

**2004 UPDATE LETTER FOR
STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM
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Chapter 1: An Overview of the Governmental System

B. State Government

2. Constitutional Limitations on State and Local Authority

Notes following *State v. Baker*

5. *An independent state constitutional law?* State constitutions differ from the federal constitution and from each other both textually and with respect to history, making state-specific interpretation of state constitutions necessary. For example, many state constitutions directly establish separation of powers, while the federal constitution omits a specific recognition of separation of powers. State constitutions also often do not establish a single executive, but instead provide for separate election for offices of attorney general, secretary of state, and treasurer. Additionally, interpretation of state constitutions requires analysis of historical development due to the more frequent amendment of state constitutions as compared to the federal constitution. *See Tarr, Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. Am. L. 329 (2003).

8. *Developments in Other Jurisdictions Since Baker.* In the last year, other courts and legislatures have faced the issues raised in *Baker* regarding rights of individuals of the same sex to receive the benefits of marriage. The Massachusetts Supreme Judicial Court went further than the court in *Baker*, concluding not only that same-sex couples could not be denied the benefits associated with marriage under the state constitution, but also that a system of civil unions did not go far enough to assure true comparability between rights accorded same-sex and heterosexual couples. *See Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass., 2003) (holding state constitution required comparable rights); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (advisory opinion rejecting civil unions alternative presented by state legislature). Important questions have also been raised about the authority of state and local officials to permit same-sex unions. *See Lockyer v. City and County of San Francisco*, 2004 Cal. LEXIS 7238 (August 12, 2004) (invalidating may's issuance of licenses for same-sex unions).

C. Local Government

A Note on the Fragmentation of Power and Authority in American Local Government.

2. *Who governs?* A recent study found that local governments were more complicated than the two traditional categories of either a council-manager structure or a mayor-council structure. Many cities have hybrid forms of government in which the mayor has varying degrees of power. For example the mayor may have a veto over the budget or appointments of the council, or may have no veto power but instead have authority in budget preparation or appointments. See DeSantis & Renner, *City Government Structures: An Attempt at Clarification*, 34 *State and Local Gov't Rev.* 95 (2002).

Chapter 2: Local Government Incorporation and Annexation

A. The Judicial Review Problem.

Notes following Town of Beloit v. City of Beloit.

1. *Policy making in the courts.* In *City of Claremore v. Town of Verdigris*, 50 P.3d 208 (Okla. 2001), the court struck down a statute authorizing a court to consider the "substantial government interest" in an annexation because it was a political, not a judicial, consideration. "The primary judicial function of the courts in annexation matters is to insure that the municipality has acted within the scope of legislative authority and that its actions have been reasonable." *Id.* at 213.

B. Municipal Incorporation and Annexation

Notes following Town of Pleasant Prairie v. City of Kenosha

6. *The contiguity problem.* The debate over the definition of "contiguous" land continues, with the Supreme Court of Wyoming in 2004 refusing to allow annexation of land located one quarter of a mile from a city boundary because it was not contiguous in *Board. of County Comm'rs of the County of Laramie v. City of Cheyenne*, 85 P.3d 999 (Wyo. 2004). After examining varying definitions of the language "contiguous" and "adjacent," the court concluded that this language required the boundary of the municipality and the land proposed for annexation to touch to a "substantial degree," but did not require a "lengthy shared border."

Chapter 3: Local Government Powers and State Preemption

B. Statutory Powers.

General Bldg. Contractors v. Board of Shawnee County Comm'rs, 66 P.3d 873 (Kan 2003), held that the granting of legislative home rule powers to counties repealed Dillon's Rule. The court interpreted the statutes to confer the power of eminent domain.

C. Constitutional Home Rule.

Is there a constitutional problem if home rule local governments are granted powers not conferred on statutory local governments? The court thought not in *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204 (10th Cir. 2002). The Colorado Constitution does not reserve the right of initiative at the county level. All counties in Colorado are initially created as statutory counties

which may become home rule counties and assume a greater degree of self-government. There are several differences between the two; one is the scope of the power of initiative. The electors of statutory counties may only initiate legislation with respect to a very limited range of issues, while home rule counties are statutorily required to provide for the initiative and referendum on all measures under the same requirements that apply to statewide ballot measures.

Save Palisade is in a statutory county in which the group tried to stop the encroachment of residential subdivisions by placing a measure on the Mesa County ballot that would restrict the ability of landowners to subdivide their property. Mesa County refused to place the initiative on the ballot as no authorization for countywide initiatives in a statutory county such as Mesa existed. The Colorado Constitution did not authorize the electors of statutory counties to initiate legislation. Save Palisades argued that statutory counties have been denied the equal protection of the laws as it impinges on their right to free speech and to vote because home rule counties have the power of initiative. The court held that the right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure; no fundamental right exists and rational basis review applies. The classification need only bear a rational relation to some legitimate end to satisfy the Equal Protection Clause. The end to be served is that home rule counties have a broader range of powers than statutory counties and were created to give citizens of unincorporated areas a greater degree of autonomy in local affairs than they previously enjoyed. Granting the powers of initiative to home rule counties and not statutory counties could advance both these ends and is rationally related to either purpose:

The classification here is statutory counties, in contrast to home rule counties, and citizens of the two types of counties are treated differently in Colorado. Status as a statutory county, however, has not been recognized as a suspect or quasi-suspect classification. [Id. at 1210.]

2. Home Rule Powers in the Imperio States.

Notes following City and County of Denver v. State.

1. *What is local?* The Colorado court held that an ordinance that prohibited unrelated, registered sex offenders from living together in a single-family residence implicated a matter of state concern in *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003). The court reaffirmed the principles it had adopted to decide this question in *City of Denver*, and pointed out it applied a “totality of circumstances” rule in implementing the *Denver* decision. Considering the totality of the circumstances by looking at certain factors, the court held this was a matter of statewide concern in that there is a need for statewide uniformity, the ordinance has an extraterritorial impact or ripple effect that impacts state residents outside the municipality, the subject matter is one traditionally governed by state government, and the Colorado Constitution does not specifically provide that the city may regulate the number of registered child sex offenders living in foster care homes.

2. *The California rule.* In an important case, the California Supreme Court held a state statute requiring counties to submit to binding arbitration on economic issues that arise during labor negotiations with fire fighters or law enforcement officers violated a provision of the state constitution that authorizes county governing bodies to “provide for the number, compensation, tenure, and appointment of employees.” The court noted they had established a clear distinction between the substance of a public employee labor issue and the procedure through which it is solved. The challenged statute was substantive because it allowed a body other than the county's

governing body to establish local salaries. The court also held that statute violated the constitutional provision prohibiting the delegation of a municipal function to a private body. *County of Riverside v. Superior Court*, 66 P.3d 718 (Cal. 2003).

Notes following City of Miami Beach v. Fleetwood Hotel

2. *Exclusively for the state.* A county ordinance against discrimination came in to question in *Edwards Systems Technology v. Corbin*, 841 A.2d 845 (Md. App 2002). A state statute created a cause of action in the circuit courts for violations of county discrimination ordinances, and defendants argued that the combined operation of the statute and ordinance violated the Home Rule Amendment of the Maryland constitution. However, the court held that the ordinance and statute were valid, finding that chartered counties did have authority to define the elements of a claim and provide for review. The court reasoned that the anti-discrimination ordinance was a local law that was within the power of the county and was not inconsistent with any law of the state.

D. Statutory Preemption and Conflict.

Notes following Miller v. Fabius Township.

2. *More examples.* In *Roble Vista Associates v. Bacon*, 118 Cal. Rptr.2d 295 (Cal. App. 2002), the City of Palo Alto enacted the Rental Housing Stabilization Ordinance which required that a landlord offer new and renewing tenants a written lease which had a minimum term of one year. The court held the ordinance was not preempted, noting that the state's "notice [to terminate a tenancy] statutes do not suggest that the field of duration of leases is clearly a subject of paramount state interest that cannot tolerate any local involvement." Id. at 342.

In *Manning v. City of Lebanon*, 124 S.W.3d 562 (Tenn. App. 2003), the court held that a city ordinance governing procedures for clearing unsafe buildings was not preempted by the state's Slum Clearance and Redevelopment Act. The court concluded that the state act was meant to provide one method of demolishing unfit buildings, but the act also acknowledged that other procedures could be adopted by cities so there was no conflict.

Another recent case, *Lexington Fayette County Food and Beverage Ass'n v. Lexington Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004), involved a town ordinance prohibiting smoking in public buildings. The court held that the ordinance was not preempted by state laws regulating tobacco products. The court reasoned that the laws regulated tobacco only with regard to use by persons under 18, and therefore did not preempt regulation of use in public places by anyone. Neither was the ordinance impliedly preempted because the collection of various regulations dealing with smoking in the state did not constitute a comprehensive system of legislation.

3. *State vs. local.* In *Board. of Educ. v. Town & Borough of Naugatuck*, 843 A.2d 603 (Conn 2004), the court emphasized that the procedure for adopting a town budget was a matter of local concern in holding that a town's budget amendment was not preempted by state statutes. The amendment provided for town voters to approve the town's school district budget separately from the overall budget. Because this procedure was not a matter of statewide concern, the court concluded that the town's charter provisions were not superseded by the general state statute.

Chapter 4: Alternative Models for Local Government

B. Metropolitan Governance.

1. Intergovernmental Cooperation.

Notes following Goreham v. Des Moines Metropolitan Area Solid Waste Agency.

1. *Judicial construction of cooperation statutes.* In *Zack v. Marin Emergency Radio Auth.*, 13 Cal. Rptr. 3d 323 (Cal. App. 2004), the court held that an agency was exempt from a city's zoning ordinances. The agency had been formed by a joint powers agreement to provide an emergency radio system. The court concluded that since all members of the agreement had the power to operate an emergency radio system, the agency had the common power to take action and was therefore not subject to the city's zoning requirements according to a statute.

A recent article suggests that intergovernmental cooperation may not be effective at achieving fairer allocation of resources between urban and suburban areas as was previously thought. Instead cooperation may harm the central urban area by resulting in more spending on regional services instead of general purpose spending, while also allowing suburbs to avoid participation in regional policies which would redistribute revenues. As intergovernmental cooperation thrives, the gap in resources between urban and suburban areas continues to widen. See Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 Wash. L. Rev. 93 (2003).

Kubicek v. City of Lincoln, 658 N.W.2d 291 (Neb. 2003), held the city could enter into an interlocal cooperation agreement, without a popular vote, to form an agency with other entities that would engage in projects including community revitalization, transportation, and drainage and flood control improvements along a creek. Interlocal cooperation was authorized by the constitution and the city's charter, and the court held it was not made invalid by a charter provision requiring a popular vote on the assignment of departmental functions.

C. Neighborhood Government and Citizen Participation

The influence of community groups is growing in some cities due to an "accountable development" movement, intended to ensure that communities and developers work together for the benefit of the community. In Los Angeles, for example, a community group negotiated a contact with Staples Center developers to provide that the second phase of construction of the project would not have a negative impact on the neighborhood. See Goodno, *Feet to the Fire*, Planning, March 2004.

3. Consolidation and Federation

Notes following Mitchell-Weaver, Miller and Deal, Multilevel Governance and Metropolitan Regionalism in the USA

2. *Consolidation and federation movement stalls.* The consolidation of Louisville and Jefferson County, Kentucky was the first successful consolidation in decades. However, a case study of the consolidation suggests that it served the purpose of shifting power rather than promoting

efficiency as intended. The result was a greater influence of suburbanites over city development while inner city residents lost influence, which may lead to greater urban sprawl. The consolidation also made the mayor more powerful. *See Savitch and Vogel, Suburbs Without a City: Power and City-County Consolidation*, 39 Urb. Aff. Rev. 758 (2004).

A Brookings Institution study of Miami-Dade County concludes that greater attention should be paid to programs and policies to grow the middle class. *See R. Sohmer et al., Growing the Middle Class: Connecting All Miami-Dade Residents to Economic Opportunity* (2004).

Chapter 5: State and Local Finance

A. Fiscal Trends.

According to a recent study by the Brookings Institution, property taxes now account for a much lower proportion of city revenues than they have historically, while sales taxes, income taxes and user fees have become larger sources of revenue. Case studies also suggest that a city's tax structure may affect the type of land development projects it conducts. For example, Columbia, South Carolina's dependence on property taxes for revenue may have prompted the city to engage in land redevelopment projects. *See M. Pagano, City Fiscal Structures and Land Development* (2003).

The current state and local government fiscal crisis, which is one of the worst in years, is daily news. A recent survey by the National Conference of State Legislatures found some improvement, with state revenue growing after several years of declines, and fewer states reporting budget shortfalls. State finances are still problematic due to several years of financial troubles, however, and further improvement of the economy may be needed for recovery. *See Associated Press, Study Finds Improvement in Finances for States*, NY Times, Nov. 28, 2003. The Nelson A. Rockefeller Institute of Government also found improvement, with a 5.5 percent growth in state tax revenues in 2004, and increases in quarterly income tax and sales tax revenues. *See Nelson A. Rockefeller Institute of Government, Charting a Recovery*, *Governing* 48, Aug, 2004. Although budget numbers are improving, rising interest rates and rising health care and pension costs may create pressures and cause problems for states. Greenblatt, *State Budgets: Not Enough Umbrellas*, at <http://www.governing.com/articles/7nasbo.htm>.

Municipalities as well as states have also recently been undergoing budget problems. With revenues falling due to the recession and expenses rising for health care, retirement, and security, many cities are faced with budget shortfalls. For example, Kansas City faced a \$58 million budget shortfall for fiscal year 2004, and was forced to reduce costs. The city implemented early retirement programs to reduce salary costs, and cut programs and expenditures while saving core programs such as fire and police protection. Officials for many local governments are predicting similar budget shortfalls for fiscal year 2005. *See Wade, Tight Belts*, *Planning*, Jan. 2004, at 22.

B. Constitutional Limitations

2. Due Process and Equal Protection

Notes following Nordlinger v. Hahn.

4. *Business taxes.* A unanimous Supreme Court applied the deferential standard of *Nordlinger* to uphold an Iowa statute imposing differential tax rates on slot machines, 36 percent on income from slot machines at racetracks but only 20 percent on income from slot machines on riverboats. *Fitzgerald v. Racing Assn. of Central Iowa*, 539 U.S. 103 (2003). The differential rate structure was contained in a statute permitting slot machines at racetracks for the first time. In reversing the Iowa Supreme Court, the Court stated that “the Iowa law, like most laws, might predominantly serve one general objective, say, helping the racetracks, while containing subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balances objectives but still serves the general objective when seen as a whole.” Among the plausible subsidiary objectives of the differential classification system were the desire to help riverboats through difficult times and to encourage them to stay in Iowa, the Court noted.

Applying *Nordlinger* and *Fitzgerald*, the Supreme Court of Ohio upheld an exhibition center parking tax against equal protection clause challenges in *Park Corp. v. Brook Park*, 807 N.E. 2d 913 (Ohio 2004). The city of Brook Park imposed a state-authorized maximum 8 percent tax on parking fees at the city’s only exhibition center, while imposing an effective tax rate of only 3 percent on parking fees at parking lots in the city that serve the Cleveland metropolitan airport. “As in *Fitzgerald*, a statute can meet its proclaimed purpose while at the same time balancing other objectives,” the court asserted. While the primary purpose of the exhibition center tax was “to create a revenue stream where none existed before,” the differential rate could have been intended “to aid the development of the part of the city that housed the airport lots,” the court observed.

C. Revenues

1. The General Ad Valorem Property Tax

Notes following State Bd. of Tax Commissioners v. Town of St. John.

3. *The New York Experience.* While retroactive relief for invalid assessments was denied in *Hellerstein* “because the result could bring financial chaos to the Town,” the New York Court of Appeals in *New York Telephone Co. v. Nassau County*, 808 N.E. 2d 340 (N.Y. 2004), held that denial of tax refunds to utilities for invalid tax assessments was premature because the amount of the refunds had not been established and the financial impact of a refund order had not been determined.

2. Special Assessments and Special Benefit Taxation

Notes following Sarasota County v. Sarasota Church of Christ, Inc.

One commentator suggests that the use of special assessments and fees by local governments may lead citizens to a consumer-based view of local government, believing they are paying for what they get with regard to each service. This may lead to an unwillingness to pay taxes for more general redistributive purposes. Reforms aiming for greater equality between richer and poorer areas by

creating larger regional governments may fail if these governments continue to use special assessments and fees. See Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 U. Fla. L. Rev. 373 (2004).

4. User Charges and Other Taxes

Notes Following Platt v. Town of Torrey

2. *User fees vs. Taxes.* In *City of Gainesville v. State of Florida*, 863 So.2d 138 (Fla. 2003) the court upheld a fee for stormwater disposal as a user fee rather than a special assessment. The court examined factors including the name given to the charge; relationship between the fee and the value of service; whether the fee is charged only to users or to all residents of an area; whether the fee is voluntary; whether it is charged to recover costs of improvements versus routine provision of a service; whether it is a traditional utility service and whether the fee is statutorily authorized. It concluded that the fee was a user fee because it was called user fee, was charged on a monthly basis, and was part of a statutorily authorized stormwater utility. The court also held that the fee structure of the utility was permissible despite not being based on the actual amount of stormwater a user contributes to the system. The court concluded that the city acted within its discretion because the fees were based on the amount of impervious area of property and stormwater runoff cannot be feasibly measured.

In *Richmond v. Shasta Community Services Dist.*, 83 P.3d 518 (Cal. 2004), the court upheld a capacity charge and a fire suppression fee imposed as conditions for making a new connection to a water system. Noting that neither the charge nor the fee were imposed on identifiable parcels but only on individuals requesting water service, the court concluded that they were not imposed “as an incident of property ownership” and thus were not subject to voter approval.

6. Tax and Expenditure Limitations

Notes following California’s Proposition 13

2. *Construing Proposition 13.* In *County of Orange v. Bezaire*, 11 Cal. Rptr. 3d 478 (Cal. App. 2004), the court concluded that the legislative intent of the drafters of Proposition 13 was that the 2% inflation cap in Proposition 13 should be calculated based on the original purchase price of the property, rather than being applied against any intervening year’s reassessed value. In so doing, the court upheld a practice popular among California assessors of “recapturing” lost value by increasing the assessed value of property above Proposition 13’s 2% limit after that property has lost value or stayed flat in previous years. See Pasco, *Prop. 13 Ruling Means No Tax Refund*, Los Angeles Times, March 27, 2004:
<http://www.latimes.com/news/local/la-me-prop27mar27,1,5478521.story?coll=la-headlines-california>.

D. Borrowing

Notes following Flushing National Bank v. Municipal Assistance Corp.

3. *Echoes from New York City's Fiscal Crisis*. Another fiscal crisis in 2003 found New York City with \$2.5 billion remaining to pay on the MAC debt services (\$500 million/year for five years). A lengthy political struggle produced a commitment by the state to provide financial assistance to the city to cover the costs of the remaining bonds so that the city could receive sales tax revenue that was being diverted to MAC. The agreement was articulated in the *Municipal Assistance Corporation Refinancing Act*, L. 2003, ch. 62, part A4; L. 2003, ch. 63, part v, which was passed over the governor's veto of the entire state budget. The Court of Appeals, in *Local Government Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 2004 N. Y. LEXIS 1049, upheld the Act against a variety of federal and state constitutional challenges.

F. Expenditures

2. Financial Incentives for Development: the Public – Private Partnership

Notes following Federal Community Development Programs

3. *Empowerment Zones and Enterprise Communities*. One of the key elements of the empowerment zone/enterprise community strategy is the use of tax expenditures: tax deductions and exemptions in return for job creation and development activities. Eligibility for enterprise zone benefits is controlled by statute. Determining whether a particular activity qualifies can become controversial. For example, in *West Belmont, L.L.C. v. City of Chicago*, 811 N.E. 2d 220 (Ill. App. 2004), an Illinois court affirmed a denial of a Chicago transfer tax exemption to a developer who acquired property in an enterprise zone, demolished a building previously used by a furniture retailer, and began building and selling residential townhomes. A transfer tax exemption was disallowed because the development of townhomes was not considered a commercial or industrial activity and the property had been vacant immediately before the transfer. The developer argued unsuccessfully that the ordinance merely required the property that was acquired to have been used for commercial or industrial purposes before the transfer, not at the time of transfer, and that construction and sale of townhomes was a commercial activity. In affirming the denial the court observed that “[West Belmont] purchased the property to convert it to residential homes were built and sold. West Belmont would pack up and leave the property.”

Chapter 6: Serving the Public Sector: Officers and Employees

A. The Civil Service System, the Legal Landscape, and Political Considerations.

Introductory Material.

Just as the federal civil service system was significantly shaped by President Garfield's assassination in 1883, the events of September 11, 2001 have had an impact on the legal landscape governing present-day federal employment. Concerns for national security resulted in the federalization of security screening in airports, creating a government workforce responsible for functions previously performed by those in the private sector. See Selzer, *Federalization of Airport Security Workers: A Study of the Practical Impact of the Aviation and Transportation Security Act from a Labor Law Perspective*, 5 U. Pa. J. Lab. & Emp. L. 363 (2003).

The legislation creating the new federal Homeland Security Department also authorized changes in rules governing personnel and labor management relations for employees transferred

from other agencies. See P.L. 107-296, sec. 841; 116 Stat. 2135 (2002). On the other hand, legislation pending before the 10th Congress in summer 2003 (H.R. 1588 and S. 1166) calls for significant privatization of work previously done by federal Defense Department employees. In January 2003, a blue ribbon commission affiliated with the Brookings Institution (National Commission on the Public Service, also known as the “Volcker Commission”) recommended that federal agencies be authorized to develop management and personnel systems “appropriate to their missions” and to establish more “flexible” personnel systems appropriate to their “special needs.” See http://www.brookings.edu/gs/cps/volcker/volcker_hp.htm. Federal legislation addressing some of these recommendations was reported by the House Government Reform Committee and referred for consideration by other House committees. H.R. 1836 (“Civil Service and National Security Personnel Act”), reported at H.R. Rep. 116 (108th Cong. 1st Sess. 2003).

The debate about the proper balance between public and private responsibility for and implementation of functions once thought of as “public” continues. See, e.g. *Giles v. Horn*, 123 Cal. Rptr.2d 735 (Cal. App. 2002) (challenge to San Diego County decision to contract out certain functions relating to welfare-to-work program on grounds that such action violated county charter’s provisions regarding civil service, remanded for consideration of mootness). For thoughtful discussions of related issues, see *Symposium, Public Values in an Era of Privatization*, 116 Harv. L. Rev. 1212, particularly Freeman, *Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285 (2003) and Trebilcock & Iacobucci, *Privatization and Accountability*, 116 Harv. L. Rev. 1422 (2003).

The tectonic shift toward contracting out of services previously staffed by government employees is likely to result in further profound changes in the nature of the public workforce and governing legal principles. As piecemeal changes have continued to occur, a number of commentators have provided helpful insights by stepping back and asking fundamental questions regarding the fundamental changes in the government workforce and their implications. See, e.g., D. Guttman, *Governance by Contract: Constitutional Visions, Time for Reflection and Choice*, 33 Pub. Cont. L.J. 321 (2004); G. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367 (2003); J. Freeman, *Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285 (2003).

1. Nonpartisan Eligibility Requirements.

Notes following Wardwell.

7. *Aliens.* Although the analysis applicable to state and local hiring seems relatively settled, in light of the United States Supreme Court cases cited, the events of September 11 may reshape the law in this arena in days to come. Recent challenges have been brought to provisions of the Aviation and Transportation Security Act that barred non-citizens (including resident aliens) from positions as airport security screeners. See *Gerbin v. Mineta*, 231 F.Supp.2d 971 (C.D. Cal 2002) (requirement of citizenship did not fall within “governmental function exception” or deference due political branches in areas of immigration and naturalization, and did not simply require residency; ban on American nationals and resident aliens was therefore subject to strict scrutiny analysis; although compelling interest existed, employment ban was not narrowly tailored so as to constitute the least restrictive approach to addressing government concerns). For a discussion of the role of state and local governments in implementing federal policies that affect immigrants, see Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DePaul L.

8. *Elective offices.* Recent cases have interpreted the meaning of residency requirements under statutory and constitutional provisions. See, e.g. *Lewis v. Gibbons*, 80 S.W.3d 461 (Mo. 2002) (requirement of one year's residence prior to election satisfied state constitution and equal protection requirements; one year's residence interpreted as the year just prior to election, and year's residence some years previously at time of high school was not sufficient to satisfy requirement). Recent cases have also addressed nuanced distinctions between a candidate's residence and his or her domicile. See *Williams v. Clark County Dist. Attorney*, 50 P.3d 536 (Nev. 2002) (interpreting state statutes governing eligibility for office of county commissioner to include both period of "actual residence" and "legal domicile" in the applicable district, where "legal domicile" is to be determined by both actual residence and intent to remain).

2. Patronage and Political Activity.

Notes following Branti v. Finkel.

1. *The role of patronage.* For a thoughtful discussion of the role of political parties in the current era, see Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95 (2002).

2. *Protected parties.* For a recent discussion of protections afforded independent contractors who have not had prior relationships with government entities, see Hensel, *The First Amendment and Independent Contractors Lacking Preexisting Commercial Relationships with the Government: Entering a Zone of Uncertainty*, 32 Pub. Cont. L. J. 635 (2003).

4. *Positions subject to patronage dismissals.* For a recent case considering whether a director of city cable television program could be dismissed by an incoming mayor, see *Rosenberg v. City of Everett*, 328 F.3d 12 (1st Cir. 2003) (holding that director could be fired and replaced by campaign director of new mayor, where incumbent director was an "at will" employee, incumbent director's decision to extend time for challenger to submit video for campaign purposes was not mandated by FCC regulations and thus was not compelled as a matter of public policy; role of program director involved matters "potentially subject to partisan political differences; director's duties included many policy-related duties and not simply creating unbiased programming so that argument that "media independence" as a factor in First Amendment analysis was not controlling). Another recent case, arising out of Washington state, held that secretaries employed at will in a county prosecutor's office were "confidential employees" who were not protected against patronage dismissals. See *Hobler v. Brueher*, 325 F.3d 1145 (9th Cir. 2003).

7. *Discharge for cause.* An important Connecticut case recently considered the application of the state statute protecting state employees from discharge for exercise of First Amendment rights provided that the employee's action does not "substantially interfere with" the employee's bona fide job performance or working relationship. See *DiMartino v. Richens*, 822 A.2d 205 (Conn. 2003) (public employee's statement to police expressing concern about security breaches by his supervisors at the airport at which he worked was protected as a matter of public concern and employee was protected notwithstanding alleged disruptive effect of his conduct).

Note and Questions on Political Speech

1. *Private communications raising “mixed” issues of interest to the employee as an employee and those of possible concern to the public.* Two recent cases provide an interesting juxtaposition. In *Hoover v. Radabaugh*, 307 F.3d 460 (6th Cir. 2002) the court held that First Amendment protections extended to statements by a building inspector who had been told by his supervisor to ignore building code violations and reported the supervisor’s conduct to a citizen’s advisory board, the state chief plumbing inspector, and the city supervisors in a public meeting. On the other hand, a county employee who had written a memorandum alleging mismanagement and sexual harassment by a deputy assessor who was running for the position of assessor, and submitted it to county personnel director with copies to the incumbent city assessor and deputy assessor was found not to be protected by the First Amendment because, in the court’s view, the memorandum stemmed from the employee’s private interest in preserving her job if the candidate was elected). See *Sparr v. Ward*, 306 F.3d 589 (8th Cir. 2002).

2. *Protection of “whistleblowers” who identify public corruption.* For a recent case exploring questions of statutory interpretation and causation under state whistleblower provisions, see *Tharling v. City of Port Lavaca*, 329 F.3d 422 (5th Cir. 2003) (city police chief was protected under the state whistleblower statutes when he provided information to the state attorney general concerning city council violations of the Texas open meetings law, but there was no causal showing that the city council decision to ratify the termination of his contract had resulted from that action since council had been unaware of it at the time).

3. *Nature of employee’s position and duties.* In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court struck down provisions of the Minnesota canons of judicial conduct that had prohibited a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues” in connection with judicial elections mandated by the state constitution. In an opinion by Justice Scalia, the Court concluded that the “announce clause” implicated First Amendment speech of candidates and failed to satisfy strict scrutiny. In the majority’s view, the canon was not narrowly tailored to preclude statements of bias against parties (since it focused on positions on issues rather than bias against particular parties), did not preclude candidates from having preconceptions about the law, and did not assure open mindedness of judges subsequently elected.

4. *Petition for redress of grievances.* A split in the circuits continues as to whether the public concern requirement is applicable in connection with the discharge of employees who file law suits against their employers, claiming protection under the Petition Clause. Compare *Grigley v. City of Atlanta*, 136 F.3d 752, 755 (11th Cir.1998) (applying public concern requirement) with *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir.1994) (public concern criterion not applicable).

Note and Questions on the Federal and State Hatch Acts

For a recent decision under the Kentucky Hatch Act, see *Kentucky Registry of Election Finance v. Blevins*, 57 S.W.3d 289 (Ky. 2001) (finding Kentucky statute which prohibited any person from “coerce[ing] or direct[ing] any employee to vote for any political party or candidate for nomination or election to any office in this state” unconstitutional as applied to conduct by county clerk who wrote a letter on personal stationery to employees endorsing a candidate for state senate as “an honest man” and stating that the clerk would “very much appreciate your vote and support for him”).

B. Integrity in Government Service: Conflicts of Interest.

Notes following Dana-Robin Corp. v. Common Council.

1. *When conflict arises.* Another recent Indiana case provides a good example of a complex land use case and the obligations of city council members to recuse themselves in instances in which they may have a financial interest. See *City of Hobart Common Council v. Behavioral Institute of Indiana, LLC*, 785 N.E.2d 238 (Ind. App. 2003) (explaining requirements of even-handedness stemming from Indiana's state constitutional provisions including its state "privileges and immunities clause," and the bearing of state home rule provisions; and concluding that due process was denied when school officials contacted a city council member who worked as a paraprofessional for the schools and whose husband worked for the schools prior to action on variance).

2. *Non-financial interest.* For a thoughtful examination of the deep tensions that underlie conflict of interest analysis, see A. Stark, *THE DEEP STRUCTURE OF CONFLICTS OF INTEREST: CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE* (Harvard University Press 2000).

A Note on the Role of Lawyers

For recent discussions of the ethical obligations of government attorneys, see, Badgerow, *Walking the Line: Government Lawyer Ethics*, 12-SPR Kan. J.L. & Pub. Pol'y 437 (2003); Marchant, *Representing Representatives: Ethical Considerations for the Legislature's Attorneys*, 6 N.Y.U. J. Legis. & Pub. Pol'y 439 (2003); Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?* 77 Ind. L.J. 469 (2002).

C. Unions, Collective Bargaining and Strikes.

1. *Scope of Collective Bargaining*

Notes Following Central City Education Ass'n v. Illinois Educational Labor Relations Board.

1. *Scope of bargaining.* Several recent cases illustrate the continuing development of the law in this area where public school teachers are involved. See, e.g., *West Central Educ. Ass'n v. West Central School Dist.* 49-4, 655 N.W.2d 916 (S.D. 2002) (school calendar is inherently a managerial subject and thus not mandatory subject for collective bargaining under South Dakota law); *Webster Educ. Ass'n v. Webster School Dist.*, 631 N.W.2d 202 (S.D. 2001) (decision to reduce staff is managerial and not mandatory subject for negotiation, but mechanics of termination of teachers resulting from reduction in force is mandatorily negotiable); *Chicago Teachers Union, Local 1, American Federation of Teachers, AFL-CIO v. Chicago School Reform Bd. Of Trustees*, 787 N.E.2d 224 (Ill App. 2003) (job retention issues not included within Educational Labor Relations Act prohibition on collective bargaining regarding "class staffing and assignment" which relates to how classes are staffed and which teachers are assigned to teach which class; job retention issues therefore potentially subject to arbitration); *Blount County Educ. Ass'n v. Blount County Bd. Of Educ.*, 78 S.W.3d 307 (Tenn. App. 2002) (under Tennessee Education Professional Negotiations Act, non-discrimination and duration of agreement were mandatory subjects for bargaining, while voluntary transfers, involuntary transfers, layoffs and recalls were permissive subjects for bargaining). Cases involving public safety personnel also illustrate the nuances of such decisions. See, e.g., *Borough v. Pennsylvania Labor Relations Bd.*, 794 A.2d 402 (Pa. Commw. 2002) (size

of lockers and availability of lockers were subjects for collective bargaining where related to space needed to store lockers and other items); *Fraternal Order of Police, Conference of Pennsylvania Liquor Control Bd. Lodges v. Pennsylvania Labor Relations Bd.*, 751 A.2d 726 (Pa. Commw. 2000) (policies relating to use of state vehicles by law enforcement officers responsible for enforcement of liquor law was not a mandatory subject of bargaining).

2. *Accommodating competing interests.* A recent Wisconsin case has articulated the standard for determining whether a particular subject is a mandatory subject of bargaining in terms of the balance of employee and employer interests (if subject is “primarily related” to employee’s legitimate interest in wages, hours, and conditions of employment and outweighs employer concern for restriction on prerogatives or public policy, it is subject to mandatory bargaining, but where concerns for management of school system or public policy predominates it is not mandatory subject). See *Dodgeland Educ. Ass’n v. Wisconsin Employment Relations Comm’n*, 639 N.W.2d 733 (Wis. 2002). A similar standard has been used in Pennsylvania. See *Teamsters Local 77 & 250 v. Pennsylvania Labor Relations Bd.*, 786 A.2d 299 (Pa. Commw. 2001).

4. *Statutory definition.* Statutory changes in the scope of collective bargaining have been adopted in several states recently. See, e.g., Wash. Rev. Code § 41.06.150 (effective July 2004) (mandatory subjects for bargaining to include affirmative action); 2003 New Mexico Laws (H.B. 508), sec. 17 (public employers and exclusive representatives “shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties,” payroll deduction of membership dues to be a mandatory subject of bargaining if either party chooses to negotiate the issue; scope of bargaining for representatives of public schools and educational employees in state agencies to include, as a mandatory subject of bargaining “the impact of professional and instructional decisions made by the employer”).

7. *Residency.* A recent Illinois case also concluded that a residency requirement applicable to peace officers was a mandatory rather than permissive subject of bargaining insofar as residency requirement was a condition of employment instead of an inherently managerial matter. See *Town of Cicero v. Illinois Ass’n of Firefighters, IAFF Local 717 AFL-CIO, CLE*, 788 N.E.2d 286 (Ill. App. 2003).

8. *Budgeting.* An important recent decision of the Hawaii Supreme Court struck down a state statute that had purported to bar collective bargaining over cost items for the 1999-2001 biennium, in light of a state constitutional provision that guaranteed public employees the right to organize “as provided by law. See *United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi*, 62 P.3d 189 (Hawai’i 2002). When state employees work during a budget impasse, they are assured of full salary for work performed once funds are appropriated under the terms of the state constitution’s impairment of contracts clause. See *White v. Davis*, 133 Cal.Rptr.2d 648 (Cal. 2003).

11. *Other sources of rights to bargain collectively.* Recent cases have considered the implications of state constitutions in protecting the classes of employees who are entitled to bargain collectively. See, e.g., *Coastal Florida Police Benev. Ass’n, Inc. v. Williams*, 838 So.2d 543 (Fla. 2003) (deputy sheriffs must be allowed to bargain collectively in light of rights to do so guaranteed under Florida state constitution). Important pending legislation before Congress would create a federal right to bargain collectively for state and local public safety personnel. See S.606 (108th Cong., 1st Sess., 2003).

12. *Airport Security Personnel and Collective Bargaining*. Recent changes in staffing arrangements for security personnel stationed at American airports have raised fundamental questions regarding the role of collective-bargaining rights for employees involved in public safety occupations, much as was the case 20 years ago with regard to air traffic control personnel. See, e.g., J. Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. Pa. J. Lab. & Emp. L. 295 (2004); A. Hallett, *An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Security Screeners*, 72 Geo. Wash. L. Rev. 934 (2004).

2. Strikes and Strike Injunctions.

Notes following Timberlane Regional School District v. Timberlane Regional Education Ass'n.

5. *Remedies*. In a well-publicized case involving a teacher work-stoppage in New Jersey, the court ordered that striking teachers be incarcerated to enforce an injunction, rather than imposing financial penalties or ordering forfeiture of jobs. See *Board of Educ. Tp. of Middletown v. Middletown Tp. Educ. Ass'n*, 800 A.2d 286 (N.J. Ch. 2001). Increasingly, sophisticated provisions for resolution of collective bargaining impasses have been included in public employee collective bargaining statutes. See, e.g., *Council of Higher Educ. v. South Dakota Bd. of Regents*, 645 N.W.2d 240 (S.D., 2002) (in face of bargaining impasse between union for teachers in special schools and board, state statutory provisions allowing board to unilaterally incorporate liquidated damages provisions into contract would be permitted where impracticable or extremely difficult to set actual damages).

6. *Arbitration*. In a highly significant recent case, the California Supreme Court struck down a state statute that required counties to submit to binding arbitration of economic issues that arise during negotiations with unions representing firefighters or law enforcement personnel. See *County of Riverside v. Superior Court*, 132 Cal. Rptr.2d 713 (Cal. 2003). The court reasoned that the legislation conflicted with provisions of the California State Constitution that had specifically empowered counties to set employee compensation, and attempted improperly to delegate authority to private arbitrators when that power was not the legislature's to give.

Chapter 7: Governmental Liability

A. State Law.

The Georgia Supreme Court recently held that local governments were immune from liability for injuries to suspects pursued in police chases. The court ruled that a city was not liable for the death of a 14 year old girl who was pursued at high speeds by law enforcement officers while driving her father's car without permission. The court concluded that making local governments liable for injuries to fleeing suspects would go against public policy, and that a law enacted to deal with high speed chases was only intended to provide for liability of local governments in cases where an innocent bystander was injured rather than a suspect. See Rankin, *Court Limits Government Liability in Chase*, Atlanta Journal Constitution, July 12, 2003.

3. Continued Immunity for Discretionary Activities

Notes following Peavler v. Board of Commissioners of Monroe County

2. *What kind of tests?* In *Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003), the Supreme Court of Kentucky held that a municipality can be liable for the drowning death of a child who was sucked into a sewer system. The system had been “cobbled together” by municipal and private entities and the child was swept into the system at a point on private property. The court concluded the city had adopted a privately built system by connecting to it and had a ministerial duty to ensure that the system could “handle runoff from reasonably expected ordinary rainfalls.”

Notes following Kolbe v. State

1. *Public duty rule.* In North Carolina, the public duty doctrine only applies to police protection cases. However, the North Carolina Supreme Court extended the protection of the public duty rule to a local government that had contracted with a private firm to provide security in a courthouse in *Wood v Guilford*, [558 S.E.2d 490 \(2002\)](#). The court held that the county was immunized from liability for a criminal assault on a courthouse employee, because the county had no special duty to protect the employee, only a general duty to protect the public. See Brown-Graham, *Local Governments and the Public Duty Doctrine after Wood v. Guilford County*, 81 N.C.L. Rev. 2291 (2003).

2. *Special relationship.* The New York Court of Appeals refused to find a special relationship arising from the Lead Poisoning Prevention Act. While children injured by exposure to lead paint are part of the class to be benefited by the statute and a private right of action might promote the prevention of lead hazards, the overall legislative purpose is building owner responsibility for compliance with municipalities providing administrative and advisory services. A private right of action does not fit the legislative scheme and thus a special duty does not arise, the court concluded. *Pelaez v. Seide*, 810 N.E. 393, 400-01 (N.Y. 2004).

5. *Limiting liability.* The Supreme Court of Georgia, responding to certified questions from the Eleventh Circuit (325 F.3d 1236 (11th Cir. 2003)), ruled that a Georgia statute authorizing municipalities to waive sovereign immunity to the extent of liability insurance for negligent use of motor vehicles does not authorize cities to enter into third party indemnification agreements that waive such immunity, and that participation in the Georgia Interlocal Risk Management Agency (GIRMA), a multi-government insurance fund, waives sovereign immunity only if the “policy of insurance issued covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of such insurance policy,” *CSX Transportation, Inc. v. City of Garden City*, 588 S.E.2d 688, 690 (Ga. 2003) (quoting Ga. Code Ann. § 36-33-1(a)).

6. *Vicarious liability.* Adopting the rationale of two recent U. S. Supreme Court opinions applying Title VII of the Civil Rights Act to sexual harassment cases, the Supreme Court of Vermont held that a county sheriff could be held liable for sexual misconduct of a deputy sheriff while on duty. *Doe v. Forrest*, 853 A.2d 48 (Vt. 2004). The court adopted the vicarious liability theory of § 219(2)(d) of the Restatement (Second) of Agency, which confers liability on the master

when a servant “was aided in accomplishing the tort by the existence of the agency relation.” Noting that this was a case of first impression “in which we are discharging our traditional role of defining the common law,” the court rejected the argument that any policy of vicarious liability for intentional torts of law enforcement officers should be made by the legislature. In a lengthy opinion, the court reviewed the Supreme Court cases as well as cases from other jurisdictions, and emphasized the power that law enforcement officers have over citizens.

4. Inverse Condemnation.

Notes following V.T.C. Lines v. City of Harlan.

3. *Consequential damages.* See *Willis v. University of North Alabama*, 826 So.2d 118 (Ala. 2002) (denying inverse liability for damages alleged to have occurred when university built parking lot across from plaintiff’s residence.

B. Federal Law.

1. Civil Rights Cases: Suing Local Government and Its Officials Under Section 1983 of the Federal Civil Rights Act.

Notes following Collins v. City of Harker Heights.

3. *The private actor problem.* The court noted that a majority of federal circuits had accepted the “state-created danger theory” as an exception to *DeShaney* in *Gonzales v. City of Camden*, 815 A.2d 489 (N.J. App. Div. 2003), where two brothers were shot and one of them killed after city representatives refused to escort them from their store after an inspection in a high-crime area as the store was closing. The court held that “plaintiffs could not establish two elements of a claim under the state-created danger doctrine -- that the members of the inspection team "used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur" and that they "acted in wilful disregard for the safety of the plaintiffs." *Id.* at 495. The court had accepted the Third Circuit’s formulation of this theory, which requires that “(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.”

Chapter 8: Federalism

Federalism continues to be a hot topic. Highlights are summarized below.

Introduction.

Introductory Problem.

Federal campaign finance reform, the Help America Vote Act, and implications for state and local governments. In *McConnell v. Federal Election Com’n*, 540 U.S. 93 (2003), the Supreme

Court considered a range of challenges to the Federal Election Campaign Act as amended by the Bipartisan Campaign Reform Act of 2002, which limits “soft money” contributions (not currently regulated) in activities intended to influence state or local elections among others. Although much of this complex opinion concerns other provisions of the Constitution, several plaintiffs asserted that the federal statute exceeded Congress’ power under the Elections Clause to “make or alter” rules governing federal elections, and impinged on the power of the States to regulate their own elections in violation of principles of federalism as grounded in the Tenth Amendment. The Court rejected these arguments, finding that the federal legislation focused on regulating the conduct of private parties, imposed no requirements on States or state officials that would amount to commandeering, and did not expressly pre-empt state legislation (leaving states free to enforce their own restrictions on financing of state electoral campaigns). The “Help America Vote Act,” enacted after the severe problems that marred the 2000 Presidential election, has yet to be fully tested, but will undoubtedly be a focus of continuing debate during the 2004 election and its aftermath. For background on the Help America Vote Act, see B. Kim, *Recent Development: Help America Vote Act*, 40 Harv. J. on Legis. 579 (2003).

For important additional insights about federalism in general, see J. T. Noonan, Jr., *Narrowing the Nation’s Power: The Supreme Court Sides with the States*, Berkeley, Univ. of California Press (2002); Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 Vand. L. Rev. 329 (2003).

Problem. The teachers’ manual includes an extensive discussion of federal legislation addressing the need for improved voting procedures in the wake of the disputed 2000 presidential election. States have been active in adopting conforming legislation during the 2003 legislative session. For up-to-date information, see www.electionline.org and other resources referenced in the teachers’ manual. A recent article addressing related issues is: Coenen & Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 Wm. & Mary L. Rev. 851 (2002).

A. Regulatory Federalism

1. Federal Preemption.

Lorillard. The Supreme Court’s decision in *Lorillard*, resting on preemption and first amendment principles, has not been the end of the saga. Along with the regulatory regime discussed in the principal case, Massachusetts employed additional strategies designed to address concerns for the public health effects of tobacco smoking. The state required tobacco companies to submit their ingredient lists (including all ingredients besides tobacco, water, or reconstitute tobacco sheet) for all cigarettes, snuffs, and chewing tobaccos sold in the state. Mass. Gen. Laws ch. 94, § 307B (2002). The Massachusetts statute further provided that information submitted to the state “shall be public records” if the state agency determined that “there is a reasonable scientific basis for concluding that the availability of such information *could* reduce risks to public health.” The tobacco companies subsequently sued in federal court, arguing that disclosure of information they regarded as trade secrets constituted a “taking” of private property without just compensation. After an en banc review, a divided panel of the United States Court of Appeals for the First Circuit held that the Massachusetts disclosure law did create an unconstitutional taking of trade secrets and ordered injunctive relief. See *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002). For a discussion of possible state strategies for protecting young people in the wake of *Lorillard*, see Kave, *The Limits*

of Police Power: State Action to Prevent Youth Cigarette Use After Lorillard v. Reilly, 53 Case W. Res. L. Rev. 203 (2002).

Notes Following Lorillard.

2. *Express preemption of state regulation.* For more recent discussions of “presumptions” regarding preemption, see Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967 (2002); Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Greier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?* 17 BYU J. Pub. L. 1 (2002).

3. *Preemption of state common law tort claims.* During the 2002-2003 term, the United States Supreme Court again decided a number of cases relating to state common law tort claims. In *Sprietsma v. Mercury Marine*, 123 S. Ct. 518 (2003), the Supreme Court concluded that the Federal Boat Safety Act of 1971 did not preempt a state common law tort action seeking damages from the manufacturer of an outboard motor. Justice Stevens, writing for the Court, rejected arguments that three distinct preemption arguments advanced by the defendant manufacturer, which had contended that the state tort action was expressly preempted, implicitly preempted, or preempted by federal occupation of the field. Of particular interest is the court’s close reading of pertinent statutory language (“Unless permitted by [the federal agency] a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment ... that is not identical to a regulation prescribed under [the pertinent section of the federal act.] [46 U.S.C. 4306] “Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.” [46 U.S.C. 4311]) The Court also concluded that the Coast Guard’s failure to regulate particular aspects of recreational boats was fully consistent with preservation of state authority.

The Court also reached other decisions that had the effect of curtailing the prospects of state common law tort litigation. In *City of Chicago v. United States Department of Treasury*, 287 F.3d 628 (7th Cir. 2002) the City of Chicago sought to gain access through the federal Freedom of Information Act to individual names, addresses and other information contained in databases maintained by federal firearms authorities, in order to prosecute tort litigation against the gun industry. The United States Supreme Court initially granted certiorari, but then summarily vacated the judgment and remanded after Congress passed an appropriations resolution that provided that no federal funds could be used for provision of such records except to the extent that such action had been disclosed in the past. *Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives v. City of Chicago, Ill.*, 123 S. Ct. 1352 (2003). In *Jinks v. Richland County*, 123 S. Ct. 1667 (2003), the Court unanimously upheld provisions of the federal supplemental jurisdiction statute (28 U.S.C. 1378(d)) that tolled state statutes of limitations in certain cases. The case involved a suit by the widow of an arrestee against a South Carolina county, the head of a detention center, and a detention center physician. The Court concluded that Congress had adopted the federal statute consistent with its “necessary and proper” powers, and stated that no federalism concerns were raised when only local governments were concerned (notwithstanding the state’s argument that the federal statute intruded upon its power to control its political subdivisions as it saw fit). In *State Farm Mutual Automobile Insur. Co. v. Campbell*, 123 S. Ct. 1513 (2003), the Court significantly curtailed state authority to permit punitive damages, overturning a \$145 million punitive damages award on a million-dollar verdict finding that an insurance company had acted in bad faith in failing to settle a claim under auto insurance. The Court stated that due process principles prohibited such

a disproportionate award and dismissed any federalism concern in light of the fact that the insurance company's conduct occurred outside state borders and had not been unlawful in the jurisdiction in which it occurred.

For further discussion of federalism and national tort reform, see Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 Wash. & Lee L. Rev. 475 (2002).

5. *Implied preemption.* After a California governmental district (including Los Angeles and parts of nearby counties) adopted fleet rules prohibiting certain public and private fleet operators from renting or leasing vehicles that failed to meet demanding air emissions standards, a trade association of engine manufacturers sued and claimed that the Clean Air Act preempted such action where the fleet rules could be viewed as a "standard" more constraining than the manufacturing standards imposed under the act. The opinion by Justice Scalia thus rejected in general a distinction between limitations on manufacturing, and those imposed by government entities with regard to purchase. Because specific issues relating to state purchasing policies had not been fully developed when the case was accepted, however, a number of other specifics were remanded for further action below. *Engineer Manufacturers Association v. South Coast Air Quality Management District*, 124 S.Ct. 1756 (2004).

In *American Insurance Assn. v. Garamendi*, 2003 U.S. LEXIS 4797 (June 23, 2003), the Supreme Court echoed its decision in the Burma law case, striking down a California statute that required insurers licensed in that state to provide information to Holocaust survivors about insurance policies that the insurers had issued in Europe from 1925 to 1945, or to risk losing their state insurance license if they failed to comply. The Court concluded that the California law conflicted with national policy as reflected in Presidential Executive Orders and conduct of diplomacy, and noted that, even absent clear conflict, federal policy should be treated as paramount, given the limited state interest and absence of traditional state legislative authority to regulate with regard to insurance policies issued in Europe prior to World War II.

9. *The role of local governments in the federal-state debate.* The Supreme Court has recently granted certiorari to address two important preemption questions involving local governments during its 2003-04 Term. In consolidated cases arising out of Missouri, it will interpret provisions of the federal Telecommunications Act, 47 U.S.C. 253, that bar states from "prohibit[ing] or hav[ing] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Missouri municipalities have argued that they are "entities" for purposes of this provision and contended that the federal statute preempts the provisions of a Missouri statute that prohibits any "political subdivision of this state" from "provid[ing] or offer[ing] for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service for which a certificate of service authority is required." (Mo. St. 392.410). See *Missouri Mun. League v. Federal Communications Comm'n*, 299 F.3d 949 (8th Cir. 2002), *cert. granted, sub nom Southwestern Bell Telephone, L.P. v. Missouri Mun. League*, 2003 U.S. LEXIS 4817 (2003). The Court also agreed to interpret preemption provisions of the Clean Air Act, in a case in which a trade association challenged the decision of a Southern California air quality management district to require operators of motor vehicle fleets to purchase or replace their vehicles only with vehicles designated by the district as meeting its motor vehicle pollution standards. See *Engine Manufacturers Ass'n v. South Coast Air Quality Management Dist.*, 309 F.3d 550 (9th Cir. 2002), *aff'g* 158 F.Supp.2d 1107 (C.D. Cal. 2001), *cert. granted*, 123 S. Ct. 2274 (2003). The lower

court had concluded that the district's requirements did not impose new or additional emissions standards, but rather regulated which vehicles could be purchased consistent with other provisions of the Clean Air Act.

Telecommunications law and the interplay of federal preemption and state preemption of local government action. In an important recent decision, the Supreme Court addressed the interplay of federal and state statutes relating to the provision of telecommunications services in *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555 (2004). The Telecommunications Act of 1996, 47 U.S.C. 253, authorizes preemption of state and local laws and regulations expressly or effectively "prohibiting the ability of any entity" to provide telecommunications services. A Missouri statute states that "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section." Mo. Rev. Stat. 392.410(7). Missouri municipalities seeking to provide telecommunications claimed that they were "entities" for purposes of the federal law, so that the state provisions limiting such a role were themselves preempted. The Supreme Court rejected that proposition, concluding instead that the state could continue to exercise its historical role in determining the powers available to local jurisdictions. Justice Souter, writing for the majority, offered the following observations regarding the relationship between state and local governments, and the considerations pertinent in analyzing governmental assertions of a rightful entrepreneurial role:

"In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law. ... On the subject covered, state law just drops out. But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. The trouble is that a local government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of governments at the state or local level to support entry into the market. Preemption of the state advertising restriction freed a seller who otherwise had the legal authority to advertise and the money to do it if that made economic sense. But preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place. And preemption would make no difference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it. In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. That is why preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures. 124 S.Ct. at 1561.

Perspectives on preemption. Scholars continue to address the preemption issues raised by the interplay of federal and state law in a number of specific contexts. See, e.g., Berger, *Phoenix*

Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion, 97 Nw. U. L. Rev. 941 (2003); Hartley, *Preemption's Market Participant Immunity—A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. Pa. J. Lab. & Emp. L. 229 (2003); Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 Harv. L. Rev. 2250 (2002).

Note and Problem Regarding Preemption in the Field of Health Care. The Supreme Court decided two important cases involving preemption and health care during its 2002-03 Term. In *Kentucky Ass'n of Health Plans v. Miller*, 123 S. Ct. 1471 (2003), it concluded that federal ERISA did not preempt Kentucky's "any willing provider" statute (prohibiting health maintenance organizations from limiting care providers to those with plan affiliation, so long as the outside providers agreed to comparable terms and conditions), since the "any willing provider" statute was one "regulating insurance" as reserved to the states under the federal statutes savings clause. In *Pharmaceutical Research and Manufacturers of America v. Walsh*, 123 S. Ct. 1855 (2003), the Court held that the district court had abused its discretion in enjoining Maine's proposal to implement a program that required pharmaceutical manufacturers to provide drug rebates to Medicaid recipients and other covered individuals or to secure prior approval of prescriptions by state authorities. The Court concluded that Maine's prescription program was not preempted by the federal Medicaid Act and did not violate the negative Commerce Clause.

More recent developments relating to preemption. In *Aetna Health Inc. v. Davila*, 124 S.Ct 2488 (2004), the Court concluded that the federal Employee Retirement Income Security Act (ERISA) completely preempted state law claim alleging that health care administrators working for the defendant HMO had failed to exercise ordinary care as required under a Texas statute and had proximately caused injuries stemming from the HMO's failure to cover care needed to address medical conditions. Nor was the state statute one that resulted insurance, an area saved from preemption under ERISA. As a result plaintiff's claim was subject to removal to federal court. Preemption concerns are also emerging in another health-related setting. States and localities have become increasingly strapped for money to prescription drug costs associated with Medicaid, care for state prisoners, and state employee health insurance and considered securing drugs from overseas. A growing number of state and local governments have also sought to assist their citizens or employees in securing less costly medications more easily, creating website to Canadian pharmacies to assist their employees and citizens to tap such markets. In an August 23, 2003 letter to the California Attorney General's Office, the Federal Food and Drug Administration (FDA) has taken the position that importation of drugs in this fashion violates the Federal Food and Drug Act because the drugs are unapproved, incorrectly labeled, or dispensed without a valid prescription in violation of federal law (21 USC 355, 352, 353, 331). The FDA further reasoned that federal law occupies the field and implicitly pre-empts action by state and local governments to purchase drugs abroad and import them, enact state or local law purporting to make such importation legal, or negotiate with providers in Canada to import drugs for the benefit of public employees covered by state health and retirement programs. *Opinion No. 03-601 to Gregory Grout from William Hubbard, Associate Director, FDA*. On August 11, 2004, the Governor and Attorney General of Vermont announced their intention to sue the FDA for rejecting their state's request for a waiver of the federal ban on importation of Canadian drugs. Bills are currently under consideration in Congress to address related questions of drug importation. For a recent comment on developments in this area, see Reynolds, *Recent Congressional Responses to Demands for Affordable Pharmaceuticals*, 16 Loy. Consumer L. Rev. 219 (2004).

2. Reserving Rights to the States: The Tenth and Eleventh Amendments.

Notes Following New York v. United States

2. *Historical analysis.* For a recent discussion of the Tenth Amendment in historical context, see M. K. Killenbeck (ed.), *THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES* (Berkeley Public Policy Press, 2002).

States' historical role in medical Licensure and federal role in regulating controlled substances: Oregon v. Ashcroft. Following a constitutional referendum and the adoption of the Oregon Death With Dignity Act, Attorney General John Ashcroft issued a directive advising Oregon physicians that they would be subject to criminal prosecution under the federal controlled substances act and potential loss of privileges if they prescribed such substances in aid of terminally-ill patients. 66 Fed. Reg. 53,607. The State of Oregon sought declaratory and injunctive relief and physicians and terminally-ill patients also intervened. A divided panel of the Ninth Circuit held that Ashcroft had exceeded his authority under the controlled substances act, finding that the federal statutes were intended to combat prescription drug abuse and addiction, not to expose licensed physicians to criminal prosecution for proscribing drugs outside "the usual course of professional practice." The majority grounded their judgment in "the principle that state governments bear the primary responsibility for evaluating physician assisted suicide follows from our concept of federalism, which requires that state lawmakers, not the federal government, are 'the primary regulators of professional [medical] conduct.'" They concluded that in the absence of "unmistakably clear" Congressional authorization for federal intervention in the state's traditional area of responsibility, the Attorney General lacked authority to exercise control, particularly where, in the majority's view, Ashcroft's reading of the federal statute was inconsistent with the controlled substance acts' plain language, and his directive failed to conform to explicit provisions relating to revocation of physician prescription privileges. *Oregon v. Ashcroft*, 368 F.3d 1118, 1123 (9th Cir. 2004). The dissent emphasized that the core issue at hand was not the merits of physician-assisted suicide, but rather the deference to be accorded an interpretation by the United States Attorney General of a federal statute. For an argument that the case raises a fundamental question regarding use of federal power to frustrate state policy judgments in an area in which power is traditionally accorded the states, see Brian Boyle, *The Oregon Death With Dignity Act: A Successful Model or a Legal Anomaly Subject to Attack*, 40 Houston L. Rev. 1387 (2004) (discussing the constitutional implications if Congress chose to amend federal legislation on controlled substances to address physician-assisted suicide explicitly).

3. *Types of impositions on the states: Federal actions implicating state and local law enforcement.* Review of electronic records has become increasingly important to state and local prosecutors responsible for investigating and prosecuting criminal offenses under state law. Provisions of the federal Electronic Communications Privacy Act (18 U.S.C. 2706) require "governmental entities" obtaining the contents of communications and records from telecommunications companies to pay a fee for reimbursement of reasonable costs of searching for, assembling or providing such records. The Ameritech Corporation sued a Wisconsin district attorney in federal court to secure reimbursement, and the government responded challenging the suit as violating both the Tenth and Eleventh Amendments. The Seventh Circuit initially reversed the district court's ruling that the suit was barred by the Eleventh Amendment, concluding that the requested reimbursement amounted to a request for prospective relief (rather than an action for past

damages), then remanded. The district court on remand determined that Congress had acted within its Commerce Clause powers in regulating the actions of telecommunication companies and requiring them to provide requisite information with accompanying reimbursement. It found that Congress had not “commandeered” state officials, who continued to have the option to delineate what information would be requested by subpoena. It also rejected the prosecutor’s argument that the federal statute had not included express language regarding its application to state and local governments and thus had not clearly preempted state law which required no reimbursement. See *Ameritech Corp. v. McCann*, 297 F.3d 582 (7th Cir. 2002) (rejecting Eleventh Amendment argument); *Ameritech Corp. v. McCann*, 308 F.Supp.2d 911 (E.D. Wis. 2004) (Tenth Amendment and preemption analysis on remand).

4. *The coercion test.* Although Tenth Amendment issues continue to be raised in litigation, they are rarely found to have merit. In several recent appellate decisions, the federal courts have declined to find Tenth Amendment problems with regard to state or local government roles in enforcing provisions of federal environmental law. See, e.g., *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, 319 F.3d 398 (9th Cir. 2003) (no constitutional problem with implementation of National Pollutant Discharge Elimination System created by Clean Water Act); *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2d Cir. 2002) (no Tenth Amendment violation resulted from provisions of federal Comprehensive Environmental Response, Compensation, and Liability Act provisions providing dates for accrual of state causes of action); *City of Abilene v. U.S.E.P.A.*, 325 F.3d 657 (5th Cir. 2003) (requirement that cities establish storm water pollution control programs did not violate Tenth Amendment where cities had choice of alternative ways to comply with federal requirements). Some have suggested that Tenth Amendment problems may be posed by provisions of the federal Telecommunications Act limiting the authority of local governments to deny permits for construction of wireless communications towers (“Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record” 47 U.S.C. 332(c)(7)(A)-(B)), but except for statements included in a recent Fourth Circuit decision, the courts have generally tried to avoid this problem by reaching decisions on other grounds. See *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000) (two judges’ analysis resting on the Tenth Amendment); O’Connor, *National League of Cities Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Jurisprudence*, 30 B.C. Env’tl. Aff. L. Rev. 315 (2003).

6. *Regulating states “as” states.* For a recent decision finding no regulation of states “as” states, see *Nebraska v. EPA.*, 2003 U.S. App. Lexis 12718 (D.C. Cir. 2003) (Safe Drinking Water Act and EPA’s regulation of arsenic in drinking water did not regulate states “as” states, but only as public water system owners).

7. *State participation in the legislative process.* For a recent comprehensive discussion of related questions under the political question doctrine, see Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2003).

Notes Following Alden v. Maine.

3. *Grounding the Court’s interpretation: sovereignty and structure.* For a recent discussion of states’ “dignitary” interests, see Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*,

4. *Separation of powers.* For a discussion of federalism in the context of bankruptcy law, see Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381 (2003).

5. *Congressional action under the fourteenth amendment: new decision involving the Family and Maternity Leave Act.* At the end of the 2002-03 term, the Supreme Court rendered a major decision upholding the application of the federal Family and Maternity Leave Act to state employers. The Court's analysis is much more straightforward than that employed in *Alden* and other recent Eleventh Amendment cases. Excerpts from the new decision are accordingly set forth below.

More developments under the Americans with Disabilities Act. In *Tennessee v. Lane*, 124 S. Ct. 1978 (May 17, 2004), the Supreme Court turned again to questions of sovereign immunity and the Americans with Disabilities Act (ADA). Previously, in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), the Court had concluded that the Eleventh Amendment barred private suits by state employees seeking money damages from the state for violation of the employment discrimination provisions in Title I of that statute. In *Lane*, the Court faced a challenge relating to the provisions of Title II, which on its face provides that "no qualified individual with a disability shall, by reason of disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.12132. In the case at hand, plaintiffs (who used wheelchairs) asserted that they had been denied access to the Tennessee courts because of inaccessible courthouses. In an opinion by Justice Stevens, the Court concluded that Congress could abrogate state sovereign immunity under section 5 of the Fourteenth Amendment where it had relied on clear evidence of pervasive problems in accessing government programs and concluded that statutory action was needed. In the case at hand, there was clear congruity and proportionality between the injury (denial of access) and the remedy (requirement that government programs be made accessible by government removal of architectural barriers to accessibility without compromising basic eligibility for the programs involved). Reasonable modifications could be made without necessarily engaging in extremely costly structural reconstruction, for example by moving services themselves and arranging for aides as needed. The Court also remanded several cases on which certiorari had been granted for further consideration under its decision in *Lane*. See, e.g., *Kiman v. New Hampshire Dept. of Corrections*, 124 S.Ct. 2387 (claim by inmate that state had failed to accommodate his disability resulting from ALS); *Parr v. Middle State University*, 124 S.Ct. 2386 (concerning college student's assertion that the college failed to make reasonable accommodations needed for her work in a masters program, in violation of Title II of the ADA); *Feaster v. Florida*, 124 S.Ct. 2387(challenge under Title II regarding operation of Florida nursing licensure examination), *Rendon v. Florida Department of Highway Safety*, 124 S.Ct. 2387 (challenge seeking money damages in connection with a class action by disabled drivers who asserted that state tax on parking placards violated Title II).

7. *Alternate forms of recourse: real or imaginary?*

Actions by Federal Agencies Against States: Review of Whistleblower Claims. In *Connecticut Dept. of Environmental Protection v. O.S.H.A.*, 356 F.3d 226 (2d Cir. 2004), the state sought an injunction to prevent the federal occupational, safety, and health agency from investigating a state employee's claim that, following protected action as a whistleblower, the state environmental agency had discriminated against the employee in violation of federal environmental laws. The

appellate court concluded that OSHA had not violated the state's sovereign interests by conducting the investigation or intervening in the case by the employee in his private capacity.

10. Congressional power to abrogate state immunity under the Bankruptcy Clause? In a suit by college student against the state financing agency seeking discharge of student loans under an "undue hardship" provision, the Supreme Court initially granted certiorari, then sidestepped the intriguing question of whether the federal bankruptcy clause empowered Congress to establish uniform laws on the subject of bankruptcies and also gave Congress the power to discharge debts in general but to abrogate states' Eleventh Amendment immunity to such suits without the states' consent. Five circuit courts had previously determined that the bankruptcy clause did not authorize Congress to abrogate states' sovereign immunity. The Court ultimately did not reach this core question, but instead reasoned that in some circumstances states could be sued without their consent (for example in certain kinds of in rem actions where judicial jurisdiction is based upon relationship to the res itself) and said that the judicial processes used in bankruptcy cases of the sort in question were similar to mere summons, and thus did not constitute an indignity to the sovereign. It reserved for another day the question of whether Congress could rely upon the bankruptcy clause to abrogate state immunity from suits based on personal jurisdiction asserted against the state. *Tennessee Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004)

NEVADA DEPARTMENT OF HUMAN RESOURCES V. HIBBS
123 S. Ct. 1972 (2003)

[William Hibbs was an employee of the Nevada Department of Human Resources. His wife had become seriously ill and he sought leave without pay to care for her. Pursuant to the federal Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2612(a)(1)(C) covered employees are entitled to up to 12 work weeks of unpaid leave annually in the event of a "serious health condition" involving the employee's spouse. When Hibbs exhausted the available 12 weeks of unpaid leave, his employer advised him that he had to return to work or risk termination from his job. Hibbs did not return to work and was fired. He then brought suit in federal court seeking damages as provided under the federal statute, 29 U.S. C. 2617(a).]

[On a 6-3 vote, the United States Supreme Court upheld the federal statute, marking an important departure from other recent cases striking down federal nondiscrimination laws as applied to state employees. Chief Justice Rehnquist authored the principal opinion, which was joined by Justices O'Connor, Souter, Breyer, and Ginsburg. The Court remained fragmented in its analysis, however. While Justices Souter, Breyer, and Ginsburg also filed a concurring opinion and Justice Stevens wrote separately to concur in the judgment. Justice Scalia submitted a dissenting opinion, as did Justice Kennedy (with whom Justices Thomas and Kennedy joined).]

REHNQUIST, C.J.

This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision. In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. Congress may, however, abrogate States' sovereign immunity through a valid

exercise of its § 5 power, for "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."

For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. The clarity of Congress' intent here is not fairly debatable. The Act enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," and Congress has defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of ... a State, or a political subdivision of a State."

Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power "to enforce" the substantive guarantees of § 1--among them, equal protection of the laws--by enacting "appropriate legislation." Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. " 'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' " In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct....

[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees. Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations, not "an attempt to substantively redefine the States' legal obligations." We distinguish appropriate prophylactic legislation from "substantive redefinition of the Fourteenth Amendment right at issue by applying the test set forth in [*City of Boerne v. Flores*, 521 U.S. 507 (1997)]: Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. For a gender-based classification to withstand such scrutiny, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." The State's justification for such a classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.

The history of the many state laws limiting women's employment opportunities is chronicled in--and, until relatively recently, was sanctioned by--this Court's own opinions.... Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e2(a), and we sustained this abrogation. But state gender discrimination did not cease. "[I]t can hardly be doubted that ... women still face pervasive, although at times more subtle, discrimination ... in the job market." According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the

employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area.

As the FMLA's legislative record reflects, ...stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread. Congress also heard testimony that "[p]arental leave for fathers ... is rare. Even ... [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave."... Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." ... In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.

[Chief Justice Rehnquist then distinguished the Court's rulings in cases involving age- and disability-based distinctions, stating that these characteristics were not judged under heightened scrutiny and concluding that, "in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of irrational reliance on such criteria."] ... Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test--it must "serv[e] important governmental objectives" and be "substantially related to the achievement of those objectives"--it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment.

The impact of the discrimination targeted by the FMLA is significant.... Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation.... Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Here, as in *Katzenbach*, Congress again confronted a "difficult and intractable proble[m]," where previous legislative attempts had failed. Such problems may justify added prophylactic measures in response.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress

sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.

By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

The dissent characterizes the FMLA as a "substantive entitlement program" rather than a remedial statute because it establishes a floor of 12 weeks' leave. In the dissent's view, in the face of evidence of gender-based discrimination by the States in the provision of leave benefits, Congress could do no more in exercising its § 5 power than simply proscribe such discrimination. But this position cannot be squared with our recognition that Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. For example, this Court has upheld certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' § 5 power, including the literacy test ban and preclearance requirements for changes in States' voting procedures. ... Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.

Unlike the statutes at issue in [cases involving religious freedom, age discrimination, and disability discrimination], which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the fault line between work and family--precisely where sex-based overgeneralization has been and remains strongest--and affects only one aspect of the employment relationship.

We also find significant the many other limitations that Congress placed on the scope of this measure. The FMLA requires only unpaid leave, and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months. Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. Employees must give advance notice of foreseeable leave, and employers may require certification by a health care provider of the need for leave, § 2613. In choosing 12 weeks as the appropriate leave floor, Congress chose "a middle ground, a period long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" Moreover, the cause of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses, and the accrual period for backpay is limited by the Act's 2-year statute of limitations (extended to three years only for willful violations).

For the above reasons, we conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional

behavior."

Affirmed.

During the 2003-04 Term, the Supreme Court will once again have the opportunity to consider the Eleventh Amendment's application to suits against the states under the Americans with Disabilities Act and the Fourteenth Amendment. See *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 2003 U.S. LEXIS 4818 (2003) (suit by former criminal defendant and court reporter challenging denial of access to Tennessee courthouses because of physical disabilities, and seeking damages under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131).

6. *State waivers of immunity.* Numerous cases and commentators have considered whether states have waived or could be deemed to have waived their immunity through various forms of action. See, e.g., Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 NYU L. Rev. 273 (2002). The Supreme Court will soon consider whether a state waives its immunity when entering into a consent decree to resolve an enforcement action brought under the federal Medicaid statute. See *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), *cert.* 123 S.Ct.1481 (2003).

B. Fiscal Federalism.

1. Benefits and Burdens: An Overview of the Fiscal Relations Between the Federal Government and the States

Unfunded Mandates: Latest News. Local and state governments continue to be concerned about federally-imposed obligations that come with little funding to support their achievement during a time in which state and local budgets are already reeling from economic downturns and rising Medicaid costs. The National League of Cities has begun publication of "Mandate Monitor" as a means of tracking and publicizing the ways in which costs associated with federal mandates are shifted to the states. For example, in July 2004, the NCSL calculated that the minimum gap in funding to states for a range of programs amounted to more than \$26 billion for FY 2004, rising to more than \$33 billion in FY 2005. The minimum gap associated with the federal Individuals with Disabilities Education Act was estimated at more than \$9 billion for each of these fiscal years, with the costs of No Child Left Behind legislation nearing \$10 billion. The minimum costs associated with state drug costs for those with dual eligibility under Medicaid and Medicare would exceed \$6 billion, with the gap in funding for costs of environmental requirements reaching \$1 billion and more. Updates are available at www.ncsl.org.

"Invitations," Mandates, and Risks of Liability for Local Governments in Immigration Actions Associated with the "War on Terrorism." Local governments have also expressed concern with potential risks of liability associated with roles they have been "invited" to play in carrying out certain federal directives relating to the war on terrorism. For example, the federal Department of Justice in 2002 reversed its long-standing position that state and local governments were preempted from enforcing civil immigration laws, and instead indicated that the nation's 650,000 local police personnel were encouraged to play a role in federal immigration arrests. Local governments willing to play such a role may face questions about the source of their authority (regarded by the federal Justice Department as "inherent") and may face risks of civil rights litigation and damages under

42 U.S.C. 1983. See M. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084 (2004); J. Keblawi, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted*, 53 Cath. U. L. Rev. 817 (2004); H. Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U. L. Rev. 965 (2004).

2. Conditional Spending.

Notes Following South Dakota v. Dole

1. *The federal interest and relatedness.* The Supreme Court was presented with an opportunity to explore the issue of federal interests and relatedness during its 2002-03 Term, but avoided the question by taking another tack. In *Pierce County, Washington v. Guillen*, 123 S.Ct. 720 (2003), the Court addressed the interplay between Washington State's public records law and provisions of federal legislation designed to encourage states to maintain records of highway hazards as a condition of receiving federal highway funds. Plaintiffs in personal injury litigation sought to discover records of highway hazards collected under federal law in connection with their tort suit against the county alleging that the county had improperly failed to install and maintain traffic controls at an intersection where family members had been injured. Under the federal Hazard Elimination Program, state authorities were to required to evaluate and collect information on dangerous sections of their roads in order to qualify for federal funding. Although the original federal legislation had not addressed the confidentiality of such information, a subsequent amendment to the federal statute stated that "reports... or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites... shall not be admitted into evidence in any Federal or State court," 23 U.S.C. § 409. The Washington Supreme Court had concluded that it was not feasible to distinguish between such records when held by a public works department or by the county sheriff, the federal statute did not reasonably serve any valid federal interest by shielding collected information from the public in contravention of state public records policy, and thus did not satisfy constitutional requirements under the federal spending clause. The United States Supreme Court upheld the federal statute as a proper exercise of Congress's commerce clause powers, and concluded that reports collected for law enforcement purposes by the county sheriff were discoverable, although the same information collected and held by a public works department was protected from discovery under the federal statute. By adopting this line of analysis, the Court declined to reach the spending clause question or to address a claim that the federal statute had run afoul of the Tenth Amendment by intruding upon the state's sovereign prerogatives to establish discovery and admissibility rules in state courts adjudicating state causes of action.

Local officials, bribery, and federal prosecutions. The Supreme Court recently considered the extent to which federal funds must be directly implicated grounding federal prosecutions under anti-bribery statutes. In a case arising out of Minnesota, defendant Sabri allegedly bribed a city council member on three occasions in connection with council action concerning proposed real estate development, then challenged his prosecution under a federal bribery statute prohibiting bribery of state, local and tribal officials of entities receiving at least \$10,000 in federal funds. Asserting that there was an insufficient nexus between federal funds and local government action, Sabri asserted that the federal statute was unconstitutional since it could not be grounded in the conditional spending power. In an opinion by Justice Souter, the Court concluded that Congress was

not required in a federal criminal statute to include an explicit jurisdictional “hook” regarding specific federal funds associated with the particular local government action. Instead the Court found that “Congress was within its prerogative to protect spending objects from the menace of local administrators on the take. The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place.” It also disposed of Sabri’s claim that the statute amounted to “an unduly coercive, and impermissibly sweeping, condition on the grant of federal funds as judged under the criterion applied in *South Dakota v. Dole*” concluding that the statute reflected Congressional “authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State’s own choices of public policy.” It likewise rejected defendant’s assertion that the statute had exceeded Congressional power under the Commerce Clause as well as defendant’s claim that the statute was in other respects unconstitutional on its face. *Sabri v. United States*, 124 S.Ct. 1941 (2004).

3. *Independent constitutional bar.* In its recent decision upholding the Internet Children Protection Act, the Supreme Court found no independent constitutional bar under the First Amendment to conditioning receipt of federal funds provided as a means of expanding internet access upon a requirement that public libraries install software capable of blocking images that constituted obscenity or child pornography and of preventing minors from accessing material deemed harmful. See *United States v. American Library Ass’n, Inc.*, 2003 U.S. LEXIS 4799 (2003). In another recent case, the Ninth Circuit upheld provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, as applied to permit Muslim state prisoners to attend Friday afternoon services. See *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002). After the prisoners sought relief under the federal statute in order to engage in religious observances, state prison officials moved to dismiss on the grounds that the statute was not a legitimate exercise of Congress’ spending power, violated the Tenth Amendment by usurping a core state function, failed to comply with Eleventh Amendment requirements, violated the Establishment Clause, and violated separation of powers requirements. The court rejected each of these arguments and upheld the federal statute.

The Spending Clause and RLUPA. The Religious Land Use and Institutionalized Persons Act (RLUPA) states that “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to a [covered] institution..., even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling governmental interests and is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. 2000cc-1. This provision applies “in any case in which—“the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several states, or with Indian tribes.” These provisions have been raised by prison inmates in a number of cases in which they have challenged prison conditions, food, lack of religious supplies, and limitations on opportunities to congregate with others for religious observances. In *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), a Muslim prison inmate contended that he had been deprived of prayer oil and opportunities to celebrate religious feasts appropriately, and Wisconsin corrections authorities defended their refusal to honor his requests by claiming that the statute was unconstitutional as exceeding Congress’s power under the Spending Clause. The Court rejected that contention and instead concluded that the enactment was consistent with the general welfare; the conditions were unambiguous and sufficiently related to a federal interest even though the state Department of Corrections only

received 1.6% of its budget from federal sources and none of the funds were used for religious purposes. The court also said that neither the Tenth Amendment nor the Establishment Clause constituted an independent constitutional bar to the statute.

Two other federal appellate courts have recently reached opposing views of the statute's constitutionality on Establishment Clause grounds. Compare *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (holding statute unconstitutional) with *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (upholding constitutionality)..

4. *Coercion*. For discussion of the question of coercion in the context of campaign finance reform, see Davis-Denny, *Coercion in Campaign Finance Reform: A Closer Look at Footnote 65 of Buckley v. Valeo*, 50 UCLA L. Rev. 205 (2002).

8. *All-purpose "work around"?* For a thoughtful discussion of Congress's authority to use the spending clause to remedy discrimination, see Selmi, *Remedying Societal Discrimination through the Spending Power*, 80 N.C. L. Rev. 1575 (2002). For recent consideration of ways in which Congress might induce waivers of sovereign immunity through use of the conditional spending power, see T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 Hastings Const. L. Q. 439 (2002); Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 Wake Forest L. Rev. 141 (2002). In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Supreme Court held that punitive damages could not be awarded under section 504 of the Rehabilitation Act, since this federal statute (conditioning receipt of federal funds on avoidance of disability discrimination) did not clearly indicate that such damages would be available in the event of violations of the statute.

9. *Reconciling spending clause jurisprudence with other areas of constitutional doctrine*. For a recent argument that spending clause analysis should be substantially reformed to make it more consistent with other federalism principals, see Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 Geo. L. J. 461 (2002).

Chapter 9: The State Legislature

A. Special Legislation.

Notes following Anderson v. Board of Commissioners of Cloud County.

1. *Judicial review*. *Gallant v. County Comm'n of Jefferson County*, 575 S.E.2d 222 (W.Va. 2002), affirmed the usual presumption of constitutionality applied to legislation challenged under the special legislation clause and upheld legislation that applied only to historic structures in counties.

2. *Closed classes*. The Florida legislature adopted a statute that authorized a municipality to impose a parking tax but restricted its application as follows:

The governing authority of any municipality with a resident population of 300,000 or more by April 1, 1999, and which has been declared in a state of financial emergency pursuant to

this section within the previous two fiscal years may impose a discretionary per vehicle surcharge of up to 20 percent on the gross revenues of the sale, lease, or rental of space at parking facilities within the municipality that are open for use to the general public.

The court invalidated the statute. *City of Miami v. McGrath*, 824 So.2d 143 (Fla. 2002). It held in part that it excluded other municipalities that increased in size from meeting the population threshold after the statutory date.

3. *Narrow classes*. The Indiana Supreme Court struck down a statute allowing a majority of landowners in an affected area to defeat annexation, but only in counties with a population between 200,000 and 300,000. The court concluded it was clear the legislation applied only to one county, that this county had no inherent characteristics that would make a general law inapplicable, and that other counties have a need to protect rural areas from cities competing to annex those areas. *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003).

Notes following In re Belmont Fire Protection District.

1. *Finding a justification*. *Unziker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024 (Ill. 2002), upheld a statute exempting medical malpractice and pollution lawsuits from a tort liability statute. The court made it clear that a reasonableness test applied under the state's special legislation provision.

Chapter 10: The Role of the Judiciary

B. In Major Policy Decisions...

1. Reapportionment and Voting Rights.

b. Application of "One Person, One Vote" to Local Governments

Notes following Salyer Land Co v. Tulane Lake Basin Water Storage District

4. *Applying the distinctions*. In *Hoffman v. State Bar of California*, 6 Cal. Rptr. 3d 592 (Cal App. 203) an attorney who resided and practiced law in Arizona, but was an active member of the California bar, challenged the California law dictating that only active members of the State Bar who maintain their principal office in the state can vote or run as candidates for the State Bar Board of Governors. In California the State Bar is a public corporation with constitutional status; it is a so-called "integrated" bar, and it serves as an administrative arm of the California Supreme Court for particular purposes. Turning to the exceptions to the "one person, one vote" principle "alluded" to in *Avery* and applied in *Salyer* and *Ball v. James*, the California court held that "it is enough that the functions and activities of the State Bar have a significantly disproportionate effect on those enfranchised to vote for Board members notwithstanding that the disenfranchised bear some of the same burdens. Moreover, because the principal place of business requirement validates the enfranchised group's far greater objective interest and stake in State Bar affairs, it is a reflection of the narrow primary purpose of the State Bar to assist in regulating and improvising the legal profession *in this state*." (emphasis in origina). The court concluded that the one person, one vote principle does not apply to the voting scheme for State Bar board members and that it satisfied a rational basis review.

c. Voting Rights in Local Elections.

Notes following Holt Civic Club v. City of Tuscaloosa

In a New Jersey school board case, the third circuit court of appeals relied on *Holt* to reverse a district court opinion which had relied primarily on *Hadley. English v. Board of Education of Boonton*, 301 F. 3d 69 (3d Cir. 2002), reversing 135 F. Supp. 2d 588 (D.N.J. 2001) (summarized in note 2 following *Avery* in the casebook). The court of appeals held that the unequal voting structure allowed in electing school board members was “the type of complex judgment that a state legislature is entitled to make” and that the decision bears a rational relationship to a legitimate state purpose. Under New Jersey law, a school district may elect to enter into a “send-receive” relationship with a neighboring school district in order to educate its high school students. Although Lincoln Park students constituted 52% of the Boonton High School population and Lincoln Park’s population amounted to 56% of the combined population of the two towns, by law it was entitled to only one vote on the school board of the combined district. The court, relying on the Supreme Court’s decision in *Holt Civic Club v. City of Tuscaloosa* that “a government unit may legitimately restrict the right to participate in its political process to those who reside within its borders,” held that *Holt* mandates “the conclusion that strict scrutiny does not apply and that Lincoln Park residents can claim no constitutional right to proportional representation on the Boonton Board.”

A Note on Voting Rights in Boundary Changes

The Fourth Circuit Court of Appeals had occasion to reaffirm what are by now relatively well established principles guiding voting rights in matters of annexation. *Barefoot v. City of Wilmington*, 306 F. 3d 113 (4th Cir. 2002), *cert. denied*, 537 U.S. 1019 (2002). The North Carolina general annexation statute authorized cities over 5000 population to annex contiguous territory without a vote in either the annex or annexing territory. It also authorized the General Assembly to enact local acts delineating the boundaries of municipalities, and the legislature had occasionally enacted such local laws with a provision for referendum approval. The annexation by Wilmington in this case had proceeded without a vote. With heavy reliance on *Hunter* and *Berry v. Bourne*, the court held that there is no substantive constitutional right to vote on annexation although once granted, restrictions on the vote are subject to strict scrutiny – compelling state interest analysis; annexation decisions are within the absolute discretion of the state; neither due process nor taking claims are sustainable.

In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 42 P. 3d 394 (2002), rehearing 83 P. 3d 419 (2004), the Washington Supreme Court initially invalidated, then subsequently upheld a state statute authorizing the petition method of annexation (an alternative to the more traditional procedure). The petition methods authorize a specified percentage of property owners by assessed valuation (60% at the critical stage) to initiate the annexation; no vote is provided for. In the first decision the state supreme court invalidated the petition method under the state constitution’s privileges and immunities clause on the ground that it granted owners of high value property an “impermissible privilege” (of initiating annexation) not equally afforded to owners of lower value property and non-property owning residents. . On rehearing and reconsideration the Washington court found the petition method constitutional. With occasional references to *Hunter*, the court held that the petition annexation statutes “do not implicate a fundamental right and do not afford any class a ‘privilege’ or ‘immunity.’”

A Note on the Quality of Representation

Reapportionment. As expected, numerous suits have been filed in state and federal courts challenging the redistricting of congressional and state legislative districts that followed the 2000 census. Many of the lawsuits were resolved in time for the 2002 elections; some are still wending their way through the courts. Most of the suits apparently raised traditional malapportionment issues. It is interesting to note, however, the degree to which the redistricting plans adopted and respected the population deviation guidelines which court decisions had established. A table prepared by the National Conference of State Legislatures showed for each state's congressional and legislative districts the ideal district size and the "percent overall range" of deviation. For congressional districts, the percent of deviation for all states was less than 1%; for state house plans and state senate plans, the overall deviation percent was, with very few exceptions, under 10%. Some of the court challenges also invoked state constitutional provisions – e.g., compactness, respect for local government boundaries. A number raised racial or ethnic issues under the Voting Rights Act.

A current compilation of the redistricting cases is maintained by the National Conference of State Legislatures: www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/redsum2000.htm

Supreme Court Decisions:

1) In *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004), the Supreme Court returned to the vexing issue of political gerrymandering, first given constitutional life in *Davis v. Bandemer* in 1986. It can fairly be said that the Court took *Bandemer* off life support. In *Vieth*, five members of the Court dismissed a challenge to Pennsylvania's congressional districting plan which was based primarily on political gerrymandering in violation of Article I and the Fourteenth Amendment Equal Protection Clause. Four members of that majority (Justice Scalia, who wrote the opinion, Chief Justice Rehnquist, Justices O'Connor, and Thomas) would overrule *Davis v. Bandemer*, the decision in which the Court had held that political gerrymandering claims are justiciable, but could not agree on the standards to be applied to support a constitutional malfunction. The fifth, Justice Kennedy, essentially agreed with the rationale for dismissing this complaint but would leave open the possibility of judicial intervention under the First Amendment.

The Scalia opinion determined: "...no judicially described and manageable standards for adjudicating political gerrymandering claims have emerged [from 18 years of judicial effort to develop such standards]. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." And the plurality made clear that it was addressing all of the constitutional challenges raised. "We conclude that neither Article I, §2, nor the Equal Protection Clause, nor (what appellants only fleetingly invoke) Article I, §4, provide a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."

Responding to the plaintiffs' proposed test, "loosely based on our cases applying § 2 of the Voting Rights Act...to discrimination by race," Justice Scalia noted: "But a person's politics is rarely as readily discernable – and *never* as permanently discernible – as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next..." Moreover, "this standard rests upon the principle that groups (or at least political action groups) have a right to proportional representation. But the Constitution contains no such principle." Justice

Scalia then proceeded to discount the standards proposed by each of the dissenters (Justices Stevens, Souter – Ginsburg, and Breyer) and even Justice Kennedy.

2) In a decision involving pre-clearance under Section 5 of the Voting Rights Act of Georgia's state senate districts, the Supreme Court further elaborated on the by-play between sections 2 and 5 of the Voting Rights Act, the meaning and requirements of Section 5's nonretrogression standard, the relative merits and role of majority-minority districts vs. influence districts, and the question of packing vs. unpacking minorities. *Georgia v. Ashcroft*, 539 U.S. 461(2003). The 5-4 decision by Justice O'Connor remanded the district court's denial of preclearance "to reweigh all the facts in the record in the first instance in light of our explication of retrogression."

The Court reiterated that the only inquiry under Section 5 was whether the voting procedure "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." While Section 2 and Section 5 may overlap occasionally, they are distinct provisions which serve different purposes. A voting plan could violate Section 2 and still be precleared if not retrogressive. The majority also made clear that Section 5 required consideration of a range of relevant factors and did not turn solely on the ability of black voters in majority-minority districts to elect a candidate of their choice. That meant that the state legislators in drawing their plan could choose to "unpack" super-majorities in a minority district in favor of increasing the number of minority influence districts. This was the Democratic strategy, as the Court acknowledged, designed to increase the number of Democratic districts given the high correlation between black voters and Democratic voting. Again, the O'Connor majority seems more sympathetic to partisan than racial motivation.

3) *Branch v. Smith*, 538 U.S. 254 (2003). This case, arising out of the redistricting of Mississippi's congressional districts, gave voice to a complex array of procedural and process issues – involving state versus federal courts, state and federal officials (e.g., U.S. Department of Justice, state Attorney General), the effect of state legislation and federal statutes on at-large and single member districts, etc. The Court's opinions were equally complex and divided as to the interplay of these factors.

4) *Colorado General Assembly v. Salazar*, 124 S.Ct. 2228 (2004), involved only the denial of a writ of certiorari but Chief Justice Rehnquist's dissent from the denial (joined by Justices Scalia and Thomas) brought to light an interesting issue of the allowable frequency of redistricting and whose law controls, federal or state. When the Colorado General Assembly failed to pass a congressional redistricting plan in time for the 2002 election, a state district court, in response to a law suit, drew a congressional map which was followed in the 2002 election. Subsequently, the newly elected General Assembly adopted its own redistricting plan which the Attorney General now seeks to enjoin in favor of the 2002 court drawn plan. The Colorado Supreme Court held that the Colorado Constitution limited redistricting to once a decade, and it ordered state officials to employ the court drawn plan through the 2010 elections. The General Assembly and the Secretary of State challenged the Colorado court's ruling on the ground that it violated Article I, §4, cl.1, of the U.S. Constitution which grants to the "Legislature of every state the right to regulate the election of federal senators and representatives." The permanent substitution of a court plan for a legislatively enacted plan, Chief Justice Rehnquist opined, probably violated that provision and at the least should be fully reviewed by the Court.

Illustrative Redistricting Decisions

Deem v. Manchin, 188 F. Supp. 2d 651 (N.D.W.Va.2002), affd sub nom. *Unger v. Manchin*, 536 U.S. 935 (2002), illustrates a court's approach when it is faced with a state legislative redistricting that does not strictly comply with the Court's population deviation guidelines. Here two adjoining Senate districts exceeded the *Mahan v. Howell* 10% maximum deviation (but only by less than 1%). "The legislature has adopted five rational and legitimate policy goals [e.g., recognizing established political subdivisions] to justify a deviation in excess of 10%. In many respects these goals are competing and must be balanced by the legislature. We cannot conclude from the facts of this case that, in this balancing process, the legislature has failed to meet the requirement..." The districts were upheld.

Black Political Task Force v. Galirn, 300 F. Supp. 2d 291(D.Mass.2004), is one of the relatively few decisions in which the court exhaustively analyzed the redistricting under the three *Thornburg v. Gingles* preconditions, proceed from there to a detailed examination of the totality of the circumstances and conclude that all of the tests had been met to support a finding of violation of Section 2 of the Voting Rights Act. At issue were 17 State House districts in the Boston area that were incorporated in the legislative redistricting plan enacted by the Massachusetts legislature. The court's conclusion was that the enacted plan "leaves African-American citizens in the Boston area with 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" Having found a violation of Section 2 of the VRA, the court said it was unnecessary to decide whether the plan also violated plaintiffs' Constitutional rights.

Mayor of Cambridge v. Secretary of Commonwealth, 765 NE. 2d 749 (Mass.2002). A number of state constitutions provide that traditional political boundaries be respected in redistricting to the extent possible, and respect for county lines or city boundaries often provides justification for some deviation in population equality. The Massachusetts Constitution contained such a provision, described by the court as territorial integrity. It was the basis for a challenge to the post-2000 state legislative redistricting plan, which divided the City of Cambridge among 6 separate House districts. Evidence in the record showed that alternative "superior" plans were available that would reduce the number of Cambridge districts. Nevertheless, the court upheld the plan: "As long as the Legislature's actions are reasonably justified by an attempt to conform with the criteria laid out by federal and state law...we shall not usurp the Legislature's role by selecting among competing plans."

2. School Finance.

b. Serrano and District Wealth

Notes following Serrano v. Priest

2. *State funding.* A recent study determined that the *Serrano* decision did was not the main influence causing California voters to limit property taxes by adopting Proposition 13. While the

voters' shift from rejecting a similar limit in previous years to adopting Proposition 13 seemed to indicate the *Serrano* decision may have had this effect, the study found that other variables better explained the voters' decision. See Stark & Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 U.C.L.A.L. Rev. 801 (2003).

e. The New Wave: Kentucky, Adequacy, and Beyond

An Update on School Funding Since Rose

Litigation challenging the constitutional validity of a state's method of financing its elementary and secondary schools continues virtually unabated. At this point, education finance lawsuits have been filed against 45 of the 50 states; litigation is currently pending at one stage or another in some 24 states; and many states have seen multiple suits over the past several decades. Given the fiscal crisis that almost all the states experienced in the past several years, from which they are only slowly recovering, and the resultant effect on available education funds, together with rigorous new education requirements on states imposed by the federal No Child Left Behind law, new and revived challenges can be expected in the years to come.

The pattern of recent years appears to be holding. Most of the decisions (state supreme court as well as lower courts) favor the plaintiffs challenging school funding. The vast majority of the challenges and the resulting decisions (where one is reached) turn on the question of whether the state has met its constitutional obligation to provide a sound basic education to all its students – a form of adequacy. In a significant number of cases the primary thrust is aimed at the educational status of poor, minority, or at risk students (e.g., New York, North Carolina, New Jersey). The equity factor is almost always present, hovering in the background, even in an adequacy case.

“Costing out” Studies

One striking development of recent years, perhaps reflecting the changing legal approach, is the emerging role of “costing out” studies. In most states, actual student need has never been a factor used to determine state aid expenditures to local school districts. Increasingly, courts in school finance suits are ordering states to conduct “costing-out” studies that attempt to calculate the actual costs of providing adequate educational opportunities, adjusting as appropriate for variables including regional cost variations, student poverty, and English-language learning (ELL) status. Additionally, advocates and state legislatures have commissioned such studies outside of the litigation context. Over 30 such studies have been conducted since 1991. See generally *Ensuring All Children The Opportunity For An Adequate Education: A Costing-Out Primer*, New York: Campaign for Fiscal Equity, Inc. (2003) (describing the three most common approaches to costing-out education: professional judgment, successful schools, and effective strategies).

Courts in eight states – Arizona, Arkansas, Kansas, Massachusetts, Montana, New York, Ohio, and Wyoming – have specifically ordered such studies. In the last year, the New York Court of Appeals ordered the state to cost-out a “sound basic education” for New York City students in *CFE v. State*. The Montana district court in *Columbia Falls* ordered the state to ascertain “the needs and costs of the public school system,” in order to satisfy state constitutional requirements and the Kansas and Massachusetts trial courts also ordered costing-out in their 2004 decisions (noted *infra*).

School financing in Missouri is also in crisis, with a recent lawsuit claiming that the system is unconstitutional. In February 2004, a legislative committee found that several proposed solutions to school financing were expensive and unfeasible, and acknowledged that school funding problems will be difficult to fix. The committee rejected a proposal to increase spending by \$1.4 billion, as well as a proposal to redistribute funding from rich school districts to poorer districts. *See Franck, Education Panel Fails to Find Answers*, St. Louis Post Dispatch, Feb. 13, 2004.

In addition, some states have initiated costing out studies of the federal No Child Left Behind Act. For example, the Ohio Department of Education commissioned what purportedly was the first full-blown costing out of NCLB, which would require an 11% increase in education funding for that state.

* * *

A detailed and current report of school funding developments in all of the states is maintained by ACCESS, a project of the Campaign for Fiscal Equity at www.schoolfunding.info. We acknowledge its contribution.

* * *

Updates on Selected Ongoing Cases

Two prominent law suits which were noted in the casebook, New York and Ohio, have had subsequent, and presumably final developments - - although the history of the school finance movement suggests that there may be no such thing as a final resolution.

New York

In New York Judge De Grasse's exhaustive opinion finding a violation of the state constitutional Education Article with respect to students in New York City's schools was initially overturned by the appellate court, 744 N.Y.S. 2d 130 (App. Div. 2002). That decision, in turn, was reversed by the Court of Appeals which, in large part, affirmed Judge De Grasse's decision. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E. 2d. 326 (N.Y., 2003). In an opinion by Chief Judge Kaye, for a 4-1 majority, the court traced its 2003 decision to the 1982 decision in *Levittown* where the New York court first declared that the constitutional Education Article required that the state provide all students with a "sound basic education" although it rejected the plaintiffs' claims in that case. The "paramount" legal question, at this juncture, was whether the trial court had correctly defined a sound basic education, and beyond that question, whether the trial court's findings of fact on the components of this education were more credible than the appellate court's contrary findings. On both scores the trial judge won the day.

The Court of Appeals "equated a sound education with 'the basic literacy, calculation, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.'" That standard embraced both an employment component ("for this purpose a high school level education is now all but indispensable") and the ability to vote or serve as a juror "capably and knowledgeably." The court then rephrased the evidentiary issue to be resolved: "whether the State affords New York City school children the opportunity for a meaningful high school education." To evaluate that opportunity the court reviewed the evidence on "inputs" (e.g., teacher quality, school facilities, class size) and "outputs" (e.g., test results, drop

out rates) - - both of which showed that New York City school children were not receiving their constitutionally mandated opportunity for a sound basic education. The remaining essential inquiry was to establish “a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.” That burden was met, as the court rejected all of the state’s proffered explanations for the poor results in New York City schools.

In deference “to the Legislature in matters of policy making” and in recognition of significant developments since trial of the case (such as the federal No Child Left Behind Act of 2001), the court’s remedial order provided guidelines but some degree of flexibility. It also gave the defendants until July 30, 2004, to implement the necessary measures.

Finally, in a somewhat reflective conclusion, the court described both the uniqueness and the limitation of what it had decided that day.

Plaintiffs have prevailed here owing to a unique combination of circumstances: New York City schools have the *most* student need in the State and the *highest* local costs yet receive some of the *lowest* per student funding and have some of the *worst* results. Plaintiffs in other districts who cannot demonstrate a similar combination may find it tougher going in the courts (801 N.E. 2d. at 350).

That the New York City decision had a sharp focus was underscored by the Court of Appeals decision involving the Rochester City School District, handed down the same day. *Paynter v. State* 797 N.E. 2d.1225 (N.Y. 2003). The court affirmed dismissal of a complaint filed on behalf of school children in Rochester. According to the court, and unlike the New York City case, “plaintiffs here claim no inadequacy of teaching, facilities or instrumentalities of learning. Rather, they charge that the State’s fault lies in practices and policies that have resulted in high concentrations of racial minorities and poverty in the school district, leading to abysmal student performance. We agree with the Appellate Division that plaintiffs’ novel theory does not constitute a claim under the Education Article...” (797 N.E. 2d at 1226-27.)

After the state failed to meet the July 30, 2004 court-ordered deadline imposed by the Court of Appeals to devise a plan to increase spending for New York City schools, Judge DeGrasse appointed three special masters to oversee development of a remedial plan. While the lawsuit challenged only the constitutional adequacy of New York City’s school resources, the lead plaintiff Campaign for Fiscal Equity (CFE), advocated for a statewide revision of school funding as the only workable remedy. Hoff, *As Lawmakers Stall, N.Y. School Aid Case Gets ‘Special Masters’*, Educ. Week, Aug. 11, 2004 at 22. CFE and a coalition of organizations and foundations had earlier convened a major costing-out study, conducted by four prominent national education finance experts, each of whom had testified for both CFE and the State at trial. The 15-month study concluded that an additional \$7 billion annually would be required to provide a sound basic education statewide, \$4 billion per year in New York City alone. Since the Court of Appeals ordered such a costing-out process, advocates urged the state to adopt the study’s results as the basis for a reformed system. The state appointed its own funding commission, which concluded a much lower increase was necessary to achieve adequacy.

Ohio

When we last visited the Ohio *DeRolph* litigation in the casebook, the Ohio Supreme Court had granted reconsideration of its third substantive decision (*DeRolph III*) and ordered a settlement conference. The settlement efforts were unsuccessful, and the court again decided the constitutionality of Ohio's school finance system. *DeRolph v. State*, 780 N.E. 2d 529 (Dec. 11, 2002) (*DeRolph IV*). In this decision vacating *DeRolph III*, the four person majority said "we have changed our collective mind. Despite the many good aspects of *DeRolph III*, we now vacate it. Accordingly, *DeRolph I* and *II* are the law of the case, and the current school-funding system is unconstitutional." 780 N.E. 2d at 530. The court reiterated that while "nibbling at the edges," the General Assembly "has not focused on the core constitutional directive of *DeRolph I*: 'a complete systematic overhaul' of the school-funding system." 780 N.E. 2d at 530. The majority provided no additional specific guidelines as to the content of a thorough and efficient school funding system. For now, the 12-year-old *DeRolph v. State* litigation has reached an end. Although the Ohio Supreme Court found the state funding system unconstitutional, it did not retain jurisdiction to monitor the state's compliance in remedying the system, closing the case in May 2003. See, *State v. Lewis*, 789 N.E. 2d 195 (Ohio 2003), *cert. denied*, 124 S. Ct. 432 (2003).

North Carolina

In July 2004, the North Carolina Supreme Court upheld the lower court's decision in *Hoke County Board of Education v. State*, 599 S.E. 2d 365 (N.C. 2004), a decade-old suit, finding the state funding system failed to provide a "sound basic education" to North Carolina students in high-need districts, specifically Hoke County. The court affirmed virtually all of the lower court's 2002 decision, but reversed the part of the remedial order that required state-funded pre-school education for all four-year-olds in the state, labeling that "a judicial interdiction that . . . infringes on the constitutional duties and expectations of the legislative and executive branches of government."

New Jersey

In 2004, several plaintiff school districts in *Abbott v. Burke* returned to court, contesting \$124 million in state budget cuts in supplemental funding for after-school and tutoring programs, which the state supreme court had ordered in the 1998 *Abbott* decision. Additionally, six years after the New Jersey Supreme Court ordered the state to fund pre-school education for all three- and four-year-olds in the 30 plaintiff districts in *Abbott v. Burke*, a state appeals court held that the state was not obligated to ensure full funding for pre-school, only to "assist" in funding. *Millville Bd. of Educ. v. New Jersey Dept. of Educ.*, 843 A.2d 338, 343 (N.J. App. Div. 2004). Advocates had argued that over a third of eligible children are not provided such programs, despite the state supreme court directive that early childhood programs be made available to 90 percent of eligible children by the 2005-06 school year. See Jacobson, *N.J.'s Urban Districts Fall Short On Preschool*, *Report Says*, *Educ. Week*, Nov. 5, 2003, at 23. The *Millville Board* decision threw out \$6.8 million in awards granted by administrative judges to four school districts that argued the state was obligated to fully fund pre-school.

Trial Victories for Plaintiffs

State trial courts in Kansas, Massachusetts, and Montana within the past year held the school funding formulas in those states unconstitutional. All three decisions are being appealed by the state defendants.

In Kansas, the court in December 2003 found in *Montoy v. State* that the formula failed to provide adequate funding or distribute it equitably. 2003 WL 22902963 (Kan. Dist. Ct. 2003). After the state failed to make any progress in remedying the flawed formula, in May 2004 the judge ordered the state to cease funding schools – effectively shutting down the public school system – until the state complied with its constitutional obligations. *Montoy v. State*, 2004 WL 1094555 (Kan. Dist. Ct. 2004). An appeals court blocked that order, allowing schools to remain open pending appeal.

In Massachusetts, a state superior court judge ruled in April 2004 in *Hancock v. Driscoll*, 2004 WL 877984 (Mass. Super. 2004), that despite improvements in the state aid system, funding was still constitutionally inadequate for many poor children. The judge’s remedial order, fashioned on the one in New York’s *CFE v. State*, emphasized costing-out an adequate education and implementing a comprehensive accountability process. The court also suggested pre-school education was necessary. See “Plaintiff Victory in Massachusetts: Court Addresses Cost Studies, Preschool and Accountability,” at <http://www.schoolfunding.info/states/ma/4-28-04Victory.php3> (April 2004).

Montana funding reform advocates won at trial in April 2004 in *Columbia Falls Elem. School Dist. No. 6 v. State*. The court found that the existing funding system violated the state constitution’s equal protection and education clauses, 2004 WL 844055, 30 (Mont. Dist.), and ordered the state to cost-out an adequate education and base a revised formula on “educationally-relevant factors.” *Id.* at 32.

New Lawsuits Filed

In mid-2004, several new suits were filed by plaintiffs challenging the adequacy and equitability of state school funding systems. In Alaska, *Moore v. State of Alaska* was filed on August 9, 2004 by two school districts, a non-profit advocacy group, and the state teachers' union. In December 2003, Louisiana advocates and school boards filed suit against the state in *Jones v. Louisiana State Board of Elementary and Secondary Education (BESE)*, alleging that the state’s failure to include capital funding costs in its school aid formula violated the state constitution’s education clause. Advocates are also lobbying for a state constitutional amendment that would raise taxes to support schools. In January 2004, a coalition of Missouri school districts and advocates, the Committee for Educational Equity, filed an equity and adequacy challenge to the state school aid formula. In Kentucky, a new suit was also filed in late 2003, in which the *Rose v. Council for Better Education* plaintiffs allege that the state is violating its obligations under the 1989 court order by continuing to under-fund schools a decade after the original *Rose* decision.

“No Child Left Behind” Redefines the Debate

The federal requirements imposed on states by No Child Left Behind (NCLB) have somewhat unexpectedly become a boon to advocates and plaintiffs. NCLB requires states to meet rigorous academic proficiency goals, and to collect detailed student achievement data in order to measure progress toward achieving these benchmarks. Advocates have begun to use this achievement data – specifically, high failure rates in under-funded districts – as evidence that states are failing to provide the adequate educational opportunities to all children that are guaranteed in their state constitutions. Moreover, the academic content standards heavily articulated in NCLB provide advocates and courts a template definition for a “sound basic” or adequate education, in

much the same way as states' own content standards have been relied upon by plaintiffs to give content to the concept of "adequacy" before the courts. In the recently filed *Moore v. State* case in Alaska, for example, plaintiffs noted that only 42 percent of schools and 13 of Alaska's 55 districts met NCLB requirements. In essence, advocates are asking courts to use NCLB requirements as the yardstick by which a minimally adequate education (and funding to achieve it) is measured. The plaintiffs in the newly-filed Nebraska funding lawsuit, for example, specifically cited NCLB adequate yearly progress (AYP) statistics in its claim that the state underfunds schools in four plaintiff school districts. For an overview of NCLB's impact on school finance litigation, see Hoff, *Federal Law Bolsters Case for Aid Suits*, Educ. Week, Oct. 1, 2003, at 1, 20.

Vouchers

The Cleveland, Ohio, voucher case was decided by the U.S. Supreme Court on June 27, 2002, *Zelman v. Simmons-Harris*, 536 U.S. 639. In a 5-4 decision Chief Justice Rehnquist held that the Cleveland program was "entirely" neutral with respect to religion, "a program of true private choice," and therefore did not violate the Establishment Clause of the Constitution.

In a dramatic example of the independent status of state constitutional law, a Florida appellate court invalidated Florida's school voucher program as violative of the Florida constitutional "no-aid provision," *Bush v. Holmes*, 2004 WL 1809821 (Fla App. 2004). Florida's Opportunity Scholarship Program (OSP) allowed children attending "failing" public schools (failing for 2 years in a 4 year period) to transfer out to another public school or to receive a tuition voucher to attend a private school, sectarian or nonsectarian. The private school tuition, where one is utilized, is then paid by the state directly to the school in the parent's name. Florida's no-aid constitutional provision mandates that "[n]o revenue of the state...shall ever be taken from the public treasury directly or indirectly in aid...of any sectarian institution." [Art.1 §3]. The court distinguished its much stricter provision from the federal First Amendment Establishment Clause, which was held by the U.S. Supreme Court not to invalidate the Cleveland school voucher program in *Zelman v. Simmons-Harris*. The Florida court held that the OSP violated the state no-aid constitutional provision, and it also held that the no-aid provision did not violate the Free Exercise clause of the U.S. Constitution. The Florida court was very clear that its constitutional provision was more restrictive than the federal and that it prohibited this use of state revenues to aid sectarian schools. Governor Jeb Bush announced that he will appeal the decision.

A Note on Cost-Quality: Does Money Matter?

New evidence suggests that increasing spending in poorer school districts does increase school quality. A study found that districts receiving increased resources from school finance reform also had increased housing values and rents that were consistent with an increase in the quality of the school districts. Dee, *The Capitalization of Education Finance Reforms*, 43 J.L. & Econ. 185 (2003).

A Note: Is it Equity vs. Adequacy?

The balance between equity and adequacy in school finance equalization reforms may be difficult to achieve according to a recent study. The study found that many school finance

equalization schemes “level down,” producing greater equity in spending between districts but lower overall spending. Leveling down occurred particularly in states with equalization schemes that were most successful in achieving equity. In several states this leveling down even left poor districts with less funding than before the reforms. While some districts “leveled up,” achieving higher spending while still moving towards equity, these districts achieved much more modest results with respect to equity. The problem may result from the difficulty of providing incentives for greater spending to level up as compared to the ease of forbidding high spending in districts, which leads to leveling down. Hoxby, *All School Finance Equalizations Are Not Created Equal*, 116 Q.J. Econ. 1189 (2001).

For an ethical discussion of equity in school finance, see James Gordon Ward, *Ethics and the Legitimation of the Pursuit of Equity in School Finance*, 23 St. Louis. U. Pub. L. Rev. 487 (2004).

Chapter 11: The Chief Executive

A. Executive Orders.

2. Governor’s Authority to Make Policy Through Executive Orders

Notes following State of New Mexico ex rel. Taylor v. Johnson.

2. *Plenary power.* The court considered an executive order requiring binding arbitration in labor negotiations between state employees and state departments in *Kinder v. Holden*, 92 S.W.3d 793 (Mo. App. 2002). It noted it had distinguished between ceremonial executive orders, those that have the force of law, and those that do not. It held this executive order was not legally enforceable because it was not authorized by constitution or statute. The court discussed the Maryland statute reproduced on p. 863 of the casebook, and held that the legislative authority conferred by that statute strengthened the governor’s authority to issue executive orders. See *McCulloch v. Glendening*, 701 A.2d 99 (1997), upholding an executive order granting unionization and collective bargaining rights to executive branch employees.

B. Veto Powers.

Notes following Rush v. Ray and State ex rel. Wisconsin Senate v. Thompson.

1. *What can be vetoed.* Can a governor veto a reduction in the appropriation for colleges and universities that leaves the state’s budget out of balance and then “request” these entities to return enough money to balance the budget? The court thought not in *State ex rel. Condon v. Hodges*, 562 S.E.2d 623 (S.C. 2002).. It held:

However, there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly. [Id. at 245.]

Chapter 12: Citizen Control of Government Action

A. Citizen Control of Governmental Action

Notes following *St. Clair v. Yonkers Raceway Inc.*

3. Taxpayer standing in federal courts. The Supreme Court recently held that taxpayers could challenge state taxes in federal court. Arizona taxpayers had claimed that a state tax credit for residents giving contributions to private schools was unconstitutional, and the Court concluded that federal courts could hear this constitutional challenge. *Hibbs v. Winn*, 124 S. Ct. 2276 (2004). See Associated Press, *Federal Suit on State Tax Break Allowed*, Washington Post, June 15, 2004, at A12.

B. Through Local Initiative and Referendum.

Notes following *Witcher v. Kansas City*.

1. Legislative v. administrative. A group submitted the following initiative to a municipality:

Prior to the start of any physical construction of any municipally financed (in whole or in part) project requiring a Village capital expenditure of \$ 1 million or more, the Village Board shall submit to the electorate a binding referendum for approval of the project. Failure of the binding referendum shall preclude the Village from proceeding with the project. The wording of any referendum shall provide the specific purpose, location and cost of the project. Nothing in this provision shall be construed to preclude the Village from exercising its role in the planning or design of such publicly financed projects.

The court held it proposed a legislative matter in *Mount Horeb Community Alert v. Village Board of Mount Horeb*, 643 N.W.2d 186 (Wis.App. 2002) as it was permanent, and would make new law and new policy. The supreme court has granted review. Compare *Glover v. Concerned Citizens for Buji Park*, 50 P.3d 546 (Nev. 2002), where the court held an initiative proposing to maintain a park and playground in perpetuity was administrative. The court said: “The initiative involves a land use decision that has been legislatively delegated to the local government by statute. Carson City’s decisions regarding its land are administrative, to be made in accordance with existing state statutes governing zoning, planning, redevelopment, preservation and sale of county property.” *Id.* at 550

Notes following *Whatcom County v. Brisbank*

1. Limiting the initiative and referendum. The power of the people to create initiatives may also be limited by the state constitution. For example, in *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989 (Alaska 2004) the court held that an initiative for the designation of parkland was barred by the Alaska constitution as an “appropriation.” The initiative was an appropriation because it designated the use of public assets, which was barred in order to “preserve to the legislature the power to make decisions concerning the allocation of state assets.” Because the initiative in question intruded on the legislature’s control of appropriations, it was improper to put on the ballot.

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