NEW JERSEY LAWYER

October 2020

No. 326

THE FIRST AMENDMENT

Part I: Free Speech and Religion in Modern Society

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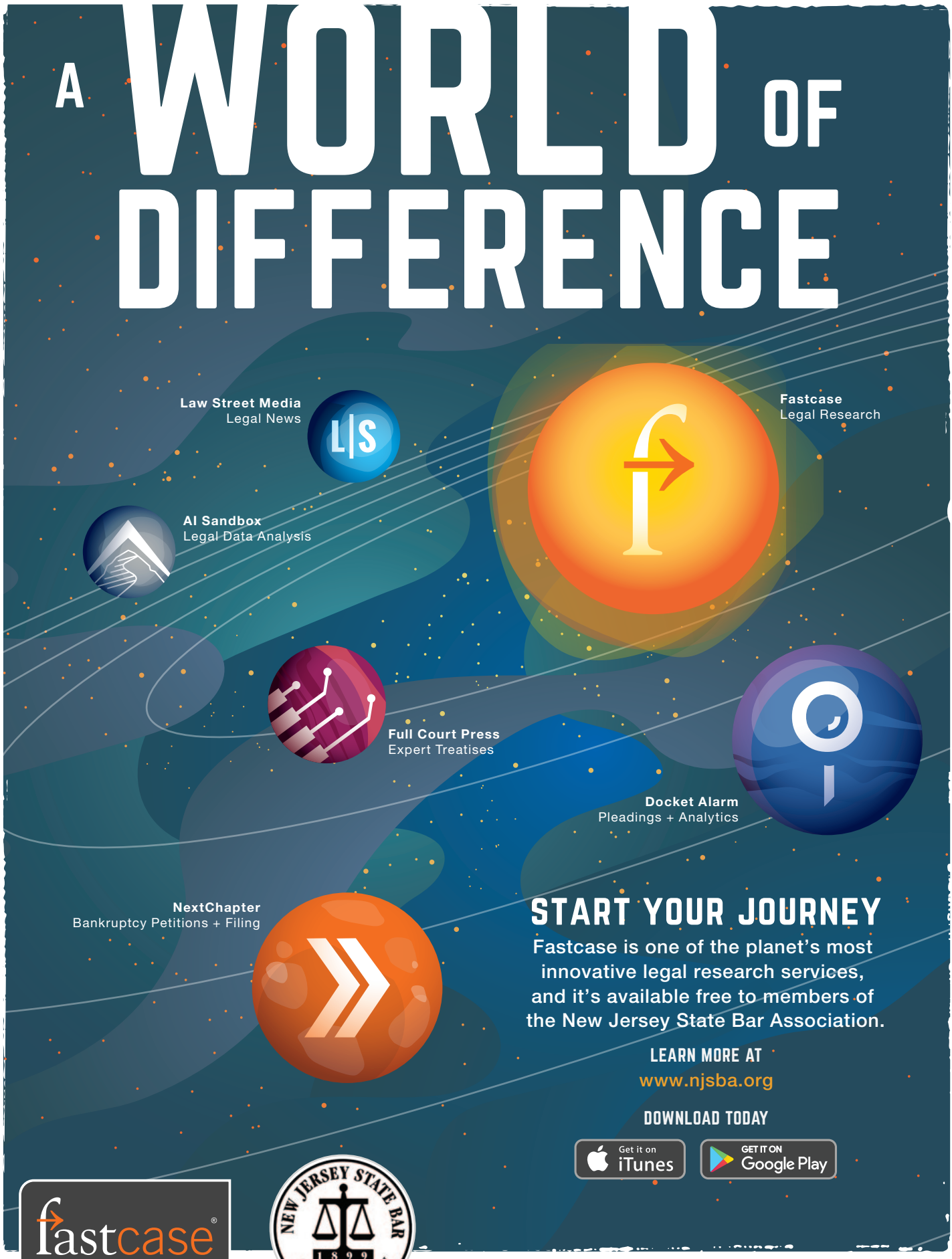

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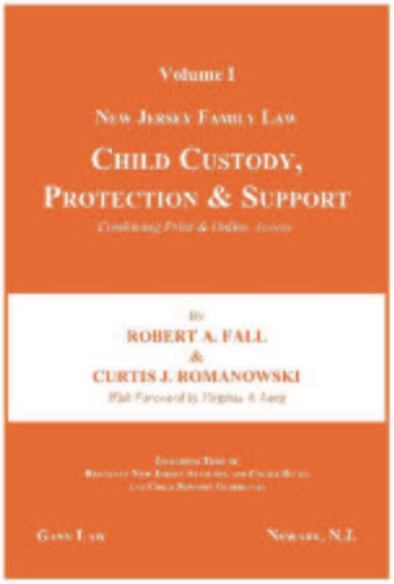

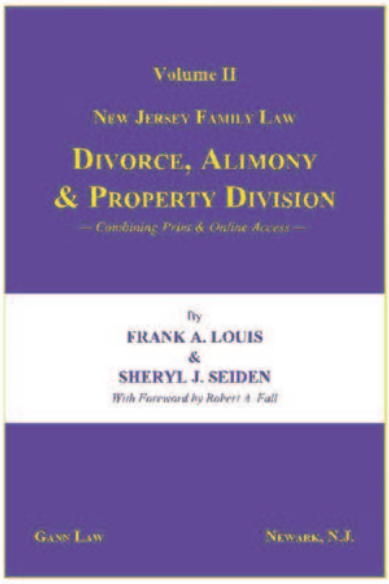

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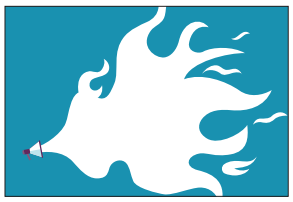

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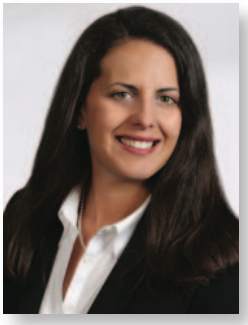
DEPARTMENTS

KIMBERLY A. YONTA

As Sworn Guardians of the Constitution, Be a Part of the United States' Democratic Experiment—Make a Plan to Vote

"Your vote is precious, almost sacred. It is the most powerful nonviolent tool we have to create a more perfect union."

–U.S. CONGRESSMAN JOHN LEWIS



Being a lawyer is a gift. Through our profession, we have the privilege of taking an oath for justice and to uphold and protect the Constitution. That brings with it a certain amount of responsibility that I believe all attorneys have for the greater good. The right to vote is one of the most sacrosanct and cherished in our democracy and is mentioned no fewer than five times in the Constitution. This election year is like no other, and I urge everyone to take a moment to reflect on the meaning and power of that right, and to make a plan for casting your vote, no matter what party or causes you support. The New Jersey State Bar Association believes voting rights matter and has dedicated energy this year to reflect on the journey many have taken to earn that right and to urge attorneys to serve the public as poll workers. We celebrated the 100th anniversary of the 19th Amendment, which gave women the right to vote. Today, it is hard to believe that it would be at all controversial that women shouldn't have the right to fully participate in elections. But earning that right was hard fought for decades before the amendment was ratified in the summer of 1920.

I am in awe of the many women who fought in a more than seven decades-long struggle for women's suffrage, including New Jersey's own Alice Paul who organized a march and protests in front of President Woodrow Wilson's White House. Many of the women endured not only demeaning, sexist verbal attacks, but sometimes physical attacks and imprisonment. We stand on the shoulders of these brave, strong women. Unfortunately, that was not the final chapter in voting rights in our country, as we saw during the civil rights era and even still today.

This year we have a unique challenge to navigate: voting in the midst of a global public health pandemic. That is why this fall, the NJSBA teamed up with the New Jersey Secretary of State, as well as bar associations and election officials around the country, to be a part of Poll Worker Esq. It is a national non-partisan effort to ensure a fair and secure election by encouraging lawyers to sign up to be poll workers because even with mail-in ballots in New Jersey, poll workers are needed, since some voters will deliver their ballots to polling sites or cast provisional ballots in person on Election Day. The goal was to head off a predicted shortage of poll workers, who tend to be older and may not want to work the polls because they are part of a demographic that is at higher risk of contracting COVID-19.

I applaud all who volunteered to be a part of that project to protect voting rights of the citizens of New Jersey.

We all have a role to play in the election process. I have always believed it is good to get involved in your community, whether it is your town, your church or local politics. My involvement in politics began because I had a little itch when I was on maternity leave after my first daughter, Abigail, was born. I volunteered to make calls for a gubernatorial candidate. Though my candidate didn't win, I walked away from that experience energized from being a part of something consequential and bigger than myself. Since then, I have tried to also get my family involved in the hopes that it will cultivate a passion for leadership and democracy and an appreciation for the power of elections in my two daughters. I think it's starting to work. A few years ago, my younger daughter, Madeline, was running to be a representative for her third grade class. Her platform: end cold pizza in the cafeteria. Apparently, sometimes the pizza arrived on the students' lunch trays nearly frozen. Fast forward to Election

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New Jersey Lawyer (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association ($10.50); those ineligible for NJSBA membership may subscribe at $60 per year. There is a charge of $2.50 per copy for providing copies of individual articles • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to *New Jersey Lawyer*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • *New Jersey Lawyer* invites contributions of articles or other items. Views and opinions expressed herein are not to be taken as official expressions of the New Jersey State Bar Association or the author's law firm or employer unless so stated. Publication of any articles herein does not necessarily imply endorsement in any way of the views expressed or legal advice. • **Printed** in U.S.A. • Official Headquarters: *New Jersey Lawyer*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • **Advertising** Display 732-565-7560.

FROM THE SPECIAL EDITORS

Advancing the Hard Truth Through the First Amendment

Justice Anthony Kennedy once stated, "The First Amendment is often inconvenient."[1] This is especially so in difficult times such as we face today. In a bitterly contested election year, the preexisting sharp social and cultural divisions in our country have been made even more acute by a lethal pandemic that has elicited a variety of responses, whether positive, negative or otherwise. This in turn has led to applications of the First Amendment to unprecedented circumstances, such as government regulations regarding face masks, stay-at-home mandates, and limitations on assembly. At the same time, there seems to be a growing trend by some to use the First Amendment, not as a shield to protect the guarantee of universal freedoms but, as a sword to assert a position of individual privilege. But properly applied, the First Amendment advances truth, however inconvenient.

…[T]here seems to be a growing trend by some to use the First Amendment, not as a shield to protect the guarantee of universal freedoms but, as a sword to assert a position of individual privilege. But properly applied, the First Amendment advances truth, however inconvenient.

Each of the articles in this edition illustrates how the application of First Amendment principles in various contexts is indeed inconvenient, often giving rise to more questions than answers. Thomas J. Cafferty, Lauren James-Weir, and

John C. Connell *is a partner/shareholder of Archer & Greiner, P.C., at the firm's headquarters in Haddonfield, and a member of the* New Jersey Lawyer *Editorial Board. He has represented clients ranging from Fortune 100 companies to individuals in a broad variety of commercial litigation matters, including First Amendment disputes, communications and intellectual property law, civil rights and employment defense litigation, and appellate advocacy.*

Lisa J. Trembly *is Of Counsel with the law firm of Connell Foley LLP at the firm's headquarters in Roseland, and is a long standing member of the* New Jersey Lawyer *Editorial Board. Her litigation practice encompasses insurance and fraud litigation, consumer fraud actions, and general commercial matters. She also advises clients on contract and insurance coverage issues and potential insurance or consumer fraud claims and violations.*

Nomi I. Lowy, discuss the legal implications of wearing face masks as a form of expression, including compliance and non-compliance with government mandates. Walter M. Luers examines the changes to the Open Public Records and Open Public Meetings acts during the pandemic and the exemption on public records during a public health emergency. C.J. Griffin and Howard Pashman consider the novel contours of Free Exercise challenges to COVID-19 regulations. Professor Ronald K. Chen examines recent decisions of the Unites States Supreme Court with a view as to how they portend future treatment of the Establishment and the Free Exercise Clauses of the First Amendment.

Professor Edward Hartnett analyzes the impact of recent United States Supreme Court decisions on state constitutional law. Professor Laura E. Little offers an exegesis of the role and function of comedy as a form of protected speech. John C. Connell and Anthony M. Fassano critique the evolution of First Amendment jurisprudence in the context of trademark registration under the Lanham Act. Bruce S. Rosen discusses the emerging trend of Anti-SLAPP statutes taking aim at suits that undermine the rights and value of the First Amendment but absent in New Jersey. Professor Burt Neuborne provides a historical assessment of robust free speech protection as an agent of egalitarian change.

We extend our sincere thanks to each of these authors for sharing their wisdom, knowledge, and keen insights. Their professional contributions are a significant benefit to the legal community, and have made this edition invaluable to attorneys on a professional and personal level.

The landscape of the First Amendment is vast, which is why we are dedicating two magazine issues to this area of law. Among the many different topics that could be addressed, this edition offers several articles on free speech and religion in modern society. We are excited to follow up in December with more First Amendment analysis on freedom, defamation and navigating a digital world, for your thoughtful consideration.

The path forward may not necessarily be well marked. But with continued vigilance on the part of the organized Bar, we expect that First Amendment protections will flourish and truth be meted out in the crucible of ideas. Our historical experiment in a democratic republic deserves no less.

We dedicate this special edition of *New Jersey Lawyer* to the memory of our recently passed colleague, Mitchell H. Cobert, Esq., who among the chairs of this Editorial Board, was an longtime icon of free speech, intellectual integrity, and progressive thought. May his memory be a blessing. ⚖

Endnote

1. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992).

President's Message

Continued from page 5

Night party in our hometown of East Brunswick, where Maddie got to meet the very newly elected member of the local school board. She organized the other children at the party to approach the board member to lobby for hot pizza. He saw her passion and told her to reach out and she did. She emailed and set up an appointment and the board member ended up visiting the cafeteria at her school and sampled the pizza. Based on that, she was invited to make a presentation at a school board meeting and the Superintendent acknowledged the issue.

I am happy to report that she won her election and the ovens were fixed so the children could enjoy hot pizza in the cafeteria. It was a great experience where she got to understand what it takes to be a leader and how to engage in the political process to address the needs of the public. We all have limited time. We all have practices and so many other things happening in our lives, especially now. But I implore each of you to make time for democracy. It doesn't matter if you are a Democrat, Republican or Independent, voting rights are voting rights, and I hope the lawyers of New Jersey will seize this opportunity to use and protect this important tool to help "create a more perfect union." ⚖

ETHICS AND PROFESSIONAL RESPONSIBILITY

Marijuana and the Practicing Attorney

By Louis J. Keleher
Law Offices of Peter W. Till

As New Jersey's legalization of marijuana seems imminent, attorneys must be aware of the consequences of taking advantage of this looming liberty, at least until the law is changed at the federal level, where marijuana usage still remains illegal. States that have already legalized marijuana for personal and medical use seem to be split on the issue of marijuana use by attorneys. That said, it is clear their analysis invokes New Jersey RPC 8.4(b), "Misconduct," which provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Because it is unclear how the New Jersey bar may regulate attorneys who choose to use marijuana recreationally, it would ordinarily be instructive to examine how states that have legalized marijuana have addressed this issue. However, there is currently too little information and too little precedent for this analysis to prove meaningfully informative. For example, in Colorado, the Colorado Bar Association Ethics Committee Formal Opinion 124 (2012) examined whether a lawyer could personally use marijuana for medical purposes without violating Colorado RPC 8.4(b). The opinion, which was issued prior to the legalization of recreational marijuana in the state in 2014, concluded that attorneys could "cultivate, possess, and use small amounts of marijuana solely to treat a debilitating medical condition." Since its legalization in Colorado for personal use, there has been no further guidance on an attorney's use of marijuana for that purpose.

Notably, Opinion 2016-6, issued by the Supreme Court of Ohio, where marijuana is not yet legal but can be consumed medicinally, rejected even medical use by attorneys, stating: "a lawyer's personal use of medical marijuana pursuant to a regulated prescription [...] subjects the lawyer to possible federal prosecution, and may adversely reflect on a lawyer's honesty, trustworthiness and overall fitness to practice law[,]" which may potentially violate Ohio RPC 8.4(b) and (h), pg. 1-7.

These two conclusions nonetheless draw out the disparity in application of the law and ethics rules while the state and federal statutes are at odds: A state that recognizes marijuana usage as legal on its books operates inconsistently if it treats attorneys who consume it as committing a criminal act. Though, the state must also balance its recognition of marijuana's legal status with the possibility of federal consequences for using marijuana when enforcing the rules of ethics. As long as federal law renders marijuana consumption illegal, there will be continued confusion about how to reconcile the two laws with each other and with Rule 8.4.

Thus, any attorney interested in consuming marijuana upon New Jersey's seemingly forthcoming legalization of the substance must appreciate the consequences that may follow from their apparent legal use of it. Although much is still unclear with regard to New Jersey's decision to legalize marijuana, the federal laws remain in direct contravention with the laws of those states that have legalized. Thus, the current state of the law, nationally, presents an ethical dilemma New Jersey attorneys will have to grapple with if they foray into the realm of marijuana use. ⚖

Considering Auto Reimbursement Options

By Scott A. Richards
RotenbergMeril

While a relatively small item in a law firm's budget, an auto allowance for business use of an automobile is an important component of compensation to a partner or employee. Factors including changes in tax law as well as the impact of COVID-19 make now a great time to review your firm's auto benefits. COVID-19 has changed the way firms work, and certain of these changes, including more flexibility in working from home and use of technology for virtual client meetings and legal proceedings, may have a lasting impact on the percentages of business versus personal auto usage.

The standard auto allowance whereby a firm makes a monthly payment to an employee is often the choice of law firms as it requires little administration and is deductible to the firm for tax purposes (and reportable on the employee's W-2 as taxable income or for a partner as guaranteed payment income). Employees were not required to track mileage, but many did so as they could write off unreimbursed business mileage to offset the taxation of the auto allowance. This write off was simply the IRS mileage rate multiplied by the business miles driven and, as long as the result along with any other unreimbursed employee expenses that the employee could claim exceeded 2% of the employees adjusted gross income, the amount was included as an itemized deduction on their tax return. This made the auto allowance tax efficient while allowing for coverage of most auto-related ownership and operating costs.

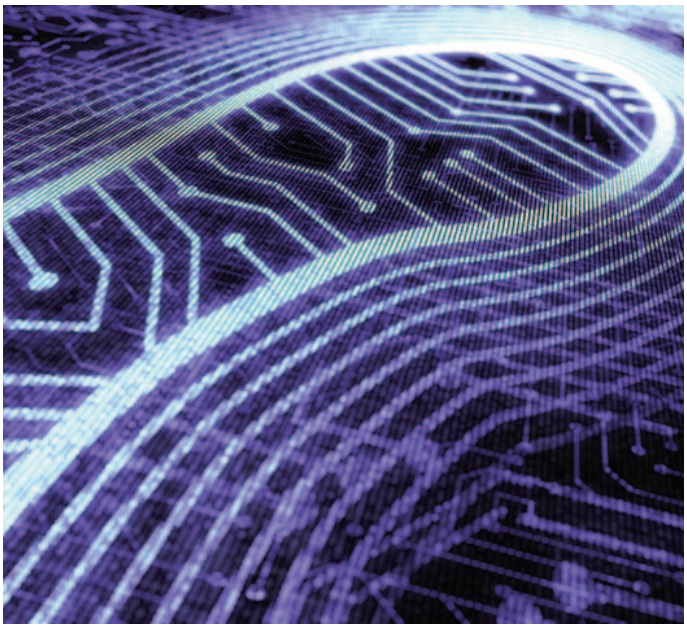
This changed with the passage of the Tax Cuts and Jobs Act, which eliminated this deduction, thereby diluting the auto allowance benefit by as much as 30% to 50%. Fixing this by paying a higher auto allowance would add to firm expense, but this can be avoided by considering alternative auto benefits such as:

- Firm ownership of vehicles;
- Paying a mileage allowance;
- Paying a mileage or fuel reimbursement; or
- Offering a Fixed and Variable Rate (FAVR) auto allowance.

Firm ownership of vehicles limits administration, but records should be kept in order to record the personal use of the vehicle which is taxable to the partner/employee. Paying a mileage allowance requires accurate mileage logs to be kept, and may limit the benefit if higher than normal miles are driven during a period. Using a mileage reimbursement such as the IRS mileage rate (57.5 cents per mile for 2020) can cause significant variations between employees, lacks precision in record keeping and fails to limit the total cost to the firm or client. Accountable mileage rate plans do not require the employee to pick up the reimbursement as taxable income, but the employer may deduct the reimbursement paid as a deductible business expense.

A tax-free FAVR auto allowance is another alternative for replacing the standard auto allowance, as it provides a non-taxable benefit for the employee thereby keeping costs down for the firm. The fixed portion of the benefit covers car insurance premiums, licenses and registration fees, taxes and depreciation, while the variable component provides mileage dependent reimbursements for gas, oil, maintenance and tire wear. Limitations for a FAVR plan are significant and require that there must be at least five covered employees that travel at least 5,000 business miles each year in the plan of which no more than 50% are management employees. Also, the vehicle cost cannot exceed $50,400 for 2020 per IRS rules. Many firms outsource the administration of their FAVR plans to companies that specialize in administering these programs. So that cost must be factored into the equation.

Substantiation is the downside to both mileage reimbursement plans and FAVR allowances, and this leads to additional administrative work. However, the upside is restoring the full auto allowance perk to the employee for business use of an auto without additional tax burden. The tax code is complex with respect to auto benefits, and it is important to consider options in order to minimize or eliminate the tax impact of this employee perk while limiting firm expense. Your tax professional can help assess the various options. ⚖



TECHNOLOGY

Reduce your Internet Footprint and Risk

By Deirdre R. Wheatley-Liss
Principal of Porzio, Bromberg & Newman

How does identity theft happen? Because you and your clients have spewed your personal information all over the internet for years. In 2018, the Federal Trade Commission processed 1.4 million fraud reports totaling $1.48 billion in losses. Children, seniors, social media users, and military personnel were most at risk. It is time to take back control to reduce your risk of identity theft.

Don't share your home address. An identity thief can use your name and address to obtain new credit cards, open a phone, electricity, or gas account, get medical care, and steal your tax refund. With an address change, bills are sent to the thief, but never paid, which in turn damages *your* credit rating.

Don't answer phone calls from numbers you don't know. If you don't know the number, ignore the call. If it is for real they will leave a voicemail.

Don't share travel plans. When traveling for business or pleasure, minimize the information you share online. Save the trip announcement for after you get home.

Save your identity—not coupons. Retailers combine the data from the unique serial number embedded in the barcode of online coupons and use this data with other information discovered online and off—such as age, income, location, or geographic routine—and sell the information to database aggregators.

Forgo the free turkey. Discontinue using grocery store reward cards that have a name, address, phone number, date of birth, and email address associated with the account. Businesses analyze and sell the data.

Manage your snail mail. Consider putting newspaper and magazine subscriptions in another name, like your middle name. Have packages delivered to a work address or post office box address.

Don't share the good news. Do not publish wedding dates, baby announcements, or graduation announcements on online registries. Fraudsters compile this information with other personal identifiers and are more than happy to steal the checks or gifts that are delivered.

Hire an Open Source Intelligence Expert (OSINT). Use expert services to remove your information from hundreds of databases to reduce your risk of identity theft and fraud. ⚖

WHAT I WISH I KNEW

Don't Be Shy About Asking For The Tools You Need To Do Your Job

By Emily Kelchen
NJSBA Young Lawyers Division President

I vividly remember the first time I was handed a company credit card. It was a shiny new AmEx with my name on it, and I was told to let the secretary know if it turned out I needed a higher credit limit. I was a newly minted attorney, who had just paid my licensing fees out of pocket and was staring down my first student loan payment, so the thought of being anything but painfully frugal was laughable to me. I put the card in my wallet and promptly forgot about it.

A few weeks later, the secretary stopped by my office asking for my monthly expense report and any reimbursement requests. I didn't think I had any. She reminded me of the client meeting I had driven to, and the CLE class several of us had attended. It hadn't occurred to me that those costs would be covered by my employer.

In speaking to other young attorneys, I discovered I wasn't the only person who had this experience. And I count myself lucky that I have avoided the opposite—finding out you work for a company or firm that doesn't cover any of your licensing or business expenses.

Financial issues are always a difficult topic to address as a new hire, but they are something you cannot avoid if you want to advance your career. Here are a few expenses to consider as you enter the practice or switch employers.

- Either you or your employer is going to need to pay for the bar exam, yearly licensing fees (maybe in multiple states), and CLE classes so you can remain in good standing.
- If you are expected to be available at all hours, or work from home, someone is going to have to pay for that technology.
- Traveling for work means someone needs to pay for gas, food, lodging, and if applicable, entertaining clients.
- Effective legal research requires specific tools. Employers sometimes need to be reminded to provide a list of what services and publications the firm subscribes to, and to set up accounts for new hires.
- Does your employer expect you to attend certain conferences or join specific professional associations? If so, do they pay the full cost of attendance, or just the bare minimum? What if you want to join an association or attend a conference hosted by an organization that nobody else in the organization is involved with?
- Eventually you may be asked to speak at a conference, be recognized with an award at a special event, or be approached about supporting a professional or community organization or event. What costs will your employer cover? Does your employer have sponsorship dollars they can spend to promote you and/or the firm?

If your employer hires new attorneys all the time, they probably have a policy in place that dictates how much, if any, of these costs they will bear. If it has been awhile since they hired anyone, it is a topic you are going to have to get comfortable talking about.

Based on my own experiences, and from talking to others, the best way to tackle this issue is head-on. Don't be shy about asking if the company has a policy on employee expenses. A lot of them do.

If there is an expense your employer doesn't pay for, but you wish they would, don't be afraid to ask them to open their pocketbooks. Make the case for why the expense should be covered. Focus on the value the company will get in return for its investment. If it is a specific product, a sales rep can give you information to back up your assessment of its usefulness. If it is an organization or conference, someone in the membership or sponsorship office can usually provide you with information about the value provided.

Approved CLE providers in the State of New Jersey are required to have a financial hardship policy. Young lawyers who are unable to attend CLE events because of the cost should not hesitate to ask a provider if they offer scholarships, waivers of course fees, reduced fees, or discounts.

Thinking about these expenses and how a firm or employee should handle them is part of learning the business side of the practice of law. It is a value skill, and not something young lawyers should shy away from mastering. ⚖

WORKING WELL

Alcoholics Anonymous—New Freedom and New Happiness

By Name Withheld

I mostly drank at home, certain my addictive behavior was invisible. Although striving to be a functioning attorney, I was rude, disinterested in others, and rarely good company. Colleagues, acquaintances, and family members kept their distance. I hated myself. Rather than facing life's challenges, I sought escape in the bottle.

A frightening and humiliating event caused me to hit *my* bottom. The melodrama before and after this catastrophe is unimportant. Active alcoholics either recuperate, or continue sliding toward new and deeper bottoms. My slide was stopped by Bill Wilson who, at the time, had been dead for 40 years.

Bill co-founded Alcoholics Anonymous ("AA") in 1935 with Dr. Bob Smith. Their program is still going strong, helping more than 2.1 million members in 180 countries. AA saved my sanity, family life, and career. Never have I been happier, or more productive. In Bill Wilson's words. "fear of people and of economic insecurity" has left me. I have become an asset to our profession.

If you suspect alcoholism is depleting your life, then learning about AA will be worthwhile. Just telephone 800-245-1377, or visit the Northern New Jersey website www.nnjaa.org. Participation at all levels is anonymous.

The AA program has been widely recognized for freeing people from the physical and psychological effects of this debilitating disease. When considering whether to participate, don't be deterred by these "boogy men":

- "AA is for foul smelling, bowery bums." Not so. It abounds with men and women from all walks of life, including professionals like you and me.
- "Only depraved reprobates need AA." False. Alcoholism is a disease, not a moral shortcoming.
- "It is a cult". Untrue. No one is browbeat, or in any way forced to follow AA's renowned 12-steps.
- "AA ruins reputations." Far from it. Every facet of AA is anonymous. We respect privacy.
- "Joining AA leads to divorce." To the contrary, most spouses become grateful for their partner's renewed commitment to the family.
- "Alcoholics Anonymous leaves little room for enjoying life." Hardly. Once released from drinking's economic, physical and psychological costs, recovering alcoholics have increased time and energy for living.

I am not the only New Jersey attorney whose life has been reclaimed through Alcoholics Anonymous. You deserve to be happy; why not consider joining us? ⚖

Confident Capitals—Tips on Capitalization in Legal Writing

By John M. Keating
Law Office of John M. Keating

To maximize efficiency and productivity when drafting a legal document, it is beneficial to become familiar and comfortable with the stylistic rules specific to legal writing, including the rules of capitalization. Capitalization rules in legal writing can be particularly tricky because they can differ significantly from the rules of more generalized types of writing.

Three common sources of capitalization confusion in legal writing are party designations, titles of court documents, and the word "court" itself. Whether to capitalize these words depends on how they are used, and various style guides come down slightly differently on the question. However, I have observed a general consensus among the guides.

Party designations such as "plaintiff," "petitioner," and "respondent" are common nouns that generally would not be capitalized in everyday writing. But in legal writing, it can be useful and acceptable to capitalize these words in some situations. The favored style is to capitalize party designations when used instead of a party's name, but not when preceded by "the" (e.g., "After Plaintiff slipped on the ice," but "before the defendant arrived on the scene"). This style helps distinguish between the parties in the current matter and parties in separate cases being discussed. A better practice to avoid confusion is to identify parties by their proper names wherever possible.

Regarding the names of court documents, it is probably best to default to beginning them in lower case. But it is appropriate to capitalize them when the document has been filed in the current matter and references the document's actual title or a shorthand form of the title. Capitalization can be especially useful to distinguish certain specific documents from other similar documents, especially if the circumstances or procedural history of the matter are such that referring to the documents using generic common nouns could become confusing. For example, it may be appropriate in an employment case to refer to the plaintiff's Complaint in the litigation using capitalization to distinguish it from a complaint the plaintiff filed internally with the employer. Designating a prior document using a capitalized descriptive term and thereafter using the capitalized term throughout the document being drafted could provide further clarity and brevity (e.g., Defendant's Certification in Response to Plaintiff's Motion to Dismiss (hereinafter, "Response Certification")).

It has been my practice to capitalize "court" when naming a court in full, when referring to the Supreme Court of the United States, and when referring to the Supreme Court of New Jersey (or the highest tribunal in the jurisdiction whose laws govern the outcome of the matter). This style is consistent with the general consensus.

I also have taken to capitalizing "court" when referring to the court that will receive the document I am drafting. I have observed this use to be less prevalent than the above rules, but I believe it is most fitting to capitalize in that situation to show appropriate respect for the court one is addressing.

Even with the available flexibility, it is most important to capitalize consistently throughout the document. Moreover, while following these rules is a prudent avenue to take, it is best to consult the relevant style guide for further information and to be certain of the rules applicable in a particular court or forum. More guidance also can be found in *The Bluebook: A Uniform System of Citation* published by the Columbia Law Review Association *et al.*, *The Redbook: A Manual on Legal Style* by Bryan A. Garner, or the *New Jersey Manual on Style for Judicial Opinions* published by the New Jersey Supreme Court.

Mastering and integrating capitalization style will increase clarity and consistency in legal writing. It will also instill confidence and efficiency into the writing process and clear the way for a focus on the substance of the writing, which, in the end, will promote the ultimate goal of communicating and advocating effectively. ⚖

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THE FIRST AMENDMENT—UNMASKED DURING A PANDEMIC

In 2020, Does an Uncovered Face Qualify as Symbolic Speech?

by Thomas J. Cafferty, Lauren James-Weir and Nomi I. Lowy

What do you think when you see someone who is not wearing a face mask during the COVID-19[1] pandemic? Do you feel the person is trying to convey a message by not wearing a mask? And, if so, what message? Is your opinion the same if you see that maskless person taking a walk alone in the park versus attending a crowded indoor rally? Newspapers, television, and social media are replete with examples of individuals who are now invoking the First Amendment as support for an argument that the government cannot force them to wear a face mask and that their refusal to wear a mask is constitutionally protected. But is the First Amendment even implicated by a person's decision not to wear a face mask? Does it matter whether the person intended to communicate a message by not wearing a mask or is it the understanding of those who witness the conduct that matters—or is it both? Or is it neither? And, even if the refusal to wear a mask is a

form of symbolic speech, can the government, nonetheless, require the wearing of face masks to protect public health and safety?

First Amendment

The free speech clause of the First Amendment to the United States Constitution provides that "Congress shall make no law…abridging the freedom of speech[.]"[2] While this pronouncement appears to be unconditional, it is well-settled that "the right of free speech is not absolute at all times and under all circumstances."[3]

A content-based law—one that targets speech based on its communicative content—is presumptively unconstitutional and may be justified only if the government proves that the law satisfies the strict scrutiny test, which requires that it be narrowly tailored to serve a compelling state interest.[4]

A content-neutral law is constitutional as a reasonable time, place, or manner restriction on speech when it is narrowly tailored to serve a significant governmental interest and it leaves open ample alternative channels for communication of the information.[5] Content-neutral laws can also constitutionally regulate symbolic speech, which involves a message delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.[6] The test, often referred to as an "intermediate"[7] level of scrutiny, used to evaluate the constitutionality of a regulation on symbolic speech differs little from the standard applied to time, place, or manner restrictions.[8] Specifically, symbolic expression may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.[9]

Symbolic Speech

Not all conduct that intends to express an idea can be labeled as "speech." As the Supreme Court has stated, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[10] So, when does conduct cross the line into the more highly protected area of symbolic speech? In *Spence v. Washington*, the Supreme Court determined that "the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression."[11] In that case, the Court also noted that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[12] The intent to convey a particularized message, however, is not a requirement for conduct to be deemed symbolic speech. "[A] narrow succinctly articulable message is not a condition of constitutional protection, which if confined to expressions convey a 'particularized message,'…would never reach the

…[E]ven if the refusal to wear a mask is a form of symbolic speech, can the government, nonetheless, require the wearing of face masks to protect public health and safety?

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unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[13] Since there is no requirement to convey a particularized message, it necessarily follows that there can be no requirement that a particularized message be understood by those who viewed it. Application of the Court's analysis in *Spence* may be complicated in some cases, given the Court's focus on the "factual context and environment" in which the conduct was undertaken and the Court's later determination that a particularized message is unnecessary to the symbolic speech analysis. The Court's focus on factors such as context and environment, which are constantly changing, leads to results that often shift with the times. The Court's determination that expressive conduct need not convey a particularized message creates another layer of complexity to the analysis of what constitutes protected symbolic speech. The question here is, can the refusal to wear a face mask during the current health crisis constitute more than mere conduct, crossing-over into the area of protected symbolic speech?

The Refusal to Wear a Face Mask During the COVID-19 Pandemic

There would seem to be little dispute that, before 2020, the act of wearing or not wearing a face mask in public would not be regarded as a form of symbolic speech. But this is 2020 and we are in the midst of a global pandemic, where masks may be viewed as more than mere face coverings and the refusal to wear a mask may be seen as deliberately expressive conduct. As the COVID-19 pandemic has evolved, so has the perception of many people regarding the use of masks. Whether it is due to the President's initial position with respect to wearing a mask, the varying beliefs as to the level of danger presented by COVID-19, or the objection of some people to the government telling them what to do with their bodies, the refusal to wear a face mask might now be seen as conveying a message, at least in some situations, although the exact nature of that message may be varied. Someone attending a rally or attempting to obtain service at a place of business that conspicuously requires face masks may be perceived, whether intended or not, as symbolically expressing a point of view, for example, "I support the President;" "COVID-19 is not that dangerous;" "my body, my choice." Those points of view might not be attributed to that person, however, if he or she is walking a dog early in the morning or speaking to a neighbor over the fence. The message being conveyed, to the extent there is one, depends upon the context. Because, during the COVID-19 pandemic, there appear to be circumstances in which the refusal to wear a face mask may be intended and/or perceived to convey a message, regulations requiring the wearing of face masks could be deemed as regulating symbolic speech—thus implicating the First Amendment. That does not necessarily mean, however, that those regulations are unconstitutional.

First Amendment Analysis of the Government's Requirement to Wear a Face Mask in Public During Pandemic

If the refusal to wear a face mask constitutes symbolic speech[14] subject to First Amendment protections, the requirement to wear a mask might, nevertheless, be defensible either as a time, place or manner restriction or as a regulation of symbolic speech.[15] In this regard, the government could argue that the requirement to wear a face mask in public is content neutral in that it regulates without regard to the substance or message of the expression. It could also be argued that the face mask requirement is imposed to prevent transmission of the virus and is, thus, within the constitutional power of the government to protect the substantial interest of public health and safety.[16] In support of its argument that the regulation is unrelated to the suppression of free speech, the government could point to the fact that the recommendations, which have evolved at least in some jurisdictions into requirements, to wear face masks were instituted before the refusal to wear them was asserted or understood to convey any message.

On the other side, a person refusing to wear a mask could argue that it is irrelevant that, when the recommendations/regulations were first enacted, the failure to wear a mask did not carry any speech component because the regulation must be evaluated giving consideration to the current environment in which, to many people, the refusal to wear a mask is intended and understood to convey a message. That person could also claim that the regulation is not narrowly tailored to the government's interest and, in fact, does not even advance that interest, arguing that there are situations in which the government does not require a face mask, such as when dining at a restaurant, and, since so little is known about the virus, there is a lack of sufficient evidence that social distancing alone is inadequate.

The government might respond by arguing that the requirement that a regulation be "narrowly tailored" does not mean that the regulation must be the least restrictive or least intrusive means.[17] Because the requirement of narrow tailoring is satisfied "so long as the … regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,"[18] the government could contend that it satisfies the "narrowly tailored" requirement, as the substantial government interest in stopping the spread of COVID-19 would be achieved less effectively without such a regulation.[19]

Another argument in support of the asserted First Amendment right not to

wear a face mask is that the regulation directly targets speech in that the refusal to wear a face mask conveys a message and the requirement to wear a face mask silences that very message. A counter to this argument is that there are alternative channels for communication of the messages that are conveyed by a person's refusal to wear a face mask—many of which would, arguably, be more readily understood to express the actual intent of the "speaker." For example, if the act of not wearing a face mask is intended to convey that the individual supports Donald Trump, that person could instead wear a MAGA hat or T-shirt evidencing support for the President.

Conclusion

It is clear that a person's innocuous conduct on one day can be deemed constitutionally protected symbolic speech on another. What is less clear is at what precise moment that occurs. It is safe to say that not wearing a face mask in 2019 was not a form of symbolic speech, as the act of not wearing a mask contained no expressive component that would have qualified the conduct for First Amendment protection. Everything changed in 2020, however.

What was deemed pure conduct in 2019—and every year before that—might now be deemed expressive speech entitled to First Amendment protection in the context of the global COVID-19 pandemic. That is because there is now a significant segment of the population refusing to wear masks in order to convey a message. And such conduct is, in fact, understood by many to convey a message—whether, for example, it be a message of support for the President, that COVID-19 is not that dangerous, or that the government does not have the right to tell citizens what to do with their bodies. The law does not require that it be a particularized message in order to qualify as symbolic speech. But where on the continuum from 2019 to 2020 does the act of not wearing a mask morph into protected symbolic speech? At what point did not wearing a face mask become reasonably understood to be communicative? Is it at the point where rather than simply being a person who does not wear a mask in 2019 that person is now ***refusing*** to wear a mask in a face of government regulation? Is the meaning intended by the person who refuses to wear the mask enough to blanket the conduct in First Amendment protection? What if the person did not intend to convey any message at all? Do a certain number of people have to understand or believe that a message is being conveyed before it qualifies as protected expressive speech? What is that number? What if the person refusing to wear a mask intends one message but it is perceived by others as another? Does it matter? How much weight is given to what the "speaker" intended? To the audience perceived? To the place where the conduct occurred?

It seems that the media coverage of those who have refused to wear a face mask and their reasons for that refusal has played a role in the developing meaning attributed to the failure to wear a face mask. The more the public is exposed to the stated motives of some people who refuse to wear a face mask, the more the public ascribes those motives to other people who are not wearing face masks. It also seems that context affects how we perceive an unmasked person. The intention to communicate a message seems clearer when the refusal to wear a mask occurs, for example, at an indoor political rally where masks are offered to those not wearing them. That scenario may lead to the conclusion that the lack of a face mask was an intentional refusal and meant to convey a message, rather than a mere oversight.

Perhaps it is because of the lack of a bright-line rule to determine whether conduct contains an expressive element that the Supreme Court has avoided that determination in some cases and simply assumed, for the purposes of the Court's examination, that the subject action constituted expressive conduct and then performed the appropriate constitutional analysis based on that assumption. Here, the analysis is even more complicated due to the fact that the symbolic nature of the refusal to wear a mask, to the extent it exists, only emerged within the last several months and what exactly that refusal means seems to be ever-changing. To illustrate, earlier in the year the failure to wear a face mask may have been intended and understood to convey a message of support for the President, whereas today, in light of the President's recent declaration that wearing a mask is patriotic,[20] the failure to wear a mask may carry a different meaning—or, ultimately, again, no meaning at all—thereby removing it from First Amendment protection altogether. ⚖

Endnotes

1. On Feb. 11, 2020 the World Health Organization announced an official name for the disease causing the 2019 novel coronavirus outbreak, first identified in Wuhan, China. The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions, Centers for Disease Control and Prevention, *available at* cdc.gov/coronavirus/2019-ncov/faq.html#:~:text=The%20new%20name%20of%20this,2019%2DnCoV%E2%80%9D (last visited July 24, 2020).
2. Although the First Amendment was originally directed only to action by the Federal Government, that distinction was eliminated with the adoption of the Fourteenth Amend-

ment and the application to the States of the First Amendment restrictions. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276–77 (1964).

3. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).
4. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).
5. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
6. *Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).
7. A lower level of scrutiny, rational basis review, is applied to state action neither involving fundamental rights, including the First Amendment, nor proceeding along suspect lines. *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993); *accord Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).
8. *Clark*, 468 U.S. at 298.
9. *O'Brien*, 391 U.S. at 376-77.
10. *Id.* at 376.
11. *Spence*, 418 U.S. at 409-10.
12. *Id.* at 410-11.
13. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).
14. The Supreme Court has on multiple occasions failed to decide the issue of whether the conduct in question constituted symbolic speech, instead simply assuming that the conduct constituted symbolic speech and that it was, therefore, entitled to First Amendment protections subject to an intermediate level of scrutiny. *See O'Brien*, 391 U.S. 367 and *Clark*, 468 U.S. 288.
15. If the refusal to wear a face mask is not deemed to be symbolic speech, the First Amendment is not implicated.
16. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000).
17. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).
18. *Id.* at 798-99.
19. Coronavirus Disease 2019 (COVID-19), Considerations for Wearing Cloth Face Coverings, *available at* cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html (last visited July 9, 2020).
20. Nicholas Reimann, *Trump Calls Mask Wearing 'Patriotic,' Tweets Photo Wearing One*, Forbes (July 20, 2020), forbes.com/sites/nicholas-reimann/2020/07/20/trump-calls-mask-wearing-patriotic-tweets-photo-wearing-one/#7d57089f1cbe

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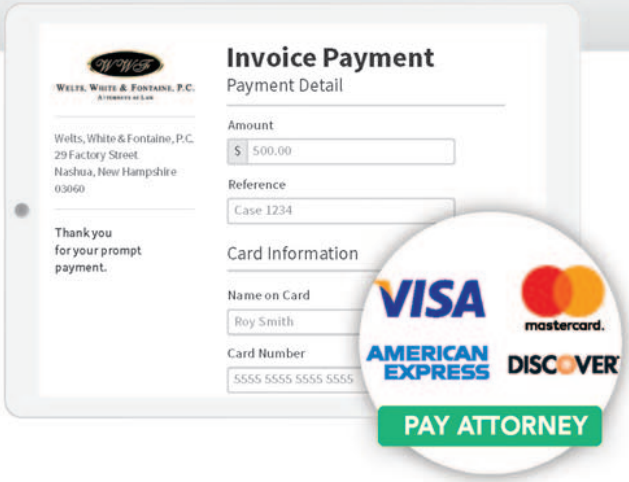

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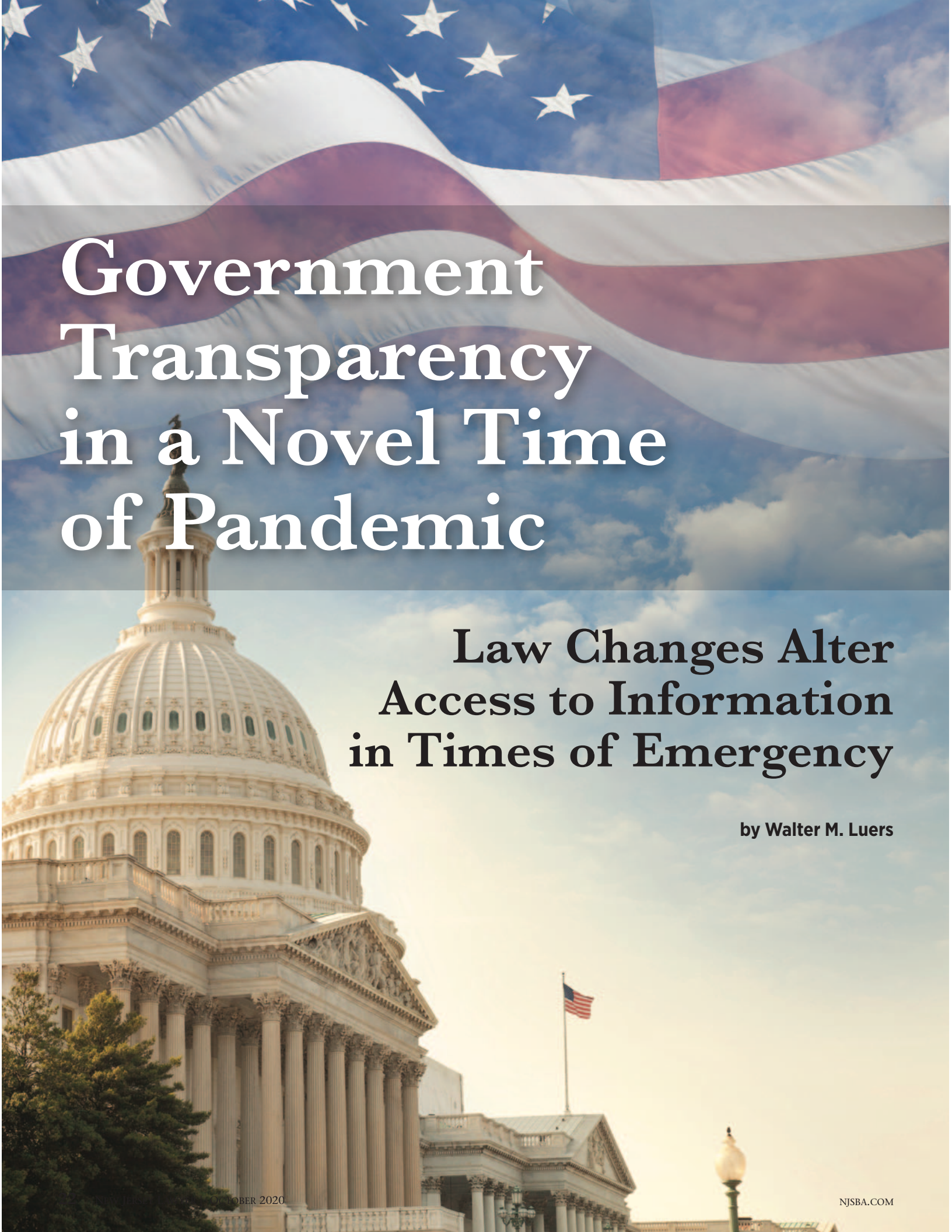

Government Transparency in a Novel Time of Pandemic

Law Changes Alter Access to Information in Times of Emergency

by Walter M. Luers

The current novel coronavirus crisis has focused transparency advocates and government watchdogs on two new changes in OPRA and OPMA, and a 2005 law, the Emergency Health Powers Act, which is being applied for the first time.

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On March 20, 2020, in the early days of the COVID-19 crisis, New Jersey amended the Open Public Meetings Act, N.J.S.A. 10:4-6 *et seq*. and the Open Public Records Act, N.J.S.A. 47:1A-1 *et seq*. Regarding OPRA, the State of New Jersey added one paragraph that modified the seven-business-day deadline for records custodians to respond to OPRA requests during an emergency.[1] The Legislature removed the deadline during times of emergency, instead requiring records custodians "make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter."[2]

The pandemic also brought to the foreground a 2005 law, the Emergency Health Powers Act, N.J.S.A. 26:13-1, *et seq*. As implied by its name, the EHPA is principally concerned with public health emergencies. However, one sentence in the EHPA excluded broad categories of records from public access: "Any correspondence, records, reports and medical information made, maintained, received or filed pursuant to this act shall not be considered a public or government record under [OPRA]."[3]

One criticism of the EHPA's constraint on access is that the limitations were simply not necessary under existing law. At the time the EHPA was passed, OPRA contained or incorporated restrictions on access to medical records,[4] security measures and techniques,[5] ongoing civil and criminal investigations,[6] information in which a person has a reasonable expectation of privacy,[7] records "concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency,"[8] and information and records of residents in long-term care facilities.[9] Due to the breadth of the limitation—"any correspondence, records, reports and medical information made, maintained, received or filed pursuant to this act"—nearly every record relating to the public health emergency is confidential.[10] Even statistical reports and analysis, such as the number of deaths at individual nursing homes and hospitals, which do not contain personally identifiable information, are non-public unless, in its discretion, public entities choose to release such information.

This is the opposite of transparency. Under OPRA, exemptions to access must be construed narrowly, subject to the exceptions contained within OPRA. In contrast, during the public health emergency, the government has applied the EHPA's records exemption broadly so as to exclude wide categories of records and information from public access.

In defense of the EHPA's restrictions on records access, public agencies may argue that when responding to OPRA requests during a health emergency, they should not be required to parse through a patchwork of applicable records exceptions contained within OPRA, other State statutes, State regulations, a fifty-seven-year-old executive order, and federal laws (*e.g.*, HIPAA's privacy rule). Notwithstanding, during a genuine emergency, records custodians have the right to deny an OPRA request if fulfilling the response would substantially disrupt agency operations and they have customarily requested extensions of time to respond, when needed.[11]

Nevertheless, the blanket exemption for records and information relating to any public health emergency has created a potentially insurmountable and permanent access barrier to important records that should be public. Even one of the EHPA's sponsors has stated that the records exceptions in the law were never intended to be as broad-reaching as they have proven to be during the current crisis.[12] That being the case, the Legislature should consider an amendment that limits denials of access to these records during an emergency, and subsequently makes the records available once the state of emergency is over (subject to other applicable exceptions).

Similarly, the state's hurried OPRA

amendment was also unnecessary under existing law. As discussed above, records custodians may deny access to records if fulfilling the request would substantially disrupt agency operations (provided that the records custodian first attempted to reach a reasonable resolution). Also, OPRA requires a response within seven "business" days, not calendar days. If an emergency forced the closing of a public agency's offices for a period of days or even weeks, that time would likely not count as "business days," thus tolling the records custodian's time to respond.

ble," suggests that upon receipt of a records request during a state of emergency, the records custodian must prioritize their response to OPRA requests above all other priorities.

However, in the context of OPRA, the phrasing "as soon as possible" in the law has not always translated into practice. Prior to this most recent amendment, the phrases "as soon as possible," "to the maximum extent possible" and "as expeditiously as possible" each appear once in OPRA. First, records custodians must grant or deny access to a record "as soon as possible, but not later than

rare, and no published decision provides a definitive rule for how quickly records custodians must deliver records. Records custodians who intend to rely on the new protections of the recent amendment should still do their best to provide a prompt initial written response, to establish a firm date for providing a final response, and to advise the requestor of the specific facts that justify prolonged time extensions. Requests for extensions that set no deadline for a reply or tie the response date to the lifting of an emergency declaration must be avoided, as they invite litigation. Agencies should

Agencies should expect requestors to ask courts to enforce the crisis-era law as it was written; judges who have had to carry on court business during the pandemic may be receptive.

Depending on interpretations of the amendment, it may impose a greater burden on records custodians to respond to OPRA requests. The coronavirus presents a broader and more problematic series of difficulties for records custodians: Government offices have been closed to the public, many public employees were required to work from home and/or self-quarantine, and access to records by remote means, especially paper records, was disparate. These facts are presumably the basis for the Legislature's decision to relieve public agencies of the requirement to respond to OPRA requests within seven business days and, instead, require that records custodians "shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter."[13] This language, "as soon as possi-

seven business days after receiving the request[.]" Second, the Government Records Council must "act, to the maximum extent possible, at the convenience of the parties [by utilizing] teleconferencing, faxing of documents, email and similar forms of modern communication[.]" Third, "All proceedings of the [GRC] shall be conducted as expeditiously as possible."[14] Frequent requestors and their attorneys know that access to records is regularly not granted or denied in seven business days. Rather, custodians request or, more generally, provide themselves response time extensions that well exceed seven business days. And while the GRC does permit parties to file documents via email and generally conducts mediations via teleconference, individual case adjudications often take several months or years.[15]

Litigation regarding response delays is

expect requestors to ask courts to enforce the crisis-era law as it was written; judges who have had to carry on court business during the pandemic may be receptive.

Additionally, on March 20, 2020, New Jersey made two key changes to OPMA. First, the amendment primarily granted public bodies the ability, during an emergency, to use a "means of communication or other electronic equipment" to "(1) conduct a meeting and any public business to be conducted thereat; (2) cause a meeting to be open to the public; (3) vote, or (4) receive public comment."[16] Second, the amendment granted authority to a public agency, during an emergency, to "elect to provide electronic notice [of a public meeting] and shall not be deemed to have violated any provision of law…in providing such electronic notice."[17] While it is an incremental advance in the law to allow public agencies to post

electronic notices of their meetings, there is no reason to limit this Legislation solely to times of emergency. Many agencies currently post their meeting notices online, and the public relies upon agency websites for such information. Thus, the burden would be low relative to the public benefits. Also, the Legislature does a disservice to the public when they relieve public agencies of the original obligation to transmit notice of the meetings to two newspapers under those circumstances. While public agencies are not required to advertise such meetings, and newspapers are not required to post those notices, many newspapers do. The New Jersey Press Association has a website dedicated to publishing a searchable database of public notices.[18] As more people rely on the internet and the use of personal devices to stay connected, especially in times of crisis, the OPMA should require electronic notice of meetings at all times, not just during an emergency.

Holding public meetings electronically is another good idea. However, the application should not be limited to times of emergency. For years, practitioners have acknowledged that public agencies could hold public meetings via conference call, provided that the public is given advance notice, the opportunity to listen, and the means to comment on the record. Any form of secret meeting (via conference call, internet, or in-person) or email is barred by the OPMA. Public meetings via conference calls have always been legal but have historically been difficult to administer. The concept of using platforms such as Zoom to allow the public to watch and participate in meetings remotely should be the permanent standard and not solely a prophylactic measure during emergencies. The Legislature should mandate the use of call and video conferencing technology to give the public live access to public meetings without having to attend them. On September 24, 2020, the Department of Community Affairs published "Emergency Remote Meeting Protocol for Local Public Bodies," N.J.A.C. 5:39-1, *et seq.*, which requires public bodies to provide the public "with similar access to a remote public meeting as members of the local public body," N.J.A.C. 4:39-14(c). However, these provisions only apply during a time of declared emergency. Public agencies should be required to give the public remote audio and video access when there is no emergency. Finally, to maximize access, meetings should be recorded electronically and permanently posted on public agencies' websites. ⚖

Endnotes

1. Both the OPRA and OPMA amendments dashed through the Legislature in four days without any public hearings or public input from stakeholders.
2. N.J.S.A. 47:1A-5(i)(2). The seven-business-day deadline is suspended during a state-wide state of emergency or state-wide public health emergency, or a state of local disaster emergency. *Id.*
3. N.J.S.A. 26:13-26.
4. Exec. Order 26 (McGreevey 2002).
5. N.J.S.A. 47:1A-1.1.
6. N.J.S.A. 47:1A-3(a).
7. N.J.S.A. 47:1A-1.
8. Exec. Order 9 (Hughes 1963).
9. N.J.A. C. 8:36-15.3(a) & 8:36-23.15.
10. An open issue is whether a record that relates to a public health emergency that is required to be made, maintained or kept on file by a law other than the EHPA would not be covered by the EHPA's exemption.
11. N.J.S.A. 47:1A-5(g).
12. *See* nj.com/coronavirus/2020/05/requests-for-nj-public-records-rejected-during-coronavirus-crisis-as-murphy-uses-little-known-law.html (last visited May 29, 2020).
13. N.J.S.A. 47:1A-5(i)(2).
14. N.J.S.A. 47:1A-5(i)(1); N.J.S.A. 47:1A-7(b) & (e) (respectively).
15. Legislation proposed this term would mandate that the GRC adjudicate "all disputes and complaints" in 150 calendar days. (S380).
16. N.J.S.A. 10:4-9.3(a). The amendment's language regarding what type of emergency triggers these provisions tracks the language in the OPRA amendment.
17. N.J.S.A. 10:4-9(b).
18. *See* njpublicnotices.com (last visited May 29, 2020).

COVID-19 'Stay at Home' Orders Provoke First Amendment Challenges

by C.J. Griffin and Howard Pashman

As state and local authorities scrambled in March and April 2020 to respond to COVID-19, a disease caused by the novel coronavirus, it became hard to explain to the public why houses of worship had restrictions that other places did not. In Louisville, Kentucky, drive-through liquor stores could operate, but drive-in churches could not. In Kansas, religious gatherings were limited to 10 congregants with an unlimited number of clerics, musical performers, and others leading a service, while detoxification centers, hotels, and libraries had no restrictions on the number of people who could gather. In Illinois, religious gatherings were limited to 10 people total, but large warehouses and stores selling recreational cannabis were not.

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Religious organizations around the country sued to enjoin these restrictions on the grounds that they violated the Free Exercise Clause of the First Amendment. Courts reached widely divergent conclusions on these cases, unable to agree even on the standard of review to apply. This article explores the issues that arose under the Free Exercise Clause when states imposed restrictions on gatherings to slow the spread of COVID-19. Those issues, in New Jersey and elsewhere, are unlikely to be fully resolved in the courts. They will be addressed through revised executive orders and policy decisions about how to balance public health and public sentiment.

How Courts Approach Free Exercise Challenges to COVID-19 Regulations

The Free Exercise Clause of the First Amendment, applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] This right, like others, can be regulated, particularly during a public health crisis. What is unclear is what standard of review applies to determine whether the restrictions that governors across the nation have placed upon religious gatherings are constitutionally permissible, and courts in different jurisdictions have come to different conclusions.

In *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905), the Supreme Court rejected a Fourteenth Amendment challenge to compulsory vaccination against smallpox. The Court reasoned that "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."[2] This principle is particularly true during a public health crisis because "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[3] However, the Court recognized that this power is limited: any law enacted to protect public health or safety must nonetheless be rejected if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[4] As concisely summarized by the Fifth Circuit:

> The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive." At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.[5]

Some courts have applied what might be called the *Jacobson* standard to Free Exercise challenges to COVID-19 regulations. This standard of review asks whether the restrictions on religious gatherings have a "real or substantial relation" to protecting public health, or if the regulations are "beyond all question, a plain, palpable invasion of rights."[6] These courts typically focus on the severity of the current public health crisis and affirm restrictions on religious gatherings.[7]

Some courts have applied a more traditional Free Exercise Clause analysis that gives no special weight to the fact that the challenged regulations were intended to address a pandemic. This view starts with the proposition that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[8] Thus, a neutral, generally applicable law that only incidentally burdens religious practice needs a rational basis.[9] Courts applying this form of scrutiny to COVID-19 restrictions ask whether the challenged law is facially neutral or if it specifically targets religion. In doing so, courts often focus on the fact that the regulations explicitly restrict religious practice while allowing a wide range of secular, commercial activity as essential—everything from manufacturing facilities to supermarkets, hardware stores to liquor stores.[10] The restrictions on religious gatherings that do not apply to "essential" businesses are cited as evidence that there is no rational basis for them. As one judge in the Western District of Kentucky put it, "If beer is 'essential,' so is Easter."[11]

Other courts have applied the rational basis standard but reached a different result. Instead of comparing the restrictions on religious gatherings to essential commercial activities to see if secular activity is treated differently, these courts compare religious gatherings to gatherings like concerts and sporting events. As one judge in the Northern District of Illinois saw it,

> retailers and food manufacturers are not comparable to religious organizations.... The key distinction turns on the nature of each activity. When people buy groceries, for example, they typically enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. The purpose of shopping is not to gather with others or engage them in conversation and fellowship, but to purchase necessary items and then leave as soon as possible. By comparison, religious services involve sustained interactions between many people.[12]

In this view, the fact that certain businesses can operate is irrelevant to the restrictions on religious gatherings and does not prove that those restrictions lack a rational basis.

The rational basis test only applies where the law is a neutral, generally applicable one that incidentally burdens religion. But "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[13] Thus, if a COVID-19 restriction targets religious practice, then it must pass strict scrutiny, which those restrictions rarely if ever have done. Courts applying strict scrutiny rely on the fact that the restrictions are not facially neutral since they expressly limit the number of people who can gather for religious purposes. Moreover, such courts cite the fact that religious gatherings are restricted in a way that "essential" businesses are not as evidence that the restrictions are not narrowly tailored. As one court put it when enjoining enforcement of an executive order by the Governor of Kansas, nothing suggests that "mass gatherings at churches pose unique health risks that do not arise at airports, offices, and production facilities."[14]

The U.S. Supreme Court appears as divided as the District Courts over these issues. A California church sought interlocutory injunctive relief from Gov. Gavin Newsom's executive order limiting houses of worship to 25% capacity, and the Court denied the application. Chief Justice Roberts—writing for Justices Kagan, Sotomayor, Ginsburg, and Breyer—relied on *Jacobson* in finding that political leaders have primary responsibility for protecting "the safety and health of the people" during a pandemic.[15] Chief Justice Roberts also suggested that California's restrictions on religious gatherings "appear consistent with the Free Exercise Clause" because "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[16]

On the other hand, Justice Kavanaugh—writing for himself and Justices Alito, Thomas, and Gorsuch—would have granted the application. Justice Kavanaugh applied strict scrutiny and found that the restrictions on houses of worship were not narrowly tailored: California lacked "a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."[17] According to Justice Kavanaugh, "[t]he basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[18] Thus, the Supreme Court appears divided, with some Justices relying on *Jacobson* in deferring to elected leaders to protect public health during a pandemic, and finding that restrictions placed on houses of worship should resemble those placed on gatherings like concerts and spectator sports; but other Justices applying strict scrutiny to gauge whether the restrictions are narrowly tailored by comparing them to limitations on retail businesses like restaurants, malls, and bookstores.

In sum, COVID-19 regulations, usual-

ly in the form of executive orders, are sometimes analyzed under the *Jacobson* standard, and other times through rational basis or strict scrutiny. Of course, the exact nature of the regulations affect how courts interpret them. But courts have not identified which type of scrutiny should be used in which circumstance. The result has been a patchwork of approaches, with some courts analyzing the regulations under multiple standards of review, perhaps to cover their bases.[19]

Resolving Disputes Over COVID-19 Restrictions

Despite the conflicting guidance from the courts, or perhaps because of it, Free Exercise challenges to COVID-19 restrictions have been resolved in other venues or have been mooted by new or revised executive orders. For instance, the plaintiffs challenging an executive order in Kansas voluntarily dismissed their suit when the order expired and was replaced by one that allowed in-person worship provided that the congregants observed social distancing.[20] Other governors amended their executive orders to address rapidly changing public health conditions. Officials in New York, New Jersey, and elsewhere relaxed restrictions on religious gatherings and other events as those states met certain benchmarks in reducing the spread of the virus.

In addition to the changing conditions in the spread of the virus, widespread social upheaval forced officials to reevaluate their positions on large gatherings. In particular, protests following the killing of George Floyd in Minneapolis forced leaders to reconcile their support for the racial justice protests with their desire to continue limiting gatherings to prevent a spike in infections. Large racial justice protests have happened in all 50 states and no state has issued citations for violating bans on gatherings.[21]

New Jersey is a case in point in how these political balances could have unintended constitutional implications. Gov. Phil Murphy's Executive Order 107, issued on March 21, 2020, prohibited all "gatherings of individuals" such as "parties, celebrations, or other social events" with limited exceptions.[22] Paragraph 2 of the same executive order permitted people to leave home for a "religious reason," though it was unclear where they might go since they could not create a "gathering of individuals" for religious purposes. Executive Order 142, issued on May 13, relaxed that broad restriction by providing that gatherings could take place if attendees stayed in their cars or if the gatherings were limited to 10 people.[23] On May 22, Executive Order 148 allowed outdoor gatherings of up to 25 people, not in their cars and excluding contact sports, provided attendees followed social distancing.[24] Thus, as the weather improved and the virus spread more slowly, New Jersey started to allow religious and other gatherings to resume as part of the "re-opening" of New Jersey.

The protests, however, changed the planned trajectory of re-opening by requiring Murphy to balance his support for the protests against his executive orders that made large gatherings illegal. On June 1, Murphy declared that "I support these protests and thank the thousands of people who peacefully and respectfully took part."[25] While such a view may be a sound and even laudable political position, it likely opens the door to Free Exercise challenges to his executive orders limiting gatherings. There would be no constitutionally permissible basis for Murphy or any other governor to enforce restrictions only against religious gatherings but not political ones simply because the governor agrees with the goals of the political gathering. To put the point even more starkly: Imagine 50 people attend a protest where they chant, pray, and are not ticketed. If those same people recite the same prayers and gather at church the next day, then they could be cited for it under the current executive order. This double standard could not pass constitutional muster, regardless of what type of scrutiny courts use.[26]

Perhaps recognizing his untenable position, on June 9, Murphy issued Executive Order 152, which recognized that "religious gatherings and political activity" are "particularly important to the functioning of the State and of society."[27] The new executive order permitted outdoor gatherings of up to 100 people with "an exception explicitly allowing outdoor gatherings of more than 100 persons for First Amendment-protected outdoor activities."[28] The same executive order allowed either 25 percent of a building's capacity or 50 people, whichever is lower, to gather indoors for religious purposes.[29] However, if New Jersey experiences a second wave of COVID-19 that requires tightening restrictions on gatherings all over again, then the Governor will need to navigate these legal shoals very carefully in order to avoid a First Amendment challenge similar to the one the Supreme Court recently addressed in California.

As the virus ebbs and flows, with its economic effects deepening, and as demands for wide-ranging social justice reform persist, political leaders will have to balance fundamental interests such as public health, the right to free speech, and the free exercise of religion. Given the murky state of the law, whether challenges to restrictions on religious gatherings are upheld by the judiciary will largely depend on the standard of review that the federal court in a particular jurisdiction applies. But more likely, most challenges will be resolved by amendments to executive orders due to changing circumstances or voluntary acknowledgment that the executive orders were problematic. ⚖

Endnotes

1. U.S. Const. Amend. I.
2. *Jacobson*, 197 U.S. at 26.
3. *Jacobson*, 197 U.S. at 27.
4. *Jacobson*, 197 U.S. at 31.
5. *In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (internal citations omitted).
6. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, Civ. Action No. 20-cv-02782, 2020 WL 2468194, at *3 (N.D.Ill. May 13, 2020) *aff'd*, No. 20-1811, 2020 WL 2517093 (7th Cir. May 16, 2020); *Cassell v. Snyders*, Civ. Action No. 20-C-50553, 2020 WL 2112374, at *6 (N.D.Ill. May 3, 2020).
7. *Elim*, 2020 WL 2468194, at *3; *Cassell*, 2020 WL 2112374 at *6.
8. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).
9. *Lukumi*, 508 U.S. at 531-32; *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).
10. *See, e.g.*, *First Baptist Church v. Kelly*, Civ. Action No. 20-1102-JWB, 2020 WL 1910021, at *7 (D.Kan. Apr. 18, 2020).
11. *On Fire Christian Center v. Fischer*, Civ. Action No. 3:20-cv-264-JRW, 2020 WL 1820249, *7 (W.D.Ky. Apr. 11, 2020).
12. *Cassell*, 2020 WL 2112374, at *9. *See also Elim*, 2020 WL 2468194, at *3; *Maryville Baptist Church v. Beshear*, Civ. Action No. 3:20-cv-278-DJH, 2020 WL 1909616, at *2 (W.D.Ky. Apr. 18, 2020) (comparing religious gatherings to concerts and sporting events, unlike the "singular and transitory experience" of shopping at supermarkets and big box stores), *rev'd*, 957 F.3d 610 (6th Cir. 2020).
13. *Lukumi*, 508 U.S. at 533.
14. *First Baptist*, 2020 WL 1910021, at *7. *See also On fire*, 2020 WL 1820249, at *7.
15. *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (quoting *Jacobson*, 197 U.S. at 38).
16. *Ibid.*
17. *Id.* at *2.
18. *Ibid.*
19. *See, e.g.*, *Elim Romanian*, 2020 WL 2468194, at *3-4.
20. *First Baptist Church*, Civ. Action No. 20-1102-JWB [ECF Doc. No. 60] (D. Kan. May 4, 2020).
21. Some jurisdictions have issued tickets to protesters for other reasons, such as violating curfews.
22. Gov. Murphy, Exec. Order 107 ¶5.
23. Gov. Murphy, Exec. Order 142 ¶¶4, 8.
24. Gov. Murphy, Exec. Order 148 ¶1.
25. Alex Napoliello and Brent Johnson, "Murphy commends peaceful protests in N.J., but says more needs to be done. 'Racism exists here.", NJ Advance Media for NJ.com (June 2, 2020), published at nj.com/politics/2020/06/murphy-commends-peaceful-protests-in-nj-but-says-more-needs-to-be-done-racism-exists-here.html.
26. Enforcing the executive order in church but not in a street protest would make the order particularly susceptible to the claim that it "regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532
27. Gov. Murphy, Exec. Order 107.
28. Matt Arco, "Churches, synagogues, and Mosques can reopen for indoor Services with New capacity limits, Murphy says," NJ Advance Media for NJ.com (June 9, 2020), published at nj.com/coronavirus/2020/06/churches-synagogues-and-mosques-can-reopen-for-indoor-services-with-new-capacity-limits-murphy-says.html.
29. Gov. Murphy, Exec. Order 107 ¶1.

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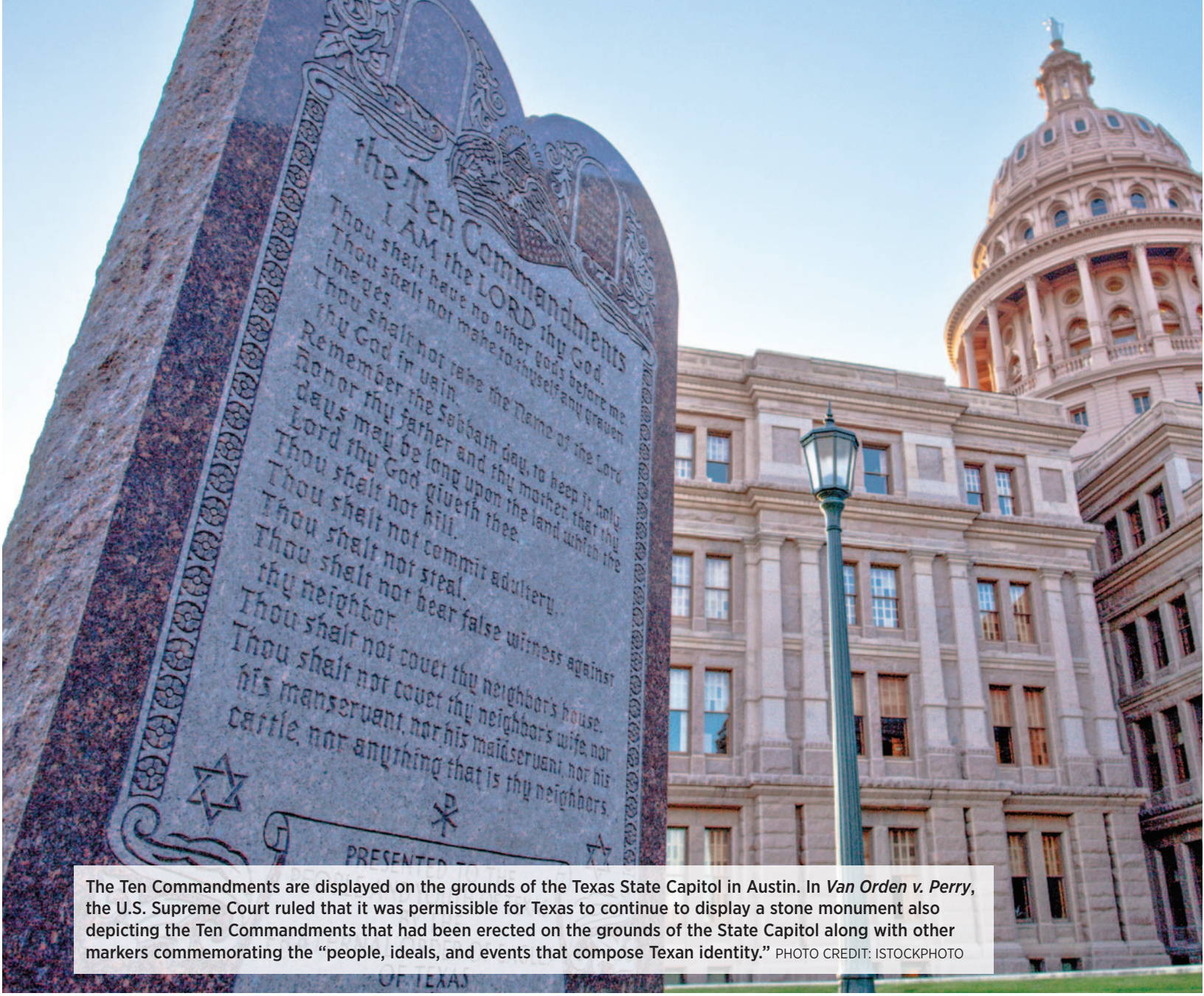

The Ten Commandments are displayed on the grounds of the Texas State Capitol in Austin. In *Van Orden v. Perry*, the U.S. Supreme Court ruled that it was permissible for Texas to continue to display a stone monument also depicting the Ten Commandments that had been erected on the grounds of the State Capitol along with other markers commemorating the "people, ideals, and events that compose Texan identity." PHOTO CREDIT: ISTOCKPHOTO

Religion Clause Jurisprudence at the Crossroads?

Court Interpretations on Displays are Evolving

by Ronald K. Chen

After several years in which the United States Supreme Court left relatively undisturbed the constitutional doctrines governing religious liberty, recent cases suggest that the Court may be nearing the precipice of adopting very different governing principles for both the Establishment and the Free Exercise Clause prongs of the First Amendment.

Establishment Clause

In the Establishment area, after a hiatus of 15 years, the Court reviewed a public religious display case in *American Legion v. American Humanist Association*.[1] In 1925, a 40-foot Latin cross was constructed by the American Legion in Bladensburg, Maryland, to honor the local servicemen that died during World War I. At the time it was built, the monument was on private land, but in 1961 the land was donated to a state agency which maintains the cross, now located in the median of a divided highway. The American Humanist Association challenged the memorial as violative of the Establishment Clause. The challenge was largely based on the Supreme Court's decision in *Lemon v. Kurtzman,*[2] in which the Court laid out a three-part test in gauging Establishment Clause challenges, *viz.*, does the challenged government action (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion? The district court, finding that the purpose of the memorial was primarily secular, upheld its constitutionality. The United States Court of Appeals for the Fourth Circuit, however, reversed and, focusing more on the second prong of the *Lemon* tests, found that although the purpose was secular, a reasonable observer would nevertheless have fairly understood the cross to have the primary effect of endorsing religion.

The last time the Court dealt with the constitutionality of public religious displays, it issued two judgments on the same day whose results were facially difficult to reconcile. In *McCreary County v. ACLU*,[3] the Court ruled in a 5–4 decision written by Justice Souter that the practice that had been adopted relatively recently by two Kentucky counties of posting the Ten Commandments in the county courthouses violated the Establishment Clause. Based on evidence of the history of the government's actions in this particular case, the Court concluded that the purpose was religious, not secular, without making a broader pronouncement on the constitutionality on the Ten Commandments in other settings. But in *Van Orden v. Perry*,[4] the Court ruled, also by a vote of 5–4, that it was permissible for Texas to continue to display a stone monument also depicting the Ten Commandments that had been erected on the grounds of the State Capitol along with other markers commemorating the "people, ideals, and events that compose Texan identity." The plurality opinion, written by Chief Justice Rehnquist, minimized the utility of *Lemon v. Kurtzman* in analyzing Establishment Clause cases generally, and public monuments and displays in particular, although it did not outright eliminate the *Lemon* tests.

Given the subsequent changes in the composition of the Court, some had speculated that the Court might take the opportunity in *American Legion v. American Humanist Association* to declare definitively that the three-part test of *Lemon v. Kurtzman* was now eliminated from its constitutional jurisprudence. In particular, Justice Alito had succeeded Justice O'Connor, whose prior opinions had reinforced the *Lemon* tests, and particularly the second prong of secular effect, which Justice O'Connor had further interpreted as requiring that a "reasonable observer" construe the challenged governmental action as demonstrating neither endorsement of nor

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hostility to religion. The analytical construct of a hypothetical "reasonable observer" being offended by a purportedly nonsectarian governmental display was particularly disagreeable to the late Justice Scalia, who believed that the Establishment Clause did not prevent government endorsement of religion generally, as well as Justice Thomas, who does not believe that the Establishment Clause should be made applicable to the states through incorporation by the Fourteenth Amendment.

It was mildly surprising, therefore, that the opinion announcing the judgment of the Court by Justice Alito in *American Legion v. American Humanist Association* did not formally consign *Lemon v. Kurtzman* to doctrinal oblivion, although even the most sanguine metaphor might be that it is currently on "life support." Although the ultimate judgment to permit governmental display of the Latin Cross received seven of nine votes (including Justices Breyer and Kagan), the only portion of the opinion that garnered an absolute majority of the Court based the result on the fact-intensive observation that over the passage of time the Bladensburg Cross, although undeniably a Christian symbol, had become uniquely associated with the fallen soldiers of World War I. "With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity." The Court thus found that with regard to religiously expressive monuments that had existed for many years, the passage of time itself gives rise to a strong presumption of constitutionality, and tearing down those monuments might in fact evince hostility toward religion.

The portions of the opinion that did discuss the continued vitality of *Lemon v. Kurtzman* noted that it had failed in its attempt to provide a universal framework by which to analyze all Establishment Clause challenges, and found it particularly inapt in considering challenges to religiously expressive public monuments and displays. Nevertheless, even these parts of the opinion did not reject *Lemon* outright leaving open the remote possibility that the perception of the hypothetical "reasonable observer" on whether government had endorsed religion might still be somewhat persuasive evidence of constitutionality.

It is clear that now the Court has little use for the "reasonable observer" analysis or the *Lemon* effects test generally in public religious displays cases. Rather, it will focus on the inquiry of whether the historical purpose behind the particular display in question, judged by fairly generous standards of hindsight, could be rationalized as secular. To the extent that the effects prong of the *Lemon* tests has any continued vitality, it may be in the school setting, where concern over the susceptibility of younger children to the perception of government endorsement of religion might continue to justify some restraints on organized religious activity that is reasonably perceived as communicating government endorsement or hostility.

Free Exercise

After the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*,[5] the so-called "peyote" case, the Free Exercise prong of the First Amendment appeared in many cases to be little more than a cautious redundancy to the Equal Protection clause. In holding that generally applicable laws, which did not target specific religious practices or establish a denominational preference, do not violate free exercise, the Court discarded the compelling interest test that it had previously used in free exercise cases since *Sherbert v. Verner.*[6] Cases in which the Court found a free exercise violation were those in which it found that the statute or government practice in question singled out religious activity for particular restrictions, such as *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[7] (city ordinance prohibiting ritual slaughter of animals was "gerrymandered with care" to only apply to religious killings). A subsequent attempt by Congress to reverse *Smith* by statute was held partially unconstitutional, as applied to the states, in *City of Boerne v. Flores*.[8]

In recent cases, however, the Court has been invited to narrowly construe and indeed outright overrule *Smith*. Notably, the proponents of this doctrinal change are often religiously affiliated entities or individuals who object to facially neutral secular laws that conflict with their religious beliefs, such as LGBT anti-discrimination laws. In the well-publicized case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[9] a cakeshop owner sought to avoid the proscriptions of Colorado's law forbidding discrimination on the basis of sexual orientation. The lower courts found the law to be generally applicable and neutral with regard to religious belief, and therefore upheld the statute under the principles of *Smith*. The Supreme Court, however, relying heavily on comments made by an individual member of the state civil rights commission which the majority thought exhibited hostility to religion, found that an anti-religion animus undergird the commission's actions enforcing the statute. By basing its judgment on a narrow fact-specific circumstance, however, the Court avoided making any major doctrinal changes.

This attention by some members of the Court to the possibility of subjective anti-religious animus motivating state laws was also evident in the case decided this term, *Espinoza v. Montana Department of Revenue*, in which a tax credit was available to parents who sent their child to private school. Montana's constitution, however, contained a "no aid"

Further indication of a possible willingness by at least some members of the Court to more readily discover anti-religious hostility based on extrinsic evidence can be found in the context of the COVID-19 pandemic.

provision to sectarian schools, and therefore the tax credit was not available to the plaintiff, and he sued under the Free Exercise clause. Although not facially discriminatory among religious denominations, the "no aid" clause did differentiate between religious and secular private schools, and the Court therefore distinguished *Smith* and applied the demanding standard of strict scrutiny. Montana claimed a compelling state interest in seeking to avoid violating the Establishment Clause, but since the Court has held in the past that the Establishment Clause is not violated when religious entities receive government benefits under a neutral program available to all similarly situated applicants, it found that such a compelling state interest was absent. Noting that a "State's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause," the majority narrowed the "play in the joints" between "what the Establishment Clause permits and the Free Exercise Clause compels."

The majority opinion written by Chief Justice Roberts also expanded the methods by which hostility to a particular denomination might be shown, through extrinsic evidence not derived from the text itself. It noted that the Montana constitutional prohibition against public aid to sectarian schools was modelled after the Blaine Amendment, a failed proposal in 1875 to amend the U.S. Constitution to explicitly prohibit such aid. Forty states eventually adopted a version of a "no sectarian aid" provision on their own (not including New Jersey, whose own version of a "no sectarian aid" clause was adopted decades earlier in the 1844 state constitution). The Court noted, citing secondary scholarly sources, that "it was an open secret that 'sectarian' was code for 'Catholic.'" The Blaine Amendment, the Court concluded, was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general." Although the Blaine Amendment itself failed, Roberts concluded that many of its state counterparts have a similarly "shameful pedigree."

Further indication of a possible willingness by at least some members of the Court to more readily discover anti-religious hostility based on extrinsic evidence can be found in the context of the COVID-19 pandemic. In *South Bay United Pentecostal Church v. Newsom*,[10] (on application for injunctive relief), a California church challenged the limitation imposed by Governor Gavin Newsom in his Phase IV reopening plan that live attendance at group activities such as lectures, concerts, movie showings, spectator sports, and theatrical performances, and explicitly including religious services, be limited to 25% of capacity. Plaintiff alleged that "similar" secular activities, such as grocery stores or indoor dining, were not so limited, and therefore the regulation discriminated expressly against religion. The state responded, in part, by claiming that there was no animus against religious activity, that church attendance was grouped together with *comparable* indoor secular activities, and that other secular activities did not involve prolonged periods of large audiences singing and reciting, which activities presented enhanced risk of virus transmission.

The Court denied the motion by a 5–4 vote. Chief Justice Roberts filed a carefully nuanced opinion, noting that the judgment on appropriate measures to combat the virus is a "dynamic and fact-intensive matter subject to reasonable disagreement," and "in areas fraught with medical and scientific uncertainties," the latitude given to government officials "must be especially broad." Justice Kavanaugh, joined by Justices Thomas and Gorsuch, however, filed an opinion that was less willing to afford that latitude, and implicitly rejected the state's assertion that the limitation imposed on churches was also imposed on "comparable secular businesses." Justice Kavanaugh posed rhetorically, "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" The opinion is thus notable in that it demonstrates those justices' willingness to look behind governmental expertise in characterizing the danger of contagion in particular settings, and thus to require more evidence in order to dispel the suspicion that the regulation was based on anti-religious animus.

In a case that has been accepted but not yet argued, *Fulton v. City of Philadelphia*,[11] the petition for *certiorari* explicitly

invites the Court to revisit *Smith*. In *Fulton*, the city's anti-discrimination laws forbade city contractors from discriminating on the basis, *inter alia*, of sexual orientation or identity. When Catholic adoption agencies confirmed that, because of their religious views on marriage, they would not work with gay couples, the city's human services agency ceased referring foster children to them. The Third Circuit, in affirming the denial of a preliminary injunction, concluded that the Catholic agencies were not being singled out for adverse treatment because of their religious character, and therefore applied *Smith* according to its terms. Whether the Court will accept this invitation is an open question whose answer may substantially redirect the flow of Free Exercise clause analysis.

At the very end of the Court's Term, in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*,[12] it decided consolidated cases that significantly expanded the "ministerial exception," under which religious entities are immunized from enforcement of government employment regulations, including anti-discrimination laws. Plaintiffs were teachers in parochial schools, one of whom alleged termination based on her age in violation of the Age Discrimination in Employment Act, and another who claimed she was terminated after she had requested a leave of absence to obtain breast cancer treatment, in violation of the Americans with Disabilities Act. The Court found in a 7–2 decision that the Free Exercise clause affirmatively prohibited application of those statutes to religious institutions, even though they were of general applicability. The Court expanded the ministerial exception beyond titular clergy to include those whose functions include "responsibility in elucidating or teaching the tenets of the faith."

In defining the scope of the "ministerial exception," the Court found that the title of the employee is not dispositive, and that "a variety of factors may be important." The Court concluded that "What matters, at bottom, is what an employee does." Justice Thomas, in his concurrence, would have gone further and explicitly required "civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'" Justice Sotomayor in dissent, joined by Justice Ginsburg, criticized the majority for tacitly adopting Justice Thomas's reasoning. She wrote, "because the Court's new standard prizes a functional importance that it appears to deem churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp."

Morrissey-Berru may therefore be a telling indicator of whether the Court is in fact willing to revisit its Free Exercise jurisprudence and, contrary to *Smith*, make the clause the source of affirmative constitutional immunity against neutral government regulation, rather than merely a passive shield against government discrimination against religion. If so, then the Court may also need to develop more objective doctrinal tests to determine the boundaries of this new affirmative protection.

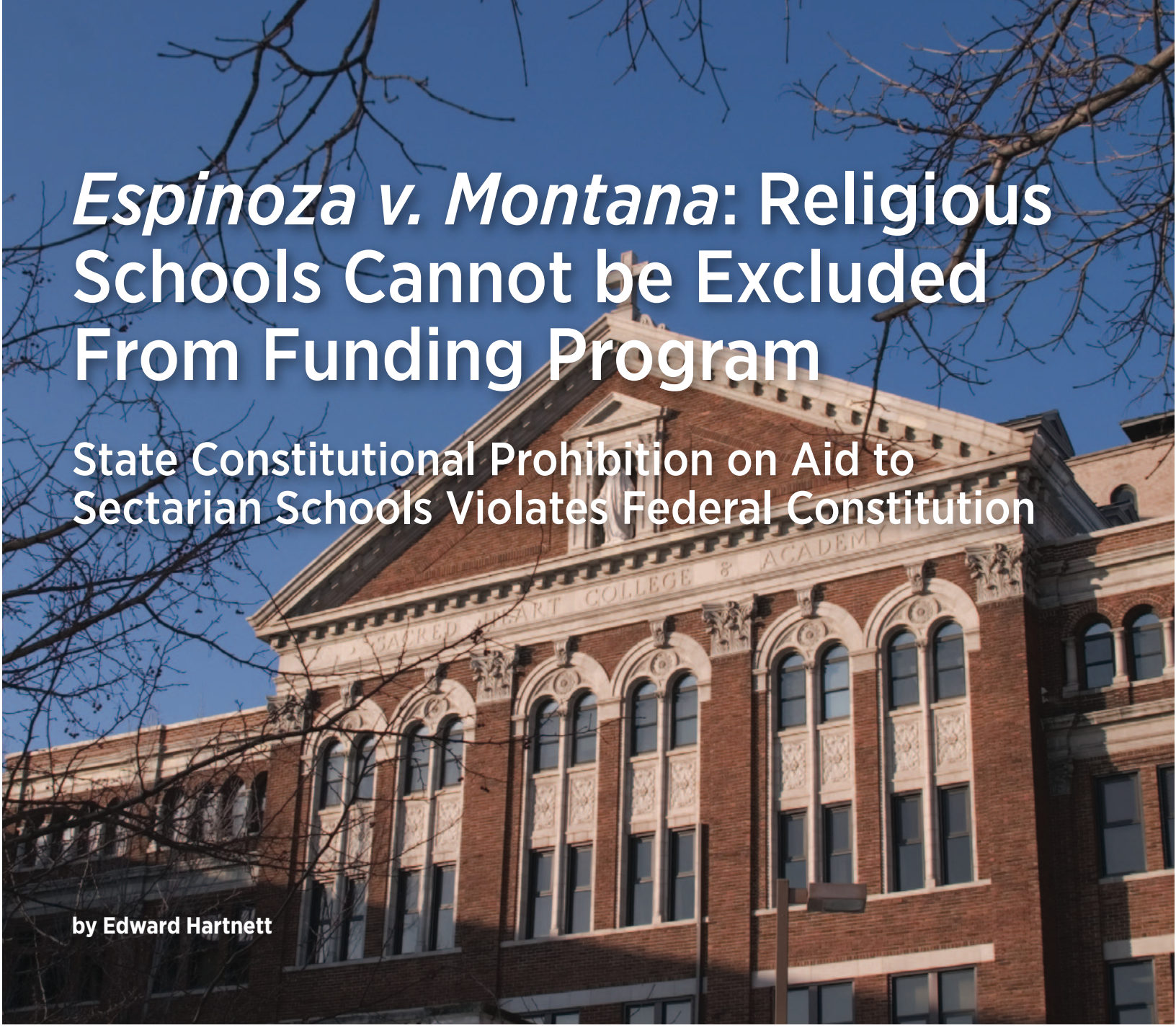
New Jersey Religion Clause Analysis

New Jersey's state constitutional provisions on religious freedom have traditionally been construed as coterminous with their federal counterparts. But in *Freedom From Religion Foundation v. Morris County Bd. of Chosen Freeholders*,[13] our state Supreme Court did give independent meaning to N.J. Const. (1947) Art. I ¶3, which forbids use of public money for "building or repairing any church or churches, place or places of worship." Thus, the Court forbade use of state historical preservation funds to repair 12 churches. Although the state program was neutral and available to a broad array of primarily secular uses, our court distinguished *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[14] (Free Exercise clause forbids discrimination against religious entities in provision of secular government benefits), based on the distinction that, unlike the playground recreational equipment at issue in *Trinity Lutheran*, "the public funds awarded in this case actually went toward 'religious uses,'" *i.e.*, the repair of churches.

Presaging the historical analysis in *Espinoza,* the New Jersey Supreme Court noted that the Religious Aid Clause, N.J. Const. (1947) Art. I ¶3, long predated the Blaine Amendment of 1875, and indeed had its roots in the 1776 New Jersey Constitution. Moreover, since the 1844 New Jersey Constitution, the text of the Clause has omitted reference to the governing body's *purpose* in providing the aid, and is limited to the objective inquiry of the *use* to which public funds are put. Whether this distinction will be sufficient to shield New Jersey's Religious Aid Clause from federal Free Exercise clause infirmity is another open question that awaits further explanation by the United States Supreme Court as it revisits the contours of its Free Exercise jurisprudence. ⚖

Endnotes

1. 139 S.Ct. 2067 (2020).
2. 403 U.S. 602 (1971).
3. 545 U.S. 844 (2005).
4. 545 U.S. 677 (2005).
5. 494.U.S. 872 (1990).
6. 374 U.S. 398 (1963).
7. 508 U.S. 520 (1993).
8. 521 U.S. 507 (1997).
9. 138 S.Ct. 1719 (2018).
10. 140 S.Ct. 1613 (May 29, 2020)
11. No. 19-123 (petition for *certiorari* granted Feb. 24, 2020)
12. 2020 U.S. LEXIS 3547 (U.S. July 8, 2020)
13. 232 N.J. 543 (2018)
14. 137 S.Ct. 2012 (2017)



Espinoza v. Montana: Religious Schools Cannot be Excluded From Funding Program

State Constitutional Prohibition on Aid to Sectarian Schools Violates Federal Constitution

by Edward Hartnett

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In *Espinoza v. Montana*, the Supreme Court held that while a "State need not subsidize private education," once it "decides to do so, it cannot disqualify some private schools solely because they are religious."[1] This requirement is imposed by the Free Exercise Clause of the United States Constitution (applicable to the states by the Fourteenth Amendment), and a state constitutional provision barring aid to sectarian schools cannot stand in the way.[2] This decision calls into question similar state constitutional provisions around the country, including in New Jersey.

Majority opinion builds on *Trinity Lutheran* and distinguishes *Locke*

Espinoza involved a Montana state tax credit for donations to student scholarship organizations; those organizations in turn awarded scholarships for tuition at private schools. The Court built on its 2017 *Trinity Lutheran* decision, which held that a church-owned preschool could not be excluded, simply because it was church-owned, from a government grant program to resurface playgrounds.[3] *Espinoza* thus made clear that despite a footnote in *Trinity Lutheran*—pointedly not joined by two of the six justices in the majority in *Trinity Lutheran*—that this nondiscrimination principle is not limited to playground resurfacing or similar safety measures.[4]

Readers who do not follow First Amendment case law closely (especially older readers who vaguely remember trying in vain to make sense of what forms of aid to religious schools the Supreme Court used to prohibit and permit)[5] might be wondering about the Establishment Clause of the United States Constitution. Much has changed since the 1970s. The Court in *Espinoza* noted that parties did not argue that including religious schools in the scholarship program would violate the Establishment Clause, and added, "Nor could they. We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs. Any Establishment Clause objection…here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools."[6]

As a result, the federal question in the case was not whether Montana was *permitted* to include religious schools—it plainly was—but rather whether it was *obliged* to include religious schools. The leading precedent supporting the conclusion that the First Amendment permitted, but did not oblige, Montana to include religious schools was *Locke v. Davey*.[7] *Locke* emphasized that "there is room for play in the joints" between the Establishment Clause and the Free Exercise Clause.[8] It upheld a Washington scholarship program that provided money for postsecondary education, including at accredited religious schools, but prohibited students from using the scholarships to pursue degrees in devotional theology.

Chief Justice Roberts, writing for five justices in *Espinoza*, distinguished *Locke* on two grounds.[9]

First, the student in *Locke* was denied a scholarship because of what he proposed to do with the money: prepare for the ministry. He was not prohibited from using the scholarship because he was religious, or even because the school he sought to attend was religious. By contrast, Montana barred aid to religious schools simply because they were religious.[10]

Second, there was a longstanding tradition, going back to the founding, of opposition to government funding to support church leaders. No similar tradition going back to the founding "supports Montana's decision to disqualify religious schools from government aid."[11] From the founding through at least the early 19th century, government at all levels (local, state, and national) "provided financial support to private schools, including denominational ones."[12] The Court acknowledged that "a tradition against state support for religious schools arose in the second half of the 19th century," but viewed many of the no-aid provisions added to state constitutions at that time as similar to the failed Blaine Amendment—born of bigotry against Catholics—and "hardly evince[ing] a tradition that should inform our understanding of the Free Exercise Clause."[13]

Concurring opinions illuminate the path forward

Two concurring opinions, written by Justices who joined Chief Justice Roberts' opinion for the Court, help shed light on how these distinctions may affect later cases.[14] In one, Justice Gorsuch noted his doubts about whether Montana's discrimination is better described as based on religious status or religious activity, but emphasized that "it is not as if the First Amendment cares" which description is more accurate.[15] That's because the constitutional "guarantee protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly."[16]

Chief Justice Roberts' opinion did not take issue with this view, but simply observed, "Some Members of the Court…have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status."[17] Thus, while future decisions might try to draw a line between religious status and religious use, it is readily foreseeable that this way of distinguishing *Locke* might be abandoned.[18]

In another concurring opinion, Justice Alito's elaborated on the connections between the Blaine Amendment, anti-Catholicism, and the state constitutional provisions barring aid to sectarian schools, including the Montana provision.[19] To illustrate the point, he included a "famous cartoon, published in Harper's Weekly in 1871, which depicts Catholic priests as crocodiles slithering hungrily toward American children as a public school crumbles in the background."[20] He explained that

the common school movement at the time was not designed to be religiously neutral, but rather to "establish a system that would inculcate a form of least-common-denominator Protestantism,"[21] that "Catholic and Jewish schools sprang up because the common schools were not neutral on matters of religion,"[22] and that these Catholic and Jewish schools were labeled "'sectarian'—that is, people who had separated from the prevailing orthodoxy."[23]

Significantly, the majority did not rely on this history as its reason to condemn the Montana provision. Instead, the majority pointed to (a highly-abbreviated version of) this history only as a reason to reject the argument that there was a suitably deep tradition analogous to the one in *Locke*. This means that it will not be enough to uphold a state provision to show that its origins are untainted by anti-Catholic bigotry. Even no-aid provisions without any connection to the Blaine Amendment are at risk.

Dissenting opinions and the nature of judicial review

Justice Ginsburg, in a dissent joined by Justice Kagan, took a rather different approach, an approach that requires attention to another aspect of the case. The Montana statute at issue did not discriminate between secular and religious private schools. The Montana Supreme Court held that the state statute, by including religious schools, violated the Montana constitution, and concluded therefore that the state statute could not be applied at all. Under that holding, neither religious schools nor secular private schools would benefit. For this reason, Justice Ginsburg concluded that since "secular and sectarian schools alike are ineligible for benefits,…the decision cannot be said to entail differential treatment based on petitioners' religion."[24] From this perspective, because "the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety," there "simply are no scholarship funds to be had."[25]

The image of a court "striking down" legislation is common but unfortunate, because it misrepresents what courts do. Instead, when a court is confronted with two laws that purport to govern a case, it has to apply a rule of decision to determine which to apply; when it decides that one law that purports to govern a case is trumped by a higher law that purports to govern the case, it decides the case in conformity with the higher law, disregarding the lower law. In deciding the case, the Montana Supreme Court did not "strike down" the state statute; it decided the case in conformity with the state constitution, disregarding the state statute. But in doing so, it failed to heed a still higher law, the United States Constitution. As Chief Justice Roberts explained:

> The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." "This Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law." Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregarded" the no-aid provision [of the state constitution] and decided this case "conformably to the Constitution" of the United States. *Marbury v. Madison*, 5 U.S. 137, 178 (1803)."[26]

Deciding the case while disregarding the no-aid provision meant deciding the case in accordance with the state statute.

It is difficult to imagine that Justices Ginsburg and Kagan would apply their approach if the Montana legislature had (say) provided a tax break for married couples (gay and straight) and the Montana Supreme Court invalidated the tax break for all couples because the statute violated Article 13, section 12 of the Montana constitution. That section provides, "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Is there any doubt that Justices Ginsburg and Kagan would see that the United States Constitution, as interpreted in *Obergefell*,[27] prohibited the state court from relying on that state constitutional provision to hold the state statute invalid?

It is true that, in general, violations of equality can be remedied by levelling up or levelling down,[28] so that the Montana legislature remains free to remedy the federal constitutional violation by eliminating tax credits for all private schools, and would be free to eliminate tax breaks for all married couples. But what a state court cannot do is to decide a case in conformity with a state law that cannot validly be applied because of superior federal law.[29]

Impact in New Jersey

The New Jersey Constitution provides:

> No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.[30]

In a decision issued after *Trinity Lutheran* but before *Espinoza*, the New Jersey Supreme Court held that a Morris County historic preservation program

that funded repairs to historic buildings violated this provision by including churches.[31] The Court concluded that this constitutional provision "was not inspired by the 'Blaine Amendment'; nor was it a response to anti-immigrant or anti-Catholic bias.[32] Instead, the Court traced the current constitutional language to the 1776 Constitution, noting that while some rights in the 1776 Constitution were limited to Protestants, "the freedom from being compelled to fund religious institutions through taxation—including the repair of churches…was not limited to Protestants."[33] The New Jersey Supreme Court also relied on the distinction between religious status and religious use.[34]

Under *Espinoza*, however, the absence of a connection to the Blaine amendment is not enough. And while the distinction between religious status and religious use was not abandoned in *Espinoza*, it is threatened. As a result, whether New Jersey's "no tithe" provision can be validly applied may depend on the extent to which the funding at issue in a particular case is within a suitably deep tradition analogous to the one in *Locke*. ⚖

Endnotes

1. *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2261 (2020).
2. The Montana Constitution provides:

   > Aid prohibited to sectarian schools.... The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

   Mont. Const., Art. X, § 6(1).
3. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).
4. *Id.* at 2024 n.3. ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination").
5. For example, in *Wolman v. Walter*, 433 U.S. 229 (1977), "a shifting plurality struck down public aid (1) for remedial services, including speech, hearing, and psychological diagnosis and therapy, by public employees on the premises of religiously affiliated schools; (2) for the loan of instructional materials and equipment to students at religious schools; and (3) for transportation from religious schools to secular sites for field trips. The plurality sustained programs involving textbooks, standardized tests and grading, diagnostic services by public employees on the premises of religious schools, and remedial services by public employees off of those premises (even in portable classrooms parked at the curb)." Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 Pepp.L.Rev. 681, 686 (2001) (footnotes omitted). "[C]ommentators of every jurisprudential stripe, on and off the Court, have criticized this line of cases for their incoherence and inconsistency. Perhaps the best-known comment on the decisions came from Senator Daniel Patrick Moynihan, who observed that the Court had approved books for students in religious schools but not maps, and inquired what the Court would do with an atlas— 'a book of maps.' " *Id.* at 686–87 (footnotes omitted).
6. *Espinoza*, 140 S.Ct. at 2254.
7. 540 U.S. 712 (2004).
8. *Id.* at 718–19 (internal quotation marks and citation omitted) ("In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").
9. Justices Breyer, Kagan, and Sotomayor found *Locke* controlling. *Espinoza*, 140 S.Ct. at 2284 (Breyer, J., joined by Kagan, J., dissenting) ("The majority finds that the school-playground case, *Trinity Lutheran*, and not the religious-studies case, *Locke*, controls here. I disagree"); *Espinoza*,140 S.Ct. at 2296 (Sotomayor, J., dissenting) ("Properly understood, this case is no different from *Locke*").
10. *Espinoza*, 140 S.Ct. at 2257.
11. *Id. at 2258*.
12. *Ibid.*
13. *Id.* at 2259.
14. A third concurring opinion, written by Justice Thomas and joined by Justice Gorsuch, stated, "Properly understood, the Establishment Clause does not prohibit States from favoring religion." *Espinoza*, 140 S.Ct. at 2264 (Thomas, J., concurring).
15. *Espinoza*, 140 S.Ct. at 2276 (Gorsuch, J., concurring).
16. *Ibid.*
17. *Id.* at 2257.
18. "None of this is meant to suggest that we agree…that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Ibid.*
19. *Espinoza*, 140 S.Ct. at 2268 (Alito, J., concurring) ("Named after House Speaker James Blaine, the Congressman who introduced it in 1875, the amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants."). Justice Alito was motivat-

ed, in part, by the Court's rejection of his argument in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), about the constitutionality of non-unanimous juries. *See ibid.* (Alito, J., concurring) ("I argued in dissent that this original motivation, though deplorable, had no bearing on the laws' constitutionality because such laws can be adopted for non-discriminatory reasons, and "both States readopted their rules under different circumstances in later years. But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here").

20. *Id.* at 2269.
21. *Id.* at 2271 (internal quotation marks and citation omitted).
22. *Id.* at 2272.
23. *Ibid.*
24. *Espinoza*, 140 S.Ct. at 2279 (Ginsburg, J., dissenting).
25. *Ibid. See also Espinoza*, 140 S.Ct. at 2293 (Sotomayor, J., dissenting) (stating that "there is no longer a program to which Montana's no-aid provision can apply").
26. *Espinoza*, 140 S.Ct. at 2262 (Roberts, C.J.) (citations and brackets omitted). *See Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2351 n.8 (2020) (Kavanaugh, J., announcing the judgment) ("The term 'invalidate' is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced.... To be clear, however, when it 'invalidates' a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large. Instead…the Court recognizes that the Constitution is a 'superior, paramount law,' and that 'a legislative act contrary to the constitution is not law' at all. [*citing Marbury*] The Court's authority on this front 'amounts to little more than the negative power to disregard an unconstitutional enactment.' *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)").
27. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).
28. "[W]hen the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1698 (2017) (internal quotation marks omitted) (*citing Heckler v. Mathews*, 465 U.S. 728, 740 (1984) and *Iowa–Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931)).
29. Justice Sotomayor claimed that the "Montana Supreme Court remedied a state constitutional violation by invalidating a state program on state-law grounds, having expressly declined to reach any federal issue," *Espinoza*, 140 S.Ct. at 2292 (Sotomayor, J., dissenting). But a state court cannot simultaneously enforce a state law and decline to reach a party's contention that federal law prohibits the application of that state law. A state law ground cannot be an adequate and independent ground supporting a judgment in the face of an argument that federal law makes that State ground invalid as applied to the case. *See Edward A. Hartnett, Summary Reversals in the Roberts Court*, 38 Cardozo L.Rev. 591, 618 (2016) (discussing the summary reversal of a state court decision and noting that "[o]f course, the decision did not rest on adequate and independent state grounds, because it could not reach the judgment it did without rejecting the merits of the federal claim," despite the state court's explicit statement that it rested on adequate and independent grounds).
30. N.J. Const. (1947) Art. I ¶ 3.
31. *Freedom from Religion Found. v. Morris Cty. Bd. of Chosen Freeholders*, 232 N.J. 543 (2018).
32. *Id.* at 561.
33. *Id.* at 556. The Court made much of the change from "for *the purpose of* building or repairing any church" in the 1776 Constitution to "for building or repairing any church" in the 1844 Constitution. *Id.* at 565–66 ("The clause does not ask about the governing body's intent—that is, whether the authorities meant to fund repairs to churches, to preserve history and promote tourism, or both. In fact, the change from the 1776 Constitution to the 1844 Constitution removed the bracketed phrase… [the purpose of]. Thus, for most of its existence, the Religious Aid Clause has banned public funding to repair a house of worship without regard to some other non-religious purpose") (citations omitted). This conclusion seems doubtful: The word "for" has long meant "with the object or purpose of." *See* Oxford English Dictionary definition 8(a) (providing examples back to Beowulf).
34. *Freedom From Religion*, 232 N.J. at 575. ("This case does not involve the expenditure of taxpayer money for non-religious uses, such as the playground resurfacing").

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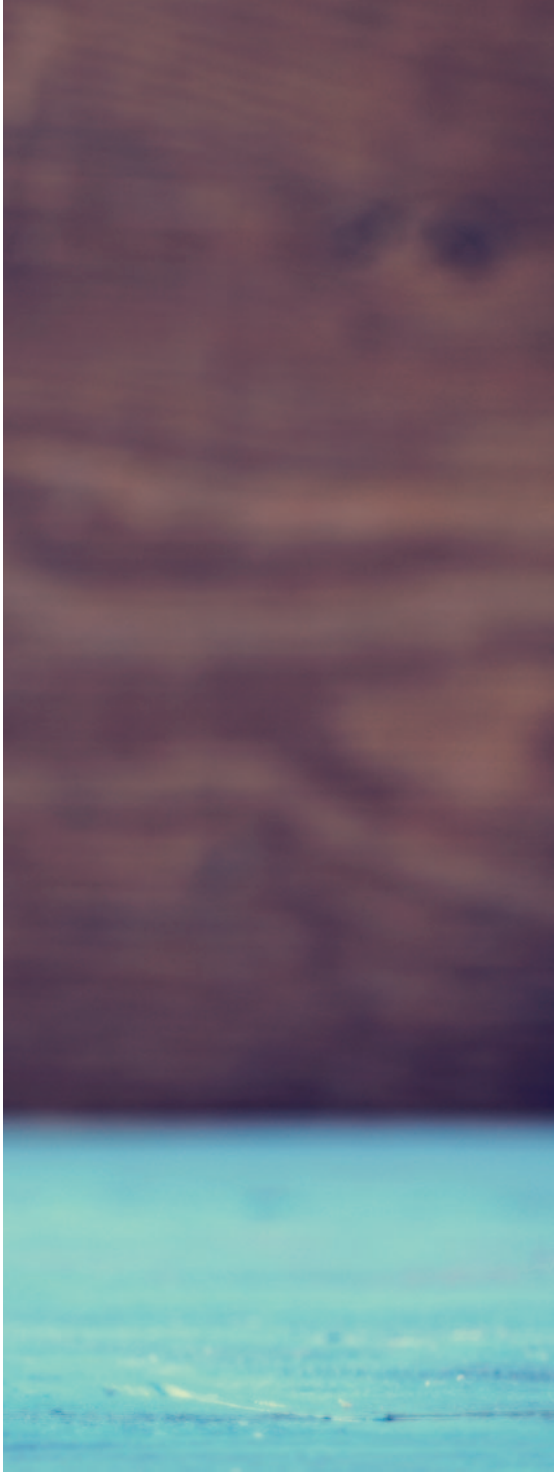
WHAT JOKES ARE OK TO SAY?

CASE RULINGS TEND TO PROTECT HUMOR INVOLVING INCONGRUITY, PARODY

by Laura E. Little



Few would debate that comedy is important—if not crucial—to full appreciation of life. Comedy provides a way to have fun, to create community and personal connections, to release tension, and to critique others' actions in a light-hearted way. But few would debate that comedy also can push boundaries of social and moral propriety as well as injure the human dignity of others.

These latter qualities most directly implicate the First Amendment. After all, we do not have a First Amendment to ease the path for expression that society generally endorses and celebrates. Such expression does not need well-forged constitutional doctrine to guard against attempts to muzzle it. Rather, the First Amendment's key function is to protect expression that many do not like: Expression that faces social condemnation and government's attempts to suppress.

So what does this First Amendment function mean for comedy? The connections are vast. Remarkably, however, a cross-section of First Amendment cases reveals consistent patterns in the statutory and case law. Not only are the patterns inherently interesting, but they also unveil principles that can guide practitioners of comedy (comedians), those who decide whether to provide a forum for comedians (night club owners, university presidents, and the like), and those who guide comedians to avoid legal trouble and who handle whatever legal problems comedians may create (lawyers and judges).

The Three Categories of Comedy

A useful way to identify humor regulation patterns comes from three theories of comedy developed by centuries of philosophers, psychologists, literary scholars, and other thinkers. This tripartite collection of theories describes comedy's different types and recognizes that a single joke can reflect more than one of the theories.

The concept that enjoys the longest lineage is superiority theory. Identified by the likes of Aristotle, Plato, Socrates, and Cicero, superiority theory describes that type of aggressive humor that disparages and ridicules others, often for the purpose of uplifting the sense of value and well-being enjoyed by the individual who delivers the humor. Next is incongruity theory, which posits that comedy rises from the juxtaposition of two unlikely phenomena. Incongruous jokes usually involve surprise: Starting with a set up that builds one type of expectation followed by a punchline or twist that delivers an unexpected resolution to the set up. Finally is release theory. Developed by Freud, this theory holds that humor often taps into repressed sources of pleasure, anxiety, discomfort, and pressure. The notion here is that jokes can provide a vehicle for releasing or relieving nervous energy that builds up in the human psyche. Release humor often occurs in the context of taboo or unpleasant topics, such as excrement, death, sex, and incest.

Patterns Emerge in a Variety of Contexts

A review of a cross-section of cases in a variety of legal contexts reveals remarkable consistency in the type of humor that First Amendment case law prefers. The conclusion? The more that a communication reveals some kind of incongruence—

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the more likely First Amendment principles will protect the humor from legal regulation.[1] (Legal regulation can, of course, come in a variety of forms, such as administrative fines, civil liability, and criminal culpability). By contrast, jokes and other quips that contain strong elements of release humor and superiority humor are much more likely to run into legal trouble. One can read this pattern as follows: Judges like jokes with incongruous references or structures, and deploy First Amendment doctrine to protect these jokes from legal regulation. Four diverse contexts illustrate this pattern: Administrative regulation, trademark infringement, common law civil suits for dignitary harms, and Title VII sexual harassment suits.

Administrative Regulation

A vivid example of administrative comedy regulation comes from one of the most classic First Amendment cases dealing with comedy, *FCC v. Pacifica Foundation*.[2] *Pacifica* addressed whether the First Amendment would allow the FCC to use a fine to punish a daytime radio feature of comedian George Carlin delivering his "filthy words" routine, which has now come to be called "Seven Dirty Words You Can Never Say on Television." This routine has much to commend it: It is clever, performed with impeccable timing, and delivers a lacerating critique of censorship rules. A strong case could be made that the routine deserved constitutional protection as it deployed carefully crafted satire of our government. But the U.S. Supreme Court disagreed, stating that Carlin's monologue was indecent, which the Court described as reflecting "nonconformance with accepted standards of morality."[3] As such, this case well illustrates the principle that the First Amendment does not tend to "step up to the plate" to protect release humor: The FCC was at liberty to regulate this routine because it riffed on scatological and sexually oriented topics.[4]

Trademark Infringement

Moving to trademark law, one finds a different orientation. First Amendment case law in the area of trademark infringement shows a marked preference for incongruity humor. This manifests most strikingly in the federal trademark infringement cases addressing trademark parodies.

Trademark infringement laws are designed to protect against harm both to consumers who may be misled into buying something they did not expect and to trademark owners who lose sales to the alleged infringer. To guard against customer confusion, courts evaluate whether consumers may be unable to distinguish between a protected product and a challenged product or communication. Where does humor come in? Alleged infringers often claim that their product or communication is a parody of the product with the protected mark.

The trademark infringement cases only sporadically invoke the First Amendment, sometimes relying solely on the federal trademark infringement statute. In both lines of cases, however, courts evaluate the parody claim by analyzing whether consumers would regard the allegedly infringing product as consistent (congruent) with the qualities and purposes of the protected product. If a consumer would likely conclude that the alleged infringing product is too outlandish or implausible to be consistent with the original, the court finds that customer confusion is unlikely and protects the alleged infringer from liability. This inquiry requires courts to answer questions such as the following: Would a profit-maximizing owner of the protected mark produce this allegedly infringing product, or would it be ridiculous to assume the owner would do such a thing?

The bottom line here is that courts are more likely to protect trademark parodies when incongruity characterizes the allegedly infringing product. Remarkably, these trademark courts use a definition of parody that maps the definition followed by literary theorists. As explained by courts, a true parody "must covey two simultaneous—and contradictory—messages: That it is the original, but also that it is *not* the original."[5] Put differently, a true parody has to be "a takeoff, not a ripoff."[6] Parodies are the essence of incongruity humor.

Courts have used this reasoning to evaluate a broad array of products that parodists have marketed using something close to or identical to a classic, protected logo. Pet fragrance marketed under the name "Timmy Holedigger" (rather than Tommy Hilfiger),[7] posters of a pregnant Girl Scout (rather than a scout who honored the slogan to "be prepared"),[8] and Lardashe jeans (rather than Jordache jeans)[9] all join the many litigated parodies.

Although the preference in favor of an incongruity approach is strong, incongruity analysis sometimes fails to win courts' inclination to protect alleged parody. Consider the court's finding that a sex toy manufacturer created a likelihood of confusion over the General Electric trademark. In finding liability for a product labeled "Genital Electric," the court suggested that a consumer might reasonably conclude that General Electric—a manufacturer of household products—would affix the same logo to a *dildo* that it would affix to a washing machine.[10] Did the court seriously embrace this reasoning? Perhaps the court's real concern was that General Electric was injured by the unsavory nature of the parody, which sullied its revered trademark.

To the extent that the *General Electric* court was motivated by a desire to regulate release humor in the form of a sex toy, the motivation was – at the time – consistent with the federal law prevent-

In one case, the U.S. Supreme Court held unconstitutional the Trademark Office's refusal to register the trademark "Slants" for a group of Asian American musicians who chose the name for the purpose of re-appropriating a racial slur and using it as a signal of power in work depicting the reality of the Asian American experience.

ing the Patent and Trademark Office from registering "immoral, deceptive, or scandalous" marks.[11] Interestingly, however, recent U.S. Supreme Court decisions have since disapproved that law, thereby protecting trademarks that the Trademark Office had judged immoral or disparaging. In one case, the U.S. Supreme Court held unconstitutional the Trademark Office's refusal to register the trademark "Slants" for a group of Asian American musicians who chose the name for the purpose of re-appropriating a racial slur and using it as a signal of power in work depicting the reality of the Asian American experience.[12] The other case concerned an application to register the trademark "FUCT" that was used for a line of edgy streetwear expressing an outlaw ethos.[13] On one hand, the Supreme Court's use of the First Amendment to protect these marks signals a shift from regulating release humor such as the *General Electric* and the George Carlin decisions. On the other hand, however, the two trademark registration cases are also aligned with the incongruity preference. Both "Slants" and "FUCT" have an ironic, satirical quality, making them close cousins of incongruity humor.

Dignitary Harms

Moving away from trademark into the law of dignitary harms, one sees that the incongruity and parody themes continue. Take for example the U.S. Supreme Court's decision in *Hustler v. Falwell*.[14] *Hustler* arose out of a Hustler magazine ad parody that depicted Reverend Jerry Falwell describing his first sexual experience *with his mother in an outhouse*. Falwell sued the magazine for intentional infliction of emotional distress. The Supreme Court blocked recovery on First Amendment grounds, citing the notion that one could not reasonably have interpreted this parody as suggesting real facts. In so doing, the Court's opinion reads as a love letter to parody and its importance to American culture.

First Amendment opinions in defamation cases reflect a similarly protective instinct toward parody and a focus on whether statements are so absurd (*i.e.*, incongruous) that they cannot be reasonably interpreted as factual. Defamation defendants often try to avoid liability by claiming their offending statement was "just a joke," which was clearly not meant to suggest facts. One line of First Amendment analysis evaluates this defense by asking whether the offending statement deserves to avoid liability because it was a mere "rhetorical hyperbole" or "vigorous epithet."[15] Another line of First Amendment cases take the position that constitutional protection attaches to humor that is "opinion" rather than something that a reasonable reader or fact finder could interpret as suggesting real facts.

The fact/opinion dichotomy has proven problematic. First, courts have had a devil of a time segregating the two because of general philosophical difficulties in defining truth. This problem is exacerbated in the comedy context, since comedy is often powerful because it resonates with a listener's unique understandings and beliefs. For example, comedy frequently comments on perceived characteristics of particular demographic groups. Whether these characteristics truly exist or deserve mockery is often contingent on varying social perceptions and biases. In addition, most fundamental to the problem distinguishing fact and opinion: Few would doubt that many a truth is said in jest. Does that mean that any grain of truth channels a joke down the liability-creating "fact" chute, rather than the constitutionally protected "opinion" chute?[16]

Sexual Harassment

The final example of cases where the First Amendment touches humor regulation- sexual harassment—also implicates varying social perceptions of propriety and truth. Cases evaluating Title VII liability for hostile work environment discrimination often evaluate whether a barrage of sexually oriented jokes changes the conditions of employment for the jokes' target. The First Amendment implications of this humor regulation have largely stayed in the background of these Title VII claims. The U.S. Supreme Court, however, has addressed the issue in *dictum*, suggesting that the First Amendment tolerates Title VII's prohibition on "sexually derogatory" speech because the prohibition targets the effects of conduct, not the content of the speech itself.[17]

Despite their dearth of First Amendment analysis, the actual Title VII cases evaluating sexual humor claims reveal an interesting pattern—largely consistent with the incongruity preference in other legal contexts more directly informed by First Amendment principles. Specifically, liability is more likely in sexual harassment cases that feature unadorned superiority and release humor, including quips such as:

- "congratulations on your success with the sale…. What did you do, promise the guy…some [sex] Saturday night?"
- "She's sitting on a gold mine."

In contrast, workplace high jinx that has an element of linguistic humor is less likely to inspire sexual harassment liability:

- Marking up a woman's desk calendar to change the word "happiness'" to "penis;"
- Changing a woman's reference from prosciutto ham to "prostitute ham;"
- Referring to rubber bands as "rubbers."

One might argue that courts treat this latter group of quips differently because they demand an additional analytic step to understand than do straightforward, raunchy jokes. In this group, the listeners must first read the quip and then double back to determine how an original expression was changed. Perhaps this extra step inspires a form of mental stimulation that helps to insulate them from the sexual impulses and wounded feelings that Title VII seeks to remedy. Notably as well, the quips contain puns, a form of humor rich with incongruity. Like pure incongruity humor, puns work best when they connect drastically disparate phenomena. Looking to the future, one wonders whether the pattern in the sexual harassment joke cases will continue if the case law adjusts to societal change arising from the #MeToo movement.

What Accounts for the Incongruity Preference?

A number of possibilities explain the preference of lawmakers and judges for incongruity humor. Starting on a fundamental level, one might hypothesize that incongruity in jokes is the quality that triggers the shared "funny bone" of all humans, including the lawmakers and judges who must undertake the daunting task of evaluating when to restrict mirth-making. This notion aligns with those humor scholars who insist that incongruity is a necessary element of all comedy, arguing that incongruity makes it more likely that a joke contains either laughter-inspiring thrill of surprise or other mental stimulation.

In similar fashion, one could argue that the incongruity preference is consistent with a shared understanding of what is funny. This understanding presumably derives from social norms—norms that lawmakers and judges incorporate in their decision-making. Such a hypothesis aligns with many areas of First Amendment doctrine, which looks to matters such as historical understanding of expressive symbols and local community standards for navigating knotty freedom of expression issues.

Finally, and perhaps most cynically, is the possibility that the law's incongruity preference derives from the common demographics, class status, and educational background of legal decision makers. Could it be that jokes packed with incongruity appeal to the intellectualism favored by those who tend to attain the power to influence law?

Whatever the explanation, the First Amendment embodies one admonition requiring decision-makers to pause when considering laws that restrict humor: We must avoid punishing speech simply because it does not appeal to our tastes or sensibilities. If the First Amendment stands for anything, it is that we—as a people—are free to believe an expression is in bad taste but should also know that this opinion does not necessarily mean that the expression should be illegal. ⚖

Endnotes

1. For a detailed discussion of this conclusion, see Laura E. Little, *Regulating Funny: Humor and the Law,* 94 Cornell L.Rev. 1236 (2009).
2. 438 U.S. 726 (1978).
3. *Id.* at 740.
4. For those who forget, the seven dirty words spoken in the monologue were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits
5. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007).
6. *Nike, Inc. v. "Just Did It" Enter.*, 6 F.3d 1225, 1228 (7th Cir. 1993).
7. *Tommy Hilfiger Licensing, Inc. v. Nature Labs*, LLC, 221 F.Supp.2d 410 (S.D.N.Y. 2002).
8. *Girl Scouts of U.S. v. Personality Posters Mfg. Co.*, 304 F.Supp. 1228, 1230 (S.D.N.Y. 1969).
9. *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987).
10. *GE v. Alumpa Coal Co.*, 205 U.S.P.Q. (BNA) 1036, 1036–37 (D.Mass. 1979).
11. 15 U.S.C. §1052(a) (2012).
12. *Matal v. Tam*, 137 S.Ct. 1744 (2017).
13. *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019).
14. 485 U.S. 46 (1988).
15. Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise*, 21 Southern California Interdisciplinary Law Journal 95, 121-123 (2011).
16. *Id.* at 124-132.
17. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992).

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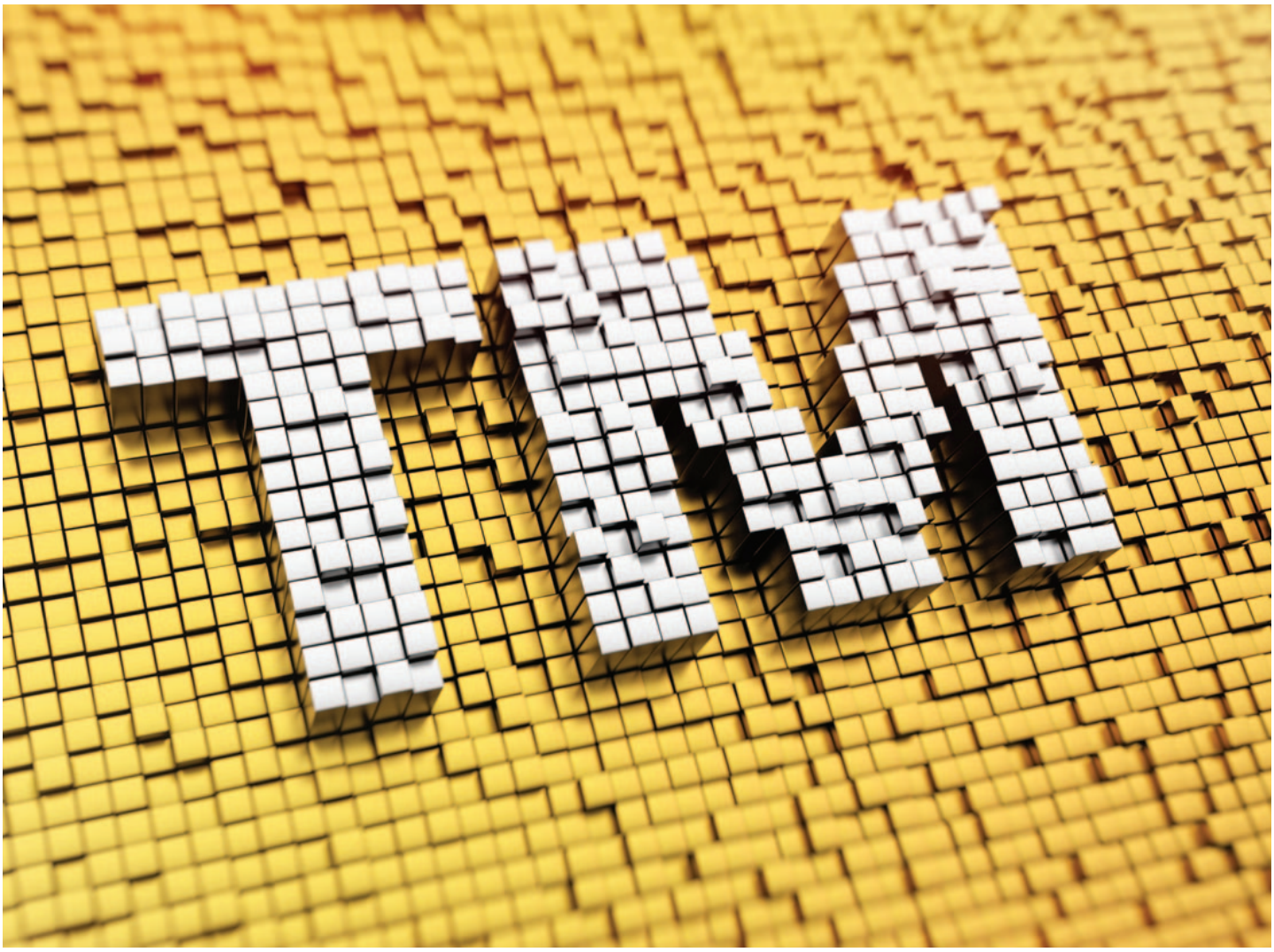

Instead of Clarifying Trademark Law, *Brunetti* Provides the Roadmap for Future Uncertainty

by John C. Connell and Anthony M. Fassano

In a pair of trademark cases, separated by only short spans of time and statutory text, the United States Supreme Court has managed to frustrate an opportunity to clarify First Amendment jurisprudence related to commercial/non-commercial speech.

Tam

Three years ago, the United States Supreme Court decided *Matal v. Tam*, which involved a facial challenge to 15 U.S.C. §1052(a), the disparagement clause of the Lanham Act.[1] The lead singer of a musical group consisting of Asian Americans sought a trademark for their group's name, "The Slants."[2] The term is a derogatory reference to people of Asian descent, and the group's goal in choosing the name was "reclaim[ing]" and "tak[ing] ownership" of the stereotype.[3] The trademark application was denied by the Patent and Trademark Office (USPTO) because it found the term offensive under the two-part administrative test applied under the disparagement clause.[4] The applicant challenged that decision in the Federal Circuit Court of Appeals which after *en banc* review reversed the denial of registration on the ground that the disparagement clause violated the First Amendment.[5] The Solicitor General successfully petitioned for *certiorari* on the sole question of whether the disparagement clause was "facially invalid under the Free Speech Clause of the First Amendment."[6]

The decision affirmed the Federal Circuit's ruling that the disparagement clause was unconstitutional, but the splintered opinion did little to clarify the state of the jurisprudence. All eight justices agreed that the disparagement clause did violate the Free Speech Clause because it violated "the bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[7] The Court also uniformly rejected the Solicitor's argument that the mark constituted government speech, characterizing that as a "huge and dangerous extension" of that doctrine.[8] Four justices then rebuffed the Solicitor's arguments based on theories of "government subsidy" and "government program," while making passing reference to the supposedly analogous "public forum" doctrine.[9]

However, the Court then dodged an important issue: Whether a trademark constitutes commercial speech, and, relatedly, whether a trademark regulation is subject to strict or intermediate scrutiny.[10] In addressing this issue, Justice Alito, joined by three other justices, noted that many "trademarks have an expressive component" (as "The Slants" unquestionably had in this case). Despite prior precedential holding—that speech is fully protected where its commercial and non-commercial components are "inextricably intertwined,"[11] and commercial speech is "no exception" to the rule that content and viewpoint discrimination are subject to "heightened scrutiny"[12]—Justice Alito declined to decide the issue simply because the disparagement clause could not withstand even the commercial speech standard of intermediate scrutiny.[13] The primary government interest asserted to justify the disparagement clause was to prevent underrepresented groups from exposure to demeaning messages.[14] But this interest, as Justice Alito correctly pointed out, amounts to viewpoint discrimination and "strike[s] at the heart of the First Amendment."[15] The term may be offensive to some, but "[g]iving offense is a viewpoint."[16] In this regard, the disparagement clause was nothing more than a "happy talk clause."[17]

A concurring opinion, authored by Justice Kennedy and joined by Justices Ginsburg, Kagan, and Sotomayor, more definitively addressed the question of the appropriate level of scrutiny to apply.[18] According to Justice Kennedy, the disparagement clause embodied "the essence of viewpoint discrimination,"[19] which is subject to "rigorous" or "heightened" scrutiny.[20] This analysis is proper because the government is signaling out speech reflecting a specific subset of views (*e.g.*, negative views toward a racial group), while allowing speech expressing the opposite idea.[21] The danger of this approach is that it could "silence dissent and distort the marketplace of ideas."[22] "To permit viewpoint discrimination in this context is to permit Government censorship."[23] As if to chastise the author of the main opinion, Justice Kennedy asserted that the undeniable existence of viewpoint discrimination "renders unnecessary any extended treatment of the other questions raised by the parties."[24]

Justice Thomas added a separate concurrence, essentially stating that strict scrutiny was appropriate under the circumstances.[25]

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Brunetti

Two years later, the Court decided to hear a sequel, which many observers hoped would allow the Court to close the loop left open by *Tam*. The new case, *Iancu v. Brunetti*, involved a challenge to another provision of 15 U.S.C. §1052(a), the immoral and scandalous clause.[26] The trademark application at issue in *Brunetti* was for a clothing line named "FUCT,"[27] a dicey acronym for the far more innocuous phase, "Friends U Can't Trust." Unlike the trademark in *Tam*, FUCT operates exclusively as a source identifier with no obvious non-commercial message, and thus is more aligned with commercial speech than the music group name, "The Slants." However, the underlying objection to both trademarks is the same: offensiveness (at least to the sensibilities of some listeners).

This case presented the Court with the opportunity to precisely define the appropriate level of scrutiny to apply to trademark regulations. The Court did not do so. What's more, the case generated four concurring and dissenting opinions, which have the potential to further muddy the waters.

Brunetti, unlike *Tam*, did produce a majority opinion. Justice Kagan, joined by five justices, began by reading the terms "immoral" and "scandalous" together, as was the practice of the Patent and Trademark Office.[28] This reading differed from the approach advocated by the government, which no doubt sensed the uphill battle it would have defending the ban on "immoral" speech.[29] In the government's view, the "scandalous" ban applies to different trademarks than the "immoral" ban.[30]

Justice Kagan went on to apply the reasoning of both opinions in *Tam* with the elegance of a simple syllogism. Both opinions agreed that a viewpoint-based trademark regulation is unconstitutional.[31] Both opinions agreed that the disparagement clause was viewpoint-based.[32] The majority in *Brunetti* found that the immoral and scandalous clause was also viewpoint-based.[33] Therefore, the immoral and scandalous clause was unconstitutional.[34]

Justice Alito, the author of the main *Tam* opinion, joined the majority opinion, agreeing that the terms "immoral" and "scandalous" must be read together and struck down as a violation of the First Amendment.[35] But he wrote separately to express his view that Congress could write "a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas."[36] Under this hypothetical statute, FUCT could be denied trademark registration.[37] According to Justice Alito, the term "is not needed to express any idea," and "generally signifies nothing except emotion and a severely limited vocabulary."[38] To register a trademark like this "serves only to further coarsen our popular culture."[39]

Chief Justice Roberts and Justices Sotomayor and Breyer concurred in part and dissented in part. All three agreed with the government's position that the terms "immoral" and "scandalous" should be read separately, and that a ban on immoral trademarks is unconstitutional, but that the term "scandalous" could be sufficiently narrowed to pass constitutional muster.[40] Under this narrowed statute, FUCT could be denied a trademark.[41]

The three opinions used slightly different terms to describe the speech that could be constitutionally prohibited under a ban on scandalous trademarks. For Chief Justice Roberts, the ban could be directed at "obscene, vulgar, or profane" trademarks.[42] Justice Breyer used "highly vulgar or obscene" to express the same idea,[43] while Justice Sotomayor used "vulgar, profane, or obscene words and images."[44] Such a ban would pass constitutional muster because it would not be directed at the content of speech, but rather at its mode of expression.[45]

Thus, four justices were willing to uphold a sufficiently narrow statute that would have allowed the Patent and Trademark Office to deny a trademark for FUCT. They effectively invited Congress to amend the statute to meet this standard. It could also encourage state and local governments to enact regulations to curtail speech that it deems obscene, vulgar, or profane.

Aftermath

By its own admission, the Court in *Tam* "could not agree on the overall framework for deciding the case."[46] While both opinions in *Tam* and *Brunetti* reaffirm the principle that the First Amendment does not tolerate viewpoint discrimination, the concurring and dissenting opinions in *Brunetti* leave open the question of under what circumstances could the government have a sufficient interest in regulating speech? *Tam* suggests that, even under intermediate scrutiny, preventing disparaging speech that expresses ideas that offend is not a valid government interest. "Giving offense is a viewpoint."[47] Immoral and scandalous marks are as capable of offending as disparaging marks. If "happy talk" cannot be the object of government regulation, it is difficult to see how "civil talk" can be. But the *Brunetti* minority appears willing to find a valid and enforceable government interest in rewarding civility in commercial discourse. This underscores the importance of Justice Alito's avoidance of the commercial/non-commercial speech dichotomy in *Tam*: Through that gaping hole emerged the *Brunetti* minority, and the real potential for future speech regulation.

The obvious danger of this approach is that it places the emphasis not on the speech itself, but rather on the effect that the speech has on the audience. Audiences, however, are not monolithic; the listeners' varied experiences mean that the speaker's words can affect them differently. Moreover, as Justice Breyer points

out, "the list of offensive swear words has changed over time."[48] This is because individuals' attitudes toward particular words change over time. The effect of particular words varies across time and across listeners, and the chance that some speech may be offensive will lead to regulation of the speech almost certainly infringing the speaker's First Amendment rights. This runs counter to the principle that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," a statement the Court has reiterated several times in the 50 years since *Street v. New York*.[49]

Inherent in the approach of the four concurring and dissenting opinions in *Brunetti* is a value judgment about the speech in question. In Justice Alito's opinion, the speech "serves only to further coarsen our popular culture," and thus that value is very little.[50] The speech in *Tam*, on the other hand, was political and anti-racist, and thus could be said to be more "valuable" than the speech in *Brunetti*. But, as Justice Alito pointed out in *Tam*, laws against speech found offensive by some "can be turned against minority and dissenting views to the detriment of all."[51]

Under these circumstances, is it properly the role of government to be making these value judgments in regulating speech? Would it be possible to characterize unpopular speech as lacking a viewpoint, so that prohibitions on such speech would not amount to viewpoint discrimination? If so, how firm is the First Amendment's "bedrock" protection for offensive speech? Would the language used in *Tom Sawyer* pass a government civility code? Should the government be the arbiter of popular culture at all, or should that be the sole responsibility of the populace from which that culture springs? Is that not precisely what has occurred in the case of the Washington Football *Redskins*, whose name survived legal scrutiny (riding *Tam*'s coat-tails) only to now die after being subject to the trial of public opinion? And is it not that same public marketplace, rather than government, that the First Amendment exclusively recognizes as the crucible of ideas?

In the wake of these decisions, the issue of the appropriate level of scrutiny to apply to trademark regulations is unanswered. In fact, it remains to be seen what effect the majority versus minority opinions in *Brunetti* will have on the confluence of the First Amendment and trademark law. So long as the distinction between commercial and non-commercial speech endures, that uncertainty will linger. ⚖

Endnotes

1. 137 S.Ct. 1744 (2017).
2. *Id.* at 1754.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 1755.
7. *Id.* at 1751.
8. *Id.* at 1760.
9. *Id.* at 1763.
10. *Compare id.* at 1764 *with id.* at 1767.
11. *Riley v. Natl. Federation of the Blind of No. Carolina, Inc.*, 487 U.S. 781, 796 (1988).
12. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).
13. 137 S.Ct. at 1764 (*citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).
14. *Id.*
15. *Id.*
16. *Id.* at 1763.
17. *Id.* at 1765.
18. *Id.* at 1767 (Kennedy, J., concurring).
19. *Id.* at 1766.
20. *Id.* at 1765, 1767.
21. *Id.* at 1766.
22. *Id.*
23. *Id.* at 1768.
24. *Id.* at 1765.
25. *Id.* at 1769 (Thomas, J., concurring)
26. 139 S.Ct. 2294 (2019).
27. *Id.* at 2297.
28. *Id.* at 2298.
29. *Id.* at 2301.
30. *Id.*
31. *Id.* at 2299.
32. *Id.*
33. *Id.*
34. *Id.* at 2302.
35. *Id.* at 2302 (Alito, J., concurring).
36. *Id.* at 2303.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part), 2304 (Breyer, J., concurring in part and dissenting in part), 2308 (Sotomayor, J., with whom Justice Breyer joins, concurring in part and dissenting in part).
41. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part), 2304 (Breyer, J., concurring in part and dissenting in part), 2308 (Sotomayor, J., with whom Justice Breyer joins, concurring in part and dissenting in part).
42. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part).
43. *Id.* at 2304 (Breyer, J., concurring in part and dissenting in part).
44. *Id.* at 2308 (Sotomayor, J., with whom Justice Breyer joins, concurring in part and dissenting in part).
45. *Id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part), 2304 (Breyer, J., concurring in part and dissenting in part), 2311 (Sotomayor, J., with whom Justice Breyer joins, concurring in part and dissenting in part).
46. *Id.* at 2298.
47. 137 S.Ct. at 1763.
48. 139 S.Ct. at 2307.
49. 394 U.S. 576, 592 (1969).
50. 139 S.Ct. at 2303.
51. 137 S. Ct. at 1769.

Is it Time for New Jersey to SLAPP Back?

by Bruce S. Rosen

It is a more typical story than you might expect. A local political gadfly, blogger or even a small publisher investigates or rails against a building project that is perceived to involve local corruption. Or perhaps a non-profit inveighs against building on wetlands. The project's developer or a business owner, fed up with the public criticism that they believe affects their reputation and economic interests, sues for defamation and tortious interference.

BRUCE S. ROSEN, *a co-founder of McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park and Manhattan, leverages more than 30 years of expertise in civil litigation and criminal defense, following a career as an award-winning newspaper reporter and editor. He has long been associated with high-profile First Amendment litigations related to free speech, media law (such as defamation and open public records) and religious freedom.*

The lawsuit may have some nub of truth, but it is likely filled with exaggerated damage claims that would be difficult if not impossible to prove. The plaintiff's purpose, though, is probably not to collect damages, but to shut down the opposition's voice with a daunting threat of excessive legal fees and personal costs necessary to defend the actions.

There is no dispute that the filing of such a suit, referred to as a "Strategic Lawsuit Against Public Participation" (or SLAPP), can chill public commentary and undermine First Amendment rights and values. Although effective defenses may abound—especially in those cases involving matters of public concern—unless experienced counsel is retained, a defendant will likely be forced to capitulate, or will flail away by filing *pro se* filings until whipsawed into submission. In the end, the defendant's constitutional right to participate in the public process will have been confiscated by a system lacking both a real a deterrent to such abuse as well as a mechanism to resolve these cases as soon as they are filed.

SLAPP suits come in all sorts of contexts, from posting on the internet, circulating flyers or petitions, filing complaints with government agencies, or even by filing legal claims or lawsuits. In at least 30 states and the District of Columbia,[1] anti-SLAPP (or "SLAPP-back") statutes, as they are known, address SLAPP suits head-on by creating a mechanism that permits defendants to file a preliminary motion designed to test the allegations in an accelerated and abbreviated fashion.

Most of these statutes stay the expensive discovery process while a judge first determines whether the allegations have enough merit to risk undermining the defendant's First Amendment rights to speech and public participation. These rights are further protected by a right of immediate appeal and, if the defendant is successful, a fee award, which in turn attracts attorneys to defend these cases.

It appears to be a banner time for state anti-SLAPP statutes: In July 2020 the National Conference of Commissioners on Uniform State Laws approved the Uniform Public Expression Protection Act[2], while almost simultaneously New York State replaced a narrowly focused and rarely-used anti-SLAPP law with one that was far more comprehensive.[3] Late in 2019, even the conservative American Legislative Exchange Council distributed a similar draft law called the Public Participation Protection Act to its patron legislators around the country.[4] Connecticut enacted its statute in 2018.

Why then is New Jersey, with some of the most progressive pro-speech case law and consumer protection laws in the country, still without an anti-SLAPP law? There is no good answer.

Why then is New Jersey, with some of the most progressive pro-speech case law and consumer protection laws in the country, still without an anti-SLAPP law? There is no good answer.

An anti-SLAPP bill (A-1077) first passed the state Assembly in 2005 by a 79–0 vote and died in the Senate. A bill (A-3505) sponsored by then-Assemblyman Joseph Lagana (D-Bergen) passed the Assembly in 2015 only to expire at the end of the session.[5] Assemblyman Lagana reintroduced an identical proposal in January 2016 (A-603)[6] only to have it die in the Senate. However, even A-603 came without sharp teeth: The imposition of legal fees upon a judicial finding that litigation was a SLAPP suit was discretionary (although there was a flat $10,000 award for a statutory violation) and there was no right to an interlocutory appeal, two emendations that its sponsor says came from the Administrative Office of the Courts. The AOC in the past has discouraged such laws arguing, among other things, of a potential explosion of SLAPP suits, but the Assembly-approved version of A-603, according to Lagana, addressed those concerns.[7]

The New Jersey Supreme Court's antipathy toward anti-SLAPP statutes is reflected in the 2009 opinion in *LoBiondo v. Schwartz*.[8] In *LoBiondo*, the defendants were sued after opposing a club owner's zoning applications and were forced to go through the entire litigation process and engage in multiple appeals. Unable to draw from a statute, a unanimous Court, in a decision written by Justice Helen Hoens, instead created a makeshift, rarely used redress procedure for victims of SLAPP suits by resurrecting the disfavored tort of malicious abuse of process—but allowed its use only after a defendant had suffered through and prevailed in the underlying case.

The elements of malicious use of process are (1) filing a complaint without probable cause, (2) actuated by malice, (3) that terminated in favor of the party seeking relief, and (4) that caused the party seeking relief to suffer a special grievance. The *LoBiondo* Court said that one who could demonstrate that their right of free speech or to petition was actually infringed satisfied the special

grievance element. The case also allowed losing plaintiffs sued under this tort to claim advice-of-counsel as a complete defense, setting forth a standard for determining counsel's liability.

LoBiondo described how anti-SLAPP statutes find their roots in the United States Supreme Court's *Noerr—Pennington* doctrine, creating immunity that protects actions that fall within the parameters of seeking the redress of one's grievances from the government. The Court noted that the statutes fall into two general categories. Generally, the first category allows for various definitions for how broad the statute's application would reach but are meant to provide protection for public participants and all allow for a special motion for dismissal that can be made to a court, creating a remedy and allowing for the award of attorneys' fees. The second category creates a separate cause of action and defines a SLAPP suit as being brought in bad faith and with the intention of limiting free speech, and many of this type of statute also require proof of an intention to harass or to interfere with the free exercise of those rights. These statutes also allow for various types of damages and attorneys' fees.[9]

LoBiondo was not particularly sympathetic to anti-SLAPP statutes, noting that such defamation or tortious interference lawsuits may, in fact, be a good faith effort to protect one's own reputation or business. "Defining the line that divides one from the other is neither simple nor straightforward," Justice Hoens wrote, citing two commentators critical of such statutes.[10] Referring approvingly to the Appellate Division's refusal to craft a new judicial cause of action to combat SLAPP suits, the opinion focuses on its improvised resolution.

By any measure, *LoBiondo* is more an example of the Court's reluctant recognition of a problem in the face of continued legislative inaction, than a real solution to the issue of wealthy interests using the courts to silence detractors. In retrospect, at least, the Court's concern regarding anti-SLAPP statutes were not only overblown, but clearly against the trend of the past 11 years. The whole idea of an anti-SLAPP law is to allow an early resolution of a defendant's claims that a lawsuit was meant to undermine free speech and public participation. A *LoBiondo* suit for malicious abuse of process is exactly the opposite: A cumbersome and difficult process that requires enormous resources (from both the parties and the judiciary) and interminable patience for an uncertain result. The Courts should be looking more seriously at the SLAPP suits undermining individual rights that will be expeditiously removed from the trial docket than worrying about those who feel aggrieved and would file such suits in the future. There may be a reticence on the part of the Court to sanction plaintiffs under an anti-SLAPP scheme but that has not prevented "shall grant" fee awards—and created a plaintiff's bar in Open Public Records Act cases. Without a mandatory fee structure, there is little incentive for many attorneys to take these cases. Without a right to interlocutory appeal, an error by the trial judge, resulting in the threat of a torrent of legal proceedings, could easily cause capitulation and loss of rights.

The recently unveiled UPEPA, on the other hand, provides first for a broad definition of those defendants who are protected. The uniform law could be applied when a person believes that a lawsuit is meant to interfere with their communications in or with a court, governmental, or judicial proceeding or any "exercise of the right of freedom of speech or the press, the right to assemble or petition." It exempts certain actions by government and suits arising out of a sale or lease of goods.

A party would have up to 60 days (the proposed New Jersey statute said 45 days) to file a special motion to dismiss and a hearing would need to take place within a similar timeframe. A stay of discovery is instituted (though limited discovery may be allowed on the relevant issues) and would remain in effect until after an appeal from the trial court's decision has been taken.

Once the moving party establishes that the statute applies (or the responding party fails to establish that it does not apply), the burden switches to the responding party to establish a *prima facie* case as to each essential element (or the moving party shows the converse). This is harder than it sounds for defamation matters, since it should require, as it does in some states, that a *prima facie* case of actual malice and/or overcoming privileges like fair report or common interest must also be presented. The court may also dismiss under the summary judgment standard.

Even if a plaintiff withdraws the suit, the moving party has the right to continue to obtain a ruling and, if successful, legal fees and costs which "shall" be awarded (rather than "may" be awarded, as provided in the New Jersey bill). In fact, mandatory fee-shifting is the trend (except in Florida, the only state to enact a statute in the past 10 years without a "shall" provision). The recently passed New York bill[11] provides that legal fees "shall" be required but only where there has been a showing that the claim at issue "lacks a substantive basis in law or is [not] supported by a substantial argument for an extension, modification or reversal of existing law," the same standard employed by the frivolous filing statute pursuant to R. 1:4-8 in New Jersey.

While there have been abuses of anti-SLAPP laws—particularly in California, where the laws are applied most broadly—the statute has also occasionally become a tool of large corporations and unpopular figures which file their own anti-SLAPP actions. The CBS Network successfully used the law to argue that

their hiring decision for an on-air weather anchor who had sued for employment discrimination was in furtherance of the network's free-speech rights.[12] President Donald Trump used the statute to dismiss a lawsuit brought by Stephanie Clifford (aka Stormy Daniels),[13] and Exxon Mobil tried to use it to defeat a slander suit brought by a former employee.[14] Despite these aberrations, at their core, anti-SLAPP laws are designed to protect the rights of less powerful individuals to participate in public discourse.[15]

Obviously, any statute enacted in New Jersey would require it to be interpreted through its own (not as cutting-edge, like California) jurisprudence before it becomes settled law. In the meantime, however, litigators across the country have been attempting to apply anti-SLAPP statutes in federal Court, where the circuits are now split as to whether these state law devices apply because they are conflict with when and how cases can be dismissed under Federal Rules of Civil Procedure 12 and 56. This also dovetails with a movement to create a federal anti-SLAPP law, a movement which has yet to gain significant traction but may do so if the U.S. Supreme Court moves to limit the various state laws' application.

Back in New Jersey, Assemblyman Lagana is now a state Senator and pledges to try again to pass an anti-SLAPP statute—especially with the impetus of the new uniform law. There is no reason, short of a political power play by business forces, which should stop it. In other states, including Texas, which does not otherwise have a motion to dismiss in its rules, these statutes passed with a wide coalition of consumer tort reform and environmental groups, the Better Business Bureau, the American Civil Liberties Union and the media. Obviously, the law would enhance press freedom as well. Established media, which is reeling financially, would benefit greatly from the statute because it could short-circuit virtually every questionable libel suit, some of which might otherwise resist a motion to dismiss and be forced into expensive discovery.)

In fact, passage of a tough new anti-SLAPP statute would very much be in line with the New Jersey Supreme Court's long and distinguished tradition of tilting the scales for speech rights against reputational interests involving matters of public concern. Ample reason thus exists for New Jersey's political constituencies to coalesce around the UPEPA. The free speech rights of those subject to these suits have been SLAPPED-back long enough. ⚖

Endnotes

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12. *See* Golden, Nina, *SLAPP down: The use (and abuse) of Anti-SLAPP motions to strike*, 12 Rutgers J. of Law & Pub. Policy 4 (Summer 2015) published at rutgerspolicyjournal.org/sites/jlpp/files/Golden.pdf
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14. forbes.com/sites/danielfisher/2017/02/24/exxonmobil-wins-an-anti-slapp-motion-in-texas-while-landrys-loses/#46557225cb41
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Security vs. Equality

The Left, the Right, and the Shifting Sands of Prioritizing Free Speech

by Burt Neuborne

Trapped in pandemic purgatory, I have just finished reading an advance copy of Eric T. Chester's, *Free Speech and the Suppression of Dissent During World War I,* a splendidly researched and richly detailed narrative of the successful efforts by both the British and American governments to censor anti-war speech and stifle left-wing dissent during WWI. The book covers familiar ground—the enactment of the Espionage Act of 1917; the *Schenck* prosecutions; the government's sly neutralization of the precursor of the American Civil Liberties Union; Woodrow Wilson's vindictive, single-minded pursuit of Eugene Debs; the impact of the Russian Revolution on the anti-war views of the left; and the attempt to use military force to suppress dissent—but does so at an ambitious scope and level of detail that reminded me, once again, how important painstaking archival research can be and how fragile free speech is, especially in times of crisis when speech really matters. I find it particularly useful today to look backward to the WWI free speech debacle chronicled in Chester's excellent book because it was in the ruins of the failed effort by socialists, pacifists, and the Industrial Workers of the World to oppose the Great War that modern First Amendment-based free speech protection was born.

Chester, a committed lifelong socialist, takes us through the now familiar story of Justice Oliver Wendell Holmes, Jr.'s halting efforts to develop the "clear and present" danger test in his disappointing opinions upholding the *Schenck* and *Debs* convictions,[1] and in the path breaking 1919 Holmes-Brandeis dissent in *Abrams*,[2] eventually culminating 50 years later in the Court's 1969 enunciation of the modern framework for First Amendment free speech in *Brandenburg v. Ohio*.[3] Chester closes with a passionate defense of a near-absolute protection of free speech as a precondition to progressive change.

Much as I enjoyed the book, I was struck by the author's almost quaint belief (I am tempted to call it faith) that robust, legally protected freedom of speech is always on the side of the progressive angels. Chester's heartfelt credo is that robust legal protection of free speech is the only way to spread the progressive truth to the oppressed masses. Once the masses know the truth, Chester is confident that they will take the vigorous political action needed to bring about a more just and equal world.

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It may be that in today's United States, near absolute free speech protection perpetuates as much (or more) injustice than it cures. My dilemma is that even if the empirical scale weighs against near absolute free speech protection, how can we regulate the potentially harmful speech of the strong without empowering the state to censor the weak…

He may well be right. As a young man in New York City during the McCarthy years, that is what I grew up believing. It is the path I followed during my deeply satisfying 11 years as an ACLU staff lawyer.[4] I believed that protecting the speech of Nazis and other unpleasant folks whose ideas I hated was the price of robust, principled legal protection for progressive speech that would eventually change the world. Deep down, I still want to believe that story. Maybe that is why Chester's book felt so cozy and reassuring as I ploughed through the welter of details.

Maybe that is also why I find my reaction to the book so unsettling. As I approach my 80th birthday, I am no longer certain that Chester's (or my) faith in the inevitable link between almost absolute free speech protection and the ultimate emergence of a more just and equal world is empirically correct. When, as during WWI, the McCarthy era, and turbulent demonstrations protesting police racism, government seeks to censor the speech of dissenters in the name of national security, order, and/or prevailing morality, I have no doubt that robust legal protection for free speech is absolutely crucial to prevent the strong from using its control over the government to silence the weak. Every time I see a polling place closed, a voter's name purged from the registration lists, or tear gas and violence deployed against overwhelmingly peaceful demonstrators, I feel transported back to Chester's nightmare story. In that sense, Chester is surely right in characterizing a near absolute, powerful First Amendment as a precondition to political, social, and economic change.

But I wonder whether the same empirical assumption is justified when government acts, not to protect the strong against dissenting speech that threatens the existing order, but to protect the weak against speech by the strong aimed at perpetuating, even exacerbating an unjust *status quo*. It may be that in today's United States, near absolute free speech protection perpetuates as much (or more) injustice than it cures. My dilemma is that even if the empirical scale weighs against near absolute free speech protection, how can we regulate the potentially harmful speech of the strong without empowering the state to censor the weak, risking a return to Chester's WWI world of suppression of dissent.

When I began practicing law more than 55 years ago, the value of robust, even near-absolute, legal protection of free speech was a left-wing article of faith. The left, confident that the future belonged to progressive ideas, was certain that more speech would inevitably lead to more justice. The manifesto was Justice William Brennan's landmark 1964 opinion in *Times v. Sullivan*[5] announcing a free market in ideas. As a young lawyer who graduated in 1964, I saw no tension between near absolute free speech protection and achieving equality. I was confident that free speech would erode the unequal economic, social, gender, and political *status quo*.

In the 1950s and early 1960s, it was the conservative right that feared free speech and championed censorship. Suffering from a massive loss of confidence in the power of conservative ideas to compete in the marketplace, the American right sought to protect the *status quo* by cutting off the flow of speech likely to prove corrosive of established verities. That is what McCarthyism, the prosecution of the leaders of the American Communist Party, and the war on erotic speech were all about. It was a page out of Chester's book, one world war and a quarter century later.

To a large extent, the shared belief of the both left and right in the 1950s and 1960s that robust free speech protection was an agent of egalitarian change proved correct. Much of the legal edifice of equality achieved during the 1960s and early 1970s was precipitated by vigorous speech protected against government suppression by the First Amendment. But the post-WWII belief of both the left and right that a powerful First Amendment was inevitably the agent of egalitarian change proved only partially correct. For one thing, it failed to predict the late mid-century renaissance in conservative thought. At the close of WWII, battered by the horrors of right-wing Nazi fascism, the collapse of religious faith, the massive economic harms caused during the 1930s by an unregulated market, and the all-too-evident brutality of right-wing military rule, principled conservatives suffered a crisis of faith in their world-view, leaving censorship and repression as their only way to defend the *status quo*. But the Anglo-American conservative idea—rooted in individual autonomy; institutional stability; and respect for hierarchy—could

not, and did not, remain in permanent intellectual eclipse. Driven by a vision of the free market as the principal engine of economic and social organization, American conservative thought exploded in the late 1960s and 1970s in a fireworks display of intellectual vigor and renewed confidence.

Once the American right had something exciting to say, free speech became an attractive idea to political conservatives, as it had always been to political liberals. That ushered in what I call the "Era of First Amendment Good Feelings," a time in the 1970s through the early 1990s when both the left and the right saw free speech as the engine for the expected triumph of their very different ideas. *Buckley v. Valeo*,[6] the virtually unanimous seminal campaign finance case, and *Texas v. Johnson*,[7] the flag burning case decided by a coalition of left and right Justices, serve as fitting examples of the era.

During the "Era of First Amendment Good Feelings," with support from both the left and right, the Supreme Court built a powerful edifice of near absolute free speech protection. At the risk of oversimplifying a complex doctrinal structure, the Court's cases required a prospective censor to **prove**—not merely plausibly allege—that the target speech posed an imminent threat to the achievement of an extremely important government interest that could not be dealt with by less drastic means. So, a putative censor had at least four opportunities to fail. First, the censor had to demonstrate that an extremely important government interest was at stake, something more vital than the ordinary concerns of government. Then, the censor had to prove that, unless regulated, the speech at issue would almost certainly make it impossible to achieve the important interest. Third, the censor had to prove that the harm to the government interest caused by the speech was imminent and almost certain to occur. Finally, the censor had to persuade a judge that censorship was the only way to protect the government interest. Since the burden of proving all four elements was on the censor, it proved virtually impossible to defend censorship in court.

In addition to such powerful substantive protection, the Court added five layers of procedural protection that reinforced and strengthened the substantive norms. Prior restraints were virtually outlawed. Overbroad statutes that banned both protected and unprotected speech were deemed facially unconstitutional. Vague statutes banning speech that failed to provide a precise definition of coverage were also deemed facially invalid. Any effort to treat similarly situated speakers unequally resulted in the invalidation of the government's entire regulatory initiative. And, anyone facing censorship is entitled to speedy access to the courts.

The combination of rigorous substantive protection and sophisticated procedural corollaries rendered it virtually impossible to impose restrictions on free speech. But all was not well in free speech Eden. This time it was the left that began to lose confidence in its intellectual positions. When the Berlin Wall came down in 1989 and communism imploded, the left's intellectual program was in tatters. Traditionally dependent on the idea of a muscular state to transfer wealth from the rich to the poor, the American left struggled throughout the 1990s to formulate a coherent political program at the very moment the right was aggressively touting the free market as a cure for just about everything. All of a sudden, it was the right enthusiastically championing free speech, and the left seeking to limit the speech of the powerful in order to advance, not security, but equality. The "Era of First Amendment Good Feelings" ended in the 1990s as the Supreme Court fragmented into a conservative majority committed to near absolute protection of free speech, and a liberal minority willing to accept government regulation of some speech in order to preserve equality. The tension played out in the campaign finance regulation[8] and hate speech[9] cases and remains unresolved.

Two recent incidents illustrate the unsettled state of current free speech protection. In the wake of Donald Trump's election as President, right-wing activists descended on Charlottesville, Virginia, to hold marches and rallies protesting the decision to remove a Confederate statue and uniting white nationalist movements. The local ACLU affiliate, confronted with efforts by town authorities to impose significant restrictions on the marchers, consulted their Skokie playbook, obtaining a federal injunction designed to protect the marchers. In Skokie, the neo-Nazis who sought protection for their ugly march were so feeble that they did not even show up at the original starting line, retreating to Chicago for a rally in which they were vastly outnumbered by counter protesters. But the Charlottesville right-wing demonstrators not only showed up, they held a threatening torchlight parade chanting racist and anti-Semitic slogans. Tragically, on the following day, one of the right-wing demonstrators drove a car into a group of counter demonstrators, killing an innocent young woman. Young lawyers at the ACLU then led something of a revolt against the organization's leadership, questioning whether the organization's traditional protection of free speech by bigots ignored the impact of the speech on vulnerable targets. The imperative of presenting a united front against serious violations of the Constitution by President Trump persuaded everyone to tamp the disagreement down, but it remains unresolved.

In the second incident, Trump used the military to disperse peaceful protestors in Lafayette Park so he could enjoy a photo opportunity replete with a Bible. When many challenged the President's

legal authority to deploy federal troops against demonstrators protesting the killing of Black men by police officers, Sen. Tom Cotton of Arkansas, a staunch ally of the President, wrote an op-ed in *The New York Times* supporting the legality and desirability of deploying federal troops against the demonstrators. The *Times*, seeking to present all sides of the issue, elected to print the op-ed, triggering a revolt in the newsroom that reminded me of the revolt of the young ACLU lawyers after Charlottesville. The outcry forced the resignation of the Op-Ed page's Senior Editor. Similar newsroom revolts took place in a dozen newspapers.

Thus, today, when, as with the Black Lives Matter demonstrations, the issue is security/order versus free speech, the left is virtually unanimous in supporting speech, and the right cannot wait to use tear gas and federal troops to silence the demonstrators. But when the issue is equality versus free speech, as it was in Charlottesville and on the *Times* Op-Ed page, the two sides change positions. The right becomes unanimous in supporting speech, and the left cannot wait to impose silence.

That is why I cannot rest comfortably in Chester's book. The story is more complex and I am not sure what the ending should look like. ⚖

Endnotes

1. The Supreme Court, speaking through Justice Holmes, unanimously affirmed convictions for speaking out vigorously against the war in *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States,* 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 219 (1919).
2. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes. J. joined by Brandeis, J., dissenting)
3. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).
4. I began my ACLU career in 1967 as a staff counsel at the NYCLU, became Assistant Legal Director of the National ACLU in 1972, and returned from NYU in 1981 to serve as National Legal Director during the Presidency of Ronald Regan.
5. *New York Times v. Sullivan*, 376 U.S. 254 (1964)
6. 424 U.S. 1 (1976)
7. 491 U.S. 397 (1989)
8. *E.g.*, *Citizens United v. FCC*, 588 U.S. 310 (2010); *Arizona Free Enterprise Fund v. Bennett*, 131 S.Ct 2806 (2011).
9. *Snyder v. Phelps*, 562 U.S. 443 (2011).

In Memory of MITCHELL H. COBERT, ESQ.

A prominent securities attorney, Cobert dedicated himself to mentorship, education and service

It is with a heavy heart that the *New Jersey Lawyer* editorial board announces the passing of Mitchell H. Cobert on Oct. 15, following a five-month battle with leukemia. The longest-tenured member of the board, Mitchell was deeply committed to the magazine's mission of educating and updating members of the bar. He served as a member from 1988 until his passing, and was chair of the board from 2003 to 2006. During his tenure, he authored dozens of articles and served as special editor for over a dozen editions, developing abroad range of themes, from "Securities" to "Big Brother." In February of this year, he served as special editor of his last issue, focused on "Drug Court." Throughout his tenure on the board, Mitchell provided unwavering dedication to the magazine and his fellow board members, serving as a mentor to many while providing invaluable insights.

Embracing the importance for all lawyers to promote respect for the legal profession, Mitchell took an active role in both local and state bar-related matters. From 1996 to 2000, he was a trustee of the Morris County Bar Association. In 2004, he was president of the Morris County Bar Foundation and the Morris County Bar Association in 2006.

In his lengthy legal career as a prominent

securities attorney, Mitchell served on numerous securities law committees of the New Jersey State Bar Association and Morris County Bar Association. Since 1993, served as chair or co-chair of the securities subcommittee of the Morris County Bar Association and was a member of the NJSBA's Securities Litigation and Regulatory Enforcement Committee since its inception in 1998.

Born in Brooklyn, New York, in 1947, Mitchell graduated from the City College of New York and St. John's Law School. He began his legal career as an assistant attorney general in the New York State Department of Law in the 1970s. In 1985, he joined Schenck, Price, Smith & King as a partner, and in 1991 established a solo legal practice. Through that practice, he zealously advocated for every client, especially those most vulnerable and in need of protection, ensuring that every client's voice was heard by a system that often overlooked them.

From 1985 to 1991, Mitchell was an adjunct assistant professor at New York University's Real Estate Institute, where he taught young lawyers about the securities aspects of real estate financing. He loved mentoring new lawyers and worked diligently with the Judiciary and other counsel to establish the Morris County Bar Association Mentoring Committee. He also worked with the Judiciary and other counsel to establish the Morris County Drug Court to help people with minor drug offenses clear their records, enabling them to re-enter society and become productive members of the community.

Additionally, Mitchell served on committees of the Morris County Chapter of ARC and was on the advisory board for the Morris County Hispanic-American Chamber of Commerce. In 1990, he was appointed by the mayor of Morristown to be co-chair of the Bill of Rights Committee when it was displayed at the Morristown Armory.

In addition to his strong commitment to his profession and society at large, Mitchell will be remembered as a devoted family man who loved traveling abroad with his wife and taking annual family vacations with his children, grandchildren, and extended family. He had a great sense of humor, a twinkle in his eye, a love of licorice, and a quiet sense of inclusivity that made everyone feel welcome in any situation. He took great pride in his home and was very active in neighborhood and community groups. And he especially enjoyed his Wednesday night "business meetings," otherwise known as the weekly poker game.

Mitchell is survived by his beloved wife Kathryn; his devoted children Jessica and Craig Smith, Lauren Cobert, and Max and Emily Cobert; his loving grandchildren Zachary Smith, Samantha Smith, and Jackson Cobert; his siblings Tamara and Edward Faggen and Jonathan and Wendy Cobert; and dozens of close cousins, nieces and nephews.

UNITED STATES POSTAL SERVICE®

Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title	2. Publication Number	3. Filing Date
New Jersey Lawyer	380-680	10/20/2020
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Bi-monthly	6	$60

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*
One Constitution Square
New Brunswick, NJ 08901-1520

Contact Person
Mindy Drexel

Telephone *(Include area code)*
(732) 937-7518

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
One Constitution Square
New Brunswick, NJ 08901-1520

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*
Angela Scheck
One Constitution Square
New Brunswick, NJ 08901-1520

Editor *(Name and complete mailing address)*
Mindy Drexel
One Constitution Square
New Brunswick, NJ 08901-1520

Managing Editor *(Name and complete mailing address)*

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

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The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☐ Has Not Changed During Preceding 12 Months
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13. Publication Title New Jersey Lawyer			14. Issue Date for Circulation Data Below 08/01/2020	
15. **Extent and Nature of Circulation** Membership			**Average No. Copies Each Issue During Preceding 12 Months**	**No. Copies of Single Issue Published Nearest to Filing Date**
a. Total Number of Copies *(Net press run)*			49683	0
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	10351	0
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c. Total Paid Distribution *[Sum of 15b (1), (2), (3), and (4)]* ▶			10381	0
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f. Total Distribution *(Sum of 15c and 15e)* ▶			10436	0
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))* ▶			28	0
h. Total *(Sum of 15f and g)*			10464	0
i. Percent Paid *(15c divided by 15f times 100)* ▶			99.5%	0

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Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

16. Electronic Copy Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies ▶	15850	16000
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☐ If the publication is a general publication, publication of this statement is required. Will be printed in the 10/1/20 issue of this publication. ☐ Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner	Date
Managing Editor	10/20/2020

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