violate the Supremacy Clause of the United States Constitution.

Univ. & Cmty. Coll. Sys. of Nev. v. DR Partners
18 P.3d 1042 (Nev. 2001)

The office of community college president is not a public office and, therefore, the interviewing of applicants for that office may be conducted in closed sessions.

Appellant, University and Community College System of Nevada (UCCSN), appealed from a district court order, enjoining it from interviewing applicants for the job of community college president in closed sessions. UCCSN argued that the district court's finding that the office of community college president is a public office was erroneous and that UCCSN was not

prohibited from interviewing presidential candidates in a closed session. Respondent DR Partners, commonly known as the Las Vegas Review Journal (RJ) newspaper, claimed that the office of community college president is a public office. RJ argued that although Nev. Rev. Stat. 241, Nevada's open meeting law, does not define "public office" or "public officer," it prohibits the presidential search committee from discussing a public officer's appointment behind closed doors.

The court ruled the position was not created by statute or state constitution, but by the Board of Regents in its bylaws, and, therefore, could not be viewed as a public office. Crucial to the court's ruling was Nev. Rev. Stat. 281, which governs public officers and defines a public officer as "a person elected or appointed to a position" that either is established by state constitution or statute, or by charter or ordinance of a state political subdivision, and involves the continuous exercise of a public power, trust, or duty as part of regular and permanent government administration.

Further, the court reversed the district court's injunctive order and disagreed with the RJ's reasoning that important presidential functions made the position a public office. The court held that, although the community college president holds an important position, it is ultimately the Board of Regents and the chancellor who maintain control over higher education.

Chief Justice Maupin, joined by Justices Young and Leavitt, dissented, agreeing with the RJ that the office satisfied the statutory criteria. The dissent argued that UCCSN and its governing Board was a political subdivision of the state and that their governing documents were analogous in purpose to a municipal body's charter. The dissent also argued that the position met the second statutory criteria, as the president has been entrusted by law with a significant part of the state's functions of higher education, a fact acknowledged by the majority.

BUSINESS LAW

Mallard Auto. Group, Ltd. v. LeClair Mgmt. Corp.
153 F. Supp. 2d 1211 (D. Nev. 2001)

Commingling of a married couple's personal funds with those of a corporation owned by the wife creates genuine issues of material fact as to whether husband and corporation are alter egos.

David Smith owed the Internal Revenue Service (IRS) over $1,000,000. His wife owned LeClair Corporation but employed her husband as manager, allowing him to make all the decisions concerning the operation of the business. During LeClair's existence, Smith and his wife paid their personal expenses out of LeClair's account and did not maintain any personal bank accounts.

When LeClair was sold to Mallard, the IRS claimed the proceeds, asserting that the doctrine of alter ego should allow reverse piercing of the corporate veil, and that LeClair's assets should be used to satisfy part of Smith's debt. Mallard filed an interpleader, and LeClair moved for summary judgment, arguing that the money belonged to Mrs. Smith and the corporation.

The court denied the motion, holding that genuine issues of material fact existed concerning whether the government could establish the three elements of the alter ego: 1) that Smith dominated and controlled LeClair; 2) that LeClair and Smith had unity of interest; and 3) that maintaining the fiction that Smith and LeClair were separate entities would result in a fraud on the public.

Trs. of the Cement Masons & Plasterers Health & Welfare Trust v. Fabel Concrete, Inc.
159 F. Supp. 2d 1249 (D. Nev. 2001)

Alter-ego status makes a company responsible for the commitments and obligations of its counterpart.

Old Republic posted a bond for Fabel Concrete (Concrete Bond) with the Nevada State Contractors Board and, approximately five months later, posted a second bond for Fabel Enterprise (Enterprise Bond). The application for Enterprise listed the company as a new business and made reference to the Concrete Bond and the common owner, Robert Fabel. Before issuing the bond, Republic reviewed the personal finances of Robert and Susan Fabel. After the first bond, but before the second bond, Fabel Concrete signed a labor agreement, requiring payments to the Trust Fund on behalf of covered employees. After signing the labor agreement, the Trust Fund sought delinquent payments from Fabel Concrete on behalf of the employees covered by the fund. In the interim, Fabel Concrete had closed operations and re-formed as Fabel Enterprise (a non-union shop), which refused to make the past payments. Old Republic, who stood as Fabel's surety, also refused to pay. The Trustees then brought an action to force payment.

Old Republic argued that it should not be liable for the Enterprise Bond because of Enterprise's fraud in listing itself as a new business on the bond application. However, the Nevada Supreme Court found that the parties had stipulated to the alter-ego status of Faber Enterprise and Faber Concrete. Thus, the court found that it only needed to determine if the alter-ego status required Old Republic to pay the Enterprise Bond.

The court found that, under Nev. Rev. Stat. 624.273(1), a surety bond must be available to benefit any employee of a contractor who performed labor on or near the construction site covered by a contract, or is injured by an unlawful act or omission of the contractor in the performance of the contract. Old Republic issued the surety bond to cover labor performed, regardless of whether Enterprise was or would enter into any labor agreement. As an alter-ego, Enterprise was held liable for any delinquent contributions to the Trust Funds.

CIVIL PROCEDURE

Allyn v. McDonald
34 P.3d 584 (Nev. 2001)

A motion to dismiss does not constitute a "trial" for purposes of Nev. R. Civ. P. 41(e).

Plaintiff Allyn contended that her lawyer, McDonald, while representing Allyn in a divorce action against her husband, promised to file a separate per-

sonal injury claim against the husband. When McDonald did not do so, Allyn filed a malpractice claim against McDonald. In the course of that litigation, the district court held that the issue of the husband's abuse towards Allyn had been litigated in the divorce action and could not be re-litigated in any new action under the *res judicata* doctrine.

McDonald subsequently moved to dismiss the malpractice claim, arguing that the *res judicata* holding gave Allyn's husband a complete defense and, as such, the failure to file a separate tort action did not cause Allyn damage. After the district court found for McDonald, Allyn sought leave to amend her complaint but did not submit the motion for several months. When she finally did submit the motion, McDonald moved to dismiss because Nev. R. Civ. P. 41(e) requires that an action be brought within three years of the remittur from the previous appeal. The court granted the motion and Allyn appealed.

The plaintiff contended that, when she challenged the defendant's motion to dismiss on *res judicata* grounds, the action was "brought to trial" for purposes of Nev. R. Civ. P. 41(e).

The Nevada Supreme Court determined that Nev. R. Civ. P. 41(e) required that an "action" be brought within three years, not just an "issue" involved in the case. Therefore, the defendant's motion to dismiss resolved only one issue and did not settle the entire action, requiring the application of the three-year time restriction. In addition, the court recognized the need for strict adherence to the guidelines set forth in Nev. R. Civ. P. 41(e), indicating that the time frame was a mandatory obligation for the court, regardless of the equities or circumstances surrounding the order of dismissal.

Anderson v. Kahre
2001 U.S. Dist. LEXIS 8180 (D. Nev. 2001)

Tax lien sale was proper where challenging party could offer no evidence that the sale was not proper or in accordance with United States Code or Nevada Revised Statutes.

Anderson bought Kahre's property at an Internal Revenue Service (IRS) auction. After the required six-month redemption period, Anderson received the deed and recorded it. Kahre contested the sale. Both sides filed actions to quiet title and Anderson moved for summary judgment.

The district court held that Kahre offered no evidence that the sale was improper or that the sale violated federal or state statutes governing tax lien sales. Since Kahre showed no interest, right, or title that he may have held when the IRS lien attached the property, the court granted Anderson summary judgment.

Badillo v. Am. Tobacco Co.
2001 U.S. Dist. LEXIS 10233 (D. Nev. 2001)

Plaintiffs' motions for class certification in lawsuits against several tobacco companies were denied because individual determinations required to reach a decision in the cases predominated and defeated the purpose of a class action suit.

The federal district court denied class certification for plaintiffs in four separate lawsuits against tobacco companies. The plaintiffs, smoking and non-

smoking casino workers exposed to second hand smoke during their employment, sought class certification in suits alleging various claims against their former employers, including continuing medical monitoring of developing disease.

On its own motion, the Nevada Supreme Court certified that Nevada common law does not recognize a cause of action for medical monitoring. The Nevada Supreme Court further noted that medical monitoring may be available as a remedy, but neither party had briefed the issue or set forth a cause of action for which it would provide a remedy.

In considering whether plaintiffs' motions for class certification should be granted, the federal district court concurred with the Nevada Supreme Court that Nevada common law does not recognize a medical monitoring cause of action and that the plaintiffs had failed to demonstrate a viable cause of action to which medical monitoring could properly be tied as a remedy.

On the issue of class certification, the court reviewed each of the proposed classes under Fed. R. Civ. P. 23, the governing rule for certifying a class. The court held that, although the plaintiffs did not specify the size of the respective classes, defendants did not contest the assertion that each plaintiffs' class would be so numerous that joinder of all members would be impracticable. However, the court held that the plaintiffs did not meet the commonality and predominance requirements, and the members of the proposed plaintiffs' classes presented many individual issues, making certification improper. Since these issues would necessarily be based on an individual assessment in each case, the ability to establish commonality and predominance was frustrated. Similarly, the typicality requirement was frustrated by plaintiffs' inability to demonstrate that the claims were typical of the entire class. Because plaintiffs failed on the commonality and typicality requirements, they could not adequately represent the interests of all members within their proposed classes, and certification was improper.

Cal. Retail Natural Gas & Elec. Antitrust Litig. v. S. Cal. Gas Co. 170 F. Supp. 2d 1052 (D. Nev. 2001)

Cases regarding California gas and electrical company trade practices were properly heard in state court, as they lacked federal subject matter jurisdiction.

In eight consolidated actions, the plaintiffs (representing various California natural gas and electric rate payers) sued to recover damages on behalf of those rate payers. They alleged defendants' conduct resulted in unfair business practices and unfair competition. The defendant removed the actions to federal district court. The plaintiffs moved to remand to state court.

The federal district court found that, while there is strong federal interest in the regulation of electricity and natural gas, there was no federal law at question sufficient to allow the federal court to exercise its limited jurisdiction over the matter. In denying federal subject matter jurisdiction over the claims, the court could not find any applicable federal law with language expressing complete exemption from state law. The court held that the claims fell within the strict guidance and power of the State of California and not under federal statute, and any applicable federal statute played only a limited role in the case.

Canterino v. Mirage Casino-Hotel
16 P.3d 415 (Nev. 2001)

Questions asked by jurors during deliberation must be presented to counsel.

Plaintiff Canterino was beaten and robbed while staying at the Mirage Hotel and Casino. Canterino alleged the Mirage's security efforts were deficient and the cause of his injuries. At trial, Canterino presented evidence of permanent physical, neurological, and psychological damage. Mirage denied liability and presented no evidence that contradicted plaintiff's characterization of his injuries. Six of the eight jurors found the defendant liable for those injuries.

The jury then requested instruction as to whether the two remaining jurors should participate in the determination of damages. After a failed attempt to contact counsel, the judge informed the jury that only those finding liability should determine damages. The jury awarded the plaintiff $5.7 million. The judge found the jury's award excessive and influenced by prejudice, due to inflammatory comments made by Canterino's counsel at trial. The court entered a conditional order of remittal, reducing the verdict to $1.5 million.

Canterino refused to accept the remittur and appealed, arguing that the remittur was improper and that the court had erred in not informing counsel of the jurors questions regarding damages.

On appeal, the Nevada Supreme Court found the trial court abused its discretion in ordering remittur where the defendant did not present evidence that the damages were excessive. Rather, the court found that the damages were amply supported by the evidence and that, while appeals to the jury by Canterino's attorney were improper, they were not sufficiently pervasive as to taint the jury's verdict. The court also noted that Mirage's counsel had not objected to opposing counsel's remarks.

The court found that Nevada law requires questions asked by the jurors during deliberations to be presented to counsel. However, if the judge answers the question correctly without first submitting it to trial counsel, the judge's actions are held to be harmless error. In this case, though, the court found that the judge's response was incorrect and ordered the case remanded for a damage determination with all jurors participating.

Justice Rose dissented in part, finding the attorney's misconduct influenced the jury's award and should be considered, even in the absence of an objection by counsel.

Chief Justice Maupin, in a concurring opinion, cautioned lower courts to exercise restraint in reviewing a record to determine attorney misconduct when there are no objections. He distinguished this case from the court's recent decision in *DeJesus v. Flick*, 7 P.3d 459 (Nev. 2000), finding misconduct when it was clear from the record that the jury disregarded evidence. Since no evidence on damages was presented by the defense in this case, that was clearly not the case. Justice Agosti concurred to note that the lower court had found the jury's damage determination to be amply supported by the evidence, while the jury in *DeJesus* had disregarded the evidence in arriving at its damage verdict.

Dahya v. County of Washoe
19 P.3d 239 (Nev. 2001)

Where service on an individual in a foreign country that has signed the Hague Convention is not performed under the methods prescribed by the convention or those methods acceptable within the foreign country wherein process is served, such service is not effective.

Casmyn Corporation (Casmyn) filed suit in Reno against Dahya, Casmyn's former president and CEO, alleging breach of fiduciary duty and fraudulent use of corporate expense accounts during Dahya's employment by Casmyn. Dahya was a naturalized Canadian citizen, and resided in Spain when San Pio, Casmyn's Spanish attorney, served process personally upon Dahya. Since no Spanish court had authorized San Pio to serve process, Dahya filed a motion, arguing that service was improper under the Hague Convention and failed to satisfy Spanish law. The court denied Dahya's motion, stating that Casmyn was entitled to bypass provisions for service specified in the Hague Convention because Casmyn complied with Article Nineteen. Article Nineteen permits a method of transmission allowed by the internal laws of the country wherein service is effectuated; since Spain did not object to the method of service, the district court held that Spain had "permitted" Casmyn to serve Dahya. Dahya appealed.

On appeal, the Nevada Supreme Court found in favor of Dahya, and reversed the trial court's decision. The court refuted the district court's interpretation of the Convention, holding that Article Nineteen's "permits" wording cannot be construed as broadly as attempted by the district court. The court noted that the Hague Convention was adopted with uniform guidelines on service in order to avoid the confusing patchwork of rules that would make litigation frustrating and difficult for foreign litigants. The court held that the Convention's intent to streamline service issues would be frustrated by an interpretation of "permits" that would allow for any service not objected to by the foreign state where service is effectuated. Such an interpretation would also impinge upon the sovereignty of foreign states. Moreover, the court's opinion that the district court's interpretation of "permits," "objects," and "opposes" is inconsonant with the purpose behind the Convention, is supported by different treatment of the words in other Articles of the Convention.

The Court also determined that, while personal service is allowed in Spain, Spanish law is silent regarding foreign service by an individual upon a resident who is not a Spanish citizen. Although both sides argued that Spain's silence on the matter favored its position, the court found that the weight of Spanish law supported Dahya's construction, that Spain does not permit service in such instances, and therefore San Pio's service was ineffective.

Dugan v. Gotsopoules
22 P.3d 205 (Nev. 2001)

A party may testify as to the value of their own vehicle and the cost of a rental car in a personal injury action.

Dugan sued Gotsopoulos for injuries and damages resulting from a car accident in which both were involved. Dugan won, but appealed the calculation of damages, claiming the court erred in refusing to allow her to testify as to

compensatory damages resulting from the accident. The testimony rejected included her own testimony as to the value of her vehicle, the Kelley Blue Book price, and the cost of a rental vehicle.

The Nevada Supreme Court reversed, holding that Dugan should have been allowed to testify as to the value of her real or personal property because the value of the property was at issue in the action. Expert testimony is not required to value personal property. In addition, the court found the Kelley Blue Book to be an acceptable and reliable publication in the automobile industry for determining the value of an automobile, and evidence based on it should have been admitted. Finally, the court held that Dugan was entitled to recover damages for loss of use of her vehicle for the period of time she was unable to use the property, since the loss resulted from the subject of the action. A measure of such damages may be rental car costs for the period required to repair the vehicle. If the party does not actually rent a substitute vehicle due to lack of financial capacity, they may still provide evidence of the cost, in order to demonstrate the financial inconvenience and deprivation the owner suffered from the inability to use their property.

Graziose v. Am. Home Prod. Corp.
202 F.R.D. 638 (D. Nev. 2001)

Permissive joinder of plaintiffs is only allowed when the right to relief asserted by each plaintiff arises out of the same transaction or occurrence and there is a common question of law or fact.

Consumers who alleged they sustained injuries from over-the-counter medications sued various manufacturers and sellers of the medications. The claims varied in the type of medication and the nature of the damages. The plaintiffs did not name the exact same defendants in their various actions, although the claims were connected by the same ingredient in each of the medications. The defendants moved to sever the plaintiffs.

The district court stated that Fed. R. Civ. P. 20(a) required the right to relief asserted by each plaintiff to arise out of the same transaction or occurrence and that there be a question of law or fact common to all parties. If these requirements are not met, the actions may be severed as long as there is not substantial prejudice to the plaintiffs. The court found that the claims of the plaintiffs did not meet the requisites for joinder.

Meyer v. Sunrise Hosp.
22 P.3d 1142 (Nev. 2001)

District court has the right to review decisions made by private hospital review boards.

Plaintiff Meyer, a physician, saw a homeless patient in the hospital for seven minutes and released him. Within hours, the patient died of pneumonia. The hospital conducted a review of Meyer's care for the patient, and a hearing was held regarding the incident. As a result, plaintiff's medical privileges were suspended with eligibility to reapply in twelve months. Plaintiff subsequently filed an action in district court against the hospital for breach of the covenant of good faith and fair dealing, as well as breach of contract.

The hospital's motion to dismiss was granted by the trial court, which ruled that the hospital's procedures were followed and that the decision was reasonable.

On appeal, the Nevada Supreme Court upheld the dismissal. The court held that the district court had the right to review decisions made by private hospital review boards, the peer review committee adequately reviewed the evidence, and the committee acted with reasonable belief that suspension was warranted. Plaintiff failed to overcome the presumption that the review committee acted with reasonable belief and that the suspension was warranted based on the evidence. Therefore, the hospital was entitled to immunity under the Health Care Quality Improvement Act.

Michel v. Nevada
17 P.3d 1003 (Nev. 2001)

Although attorney liens have priority over hospital liens, the entire funds in dispute must first be turned over to the court in an interpleader action in order to determine the rights of such interest parties.

Attorney Herbert L. Michel, Petitioner, filed a personal injury action on behalf of Yolanda B. Cervantes (Real Party in Interest) for which Cervantes agreed to pay forty percent of any amount recovered. Cervantes was awarded $14,705.00, which was insufficient to pay her $28,346.26 in medical expenses. Since the medical providers could not agree on a pro-rata share of the arbitration award, Michel deducted his fees, interpleaded the remaining $8,193.27, and named Cervantes and the medical providers as defendants. The district court refused his subsequent request to be discharged from the interpleader action, and he sought an extraordinary writ from the Nevada Supreme Court, directing the district court to discharge him.

Based on substantial case law, the court determined that an attorney's lien does, in fact, have priority over a medical provider lien when the award is insufficient to pay all liens against the award. The court held that, although there is an important public policy interest served by enforcing medical provider liens, there is no authority that supports giving them priority over attorney liens. Furthermore, Nev. Rev. Stat. 108.600(2) specifically gives attorney liens priority over "hospital liens," which the court likened to medical provider liens. However, although the court determined that the interpleader action is the appropriate procedure to determine the rights of the interested parties, the entire funds in dispute must first be turned over to the court. Once the funds have been submitted, the court must make certain findings and conclusions before the money is distributed. Since Michel failed to submit the entire funds to the court, the court could not make these findings and, therefore, Michel's writ requesting extraordinary relief was denied.

Mineral County v. Nevada
20 P.3d 800 (Nev. 2001)

Disputes involving various claimants to water rights, including adjacent states, local political subdivisions, and an Indian Reservation, are best settled in federal court when litigation has already commenced there.

Due to the depletion of water levels in Walker Lake, petitioners Mineral County and the Walker Lake Working Group sought writs of prohibition and mandamus to prevent the respondents from granting additional rights to withdraw water from the Walker River system. They also sought to compel the respondents to comply with their obligations to protect Walker Lake.

The Nevada Supreme Court ruled that mandamus and prohibition are extraordinary measures, to be used sparingly and in the court's discretion. The court noted that the United States Supreme Court has ruled that the allocation of water rights is essentially a question of property rights and is best disposed of in unified proceedings. Related litigation on water rights in the Walker River system had already begun in United States District Court. Given that fact, and that there was an action pending in Decree Court, the court ruled that federal district court was the proper place to decide the issues. The court further ruled that the petitioners did not meet the burden of showing that mandamus or prohibition was warranted.

Roll v. Tracor, Inc.
140 F. Supp. 2d 1073 (D. Nev. 2001)

Federal court ruled that, although Nevada had not yet ruled on the issue, Nevada would follow California's approach to successor liability in products liability case.

Roll, an airman at Nellis Air Force Base, was injured when flares unexpectedly exploded. The flares were part of an inventory manufactured by a company that had since been acquired by another. Roll brought suit against the new owner of the defective flares' original manufacturer. Roll was stationed at Nellis at the time of the injury; however, as a member of the military, he maintained his New York residency when he joined the military. He brought the action in the Western District of New York. It was then transferred to Nevada for the convenience of the parties.

The dispute centered on what liability, if any, the succeeding company held for products defectively designed by the company originally producing the flares.

The court found that a transferee court in a diversity action must apply the laws of the state in which the action was originally filed. New York courts apply the law of the jurisdiction with the greatest interest in the dispute, and the court found that, in this case, that jurisdiction was Nevada. The court then found that New York law required the court to decide the successor liability issue without regard for the case's other issues.

The federal court attempted to predict how the Nevada Supreme Court would rule on the case. The court based its surmise on the Nevada Supreme Court's decisions in other products liability cases, using similar California cases. Since the Nevada Supreme Court had not previously ruled on the elements of the "mere continuation" exception to successor liability, the court discussed the relationship of the domiciled state of the plaintiff (New York), the primary place of business for the defendant (Texas), and their application to the products liability case.

The federal court reasoned that, since California followed New York's version of successor liability and Nevada has looked to California decisions in

previous (similar) product liability cases, Nevada would probably rule that: the mere continuation exception to successor liability refers to corporate reorganizations where only one corporation remains and the predecessor organizations are extinguished; the successor-buyer is not in existence prior to the purchase of the predecessor's assets; and the predecessor-seller does not survive the sale of the assets. Moreover, if the business of the successor is the same as the business of the predecessor, the business employs the same work force, and the predecessor's officers and directors become the officers and directors of the successor organization, then the mere continuation exception to the successor liability rule will apply.

Stafford v. County of Washoe
2001 U.S. App. LEXIS 3183 (D. Nev. 2001)

Issue preclusion requires federal courts to preclude identical arguments made previously by a party in state court.

The state district court held that the appellants failed to state a claim in a complaint and also denied the appellants' proposed amendment to a complaint. The appellants failed to state a claim because a person cannot bring suit against a political subdivision of Nevada. An amendment to a complaint to add a plaintiff that is barred by the statute of limitations would be useless. The same appellants raised these identical issues in federal court, claiming that the district court erred in its decision. The court held that the appellants are subject to issue preclusion where identical issues are raised in the federal court that have already been decided in state court. Issue preclusion requires federal courts to respect state court rulings.

Vega v. E. Courtyard Assocs.
24 P.3d 219 (Nev. 2001)

Violation of a properly adopted building code is negligence per se if the plaintiff belongs to the class of persons the code was intended to protect and the injury suffered is the type the adopted code was intended to prevent.

Ms. Vega was injured as she attempted to negotiate a ramp to the main entrance of the Eastern Courtyard medical facility. Vega charged negligence per se because the slope of the ramp exceeded the slope allowed under the Uniform Building Code (UBC). The district court rejected the claim because Vega only alleged violation of an ordinance, not a statute. Ms. Vega appealed the district court's failure to instruct the jury on the negligence per se doctrine as it related to her case.

The Nevada Supreme Court reversed and remanded the case to the district court. The court concluded that the district court must determine as a matter of law whether a particular statute, administrative regulation, or local ordinance is utilized to define the standard of care in a negligence action. The court held that violation of a statute constitutes negligence per se when the injured party is part of the class of persons the statute was intended to protect and the injury suffered is the type that was intended to be prevented. In so ruling, the court reversed its holding in *Ashwood v. Clark County*, 930 P.2d 740 (Nev. 1997), which concluded that violation of the UBC may be used to establish negligence per se.

Chief Justice Maupin dissented. He argued that a jury should be allowed to hear evidence of a building code violation when considering negligence, but that the lack of uniform application of building codes made a negligence per se finding improper.

CONSTITUTIONAL LAW

Fallon Paiute-Shoshone Tribes v. City of Fallon
174 F. Supp. 2d 1088 (D. Nev. 2001)

Motion for summary judgment on numerous federal statutory and constitutional provisions concerning tribal land issues granted in part and denied in part.

The Fallon Paiute-Shoshone Tribe acquired property which was transferred to the United States in trust as part of its reservation, pursuant to section 103 of Public Law 101-618. The property is located within the City of Fallon, which operates the only publicly-owned sewer treatment facility in the area and also provides electrical service. The Tribe requested services from the City, which the City denied. The Tribe filed an action seeking utilities service and alleging multiple statutory and constitutional violations, and moved for summary judgment on each violation.

The Tribe argued that the City's denial of services violated 42 U.S.C. § 1983, which creates a cause of action for rights conferred by federal statutory and constitutional provisions. The Tribe also claimed a violation of the equal protection clause, alleging that the City did not similarly require that other landowners have their land annexed to the City before utilities service would be provided. The Tribe also asserted substantive due process and takings clause claims.

The district court held that the federal government assumed a guardian-ward relationship with respect to tribal Indians and must protect trust property from state interference. Because the United States was required to accept the land into trust under § 103, the Tribe has a federal right to have its land held in trust and the City's denial of services interfered with the Tribes' right to enjoy the beneficial use of such land. Plaintiff's motion for summary judgment on § 1983 was therefore granted.

Because the City failed to provide any evidence refuting the allegations that it treated similarly situated parties differently from the Tribe, summary judgment was granted on the equal protection claim. Summary judgment was denied on the substantive due process claim, because the Tribe failed to specifically identify their substantive right and because of the highly destructive potential of overextending substantive due process protection. The Tribe's motion for summary judgment on its takings clause claim was also denied because it failed to provide sufficient evidence that the refusal of service amounted to anything more than a diminution of value. The court found that issues of material fact remained regarding the details of the contract between the Tribe and the City, and thus denied summary judgment on the breach of contract claim.

Henkle v. Gregory
150 F. Supp. 2d 1067 (D. Nev. 2001)

Although § 1983 claims are totally subsumed under Title IX, a gay student could bring a claim against school administrators under the First Amendment's protections of free speech and could seek punitive damages from the officials in their individual capacities.

Plaintiff was an openly gay high-school student. After his appearance on a television show announcing his sexual orientation, he claimed to experience harassment from other students at his school, and alleged the administration failed to intervene. Plaintiff was twice transferred by school administration to new schools and told not to inform his new classmates about his sexual orientation, but continued to suffer harassment. Plaintiff was eventually placed in an adult education program, in which he could not receive a high school diploma. Plaintiff sued under 42 U.S.C. § 1983 and Title IX, alleging school administrators violated his rights under the First and Fourteenth Amendments.

The Ninth Circuit found that a cause of action may not be brought under § 1983 when another statute provides a comprehensive remedial scheme for the alleged wrong. The court found Title IX to be sufficiently comprehensive and remedial to disallow a § 1983 claim against school officials. Title IX provides for hearings and judicial review. Although the circuit courts were split as to whether Title IX subsumed a § 1983 claim, the court held it would be inconsistent to allow a plaintiff to circumvent Title IX's remedial scheme by bringing a § 1983 action.

The court found that students do not leave all constitutional rights at the schoolhouse door, and the right to free speech should not be unduly restrained. The school officials' attempts to suppress the plaintiff's speech regarding his sexual orientation were sufficient to permit the plaintiff to withstand the motion to dismiss. Further, the plaintiff presented a sufficient claim of retaliation based on his First Amendment rights to refute a motion to dismiss for failure to state a claim.

The court held that school officials were not entitled to qualified immunity. The Supreme Court has clearly established a student's First Amendment right to freedom of speech and expression. The officials should have known that students are entitled to free speech, and thus were precluded from arguing qualified immunity. Additionally, the court found the plaintiff could seek punitive damages against the officials in their individual capacities, but not in their official capacities.

The court granted defendant's motion to dismiss based on the § 1983 actions and claims for punitive damages against the officials in their official capacities. However, the court denied the motions to dismiss on the First Amendment and Title IX claims.

Mangarella v. Nevada
17 P.3d 989 (Nev. 2001)

A statute that imposes mandatory probation conditions on convicted sexual offenders and is limited in specific questions asked does not violate protection against self-incrimination and is not unconstitutionally vague.

Defendant pleaded guilty to two counts of lewdness with a minor and was sentenced to serve 36 to 120 months in prison. The sentence was suspended and defendant was placed on a five year probation, with conditions required by Nev. Rev. Stat. 176A.410. Defendant challenged the constitutionality of the statute, arguing that the polygraph provision was overbroad, requiring defendant to submit to polygraph examinations violated his Fifth Amendment privilege against self-incrimination, and the statute was vague in its failure to specify guidelines for what constitutes acceptable employment, curfews, or residences.

The Nevada Supreme Court held that the statute was not vague because it required the scope of the polygraph examination to be limited to questions related to defendant's drug use. The court wrote that the statute required the supervising probation officer to set requirements that are reasonably related to the purpose of the statute and that the statute did not give the probation officer the discretion to impose conditions that were arbitrary, capricious, or discriminatory. The court also held that compelling a probationer to answer questions in a polygraph examination as a condition of probation did not violate the Fifth Amendment because it was not a waiver of the privilege against self-incrimination.

Nevada v. Harvey
32 P.3d 1263 (Nev. 2001)

The Clerk of Court is a ministerial office, and its duties may be performed by the district court

Washoe County Clerk Harvey brought suit against the Second Judicial District Court, asserted that she was the sole person designated by the Nevada Constitution as responsible for performing the duties associated with the court clerk, and that the court had usurped her position as ex officio court clerk. The district court argued that the office of clerk is a ministerial function of the judicial branch and, as such, the district court was entitled to supervise, control, or operate the office of district court clerk.

The Nevada Supreme Court held that the district court had not usurped Harvey's authority, and dismissed the complaint. The office of the district court clerk is not a constitutional office, but rather a ministerial office inherent to the judicial branch of government. The court specified that the office's sole purpose is to perform clerical and record-keeping functions necessary to the district court's operation. The clerk's duties may be performed, in whole or in part, either by the county clerk pursuant to legislative enactment, or by the district court pursuant to court rule.

Justice Leavitt, joined by Justice Young, dissented. Justice Leavitt wrote that only the Nevada legislature can change the duties of the office of County Clerk. Because the legislature had named the County Clerk as the Clerk of the Court, and counties are legislative subdivisions of the state that derive their authority from the state, the majority was in error in specifying the Clerk's duties and who may fulfill them.

Nev. Mining Ass'n v. Erodes
26 P.3d 753 (Nev. 2001)

For purposes of the Nevada constitutional deadline for legislative adjournment, midnight Pacific Standard Time is not the same as midnight Pacific Daylight Savings Time.

During the 71st session of the Nevada Legislature, Assembly Bill 661 was returned to the Assembly, in a form which concurred with the Senate's three amendments after 12:00 a.m. Pacific Daylight Savings Time (PDST), but before 12:00 a.m. Pacific Standard Time (PST) on June 5, 2001. In addition, Assembly Bill 94 Conference Committee Report was similarly adopted by the Senate after midnight PDST but before midnight PST on June 5, 2001. Thereafter, the state legislative counsel declined to enroll both bills and refused to deliver the bills to the Governor for his action. In response, the plaintiffs, a non-profit mining association and a non-profit association of counties, petitioned the court for a writ of mandamus to compel the defendant, a public officer, to perform the legal duty of her office.

In order to determine the issue, the Nevada Supreme Court was asked to resolve whether the 120-day durational limit included the first day of regular session and whether midnight Pacific standard time is the same as midnight Pacific Daylight Savings Time. Giving effect to the intent of those who enacted the durational limit, the court determined that the durational limit constitutionally mandated under Nevada Constitution, art 4, § 2(2) restricted the regular sessions to no more than 120 days. Therefore, this 120-day regular session limit had to include the first day in the tally.

Secondly, the court defined the difference between the terms "Pacific Standard Time" and "Pacific Daylight Savings Time." By looking to the commonly understood meanings, as well as the historical development of the terms, the court determined that these terms were clearly different and distinct, Pacific Standard Time being one hour earlier than Pacific Daylight Savings Time.

Taking this into consideration, the Supreme Court converted the 120-day durational limit into hours, hence establishing that the legislature had 2,880 hours before it must adjourn. Consequently, when Nevada changed its clocks in April, the day was shortened to twenty-three hours. By tacking these twenty-three hours on to the adjournment date, the last available hour for regular session would occur at 1:00 a.m. on June 5, 2001.

In light of this conclusion, Assembly Bills 94 and 661 were passed during the regular session of the 71st session of the Nevada Legislature. The Supreme Court granted the petitions and required the defendant, under her constitutional and statutory duty, to enroll the bills and deliver them to the governor.

Nylund v. Carson City
34 P.3d 578 (Nev. 2001)

The emergency management immunity statute shields a city from liability for pre-emergency negligence that contributes to damage caused by later emergency management activities, and the city could declare the emergency and need not wait for the governor's formal emergency determination to claim immunity.

Heavy rains and melting snow created a flood in Carson City, which caused the city's storm drainage system to overflow. The city declared the situation an emergency disaster, and employees diverted water down Fifth Street by employing sandbags. This flooded the Nylund's condominium, causing serious damage. The Nylunds sued the city, their homeowners' association, and the Fraternal Order of the Eagles, claiming trespass, nuisance, wrongful channeling of waters, and negligence against plaintiffs. Carson City moved for summary judgment, claiming statutory immunity. The city produced affidavits, indicating that the city had declared the flood an emergency. Plaintiffs opposed the motion and requested more time for discovery. Plaintiffs alleged that the city had notice as early as 1983 that the storm drainage had design and maintenance defects, and the city should be held liable.

The court denied plaintiffs' request for additional discovery and granted Carson City's motion for summary judgment, claiming there was no issue of material fact due to the city's immunity. On appeal, plaintiffs alleged that the district court misapplied the emergency management immunity statute by failing to distinguish pre-flood activities, such as design, operation, and maintenance of storm drains, from handling the flood.

The Nevada Supreme Court held that the district court properly read and applied the law and summary judgment was appropriate. The court stated that the immunity statute covered both negligent emergency management activities and previous negligence that contributed to the damage caused by the emergency management activities. The court also held that Carson City was allowed to declare an emergency itself, in accordance with its municipal code, and thereby claim immunity under Nev. Rev. Stat. 414.110.

In dissent, Justice Rose stated that the purpose of the emergency management immunity statute was to grant protection to those who were taking immediate action in a crisis situation. He alleged that the majority gave the immunity statute an expansive interpretation not justified by the statute itself. He also argued that the emergency management statute specifically required an emergency called by the Governor; and since the Governor had not done so, the immunity statute was inapposite.

Perrin v. Gentner
177 F. Supp. 2d 1115 (D. Nev. 2001)

Municipal governments are not immune from suit for state law claims arising out of operational tasks.

The court reviewed defendants' motion for summary judgment arising out of a shooting incident between a Las Vegas Metropolitan police officer and a pedestrian shot and killed by the officer. Prior to the shooting, the officer ordered the pedestrian to show his hands, but never warned him that he would use deadly force. The officer subsequently fired several rounds, hitting the pedestrian more than once, stopped, and fired again when the pedestrian turned towards the officer. The officer then reloaded his weapon and radioed for help. At least six of the fourteen rounds fired hit the pedestrian, resulting in his death. The only object retrieved from a subsequent search of the victim was a glass jar.

The decedent's estate filed private rights of action against the officer and municipality for violations of the decedent's Fourth and Fourteenth Amendment rights. The estate also brought suit against defendants for violations of state law claims based on wrongful death, negligent hiring, negligent supervision, and negligent retention. All issues were subsequently disposed of except those related to negligent training, negligent supervision, and wrongful death.

Nev. Rev. Stat. 41.032(2) states that a legal action may not be brought against a state, or an officer of the state, based upon the performance or failure to perform a discretionary function, whether or not the discretion involved is abused. The question of governmental immunity depends upon whether the actions of the officer were discretionary or ministerial in nature. The district court relied on *Lewis v. St. Petersburg*, 260 F.3d 1260 (11th Cir. 2001), in which the court found that "when an officer has made an initial discretionary decision to conduct a stop and then proceeds to carry out that decision, the officer is no longer exercising a 'discretionary' function, but is engaged in an 'operational' task." Accordingly, the officer could be held liable for negligence in the use of deadly force. Applying the Eleventh Circuit's rationale to the facts of this case, the district court found that the officer's use of deadly force in furtherance of the discretionary stop was an operational task pursuant to the police department's profiling policy, which could subject the municipality to liability.

In determining the municipality's liability based upon negligent training and supervision, the court looked to Nevada case law, as stated in *State v. Webster*, 504 P.2d 1316, 1319 (Nev. 1972). The *Webster* court held that subsequent retention and supervision are "the type of operational functions of government not exempt from liability if due care has not been exercised and an injury results." Because the police department assumed the obligation to ensure that the officer's employment did not pose an unreasonable safety risk to those he stopped, the department's training and supervision constituted an "operational function" for which they do not enjoy immunity under Nev. Rev. Stat. 41.032.

Reinkemeyer v. Safeco Ins. Co. of Am.
16 P.3d 1069 (Nev. 2001)

Nevada statutory law prohibits cancellation or non-renewal of homeowner's insurance, and such law is facially constitutional under the United States and Nevada Constitutions.

Dr. and Mrs. Reinkemeyer were insured by Safeco Insurance Company of America under a homeowners' insurance policy. Between 1989 and 1993, the Reinkemeyers submitted three claims under the policy, totaling over $200,000. Although the losses were not the fault of the Reinkemeyers, Safeco declined to renew their policy in 1994.

The Reinkemeyers sued Safeco in federal district court for failing to renew the homeowner's policy, claiming Safeco violated Nev. Rev. Stat. 687B.385. Safeco argued that the statute only applied to automobile insurance, not homeowner's policies. Both sides based their arguments on the Nevada Legislature's intent when it amended Nev. Rev. Stat. 687B.385 in 1997.

The United States District Court of Nevada certified two questions concerning the legislation to the Nevada Supreme Court: (1) whether former Nev. Rev. Stat. 687B.385 prohibited cancellation or non-renewal of certain homeowners policies; and (2) whether, as the statute applied to homeowner's policies, it violated the United States and Nevada Constitutions.

Relying on the plain language of the statute which stated that the statute applies to casualty and property insurance, the Nevada Supreme Court held that the pre-1997 version of the statute applied to homeowner's insurance policies. The court also held that the statute was not facially unconstitutional under the Nevada Constitution because the statute did not require that every individual policy guarantee a fair rate of return.

CONTRACTS

Sunrise Suites, Inc. v. Eric Nelson Auctioneering
266 B.R. 895 (D. Nev. 2001)

Oral modification of a contract under a confirmation order from the bankruptcy court is a violation of the bankruptcy court's registration requirements.

Attorney Harry M. Weiss, Appellant, agreed to represent Carl Icahn at an auction to bid on the Sunrise Suites Hotel & Casino and RV Park (Properties). The bankruptcy court had previously entered a confirmation order stating that Eric Nelson Auctioneering (Nelson) would offer a one percent commission to Weiss as buyer's broker if he followed certain requirements. Weiss did not comply with the requirements, and Nelson subsequently refused to pay the broker's fee. Weiss filed a complaint in bankruptcy court, but the court granted Nelson's motion for summary judgment. The district court affirmed the bankruptcy court's holding.

In affirming, the court determined that, in order to form a contract, Weiss had to affirmatively accept the terms of Nelson's offer but failed to do so because he did not fulfill the written commission requirements. Furthermore, the contract could not be orally modified, as Weiss contended, as that would have constituted a violation of the bankruptcy court's registration requirements. Further, Nelson did not owe a fiduciary duty to Weiss because he was neither the buyer nor the seller.

Kaldi v. Farmers Ins. Exch.
21 P.3d 16 (Nev. 2001)

A wrongful termination claim involving an exclusive agency agreement was unsuccessful because it did not contain a "for cause provision."

Kaldi entered into an agent agreement with Farmers Insurance in February 1981. The agreement authorized Kaldi to sell Farmer's insurance in an area determined by Kaldi. He was to be allowed to submit requests for other insurance companies, but only if it was in an area for which Farmers' did not provide coverage. Also contained in the contract was a provision that allowed for termination of the agreement by either party upon written notice three months in advance. Upon receiving this written termination letter, an agent could request a review of the termination within ten days and receive a judgement by

the Termination Review Board. Kaldi construed this provision – allowing for a review of the termination – as a covenant that the employee relationship would not be terminated without just cause. Kaldi subsequently brought suit against Farmers, alleging wrongful termination of their agent appointment agreement, that Kaldi retained the right to all information on his customers (under trade secrets), that the contract actually created an employer-employee relationship, not one of an independent contractor, and that there was a breach of an implied covenant of good faith and fair dealing. The district court ruled in favor of Farmers, dismissing Kaldi's claims. Kaldi appealed.

The Nevada Supreme Court affirmed the lower court decision. The court held that the contract unambiguously identified Kaldi as an independent contractor, not an employee, and that, absent a contractual provision to the contrary, an independent contractor/principal agency relationship is terminable at any time at the will of the principal or the agent. Furthermore, Nev. Rev. Stat. 683A.290(1) allows for the termination of an agent's appointment at any time.

The court also rejected Kaldi's claims that he was entitled to retain all information supplied by his customers as trade secrets. The court stated that the elements needed for a finding of misappropriation of trade secrets are: 1) a valuable trade secret; 2) misappropriation of the trade secret through use, disclosure, or nondisclosure of use of the trade secret; and 3) the requirement that the misappropriation be wrongful because it was made in breach of an express or implied contract or by a party with a duty not to disclose. Because all documents and records are the confidential property of the company, and the contract clearly states that the customer's information is the property of Farmers, Kaldi's argument failed. Furthermore, Kaldi's assertion that if the agreement is breached by the company, he is not bound by the provision, also fails because the court already determined that Farmer's was within its rights to terminate Kaldi with thirty days notice.

Schwartz v. Wassenburger
30 P.3d 1114 (Nev. 2001)

In cases of anticipatory breach, the statutory period commences either on the date stipulated for actual performance or on the date that the action is initiated.

Appellant Schwartz sued on behalf of her late husband's estate, arguing that respondents breached a purchase agreement entered into by her husband before his death. The district court dismissed the action as beyond the six year statutory time limit mandated in Nev. Rev. Stat. 11.190(1)(b), with the statute being triggered at the moment the defendants allegedly repudiated the contract. Schwartz appealed, arguing that the trigger date was not correct.

The Nevada Supreme Court held that, in cases of anticipatory breach, the statutory period commences either on the date stipulated for actual performance or, if the aggrieved party chooses to bring suit before performance is due, on the date that the action is initiated. Because appellant's husband filed the complaint before performance under the contract was due, and six years had not yet lapsed from the initial filing of appellant's suit, the statute of limitations had not yet run, and the suit was proper.

Sec'y of State v. Tretiak
22 P.3d 1134 (Nev. 2001)

A claim of statutory securities fraud under Nev. Rev. Stat. 90.570 does not require the common law elements of reliance and scienter.

Tretiak, founder and CEO of a small corporation, made a public offering that the Securities Division of the Nevada Secretary of State (Division) found to have involved numerous misrepresentations and securities violations. The Division imposed sanctions based on an interpretation of Nev. Rev. Stat. 90.570 that did not require the common law elements of reliance and scienter for a claim of securities fraud. On appeal, the state district court upheld the Division's findings of fact but found that the Division had abused its discretion in imposing sanctions. The Division appealed and Tretiak cross-appealed, arguing that the findings of fact should have been set aside.

The Nevada Supreme Court found that there was substantial evidence to support the Division's findings of fact, and held that the sanctions imposed were not unreasonable. The court overruled the district court and re-imposed the sanctions.

The court also denied Tretiak's cross-appeal. The court held that scienter and fraud are not required to establish a claim of securities fraud under Nev. Rev. Stat. 90.570. In arriving at that conclusion, the court relied on both case law from other states and from the United States Supreme Court decision in *Aaron v. Securities & Exchange Commission*, 446 U.S. 680 (1980), interpreting the federal statute that parallels Nev. Rev. Stat. 90.570. That holding focused on the effect of the conduct in question on members of the investing public rather than upon the culpability of the defendant.

CRIMINAL LAW

Barton v. Nevada
30 P.3d 1103 (Nev. 2001)

Nevada statute, defining manslaughter, is not unconstitutionally vague or ambiguous.

Barton was involved in a road rage incident, in which Barton intentionally rammed another car, killing the driver. Barton was subsequently convicted of second-degree murder in a jury trial, and sentenced to life in prison. Barton filed a post-conviction petition for habeas, arguing: 1) ineffective assistance of trial counsel for failing to request a jury instruction on the lesser charge of reckless driving causing substantial bodily harm; and 2) ineffective assistance of appellate counsel for failing to argue effectively that Nev. Rev. Stat. 200.070, which defines involuntary manslaughter, is unconstitutionally vague and ambiguous. The district court denied the petition, and Barton appealed.

The Nevada Supreme Court affirmed the district court's denial, holding that, under the traditional elements analysis, reckless driving is not a lesser offense for murder. Further, the court noted that Barton was not entitled to a lesser offense instruction regarding reckless driving because the charged offense of murder could have been committed without committing reckless driving. The court therefore ruled that trial counsel was not ineffective for

failing to request the instruction. The court also held that Nev. Rev. Stat. 200.070 adequately defines murder and manslaughter, and that appellate counsel was not ineffective in arguing that the statute is unconstitutionally vague and ambiguous.

Chapman v. Nevada
16 P.3d 432 (Nev. 2001)

Denial of sexual assault defendant's request for separate psychological examination of the child victim held to be within trial court's discretion where family and clinical interviewer gave corroborating evidence and defendant did not establish a reason to doubt the victim's veracity.

Appellant, Chapman, was convicted on numerous counts of sexual assault of a minor. Chapman appealed his conviction, asserting the district court should have granted his motion for an examination by an independent psychologist. He also charged that the trial court improperly excluded evidence and improperly discounted a failure by the state to preserve evidence, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The court denied these claims and upheld Chapman's conviction.

The court found that Chapman had failed to show a compelling need for separate examination since: 1) the state's forensic interviewer did not qualify as an expert; 2) the testimony of the family corroborated the charges; and 3) the evidence did not establish a reason to suppose that the victim's mental or emotional state may have affected her veracity.

Additionally, the court held that the trial court did not err in excluding Chapman's evidence of the victim's knowledge of sexual activity and the male anatomy, since the evidence did not prove that the victim could have fabricated the charges against Chapman. Regarding Chapman's third charge, the court noted that the state never had possession of the evidence Chapman accused it of failing to preserve.

Evans v. Nevada
28 P.3d 498 (Nev. 2001)

Jurors may not prematurely rely on "other matter" evidence to find or give weight to aggravating factors.

Evans, defendant in a murder trial, was convicted and sentenced to death. The district court denied defendant's post-conviction petition for habeas corpus, upon which he filed an appeal. In the appeal, Evans contended that his trial and appellate counsel were ineffective on several counts. The Nevada Supreme Court rejected some of the arguments outright and held that, although counsel was ineffective, Evans failed to establish prejudice.

However, the court found that Evans's claim that counsel was ineffective for failing to object to the prosecutor's comments during the penalty phase of the proceeding did have merit. Evans argued that the prosecution made an improper argument to which defense counsel failed to object. The state argued that the prosecutor was merely amending a statement of defense counsel, wherein defense counsel told the jurors that they could not consider the "other matter" evidence introduced by the prosecution unless they first found an aggravating circumstance. The court ruled that, although defense counsel's

argument was incomplete because she misinformed the jurors regarding what evidence they could consider, the jurors could have considered other evidence introduced if they decided the death sentence was not appropriate. However, the prosecutor's argument erroneously directed the jury to consider other evidence in its determination of death penalty eligibility.

Consequently, Evans's penalty phase was unduly prejudiced because the jurors relied prematurely on "other matter" evidence in its consideration of enumerated aggravating circumstances.

The court upheld the conviction but vacated Evans's death sentence and remanded the case for a new penalty hearing. It also provided that, in future capital cases, jurors shall consider evidence relevant to the existence of: 1) aggravating and 2) mitigating circumstances, as well as 3) other evidence presented against the defendant. In determining whether any aggravated circumstance has been proven beyond a reasonable doubt, the jury is to only consider evidence relevant to that aggravating circumstance. The same standard applies to mitigating circumstances that outweigh any aggravating circumstances, although that determination is made on an individual basis.

After a unanimous finding beyond a reasonable doubt that at least one aggravating circumstance exists, and after each juror has determined that any mitigating circumstances do not outweigh the aggravating circumstances, the defendant is eligible for the death penalty. At that point, the jury is to consider all three types of evidence. It still has the discretion to impose a lesser sentence than that of death, and the decision must be unanimous.

Chief Justice Maupin with whom Justice Leavitt joined, dissented in part, finding that Evans's petition for post-conviction relief should have been denied in its entirety. The prosecution's attempt to correct defense counsel's misstatement was appropriate. Further, the prosecutor's statement was "related to a separate defense argument regarding other penalties and did not unequivocally address the requirements for imposition of the death penalty." Finally, the dissent suggested that any error was harmless, noting how carefully the trial was conducted, that Evans confessed to murder, and a competent witness described the murder.

Finger v. Nevada
27 P.3d 66 (Nev. 2001)

Act of the 1995 Nevada Legislature eliminating insanity as an affirmative defense is unconstitutional and, therefore, the M'Naghten *approach to insanity controls.*

On April 10, 1996, Fredrick Finger was arrested for murdering his mother. Upon being questioned by the police, Finger gave two disparate versions of the events. Finger first claimed that his mother's roommate killed his mother; however, Finger failed to explain the blood on his clothes or his possession of the murder weapon. Finger then admitted to stabbing his mother, but claimed he killed her before she could carry out a plot to kill him. Finger subsequently filed a motion to enter a plea of not guilty by reason of insanity. However, Finger's defense counsel believed that, due to 1995 Nevada legislation, Finger would be prohibited from arguing for acquittal on the grounds of legal insanity.

As a result, Finger's motion to enter a plea of insanity was never argued, and the district court never ruled on the motion.

At arraignment, Finger requested permission to enter a plea of not guilty by reason of insanity. The state objected to the request, and the district court denied the request without explanation. Finger then declined to enter a plea, and the court entered a plea of not guilty. Based on the denial of the request to enter an insanity plea and Finger's inability to raise insanity as an affirmative defense, Finger determined there were no issues to be resolved at trial. He entered a plea of guilty but mentally ill. He was convicted of second-degree murder, and subsequently appealed on the constitutional issues relating to legal insanity.

Finger argued that the accused have a fundamental right to pursue a defense of legal insanity under the due process clauses of the United States and Nevada Constitutions. Finger argued that Senate Bill 314 (SB 314), a bill enacted by the 1995 Nevada Legislature that abolished the "not guilty by reason of insanity" plea and created the "guilty but mentally ill" plea, was unconstitutional. Under SB 314, an individual pleading guilty but mentally ill is subject to the same punishment as someone entering a guilty plea, with the exception that the district court may suggest certain types of treatment for the convicted individual. Insanity status is unclear and found only in Nev. Rev. Stat. 193.220, which generally provides no lesser degree of criminality because of the defendant's mental condition. However, the finder of fact may consider insanity when determining purpose, motive, or intent as a necessary element of a crime. Finger argued that Nev. Rev. Stat. 193.220, together with the elimination of insanity as an affirmative defense, permits persons to be convicted even though they do not possess the mental ability to form the criminal intent (a required element of the crime), and that this violates the due process clauses of the United States and Nevada Constitutions.

On appeal, the Nevada Supreme Court reasoned that society historically viewed the insane as incapable of determining when their conduct violates legal or moral standards; as a result, society has found that such individuals are not criminally culpable for their actions. The court noted that criminal intent, or mens rea, is a mental element of every crime, and that a legally insane person cannot possess the necessary mens rea. The *M'Naghten* standard for determining legal insanity is available only where the defendant's mental state is such that: (1) the defendant does not have the ability to understand what he is doing; or (2) the defendant does not have the ability to appreciate that his actions are illegal. Non-descript mental health problems do not necessarily meet this test's strict guideline. While some states have adopted the *Durham* standard, which is more expansive in its definition of insanity, others have adopted the *M'Naghten* standard, and yet others have adopted a compromise that lies in between the two approaches to insanity.

Before SB 314, Nevada courts applied the *M'Naghten* rule and considered insanity to be an affirmative defense. If found not guilty by reason of insanity, a defendant would be immediately committed to a mental health facility, and would be released only if a judge determined the individual to be no longer mentally ill. After SB 314, an accused could not argue for acquittal based on legal insanity, but could only argue that the state has not proven intent beyond a

reasonable doubt. If a jury acquitted because it concluded the defendant lacked the mental capacity to form intent, the defendant was no longer immediately committed to a mental health facility, and could be held only under the provisions of the civil involuntary commitment statutes.

The court reasoned that criminal intent is a fundamental aspect of criminal law. By association, the court determined that the concept of legal insanity is also a fundamental principle, and as such, due process protects the concept of legal insanity. As a result, the court held that the legislature may not abolish insanity as a complete defense and declared the provisions of SB 314 to be unconstitutional.

The court held that the *M'Naghten* rule applies in Nevada. To qualify to be legally insane, the court requires that a defendant be: 1) delusional to the extent that the defendant did not know or understand the nature and capacity of the criminal act; or 2) the delusion is such that the defendant could not appreciate the illegality of the criminal act. Under the court's opinion, legal insanity now has a precise and narrow definition in Nevada law. The court ruled that, while lay witnesses may testify about the defendant's actions, they cannot use the word "insane" to describe those actions. In so ruling, the court expressly overruled *Aldana v. State*, 720 P.2d 1217 (Nev. 1986), to the extent it implies that any mention of mental illness requires the court to instruct the jury on the issue of legal insanity.

Justice Leavitt concurred in the judgment, writing that requiring a mentally ill defendant to plead guilty but mentally ill deprives that defendant of liberty without due process, tramples on the due process rights of mentally ill defendants, and is unconstitutional. Moreover, Justice Leavitt noted that the former reading conflicted with several statutes. The procedure made mental illness a crime by confining a person who cannot form the required criminal intent and is only mentally ill. Justice Leavitt argued that this is cruel and unusual punishment and, as such, in violation of the Eighth Amendment of the United States Constitution.

Justices Shearing, Maupin, and Chief Justice Rose dissented, arguing that Finger voluntarily pled guilty but mentally insane. The dissent claimed that the Nevada law did not violate due process rights because it still considered the mental state. Moreover, nothing requires the state to provide a not guilty by reason of insanity plea.

Garcia v. Sixth Judicial Dist. Ct.
30 P.3d 1110 (Nev. 2001)

Statute restricting sale of alcohol to minors does not require establishment to ask for identification prior to sale of alcohol.

The Pershing County Sheriff's department conducted a sting operation, attempting to crack down on illegal alcohol sales to minors. The department enlisted the help of a twenty year-old individual (subject) to attempt to make purchases. Petitioners were five individuals who sold alcohol to the subject and were subsequently convicted under Nev. Rev. Stat. 202.055 in township court for selling alcohol to minors. The petitioners were charged with failing to verify age or ask for identification prior to selling alcohol to the subject. However, the subject appeared to be twenty-four to twenty-seven years old. The

petitioners appealed to district court, arguing that they must knowingly sell to a minor in order to violate the statute. The district court affirmed the township court's convictions, and petitioners filed a writ of certiorari to the Nevada Supreme Court.

The Nevada Supreme Court reversed, holding that the lower courts improperly interpreted the word "knowingly" in Nev. Rev. Stat. 202.055 to require the proprietor of the establishment to ensure the individual was over twenty-one by identification alone. Nev. Rev. Stat. 202.055 does not require an establishment to ask for identification before selling alcohol unless the proprietor knows or reasonably should have known the individual was under twenty-one.

Gallego v. Nevada
23 P.3d 227 (Nev. 2001)

Defendant was not denied Sixth Amendment right of self-representation where his disruptive behavior during court proceedings precludes dismissal of court-appointed defense attorney.

Gallego and an accomplice lured two girls into their van, then proceeded to molest and murder them. Their bodies were found in a remote canyon in northern Nevada. The jury found Gallego guilty and sentenced him to death. The death sentence was affirmed in a second penalty hearing fifteen years later. Gallego subsequently appealed, contending that he should have been allowed to represent himself at the second penalty hearing and should have been allowed to substitute counsel during that hearing.

The Nevada Supreme Court affirmed the denial of Gallego's motion for new counsel, holding a request for new counsel will only be granted to an indigent defendant when good cause can be shown. Gallego failed to prove good cause existed merely because he disagreed with the defense strategy of his public defender. The court noted that the strategy was perfectly reasonable and that Gallego's alternate strategies would have been largely impermissible under the rules of evidence.

The court stated that a defendant usually has a Sixth Amendment right to represent himself, but that the right may be denied if the request is untimely, if the request is equivocal, or if the defendant's behavior disrupts the court proceedings. The right may also be voluntarily waived.

The court held Gallego's request to represent himself was timely because it came almost one year prior to the empanelling of the second jury. No delay occurred, and the request did not necessitate a continuance. Similarly, the court found he did not waive his right merely because he used counsel at the original trial, including the first penalty phase. The court rejected the lower court's determination that Gallego's decisions at his first trial could have any application now, fifteen years later.

The court also found Gallego's request could have been unequivocal. At trial, Gallego expressed a desire both to represent himself and to change counsel. The lower court held that the latter request made the former request equivocal. The Nevada Supreme Court rejected that argument, however, because the essence of both requests revolved around the same desire: to cease his relationship with his current public defender. If the request for new counsel was

denied, then Gallego had the right to proceed in his motion to represent himself. The court did not find this error to warrant relief.

However, the court ruled that Gallego's behavior supported the lower court's decision to deny his motion for self-representation. When requesting self representation, a defendant's behavior, even pre-trial, must evidence his "ab[ility] and willing[ness] to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984). Gallego had repeatedly pretended that he could not hear in the courtroom, often turned his back to the court, refused to participate in a conference call, and refused to stop claiming his innocence after the trial judge informed him that such proclamations were inappropriate during a penalty hearing.

Garcia v. Nevada
17 P.3d 994 (Nev. 2001)

Order of conviction affirmed, and order denying a motion to suppress affirmed because suppression of evidence is not available for the violation of an individual's rights under the Vienna Convention on Consular Relations.

The police arrested Garcia after an alcohol-related car accident. The police informed Garcia of his *Miranda* rights, but failed to inform him of his rights as a foreign national under the Vienna Convention. Garcia moved to suppress evidence based on this violation. The trial court denied the motion and a jury convicted Garcia of multiple charges related to the accident.

Garcia appealed his conviction, arguing that the police violation warranted suppression and requesting an automatic reversal based on "structural error."

The court, after considering the Ninth Circuit's stance and the majority of federal and state court decisions, concluded a suppression remedy is not available under the Vienna Convention. The court also concluded an automatic reversal of his conviction would be improper, since the violation was not a "structural error."

Grant v. Nevada
24 P.3d 761 (Nev. 2001)

Court upheld conviction of appellant Grant because improperly admitted evidence was harmless, amendment of the charges against him was not prejudicial, use of a peremptory challenge was race-neutral, and the evidence fully supported his conviction.

Therese Wilson had her purse stolen while gambling at the Bellagio Hotel in Las Vegas. She witnessed a man walking away with her purse and was unable to stop him. Wilson subsequently reported the incident to hotel Security Officer Wayne Kimi, who was called to the hotel lobby with Wilson to identify a possible suspect. That suspect was identified as the man that Wilson saw steal the purse, Isaiah Grant, III. Security Officer Raymond Brown joined them in the lobby and confronted Grant. When Brown lifted the suspect's jacket, Wilson's purse was exposed and Brown and Grant began to struggle. Surveillance cameras captured the event on tape and showed one security officer placing an object back into Grant's jacket, although the tape did not reveal whether or not the object fell out of the jacket. The state filed charges against Grant, including grand larceny and possession of a controlled substance.

Officer Brown testified in the security room as to items he found in the jacket. At trial Security Officer Bernardo Figuredo offered testimony as to what he witnessed on the surveillance tape. The day before the trial began, the state moved to admit Brown's testimony because he was unavailable to testify at trial. The trial court granted the motion. Grant was convicted on both counts.

On appeal, Grant challenged the trial court's admission of Brown's previous testimony. Grant also contended on appeal that the trial court should not have amended his charge of grand larceny *sua sponte* from category B to C.

The Supreme Court of Nevada held for Grant, stating that Nev. Rev. Stat. 171.198(6) did not permit the admittance of prior testimony if the state did not act with due diligence or good faith to have Brown appear at trial. Nevertheless, the court held that the error in admitting the testimony was harmless because the other testimony offered was virtually identical to that of Brown. The court also held that the amendment did not prejudice Grant because the amendment did not involve new charges or offenses. Grant was on notice before the amendment that he was subject to the category C felony.

Hudson v. Warden, Nevada State Prison
22 P.2d 1154 (Nev. 2001)

DUI plea bargain reversed and remanded for further proceedings because trial judge did not properly canvass defendant and appellate counsel was deemed ineffective for failing to raise the issue of the validity of prior convictions.

Appellant Hudson was at the Burning Man Festival at Black Rock Desert in Nevada. While there, he ingested methamphetamines, heroin, and ecstasy. At approximately 6:45 a.m. on September 2, he drove a vehicle while under the influence, running over two tents, hitting a third tent, and striking a parked vehicle. Three people were seriously injured as they slept. One victim sustained permanent brain damage after Hudson's vehicle ran over his head. Another victim sustained a concussion, scrapes and cuts to her face, and a severed ear lobe. The third victim suffered third degree burns from hot anti-freeze and battery acid that poured over her as she lay trapped under a vehicle tire.

At trial, the prosecution relied on Hudson's pre-sentence report to prove prior convictions. Hudson's attorney unsuccessfully challenged the use of the pre-sentence report to prove past convictions. As a result, Hudson pled guilty to two counts of causing substantial bodily harm while driving under the influence of a controlled substance and one count of possession of a controlled substance. On appeal, Hudson claimed he was not fully informed of the ramifications of the plea bargain and claimed ineffective appellate and trial counsel. On appeal, Hudson's counsel failed to contest the use of the pre-sentence report to prove convictions. The appeal was denied.

Hudson filed a post-conviction petition for writ of habeas corpus. He argued that he did not understand the potential consequences of the plea agreement and, as a result, the enhanced sentence should be set aside. Hudson argued that he was not aware that the possession charge was upgraded from a category E to a category D felony. Due to his prior convictions, the third conviction increased the amount of time Hudson would spend in jail.

The Nevada Supreme Court held that, while Hudson's plea was freely and voluntarily given, the trial judge did not conduct a proper plea canvass before accepting Hudson's guilty pleas. The judge did not discuss the critical third page of the plea bargain, which discussed consecutive sentencing. The consecutive sentence would have increased the maximum time served from twenty to forty years.

The court also held defense counsel ineffective for neglecting to challenge the prosecution's failure to prove Hudson's prior convictions. During trial, the state has the burden of proving the existence of a sentence enhancing prior conviction. The court held that counsel's failure to raise the issue on appeal fell below the objective standard of effective assistance.

Justice Maupin concurred but took the opportunity to press for adoption of a mandatory oral canvass to minimize the uncertainties in the plea bargaining process.

Justice Agosti, joined by Justices Rose and Leavitt, concurred in the result. The concurrence disagreed with the majority's holding that Hudson freely and voluntarily pled guilty. Justice Agosti asserted that a defendant cannot voluntarily plead guilty if the plea is not knowingly made.

Jackson v. Nevada
17 P.3d 998 (Nev. 2001)

A change of appearance jury instruction is proper when the defendant changes appearance prior to a physical line-up.

On August 15, 1998, Jackson entered and robbed a convenience store. The police responded to store clerk Perry's activation of the store alarm. Perry described the robber as a black male with a goatee and beard, approximately five feet ten inches tall and of a medium build. Perry also indicated the robber was carrying a pair of orange-handled scissors in his pocket.

On August 18, 1998, police stopped a pedestrian near the robbed store who matched the description of the robber. The pedestrian was identified as Jackson, and had a pair of orange handled scissors in his pocket. The police took two photographs of Jackson.

Perry picked Jackson out of a photo line-up. Upon Jackson's request, a physical line-up was subsequently conducted. When Jackson appeared for the physical line-up, he had no facial hair and had made other changes to his appearance since Perry viewed the photo line-up. Perry was unable to identify Jackson in the physical line-up.

At trial, the court gave a "change of appearance" instruction to the jury. The instruction allowed the jury to consider an intentional change of appearance as a factor in determining guilt or innocence. On August 17, 1999, the jury found Jackson guilty of burglary and robbery.

Jackson appealed the use of a change of appearance jury instruction and alleged that there was insufficient evidence to support the guilty verdict. Jackson contended that, since he was unaware of the physical line-up, consciousness of guilt could not be inferred. The Nevada Supreme Court held the argument lacked merit because Jackson himself requested the physical line-up, and was told in advance that someone would be looking at his appearance to pick him out of a group. Jackson also contended that the change of appearance

instruction is only proper where a defendant changes his appearance immediately after the crime. The court found the instruction contemplates two instances where the instruction is appropriate: immediately after the crime or after being accused of the crime. The court held that Jackson changed his appearance to avoid identification for an accused crime, the specific concern that the second part of the instruction intended to avoid.

The court held that the jury could reasonably infer from the presented evidence that Jackson was guilty of the crime. The surveillance video showing the robber with orange handled scissors, the proximity of Jackson's arrest to the scene of the crime, and Perry's repeated identification of Jackson as the perpetrator were all reasons for the jury to find guilt. As a result, the district court did not abuse its discretion in submitting the change of appearance instruction to the jury and there was sufficient evidence to support the jury's guilty verdict.

Johnson v. Nevada
17 P.3d 1008 (Nev. 2001)

If a defendant is mentally competent to stand trial, defendant has the absolute right to prohibit defense counsel from interposing an insanity defense.

Johnson shot and killed a man outside of Caesar's Palace. Several witnesses identified Johnson as the killer, and eight surveillance cameras recorded the murder. Johnson was charged with murder, but facts came to light that suggested that Johnson's mental health was questionable. Following a psychiatric evaluation, Johnson was remanded to the state mental health facility at Lakes Crossing for a sanity commission evaluation. At the mental health facility, three psychiatrists found Johnson capable of standing trial. Johnson pleaded not guilty, and Johnson's public defender attempted to argue an insanity defense. Angry with the public defender's efforts, Johnson sought to represent himself pro se; but after an extensive canvass and citing concerns as to Johnson's mental stability, the court appointed the public defender as Johnson's sole counsel. The public defender argued the insanity defense, but Johnson was subsequently convicted of second degree murder with a deadly weapon. Johnson appealed on the grounds of ineffective counsel in that his public defender argued the insanity defense against Johnson's express wishes.

The Nevada Supreme Court held that the public defender's presentation of the insanity defense against Johnson's express objections was per se improper. The accused has the ultimate authority to specify the pleading to be entered, and an attorney may not speak for the accused on that subject without consultation and cannot waive this right over client's objections. The court held that, if a defendant is mentally competent to stand trial, defendant has the absolute right to prohibit defense counsel from interposing an insanity defense.

The court stated that the public defendant's actions were not subject to the harmless error analysis because entering a plea of not guilty by reason of insanity is a structural defect that affects the framework within which the trial proceeds. As a result, the court held the assertion of an insanity defense under the circumstances to constitute reversible error. The court reversed the conviction and remanded for further proceedings.

Nevada v. Weddell
27 P.3d 450 (Nev. 2001)

A private person attempting to make a citizen's arrest of a felon may only use the amount of force reasonable and necessary under the circumstances.

Weddell attempted to make a citizen's arrest of Bustamonte. Weddell believed that Bustamonte had threatened Weddell's daughter and had intentionally struck Weddell's employee, Cole, with a vehicle the previous day. Weddell parked his car behind Bustamonte's vehicle to prevent its departure and ordered Bustamonte, while pointing a gun at him, to place his hands on the hood of the vehicle. Bustamonte turned and ran and Weddell shot at him several times. None of the shots hit Bustamonte. Weddell was subsequently charged with assault with a deadly weapon and discharging a firearm at another. The district court granted Weddell's motion to dismiss the charges, noting that Nevada law permits private persons to arrest a felon even if the felony is committed outside his presence. The district court determined that Bustamonte committed a felony by striking Cole, and that Weddell was attempting to arrest Bustamonte for this felony. The district court also concluded that, as a matter of law, Weddell was not guilty of the charged conduct because an individual may use whatever force is necessary to effect the arrest of a fleeing felon. The state appealed the dismissal.

The Supreme Court of Nevada reversed the district court and remanded the case for trial. The court considered, as a matter of first impression, what amount of force is allowed under Nevada statutory law. Nev. Rev. Stat. 171.126 provides that a private person may arrest another in three situations: 1) when an offense was committed or attempted in the arrestor's presence; 2) when the person committed a felony offense outside the arrestor's presence; and 3) when a felony has in fact been committed and the arrestor has reasonable cause to believe that the person to be arrested has committed it.

The court explained that, historically, the "fleeing felon rule" permitted a private person to use deadly force to apprehend a felon. The rule developed when the punishment for nearly all felonies was death, and the rule was designed to prevent the escape of a felon by inflicting the inevitable punishment. The court noted that, today, many felonies do not involve dangerous conduct and most are not punishable by death. The court reasoned that when the legislature repealed Nevada's fleeing felon rule in 1993 and simultaneously enacting a new statute limiting the use of deadly force by police officers in making or attempting felony arrests, it intended a substantial change in the law. The court also noted that other states have abandoned the common law version of the fleeing felon rule.

In light of these factors, the court held that a private person making or attempting a felony arrest may use only the amount of force that is reasonable and necessary under the circumstances. The court further held that use of deadly force is, as a matter of law, unreasonable unless the arrestee poses a threat of serious bodily injury to the arrestor or others.

Segler v. Clark County
142 F. Supp. 2d 1264 (D. Nev. 2001)

Summary judgment is not proper in cases alleging medical mistreatment in violation of the Eighth Amendment at county jail when the exact time and extent of medical care is in dispute.

Plaintiff Segler was held in the Clark County Detention Center (CCDC) from October 24, 1997 through December 29, 1997. Prior to his detention, Segler had three surgeries on his shoulder. On November 4, 1997, Segler reinjured his shoulder. That evening, a nurse from EMSA, CCDC's health care provider, treated Segler's shoulder. Segler claimed that the treatment did not occur until four hours after he sustained the injury, but CCDC maintained that EMSA treated Segler within an hour of his injury. On November 5, 1997, EMSA claimed a doctor examined Segler, found no dislocation, and ordered an x-ray. Segler maintained he was never seen by a doctor and requested additional treatment which was never given. After Segler's release from CCDC, he required two additional shoulder surgeries.

Segler brought suit in federal district court under 42 U.S.C. § 1983, claiming violation of his Eighth and Fourteenth Amendment rights. EMSA moved for summary judgment, alleging it was a municipality under 42 U.S.C. § 1983 and, thus, immune from punitive damages. The court found that, while EMSA was a state actor, it was still a private corporation. Accordingly, an award of punitive damages would not punish the taxpayers in the way that such a decision would if EMSA was a municipality. Moreover, the award of punitive damages would act as a deterrent for EMSA's future actions.

The court then considered whether the actions of EMSA violated Segler's Eighth Amendment rights. The court denied EMSA's motion for summary judgment, holding that determining the sequence of events of Segler's medical treatment was the essence of the case and best left to the trier of fact to determine. The denial of medical attention violates the Eighth Amendment if the "denial amounts to deliberate indifference to serious medical needs of prisoners." *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986). Therefore Segler had to demonstrate that EMSA was deliberately indifferent to his medical needs. Since there was a dispute as to how long it took for Segler to receive medical treatment and when Dr. Hoffman actually saw Segler, the court declined to make a determination on these issues of material fact.

Servin v. Nevada
32 P.3d 1277 (Nev. 2001)

Court cannot use multiple crimes of similar gravamen as multiple aggravating factors in imposition of sentence.

Appellant Servin was convicted of shooting and killing a handicapped woman and of stealing $35,000 that the woman kept in a safe in her home. Two others accompanied Servin, who was sixteen years old at the time of the murder. At trial, evidence was presented that Servin planned to shoot the woman if he had to, hit the woman in the head to make her stop screaming, and pointed the gun at her repeatedly. Servin was subsequently sentenced to death when the jury found five aggravating factors, including that the murder was committed in the course of a burglary and home invasion.

Servin appealed, arguing among other grounds that nearly all persons convicted of murder are eligible for the death penalty because of the conflicting provisions of Nev. Rev. Stat. 175.552 and Nev. Rev. Stat. 200.033. Servin further argued that the imposition of the death penalty upon him violated the International Covenant on Civil and Political Rights (ICCPR) because he was only sixteen years old at the time of the murder. Servin next asserted that he could not be convicted of both burglary and home invasion, so the crimes were mutually exclusive as aggravators of a crime. Finally, Servin argued that the imposition of the death penalty was excessive where the evidence presented at trial was not conclusive in proving that Servin was the direct cause of the victim's death. In fact, the evidence revealed that the accomplices, one of whom had pled guilty to avoid the death penalty, may have also been involved.

Based on the these arguments, the Nevada Supreme Court ruled that Nev. Rev. Stat. 176.025 only forbids the execution of juveniles *under* the age of sixteen at the time of the crime. There was no conflict between the ICCPR and Nevada's statute and therefore no error. The court also ruled that aggravating and mitigating circumstances of the crime must be evaluated prior to considering any other circumstances. The conduct that satisfied the elements of burglary and home invasion was the same and, therefore, both aggravators could not stand under Nev. Rev. Stat. 200.033(4). The court held that the key question is whether the gravity of the charged offenses is such that it can be said that the legislature did not intend multiple convictions. Given Servin's youth and the questionable evidence regarding the identity of the shooter, the court vacated the imposition of the death penalty, assigning instead two consecutive life prison terms.

Justice Rose concurred in the judgment, arguing that Servin's youth should also justify the vacation of the death penalty under the ICCPR. Chief Justice Maupin dissented, arguing that the case should be remanded for a new penalty hearing, one which would still allow the imposition of the death penalty. Justice Leavitt also dissented, supported by Justice Young, arguing that the court had no reason to believe that the jury failed to consider the possible weaknesses in the evidence and Servin's youth in imposing the penalty.

Tavares v. Nevada
30 P.3d 1128 (Nev. 2001)

The prosecutor has the burden of requesting that a limiting instruction be given both at the time evidence is introduced and at the final charge to the jury, barring the defendant's objection.

On January 31, 1988, Tavares called 911, indicating that his three-month-old infant, C.T., had stopped breathing. C.T. was brought breathless and pulseless to the hospital, where she was later ruled dead. The doctors determined that she had suffered multiple broken ribs and asphyxiation, which resulted in brain damage and eventual death. Tavares was charged with first-degree murder under alternative theories of either willful, premeditated, and deliberate murder or death resulting from child abuse.

April Striggles, the defendant's ex-girlfriend with whom Tavares had fathered a child, testified at trial. She stated that Tavares once bruised their son's ribs by squeezing him. In a separate incident, Striggles discovered

Tavares covering their son's mouth and nose with his hand, causing him to stop breathing. The testimony was admitted to prove intent and refute an assertion of accident, although the jury was never instructed on the limited purpose for which the prior bad acts evidence was admitted. The jury subsequently convicted Tavares of first-degree murder.

Tavares appealed the failure to give a limiting instruction on the use of prior bad act testimony. While Tavares had not asked for the instruction, the Nevada Supreme Court found that the court may review if the error is plain and affects the defendant's substantive rights. The court held that, since prior bad act evidence is limited in its admissibility, the prosecution must prove that the prior bad acts are admissible as evidence. By extension, the prosecutor also has the duty to request that the jury be instructed on the limited use of the prior bad act evidence. However, the defendant may request that the limiting instruction not be used for strategic reasons. Furthermore, the instruction should be given at the time the evidence is introduced and as a general instruction at the end of the trial. The court held that Tavares's rights were prejudiced by the lower court's failure to inform and instruct the jury on the limited purpose for which prior bad acts may be introduced. Consequently, the defendant's conviction was reversed and the case remanded for a new trial.

United States v. Skuban
175 F. Supp. 2d 1253 (D. Nev. 2001)

Federal law prohibiting firearm ownership by one convicted of domestic violence misdemeanor does not apply to one convicted of a violent misdemeanor against a parent.

Skuban was convicted in February 2001 of assaulting his mother, which, under Nevada law, is considered a domestic violence misdemeanor. Skuban was later indicted under federal law, which prohibits firearm ownership by persons convicted of a domestic violence misdemeanor. Skuban filed a motion to dismiss his indictment because the federal statute does not list child-parent among the qualifying relationships.

The district court granted the motion to dismiss. The court held that the statute clearly contemplated specific relationships between perpetrator and victim, and the child-parent relationship was not specified as one that met the predicate requirements for misdemeanor domestic violence.

Washington v. Nevada
30 P.3d 1134 (Nev. 2001)

Nev. Rev. Stat. 453.323, making the sale of an imitation controlled substance a misdemeanor, was impliedly repealed by Nev. Rev. Stat. 453.332, which made the same crime a felony.

Appellant Washington sold a substance he represented as cocaine to an undercover police officer, although the substance was not actually cocaine. Washington was arrested for the sale, and charged under Nev. Rev. Stat. 453.323, making his actions a felony. Washington argued that a more recently enacted law, Nev. Rev. Stat. 453.332, making the same actions a misdemeanor, should have been applied. The district court rejected Washington's argument,

holding that, since both statutes had been technically amended in 1995, there was no repeal by implication. Washington appealed.

The Nevada Supreme Court found that the trial court erred in concluding that a 1995 amendment of both statutes meant that the legislature had not intended to repeal the earlier statue when they enacted the later one. After examining the text of both statutes, the court determined that the only true difference between the two was the degree of penalty. The court noted that the 1995 amendment was part of a revision of all criminal statutes and that the two statutes shared similar legislative history. As a result, the court concluded that the legislature must have intended that NRS 453.323 be effectively repealed by the passage of NRS 453.332.

CRIMINAL PROCEDURE

Crawford v. Nevada
30 P.3d 1123 (Nev. 2001)

Where continued bail is a condition of a plea agreement, defendant is entitled to withdraw a guilty plea if bail is revoked.

Crawford was charged with the murder of a woman with whom he had been involved. Crawford subsequently entered into a plea agreement, wherein he pled guilty to first-degree murder, resulting in back to back life sentences without the possibility of parole. Crawford then changed his plea to not guilty, and remained on bail within the community for a period of two years. On the eve of trial, Crawford again entered a plea bargain, changing his plea to guilty. Crawford's bail was then revoked, and Crawford was jailed. Crawford alleged that a condition of his second plea bargain was that he be allowed to remain on bail, and moved the court to withdraw his guilty plea. The district court denied the motion, and Crawford was tried and convicted of first degree murder. Crawford appealed, alleging violation of due process and that the district judge engaged in ex parte communication with Crawford's counsel.

On appeal, the Nevada Supreme Court reversed the district court, and held that the district court's denial of Crawford's motion was an abuse of discretion. To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently. The court held that Crawford's guilty plea was not knowing, voluntary, and intelligent, and defendant was entitled to withdraw his plea. Since Crawford's plea was conditioned upon the trial court's promise to allow him to remain out of custody until after Christmas, and the district court subsequently revoked his bail, the Nevada Supreme Court held that the district judge effectively gave Crawford what he wanted in order to induce a guilty plea. In so doing, the judge either insufficiently canvassed Crawford's guilty plea or violated the terms of the plea bargain. Therefore, Crawford was entitled to withdraw his guilty plea.

Hernandez v. Nevada
24 P.3d 767 (Nev. 2001)

While appellate briefs may require more than the standard thirty pages, they should not render a disservice to the [defendant] by obscuring potentially good claims.

The defendant made a motion for leave to file a 124 page opening brief in a direct appeal for a first-degree murder conviction and death sentence. The Nevada Supreme Court denied the motion and concluded that eighty pages were enough to present the court with an effective brief. The court noted that counsel is under no obligation to present every non-frivolous claim. To raise every non-frivolous issue may detract from more credible issues. However, the court noted that it is aware that some situations require briefs longer than the standard thirty pages.

Koger v. Nevada
17 P.3d 428 (Nev. 2001)

Miranda warnings given twelve days prior to an interview are proper warning when the individual is reminded of such rights and the individual acknowledges having been advised of such rights.

Defendant Koger was questioned in connection with an armed robbery. She was first questioned at her place of employment, at which time she was apprised of her *Miranda* rights. She was later questioned again the same day at the detective's office, at which time she was again informed of her *Miranda* rights and signed a waiver form. Twelve days later, she was again interviewed at the police station; police did not offer the *Miranda* warnings after being told by the detective and Koger that she had previously been advised. She gave answers inconsistent with her previous interviews and was charged and ultimately convicted of conspiracy to commit robbery.

Koger appealed, arguing that the district court made a mistake by admitting her interview statements because she was not properly warned of her *Miranda* rights. The state argued that Koger had expressed an understanding of her rights in the first two interviews and that a third warning was not necessary.

The Nevada Supreme Court held that the warnings had been properly administered and affirmed the conviction. The most relevant factor in analyzing whether the previous admonitions were still in effect was the amount of time that had passed since the warning was issued for the third interview. In addition, the court noted that Koger was reminded of her rights and that she indicated that she remembered and understood the rights during the third interview.

Lee v. Clark County Dist. Atty.
145 F. Supp. 2d 1185 (D. Nev. 2001)

To obtain the release of evidence in the custody of the Clerk of the Court, plaintiff must file an action for the release pursuant to Rule 11(3)(b).

Plaintiff Albert N. Lee had exhausted all appeals of his rape conviction by 1996. In 2001, he filed a complaint, seeking the release of all biological evidence collected in connection with the rape of which he was convicted so that it

could be scientifically tested. He named only the Clark County District Attorney's Office as defendant, but filed a motion to amend to include the Clerk of Court because the Clerk had possession of the biological evidence in question. Defendants filed an opposition to the motion to dismiss.

On appeal, the Nevada Supreme Court examined District Court Rule 11, which details the procedure necessary to obtain the release of evidence in the custody of the Clerk of the Court. Rule 11 requires that notice be given to the adverse party prior to making the motion. Since plaintiff Lee had not filed an action for the release of the evidence pursuant to Rule 11(3)(b), the issue was not yet ripe for decision. The court held that there was no reason to believe that such an action would be futile, nor that, if it were, the plaintiff would have waived his right to pursue the matter in United States District Court.

Moore v. Nevada
27 P.3d 447 (Nev. 2001)

A perpetrator cannot "use" a weapon to reach an agreement to conspire; as a result, it is improper to enhance a conspiracy charge via the deadly weapon enhancement.

Moore was one of three perpetrators who conspired to rob the occupants of an apartment. During the robbery, one of the conspirators shot and killed a visitor in the apartment. Moore was subsequently convicted of first-degree murder, robbery, and conspiracy, all with use of a firearm. Pursuant to Nev. Rev. Stat. 193.165(1), the deadly weapon enhancement, the district judge enhanced Moore's conspiracy sentence to be served consecutively rather than concurrently. Moore appealed.

Nev. Rev. Stat. 193.165(1) allows a judge to enhance a sentence based on use of a deadly weapon in the commission of the crime. Moore argued that he could not have used a weapon to commit conspiracy. The state called for a broad construction of the term "uses."

The Nevada Supreme Court found in Moore's favor. In Nevada, the charge of conspiracy does not require an overt act; rather, the essence of the crime is reaching an unlawful agreement. Nev. Rev. Stat. 199.490. The court ruled that a perpetrator could not "use" a weapon to reach that agreement, and held that it is improper to enhance a conspiracy charge with the deadly weapon enhancement. The court reversed that portion of the sentence, and ordered the sentences to be served concurrently.

Nevada v. Quinn
30 P.3d 1117 (Nev. 2001)

With relation to the statute of limitations, "discovery" of a gross-misdemeanor committed in secrecy occurs when any person, other than the wrongdoer, has knowledge of the act and its criminal nature.

Respondent Quinn was charged on December 17, 1998 with lewdness with a minor under fourteen and indecent exposure, in connection with acts that occurred between January 1, 1993 and December 12, 1996. Quinn moved to dismiss the indecent exposure charges because the charges were filed beyond the two-year statute of limitations on misdemeanors. Quinn argues that the statute of limitations tolled from the day that the minor made her mother aware

of the acts. The state claimed that the crimes were not reported to authorities until November 2, 1998, and argued that the statute should not toll until the day that law enforcement became aware of them. The district court held for Quinn.

The Nevada Supreme Court found that Nev. Rev. Stat. 171.095(1)(a) provides that the statute of limitations period for gross misdemeanors committed in secrecy begins to run at the time of discovery of the crime. The court held that discovery meant the discovery by any person other than the wrongdoer, with some limited exceptions based on intimidation. The court remanded to determine if the minor's mother had remained silent out of fear.

Justice Shearing concurred with the result, but argued that the standard requiring a traumatized child to report the child's own trauma was unreasonable. She also argued that the mother had no legal duty to report, and that the court should have established a standard that tolled the statute of limitations until the time a person with a legal duty to report became aware of the crime.

Pellegrini v. Nevada
34 P.3d 519 (Nev. 2001)

Prisoner was denied permission to file his habeas corpus petition because the one-year limitation for successive petitions had passed; allegations of ineffective assistance are properly raised in the first timely post-conviction petition; allegations of ineffective assistance in post-conviction petition was not a good cause for relieving procedural bar. Moreover, decisions in other, non-related cases were not the law of the case under the law of the case doctrine.

Pellegrini was convicted and received the death sentence in a capital murder case. He filed a timely post-conviction petition, which was denied by the Eighth Judicial District Court and subsequently dismissed by the Nevada Supreme Court. The Nevada Supreme Court held that Nev. Rev. Stat. 34.726 applies to all post-conviction petitions. Nev. Rev. Stat. 34.726 provides for dismissal of the habeas corpus petition based on delay in filing, unless there is good cause shown for the delay in filing, if the petition was not filed within one year after entry of the judgment or conviction or one year after the Nevada Supreme Court issued its remittitur. The court held that Nev. Rev. Stat. 34.726 applied to successive petitions. The court articulated one exception: those petitions which were properly filed prior to the passage of Nev. Rev. Stat. 34.726. The court concluded that the intent behind the one year limitation was to prevent perpetual filing of petitions for relief, reducing the strain on the court system. The court also concluded that its decision did not nullify the laches provisions of Nev. Rev. Stat. 34.800 nor the waiver and successive petition provisions of Nev. Rev. Stat. 34.810.

The Nevada Supreme Court also took the opportunity to clarify the Ninth Circuit's use of previous Nevada case law in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995) and *Petrocelli v. Angelone*, 248 F.3d 877 (9th Cir. 2001). The court stated that claims of ineffective assistance of counsel are properly raised for the first time during the first timely post-conviction petition; the cause and prejudice analysis is not necessary in determining whether these claims are appropriately considered on the merits. The Nevada Supreme Court reaffirmed its holding in *Daniels v. Nevada*, 688 P.2d 315 (Nev. 1984), that the need for an evidentiary hearing to resolve claims of ineffective counsel, the

failure to raise that claim on a direct appeal is not a waiver of the claim for purposes of post-conviction proceedings, provided the claims are brought in a timely first post-conviction petition for habeas corpus.

The court also clarified that *Pertgen v. Nevada*, 875 P.2d 361 (Nev. 1994), does not relax the procedural bars for waiver. However, independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised on direct appeal. Moreover, Nev. Rev. Stat. 178.602 allows the court to review plain errors or defects affecting substantial rights, whether or not they are brought to the court's attention. However, this plain error rule is for review on direct appeal and does not create a procedural bar exception in any habeas proceeding.

The law of the case doctrine states that the law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same. The court rejected the suggestion that the rare exercise of discretion must result in a determination that the law of the case doctrine is inadequate to bar reassertion of a claim in habeas.

Finally, the court overruled *Warden v. Lischko*, 523 P.2d 6 (Nev. 1974), in as much as it supported discretionary application of the procedural bar for waiver: Nev. Rev. Stat. 34.810 is mandatory. Furthermore, the court overruled *Lischko* to the extent that it may be read to suggest that the Nevada Supreme Court "must" review the merits of a post-conviction claim whenever the trial court has elected to do so. The court concluded that good cause and actual prejudice are required to overcome the statutory procedural bars.

In order to demonstrate good cause, the petitioner must show an external impediment prevented him from raising the claims earlier. Actual prejudice requires a showing, not merely that the errors complained of created possible prejudice, but that the errors worked to the petitioner's actual and substantial disadvantage in affecting the state proceeding with error of constitutional dimensions. The court reasoned that it could excuse the failure to show cause where the prejudice from considering the claim amounts to a fundamental miscarriage of justice. In order to avoid application of the procedural bar to claims attacking the validity of a conviction, a person claiming innocence must show that it is more likely than not that no reasonable jury would have convicted him absent the constitutional violation. However, where the petitioner is claiming procedural error when the petitioner is ineligible for the death penalty, the petitioner must show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have found him eligible for the death penalty.

Randolph v. Nevada
36 P.3d 424 (Nev. 2001)

Where defendant raises a defense that implicates a theory of criminal conduct, prosecutors are permitted to instruct the jury as to that theory of criminal conduct; where a prosecutor mischaracterizes the reasonable doubt standard, the Nevada Supreme Court will require an explanation from that prosecutor.

Appellant Randolph robbed and murdered a bartender in Las Vegas. Randolph asserted that Garner, whose car Randolph drove during the night of the crime, was actually responsible for the murder, and that Randolph had partici-

pated only in the robbery. At a jury trial, Randolph was found guilty of first-degree murder with use of a deadly weapon and other offenses. During the penalty phase, jurors considered several mitigating and aggravating factors. Although the state originally charged Randolph with the actual murder, at the end of the guilt phase, the district court instructed the jury on co-conspirator liability and liability for aiding and abetting. Finding that Randolph's aggravating circumstances outweighed the mitigating factors, the jury imposed the death sentence. Randolph appealed, arguing that he was unprepared to argue against conspirator and abetting liability, that the indictment did not allege aiding and abetting charges, that the prosecutor mischaracterized the reasonable doubt standard, and that the district court should have granted a mistrial.

The Nevada Supreme Court held that Randolph was on adequate notice that he could be held liable as a co-conspirator. Several of the criminal counts brought against Randolph made reference to Randolph's intent to further conspiracy. The court also held that, although failing to include a charge of aiding and abetting in the indictment would ordinarily preclude the state from gaining jury instructions on the charge, the prosecution was entitled to jury instruction on aiding and abetting because Randolph raised a defense that implicated a theory of accomplice liability.

The court held that the prosecutor did mischaracterize the reasonable doubt standard, but that it was harmless error. While the court reiterated earlier cautions that prosecutors are in the outer ambit of their authority when they attempt to quantify, clarify, or supplement the statutorily prescribed reasonable doubt standard, such incorrect explanations of the reasonable doubt standard is harmless error as long as the jury instructions correctly define reasonable doubt. Because the lower court's jury instructions corrected this definition, the court found the prosecutor's mischaracterization to be harmless. However, the Nevada Supreme Court noted that the lower court should have firmly admonished the prosecutor for the mischaracterization. Further, the court declared its intention to call this and future prosecutors before the court to account for such mischaracterizations.

Robinson v. Nevada
17 P.3d 420 (Nev. 2001)

A person in civil protective custody for public intoxication is not a prisoner, for purposes of criminal statutes.

Robinson was held in civil protective custody after being publicly intoxicated. Robinson was unable to be placed in an alcohol treatment facility and was subsequently taken to jail. While in civil protective custody, Robinson struck another prisoner and was charged with battery by a prisoner. His status as a prisoner escalated the normal misdemeanor battery to a category B felony. Robinson pled guilty on the condition that he could appeal his prisoner status.

The Nevada Supreme Court found that Nev. Rev. Stat. 458.250 made public intoxication a civil offense. Nevada law defines a "prisoner" as a person who is deprived of his liberty and kept under involuntary restraint, confinement, or custody, as applied in the criminal context of Nev. Rev. Stat. 193.022. The court held that inebriated persons are not subject to the statutory definition of Nev. Rev. Stat.193.022 because, had the battery been committed at a treat-

ment center, Robinson would not have been charged with felony battery. The court reasoned that Robinson should not have been exposed to greater liability merely because he was taken to the police facility, instead of a treatment facility.

Salaiscooper v. Eighth Judicial Dist. Court
34 P.3d 509 (Nev. 2001)

Justice courts have authority to resolve constitutional issues arising in criminal misdemeanor cases but do not have authority to sit "en banc" or make collective decisions.

Woman charged with solicitation of prostitution alleged that the district attorney's policy violated the equal protection rights of women. The policy offers plea agreements to criminal defendants charged with buying sex, but not those soliciting sex, to avoid convictions by attending diversion classes. At the conclusion of the evidentiary hearing, the judge reserved her ruling so that the other justices of the Las Vegas Justice Court could make a collective decision. All seven justices of the Las Vegas Justice Court unanimously concluded that the district attorney's policy was constitutional.

On appeal, the Nevada Supreme Court held that justice courts do not have authority to sit "en banc" or make collective decisions. However, the court held that a justice court's jurisdiction may resolve constitutional issues arising in criminal misdemeanor cases, overruling *In re Dixon*, 40 Nev. 228 (1916). Additionally, the court reasoned that the district attorney has prosecutorial discretion to treat buyers of sex different than sellers of sex because the policy is not intended to discriminate, rather to deter acts of prostitution. Therefore, the court held that the district attorney's policy does not run afoul of the Equal Protection Clause.

Theis v. Nevada
30 P.3d 1140 (Nev. 2001)

A detainer must be in writing and request that the institution housing the prisoner hold the prisoner for the detainer-filing agency or notify that agency of the prisoner's imminent release.

Appellant, Theis, allegedly committed armed robberies in the counties of Elko and Washoe, Nevada, as well as in Idaho. Idaho authorities apprehended Theis and he was subsequently convicted for the Idaho robberies. After learning of Theis's apprehension, Elko County filed a formal, written detainer with the Idaho prison. Washoe County did not file a written detainer, but did enter relevant information into the National Crime Information Center (NCIC) database. Washoe County also called the Idaho prison in which Theis was incarcerated, requesting that Washoe County be added to Elko County's written detainer. The Idaho prison officer agreed to do so.

Theis, upon receipt of Elko County's written detainer, requested a final disposition, which requires all charges be brought within 180 days. Elko County charged and convicted Theis within the 180-day period. Washoe County brought charges after the 180-day period had run, and Theis sought to have the charges dismissed.

Washoe County claimed the 180-day limitation did not apply to it because it had not filed a detainer in writing with the Idaho prison. Theis argued that either the entering of his information into the NCIC, or the phone call from Washoe County to the Idaho prison, initiated the detainer.

The Nevada Supreme Court held that a detainer must be issued in writing. Detainers are issued based on inter-state agreement, codified in Nev. Rev. Stat. 178.620. As an inter-state compact authorized under the Compact Clause of the Constitution, the court found that federal case law controlled. Although previous federal case law did not address the issue of whether the request must be in writing, it did require that the request be filed with the institution where the prisoner was incarcerated. The court found that entering information into the NCIC does not satisfy this requirement, as the request was not made specifically to the Idaho prison. The court also found that the purpose of a detainer is to inform a prisoner of charges filed against him. The court held that the detainer must be in writing to assure that the prisoner is accurately informed of the charges against him, and to prevent the misinterpretation of an oral communication. The court found that Washoe County had not filed a formal, written detainer with the Idaho prison, and affirmed the trial court's denial of plaintiff's motion to dismiss.

Vanisi v. Nevada
22 P.3d 1164 (Nev. 2001)

District court may refuse to allow defendant to represent himself pro se where defendant is attempting to delay the proceedings by assuming his own defense or defendant has demonstrated a likelihood that pro se representation would disrupt the trial proceedings, but district court may not consider complexity of case and the quality of defendant's defense.

Appellant Vanisi planned and committed the murder of a UNR policeman. Following the murder, Vanisi committed two burglaries, stole a car, and drove to Salt Lake City, Utah. Following a standoff with a SWAT team, Vanisi was apprehended and tried for first-degree murder and three counts of robbery, all with a deadly weapon, and one count of grand larceny. Before the trial, Vanisi unsuccessfully moved to represent himself. The jury imposed the death sentence. Vanisi appealed, arguing that he should have been allowed to represent himself pro se, that the aggravating circumstances of mutilation did not apply, and that the district court erred in refusing to instruct the jury according to Vanisi's version of the reasonable doubt standard.

The Nevada Supreme Court held that the district court was within its discretion to deny Vanisi's motion to represent himself pro se. The lower court determined that Vanisi was attempting to delay the proceedings and represented a risk of disruption in the trial's proceedings, inferences that the court found within the discretion of the lower court and supported by the record. However, the court rejected the lower court's consideration that the case was complex and the defendant would be unable to provide an adequate defense. Considerations of complexity are relevant only in canvassing the defendant to ensure that defendant is apprised of the obligations and duties of a pro se representation.

The court also rejected Vanisi's assertion that there was insufficient evidence to find aggravating circumstances of mutilation. The court highlighted

that the forensic evidence indicated that the victim was severely assaulted in several different manners with a hatchet and "stomping" on the head. Finally, the Nevada Supreme Court held that the lower court did not err in deciding to use the statutory instruction as to reasonable doubt in lieu of Vanisi's own instruction on reasonable doubt.

Villanueva v. Nevada
27 P.3d 443 (Nev. 2001)

Nev. Rev. Stat. 193.161, the "on-school-property alternative," is not unconstitutionally vague in granting the district court discretionary options in the sentencing of school-related crimes.

Villanueva shot and injured two high school students, who were members of a rival gang, at their high school. Some of the charges against Villanueva were brought under Nev. Rev. Stat. 193.161(2), which allows the court to sentence defendants to longer than usual terms of imprisonment if a crime occurs on school property. Villanueva moved to strike the charges arising under Nev. Rev. Stat. 193.161(2), alleging that the statute was void for vagueness. The court denied Villanueva's motion, and Villanueva subsequently pled guilty while reserving his right to appeal the motion to strike.

The Nevada Supreme Court held that the statute's language, providing that a felony occurring on school property "may" be punished by imprisonment, was not overly vague. The court held that the legislature's use of "may" was not vague as to what the legislature intended to be done, but rather gave the district court discretion in sentencing. Because the underlying penalties are clear and unambiguous, the discretion to apply the alternative penalty is not vague.

Further, the court rejected Villanueva's assertion that the legislature impermissibly delegated its authority to define crimes and affix penalties. The court noted that in only two instances has it found an impermissible delegation: challenges to sentences as cruel and unusual punishment and challenges to the authority delegated to administrative agencies. The judiciary has long enjoyed broad discretion in selecting among several sentences specified by the legislature, and the lower court selected such a sentence.

The court also rejected Villanueva's alternative assertion that Nev. Rev. Stat. 193.161(2) does not apply to inchoate crimes, such as attempted offenses, because another statute, Nev. Rev. Stat. 193.330, governs such attempted crimes. The court noted that Nev. Rev. Stat. 193.330 itself contemplates being supplanted by other statutes that might be enacted by the legislature, and does not therefore displace Nev. Rev. Stat. 193.161(2).

EMPLOYMENT LAW

Coast Hotels & Casino, Inc., v. Nev. State Labor Comm'n
34 P.3d 546 (Nev. 2001)

Employer may require employee to reimburse the employer for shortages if employee voluntarily authorized the withholding in writing.

Employee Sandra Meranian signed a pre-employment waiver, agreeing that her casino employer could deduct any shortages in her cash drawer from her wages. Meranian's cash drawer was short twice. For both shortages, she signed a shortage slip, acknowledging the missing amounts and authorizing the casino to withhold the total from her wages. The amounts were subsequently withheld. Meranian was later discharged for unrelated reasons. After termination, Meranian filed a claim for the wages from the Labor Commission. The hearings officer stated that the casino provided insufficient evidence that the employee was responsible for the shortage, making her authorization invalid. The hearings officer determined that the $520 that was withheld should be reimbursed to Meranian and fined the casino $548.

On judicial review, the district court upheld the reimbursement to Meranian but reversed the statutory penalty against Coast. The parties appealed to the Nevada Supreme Court.

The court held that the language of Nev. Rev. Stat. 608.110 did not require that withholdings benefit the employee, so long as the employee authorized the deduction in writing. Thus, it was permissible for cash shortages to be withheld, as long as the employee authorized it in writing.

The court found that the casino provided sufficient evidence to prove that Meranian was responsible for the shortages. The casino had strict rules by which the cashiers were to abide. The cashiers were to count their money before and at the end of each shift. Further, the cashiers were to lock their drawers when away from the money. The court determined that when Meranian was short, she admitted she could not account for the shortage. Nor did she challenge the missing amount when it was discovered at the end of her shift. The court reversed the reimbursement to Meranian and affirmed setting aside the penalty against the casino.

GES, Inc. v. Corbitt
21 P.3d 11 (Nev. 2001)

To hold multiple tortfeasors jointly and severally liable under the "concerted acts exception," there must be an agreement between tortfeasors to engage in conduct that is inherently dangerous or poses a substantial risk of harm to the other.

Respondent Corbitt was employed as a lighting technician for Legends, an entertainment group scheduled to perform at appellant Powerline/VIP's exhibit site during the Consumer Electronics Show in Las Vegas. Corbitt suffered a fractured skull, sinuses, wrist, and elbow when a collapsing truss, assembled by employees of both Powerline/VIP and appellant GES, Inc. (an electrical contractor), knocked Corbitt from a forklift to the ground some thirteen feet below.

At trial, the jury awarded damages against Powerline and GES exceeding $1,100,000, and assessed the comparative fault, by way of a special verdict, at ten percent against Corbitt; twenty-five percent against GES; and sixty-five percent against Powerline. GES appealed, claiming that the Nevada Industrial Insurance Act immunized GES from suit under workers compensation exclusivity, and that the district court erred in finding it jointly and severally liable with Powerline under the concerted acts exception.

The Nevada Supreme Court noted that a worker may pursue a common law tort action against any tortfeasor who is not his statutory employer or co-employee under the "normal work test" codified in Nev. Rev. Stat. 616B.603(1)(b). The court found that the test would result in immunity to GES only if GES was in the same trade, business, profession, or occupation as Corbitt's employer, Legends. Since Legends' trade was live entertainment, and GES supplied electricity and assembly services, GES did not qualify as a statutory employer under the "normal work test" analysis, and the district court did not err by denying GES's motion for summary judgment.

The court found for GES on the issue of joint and several liability. Nev. Rev. Stat. 41.141(5)(d) creates a limited exception from joint and several liability for defendants who act in concert where comparative negligence is a viable partial defense. Ordinarily when a plaintiff is no more than fifty percent negligent, defendants found liable are presumed to be severally liable unless they act in concert to cause an injury. The court found the "concerted acts exception" requires an explicit or tacit agreement between tortfeasors to engage in conduct that is inherently dangerous or poses a threat of substantial risk of harm to others. While both Powerline and GES assembled the truss and knew that the assembly was incomplete, both were merely negligent in relying upon the other to perform certain acts in erecting the booth. They did not agree to assemble together, or to proceed knowing the truss was likely to collapse. The court reversed the judgment holding GES jointly liable, and held that GES was severally liable for twenty-five percent of the damages awarded based upon the special verdict.

Harris v. Rio Hotel & Casino, Inc.
25 P.3d 206 (Nev. 2001)

If the defendant in a construction case is a landowner that contracted with a licensed principal contractor, the landowner is immune from suit as a matter of law for industrial injuries sustained during performance for the construction contract.

Appellant Harris was injured while working at the Rio Hotel and Casino (the Rio). Harris received worker's compensation benefits from his employer, Marnell Corrao Construction, which was the licensed contractor for a project at the Rio. Harris filed an action against the Rio. The Rio moved to dismiss, claiming it was immune under the Nevada Industrial Insurance Act (NIIA), which provides an exclusive remedy for Nevada workers who are injured in an accident arising out of their employment. The district court granted the Rio's motion to dismiss.

Harris appealed, arguing that a landowner who constructs improvements to real property through a licensed general contractor does not enjoy the same immunity under the NIIA as the contractor.

The Nevada Supreme Court held that if the defendant in a construction case is a landowner that contracted with a licensed principal contractor, the landowner is immune from suit as a matter of law for industrial injuries sustained during performance of the construction contract. The court cited several policy considerations supporting the conclusion. First, worker's compensation should protect the property owner, who is indirectly paying the cost of the

worker's compensation coverage. Second, if commercial property owners were liable to injured construction workers, they would be at a greater financial risk than if their own employees were to do the work. Finally, property owners who have little expertise in the area of construction should be encouraged to retain experienced contractors to reduce the risk of injury.

Justice Rose concurred, but urged the court to recognize the "dual capacity doctrine," which recognizes that an employer may take on a second role that confers obligations, including tort liability, independent of those imposed on an employer. However, Justice Rose conceded that the doctrine would not have been applicable in this case.

***In re* Norbert**
258 B.R. 459 (D. Nev. 2001)

The Bankruptcy Code's prohibition against private employers terminating employment of, or discriminating with respect to employment against, a bankruptcy debtor does not apply to actions taken by the private employer before the filing of bankruptcy.

Appellant appealed the bankruptcy court's decision that 11 U.S.C. § 525(b), which prohibits a private employer from terminating the employment of, or discriminating with respect to employment against, an individual who is or has been a bankruptcy debtor, does not apply to an employer's actions against an individual who had not yet filed for bankruptcy. The district court reasoned that interpreting the phrase "an individual who is or has been a debtor under this title" to include persons who have not filed for bankruptcy prior to the alleged discriminatory acts by the employer, destroys the plain meaning of 11 U.S.C. § 525(b).

Morrow v. Putnam
142 F. Supp. 2d 1271 (D. Nev. 2001)

Government agency supervisors may be sued as employers under the Family Medical Leave Act.

Plaintiff Morrow took medical leave from his job with the United States Postal Service. When he returned to work, he was placed in a new and unequal position in comparison to his former station. He subsequently sued his supervisors and the Postmaster General, claiming that this action violated the Family Medical Leave Act (FMLA). The defendants argued that as government agency employees, they were immune from such suit, though they were the plaintiff's supervisors.

The district court held that the plain language of the FMLA clearly applied to government agencies. Further, the language was clear in extending liability to persons in supervisory positions. Finding no specific exemption for government agency supervisors, the court held that such supervisions were liable under the FMLA.

Although the court did acknowledge that evidence may reveal that some defendants did not have sufficient authority over the plaintiff to be considered employers under the FMLA, government agency supervisors may be sued under the FMLA as a matter of law.

Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.
156 F. Supp. 2d 1170 (9th Cir. 2001)

General contractors are liable for indebtedness of labor incurred by any subcontractors working under the general contractor.

General contractor Richardson Construction employed subcontractor Desert Valley. When Desert Valley failed to require employee benefit contributions, plaintiff trustees obtained a default judgment against Desert Valley. Trustees subsequently filed a motion for partial summary judgment against the general contractor under Nev. Rev. Stat. 608.150(1), which makes general contractor's liable for indebtedness incurred by their subcontractors.

The trustees argued that the default judgment against the subcontractor had the same legal impact as against the general contractor. The defendant claimed the default judgment was not applicable to defendant, arguing that, when a joint claim is made against several defendants, a defendant's failure to appear only equates to a waiver of the defaulting defendant's standing to appear. Richardson argued that extending Desert Valley's default to Richardson would deprive it of the right to a jury trial.

The Nevada Supreme Court granted partial summary judgment. The court found that the phrase "indebtedness for labor" in Nev. Rev. Stat. 608.150(1) includes employee benefits provided for in collective bargaining agreements. The court rejected Richardson's joint claim argument, finding that the trustees' claim was against Richardson for Desert Valley's indebtedness. The court also held that Richardson's request for a jury trial should have been made when they intervened in the case, not after damages were assessed.

IMMIGRATION LAW

Gato-Herrera v. Immigration & Naturalization Serv.
130 F. Supp. 2d 1213 (D. Nev. 2001)

Immigration parole entry into the United States does not constitute entry for purposes of constitutional protections against continued detention.

Herrera entered the United States from Cuba on an immigration parole. After being jailed for criminal conduct in the United States, Herrera was found to be inadmissible into the United States and ordered removed. He remained in detention by the Immigration and Naturalization Service (INS). Federal law only permits the detention of removable aliens for a reasonable time beyond the ninety-day period after the order of removal. 8 U.S.C. § 1231(a)(6). Herrera claimed that his detention was a violation of the Constitution, and petitioned for release.

The district court ruled that, under immigration parole, there is no true entry into the United States. Since the petitioner did not enter the country, he had no claims under the Constitution or federal statutes. The court also stated that if the federal law in question is in conflict with international law that states the petitioner's detention cannot be prolonged and arbitrary, federal law displaces international law.

Herrera claimed that the Nicaraguan Adjustment and Central American Relief Act of 1997 and the Cuban Adjustment Act of 1966 automatically adjusted his status to a lawful permanent resident.

The district court held that none of these acts automatically adjusted his status merely by their enactment. Each act requires the alien to meet certain criteria based on the Act. Moreover, both acts require the alien to apply for the adjustment, which Herrera did not.

Because Herrera was not admitted to the United States other than under the provisions of an immigration parole, and because he failed to apply to change his status, the court held that his continued detention did not violate the United States Constitution.

Hays Home Delivery, Inc. v. Employers Ins. Co. of Nevada
31 P.3d 367 (D. Nev. 2001)

Where a subcontractor is involved in the same trade as the contractor and the subcontractor's activities would normally be carried out by employees rather than independent contractors, the subcontractor is considered an employee for purposes of state workers' compensation law.

Green, an owner/operator who delivered furniture for Hays, was hurt on the job. After failure to pay his premium, Green submitted a claim to Employers Insurance Company of Nevada, Hays' insurer, which was eventually honored. Hays appealed to the district court, arguing that Green was not an employee. The district court affirmed the claim, and Hays appealed to the Nevada Supreme Court.

The court found that Green was under a contract of hire and that Green was in the same trade as Hays. The Nevada Industrial Insurance Act (NIIA) explicitly allows independent contractors to be considered employees. Nev. Rev. Stat. 616A.210(1). In addition, the court noted that the case was a non-construction case, such that the normal work test from *Meers v. Haughton Elevators*, 701 P.2d 1006 (Nev. 1985), applied. As a result, the NIIA treats Green as an employee for purposes of workers' compensation, even though Green was involved in an independent enterprise distinct from that of Hays. The court reaffirmed the ruling in *Meers* that, where an independent contractor's indispensable activity is normally carried on through employees of a company or enterprise, the independent contractor is considered an employee for purposes of worker's compensation.

Tarango v. State Indus. Ins. Sys.
25 P.3d 175 (Nev. 2001)

Injured, undocumented aliens may be denied some of Nevada's workers' compensation benefits.

Tarango, an undocumented alien, suffered an industrial injury while at work. After receiving maximum medical treatment, doctors recommended vocational rehabilitation. The State Industrial Insurance System (SIIS) awarded claimant permanent partial disability but required claimant to submit Immigration and Naturalization Form I-9 as proof of his right to work in the United States. Claimant failed to satisfy the verification requirement and SIIS subsequently suspended his benefits until proof was provided. Claimant argued

that, under Nevada's workers' compensations laws, an injured worker is entitled to full workers' compensation benefits regardless of immigration status. SIIS held against Tarango, and he appealed.

The Nevada Supreme Court held that the Federal Immigration Reform and Control Act precludes an employer from modifying employment or vocational training benefits under Nev. Rev. Stat. 616C.530 for undocumented claimants. The claimant argued that SIIS's denial of vocational rehabilitation benefits violated the Fourteenth Amendment. The court held that, while undocumented aliens have a right to equal protection under the Fourteenth Amendment, certain benefits may be withheld from undocumented aliens because their presence in the United States is a crime. Thus, benefits that promote an undocumented alien's vocational training in the United States will be denied.

PROFESSIONAL RESPONSIBILITY

***In re* Schaefer**
25 P.3d 191 (Nev. 2001)

Supreme Court Rule 182 applies to an attorney, even when representing himself.

After hearing two formal complaints against attorney Michael Schaefer, the Southern Nevada Disciplinary Board concluded that Schaefer violated various professional conduct rules and recommended his disbarment. The panel found various violations of the Supreme Court Rules, including Sup. Ct. R. 182, which prohibits communication with persons represented by counsel. Schaefer's Sup. Ct. R. 182 violations occurred during Schaefer's litigation with Mirage Resorts, Inc., when he repeatedly communicated with Mirage officers, directors, and employees concerning the litigation. General counsel for Mirage Resorts, Inc., specifically instructed Schaefer to communicate only through him.

On automatic appeal, Schaefer argued he did not violate Sup. Ct. R. 182 when representing himself pro se. He argued that the rule was unconstitutionally vague and unconstitutional under the First Amendment because it was a content-based restriction. The Nevada Supreme Court determined Sup. Ct. R. 182 was vague in Schaefer's situation and subsequently did not consider three of the Sup. Ct. R. 182 violations because of the rule's uncertainty. However, the court warned that the rule applies to lawyers acting pro se and is constitutional. The court also did not consider the Sup. Ct. R. 203(1) violation, Sup. Ct. R. 203(2) violation, or the four Sup. Ct. R. 203(4) violations because these violations were not charged in the complaint. The court found the other violations were supported by clear and convincing evidence.

Schaefer's pattern of misconduct, his numerous ethical violations, and his denial of guilt supported the panel's findings of aggravating factors and its recommendation for disbarment. As a result, the court disbarred Schaefer and ordered him to pay the disciplinary proceeding costs.

Moran v. Bonneville Square Assocs.
25 P.3d 898 (Nev. 2001)

Failure to provide complete and accurate responses to docketing statement requests resulted in monetary sanctions.

Appellant Moran's counsel, Kirk T. Kennedy, was required to provide responses to two docketing statement requests as part of an appeal in a personal injury action. The requests required Moran to show that a motion for a new trial was filed and rejected, and that Moran included copies of all the last-filed pleadings, respectively.

The Nevada Supreme Court held that Kennedy failed to provide the appropriate responses, and sanctioned Kennedy for that failure. The court found that both requests pertained to jurisdiction of the Nevada Supreme Court. The Nevada Supreme Court is a court of limited appellate jurisdiction and the burden of showing jurisdiction rests with the appellant. The docketing statement requests are designed to facilitate that showing without requiring the court to issue an order to show cause why the appeal should not be dismissed. Further, the court noted that the first page of the docketing statement form includes a warning that all requests should be fully and accurately completed or sanctions may be imposed.

The court held that Kennedy's neglect showed a lack of consideration and that the requests were not given the proper, careful attention they required. As a result, he was sanctioned $500 for his conduct.

Mosley v. Nev. Comm'n on Judicial Discipline
22 P.3d 655 (Nev. 2001)

Adjudicators who engage in investigative, prosecutorial, and adjudicative functions are entitled to presumption of honesty and, therefore, the combination of functions does not violate due process.

The Las Vegas Review Journal reported that Judge Donald Mosley used his judicial office to secure favorable testimony in an attempt to gain custody of his son. The Nevada Commission on Judicial Discipline instituted an investigation, concluding that sufficient probable cause existed to warrant formal disciplinary hearings. In his answer, Judge Mosley claimed that the Commission's proceedings were unconstitutional because the combined investigative, prosecutorial, and adjudicative functions deprived him of the property interest inherent in his position without due process. When Judge Mosley's motion to dismiss was denied, he filed a motion for extraordinary relief with the Nevada Supreme Court, which was granted.

The court found that, in order to prove violation of due process, a defendant must overcome the presumption that the adjudicators are honest and prove there is a risk of actual bias. Since Judge Mosley offered no evidence of actual bias, the court concluded that his due process rights had not been infringed.

The court did agree with Judge Mosley's assertion that the State Bar had improperly delegated power to the executive director of the Commission to appoint replacements for two members who had recused themselves.

Justice Shearing, joined by Justice Agosti, concurred with the due process holding, but dissented on the holding pertaining to replacement of Commission members. The majority held that the State Bar's power to appoint replacement

members of the Commission was a specific power that the Bar was precluded from delegating. Justice Shearing asserted that delegation should be allowed for the appointment of one-time substitutes.

Justice Leavitt concurred that the appointment process had been improperly delegated but dissented from the majority's solution, which required the Bar to appoint two new members to hear the Mosley case. Justice Leavitt asserted that all actions taken by the improperly-constituted Commission should have been voided and the action begun anew.

PROPERTY

Besnilian v. Wilkinson
25 P.2d 187 (Nev. 2001)

One party to a declaration of homestead cannot alienate a homestead property without the other party's consent.

In 1975, husband and wife Simon and Glenda Besnilian acquired property in joint tenancy. In 1990, the couple jointly executed a declaration of homestead. Later, and unbeknownst to Glenda, Simon deeded half of the property to a third party. Simon subsequently died, and when Glenda brought an action to quiet title some time later, the trial court denied the action as foreclosed under the doctrine of laches. Glenda appealed.

The Nevada Supreme Court held that a spouse may not alienate a homestead without consent of the other spouse. The court ruled that the homestead law is intended to protect the family home. Prohibiting a spouse from conveying their interest in the homestead/joint tenancy estate, without the knowledge and consent of the other spouse, furthers the intent of the homestead law.

Justice Agosti concurred, noting the impact of this decision on property law. Justice Agosti claimed that the decision transmuted property held in joint tenancy into community property, arguing that the majority's holding subjects homestead property held in joint tenancy between spouses to the same disposition as property held by spouses as community property.

Justice Rose dissented, focusing on the fact that the effective changes enumerated in the concurrence were not necessary to give full effect to a declaration of homestead. Justice Rose also urged that there was no indication of such intent in Nevada law.

Churchill County v. United States
199 F. Supp. 2d 1031 (D. Nev. 2001)

Secretary of the Interior's decision to transfer land into trust for the benefit of the Fallon Paiute-Shosone Tribe held lawful.

The Fallon Pauite-Shoshone Indian Tribes acquired thirty-seven acres of land in Churchill County and the United States took the land into trust. Churchill County disputed the validity of placing the land into trust, arguing that: 1) the intent of the enabling statute is to allow the tribe to acquire land and water rights solely for agricultural purposes; 2) the Secretary failed to consider the factors in 24 C.F.R. § 151.1 when he decided to place the land in trust; 3) the statute unconstitutionally delegates legislative power to the agency; and 4) the

statute is unconstitutional as a violation of equal protection under the Fifth Amendment. The Tribes moved to dismiss for failure to state a claim.

The district court granted the motion to dismiss. It held that, while the enabling statute mentioned water rights, it did not limit the use of the land. The court also held that the legislature imposed standards for the Secretary of Interior to follow that were unambiguous and within the boundaries of acceptable delegation to an administrative agency, making them constitutional.

Mark Props., Inc. v. Nat'l Title Co.
34 P.3d 587 (Nev. 2001)

An escrow agent must inform a party to the escrow of any fraud committed if facts known to the escrow agent provide substantial evidence of such.

Mark Properties (Mark) consisted of two real estate investors who participated in a joint venture with other investors. Mark later discovered that the seller of the parcel they planned to purchase was not an unrelated third party, but a co-investor. The co-investor falsely informed Mark that the purchase was only to facilitate acquisition of the property, and that there was no difference in the purchase price. Mark later learned that the property was indeed purchased for a lower price, and that their co-investors had obtained a double escrow on the property at issue. Mark argued that defendant, National Title, knew the details and should have divulged any potential fraud to them. The district court granted summary judgment to defendant National Title, and Mark appealed.

The Nevada Supreme Court reversed, holding that an escrow agent has a legal duty to disclose fraudulent circumstances, of which it is aware, to another party to the escrow if the circumstances present substantial evidence of fraud. To do otherwise would effectively render the agent a participant in the fraud. In its opinion, the court disagreed with other jurisdictions, which have refused to impose such disclosure on the basis that such disclosure would subject the escrow agent to a high risk of litigation. However, the court also held that an escrow agent does not have a duty to disclose to a party that is not a party to the escrow, and moreover, does not have a duty to investigate circumstances surrounding a particular sale to discover fraud.

Nev. Tax. Comm'n v. Nev. Cement Co.
36 P.3d 418 (Nev. 2001)

The primary-purpose test applies in determining if an item, used both in the manufacturing process and as an ingredient in the finished product, is a retail sale or a sale for resale.

Nevada Cement manufactures cement by using four pieces of equipment that gradually disintegrate over time and are incorporated into Nevada Cement's finished product. As a result, the equipment has the dual purpose of assisting in the manufacturing process and contributing to the ingredients of the final product.

A sales or use tax must be paid on all tangible personal property sold at retail in Nevada. The sales tax applies to property sold at retail in Nevada, while the use tax applies to property purchased outside the state but stored, used, or consumed in Nevada. Items purchased for resale are exempt from the sales and use tax. Nevada Cement's liability depends upon whether its

purchase constituted a retail sale or a sale for resale. Nevada Cement initially paid either sales or use taxes on the four pieces of equipment, and then later requested a refund. The Nevada Department of Taxation denied the request.

Nevada Cement filed a petition for re-determination, claiming that, because the process eventually incorporates the equipment into the finished product that was later sold, the equipment purchase was for resale and not retail, and should be tax exempt. The matter proceeded to an administrative hearing, and the Department hearing officer denied the refund claim. On administrative appeal, the Tax Commission determined Nevada Cement purchased the equipment for manufacturing cement and upheld the hearing officer's decision.

Nevada Cement contended the proper test to apply is the physical-ingredient test, which states that, where an item becomes a physical ingredient or a component of the finished product, it is a sale for resale and therefore exempt from the sales and use tax. The Commission contended that the sole-purpose test applies, which states that, if any purpose of a dual-purpose item is not for resale, then the sales and use tax applies.

The Nevada Supreme Court held that the primary-purpose test applies. This test looks to the primary purpose of the purchase to determine if the sale is at retail or for resale. If one purchases an item primarily to aid the manufacturing process, it is taxable, regardless if it becomes part of the finished product. If one purchases an item primarily to become part of the finished product, it is exempt as sale for resale, regardless of whether it assists in the manufacturing process. Therefore, the district court erred in applying the physical-ingredient test.

The court held the record demonstrated that Nevada Cement purchased the equipment for the primary purpose of manufacturing cement. The contribution to ingredients was only a secondary purpose. Under the primary-purpose test, the equipment purchased by Nevada Cement was taxable as a retail sale.

Pro-Max Corp. v. Feenstra
16 P.3d 1074 (Nev. 2001)

Under Nev. Rev. Stat. 106.240, liens on real property are presumed extinguished ten years after debt is due.

Pro-Max Corporation borrowed money in 1982 from various shareholders in order to secure funding for real property. Pro-Max signed promissory notes to those from whom it borrowed, which were secured by deeds of trust on the purchased property. These notes became due two years after their execution on May 14, 1984. However, no payment was ever made, including after the sale of the property in 1996. The trial court interpreted Nev. Rev. Stat. 106.240 to provide protection to bona fide purchasers and held that the statute did not, in fact, extinguish the notes.

On appeal, the Nevada Supreme Court found that the trial court erred in its interpretation. The court held that the statute was clear and unambiguous and the notes were extinguished on May 14, 1996, ten years after they became due. The court remanded the case for a determination of whether Pro-Max should be estopped from claiming protection under Nev. Rev. Stat. 106.240.

Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc.
2001 Nev. LEXIS 82 (D. Nev. 2001)

Although respondent was granted title to land in dispute before the court, attorney's fees were improperly granted because respondent failed to demonstrate proximate cause between the fees and the appellant's actions.

Dispute between appellant (developer) and respondents (homeowners' association and individually-named land owners) arose over property that the respondents asserted was intended to be conveyed to respondents as common areas. The appellant argued that the land in question was not included in the description of land indicating common areas. The appellant further contended that the lower court erred in awarding attorney's fees because attorney's fees cannot be recovered unless authorized by agreement, statute, or rule, none of which applied to this case. Respondent asserted that fees were not awarded as costs, but as recoverable damages in the underlying action.

The Nevada Supreme Court affirmed the lower court's decision granting title, holding that the lower court's determination was based on findings of fact. However, the court reversed the lower court's decision to grant attorney's fees to the respondents and remanded the case for further determination of whether the fees were proximately caused by the conduct of the appellant.

The court agreed with the appellant's assertion that attorney's fees cannot be recovered as a cost of litigation unless authorized by agreement, statute, or rule, which was not the case here. However, the court also noted that fees may be claimed as the foreseeable damages resulting from tortious conduct or a breach of contract, considered special damages. In order to claim special damages, Nev. R. Civ. P. 9(g) requires that they be pleaded as such in the complaint and proved by competent evidence, similar to any other claim for damages. Further, when attorney's fees are considered as damages, they must be the natural and proximate result of the injurious conduct, and be proven as to each claim. Respondents did not allege fees as special damages, but instead mentioned the legal fees only in the general prayer for relief. The lower court erred in viewing affidavits from the respondents as a basis for granting relief rather than conducting an evidentiary hearing to determine if the fees were a proximate cause of the appellant's actions.

S.O.C., Inc. v. Mirage Casino-Hotel
23 P.3d 243 (Nev. 2001)

Hotel-casino's conveyance of a pedestrian easement to the county for sidewalk abutting property did not create a public forum wherein commercial advertisements may be distributed against the wishes of the property owner.

The Mirage conveyed a perpetual pedestrian easement, in the form of a sidewalk, along the Las Vegas Strip to Clark County. S.O.C. used the sidewalk as a place to distribute business advertisements for nude dancers. The Mirage sought an injunction to enjoin S.O.C. from further distributing literature on the sidewalk. S.O.C. alleged the First Amendment protected their right to distribute literature on the sidewalk. The trial court granted a temporary injunction and S.O.C. appealed.

The Nevada Supreme Court found the granting of an easement to be insufficient to transform private property into a public forum. The right to exclude

certain persons or activities is one of the chief characteristics of private property ownership. Private property does not become public simply because the public is permitted access. The court found that easements are only as broad as necessary to accomplish its purpose. Here, Mirage's purpose was to allow pedestrians to traverse the Strip, not to provide a place where others could conduct business.

The court also found that, generally, constitutional requirements are not imposed on a private actor. The First Amendment secures an individual's right to not have his freedom of speech infringed upon by a state actor, not a private individual or corporation. Since Mirage is not a government entity, constitutional protections did not apply to their sidewalk.

Justices Maupin and Shearing concurred, but found that the commercial nature of the plaintiff's business is key to the decision not to permit the distribution of materials on the sidewalk. Commercial speech is not afforded full constitutional protections.

Justice Rose dissented, asserting that the location and purpose of the sidewalks dictate the degree of control the owners can exercise. In this case, the sidewalks are the only means of traversing a busy street, and are therefore clearly a public forum. As a public forum, the protections of the First Amendment are implicated.

TORTS

Borgenson v. Scanlon
19 P.3d 236 (Nev. 2001)

The Firefighter's Rule, codified at Nev. Rev. Stat. 41.139, does not allow recovery of damages if a police officer sustains an injury while apprehending a suspect because the suspect's parents did not negligently interfere with the arrest and the suspect's flight was a reasonably foreseeable component of an officer's duties.

Robert and Patricia Scanlon were holding a family reunion at a family owned bar when their son, David, arrived drunk and violent. Robert called 911 and officers Borgenson and Snarr responded. While chasing David, who fled the scene, Borgenson fell and suffered leg injuries. Borgenson alleged that Robert and Patricia negligently interfered with David's arrest, allowing him to flee, leading to the injuries.

The district court granted Robert and Patricia's motion for summary judgment, concluding there was no evidence that either Robert or Patricia instigated David's flight, and that, therefore, the Firefighter's Rule precluded Borgenson's recovery because he sustained the injury in the course of his official duties. Patricia filed a motion for costs pursuant to Nev. Rev. Stat. 18.005 and 18.050, Borgenson filed a motion to retax costs, and the district court reduced and denied costs, awarding $14,209.26 to Patricia. Borgenson appealed the summary judgment, contending the Firefighter's Rule, as codified at Nev. Rev. Stat. 41.139, does not preclude recovery because Robert and Patricia's actions constitute independent acts outside the scope of Borgenson's official duties. Borgenson also argued that Patricia is vicariously liable for David's acts under

the duty of the parent-child relationship, and the district court abused its discretion by awarding unreasonable costs to Patricia.

On appeal, the Nevada Supreme Court held that a district court cannot determine credibility of witnesses or the weight of evidence when resolving a motion for summary judgment. At common law, the Firefighter's Rule bars recovery of negligent damages incurred during the scope of official duties because the officer assumes all normal risks inherent in the employment. Nev. Rev. Stat. 41.139 limits this common law rule and allows recovery when the negligence is unforeseeable or an independent or intervening act. The court concluded the district court correctly determined there was no evidence of negligent interference and that pursuing a suspect is a reasonable extension of an officer's official duties; therefore, the Firefighter's Rule bars Borgenson's claim.

The court also stated that it has only recognized a parent to be vicariously liable for a child's actions in cases of motor vehicle ownership or negligent entrustment of motor vehicles where the child is a minor; there is no indication Patricia had any control of twenty-nine-year-old David. Additionally, neither party submitted documentation for costs in the appellate record; therefore, vicarious liability is not at issue and the court affirmed the district court's award of costs.

Burns v. Mayer
175 F. Supp. 2d 1259 (D. Nev. 2001)

Tort claims based on sexual harassment are not preempted by Nevada workers' compensation law.

Plaintiff Burns, an employee of Harrah's Garden Café, claimed that she was subjected to male co-workers simulating male appendages with food products, asking her to have sex with them, touching her buttocks, and commenting on her breasts, buttocks, and menstrual cycle. She filed suit against Harrah's and individual co-workers, claiming sexual harassment and retaliation under Title VII, violation of Nevada's antidiscrimination suit, and respondeat superior liability for the tort actions of her co-workers.

The defendants filed summary judgment motions as to all the claims. Harrah's argued that Burns had not shown that the acts constituted a hostile work environment, and that Harrah's had no respondeat superior liability for its employees' acts. In addition, Harrah's claimed that Nevada workmen's compensation law preempted Burns's tort claims.

The district court denied defendant Harrah's motion for summary judgment on the sexual harassment claims, holding that Harrah's had shown insufficient evidence to deny the hostile work environment claim. The court held that Harrah's may be held liable for the tort actions of its employees under the theory of respondeat superior, given that the alleged acts of sexual harassment fell within the scope of tasks assigned to the employees. Further, the court found Harrah's had not demonstrated that it took prompt, effective action to remedy the inappropriate behavior towards the plaintiff.

The court also denied Harrah's contention that the tort claims were preempted by Nevada's worker compensation law, as that law covers injuries sustained by accident during the course of employment. The court found it

implausible that the alleged acts could have occurred "accidentally." The court also denied Harrah's contention that plaintiff's emotional distress claims would be preempted by Nevada's anti-discrimination law, as most courts permit both a sexual harassment claim under state anti-discrimination laws and an emotional distress claim under common law.

The court denied the individual defendants' motion for summary judgment on the intentional infliction of emotional distress claim because other courts have found that behavior similar to that of the defendants could rise to the level of extreme and outrageous conduct. Whether or not the behavior constituted "extreme or outrageous" conduct was to be determined by the trier of fact. Further, the plaintiff presented sufficient evidence as to her emotional distress that such could be considered severe.

The court did grant summary judgment for the individual defendants as to the defamation claim because the plaintiff was unable to prove the claim at the time of the motion, but claimed she would be able to do so at trial. As plaintiff could not prove at trial what she was required to show at summary judgment, and the plaintiff had no supporting testimony other than her own speculation, the court held that her defamation claim failed.

Krause Inc. v. Little
34 P.3d 566 (Nev. 2001)

Jurors may reenact an expert's experiment using admitted evidence and objective injuries, such as broken bones, and do not require expert testimony for the jury to award future pain and suffering damages.

Respondent Don Little used a Multimatic ladder, manufactured by appellant Krause, which he purchased from appellant Home Depot. The ladder collapsed when Little's foot accidentally bumped the release lever, causing him to fall to the ground. In the fall, Little broke his ankle in two places and was subsequently unable to resume full activity for two and one-half months. In the ensuing product liability suit, Little's expert witness testified as to the possibility that such an accident could occur. During deliberations, the jury reconstructed the expert's demonstration in order to reach a verdict. The jury subsequently awarded Little $80,000 in past damages and $20,000 for future pain and suffering. Appellant's motion for a judgment notwithstanding the verdict was denied, and an appeal followed.

Krause argued that the jurors reconstruction of the expert witness's experiment was an improper introduction of new evidence, and that the plaintiff's failure to present expert testimony regarding future pain and suffering was improper.

The Nevada Supreme Court affirmed the trial court verdict. The court determined that the jury's use of admitted evidence to reenact an expert witness's experiment did not constitute the introduction of new evidence, but rather that the jury was merely "examin[ing] the accuracy of Manning's expert testimony." Regarding the second issue, the court stated that medical testimony is necessary when injuries are subjective and cannot be demonstrated to others; however, a broken bone is an objective injury that does not require expert testimony for a jury to award damages for future pain and suffering.

Justice Becker concurred, but dissented as to the future damages instruction. In dissent, Justice Becker stated that the cases cited to by the majority did not hold that an expert testimony is unnecessary to prove future pain or suffering when the injury is objective, but rather hold that expert testimony is unnecessary where the cause of future pain, suffering, or disability is objectively demonstrable to the trier of fact.

Lee v. GNLV Corp.
22 P.3d 209 (Nev. 2001)

Restaurant employees did not breach their duty of care to a restaurant patron by failing to perform the Heimlich maneuver.

The Carson Street Café, located in downtown Las Vegas, is a restaurant owned by GNLV Corp. Mr. Sturms and his companion went to the Carson Street Café for dinner after drinking alcohol earlier that evening.

Shortly after beginning their meal, Mr. Sturms appeared ill, vomited in his lap, and afterward slumped over in his chair. Security officers and a waitress were summoned to the table and checked Sturms' pulse, that first appeared normal, but quickly began to deteriorate. The Las Vegas Fire Department paramedics were called to the restaurant. In the meantime, security personnel attempted to give Mr. Sturms CPR, as well as oxygen, but did not perform the Heimlich maneuver.

When the paramedics arrived, they attempted unsuccessfully to revive Mr. Sturms. Sturms was then rushed to the hospital where doctors also attempted unsuccessfully to clear his airway. Sturms was pronounced dead at 10:10 pm. The autopsy report concluded Mr. Sturms death was caused by food lodged in his upper airway.

Mr. Sturms' wife, Ahiliya Lee, sued GNLV for negligence, arguing failure on the part of GNLV to exercise reasonable care. GNLV moved for summary judgment, alleging it fulfilled its duty by taking reasonable measures to aid Mr. Sturms when his condition appeared to deteriorate.

The Nevada Supreme Court found that there is a special relationship between the restaurant and its patrons, requiring that the restaurant take reasonable steps to fulfill its duty. The court held that GNLV's employees fulfilled their duty by summoning professional help, and were under no legal duty to perform the Heimlich maneuver.

Lubin v. Kunin
17 P.3d 422 (Nev. 2001)

Statements published by defendants could be construed as defamatory and were for the jury to determine.

Appellant Lubin served as a director of a private school. The parents of several students believed Lubin's mismanagement caused, among other problems, high teacher turnovers. The disgruntled parents printed flyers and handouts, reproducing statements from a judicial complaint arising out of a lawsuit between the director and the school's Board of Trustees. The flyers implied child abuse occurred at the school and, as a result, a lawsuit alleging child abuse was filed.

Lubin filed a defamation suit. The defendant parents filed a motion to dismiss. They claimed the statements were opinions and protected by privilege. The district court granted the motion to dismiss, finding the director failed to allege a false and defamatory statement of fact. Lubin appealed.

The Nevada Supreme Court held that the district court erred in granting the motion to dismiss because the statements in question were capable of a defamatory construction. The court held that a jury must determine whether statements are false. The court reasoned that, since the statements by the parents implied the existence of factual information to backup the allegations, the parents were not merely stating opinion. The flyers contained mixed statements of opinion and fact that lent an air of accuracy; thus, the court concluded that the falsity of the statements was for the jury to determine. The court also held that the statements were not privileged because the one-sided nature of the statements excluded them from consideration as fair and accurate reporting.

Woosley v. State Farm Ins. Co.
18 P.3d 317 (Nev. 2001)

The comparative negligence standard articulated in Nev. Rev. Stat. 41.141 is integrated into the doctrine of res ipsa loquitur.

Douglas Adams was killed in an automobile accident when he swerved to avoid a ladder lying in the middle of his lane on the highway and collided with a truck stopped in the emergency lane. Based upon Adams' auto insurance policy, the estate filed a claim to collect uninsured motorist benefits, alleging negligence on the part of an unknown driver for dropping the ladder. State Farm refused to pay the claim, and the estate filed a breach of contract claim.

The estate contended that it was entitled to uninsured motorist benefits because the accident was substantially caused by the negligence of the unknown driver, in reliance on the doctrine of *res ipsa loquitur*. State Farm countered that Adams' contributory negligence was greater than the unknown driver and, therefore, prevented the recovery of uninsured motorists' benefits. The estate requested a jury instruction pertaining to *res ipsa loquitur*. The district court refused to give the jury instruction because Adams was contributorily negligent and, therefore, in violation of the third element of the *res ipsa loquitur* doctrine (requiring that plaintiff make no contribution to the event). The estate appealed, arguing that modern comparative negligence law and Nev. Rev. Stat. 41.141, passed in response to changes in the common law, required that the third prong of *res ipsa loquitur* be enforced only where the plaintiff's negligence is greater than that of the defendant.

The Nevada Supreme Court reversed the lower court, recognizing the need to incorporate the statute into the *res ipsa loquitur* jury instruction. The ruling expressly overrules *Bialer v. St. Mary's Hospital*, 427 P.2d 957 (Nev. 1967), which previously set forth the three elements for the *res ipsa loquitur* doctrine.

Wynn v. Smith
16 P.3d 424 (Nev. 2001)

Defamation verdict reversed and remanded for second trial because the district court erred by allowing an inaccurate malice jury instruction.

Wynn filed an action for defamation against Smith, Barricade Books, Inc., and Barricade Books' principal, Stuart, because of a statement published in an advertisement for Smith's unauthorized biography of Wynn. The trade catalog advertisement said the book "details why a confidential Scotland Yard report called Wynn the front man for the Genovese family." The district court granted summary judgment in favor of Smith. Wynn subsequently brought suit against Barricade Books and Stuart. The district court in the second suit entered judgment in favor of Wynn, totaling over $3.3 million for costs, compensatory, and punitive damages. Wynn, Smith, Barricade Books, and Stuart appealed for different reasons.

Wynn appealed the summary judgment entered in favor of Smith, arguing Smith was the source of the statement and should be liable. The Nevada Supreme Court affirmed the lower court's judgment in favor of Smith after deciding that Smith only provided his manuscript to the other defendants and did not represent his opinions as facts in the advertisement.

Smith appealed the denial of attorney's fees, claiming the district court reached the wrong conclusion under the *Beattie* factors. According to *Beattie v. Thomas*, 668 P.2d 268 (Nev. 1983), the district court must evaluate specific factors when deciding on attorney's fees. While finding that the district court failed to specifically address each *Beattie* factor, the Nevada Supreme Court affirmed the judgment because there was no abuse of discretion.

Barricade Books and Stuart appealed the defamation judgment, claiming the fair report privilege afforded them protection from liability, the jury instruction on malice was improper, and the statement at issue was non-actionable because only statements of fact, not opinions, constitute defamation. The court refused to apply privilege under the fair report privilege because the report from Scotland Yard was not official. The court followed the Third Circuit's reasoning that unauthorized or confidential reports do not qualify as official reports. However, the court reversed and remanded the decision because the jury instruction on malice failed to qualify the degree of doubt required for malice, essentially reducing the required standard of proof: the instruction required a finding of "doubt" and should have required "serious doubt." Additionally, the court ordered that, on remand, the district court submit the question of the statement's factual nature to the jury for determination. The court remanded the matter for a new trial against Barricade Books and Stuart.

Justice Leavitt voluntarily recused himself.

Justice Becker concurred, but expressed disagreement with the court's "serious doubt" standard and a preference for the United States Supreme Court's standard imposed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).