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An Infamous Legal Treatise: An Examination of the *Malleus Maleficarum* and Its Effect on the Prosecution of Witches in Europe

EDWARD J. MAGGIO*

It was a time of uncertainty and upheaval. In the fifteenth century, European jurists were struggling to understand the source of problems in their close-knit communities. Concerned that witchcraft was the source of these problems, a legal and theological treatise was created that would impact both Europe and the early North American colonies. It was known simply as the *Malleus Maleficarum*, loosely translated as 'the hammer of witches.' It was a legal and theological guide like no other in that it was meticulous in its discussion of criminal procedure in regards to heresy and witchcraft. It became perhaps the most notorious and far-reaching criminal procedure document of the Papal Inquisition and a guide for secular courts for the prosecution of suspected witches. During the height of both Catholic and Protestant witchcraft prosecution which began in the mid-fifteenth century, it was reprinted at least twenty-eight times.[1] Due to its widespread impact and popularity among jurists and lay people, it undoubtedly helped to foster the torture and execution of thousands of innocent Europeans along with the residents of Salem, Massachusetts during the 1690s.[2] In examining the history and development of the document along with its impact, an evolution in legal doctrine and criminal procedure becomes apparent.

In modern times, the reality of witches is much different than the popular images and constructs held by society. Historically, European witches were often people who died for being martyrs to religious fanaticism contrary to the established Church. Thus, people with Gnostic, Catharian, or Waldensian beliefs would be considered heretics and routed out of society by force.[3] While many people even today maintain the idea that accused witches were guilty of placing curses and making potions, most people accused of witchcraft in Europe in fact did absolutely nothing to harm their neighbors. The accused were often only serving the medical needs of the community to the benefit of the masses.[4] Yet, suspected witches were likely to be arrested without evidence, sadistically

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1. CHAS S. CLIFTON, ENCYCLOPEDIA OF HERESIES AND HERETICS 85 (1992).
2. *Id.*
3. NIGEL CAWTHORNE, WITCH HUNT 36-38 (2004).
4. ANNE LLEWELLYN BARSTOW, WITCHCRAZE: A NEW HISTORY OF THE EUROPEAN WITCH HUNTS 111 (1994); *see also* ROBIN BRIGGS, WITCHES AND NEIGHBORS 71 (1996).

tortured, interrogated about their faith, questioned about their sex lives, and sentenced to death. These methods were in part developed out of twelfth century Roman Law that stressed punitive justice with an emphasis on fines, harsh punishments, and the death penalty.[5]

To add insult to injury, the family members of convicted European witches were to repay society for the sins of their kin. The relatives of the accused were often compelled to pay court and prison costs, as well as other fees, which often included the feast that prosecuting judges and lawyers enjoyed the day following the executions of witches.[6] By 1450, the idea of European witchcraft began to develop into a more stable and widely held concept as a result of the trials of the 1420s and 1430s, and ultimately endured for more than two centuries.[7] Because of a lack of uniformity throughout European nations, it was not clear which harms were uniquely attributed to witches. Inconsistencies also existed in the manner in which a witch was to be examined, tried, and sentenced. Specific criminal charges against witches varied from one location to another.[8]

The advancement and dissemination of theories and beliefs on European witchcraft occurred as a result of the interaction between the judicial process in a given location and the literary oral tradition of Europeans in a specific community.[9] The Catholic Church's early view on witchcraft in European communities is noticeably observed through the set of instructions developed and written by Regino of Prüm, known as the *Canon Episcopi*.[10] By formalizing concepts that would later become strict Canon Law of the Catholic Church in the twelfth century, Regino of Prüm was drawing on Roman Law, texts from earlier church councils, and Papal statements of the past. He arrived at the theological deduction that it was indeed heresy to believe in the reality of witchcraft during the Medieval European Period.[11] In condemning held beliefs in the power of witches in European societies, Regino of Prüm made it very clear that it was heresy to believe that witches could change into different forms or make physical changes, since such a belief infers that human beings can obtain powers reserved only for the Supreme Being in heaven:

> Whoever therefore believes that anything can be made, or that any creature can be changed or transformed to better or to worse or be transformed into

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5. BARSTOW, *supra* note 4, at 32.

6. RICHARD ZACKS, AN UNDERGROUND EDUCATION 321 (1997); *see also* ROSSELL HOPE ROBBINS, THE ENCYCLOPEDIA OF WITCHCRAFT AND DEMONOLOGY (1959).

7. BRIAN LEVACK, THE WITCH-HUNT IN EARLY MODERN EUROPE 50-51 (2d ed., Longman Group Limited 1987).

8. *Id.* at 52.

9. *Id.*

10. CLIFTON, *supra* note 1, at 134.

11. Regino of Prüm, *A Warning to Bishops, The Canon Episcopi (ca. 906), in* WITCHCRAFT IN EUROPE, 400-1700: A DOCUMENTARY HISTORY 60, 61 (Alan Charles Kors & Edward Peters eds., 2d ed. 2001).

> another species or likeness, except by the Creator himself who made everything and through whom all things were made, is beyond doubt an infidel.[12]

Through a quick examination of the *Canon Episcopi*, it seems as though skepticism of witches in European villages existed among the educated church clergy during this medieval period. However, a further reading of the *Canon Episcopi* reveals a viewpoint regarding the potential of women to be evil and adulterous in European society:

> It is also not to be omitted that some wicked women, who have been given themselves back to Satan and had been seduced by the illusions and phantasms of demons, believe and profess that, in the hours of night, they ride upon certain beasts with Diana, the goddess of pagans, and an innumerable multitude of women, and in the silence of the night, traverse great spaces of earth, and obey her commands as of their lady, and are summoned to her service on certain nights.[13]

Such beliefs among clergy of the potential of women to be evil did not disappear, but only grew to be more commonly held during later centuries, especially in regions of Germany and France.[14]

Despite the doctrine established in the *Canon Episcopi* and its establishment as strict Canon Law, "the belief in the reality of witchcraft, not witchcraft itself, was heresy."[15] Inquisitors working in the field on behalf of the Vatican continued to seek sanctions to prosecute suspected witches and sorcerers in their communities.[16] As increased fear began to grip Europe, the views regarding witchcraft began to change within the higher members of the clergy living in the Vatican, beginning with the Holy Father himself.[17] The change in attitude and belief in witchcraft was lead by Pope Innocent VIII. With the inquisition already in place, Pope Innocent VIII issued the Papal Bull (a Papal order and decree) *Summis Desiderantes Affectibus* (desiring with the most profound anxiety) on December 5, 1484, which marked the official persecution of witches.[18] The Bull read:

> It has indeed lately come to Our ears, not without afflicting Us with bitter sorrow, that in some parts of Northern Germany, as well as the provinces, cities, territories, regions and dioceses of Mainz, Cologne, Trèves, Salzburg, and Bremen, many persons of both sexes, unmindful of their own salvation and deviating from the Catholic Faith, have abandoned themselves to devils,

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12. Regino of Prüm, *supra* note 11, at 62-63.
13. *Id.* at 62.
14. BARSTOW, *supra* note 4, at 59, 61.
15. CLIFTON, *supra* note 1, at 134.
16. *Id.*
17. Pope Innocent VIII, *Summis Desiderantes Affectibus* (The Bull of Innocent VIII) (1484), *reprinted in* HEINRICH KRAMER & JAMES SPRENGER, MALLEUS MALEFICARUM, at xliii (Montague Summers trans., Dover Publ'ns 1971) (1928).
18. CAWTHORNE, *supra* note 3, at 39.

> incubi and succubi, and by their incantations, spells, conjurations, and other accursed charms and crafts, enormities and horrid offences, have slain infants yet in the mother's womb, as also the offspring of cattle, have blasted the produce of the earth, the grapes of the vine, and the fruits of trees, nay, men and women, beasts of burthen, herd-beasts, as well as animals of other kinds, vineyards, orchards, meadows, pasture-land, corn, wheat, and all other cereals; these wretches furthermore afflict and torment men and women, beasts of burthen, herd-beasts, as well as animals of other kinds, with terrible and piteous pains and sore diseases, both internal and external; they hinder men from performing the sexual act and women from conceiving, whence husbands cannot know their wives nor wives receive their husbands; over and above this, they blasphemously renounce that Faith which is theirs by the Sacrament of Baptism, and at the instigation of the Enemy of Mankind they do not shrink from committing and perpetrating the foulest abominations and filthiest excesses to the deadly peril of their own souls, whereby they outrage the Divine Majesty and are a cause of scandal and danger to very many.[19]

The result of this bold statement was that concepts regarding heresy and witchcraft laid out in the *Canon Episcopi* were now reversed. Pope Innocent VIII went further in his Bull of 1484:

> [T]he aforesaid Inquisitors be empowered to proceed to the just correction, imprisonment, and punishment of any persons, [for the said abominations and enormities,] without let or hindrance, in every way as if the provinces, townships, dioceses, districts, territories, yea, even the persons and their crimes in this kind were named and particularly designated in Our letters.[20]

The established Canon Law on witchcraft was now overruled. By his right as the head of the church, Pope Innocent VIII, through this Papal Bull, authorized the inquisition to persecute alleged witches since witchcraft was now established heresy in the eyes of the Church. It is also clear that Pope Innocent wanted church clergy to lead the way in seeking out and punishing witches in the community. The inquisition, rather than the secular courts, had jurisdiction over witchcraft investigation and prosecution.[21] The Pope's actions went further in lighting the bonfires of persecution by deeming witchcraft a death penalty offense.[22] The Papal Bull's message also benefited from newly developed technology since it was copied and spread throughout Europe as a result of Gutenberg's printing press.[23]

While appearing as a leader in the fight against evil in Europe, it is important to note that Pope Innocent VIII himself maintained a questionable lifestyle in terms of Church doctrine and his vows as a clergy member. He kept a mistress,

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19. Pope Innocent VIII, *supra* note 17, at xliii-xlv.
20. *Id.*
21. CLIFTON, *supra* note 1.
22. CAWTHORNE, *supra* note 3, at 40-41.
23. ZACKS, *supra* note 6, at 322.

fathered two children, and was kept alive in his remaining months by sucking milk from a woman's breast and rejuvenating himself with blood transfusions from three boys who ultimately died as a result of the blood transfusion process.[24] Although arguably suffering from physical anguish on his death bed, the effects of the Papal Bull were already being felt among the clergy. Directions were sent to the Bishop of Strasburg which authorized additional support for the prosecution of witches by two unique yet questionable inquisitors who sought assistance in the fight against witchcraft at the local level.[25]

Around 1486, two Dominican inquisitors, Heinrich Kramer and Jacob Sprenger, created the *Malleus Maleficarum*, which had a tremendous theological and legal impact on European communities. Written in Germany, it proposed an argument contrary to that within the *Canon Episcopi* and even clearer than that within the Papal Bull of 1484 when its authors stated that the belief that there are such things as witches is so essential a part of the Catholic faith that to maintain the opposite opinion is heresy.[26] Both Kramer and Sprenger had infamous reputations in Germany. Sprenger was the Dean of Cologne University and Kramer was a professor of theology at the University of Salzburg. Kramer had already served as an inquisitor in parts of Germany and was forced from one diocese for his extreme tactics.[27] Such extreme tactics included persuading a dissolute woman in Tyrol in the 1480s to hide in an oven and pretend that the devil lived there. After the woman denounced people from inside the oven, Kramer tortured the named people until the Bishop of Bixel finally managed to expel him from the community.[28]

In its basic format, the *Malleus* takes the form of a scholastic disputation, a book in which a series of questions regarding witchcraft and law are asked and answered by Kramer and Sprenger. By writing in this format, the authors relied on scholastic thought of leading Christian scholars, especially that of Thomas Aquinas.[29] It is notable that the *Malleus* did not in any way formulate the cumulative concept of witchcraft.[30] In fact, as a statement of the cumulative concept, the *Malleus* was somewhat deficient, for it referred to events such as the copulation and sorcery during the Black Sabbath only in passing, and it did not discuss the obscene kiss, the devil's mark, or other telltale signs of a witch.[31] Nor did the *Malleus* make a contribution to the further development of witch

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24. CAWTHORNE, *supra* note 3, at 40.

25. *Id.*

26. HEINRICH KRAMER & JAMES SPRENGER, MALLEUS MALEFICARUM, 1-11 (Montague Summers trans., Dover Publ'ns 1971) (1928).

27. CLIFTON, *supra* note 1.

28. CAWTHORNE, *supra* note 3, at 109; *see also* Sydney Anglo, *Evident Authority and Authoritative Evidence: The Malleus Maleficarum*, *in* THE DAMNED ART: ESSAYS IN THE LITERATURE OF WITCHCRAFT, 1-31 (Sydney Anglo ed., 1977).

29. LEVACK, *supra* note 7, at 54; *see also* Anglo, *supra* note 28.

30. *Id.*

31. *Id.*

beliefs in Europe. Nevertheless, the work did help to strengthen the fusion that had already taken place between many different witch beliefs of the time by discussing them in a single work in an ordered and systematic way.[32] It served, therefore, as an encyclopedia of currently held beliefs and concepts of European witchcraft, and in that form, transmitted an entire set of learned beliefs in an easier to grasp format to a larger audience that could implement the suggestions of the authors to the community.

While not the first treatise written regarding the investigation and treatment of witches, the *Malleus* was unique in that it combined witchcraft folklore of the time along with Canon Law and Church dogmatic concepts. The organization of the book also made it easier for theologians and jurists to learn and apply the techniques to suspected witches. It is not surprising that the *Malleus* went through twenty-eight editions between 1486 and 1600, and was accepted by Roman Catholics and Protestants alike.[33] The overall work is in three parts. In Part I, the existence of witches in Europe is made clear, along with a strong message that disbelief in demonology is heresy in the church. Part II is a compendium of fabulous stories about the activities of witches, diabolical compacts, sexual relations with devils (incubi and succubi), transvection (night-riding), and metamorphosis.[34] Meticulous and thorough, Part III is a discussion of the legal procedures to be followed in witch trials.[35] Kramer and Sprenger emphasized that routing out witches would require no hesitation in the use of force. Torture was sanctioned as a means of obtaining confessions from witches.[36] Due to the believed nature of witches and their powers, any witness, no matter how bad his credentials, could testify against an accused in a legal proceeding.[37] Secular authorities were called upon to assist inquisitors in the task of executing the condemned.[38]

The *Malleus* proposed very harsh and strict techniques in the investigation of alleged witches. Alleged witches were to be stripped and their body hair and head hair were to be removed immediately: "The hair should be shaved from every part of her body."[39] There was a specific reason for this body invasion of alleged witches. According to Kramer and Sprenger, "in order to preserve their power of silence they are in the habit of hiding some superstitious object in their clothes or in their hair, or even in the most secret parts of their bodies."[40] These "superstitious objects" were supposedly charms that would empower witches to

32. LEVACK, *supra* note 7, at 54.
33. *Id.* at 40-41.
34. KRAMER & SPRENGER, *supra* note 26, at 89-193.
35. *Id.* at 194-271.
36. *Id.* at 220-30.
37. *Id.* at 205-10; *see also* BRIGGS, *supra* note 4, at 217.
38. CAWTHORNE, *supra* note 3, at 41.
39. KRAMER & SPRENGER, *supra* note 26, at 228.
40. *Id.* at 228-29.

face pain and torture and remain silent through the tough questioning and torture techniques that were applied in proceedings.[41] Another reason for the invasive searching and shaving was the search for the devil's mark. On the body of a suspected witch, any wart or scar could be viewed as Satan's nipple, the witch's teat, from which the devil got his nourishment.[42] These spots were believed to be insensitive to pain and reaction, so witch hunters and inquisitors would prick them with needles and blades and watch for the suspect's lack of reaction to pain.[43]

The idea of such invasive procedures at this time in European societies was not regarded as trivial. Kramer and Sprenger, based on their experiences, were likely aware that European townspeople would be offended by such measures. It is not surprising that the *Malleus* does point out that sometimes the local populace rebelled against the idea of Church officials performing invasive bodily searching:

> Now in the parts of Germany such shaving, especially of the secret parts, is not generally considered delicate, and therefore we Inquisitors do not use it [. . .]. But in other countries the Inquisitors order the witch to be shaved all over her body. And the Inquisitor of Como has informed us that last year, that is, in 1485, he ordered forty-one witches to be burned, after they had been shaved all over.[44]

For inquisitors and secular authorities, obtaining physical evidence through a search of a suspect was enough for a conviction. Certainly a suspect in custody would need a form of inducement to admit that she was an agent of evil. The *Malleus* provided guidelines for the use of torture since a suspect rarely confessed to committing evil in a community without some form of torture.[45] In addition, Kramer and Sprenger emphasized that "common justice demands that a witch should not be condemned to death unless she is convicted by her own confession."[46] The *Malleus* laid out the procedural steps that were to be carried out first. From the beginning, the accused would be asked to confess, followed by a showing of the instruments of torture. The suspect was then asked again to confess her crimes, and finally tortured if necessary. The *Malleus* states, but with a warning, "[Let the guards] bind her with cords, and apply her to some engine of torture . . . ."[47] It is interesting that Kramer and Sprenger were concerned that the inquisitors and secular authorities would appear to enjoy the work they were carrying out on behalf of the Church. Therefore, they wrote

41. KRAMER & SPRENGER, *supra* note 26, at 228-29.
42. BRIGGS, *supra* note 4, at 25-29; *see also* ZACKS, *supra* note 6, at 323.
43. ZACKS, *supra* note 6, at 217.
44. KRAMER & SPRENGER, *supra* note 26, at 230.
45. *Id.*
46. *Id.* at 222-23.
47. *Id.* at 225.

very poignantly, "Let [the men] obey at once but not joyfully, rather appearing to be disturbed by their duty."[48]

In examining Kramer and Sprenger's work, the *Malleus* does appear to display an anti-feminine character throughout the text. Women, who are less spiritual than men by their nature, according to Kramer and Sprenger, have several reasons for falling into witchcraft so easily. Quoting biblical, classical, and medieval sources, Kramer and Sprenger claimed that women are liars, more superstitious than men, more impressionable, wicked-minded, and in need of constant male supervision: "When a woman thinks alone, she thinks evil. [. . .] Women are intellectually like children."[49] They also noted that women are less experienced than men, more curious, more likely to seek revenge, more susceptible to despair, and more prone to gossip.[50] Women's ultimate flaw though, in the eyes of these two priests, was their inordinate carnality. Kramer and Sprenger noted: "All witchcraft comes from carnal lust, which in women is insatiable."[51] As a result of their sexual nature, Kramer and Sprenger extended the evil results of the sexual carnality of women:

> [T]he authors blamed witches for causing impotence in men and for seducing them and destroying their souls. In the face of such horrors, the authors praised God for having "preserved the male sex from so great a crime," and no doubt added thanks that as celibates they were less likely to fall into the trap of wicked women.[52]

Even from the beginning, the authors changed the gender of the title to the feminine spelling (*Maleficarum* from *Malifcorum*). They also "indulged in such Latin worldplay as breaking *femina* (woman) into *fe minus* (less faith)."[53]

The constant portrayal of women as evil, overemphasis on the susceptibility of women to the crime of witchcraft, and the claim that the most powerful class of witches all practiced carnal copulation with devils throughout the *Malleus* can be regarded as an inventive portion of this witch-hunting guide that differentiated it from other texts.[54] This work made it clear that any witch-hunt that was launched in Europe should be a focused attack on women. "Though it is true that the major persecutions did not begin until about seventy years after the publication of the *Malleus* (c. 1560)," the fact that the witch-hunt craze throughout Europe can be viewed as focused attacks on women, and especially their

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48. KRAMER & SPRENGER, *supra* note 26, at 230.
49. *Id.* at 43-44.
50. CLIFTON, *supra* note 1, at 86.
51. *Id.*
52. BARSTOW, *supra* note 4, at 172; *see also,* KRAMER & SPRENGER, *supra* note 26, at 41-48.
53. CLIFTON, *supra* note 1, at 86.
54. Peter Burke, *Witchcraft and Magic in Reinassance Italy; Gianfrancesco Pico and His Strix, in* THE DAMNED ART; ESSAYS IN THE LITERATURE OF WITCHCRAFT 41, 41-48 (Sydney Anglo ed., 1977); Christopher Baxter, *Jean Bodin's De La Démonamanie Des Sorciers: The Logic of Persecution, in* THE DAMNED ART; ESSAYS IN THE LITERATURE OF WITCHCRAFT 76, 99 (Sydney Anglo ed., 1977).

sexuality, makes the *Malleus* an important contributing factor to the persecution of women as witches.[55]

In terms of obtaining confessions, inquisitors were to focus on a number of areas in their obtainment of incriminating statements. The inquisitors, besides probing the specific accusation of evil spell-casting, were guided to focus on sex/copulation with the devil, and the witches at a Black Sabbath.[56] Surprisingly, the *Malleus* does warn about the pitfalls of torture: "[N]ote that, if she confesses under torture, she should then be taken to another place and questioned anew, so that she does not confess only under the stress of torture."[57] This would allow a court to deem an incriminating statement to be a free and open confession that could then be entered into court record by a notary, and prove the legitimacy of the investigation.[58]

Contrary to the legal protections offered to criminal defendants in the modern western world, the *Malleus* did not allow the accused witch much confrontation of her accusers. Kramer and Sprenger made it very clear that:

> [I]t threatens more danger to the witnesses if their names are made known to the accused. The reason for this is that it is more dangerous to make known the names of the witnesses to an accused person who is poor, because such a person has many evil accomplices, such as outlaws and homicides, associated with him, who venture nothing but their own persons [. . .].[59]

The *Malleus* did allow the accused to have an advocate, but the witnesses were never to be made known to the advocate, even under an oath of secrecy.[60]

By establishing proceedings in which invasive methods, harsh questioning, torture, and inadequate means to a defense were the legal norm, the most likely result was a verdict of guilty by those who would pass judgment over the accused. When the inevitable guilty verdict did indeed come, the *Malleus* furnished the judge with the proper words to use depending on whether the accused repented or confessed, or the level of suspicion of the investigative body itself.[61] Such boiler-plate criminal sentences were in a variable format that judges could alter to fit the location, presiding officers, and nature of the proceedings themselves.[62]

Despite the earlier mentioned claim in the *Malleus* that those who denied the reality of witchcraft were heretics,[63] it is important to note that the creation of this book did not suddenly spark a witch-hunt craze in Europe. Most of the

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55. BARSTOW, *supra* note 4, at 172.
56. BRIGGS, *supra* note 4, at 31-34.
57. KRAMER & SPRENGER, *supra* note 26, at 226.
58. *See id.*
59. *Id.* at 216-17.
60. *Id.* at 217.
61. *See id.* at 240-71.
62. KRAMER & SPRENGER, *supra* note 26, at 1-12.
63. *Id.*

European populace in the late fifteenth century was illiterate. Therefore, the belief in witches and witchcraft, as influenced by the *Malleus*, would have to begin first with the educated upper-class elite of European society since they possessed the ability to read and understand such a work. For the rest of European society, members had to be told by the educated that witches could and did perform the various acts of which they were accused.[64] In this process, the *Malleus* was an appropriate tool in the dissemination of beliefs and information since it held enough information drawn from the judicial/inquisitorial experiences of the authors and contained theological citation to important works with a style of argumentation to make it appear authoritative.[65] While not directly inspiring a frenzy of witchcraft prosecutions, the *Malleus* nevertheless did make one of the most important contributions to the development of the European witch-hunt. Such witch-hunts were also spurred onward by municipal and royal courts adopting inquisitorial procedures.[66] The following were accepted universally in the courts in the sixteenth century as a means to an end: "Secret sessions, withholding of the source of charges, denial of counsel, [and] acceptance of evidence from prejudiced sources, lack of cross-examination, [. . .] assumption of guilt [. . .]."[67]

While having an effect among the educated of Europe, and in turn the lay people in European communities, the concepts of the *Malleus* soon influenced the civil codes of the legal systems of European states. In 1532, the states of the Holy Roman Empire, which included what is now Germany, Austria, the Czech Republic, Switzerland, Eastern France, the Low Countries, and parts of Northern and Central Italy, adopted the Carolina Code, which imposed torture and death as punishments for witchcraft as suggested by the *Malleus*.[68]

In the sections of the *Malleus* denouncing European midwives that worked in the local communities,[69] Kramer and Sprenger note that "it comes as no surprise that the persecutions were also viewed as a reaction by a male-dominated church against women, old women in particular."[70] The idea of a woman having medical knowledge and carrying out procedures would not have been welcomed by educated males in a community.[71] To simply argue that witch-hunting, as a result of the *Malleus*, was woman-hunting "ignores the fact that men were seized, [tried] and executed [as witches]."[72] However, evidence suggests that when brought into court on charges of sorcery, men were often let off

64. KRAMER & SPRENGER, *supra* note 26, at 1-12.
65. *See id.*
66. BARSTOW, *supra* note 4, at 49.
67. *Id.*
68. CAWTHORNE, *supra* note 3, at 41.
69. BRIGGS, *supra* note 4, at 217; *see also* CLIFTON, *supra* note 1, at 138.
70. CLIFTON, *supra* note 1, at 138.
71. *Id.* at 77.
72. *Id.* at 139.

with lighter sentences than women since the laws and theology were not biased against men.[73] A significant percentage of the people (80-85%) who were executed for witchcraft were indeed women.[74] In fact, while no historian agrees on the death toll aided by the use of the *Malleus*, more credible academic estimates usually range between 200,000 and 300,000.[75] Regardless of the sex examined, the effect of the *Malleus* on the law lasted until the 1700s with support from clergy, educated citizens, and jurists. Notably, medieval jurists such as Jean Bodin, Professor of Law at Toulouse and Royal Advisor to the King of France, would refer to the Papal Bull of Innocent VIII and other sources such as the *Malleus* in his support of witch-hunts when he expressed his viewpoints on witches:

> [T]hose who let witches escape or who do not carry out their punishment with utmost rigour, can be assured that they will be abandoned by God to the mercy of witches. And the country which tolerates them will be struck by plagues, famines, and wars – but those take vengeance against them will be blessed by God, and will bring an end to His wrath.[76]

While jurists did indeed continue to support the concepts of the *Malleus* in the later sixteenth century, the problematic nature of the *Malleus* began to be noticed by scholars of the day. In 1584, Reginald Scot argued a skeptical view of witchcraft. Scot was quick to point out that those accused and arrested for being witches had failed to make themselves young and beautiful through witchcraft or pacts with the devil. He further reasoned that since any woman would desire to be beautiful, the whole apparatus of devil worship must be a sham.[77] Often it was the old, opinionated, or unpopular woman in a community who would be likely to be seized and examined as a witch in the manner prescribed by the *Malleus*.[78] Scot's treatise went even further, and offered one of the first condemnations of Kramer and Sprenger and their work on the *Malleus*:

> These two doctors, to mainteine their credit, and to cover their injuries, have published [with the] same monsterous lies, which have abused all Christendome, being spread abroad with such authoritie, as it will be hard to suppress the credit of their writings, be they never so ridiculous and false. Which although they mainteine and stirre up with their owne praises; yet men are so bewitched, as to give credit unto them. For proofe whereof I remember they write in one place of their said booke, that by reason of their severe proceedings against witches, they suffered intolerable assaults, speciallie in the night,

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73. BARSTOW, *supra* note 4, at 25.

74. CLIFTON, *supra* note 1, at 138.

75. *Id.*

76. Jean Bodin, *On the Demon Mania of Witches (1580), in* WITCHCRAFT IN EUROPE, 400-1700: A DOCUMENTARY HISTORY 290, 301 (Alan Charles Kors & Edward Peters eds., 2d ed. 2001).

77. Reginald Scot, *Discoveries of Witchcraft (1584), in* WITCHCRAFT IN EUROPE, 400-1700: A DOCUMENTARY HISTORY 394, 398-99 (Alan Charles Kors & Edward Peters eds., 2d ed. 2001).

78. *See* BARSTOW, *supra* note 4, at 27.

> many times finding needels sticking in their biggens, which were thither conveied by witches charmes: and through their innocencie and holiness (they saie) they were never miraculouslie preserved from hurt. Howbeit they affirnie that they will not tell all that might make to the manifestation of their holines: for then should their owne praise stinke in their owne mouthes. And yet God knoweth their whole booke conteineth nothing but stinking lies and poperie. Which groundworke and foundation how weake and wavering it is, how unlike to continue, and how slenderlie laid, a child may soon discerne and perceive.[79]

It is notable that there was a small reduction in the intensity of witch-hunting during the first half of the sixteenth century. This reduction, however, while attributed to the early criticism of the tenets laid out in the *Malleus*, can also be attributed to the interruption in the publication of the *Malleus* itself. The *Malleus*, while popular between 1486 and 1520, and again between 1580 and 1650, was not reprinted at all between 1521 and 1576.[80] In the last portion of the sixteenth century, the witch-hunt craze intensified again due to economic and political instability among the European states. During the years from 1550 to 1650, Europe experienced continued inflation, famines, decrease in trade, revolts, and civil wars.[81] In times of great upheaval, it would not be inconceivable that people in European communities looked for a simple cause to explain bad events and the poor standard of living they faced on a daily basis. Witches, therefore, offered the easier discoverable source of problems, and executions offered the easier solution to impose on a community in difficult times.

Within the next few decades, more European scholars and legal jurists risked the wrath of the church and the legal system in their communities by criticizing the method for seeking out witches. In 1631, Friedrich Spee followed Reginald Scot as a critic of the criminal justice system in regards to witchcraft. Spee was a Jesuit and a poet who had the painful task of being a confessor of witches condemned to death in the persecutions at Wurzburg in the late 1620s.[82] Spee was appalled by the method of the trials, and he published an anonymous attack upon the persecution of witches in 1631, known as a *Cautio Criminalis*, only to have his identity revealed later in the century.[83] Spee focused his attention on the lack of proof of allegations against defendants and the degree of unfairness that played out in the trials of witches. His treatise also focused on the ques-

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79. Scot, *supra* note 77.

80. *See* LEVACK, *supra* note 7, at 187.

81. *Id.* at 190; *see also,* E. J. Hobsbawm, *The Crisis of the Seventeenth Century, in* CRISIS IN EUROPE, 1560-1660 5-58 (Trevor Henry Aston ed., 1965).

82. Friedrich Spee, *Cautio Criminalis (1631), in* WITCHCRAFT IN EUROPE, 400-1700: A DOCUMENTARY HISTORY 425, 425 (Alan Charles Kors & Edward Peters eds., 2d ed. 2001) (quoting GEORGE LINCOLN BURR, THE WITCH PERSECUTIONS 30-35 (Phila. Univ. of Pa. Press, reprint 1971) (1907)).

83. *Id.*

tionable methods of trials against witches that were in place. To answer his questions, he proposed sharp attacks against the trial system of the day:

> If now some utterance of a demoniac or some malign and idle rumor then current (for proof of the scandal is never asked) points especially to some poor and helpless Gaia, she is the first to suffer. [. . .] And yet, lest it appear that she is indicted on the basis of rumor alone, without other proofs, as the phrase goes, lo a certain presumption is at once obtained against her by posing the following dilemma: Either Gaia has led a bad and improper life, or she has led a good proper one. If a bad one, then, say they, the proof is cogent against her; for from malice to malice the presumption is strong. If, however, she has led a good one, this also is none the less a proof; for thus, they say, are witches wont to cloak themselves and try to seem especially proper. [. . .] Lest, however, further proofs against her should be lacking, the Commissioner has his own creatures, often depraved and notorious, who question into all her past life. This, of course, cannot be done without coming upon some saying or doing of hers which evil-minded men can easily twist or distort into ground for suspicion of witchcraft. [. . .] Before she is tortured, however, she is led aside by the executioner, and, lest she may by magical means have fortified herself against pain, she is searched, her whole body being shaved [. . .]; although up to this time nothing of the sort was ever found [. . .].[84]

Spee, in his detailed accounts of his observations during witch trials, certainly noted the procedures laid out in the *Malleus*. However, unlike the positive results and benefits of Kramer's and Sprenger's work, the account offers the unfair and biased reality of the use of such methods of investigation and trial techniques in the search for the truth regarding a possible claim of witchcraft against an accused.

By the 1700s, changes took place in the operation of European judicial systems that led to a decline in the prosecution of people as witches. New developments in the area of judicial and legal theory now required conclusive evidence regarding witchcraft and a pact with the devil.[85] Stricter rules were created regarding the use of torture, and also, there was an increase in the promulgation of decrees either restricting or eliminating prosecutions for witchcraft.[86] At the same time, European judges and princes were beginning to change their outlook with regards to witchcraft. Judicial reluctance now emerged in the realm of dealing with witchcraft cases in court. This reluctance stemmed from the embracement of deep doubts by jurists and judicial officials about the reality of witchcraft phenomena. They were more inclined at this period in European history to insist upon complete proof or a voluntary confession before torture could be implemented against a suspect in custody.[87]

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84. Spee, *supra* note 82, at 426-27.
85. LEVACK, *supra* note 7, at 236.
86. *Id.*
87. *Id.* at 239.

Despite changing societal views towards witchcraft, the concepts and tenets of the *Malleus* still had influence in the courtroom. By the beginning of the eighteenth century, the influence of the *Malleus* was still felt, and the criticism of witch-hunting in certain communities could bring disaster to a theological or legal scholar who dared to challenge the prevailing views of the day.[88] Christian Thomasius was one such scholar. As the first head of the University of Halle in Brandenburg, Prussia, his insistence on religious toleration, criticism of judicial torture, and denial of the crime of witchcraft drew down on him the opposition of both theologians and other jurists while making him a prominent and controversial jurist.[89] From his winter lecture notes of 1702, it becomes clear why he drew so much criticism from the authorities of the time:

> But I deny most firmly and cannot believe (10) that the devil has horns, claws, or talons, or that he appears as a Pharisee, or a monk, or a monster as men depict him. [. . .] I also cannot believe (12) that the devil can enter into agreements with humans, cause them to give him written documents [that is, pacts] sleep [that is, have sexual intercourse] with them, or that he bears them off to the Blocksberg [sabbat] on a broom or a goat, and so forth. [. . .] I hold (16) that since the procedure of the witch trials is inadequate, because jurists have made the pact with the devil the basis of the charge, a thing which is not possible in nature, that one has to proceed cautiously if people are to be convicted of having injured others through witchcraft. There must be many proofs, and the rules of evidence indicated in the Code of Criminal Law are not correct, as has been shown in my disputation. And (17) especially in the case of wonderful and supernaturally induced diseases, great investigation should be made in order to make certain that there are no deceptions involved, even when they are testified to by learned and trustworthy persons and even by doctors of medicine, because learned and trustworthy people can be as easily deceived as any others, if not more so. [. . .] At that time it was said, who denies Christ denies God. Today it is said, who denies the horned and painted devil denies God. Even in the depths of darkest popery would it have been possible for such mischief to be conceived?[90]

Thomasius also wrote the *Historische Untersuchung vom Ursprung und Fortgang des Inquisitions Prozesses* (historical investigation into the origins and continuation of the inquisitorial trial) in 1712.[91] This work provided a detailed and highly critical consideration of virtually every known text from the Bible, Roman Law, Canon Law, and *Malleus Maleficarum* itself.[92]

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88. *See* Christian Thomasius, *Witchcraft and the Law (1702), in* WITCHCRAFT IN EUROPE, 400-1700: A DOCUMENTARY HISTORY 444 (Alan Charles Kors & Edward Peters eds., 2d ed. 2001).

89. *Id.* at 444.

90. *Id.* at 446-48.

91. *Id.* at 444.

92. *Id.*

Thomasius's work also reiterated that Spee was the author of *Cautio Criminalis*.[93]

Eventually, the work of jurists led to changes in the witchcraft beliefs of the educated European elite and later, the lay people of Europe. Many of the early criticisms of the concepts of the *Malleus* and the nature of witchcraft came from theologians, philosophers, and scientists who had nothing to do with the prosecution or trials of suspected witches.[94] New views that unexplained or mysterious phenomena occurring in the daily lives of Europeans was a possible product of a natural world and the ordered universe helped to finally remove the credibility of the beliefs held in the *Malleus*.[95] However, the impact on European society, law, and theology, as well as the lives of those executed by a prosecutor with a *Malleus* in hand were profound and far-reaching.

93. Thomasius, *supra* note 88.
94. LEVACK, *supra* note 7, at 239.
95. *Id.* at 241-42.

The *Lopez/Morrison* Limitation on the Commerce Clause-Fact or Fabrication?

MARK A. CORRERO*

"[G]overnment's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it."[1]

I. INTRODUCTION

Have *United States v. Lopez* and *United States v. Morrison* really increased the number of overturned federal statutes?[2] Or, has their effect been mainly to increase the number of pages in law review journals? Although many pages have been filled exploring the theoretical implications of *Lopez* and *Morrison*, there is a dearth of scholarship delineating their actual effect on federal statutes.[3] This article explores the decisions of the federal courts, and seeks to determine which statutes have been impacted as a result of *Lopez* and *Morrison*. Further, it will analyze the characteristics of those statutes overturned by *Lopez* and *Morrison* in order to determine which current federal statutes might also be overturned.

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1. President Ronald Reagan's Address at the White House Conference on Small Business, 22 WEEKLY COMP. PRES. DOC. 1101 (Aug. 15, 1986).

2. United States v. Morrison, 529 U.S. 598, 617 (2000) (holding, "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."); United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that "the Gun-Free School Zones Act [of 1990], Congress made it a federal offense for any individual knowingly to possess a firearm [. . .] [in a] school zone [. . .] the Act exceeds the authority of Congress [under the] commerce clause [. . .] [because it was] a criminal statute that by its terms ha[d] nothing to do with "commerce" or any [kind] of economic enterprise [. . .] [and it] "contain[ed] no jurisdictional element [to] ensure, through case-by-case inquiry, that [. . .] possession [. . .] [of a firearm had any concrete tie to] interstate commerce.").

3. As of the date of submission of this article, more than 3,722 articles have been written on *Lopez* and *Morrison*. Of those, none have attempted to actually characterize the total breadth of their combined effect. There was one written shortly after the *Lopez* decision. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 681 (1995) (discussing issues after *Lopez*).

II. BRIEF HISTORY OF THE COMMERCE CLAUSE

A. BROAD FEDERAL COMMERCE POWER

"The Congress shall have Power To [. . .] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[4] How much power do these words give Congress? The answer depends on the era of history. From 1937 to the early 1990s, Congress' power through the Commerce Clause was virtually limitless.[5] Three key decisions redefined the Supreme Court's expansive interpretation of "commerce among the states."[6] In so doing, the Court preordained fifty-eight years of not one federal law being declared unconstitutional as exceeding the scope of Congress' commerce power.[7]

B. CONTRACTION OF THE COMMERCE POWER AND RESURGENCE OF THE TENTH AMENDMENT AS A LIMIT ON CONGRESS

It was not until the 1990s that the Court commenced the task of limiting the scope of Congress' powers.[8] *Lopez* and *Morrison* established that if an activity is noncommercial, then it must have an obvious connection to interstate commerce. Furthermore, the effects of the activity cannot be aggregated if it is non-economic and traditionally left to the states. The Court in *United States v. Lopez*, for the first time since 1937, declared a law unconstitutional because it exceeded the scope of Congress' commerce power.[9] The law in question was 18 U.S.C. § 922(q)(1)(A), which prohibited "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[10] The Court held that 18 U.S.C. § 922(q) exceeded Congress' Commerce Clause authority because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[11] The Court pronounced that § 922(q) "contains no jurisdictional element which would ensure, through case-

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4. U.S. CONST. art. I, § 8, cl. 3.

5. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 127 (Richard A. Epstein et al. eds., 2001).

6. CHEMERINSKY, *supra* note 5, at 120. Wickard v. Filburn, 317 U.S. 111, 128 (1942) (holding that even an entirely intrastate activity, such as growing wheat for family consumption can be regulated by Congress under the Commerce Clause power); United States v. Darby, 312 U.S. 100, 118 (1941) (holding that Congress, pursuant to its Commerce Clause power, may regulate intrastate activity as a means to the legitimate end of regulating interstate commerce); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.").

7. CHEMERINSKY, *supra* note 5, at 120.

8. *Id.* at 142.

9. *Id.* (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).

10. *Id.* at 143 (quoting *Lopez*, 514 U.S. at 551).

11. *Lopez*, 514 U.S. at 561.

by-case inquiry, that the firearm possession in question affects interstate commerce."[12]

Five years following *Lopez*,[13] the Supreme Court, in *United States v. Morrison*, once again limited the reach of the Commerce Clause. The statute at issue in *Morrison* was 42 U.S.C. § 13981, the Violence Against Women Act (VAWA), which proscribed federal punishment for violent crimes committed against women. In reaffirming *Lopez*, the *Morrison* Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."[14] The Court went on to state that "[t]he regulation and punishment of *intrastate* violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[15]

III. EFFECT OF *LOPEZ* AND *MORRISON*

This article will explore statutes that have been interpreted by the federal circuit courts by applying *Lopez* and *Morrison* over the past three years. How the courts have construed these statutes is crucial in determining whether, and to what extent, *Lopez* and *Morrison* are impacting the Commerce Clause. Some of the statutes this article will analyze are: (1) 18 U.S.C. § 844(i) (Federal Arson Statute); (2) 18 U.S.C. § 2113(f) (Federal Bank Robbery Statute); (3) 18 U.S.C. § 228 (Child Support Recovery Act); (4) 21 U.S.C. § 841 (Drug Abuse Prevention Act); (5) 18 U.S.C. § 922 (Felon in Possession Statute); (6) 18 U.S.C. § 248(a) (Freedom of Access to Abortion Clinics); (7) 18 U.S.C. § 1951 (Hobbs Act); (8) 18 U.S.C. § 922(g)(8) & (9) (Possession of Firearm while Subject to a Domestic Order); (9) 18 U.S.C. § 962 (RICO); and (10) 18 U.S.C. § 2251 (Sexual Exploitation of a Minor). This article will then seek to extrapolate from these findings in order to determine what other statutes might pass or fail a constitutional challenge based on the *Lopez* and *Morrison* limitation on the Commerce Clause.

A. STATUTES CORRECTLY CONSTRUED NARROWLY BECAUSE OF LOPEZ AND MORRISON

1. *Federal Arson Statute, 18 U.S.C. § 844(i)*

Lopez and *Morrison* have had a substantial impact on two statutes. The Federal Arson Statute has been limited considerably because of *Lopez* and *Morri-*

12. *Lopez*, 514 U.S. at 561.
13. United States v. Morrison, 529 U.S. 598, 598 (2000).
14. *Morrison*, 529 U.S. at 617–18 (citing *Lopez*, 514 U.S. at 568).
15. *Id.* at 618 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426, 428 (1821) (emphasis added)).

son.[16] Of all the federal statutes reviewed since *Lopez* and *Morrison*, the Federal Arson Statute has received the third most attention from the courts.[17] The Federal Arson Statute attaches federal penalties to seemingly wholly intrastate criminal behavior.[18] Of the nine court decisions reviewing the Federal Arson Statute, all but two have narrowly construed what it means to substantially affect interstate commerce.[19]

The first case that did not use *Lopez* and *Morrison* to limit the application of the Federal Arson Statute was *United States v. Jimenez.*[20] In *Jimenez*, the court reviewed *Lopez* and *Morrison* and stated that the test for determining whether or not an activity affects interstate commerce in arson cases is determined by the use of the building.[21] The court stated, "It is undisputed that the instant case turns on whether the property was used in an activity affecting interstate commerce."[22] In affirming the defendant's sentence, the court determined that since

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16. 18 U.S.C. § 844(i) (2000) (mandating federal prison terms for burning down property used in interstate commerce).

17. At the time of this article the arson statute had been discussed substantially in nine cases. In all but two cases the behavior in question did not sufficiently affect interstate commerce. *See generally* Jones v. United States, 529 U.S. 848 (2000) (holding that a burned private residence did not fall within the coverage of the federal arson statute); United States v. Williams, 299 F.3d 250 (3d Cir. 2002) (holding that the burning of a vacant building sufficiently affected interstate commerce to constitute a federal crime); United States v. Rayborn, 312 F.3d 229 (6th Cir. 2002) (holding that the burning of a church did affect interstate commerce); United States v. Rea, 300 F.3d 952 (8th Cir. 2002) (holding that the burning of a church did not affect interstate commerce); United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002) (holding that the burned churches did not have a sufficient effect on interstate commerce to violate the arson statute); United States v. Jimenez, 256 F.3d 330 (5th Cir. 2001) (holding the burning of a family home satisfied the interstate commerce requirement of federal arson statute); United States v. Odom, 252 F.3d 1289 (11th Cir. 2001) (holding that the evidence was insufficient to show that the church was used in or affected interstate commerce, so as to bring it within the scope of the federal arson statute); United States v. Ramey, 2000 WL 790959 (4th Cir. June 20, 2000) (holding that the burning of a private mobile home does not satisfy the interstate commerce requirement of the federal arson statute); United States v. Ryan, 227 F.3d 1058 (8th Cir. 2000) (holding that a burned building was not used in an activity affecting interstate commerce).

18. 18 U.S.C. § 844(i) (2000) states that:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

19. United States v. Williams, 299 F.3d 250, 250 (3d Cir. 2002); United States v. Rayborn, 312 F.3d 229, 229 (6th Cir. 2002).

20. United States v. Jiminez, 256 F.3d 330 (5th Cir. 2001).

21. *Jiminez*, 256 F.3d at 336–37.

22. *Id.* at 337.

the home also contained a business, it "would *easily* be classified as substantially affecting interstate commerce."[23] The court relied on the following facts:

> From 1981 until the time of the fire, Richard ran the family business, A-1 Plastering, from a one-room office adjacent to the garage. This office was the company's business address. Business records and smaller supplies were located in the office. Other supplies, like cement, were stored in the garage. In the first nine months of 1993, A-1 Plastering employed six full-time workers and generated gross receipts of $170,000. The business used two pickup trucks and one van, each manufactured in Missouri. Further, A-1 Plastering's regularly used supplies and equipment were all manufactured outside of Texas.[24]

United States v. Williams broadly construed the Federal Arson Statute as well.[25] In *Williams*, the defendant was convicted of violating § 844(i) by burning down a vacant building.[26] The facts of the case illuminate the court's decision.[27] In April 1998, Williams and his ex-business partner bought a vacant building for $111,000, making the down payment of $11,000 to Lhormer Realty.[28] For five months Williams made repeated attempts to rent the building, including hanging a banner on the building.[29] Furthermore, he took out advertisements in the local newspaper.[30] Eventually he had the building shown to a Virginia satellite television company, Primestar-Excalibur (Primestar).[31] The night before the building burned, Williams finalized the lease negotiations with Primestar.[32] Primestar planned to immediately move into the building.[33]

After the building burned, Williams claimed $500,000 in insurance proceeds.[34] The insurance company paid Williams a total of $400,000 which included $336,000, the fair market value minus the payoff Williams owed to the mortgage company, plus $64,000 for the clean up costs of the lot.[35] The court in *Williams* determined that since the Federal Arson Statute contained the jurisdictional element that *Lopez* lacked, its conclusion would be determined under *Jones v. United States*.[36] The court determined that the proper inquiry is to the

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23. *Id.* at 331, 339 (emphasis added).
24. *Id.* at 335.
25. *Williams*, 299 F.3d at 250.
26. *Id.* at 252.
27. *Id.*
28. *Id.*
29. *Id.* at 252-53.
30. *Williams*, 299 F.3d at 253.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Williams*, 299 F.3d at 253.
36. *Williams*, 299 F.3d at 254; *see* Jones v. United States, 529 U.S. 848 (2000).

use of the building.[37] Williams argued that since the building was vacant, it was not actively "employed for commercial purposes."[38] The court reasoned, based on *United States v. Gaydos*, that since Williams was actively attempting to lease the building, "a reasonable trier of the facts could have concluded that Williams intended the building, at the very least, to return to the stream of commerce."[39] The court went on to conclude that "[i]t can be reasonably assumed that Primestar, a Virginia corporation negotiating to lease Pennsylvania property, had its interstate commercial activities disrupted when it learned of the destruction of the [. . .] building. A rational trier of the facts could find that this satisfied the requisite interstate commerce nexus."[40]

The court in *United States v. Rayborn* held that the burning of a church affected interstate commerce enough to fall within the bounds of the Federal Arson Statute.[41] The defendant in this case, Rayborn, was also the pastor of the church.[42] After the church was destroyed by fire, the government indicted him under 18 U.S.C. § 844(i), alleging that he set the fire to collect the insurance proceeds.[43]

The court, also relying on *Jones*, concluded that *Jones* imparted a two-part test to determine whether the building would fall within the reach of the Federal Arson Statute:[44] "First, courts must inquire 'into the function of the building itself.' Second, courts should determine whether that function 'affects interstate commerce.'"[45] The court concluded that even though the use of the building as a church failed to meet the first part of the test, it would still fall under the statute if it affected interstate commerce.[46] The court then relied on various facts to establish that the activities of this church affected interstate commerce:

> In particular, the church used regular radio broadcasts as part of its evangelism; the desired effect was to increase membership and attendance at the church's worship services and other programs. Because the broadcast area included Mississippi and Arkansas, as well as Tennessee, the logical consequence of increased attendance would be increased travel into Tennessee from neighboring states. Causing interstate travel for the purpose of receiving money from the travelers affects the flow of money in commerce, even if the money is a gift. [. . .] Furthermore, the use of the radio broadcasts clearly encompasses active employment of commercial entities, including three radio

37. *Williams*, 299 F.3d at 254.
38. *Id.* at 255.
39. *Id.* (citing 108 F.3d 505, 507-11 (1997)).
40. *Id.* at 256.
41. *Rayborn*, 312 F.3d at 230 (holding that the burning of a church did affect interstate commerce).
42. *Id.* at 232.
43. *Id.*
44. *Rayborn*, 312 F.3d at 233; *see Jones*, 529 U.S. at 854.
45. *Rayborn*, 312 F.3d at 232 (citing *Jones*, 529 U.S. at 854) (citations omitted).
46. *Id.* at 233-34.

stations in Tennessee and one in Mississippi. Altogether, the church paid $17,000 in 1997 to the various radio stations for its broadcasts.[47]

2. *Possession of Child Pornography, 18 U.S.C. § 2252(a)(4)(B)*

The only other statute that *Lopez* and *Morrison* seem to have dramatically impacted is 18 U.S.C. § 2252. This statute makes it unlawful to possess pornographic pictures of minors.[48] This statute was overturned by *United States v. Corp* in 2001.[49]

Corp, the twenty-three year old defendant, took consensual pornographic pictures of his twenty-six year old wife and seventeen year old girlfriend.[50] He took the pictures, depicting the two females engaged in sexual activities, to a

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47. *Rayborn*, 312 F.3d at 234 (citing Camps Newfound/Owatonna Inc. v. Town of Harrison, Maine, 520 U.S. 564, 573 (1997)) (citations omitted). The Court went on to note that:

> Other facts support a conclusion that the building was used in interstate commerce. Because of its location, which is less than five miles to Tennessee's border with Mississippi and no more than fifteen miles to the border with Arkansas, the church drew members from Tennessee, Arkansas, and Mississippi. The church also hosted free events, to which the public was invited. It served as the site of gospel concerts, including some featuring out-of-state talent, for which the church requested donations of $10 to $12.
>
> Furthermore, unlike the private home in *Jones*, the church building was owned by a tax-exempt, non-profit organization with a Board of Trustees. In addition, the church employed two persons and collected substantial sums on a weekly basis, approximately $9,000 to $10,000. These funds were received from residents of Tennessee, Mississippi, and Arkansas, as well as other states.
>
> The church also engaged in substantial activities in the local market for goods. For example, the church spent $4,700 on food and flowers for funerals in 1997, as well as $7,000 for groceries to be used to host its picnics and breakfasts. In addition, the church owned several vehicles, including a car, a truck, and a recreational vehicle.

Rayborn, 312 F.3d at 234-35.

48. 18 U.S.C. § 2252(a)(4) (2000) made it unlawful to:

> **(4)** Either—
>
> **(A)** In the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or
>
> **(B)** Knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> **(i)** The producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> **(ii)** Such visual depiction is of such conduct [. . .]

49. United States v. Corp, 236 F.3d 325, 333 (6th Cir. 2001) (holding that "[c]learly, Corp was not the typical offender feared by Congress that would become addicted to pornography and perpetuate the industry via interstate connections. Under these circumstances, the government has failed to make a showing that Corp's sort of activity would substantially affect interstate commerce").

50. *Corp*, 236 F.3d at 326.

local pharmacy to be developed.[51] The pharmacy called the local police who began an investigation that ended with Corp being indicted for violation of § 2252(a)(4)(B). The district court maintained that it had jurisdiction because the paper the pictures were printed on was manufactured out of state.[52] Corp objected, claiming that the court could not establish a sufficient nexus between the paper and an effect on interstate commerce.[53]

In overruling the defendant's objection, the court allowed Corp to enter into a plea deal that would enable him to appeal the court's ruling on his objection. The court stated, "You know, I tend to agree with your gut reaction to this. This is an awful stretch, it seems to me, of the interstate commerce clause. And I don't think it would hurt anyone to get that clarified [. . .] ."[54] On appeal, Corp argued that § 2252(a)(4)(B) was unconstitutional both facially and as applied to him.[55] The appellate court reviewed the statute, considering both *Lopez* and *Morrison*.[56]

The government first argued that Congress found the production and distribution of child pornography an economic activity.[57] Further, the government contended that § 2252(a)(4)(B) contained the necessary jurisdictional element that *Lopez* lacked.[58] The court refused to find the statute facially unconstitutional.[59] However, the court did conclude that the statute was unconstitutional as applied to Corp.[60] The court based its decision on the facts that Corp did not distribute

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51. *Id.*
52. *Id.* at 327.
53. *Id.*
54. *Id.*
55. *Corp*, 236 F.3d at 327.
56. *Id.* at 331–32. The court stated:

> In addressing the constitutionality of § 2252(a)(4)(B), we must apply the framework of *Lopez* in light of the later case of *Morrison*. As we have stated, those cases have established that we must consider (1) whether the prohibited activity is commercial/economic in nature; (2) whether there is an express jurisdictional element in the statute; (3) whether Congress made specific findings about the prohibited activity's affect on interstate commerce; and (4) whether Congress's findings could be interpreted to establish a general federal police power or whether there is a sufficient link between the regulated activity and interstate commerce.

Id. (citation omitted).

57. *Id.* at 332 (citing the Child Abuse Victims Right Act of 1986, Pub L. No. 99-591 § 702, 100 Stat. 3341–74 (codified as amended at 18 U.S.C. § 2252 (2000))).
58. *Id.*
59. *Id.* The court stated that:

> While we are faced with serious questions about the constitutionality of the Act under the Commerce Clause power of Congress, we choose not to declare the Act facially unconstitutional. Instead, we assume [. . .] that *Morrison* and *Lopez* have required that the jurisdictional components of constitutional statutes are to be read as meaningful restrictions. Furthermore, we do not determine the aggregate effect on interstate commerce of the purely intrastate dealing in child pornography.

Corp, 236 F.3d at 332.
60. *Corp*, 236 F.3d at 332.

the material, the seventeen year old was not an exploited child of the type that Congress was attempting to protect, and there was no allegation that Corp was a pedophile.[61] More recently, the Ninth Circuit relied on *Corp* when it found § 2252(a)(4)(B) to be unconstitutional.[62]

B. STATUTES CORRECTLY CONSTRUED BROADLY WHERE *LOPEZ* AND *MORRISON* HAVE ONLY HAD MINIMAL IMPACT

This article also includes detailed findings as to which circuit courts are applying the *Lopez* and *Morrison* limitation and which are still seeking to further expand the seemingly limitless reach of Congress. Although the following statutes have been correctly decided under current law, many of these statutes, particularly the ones pertaining to gun ownership, seem to intrude upon other constitutional principles.

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61. *Id.* at 332–33. The court reasoned that:

> Instead, we conclude that Corp's activity was not of a type demonstrated *substantially* to be connected or related to interstate commerce on the facts of this case. Under the undisputed circumstances here, Corp was not involved, nor intended to be involved, in the distribution or sharing with others of the pictures in question. [The seventeen year old] was not an "exploited child" nor a victim in any real and practical sense in this case. In the other cases that have addressed this issue, the courts were faced with the much more threatening situation where an adult was taking advantage of a much younger child or using the imagery for abusive or semi-commercial purposes.
>
> . . . .
>
> Was the activity in this case related to explicit and graphic pictures of children engaged in sexual activity, particularly children about fourteen years of age or under, for commercial or exploitive purposes? Were there multiple children so pictured? Were the children otherwise sexually abused? Was there a record that defendant repeatedly engaged in such conduct or other sexually abusive conduct with children? Did defendant move from place to place, or state to state, and repeatedly engage in production of such pictures of children? These questions are relevant to a determination on a case-by-case basis about whether the activity involved in a certain case had a substantial effect on commerce.
>
> . . . .
>
> Corp was not alleged to be a pedophile nor was he alleged to have been illegally sexually involved with minors other than [the seventeen year old], who was merely months away from reaching majority. Clearly, Corp was not the typical offender feared by Congress that would become addicted to pornography and perpetuate the industry via interstate connections. Under these circumstances, the government has failed to make a showing that Corp's sort of activity would substantially affect interstate commerce. Having reached this conclusion, we need not decide whether the conduct in this case was commercial activity within the meaning of *Morrison*.
>
> . . . .
>
> Accordingly, we REVERSE Corp's conviction and sentence on the grounds that, reviewing the undisputed and unusual facts of this case, we are not persuaded that Corp's activity has a sufficient nexus with interstate commerce.

Id. (citations omitted).

62. United States v. McCoy, 323 F.3d 1114, 1115 (9th Cir. 2003) (holding § 2252, which prohibits possession of child pornography made with materials that traveled in interstate commerce, to be unconstitutional because the picture was a family photo that depicted a mother and her young daughter).

Circuits have recently upheld the constitutionality of the Americans with Disabilities Act ("ADA") under the Commerce Clause. In *United States v. Mississippi Department of Public Safety*, the court decided that the dismissal of a law enforcement trainee was a violation of the ADA.[63] The Mississippi Department of Public Safety argued, pursuant to *Lopez* and *Morrison*, that the trainee's dis-

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63. United States v. Miss. Dep't of Pub. Safety, 321 F.3d 495, 500-01 (5th Cir. 2003) (deciding the constitutionality of 42 U.S.C.A. § 12112, ADA, in light of *Morrison* and *Lopez*). The ADA states that:

(a) General rule
No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction
As used in subsection (a) of this section, the term "discriminate" includes—

(1) Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) Participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) Utilizing standards, criteria, or methods of administration—

(A) That have the effect of discrimination on the basis of disability; or

(B) That perpetuate the discrimination of others who are subject to common administrative control;

(4) Excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) Failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C.A. § 12112 (2003).

missal was a purely local activity that did not provide the substantial nexus requirement propounded by *Lopez* and *Morrison*.[64] The court disagreed. The court cited *Morrison's* language indicating that Congress can regulate any crime so long as it has a substantial aggregate effect on employment.[65] The court relied on both the evidence that the United States presented showing the harmful effects of discrimination across the nation and the legislative history of the ADA. The legislative history cited substantial findings by Congress concerning the number of Americans with disabilities and the financial impact that discrimination would have on the economy as a whole.[66]

Another statute that has been upheld as a constitutional exercise of Congress' Commerce Clause power is the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228.[67] In *United States v. Monts*, the court held that failure to pay child support is the type of crime that is within the reach of the Commerce Clause.[68] Every other circuit that has addressed the CSRA has agreed.[69]

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64. *Miss. Dep't of Pub. Safety*, 321 F.3d at 500.

65. *Id.*

66. *Id.* at 500–01. *But see* Lavia v. Pa. Dep't of Corr., 224 F.3d 190, 206 (3d Cir. 2000) (deciding that in enacting the ADA, Congress exceeded its § 5 enforcement power).

67. *See generally* United States v. Monts, 311 F.3d 993 (10th Cir. 2002) (discussing the implications of failure to pay child support); United States v. King, 276 F.3d 109 (2d Cir. 2002) (holding that CSRA represents a legitimate exercise of Congressional power under commerce clause); United States v. Manzella, No. 00-50454, 2001 WL 649931 (9th Cir. June 12, 2001) (deciding that Congress did not exceed the scope of its Commerce Clause authority in enacting statute defining offense of failure to pay legal child support obligations); United States v. Lewko, 269 F.3d 64 (1st Cir. 2001) (holding that Congress had authority under commerce clause to enact the CSRA.); United States v. Faasse, 265 F.3d 475 (6th Cir. 2001) (subjecting defendant to criminal liability under CSRA for failure to pay child support was appropriate exercise of Congress' commerce clause power as a regulation of a "thing" in interstate commerce). CSRA makes it an offense for any person who:

> **(a)(1)** Willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;
>
> **(2)** Travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or
>
> **(3)** Willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000; shall be punished as provided in subsection (c).

18 U.S.C. § 228 (2003).

68. United States v. Monts, 311 F.3d 993, 996–97 (10th Cir. 2002). In comparing this case to *Morrison* and *Lopez*, the court stated:

> In holding that Congress exceeded its Commerce Clause power in enacting the Violence Against Women Act ("VAWA"), the Supreme Court in *Morrison* essentially reiterated its *Lopez* analysis and rested its conclusion on the fact that the VAWA failed to satisfy the *Lopez* requirements. [. . .] Unlike the VAWA in *Morrison*, § 228(a) directly involves an activity that is both economic and interstate in nature, specifically, the regulation of a court-ordered obligation to pay money in interstate commerce. Furthermore, unlike the VAWA, § 228(a) contains a jurisdictional element establishing that the activity in question is interstate in nature by requiring as an essential element that the defendant reside in a different state than the

Circuits have also upheld the constitutionality of the Clean Air Act ("CAA"), 42 U.S.C. § 7412.[70] The Fifth Circuit discussed the CAA in its decision in *United States v. Ho*.[71] There, the defendant was convicted of violating asbestos regulations, and he alleged that pursuant to *Lopez* and *Morrison*, the CAA exceeded Congress' authority under the Commerce Clause.[72] The court disagreed and found a substantial nexus between the defendant's activities and a national asbestos removal market.[73]

In spite of *Lopez* and *Morrison*, the Drug Abuse Prevention Act, 21 U.S.C. § 841, has also been upheld.[74] The defendant in *United States v. Price* was convicted of various narcotics violations and argued that § 841 should be overturned in light of *Lopez* and *Morrison*.[75] The court differentiated § 841 from the statutes at issue in *Lopez* and *Morrison* because § 841 has a definite economic impact.[76]

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child for whom support is owed. 18 U.S.C. § 228(a). And lastly [. . .] Congress made explicit findings concerning the impact of delinquent parents on interstate commerce, further supporting the conclusion that § 228(a) is within the *Lopez* framework. (citations omitted).

Monts, 311 F.3d 996-97.

69. *See generally Monts*, 311 F.3d 993; *King*, 276 F.3d 109; *Manzella*, 2001 WL 649931; *Lewko*, 269 F.3d 64; *Faasse*, 265 F.3d 475.

70. *See* United States v. Ho, 311 F.3d 589 (5th Cir. 2002) (deciding that CAA provisions violated were valid exercises of Congress' Commerce Clause authority, as applied to defendant); Allied Local and Reg'l Mfrs. Caucus v. United States E.P.A., 215 F.3d 61 (D.C. Cir. 2000) (holding that Congress did not exceed its authority under Commerce Clause by authorizing regulation).

71. *Ho*, 311 F.3d 589 (deciding that CAA provisions violated were valid exercises of Congress' Commerce Clause authority, as applied to defendant).

72. *Id.* at 594.

73. *Id.* at 603. The court stated that:

> Most importantly, the relationship between the asbestos removal in violation of the work practice standard and interstate commerce is not attenuated, but direct and apparent. Congress had a rational basis to find not only that a national market exists for asbestos removal services, but also that Ho's activities would injure this market.

Id.; *accord Allied Local*, 215 F.3d at 81–83.

74. *See* United States v. Price, 265 F.3d 1097 (10th Cir. 2001) (holding that statutes criminalizing drug offenses fell within Congress' power to regulate interstate commerce); United States v. Brown, No. 97-1618, 2000 WL 876382 (6th Cir. June 20, 2000) (noting that indeed, "every circuit that has considered the Comprehensive Drug Abuse Prevention and Control Act has upheld it as a valid exercise of Congress' Commerce Clause authority) (unpublished decision). The Drug Abuse Prevention Act states that "it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C. § 841(a) (2003).

75. *Price*, 265 F.3d at 1106.

76. *Id.* at 1107. The court stated:

> In contrast, § 841(a)(1) makes it illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." These activities are, by their nature, economic in character. Because *Morrison* involved the regulation of non-economic activities, while § 841(a)(1) deals with the regulation of economic activities, *Morrison* does not require a different conclusion than the one reached in *Wacker*. Thus,

Also upheld by the circuit courts is the Theft or Embezzlement in Connection with Health Care Act, 18 U.S.C. § 669.[77] In *United States v. Whited*, the defendant, a health care provider, was convicted of embezzling funds from a health care benefit program.[78] As in the cases of the above-cited statutes, the *Whited* court distinguished this case from *Lopez* and *Morrison* based on the economic effect of the criminal activity.[79]

The *Norton v. Ashcroft* court has considered the constitutionality of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248.[80] Protesters, blocking

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§ 841(a)(1) and § 846 are within Congress' power to regulate interstate commerce. (citations omitted).

Price, 265 F.3d at 1107; *accord* United States v. Brown, 2000 WL 876382 at *14 (6th Cir. 2000).

77. United States v. Whited, 311 F.3d 259, 267 (3d Cir. 2002) (deciding that statute regulating theft or embezzlement from local medical service providers was proper exercise of Congress' Commerce Clause authority). The Act states that it shall be unlawful for:

> Whoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program, shall be fined under this title or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100 the defendant shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 669(a) (2003).

78. *Whited*, 311 F.3d at 261.

79. *Id.* at 270. The court stated:

> This history provides independent support for the conclusion that fraud and abuse within the health care industry is a massive national problem that transcends the traditional boundaries of policing as between local, state, and federal governments. It is also readily apparent that such activity—the illegal conversion of many billions of dollars annually—has a substantial effect on interstate commerce. And given the scope and variety of the defects in the system, we cannot conclude that Congress was without a rational basis for determining that it was within its constitutional authority in criminalizing even seemingly minor local thefts or embezzlements in connection with health care. Thus, although the absence of detailed congressional findings would not alter our ultimate decision in this case, we find that the legislative history supports our conclusion that § 669 is a valid exercise of Congress's [sic] Commerce Clause authority.

80. *See* Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002) (deciding that Congress validly enacted Act pursuant to its authority under Commerce Clause); United States v. Gregg, 226 F.3d 253 (3d Cir. 2000) (holding that FACE was valid exercise of Congress' Commerce Clause power). FACE makes it unlawful for whoever:

> (a)(1) By force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
> (2) By force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
> (3) Intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship.

the entrances to abortion clinics, claimed that § 248 was unconstitutional under *Lopez* and *Morrison*, both substantively and procedurally, since § 248 lacked a jurisdictional element.[81] The court was persuaded by the extensive legislative findings on the economic impact that disruption of abortion clinics would have on the national economy.[82]

Courts have also upheld the constitutionality of the Motor Vehicles Act, 18 U.S.C. § 2119.[83] Most recently, in *United States v. Dixon*, the court affirmed the conviction of a defendant who was convicted of carjacking. The defendant alleged that § 2119 exceeded Congress' authority under the Commerce Clause.[84] The court, however, was satisfied to conclude "that the automobile in question 'has been transported, shipped, or received in interstate or foreign commerce.'"[85] The other circuits are in agreement that § 2119 is a valid exercise of Congress' Commerce Clause power.[86] One statute that has received considerable attention is the Felon in Possession Act ("FPA"), 18 U.S.C.

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18 U.S.C. § 248(a)(1)–(3) (2003).

81. *Norton*, 298 F.3d at 556–59.

82. *Id.* at 556; *accord Gregg*, 226 F.3d at 263–67. The *Gregg* court stated:

> In sum, due to the acute shortage of abortion-related services in this country and the resulting national market for abortion-related services, the conduct proscribed by FACE—the commission of blockades and other acts of violence—has a substantial effect on the availability in interstate commerce of reproductive health services. The effect of the misconduct is to deter physicians from providing further services and temporarily and permanently to shut down reproductive health clinics, thus forcing large numbers of women to travel across state lines to obtain services.

Id. at 265–66.

83. *See generally* United States v. Dixon, No. 02-3295, 2002 WL 31681805 (10th Cir. Nov. 27, 2002) (deciding that federal carjacking statute did not exceed congressional authority under Commerce Clause); United States v. Cortes, 299 F.3d 1030 (9th Cir. 2002) (holding that Congress did not exceed its Commerce Clause authority by enacting federal carjacking statute); United States v. Garcia, No. 01-2163, 2001 WL 1632546 (10th Cir. Dec. 20, 2001) (deciding that petitioner's conviction under federal carjacking statute was constitutional); United States v. Taylor, 226 F.3d 593 (7th Cir. 2000) (holding that federal carjacking statute did not exceed Congressional power under Commerce Clause). The statute states that:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -
> (1) Be fined under this title or imprisoned not more than 15 years, or both,
> (2) If serious bodily injury (as defined in § 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate § 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
> (3) If death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (2003).

84. *Dixon*, 2002 WL 31681805 at *1.

85. *Dixon*, 2002 WL 31681805 at *1 (quoting 18 U.S.C. § 2119 (2003)).

86. *Accord Cortes*, 299 F.3d 1033 (holding that Congress did not exceed its Commerce Clause authority by enacting federal carjacking statute); *Garcia*, 2001 WL 1632546 at *2 (holding that peti-

§ 922(g).[87] Although the courts have struggled with the constitutionality of this Act, the FPA has been upheld as a valid exercise of power under the Commerce Clause.

In *United States v. Carnes*, the defendant was arrested for parole violations and found to be in possession of a handgun and ammunition.[88] The defendant maintained that his activities were not interstate in nature and that his conviction violated the principles of *Morrison*.[89] The court summarily dismissed his complaints and cited the reasoning of other cases that have held the FPA to be a valid exercise of congressional power.[90] The court quoted the language of

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tioner's conviction under federal carjacking statute was constitutional); *Taylor*, 226 F.3d at 598-99 (deciding that federal carjacking statute did not exceed Congressional power under Commerce Clause).

87. *See generally* United States v. Carnes, 309 F.3d 950 (6th Cir. 2002) (holding that felon-in-possession and wiretapping statutes were within Congress's authority under Commerce Clause); United States v. Lemons, 302 F.3d 769 (7th Cir. 2002) (deciding that application of felon-in-possession statute to intrastate possession of weapon that, at some previous time, had crossed state lines, was not beyond authority bestowed on Congress by Commerce Clause); United States v. Mitchell, 299 F.3d 632 (7th Cir. 2002); United States v. Santiago, 238 F.3d 213 (2d Cir. 2001) (holding that that statute criminalizing possession by felons of firearms that traveled in interstate commerce was a valid exercise of Congressional power under the Commerce Clause); United States v. Smith, No. 00-4534, 2001 WL 1082100 (4th Cir. Sept. 17, 2001) (deciding that the statute prohibiting firearm possession by felon did not violate the Commerce Clause); United States v. Price, 265 F.3d 1097 (10th Cir. 2001) (holding that evidence was sufficient to support conviction for possession because firearm that had been in interstate commerce); United States v. King, No. 00-2874, 2001 WL 548920 (7th Cir. May 18, 2001) (deciding that statute proscribing possession of firearm by person previously convicted of felony was valid enactment under Congress' Commerce Clause powers); United States v. Singletary, 268 F.3d 196 (3d Cir. 2001) (holding that proof of past transport of weapon in interstate commerce sufficient to support felon-in-possession conviction); United States v. Scott, 263 F.3d 1270 (11th Cir. 2001) (deciding that felon in possession statute is facially valid under the Commerce Clause); United States v. Dupree, 258 F.3d 1258 (11th Cir. 2001) (holding that jurisdictional element of statute, which requires that weapon must be possessed "in or affecting commerce," brings statute within power of Congress under commerce clause); United States v. Stuckey, 255 F.3d 528 (8th Cir. 2001) (deciding that statute prohibiting being a felon in possession of firearm which was transported in interstate commerce did not violate Commerce Clause); United States v. Gallimore, 247 F.3d 134 (4th Cir. 2001) (holding that the Government may establish the requisite interstate commerce nexus by showing that a firearm was manufactured outside the state where the defendant possessed it); United States v. Dorris, 236 F.3d 582 (10th Cir. 2000) (deciding that Congress did not exceed its authority under the Commerce Clause in enacting statute making it a crime for a felon to possess a firearm which has been shipped or transported in interstate commerce). The Act states in part:

> (g) It shall be unlawful for any person—
> (1) Who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> (2) Who is a fugitive from justice;
> (3) Who is an unlawful user of or addicted to any controlled substance (as defined in § 102 of the Controlled Substances Act (21 U.S.C. 802)) [. . .]

18 U.S.C. § 922(g)(1)-(3) (2003).

88. *Carnes*, 309 F.3d at 953.

89. *Carnes*, 309 F.3d at 954.

90. *Id.* (citing United States v. Shepherd, 284 F.3d 965 (8th Cir. 2002); United States v. Singletary, 268 F.3d 196 (3d Cir. 2001); United States v. Dorris, 236 F.3d 582 (10th Cir. 2000)).

United States v. Dorris and affirmed his conviction.[91] Since one of the more recent circuit decision relied on *Dorris*, a brief examination of that case is apposite.

In *Dorris*, the United States charged Mr. Dorris with possession of a handgun in connection with a neighborhood shooting.[92] Mr. Dorris, having a prior felony record, was convicted and sentenced to a term of 210 months in prison.[93] The court's "rigorous analysis" of constitutional mandates led it to summarily conclude that an analysis pursuant to *Lopez* and *Morrison* would not be appropriate because firearms are subject to interstate trade.[94] Whatever else *Dorris* and *Carnes* may be lacking, it is not circuit agreement. Almost universally, every circuit that has addressed the FPA has found that it passes constitutional muster.[95]

Lopez and *Morrison* have also had minimal impact on the Hobbs Act, 18 U.S.C.A. § 1951.[96] Most of the circuits that have addressed the Hobbs Act have upheld it under scrutiny of *Lopez* and *Morrison*.

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91. *Carnes*, 309 F.3d at 954 (quoting *Dorris*, 236 F.3d at 586. *Dorris* points out that "Section 922(g)(1) by its language only regulates those weapons affecting interstate commerce by being the subject of interstate trade. It addresses items sent in interstate commerce, and the channels of commerce themselves—ordering that they be kept clear of firearms. Thus, no analysis of the style of [. . .] *Morrison* is appropriate.").

92. *Dorris*, 236 F.3d at 584.

93. *Id.*

94. *Id.* at 586. The court concluded that:

> The jurisdictional element in § 922(g)(1) puts it into a different category of analysis than the laws considered in *Lopez* and *Morrison*. Section 922(g)(1) by its language only regulates those weapons affecting interstate commerce by being the subject of interstate trade. It addresses items sent in interstate commerce, and the channels of commerce themselves—ordering they be kept clear of firearms. Thus, no analysis of the style of *Lopez* or *Morrison* is appropriate.

95. *See, e.g.*, *Carnes*, 309 F.3d at 954 (citing United States v. Shepherd, 284 F.3d 965 (8th Cir. 2002); United States v. Singletary, 268 F.3d 196 (3d Cir. 2001); United States v. Dorris, 236 F.3d 582 (10th Cir. 2000)).

96. *See generally* United States v. Fabian, 312 F.3d 550 (2d Cir. 2002) (holding that evidence was sufficient to prove nexus to interstate commerce); United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (affirming the conviction and stating that "It is a deep mystery to us why five judges thought it helpful or appropriate to take eight fellow judges to task for failing to explain why they decline to change the established law of this circuit and create a circuit split. We of course disclaim their attempt to attribute views to us"); United States v. Lynch, 282 F.3d 1049 (9th Cir. 2002) (vacating the district court's denial of defendant's motion for acquittal and stating that defendant's acts violated Hobbs Act only if acts depleted assets of individual who was directly and customarily engaged in interstate commerce, if acts caused or created likelihood that individual would deplete assets of entity engaged in interstate commerce, or if number of individuals victimized or sum at stake was so large that there would be some cumulative effect on interstate commerce); United States v. Taniguchi, No. 00-4495, 00-4496, 2002 WL 31371978 (6th Cir. Oct. 11, 2002) (holding that "[t]he Hobbs Act most neatly fits within the third *Lopez* category of commerce clause legislation, and our circuit has explicitly endorsed its constitutionality post-*Lopez*"); United States v. Love, No. 00-5042, 2001 WL 1012123 (10th Cir. Sept. 5, 2001) (deciding that Congress' enactment of the Hobbs Act did not exceed Congress' powers under the Commerce Clause); United States v. Toles, No. 00-3012, 2001 WL 314523 (10th Cir. Apr. 2, 2001) (deciding that enactment of the Hobbs Act was a constitutional exercise of Congress' authority to

A more recent case to uphold the Hobbs Act, *United States v. Fabian*, distinguished the Hobbs Act from the statute in *Morrison* because the Hobbs Act contains a jurisdictional element. Under *Morrison*, the nexus between the conduct and interstate commerce only has to be minimal.[97] Interestingly, the Fifth Circuit seems to be alone in its struggle to correctly decide cases under the Hobbs Act since *Lopez* and *Morrison*.[98]

Two statutes that deal specifically with business activities have been held to be constitutional under *Lopez* and *Morrison*. The two statutes are: the Crimes By or Affecting Persons Engaged in the Business of Insurance Whose Activities

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regulate interstate commerce); United States v. Gray, 260 F.3d 1267 (11th Cir. 2001) (finding that defendant's conduct, in removing an unspecified sum of money from cash register of fast food restaurant, and in causing a closure of restaurant's interior and dining area during relatively busy time of day, had impacted, to at least some minimal extent, on interstate commerce was sufficiently supported by evidence); United States v. Morris, 247 F.3d 1080 (10th Cir. 2001) (holding that Hobbs Act did not exceed Congress' power under the Commerce Clause as applied to defendant's robbery convictions); United States v. Peterson, 236 F.3d 848 (7th Cir. 2001) (deciding that Government need only show some actual, even if de minimis, effect, or, where there is no actual effect, a realistic probability of an effect, on interstate commerce, to bring robbery within its prosecutorial reach under Hobbs Act); United States v. Wang, 222 F.3d 234 (6th Cir. 2000) (holding that defendant's robbery of $4,200 from individual victims, of which $1,200 belonged to restaurant owned by victims, did not have sufficient impact on commerce to support a federal prosecution); United States v. Malone, 222 F.3d 1286 (10th Cir. 2000) (holding that only a de minimis effect on interstate commerce is needed to prove the jurisdictional nexus required for the Hobbs Act). The Act states that:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (2003).

97. *Fabian*, 312 F.3d at 555. The court stated:

> In *Morrison*, the Supreme Court struck down a civil cause of action for gender-related violence created by the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981(b). The Court found Congress' power under the Commerce Clause did not extend to "regulat[ing] noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. As in *Lopez*, however, the Court noted that § 13981(b) lacked a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." The Court noted, with approval, that sections of VAWA containing jurisdictional elements have been upheld by various Courts of Appeal. As the Hobbs Act requires a particularized jurisdictional showing, we find *Morrison* does not affect our requirement that "the Government need only show a 'minimal' effect on interstate commerce" to support Hobbs Act jurisdiction. (citations omitted).

98. *McFarland*, 311 F.3d at 377. The court finally affirmed the defendant's conviction after initially overturning it, however, it noted that:

> It is a deep mystery to us why five judges thought it helpful or appropriate to take eight fellow judges to task for failing to explain why they decline to change the established law of this circuit and create a circuit split. We of course disclaim their attempt to attribute views to us.

Affect Interstate Commerce Act[99] and the Frauds and Swindles Act.[100] In *United States v. Turner*, the defendant embezzled money from his employer, Allstate Insurance Company.[101] The court had no trouble holding that the defendant could not avail himself of *Lopez* and *Morrison*.[102] Likewise, in *United States v. Gil*, the court had no trouble concluding that when a defendant business owner inflates invoices in order to obtain payment by fraud, he cannot maintain that *Lopez* limits the reach of the federal government.[103]

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99. *See* United States v. Turner, 301 F.3d 541, 542 (7th Cir. 2002) (holding that Congress did not exceed its Commerce Clause authority in enacting statute). The Act states that it shall be unlawful for:

> (a)(1) Whoever is engaged in the business of insurance whose activities affect interstate commerce and knowingly, with the intent to deceive, makes any false material statement or report or willfully and materially overvalues any land, property or security—
>
> (A) In connection with any financial reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person, and
>
> (B) For the purpose of influencing the actions of such official or agency or such an appointed agent or examiner [. . .]

18 U.S.C. § 1033(a)(1) (2003).

100. United States v. Gil, 297 F.3d 93 (2d Cir. 2002) (concluding that "private and commercial interstate carriers, which carry mailings between and among states and countries, are instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate"); United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229 (4th Cir. 2001) (stating that jurisdictional requirement of mail fraud statute was satisfied). The Act states that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 1341 (2002).

101. *Turner*, 301 F.3d at 541.

102. *Id.* at 547-48. The court held that:

> Turner's crime may be local and have only an indirect effect on commerce; nevertheless, the activity may be reached by Congress by virtue of the fact that it affects Allstate's business—which, in turn, affects interstate commerce—or in the aggregate, embezzlement may negatively effect and destabilize the entire insurance industry.

103. *Gil*, 297 F.3d at 100 (reversed on other grounds). *See also Photogrammetric*, 259 F.3d at 248 (upholding the conviction of defendants on similar charges).

The Interstate Stalking Statute has also been upheld as constitutional.[104] The defendant in *United States v. Al-Zubaidy* was convicted of making various intrastate and interstate threats of violence against his ex-wife.[105] The *Al-Zubaidy* court upheld § 2261A because it contained an express jurisdictional element and, more importantly, "is spared the 'substantial effects' test for Commerce Clause regulation because it regulates a *channel* of commerce - prohibiting persons from crossing state lines to engage in unlawful conduct."[106]

The International Parental Kidnapping Act ("IPKCA"), 18 U.S.C. § 1204(a),[107] and the Transportation of Minors Act, 18 U.S.C. § 2423,[108] are

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104. United States v. Al-Zubaidy, 283 F.3d 804, 812 (6th Cir. 2002) (holding that as a matter of first impression in the Sixth Circuit, statute setting forth the offense of interstate stalking was within Congress' authority under the Commerce Clause). The statute proscribes federal penalties for whoever:

> (1) Travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family (as defined in § 115) of that person, or the spouse or intimate partner of that person; or
>
> (2) With the intent –
>
> > (A) To kill or injure a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States; or
> >
> > (B) To place a person in another State or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to –
> >
> > > (i) That person;
> > >
> > > (ii) A member of the immediate family (as defined in § 115) of that person; or
> > >
> > > (iii) A spouse or intimate partner of that person, uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in clauses (i) through (iii).

18 U.S.C.A. § 2261A (2003).

105. *Al-Zubaidy*, 283 F.3d at 806–07.

106. *Id.* at 812.

107. United States v. Cummings, 281 F.3d 1046, 1051 (9th Cir. 2002) (holding that IPKCA was validly enacted within Congress' authority under the Commerce Clause).

> Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

18 U.S.C. § 1204(a) (2003) *amended by* Pub. L. No. 108–21, 117 Stat. 650 (2003).

108. United States v. Han, 230 F.3d 560, 563 (2d Cir. 2000) (deciding that the applicable statute does not violate the Commerce Clause). The statute states that it is illegal for a person to engage in:

> (a) Transportation with intent to engage in criminal sexual activity—A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.
>
> (b) Travel with intent to engage in sexual act with a juvenile—A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for

two statutes that criminalize the transportation of minors, and they also pass Commerce Clause scrutiny. The defendant in *United States v. Han* was convicted of soliciting a thirteen year old girl, via the Internet, to have sex with him. He then traveled from New Jersey to New York to meet her.[109] The crux of this case was that a police officer was posing as the thirteen year old girl, so Han argued that merely driving across state lines and thinking about having sex with a minor is not within the scope of the Commerce Clause.[110] The court used the same analysis that the *Al-Zubaidy* court used and ruled that this case dealt with the channels of interstate commerce; thus, *Lopez* is inapposite.[111]

In *United States v. Cummings*, the defendant was living in the United States while his new wife was living in Germany and while his ex-wife and three children were also living in the United States.[112] Fearing that his children were being abused by their stepfather, he took the children from the ex-wife's home and flew them to Germany.[113] He was convicted in the United States for violating IPKCA and appealed his conviction based on his belief that Congress did not have the authority to criminalize the retention of children in a foreign country.[114] Again, this court relied on the use of the "channels" prong in *Lopez* to find that Congress could validly exercise its reach into a foreign country.[115] The court concluded that:

> The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of

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> permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in § 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C.A. § 2423 (2003).

109. *Han*, 230 F.3d at 561.

110. *Id.* at 562.

111. *Id.* The court stated, "The Second Circuit adopted the holding and analysis of the district court, which found that Congress acted within its authority over the channels of interstate commerce and there was no need to show that interstate commerce was substantially affected." In dicta the court went on to state that:

> Accordingly, as Han formed the intent prohibited by § 2423(b) and took sufficient steps to bring that intent to fruition, including the crossing of state lines, § 2423(b) was constitutionally applied to Han. It is unnecessary to decide here, and thus it is not held, that a mere thought of engaging in a sexual act with a person under 18 years of age, where coupled with crossing a state line, constitutes a prohibited act and thus a violation of § 2423(b). Nor is it held that, if thus construed, § 2423(b) would pass constitutional muster. These questions can be considered when raised where the facts are so limited.

Id. at 563.

112. *Cummings*, 281 F.3d at 1047.

113. *Id.* at 1048.

114. *Id.*

115. *Cummings*, 281 F.3d at 1049.

> interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.[116]

The final two statutes that have been construed broadly under *Lopez* and *Morrison* are the Violent Crimes in Aid of Racketeering Activity Act, 18 U.S.C. § 1959[117] and the RICO Act, 18 U.S.C. § 1962.[118] The defendants in *United States v. Feliciano* were prosecuted for murder. The court stated:

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116. *Id.*

117. United States v. Feliciano, 223 F.3d 102, 118 (2d Cir. 2000) (holding that "[t]he basis on which federal prosecution of Gonzalez and his co-defendants was grounded was their commission of a violent crime undertaken for the sake of their membership in a gang that—as the evidence at trial demonstrated—engaged over several years in selling cocaine, crack cocaine, and heroin. In the aftermath of the *Lopez* decision, this Court has repeatedly held that Congress reasonably concluded that narcotics trafficking has a substantial effect on interstate or foreign commerce"). The Act states that:

> Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished.

18 U.S.C. § 1959 (2003).

118. *See generally* United States v. Chance, 306 F.3d 356 (6th Cir. 2002) (deciding that evidence satisfied interstate commerce elements of RICO charges and one charge under Hobbs Act); United States v. Marino, 277 F.3d 11 (1st Cir. 2002) (holding that RICO contains the jurisdictional element that *Lopez* lacked and the government must only establish a de minimis impact on interstate commerce); United States v. Espinoza, No. 02-1596, 2002 WL 31769470 (7th Cir. Dec. 5, 2002) (holding that government was required to show only de minimis, nexus between organization's activities and interstate commerce to gain conviction under RICO); United States v. Riddle, 249 F.3d 529 (6th Cir. 2001) (deciding that de minimis connection with interstate commerce suffices to establish interstate commerce element of RICO offense). The Act makes it unlawful to:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate,

> Because of evidence that the murder was an execution ordered and carried out by members of Los Solidos, a gang that trafficked in drugs in several cities in Connecticut, federal authorities sought to prosecute those allegedly responsible for the murder under 18 U.S.C. § 1959, which prohibits violent crime in aid of racketeering ("VCAR").[119]

The defendants argued that after the decision in *Morrison*, Congress lacked the ability to regulate violent intrastate criminal activity.[120] The court stated that *Morrison* was inapplicable because a murder pursuant to VCAR bears a close nexus with racketeering activity that affects commerce, and VCAR has a clear jurisdictional element.[121] Also, in *United States v. Chance*, the defendant was convicted of taking money from the mafia to finance his bid to become sheriff.[122] The defendant contended that his activities did not have an affect on interstate commerce. The court, however, found that the government only needed to show a *de minimis* impact.[123]

IV. STATUTES THAT HAVE BEEN INCORRECTLY HELD TO BE BROAD

Although the following three statutes have been construed to pass Commerce Clause challenges under *Lopez* and *Morrison*, their similarity to statutes that have been narrowly construed begs the question, "Have the courts correctly applied *Lopez* and *Morrison* to these statutes?" The three statutes that have been upheld following *Lopez* and *Morrison* should be closely scrutinized in light of *United States v. Emerson*[124] and *Printz v. United States*.[125] Because of the broad scope of § 922(g), this section defines the metes and bounds of the final bastion against the current onslaught of the federal government on areas of state sovereignty—the Tenth Amendment.

> directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(a)–(c) (2003).

119. *Feliciano*, 223 F.3d at 107.

120. *Id.* at 119.

121. *Id.* The court found that:

> [A]s the legislative history indicates, "it is evident that Congress enacted section 1959 in view of the Federal Government's strong interest [. . .] in suppressing the activities of organized criminal enterprises.' "[Because] any predicate murder [under § 1959 must] bear a strong relationship to racketeering activity that affects interstate commerce, it does not risk improperly making purely local crimes a matter of federal concern." Moreover, the racketeering activity that satisfies the jurisdictional element in this case—narcotics trafficking—is clearly economic in nature and has been found by Congress to have a substantial effect on interstate commerce. (citations omitted).

122. *Chance*, 306 F.3d at 366.

123. *Id.* at 373. *See generally accord Chance*, 306 F.3d 356; *Marino*, 277 F.3d 11; *Espinoza*, 2002 WL 31769470; *Riddle*, 249 F.3d 529.

124. United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Texas 1999).

125. Printz v. United States. 521 U.S. 898 (1997).

A. POSSESSION OF A FIREARM WHILE SUBJECT TO A DOMESTIC ORDER, 18 U.S.C. § 922(g)(8)[126] AND POSSESSION OF A FIREARM WITH DOMESTIC VIOLENCE, § 922(g)(9)[127]

1. *The Importance of New York v. United States*

New York v. United States is undeniably one of the most important decisions concerning federalism and the Tenth Amendment.[128] The federal government passed the Low-Level Radioactive Waste Policy Amendments Act, mandating that states dispose of their radioactive waste.[129] The government used the "carrot and stick" approach by providing to the states that they either comply with the Act or take title to the waste and incur liability.[130]

The Supreme Court held the "take title" provision to be unconstitutional and violative of the Tenth Amendment.[131] Citing the Federalist Papers, the Court wrote:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level

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126. *See generally* United States v. Bayles, 310 F.3d 1302 (10th Cir. 2002) (holding that statute in question was valid under Commerce Clause); United States v. Napier, 233 F.3d 394 (6th Cir. 2000) (stating that statute is not an unconstitutional exercise of Congress' power under the Commerce Clause); United States v. Gill, 2002 WL 661718 (9th Cir. 2002) (holding that a statute prohibiting possessing a firearm while a domestic violence restraining order was in effect was constitutional as applied to defendant); United States v. Jones, 231 F.3d 508 (9th Cir. 2000) (holding that statute which prohibits a person who is subject to a domestic violence restraining order from possessing a firearm does not violate the Commerce Clause).

127. United States v. Costigan, 2001 WL 535734 (1st Cir. 2001) (holding that the statute did not violate the Commerce Clause).

128. Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 880 (2001). Federalism refers to the doctrine of enumerated powers and the Tenth Amendment's reprimand that all powers not delegated to the federal government belong to the States or the people. Cases during the New Deal allowed a colossal extension of federal powers. Examples of such cases include: *United States v. Butler*, 297 U.S. 1 (1936), *Helvering v. Davis*, 301 U.S. 619 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (each broadly interpreted Congress' Commerce Clause power). Newer cases have begun to restrict the federal government role in areas traditionally reserved to the states. These cases include: *New York v. United States*, 505 U.S. 144 (1992), *United States v. Lopez*, 514 U.S. 549 (1995), and *Printz v. United States*, 521 U.S. 898 (1997) (all limiting the reach of Congress' Commerce Clause power).

129. Chemerinsky, *supra* note 128.

130. *Id.*

131. *Id.*; New York v. United States, 505 U.S. 144, 188 (1992).

> radioactive waste. The Constitution enables the Federal Government to preempt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.[132]

The Court reasoned that allowing the federal government to compel states in such ways would frustrate voters as well as democratic accountability.[133] The Court determined that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[134]

2. *The Printz* Standard

This article contends that circuit court reluctance to narrow §§ 922(g)(8)–(9) is incorrect based on the Tenth Amendment and the decision in *Emerson*. *Emerson* held that the Second Amendment does protect an individual's right to keep and bear arms.[135] If courts want to decide that there is no need to analyze the statute under *Lopez* and *Morrison* because the statute is constitutional under the Thirteenth Amendment, then they also need to recognize the Tenth Amendment which limits federal incursion on state sovereignty.

In *Printz v. United States*,[136] the Supreme Court found that the Brady Handgun Violence Prevention Act ("Brady Act"), set forth in 18 U.S.C. § 922, violated the structure of the Constitution in three important ways.[137] First, the statute intrudes upon state sovereignty.[138] The Court stated that the Constitution establishes a dual-sovereignty system in which the states retain "a residuary and inviolable sovereignty."[139] Several provisions of the Constitution refer to

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132. *New York*, 505 U.S. at 188 (emphasis added) (quoting THE FEDERALIST No. 39 at 245 (James Madison)(Clinton Rossiter ed., 1961)).

133. Chemerinsky, *supra* note 128.

134. *New York*, 505 U.S. at 168.

135. *Emerson*, 46 F. Supp. 2d 598 (N.D. Texas 1999).

136. *Printz*, 521 U.S. at 899 (abrogating 18 U.S.C. § 922(s)).

137. Stephen P. Halbrook, *Restoring the Tenth Amendment: Printz v. United States, in* COMMENTARIES ON LAW & PUBLIC POLICY: 1997 YEARBOOK 57–61 (Robert W. McGee ed., 1998). This book chapter was written by Halbrook after he argued the *Printz* case to the Supreme Court.

138. Halbrook, *supra* note 137, at 58.

139. *Id.* (quoting *Printz*, 521 U.S. at 899).

> Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text. The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people. The Federal Government's power would be augmented immeasurably and impermissibly if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.

residual state sovereignty.[140] *Printz* states that this sovereignty forbids either the federal government or state governments from subjugating each other.[141]

The Court in *Printz* opined that if the states lose their independence, then their sovereignty will be destroyed.[142] Because 18 U.S.C. § 922(s) allowed the federal government to impress the service of police officers of all fifty states, it violated constitutional principles of federalism.[143]

Second, the Brady Act violated the checks and balances system of the three branches of government.[144] Since the Constitution is clear that the executive branch carries out constitutional mandates, the Brady Act violated this directive by consolidating power within Congress.[145] In short, the Brady Act transferred constitutional powers from the executive branch to the legislative branch without the associated check of removal.[146]

Finally, even if Congress is acting through an express power, it cannot merge this power with the Necessary and Proper Clause to usurp state sovereignty.[147] In other words, even if the Commerce Clause authorizes Congress to regulate interstate commerce, it does not authorize it to regulate the states in a sovereign

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Printz, 521 U.S. at 899.

140. Halbrook, *supra* note 137 at 58. *See also Printz*, 521 U.S. at 919.

> The guarantee of the State's territory (Art. IV, § 3), the Judicial Power Clause (Art. III, § 2), the Privileges and Immunities Clause (Art. IV, § 2), the provision for amendment by three-fourths of the States (Article V), and the Guarantee Clause (Art. IV, § 4). Residual state sovereignty was also implicit in Art. I, § 8, which conferred only discrete, enumerated powers, "which implication was rendered express by the Tenth Amendment."

141. *Id.* ("As Madison expressed it: 'The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" (quoting *Printz*, 521 U.S. at 920–21)).

142. *See Printz*, 521 U.S. at 928. Stating that:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "'dragooned'" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

143. Halbrook, *supra* note 137, at 59.

144. *Id.*

145. *Id.* ("'The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 states, who are left to implement the program without meaningful Presidential control if indeed meaningful Presidential control is possible without the power to appoint and remove'" (quoting *Printz*, 521 U.S. at 922)).

146. *Id.* at 59–60.

> The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

Printz, 521 U.S. at 922–23.

147. Halbrook, *supra* note 137, at 59-60.

capacity.[148] Therefore, Congress may act pursuant to its express Commerce Clause power and still plunder the principles of state sovereignty enunciated in the Tenth Amendment.[149]

Justice Thomas filed a concurring opinion in *Printz* to emphasize that the federal government has limited powers.[150] Justice Thomas wrote that the Commerce Clause forbids Congress from regulating *intrastate* commerce.[151] He admonished that the Second Amendment contains an express limitation on the government's authority.[152] Justice Thomas stated that "[i]f, however, the Second Amendment is read to confer a personal right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections."[153] In a footnote, he added that "[m]arshalling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[154]

Considering that *Emerson* held that the Second Amendment does protect an individual's right to keep and bear arms, and according to Justice Thomas's concurring opinion in *Printz*, §§ 922(g)(8)–(9) violate the Tenth Amendment in two important ways. These sections impermissibly regulate the ability of state judges to carry out family law, thereby usurping an area that has been traditionally reserved, for at least over a century, to the states.[155] Sections 922(g)(8)–(9)

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148. *Printz*, 521 U.S. at 924.

> Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts [. . .]. [T]he Commerce Clause; for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. (quoting *New York*, 505 U.S. at 166).

149. *Id.* at 933.

150. *Id.* at 936.

151. *Id.* at 937 ("Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must 'temper our Commerce Clause jurisprudence' and return to an interpretation better rooted in the Clause's original understanding.") (emphasis added).

152. *Id.* at 937–38.

153. *Printz*, 521 U.S. at 938.

154. *Id.* at 939 (citing J. MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (1994); S. HALBROOK, THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); William Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 DUKE L.J. 1236 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Sanford Levinson, *The Embarrassing Second Amendment,* 99 YALE L.J. 637 (1989); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983)).

155. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979). Holding that, "'Insofar as marriage is within temporal control, the States lay on the guiding hand. 'The whole subject of the domestic rela-

also offend general principles of federalism by exceeding the power given to Congress by the Commerce Clause.

3. *18 U.S.C. §§ 922(g)(8)–(9) Invade Areas Traditionally Reserved to the States*

The most recent Supreme Court case to pronounce judgment on the domestic relations exception to federal jurisdiction stated that "the federal courts have no jurisdiction over suits for divorce or the allowance of alimony."[156] The Court in *Ankenbrandt v. Richards* held that:

> We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity."[157]

Before *Ankenbrandt*, the court in *Hisquierdo v. Hisquierdo* held that the entire area of family law is solely within the domain of the states, based on the holding of *In re Burrus*.[158] The substance of the domestic relations exception is best illustrated by *Burrus*. *Burrus* involved Louis B. Miller, a citizen of the state of Ohio, who was the father of Evelyn Estelle Miller.[159] Louis Miller's wife died shortly after Evelyn's birth and Evelyn was taken, under doctor's orders, to the home of the grandparents, Thomas F. Burrus and Catherine Burrus, who were both citizens of Nebraska.[160] After a while, Miller married again, prepared his home to take care of his child, and began to demand that the grandparents return her.[161] The grandparents repeatedly refused to give Miller his daughter back, and he subsequently applied to the district court for a writ of habeas corpus to recover the care and custody of the child, claiming that the grandparents' home was not fit for the child.[162]

The district court issued the writ and demanded the return of the child. The grandparents argued that they had the right to continued custody because they had cared for her from birth, approximately eight or nine years.[163] Initially, the

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tions of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890)).

156. Ankenbrandt v. Richards, 504 U.S. 689, 694 (1992) (affirming the holding of Barber v. Barber, 62 U.S. 582, 584 (1858) (stating, "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.")).

157. *Ankenbrandt*, 504 U.S. at 700.

158. *Hisquierdo*, 439 U.S. at 581; *see In Re Burrus*, 136 U.S. 586 (1890).

159. *In re Burrus*, 136 U.S. at 587.

160. *Id.*

161. *Id.*

162. *In re Burrus*, 136 U.S. at 587.

163. *Id.* at 587–88.

grandparents complied with the court order. However, they later kidnapped the child through force of violence from Miller while the two were traveling in Iowa, and then returned to Nebraska.[164] The grandparents were called back into the district court and the grandfather was imprisoned for contempt.[165] Burrus appealed his sentence on the ground that the district court did not have jurisdiction over him.[166]

The Supreme Court held that even though the parties claimed diversity of citizenship in the proceeding in which the child was given to the father, that was not enough to grant jurisdiction.[167] The Court reasoned that family relations are governed not by federal law, but by state law, and as such it is not within the province of the federal courts to intrude.[168] The Court concluded its opinion by ordering the release of Burrus.[169]

Despite *In re Burrus*, *Hisquierdo* makes it clear that the federal government does not carry an absolute authority to interfere with state law decisions in areas of family law.[170] Consequently, §§ 922(g)(8)–(9) supplant state law in the area of domestic relations.[171] These sections rob family law judges of their power over cases of domestic relations by summarily labeling anyone subjected to a temporary restraining order ("TRO") a felon. This vastly alters the consequences imposed for violating a restraining order by depriving a person of his fundamental right to bear arms.

In Dr. Emerson's case, there was no showing that he ever threatened his wife or child. In fact, the only wrong Mrs. Emerson ever alleged was that one time, over the telephone, he threatened the man with whom she was having the adulterous affair.[172] Because of these statutes, state citizens subjected to a TRO or a family violence conviction are forever labeled felons and stripped of their constitutionally protected right to defend themselves, hunt, or just go to the shooting range.[173] This is a major shift in power that has been imposed on the states by Congress.

4. *18 U.S.C. §§ 922(g)(8)–(9) Offend General Principles of Federalism*

James Madison described the specific constitutionally authorized powers granted from the states to the federal government as:

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164. *Id.* at 588.
165. *Id.* at 589.
166. *Id.*
167. *In re Burrus*, 136 U.S. at 596.
168. *Id.* at 596–97. The Court stated, "[W]e know of no statute, no provision of law, no authority thority [sic] intended to be conferred upon the district court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case." *Id.*
169. *Id.* at 597.
170. *Hisquierdo*, 439 U.S. at 581.
171. 18 U.S.C. § 922(g)(8) (2002) (forbidding possession of a firearm by anyone subject to a TRO).
172. *Emerson*, 46 F. Supp. 2d at 599.
173. 18 U.S.C. § 922(g)(8) (The statute does not contain an exception for these activities).

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.[174]

In fact, the text of the Tenth Amendment demonstrates that it was passed by the Founders out of fear of an autocratic government.[175] The Tenth Amendment admonishes that any powers not delegated to the federal government belong either to the states or the people.[176] However, the Tenth Amendment does not delineate which powers are reserved to the states or delegated to the federal government.[177] Hence, one must look to another doctrine to understand the Tenth Amendment. The first article of the Constitution expresses the Doctrine of Enumerated Powers.[178]

> Plainly, power resides in the first instance in the people, who then grant or delegate their power, reserve it, or prohibit its exercise, not immediately through periodic elections but rather institutionally—through the Constitution. The importance of that starting point cannot be overstated, for it is the foundation of whatever legitimacy our system of government can claim.[179]

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174. THE FEDERALIST No. 45, at 328 (James Madison) (Barnes and Noble Books, 2004).

175. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

176. U.S. CONST. amend. X. *See* Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government* 3 TEX. REV. L. & POL. 1, 1 (1998).

177. U.S. CONST. amend. X. *See also The Federalism Debate*: *Why doesn't Washington trust the states?: Hearing before the Subcomm. On Human Resources and Intergovernmental Relations of the Comm. On Government Reform and Oversight*, 104th Cong. (1995) (statement of Richard Pilon, Senior Fellow & Director, Center for Constitutional Studies, Cato Institute).

178. U.S. CONST. art. I, § 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *see also* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. REV. 819, n.28 (1999). Rappaport states that:

> Confirming that Congress is limited to its enumerated powers is only one function of the Tenth Amendment. A second function is to indicate that Congress's enumerated powers confer only limited authority. After all, there would be little reason to pass an amendment restricting Congress to its enumerated powers if they had unlimited scope. Thus, the common claim that the Tenth Amendment is a truism, is true of its first function, [. . .] but not its second function. But even though the Tenth Amendment is more than a truism, it still does not justify the prohibition on commandeering (or any other immunity), because it fails to explain how this immunity can be derived from the language of Congress's enumerated powers.

179. *The Federalism Debate*, *supra* note 177.

If a power is not delegated to the federal government, it is either reserved to the states or the people. The federal government is impotent to act if the power has not been delegated to it.[180] The Tenth Amendment reiterates that the federal government must have the consent of the people to act. During the New Deal, these reserved powers were greatly eviscerated by an administration bent on social regulation and wealth redistribution.[181] This became the primary reason why the people of the United States no longer trusted Washington.[182]

As the Court in *Burrus* stated, family law is exclusively the domain of the states.[183] Any intrusion by the federal government plunders the principles of federalism that our government's legitimacy is founded on. Not only are §§ 922(g)(8)–(9) by their very nature criminal statutes, but they also attach to a domestic relations area of state law. The Supreme Court in *Ankenbrandt* stated:

> We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.[184]

Accordingly, §§ 922(g)(8)–(9) complicate a state judge's decision to issue a TRO to protect the marital property because of the resulting federal consequences.

In light of these consequences, a family law judge in Texas is now faced with three alternatives. First, she can issue the TRO to protect the marital property and not concern herself with the federal penalties that will attach. Second, she can refuse to issue the TRO and not concern herself with protecting the marital estate. Finally, she can attempt to draft a TRO that will protect the marital estate but not trigger § 922(g)(8). This usurps the state judge's ability to manage divorce proceedings.

The Fifth Circuit correctly concluded that the Second Amendment does protect an individual's right to keep and bear arms. Its rejection of the collective rights theory is sound and unassailable. However, in light of *Printz* and *Emerson*, if 18 U.S.C. §§ 922(g)(8)–(9) are sufficient to deprive an individual of a

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180. *Id.*; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (Thomas, J., dissenting).

181. *Id.* (this evisceration of the Tenth Amendment arose out of Franklin Roosevelt's 1937 Court packing scheme). *See e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution"); Richard A. Epstein, *The Proper Scope of the Commerce Clause*, 73 VA. L. REV. 1387, 1388 (1987) ("I think that the expansive construction of the [Commerce] [C]lause accepted by the New Deal Supreme Court is wrong, and clearly so . . . .").

182. *The Federalism Debate*, *supra* note 177.

183. *In re Burrus*, 136 U.S. at 596–97. *Burrus* has been continuously upheld. *See, e.g.*, *Ankenbrandt*, 504 U.S. at 703.

184. *Ankenbrandt*, 504 U.S. at 703.

basic constitutional right, the federal government has invaded an area of traditional state law. The people never delegated to the federal government the power to prosecute ordinary, run of the mill, gun crimes. "As Alexander Hamilton put it in the Federalist Papers, the ordinary administration of criminal justice belongs to the states."[185] These statutes make it difficult for law abiding gun owners to get a divorce in Texas without being subject to federal criminal prosecution.

As such, 18 U.S.C. §§ 922(g)(8)–(9) offend general Tenth Amendment principles of federalism because they regulate the state in its sovereign capacity.[186] The above Tenth Amendment analysis applies equally well to the following statute.

B. POSSESSION OF A FIREARM WITH DRUGS, 18 U.S.C. § 922(g)(3)[187]

The facts of *United States v. Letts* are shocking on their face. Based on an anonymous tip, law enforcement officers commenced surveillance of Letts's farm in rural Iowa.[188] With search warrant in hand, the officers searched two campers and outside buildings on the property.[189] In the outer buildings they found fifty-five firearms and materials for making methamphetamines.[190] However, most of the guns were in Letts's home and the only drugs found inside the residence were within marijuana pipes.[191] While in custody, Letts submitted to a urinalysis that proved positive for methamphetamines.[192]

According to the court, "[t]he government charged Letts under 18 U.S.C. § 922(g)(3), which forbids an unlawful user of a controlled substance from possessing a firearm that has been shipped or transported in interstate commerce."[193] Letts stipulated that the firearms had traveled in interstate commerce and he was sentenced to fifty-seven months in prison.[194]

The court reasoned that under *Lopez*, the government could control the instrumentalities of commerce.[195] Since Letts stipulated prior to trial that all the

185. Gene Healy, *The NRA Takes Aim at 10th Amendment*, *available at* http://www.cato.org/dailys/05-31-02.html (last visited Oct. 10, 2005).

186. *Emerson*, 46 F. Supp. 2d at 614 (citing *Hisquierdo*, 439 U.S. at 581).

187. 18 U.S.C. § 922(g)(3).

188. United States v. Letts, 264 F.3d 787, 788-89 (8th Cir. 2001) (holding that a statute prohibiting unlawful users of controlled substances from possessing firearms did not exceed reach of the Commerce Clause).

189. *Letts*, 264 F.3d at 789.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Letts*, 264 F.3d at 789.

194. *Id.*

195. *Id.*

firearms traveled in interstate commerce, the court concluded that *Lopez* was inapplicable.[196]

This case might lead any reasonable person to conclude that because of the outrageousness of the facts, Letts's argument was logically untenable. However, § 922(g)(3) has the potential to reach far greater numbers of persons than those with Letts's predilections for making and selling methamphetamines. The problem with the court's decision in *Letts* is twofold.

First, no reasonable person could logically conclude that the firearm in *Lopez* had not traveled in interstate commerce. The *Letts* court rationalized that the fact that the gun he possessed had traveled in interstate commerce was enough to sustain his conviction. However, that is no different than what happened in *Lopez*. *Morrison* made clear that the Commerce Clause does not empower Congress to attach federal remedies to state law crimes.[197] *Morrison* reaffirmed the framework in *Lopez* that "the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court's conclusion that Congress lacks authority to regulate such possession."[198] Similarly, possession of a firearm with a small quantity of drugs is not, in any sense, economic activity that should be plucked from the authority of the state and placed under the jurisdiction of the federal government. The *Morrison* Court stated that:

> The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce.[199]

Just as Justice Thomas reasoned in *Printz*, the mere possession of a firearm is not sufficient to trigger federal penalties.[200]

Second, § 922(g)(3) makes no distinction between individuals that are engaged in the trafficking and sale of drugs and those who merely possess small quantities for personal use. While trafficking and sale have a truly national impact, possession of small quantities are local in character and should be left up to the local state to prosecute. In other words, under Texas state law, the possession of less than two ounces of marijuana is a class B misdemeanor[201] punishable by a fine not to exceed $2,000 and/or confinement in jail for no more than 180 days.[202] However, if an individual possessed this amount of marijuana

196. *Id.* at 790.
197. *Morrison*, 529 U.S. at 598.
198. *Id.*
199. *Id.* at 599.
200. *Printz*, 521 U.S. at 898.
201. TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(1) (2000).
202. TEX. PENAL CODE ANN. § 12.22 (2000).

and also had granddad's old twenty-gauge shotgun that sat in the closet and collected dust for thirty years, under federal law the sentence could be increased by up to ten years in federal prison and/or a $250,000 fine.[203] In addition, the conviction is a felony that strips the person of his constitutionally protected right to bear arms.[204]

V. CONCLUSION

The *Lopez/Morrison* limitation is not just a fabrication. Despite this fact, it has yet to have the impact on federal encroachment into state sovereignty that some have postulated. In most areas, courts have found a way to factually distinguish a statute or case in order to uphold the constitutionality of the federal statute. In some areas, such as the Federal Arson Statute and the Possession of Child Pornography Act, the courts have severely limited the reach of the federal government by relying on *Lopez* and *Morrison*. In other areas, like domestic relations and family violence, the courts have engaged in intellectual corruption in order to square the statute with the Constitution. The federal statutes that attach federal penalties to crimes such as being subject to a temporary restraining order, being convicted of domestic violence, and possessing a firearm with drugs, are totally devoid of any resemblance of respect toward basic constitutional mandates such as those espoused in the Second and Tenth Amendments. In the future, "[w]hen weighing those questions, the Supreme Court should weigh . . . and should ask itself: Is not such recondite reasoning, leading to such opaque conclusions about such baroque regulations . . . prima facie evidence of incompatibility with the austere brevity of the [Second and Tenth] Amendment[s]?"[205]

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203. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2002) (discussing that the sentence will be enhanced).

204. 18 U.S.C. § 922(g)(3) (The statute does not contain an exception for these activities).

205. George Will, *Freedom of Speech Survives Another Day*, WASH. POST, May 08, 2003, at A31. In this article George Will is referring to recent court decisions attempting to reconcile freedom of speech with McCain-Feingold.

Grabbing When They Leave: Employers Who Fire, Then "Bargain" for Non-Compete Clauses

Lois Galluzzo

I. Introduction

A newly discharged employee, who may have been fired for any reason or for no reason at all, is probably not entitled to any severance pay,[1] and faces unemployment of unknown duration. He has immediately lost not only his income, but also his paid health insurance, other insurance benefits, and any unvested deferred compensation. His professional and personal reputations have no doubt been damaged by the discharge, and he may not be able to find other employment unless he expatriates himself and his family.

This discharged employee is facing a great professional and personal crisis,[2] but even this situation can be made worse. In fact, it is common for an employer to exacerbate the employee's unenviable position by requiring him to agree to a new non-compete clause in order to receive any severance "package." These contract clauses, herein termed "post-involuntary termination covenants not to compete," intensify the ex-employee's crisis by imposing new restrictions on his job prospects at the very time when he most needs a new job.

Post-involuntary termination covenants not to compete confer the benefit of a non-compete clause upon an employer who declined to negotiate such a contract prior to or during the employee's tenure, when the employee's bargaining power would have been stronger. The covenants are even arguably "free" to the employer because their coupling with an employee's waiver of liability makes it impossible to tell whether the employee has received any compensation for the non-compete clause alone.

Some courts have refused to enforce these belatedly-negotiated non-compete clauses,[3] in part because they offend notions of fair play: "The employer who fires an employee [. . .] deems the employee worthless [. . .]. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests."[4] The reasoning of these courts is that "it is antithetical to allow an employer to terminate an employee

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1. *See* Gerard P. Panaro, Employment Law Manual 12-58 (2d ed. 1993).

2. *See* Charles Tiefer, *Forfeiture by Cancellation or Termination*, 54 Mercer L. Rev. 1031, 1058 (2003).

3. Kenneth J. Vanko, *"You're Fired! And Don't Forget Your Non-Compete. . .": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DePaul Bus. & Com. L.J. 1, 11 (citing Insulation Corp. of Am. v. Brobston, 667 A.2d 729 (Pa. Super. Ct. 1995)).

4. *Id.* at 12.

and [then] prevent him from working in his chosen profession."[5] Other courts enforce all non-compete clauses according to the same standards regardless of the manner in which the employment contract was terminated,[6] while still other courts take an intermediate balancing of the equities approach.[7] Under this unsettled doctrine, however, employers have an incentive to include the clauses in all their severance agreements despite their unpredictable enforcement because even an unenforceable contract bears an aura of authenticity that may cause an ex-employee to comply with its terms.

Discharged employees are in no position to bargain equally with their ex-employers, so non-compete clauses signed after termination are likely to confer disproportionate benefits on the employer, who is the stronger party to the contract. Legislatures should therefore define statutory limits for non-compete clauses that are "bargained for" after an employee is discharged in order to level the playing field between fired employees and the employers who fire them. The best solution would be to ban post-involuntary termination covenants not to compete, except in cases where an ex-employer has agreed to pay the employee's salary for the duration of any limitation on his ability to compete.[8]

II. UNCONSCIONABILITY IN POST-INVOLUNTARY TERMINATION COVENANTS NOT TO COMPETE

Contracts should not be enforced when an element of unconscionability exists at the time a contract is made,[9] with unconscionability determined through an analysis of the totality of the circumstances of the contract. Factors that are considered in the analysis include whether there was "an absence of meaningful choice on the part of one of the parties,"[10] and whether the "contract terms are unreasonably favorable to the other party."[11]

Discharged employees have little meaningful choice in ratifying a severance agreement because the agreements are commonly contracts of adhesion drafted by the offeror, and because the ex-employee does not have the bargaining power necessary to compel more favorable terms. In addition, most employees feel acute financial pressures when they are fired because they tend to be both financially and emotionally unprepared for a period of unemployment.[12] As a

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5. Vanko, *supra* note 3, at 1.

6. *Id.* at 21.

7. *Id.*

8. Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2291 (2002).

9. RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE 1134 (2d ed. 1999).

10. *Id.*

11. *Id.*

12. *See* Tiefer, *supra* note 2, at 1051 n.106.

result, they may consent to an unconscionable severance agreement because of financial pressures, which may rise to a level of coercion.[13]

Severance agreements confer disproportionate benefits on an ex-employer in part because they commonly include both a waiver of employer liability and a post-involuntary termination covenant not to compete. The employer receives a valuable benefit from just the employee's waiver of his statutory right to sue for wrongful discharge; in many cases, the employer purchases the waiver for less than one month's severance for each year of service, which most employees in Europe receive as a right after involuntary discharge.[14] The American employers' "bargain" is even more striking given that their severance pay often purchases not only the waiver of liability, but also a new non-compete clause.

A. A LACK OF MEANINGFUL CHOICE

1. *Inequality in Bargaining Power*

It has been said that "[a]ny relationship is under the control of the person who cares the least."[15] By that definition, most employers are logically in control of employment relationships. Employers may simply care less because their risk is usually widely dispersed; a single employee may represent only a fraction of one percent of the employer's workforce.[16] For the employee, however, the job usually represents 100% of his income and health insurance. This basic imbalance, normally present, is intensified once an employer has determined to discharge the employee and no longer values his services.[17]

The "bargaining power of a fired employee" is an oxymoron, a contradiction in terms. Even at the point of hiring, employers and employees are unlikely to have equal bargaining power; bargaining equity is usually available only to the most select employees.[18] At discharge, even those few select employees lose any claim to equal power. The employee still needs income and health benefits, and usually has no immediate source for either. Those needs define the vulnerability of the employee's position, which may be exploited by an employer who is presented with an opportunity to "grab" disproportionate concessions from the ex-employee as he is forced to leave.[19]

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13. *See* Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 1012 (1998).

14. Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1790 n.25 (1996).

15. GORDON LIVINGSTON, M.D., TOO SOON OLD, TOO LATE SMART 24 (2004). The author's remarks were in the different context of personal relationships.

16. Issacharoff, *supra* note 14, at 1795.

17. Vanko, *supra* note 3, at 12.

18. Issacharoff, *supra* note 14, at 1795.

19. *See id.* at 1804.

2. *Contracts of Adhesion; The "Take it or Leave it" Choice*

Employment contracts and severance agreements are commonly drafted by the employer as the offeror, and employees are rarely given an opportunity to incorporate changes.[20] Employers who offer severance agreements may adopt a "take it or leave it" stance[21] which is hard to defeat; the fired employee cannot simply choose to reject the contract and return to work. An ex-employee's options are usually limited to signing the agreement on the employer's terms or facing unemployment with no severance pay.

3. *Time Pressure as a Constraint on Choice*

Discharged employees must make decisions quickly because severance offers carry time limits for acceptance: "[W]e will hold this offer open for twenty-one (21) days [. . .]."[22] Although the statutorily mandated three-week time frame[23] may not appear coercive in the context of most contracts, it seems much less generous when ex-employees must make decisions that permanently foreclose any statutory right to an action for wrongful discharge. In other words, the time frame for acceptance of a severance agreement is short when compared to the statute of limitations for wrongful discharge.

It is impossible for most employees to predict, and therefore adequately value, the extent of their discharge-related losses at the time they are fired. The costs will vary with the duration of the unemployment, and may include moving expenses for the ex-employee and his family, or the costs of illnesses that may result from the anxiety of uncertainty and dislocation. The extent of damage to the ex-employee's professional and personal reputations is also hard to quantify before the ex-employee has tested the job market. The severance agreements nevertheless define the limits of the firing employer's liability, and ensure that any additional unknown costs will be borne disproportionately by the employee.

A fired employee faces additional time pressure because he may need several weeks to consult counsel to determine whether he may have a viable claim.[24] The ex-employee may also require counsel even if he does not intend to challenge his discharge because he needs information that an experienced attorney might be able to provide. For example, a recently fired employee often has no information about the employer's previous settlement agreements since other fired employees are constrained from disclosing the size of their severance payments or the details of any post-involuntary termination non-compete clauses:

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20. *See* Vanko, *supra* note 3, at 40; Tiefer, *supra* note 2, at 1079.

21. Vanko, *supra* note 3, at 40.

22. Throughout the article I refer to a hypothetical Severance Agreement to illustrate language used in a typical form of discharge [hereinafter Severance Agreement].

23. Blumrosen, *supra* note 13, at 1008.

24. *See id.* at 990.

> You agree that you will hold [. . .] the terms and existence of this letter agreement, in confidence, and you will not use in any manner whatsoever [. . .] or disclose any of such information to any third party except (i) in the case of information regarding this letter agreement, to your legal counsel, financial advisors, tax accountants or immediate family members who agree to keep the terms and existence of this letter agreement confidential [. . .].[25]

The employer, in contrast, knows exactly what severance payments have been sufficient to purchase waivers and non-compete clauses from previously fired employees who are comparable in their ages, positions, and length of service.

The confidentiality clauses in severance agreements have the practical effect of denying the fired employee information that is freely available to the employer. As a result, an employee may sign the agreement while believing in error that other ex-employees have settled for the same terms. The employee who hopes to overcome this information imbalance will need time to identify and confer with an attorney who might have previous experience with clients fired by the same or a similarly situated employer.

Most employees probably under-bargain for the risk of involuntary termination as they optimistically accept a new job;[26] they tend to underestimate the possibility that they will be fired[27] just as they discount other risks such as the likelihood that they will be injured in an accident.[28] They also under-bargain because they are reluctant to discuss the possibility of discharge with a potential employer.[29] As a result, discharged employees may be both financially and emotionally unprepared to face unemployment. The ex-employee may therefore choose to accept a settlement because it offers a quick payment;[30] the alternative of suing for wrongful discharge would be uncertain, costly, and slow.

B. CONTRACT TERMS THAT ARE DISPROPORTIONALLY FAVORABLE TO THE EMPLOYER

The Supreme Court favorably noted: "[I]nvoluntary termination is a point of individual trauma for the employee, producing burden and vulnerability for the social fabric."[31] This trauma is mitigated in many European countries because severance pay is mandated as a base level of compensation for the cancelled party to the employment contract.[32] In contrast, the employment doctrine in the

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25. Severance Agreement, *supra* note 22.

26. Issacharoff, *supra* note 14, at 1801.

27. *Id.* at 1801-02.

28. Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L. J. 1, 5 (2001).

29. Issacharoff, *supra* note 14, at 1794-95.

30. Vanko, *supra* note 3, at 45.

31. Tiefer, *supra* note 2, at 1058-59.

32. *See* Issacharoff, *supra* note 14, at 1788 n.25.

United States allows employers to discharge most employees at will,[33] without liability for severance payments.[34] Discharged employees in the United States must therefore commonly sign waivers of liability and restrictive covenants not to compete in order to receive the same severance payments that are an implied contractual term in other countries.[35] This "no required severance pay" stance in the United States creates the potential for harsh inequitable outcomes and disproportionate losses, or forfeiture, for the discharged employee.

1. *Discharge and Forfeiture of the Employment Contract*

Because of the employment-at-will doctrine, an employer may "treat its own obligations under the [employment] contract as discharged or cancelled based on something less, often much less, than material breach by the other party."[36] And even in those limited cases where an employee's conduct has constituted a material breach of the employment contract and the employer therefore has cause for cancellation, the ex-employee's forfeiture may well be disproportionate.[37] An employer may therefore "inflict, by cancellation, disproportionate losses to the reliance interests—in a word, forfeiture—upon a weaker contracting partner."[38]

In the United States, the employer may impose termination and condition provisions to an employment contract, then invoke them at will.[39] In fact, because of the employment-at-will doctrine, those termination and condition provisions need not even be articulated; the employee can be fired for a "good reason, a bad reason, or no reason at all."[40] These implied termination and condition provisions of at-will employment contracts have an enormous impact in the United States, where two-thirds of all employees are employees-at-will.[41]

The loss to the employee is disproportionate. While it is likely that the employer will be able to find a replacement employee whose services it will value, the employee is unlikely to find "something that suits his situation, let alone to something that he hopes will promptly improve it."[42] An ex-employee's forfeiture is, in fact:

> [S]o acute [. . .] that an employee [is unlikely to have an] effective means, after the triggering event of job termination, of belated substitution of an al-

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33. Tiefer *supra* note 2, at 1044 (stating that two-thirds of United States employees are employees-at-will).
34. *See* Blumrosen, *supra* note 13, at 947-48.
35. *See id.*; *see* Issacharoff, *supra* note 14, at 1809 n.84.
36. Tiefer, *supra* note 2, at 1031.
37. *Id.* at 1075.
38. *Id.* at 1033.
39. *Id.* at 1032-33.
40. PANARO, *supra* note 1.
41. Tiefer, *supra* note 2, at 1035.
42. *Id.* at 1051 n.104.

> ternative means of dealing with her lost interests, just as an insured cannot substitute, after the hazard occurs, for a policy that does not provide the coverage she anticipated.[43]

The effects of a discharge are so profound that the "termination of a work relationship through discharge [. . .] is the equivalent of workplace capital punishment" or "a death in the family."[44] When facing such a forfeiture, employees may be expected to settle for less than the full value of their losses, even if they could accurately predict the extent of those losses.

2. *Multiple Benefits at One Low Price: The Employer's "Bargain"*

a. *The Substantial Value of an Ex-Employee's Waiver*

Firing employers in the United States can exchange waivers of liability for severance pay, and thereby "insulate themselves from liability"[45] by purchasing "virtual immunity from the panoply of federal and state laws protecting workers' rights."[46] Such waivers "have the 'functional effect' of prospective waivers because they reduce incentives [for the employers] to comply with statutory duties."[47] The ability to economically purchase such waivers may tempt employers to "risk noncompliance with OWBPA,"[48] and disregard the requirements of Title VII, the ADEA, and ERISA.[49] In fact, members of Congress were so concerned that waivers could compromise an ex-employee's right to sue for age discrimination that they passed OWBPA in order to make it more difficult for employers to secure releases from age discrimination claims.[50]

Employer-drafted release clauses may confer substantial benefits in return for limited severance pay:[51]

> In consideration of the benefits to be paid pursuant to this letter agreement, you agree to release and discharge the Company, and all of its past, present and future respective officers, directors, employees, agents, plans, trusts, administrators, stockholders and trustees from any and all claims, losses or expenses you may have or have had or may later claim to have had against them, whether known or unknown, arising out of anything that has occurred

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43. Tiefer, *supra* note 2, at 1051 n.105.

44. *Id.* at 1051 n.104 (citing Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: "Right Sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 277-78 (2000)).

45. *See* Blumrosen, *supra* note 13, at 943.

46. *Id.* at 946.

47. *Id.* at 945. While the article refers to severance packages pre-planned for downsizing layoffs, it may be argued that an employer can "pre-plan" to purchase waivers from all employees who might be individually fired.

48. *Id.* at 952 (discussing the Older Workers' Benefit Protection Act of 1990).

49. *Id.* at 943.

50. PANARO, *supra* note 1.

51. Severance Agreement, *supra* note 22. In this case, six months of salary, limited to base salary, for an employee with five years of service with the company.

> up through the date you sign this letter agreement, including without limitation, any claims, losses or expenses arising out of your employment with the Company or the termination of your employment [. . .]. You understand and agree that, except for the claims expressly excluded from this release [workers' compensation benefits, unemployment compensation, pension benefits, health care, life insurance, disability or other similar benefits that] you will not be entitled hereafter to pursue any claims arising out of any alleged violation of your rights [. . .], including [. . .] claims arising under Title VII of the Civil Rights Act of 1964; the Worker Adjustment and Retraining Notification Act; the Fair Labor Standards Act; the Age Discrimination in Employment Act of 1967; the Employee Retirement Income Security Act of 1974; the Family and Medical Leave Act; the Americans with Disabilities Act; the New York Human Rights Law; the Westchester County Human Rights Law; and Connecticut's Human Rights Law, as these laws may be amended from time to time; and any other federal, state or local law, regulation, administrative guidance or common law doctrine claim relating to your employment.[52]

The company is also released from any individual claims that might be brought on behalf of the ex-employee by an administrative agency, including the "Equal Employment Opportunity Commission, the Department of Labor, or any state or local Human Rights Agencies," for any claim "for or on account of anything, whether known or unknown, foreseen or unforeseen, which has occurred up to the effective date of this letter agreement and which relates to your employment with the Company."[53] The employee also releases the company from any claims that he may have as a part of any later class action lawsuit.[54]

In the United States, a worker's job is not only the source of an employee's income and professional and personal identity, but also the "locus of [. . .] social safety net elements [such as] health benefits,"[55] disability insurance, and life insurance. As the job goes, so go the related benefits. As a result, the employee loses his health insurance, life insurance, disability insurance, and any unvested deferred compensation when he is involuntarily terminated.[56]

The value of a waiver to an employer is enhanced because the employee's signature on the document is a ratification of all the terms stated in the agreement. For example, the employer's "benefit" from a waiver will include the employee's ratification of his forfeiture of other benefits, such as deferred compensation:

> Pursuant to the terms of your stock option agreements, none of [your unvested] Options [. . .] will be vested as of your Termination Date. Therefore, these Options will automatically expire and be canceled on your Termination

52. Severance Agreement, *supra* note 22.
53. *Id.*
54. *Id.*
55. Tiefer, *supra* note 2, at 1044.
56. *Id.*

> Date. Similarly, your variable awards granted to you under the LTIP in 1999 and 2000 will not be vested on your Termination Date and, therefore, will automatically expire and be canceled on that date.[57]

Although the employee will have a statutory right to continue his health insurance at his own expense due to the COBRA legislation, there may be no option to continue other benefits, such as disability insurance. For example, the severance agreement offered to one discharged Fortune 100 employee contained the following clause: "Please note that during your Leave of Absence Period, you will not be eligible for long or short-term disability coverage."[58]

b. *The Employer's Bonus: The Value of the Non-Compete Clause*

1). *Undifferentiated Consideration*

Employers who wish to bind current employees to a new non-compete clause must offer consideration for the additional contract which is distinct from the employee's current compensation.[59] An annual raise given each year is not sufficient;[60] there must be a beneficial change in status.[61] Sufficient consideration might consist of "multiple benefits"[62] that could include money, an increase in benefits, a promotion, or a new severance benefit.[63] Yet, when a non-compete clause is included in a severance agreement that also includes an employer's waiver of liability, the consideration for the non-compete clause is undifferentiated. This lack of differentiation calls into question whether the ex-employee has in fact received consideration for the non-compete clause, or whether he might have been able to negotiate the same or similar compensation in return for the waiver alone. The ex-employee, however, is highly unlikely to have been able to choose among the theoretical alternatives of signing only a waiver, or only a non-compete clause, or a combination of the two.[64]

It is curious that employment law doctrine, which requires "multiple benefits" to ensure the enforceability of a non-compete clause signed during an employment tenure,[65] may endorse a post-employment non-compete clause which lacks any clearly defined consideration. This anomaly could be resolved if employers were statutorily prohibited from "packaging" a waiver of liability and a non-compete clause in the same agreement. A requirement that any post-termi-

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57. *See* Severance Agreement, *supra* note 22.

58. *Id.*

59. Gregory Jordan & Mary Hackett, *Non-Compete Agreements and Consideration – What's an Employer To Do?*, 67 PA BAR ASS'N QUARTERLY 76 (1996).

60. *Id.* at 77.

61. *Id.* at 78.

62. *Id.*

63. *Id.*

64. *See* Vanko, *supra* note 3, at 27 n.181 (discussing the uncommonness of separate consideration in pre-employment covenants not to compete).

65. Jordan, *supra* note 59, at 78.

nation non-compete clause be negotiated separately would ensure that the employer has distinctly purchased the clause. In addition, the separate negotiation of any non-compete clause would decrease the coercive pressure on an ex-employee by increasing his choices: he could choose to agree to only the waiver, only the non-compete clause, or for the sum of the two proposed considerations— the combination of the two.

2). *Competitive Restraint of Industry-Specific Skills*

An employee who signs a post-involuntary termination covenant not to compete will lose, at least for a time, the value of his industry-specific skills. For example, employees expect that as they gain work experience, their salaries will increase. The increase is due not only to personal skills, which the employees have developed over time, but also due to their industry-specific skills. For example, a salesperson who has been selling beds for ten years is paid more than the novice not only because of his independent sales skills, but also because he knows beds: their manufacturers, their delivery systems, their quality indicators, and their value in different geographic and consumer markets.[66]

When an employee is constrained by a non-compete clause from working in the industry in which he is most productive,[67] he arguably loses half his "markup" value relative to the novice. The loss of this "experience value" is then borne by the discharged employee and his family through decreased earnings, and by the United States' economy through decreased competitiveness due to "wasted" knowledge.[68] In contrast to the ex-employee's loss is the ex-employer's gain; a discharging employer who includes a non-compete clause in an ex-employee's severance agreement gains competitive advantage by forcing the removal from the market of the ex-employee's specific expertise.

The value of industry-specific knowledge may become either temporarily or even permanently unavailable to the employee and to society. An ex-employee's skills may quickly become obsolete, or he may accept new employment where those skills are not applicable. It is the prospective, competitive restraint of these skills that may be seen as a benefit to the ex-employer, and especially to an opportunistic ex-employer who:

> [M]ight use covenants not to compete as a means to restrict the future employment of ex-employees in order to improve their own competitive position in regard to competitors. To bind employees to restrictive covenants absent the reasonable need for protection of proprietary information has been found

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66. *See, e.g.* Bed Mart, Inc. v. Kelley, 45 P.3d 1219 (Ariz. Ct. App. 2002).

67. *See* Steven Wilf, *Commentary: Trade Secrets, Property, and Social Relations*, 34 CONN. L. REV. 787, 798 (2002).

68. *See* Rebecca J. Berkun, *The Dangers of the Doctrine of Inevitable Disclosure in Pennsylvania*, 6 U. PA. J. LAB. & EMP. L. 157, 168 (2003).

by some courts as a mechanism to hold employees "virtual hostages of their employers."[69]

3). *Enforcement at the Expense of the Ex-Employee*

In the severance agreement, the ex-employee also agrees to be responsible for any expenses the ex-employer may incur in order to enforce the agreement: "In addition, you agree to indemnify and hold the Company and its respective officers, directors, employees, plans, trusts, administrators and trustees harmless from any claim, loss or expense (*including attorneys' fees*) *incurred by them* (emphasis added) arising out of your breach of any portion of this letter agreement."[70] This clause gives another considerable benefit to the employer because post-involuntary covenants not to compete are often unenforceable,[71] and may be overbroad or ambiguous. Yet, an uncertain ex-employee will be unlikely to accept employment in any "grey areas" of the agreement because of the additional "chilling effect" of his potential liability for the ex-employer's legal fees.

A large employer may impose an additional constraint upon the ex-employee in order to ensure that the employee will be responsible for enforcement of the covenant, apparently fearing that the company or one if its many subsidiaries might rehire him:

> You acknowledge that you are not eligible for rehire or reemployment and agree that you will not seek employment or any form of independent contractor and/or consultant relationship with the Company at any time after the Effective Date. In addition, you hereby give unequivocal and express notice of your intent not to return to work at the Company.[72]

4). *A Shifting of Business Costs to the Ex-Employee*

The cost of a good should reflect all the expenses of its production. Those expenses logically include the costs of protecting confidential information and any trade secrets that are part of the company's core competencies. If the dissemination of information results in competitive disadvantage for the company, then the protection of that information should be seen as a cost of doing business. For example, "[t]rade secrets become property only if third-party access is vigilantly policed,"[73] so the cost of such policing is rationally a business cost. "Vigilant policing" could arguably include a duty on the part of the employer to carefully select the employees who will have access to such information, and to

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69. Wilf, *supra* note 67, at 799.
70. Severance Agreement, *supra* note 22.
71. Vanko, *supra* note 3, at 9.
72. Severance Agreement, *supra* note 22.
73. Wilf, *supra* note 67, at 791.

reveal such information only to trusted employees who are unlikely to be fired.[74] In short, employers control access to their trade secrets, and can therefore control the risk of their dissemination.

Because employers are the best possible cost-avoiders, they should bear any costs associated with the maintenance of confidential information. But post-termination covenants not to compete thwart the application of this principle by shifting some of the "maintenance costs" of confidential information to the ex-employee.[75] For example, an ex-employee may earn lower wages because a non-compete clause forces him to "[abandon even if only for a time] the only occupation for which he is fitted and in which he is experienced, or expatriat[e] himself and [his] family to find employment elsewhere, with persons to whom his character and proficiency are unknown quantities."[76] If a non-compete clause causes an ex-employee to be unemployed or underemployed, then his lost wages can be considered part of the employer's trade secret "policing" costs. To the extent that the non-compete clause itself causes unreimbursed lost wages, those maintenance costs will be externalized to the employee or transferred to society through reduced productivity or increased social costs.[77]

III. THE UNPREDICTABLE ENFORCEABILITY OF POST-INVOLUNTARY TERMINATION COVENANTS NOT TO COMPETE

The question of whether a non-compete clause should be enforceable "has never been a matter of the simple application of contract principles," but also includes an analysis of public policy concerns because non-compete clauses restrain competitive trade and affect an individual's ability to earn a living.[78] Courts have been generally reluctant to enforce restrictive covenants given the importance of free mobility of employees.[79] In recent years, however, "businesses have made ever greater claim to the ownership of trade secrets,"[80] and courts have become increasingly solicitous to trade secret protection.[81] The result has been a "doctrinal fog"[82] consisting of "an explosion in litigation seeking to enforce these [non-compete] provisions"[83] and "inconsistent decisions and subsequent confusion in both the legal and business communities."[84]

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74. *See* Berkun, *supra* note 68, at 167; Lembrich, *supra* note 8, at 2316.
75. *See* Wilf, *supra* note 67, at 797.
76. Lembrich, *supra* note 8, at 2300.
77. *See* Berkun, *supra* note 68.
78. *Id.*
79. Vanko, *supra* note 3, at 1.
80. Wilf, *supra* note 67, at 796.
81. *Id.* at 790, 795.
82. *See* Isaacharoff, *supra* note 14, at 1804.
83. Lembrich, *supra* note 8, at 2294.
84. *Id.*

A. THE REQUIREMENT OF REASONABLENESS FOR ALL NON-COMPETE CLAUSES

Non-compete clauses may be unenforceable regardless of the circumstances of termination of employment if they fail to satisfy a standard of reasonableness. The reasonableness of a non-compete clause is determined through a totality of the circumstances approach where "what is reasonable depends on the whole subject matter of the contract, the kind, character and location of the business, [and] the purpose to be accomplished by the restriction."[85] Factors that are considered are: the duration of the restraint, the geographic area of the restraint, the scope of the prohibited activities, the extent to which the employer contributed to the worker's special knowledge and skill, and the extent of any harm caused to a former employer.[86]

Courts have enforced five-year long non-compete clauses,[87] but have also held that a one-year restriction may be unreasonably long.[88] Particularly when skills are technical or may for other reasons quickly become obsolete, courts have held that a one-year covenant is too long given the dynamic nature of an industry,[89] and that some restrictions should be limited to six months given "the speed with which [an] Internet advertising industry [. . .] changes . . . ."[90]

A restriction that may appear otherwise reasonable may be "stretched" beyond its stated duration if the employer simply defines the restraint period as beginning after the ex-employee's severance pay has ended.[91] This result is accomplished by specifying in the severance agreement that the ex-employee will not compete with the employer until after "the first anniversary of the Termination Date,"[92] which has been defined as that date when severance pay ends,[93] rather than as the date when the ex-employee was discharged. As a result, a restraint period that appears on the first reading to be limited to one year actually continues for eighteen months.[94]

Courts have held that world-wide non-compete clauses can be valid in cases where a company's operations are world-wide. For example, "A one year non-competition covenant against a research and development project director for a

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85. Olliver/Pilcher Ins., Inc. v. Daniels, 715 P.2d 1218, 1220 (1986) (citing Gann v. Morris, 596 P.2d 43, 44 (App. 1979)).

86. ALVIN L. GOLDMAN, LABOR AND EMPLOYMENT LAW IN THE UNITED STATES 97-98 (1996).

87. Pierre H. Bergeron, *Navigating the "Deep and Unsettled Sea" of Covenant Not to Compete Litigation in Ohio: A Comprehensive Look*, 31 U. TOL. L. REV. 373, 377 (2000).

88. *Id.*

89. Wilf, *supra* note 67, at 801 n.93 (citing Earthweb, Inc. v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999)).

90. *Id.* at 801 n.96 (citing Doubleclick, Inc. v. Henderson et al., 1997 N.Y. Misc. LEXIS 577 (N.Y. Gen. Term Nov 5, 1997)).

91. Severance Agreement, *supra* note 22.

92. *Id.* The severance pay period was six months, so the non-compete clause was to continue for eighteen months after the employee was discharged.

93. *Id.*

94. *Id.*

pharmaceutical company may be enforceable even though it applies to employment in a similar capacity with any direct competitor anywhere in the world."[95] A world-wide geographic broader scope would logically result in a shorter temporal duration if the employee's interests in earning a living are balanced against the ex-employer's protectable interest. However, some agreements may still require both a world-wide geographic scope and a traditional time limitation, as did this agreement offered to a departing executive:

> You agree that, until the first anniversary of the Termination Date, you will neither directly nor indirectly:
> (i) participate or have any interest in, own, manage, operate, control, be connected with as a stockholder, director, officer, employee, partner or consultant, or otherwise engage, invest or participate in any entity that competes with any business of the Company anywhere in the world, including [competing] Enterprises or [their] franchisees or affiliates . . . .[96]

An employer may additionally extend the scope of a non-compete clause by broadly defining the "Company" for which an ex-employee has worked, for example by including in the definition not only the immediate "Company," but also "its subsidiaries, divisions, affiliates, predecessors and successors."[97]

If one or more provisions of a non-compete clause are deemed unreasonable, some courts will sever the objectionable provision(s), while others will decline to edit the agreement to bring it into compliance with the "reasonableness standard," and therefore reject the entire contract.[98] One justification for the latter approach is that a court's willingness to "edit" an agreement until it is reasonable encourages employers to write overreaching contracts which, if challenged, will merely be re-written until they are reasonable. A jurisdiction with a "no-edit" rule, in contrast, discourages employers from drafting overbroad agreements by refusing to enforce even the reasonable provisions of an overbroad covenant.[99]

B. NON-COMPETE CLAUSE ENFORCEMENT IN INVOLUNTARY TERMINATION CASES

Non-compete covenants signed at the beginning of or during the employment relationship normally specify that they will take effect when an employee resigns or is terminated for any reason.[100] However, such provisions are not uniformly enforced. Some courts will consider an individual's manner of

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95. GOLDMAN, *supra* note 86, at 98.
96. *See* Severance Agreement, *supra* note 22.
97. *Id.*
98. Michael S. Green & Laura P. Chiasson, *Covenants Not To Compete, An Old Dog with a New Bite*, 39 ARIZ. ATT'Y 18, 22 (Feb., 2003) (quoting Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999)).
99. *Id.*
100. Vanko, *supra* note 3, at 1.

termination from the company when determining whether a non-compete clause should be enforced, while other courts may consider the circumstances of the termination to be irrelevant if the contract is otherwise reasonable.[101]

1. *Three Doctrinal Approaches*

The enforceability of non-compete clauses in cases of involuntary termination varies widely from state to state, and is unpredictable even within a given jurisdiction due to a lack of bright-line rules in this area of law.[102] Jurisdictional approaches in discharge non-compete cases may generally be described as falling into one of three doctrinal categories: covenants are per se unenforceable when the employee has been discharged without cause; covenants are presumptively unenforceable but the employer may rebut the presumption; or covenants are enforceable without regard for the cause of termination.[103]

The first approach is exemplified by the stance of the New York courts, which will not enforce a non-compete clause in an employment agreement if the former employee was involuntarily discharged from his position.[104] For example, the Court of Appeals noted that "[a]n essential aspect (of enforceable restraints on employee mobility) is the employer's continued willingness to employ the party covenanting not to compete."[105] This straightforward approach, however, may still become complicated.

One district court in New York stated that "where the employer terminates the employment relationship without cause [. . .] his action necessarily destroys the mutuality of obligation on which the covenant rests.[106] This position often necessitates another extremely difficult judicial inquiry into whether the employee was discharged for cause.[107] The employer's label of a discharge as "for cause" cannot be determinative,[108] and state definitions of "cause" vary under the common law. It may generally be accepted that fraud, breach of fiduciary duty, insubordination, and violation of company policy constitute "cause." But employer claims that the ex-employee's job performance was inadequate are much more difficult to verify, and "lead to an inquisition into the discharged employee's job performance and whether it rises to the level of good cause for dismissal."[109] The court's difficulty in examining and evaluating job perform-

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101. Vanko, *supra* note 3, at 21.

102. Lembrich, *supra* note 8.

103. Vanko, *supra* note 3, at 9.

104. Sifco Industries, Inc. v. Advanced Plating Technologies, 867 F. Supp. 155, 158 (S.D.N.Y. 1994) (citing Post v. Merrill Lynch, 397 N.E.2d 358 (N.Y. 1979)).

105. *Sifco*, 867 F. Supp. at 158-59.

106. *Id.* at 155, 158.

107. Vanko, *supra* note 3, at 25.

108. *Id.*

109. *Id.*

ance may frustrate both parties' need for an expeditious resolution of the pressing issue of whether the ex-employee may work for a new employer.

Some jurisdictions that follow a "middle-ground" analysis may consider a non-compete clause to be presumptively invalid if the employee was involuntarily discharged, but allow the employer to rebut that presumption by showing that the company has a protectable interest that is threatened if the covenant is not enforced.[110] Other factors considered in some middle-ground jurisdictions include whether there was any demonstrated bad faith in the termination by the employer, and whether the employer's conduct was opportunistic, arbitrary, or otherwise unreasonable.[111]

Florida law, strictly interpreted, requires courts to disregard the fact that an employee was involuntarily discharged when determining the reasonableness of a non-compete clause. This unambiguously pro-employer stance may change in the future; however, a Florida court, in dicta, recently stated that if an employer were to discharge an employee without cause shortly after hiring him, the court might deem the conduct unconscionable and refuse to enforce a non-compete clause.[112]

2. *Additional Considerations When Late-Career Employees Have Been Discharged*

Courts should scrutinize non-compete clauses even more closely when an employer seeks enforcement against a late-career employee because non-compete clause terms that might be otherwise reasonable could become unreasonable when enforced against a more senior employee. Restrictive covenants inhibit employees' ability to earn a living to support themselves and their families during the duration of the restraint. As such, there is an increasing prospect that the state will become burdened by these employees.[113] This concern should be especially weighed in cases where a late-career employee has been discharged because it is harder for a more senior employee to find comparable employment, and he may, therefore, suffer more acutely from competitive restraints than would any of his younger colleagues. If the job market is seen as a pyramid with greater numbers of jobs at the lower levels, then there are logically fewer comparable jobs available to employees who have been promoted to responsible positions through years of service. The late-career employee also has more to lose if he is forced to abandon the industry or position where he has already acquired years of experience, established his professional reputation, and developed specialized expertise. In addition, he may find it more distres-

110. Vanko, *supra* note 3, at 9.
111. *Id.* at 19.
112. *Id.* at 23.
113. Lembrich, *supra* note 8, at 2298.

sing to move in order to avoid competing with a former employer, due to his long-standing "roots" in his present community.

The discharge of a late-career employee is more likely to have been the result of a bad faith, opportunistic discharge. In fact, late-career employees are so much more at risk for opportunistic discharge that some courts consider their cases with a "special legal solicitude."[114] There is nevertheless "a general problem of underdeterrence of the employer's temptation to breach career-term [employment] contracts," despite an increase in wrongful termination claims that began in the 1980s.[115] Particular scrutiny should therefore be given to non-compete clauses that constrain late-career employees; enforcement would be especially inequitable if the clauses were imposed after an opportunistic discharge.

IV. PROPOSED SOLUTIONS TO THE NON-COMPETE CLAUSE DILEMMA

The best solution to the non-compete clause dilemma would be to statutorily ban post-involuntary termination covenants not to compete because they are inherently unconscionable and contrary to the public policy interests of employee mobility[116] and free competition. This proposed ban would not affect the rights of the employer and employee to bargain for a waiver of the employer's liability for wrongful discharge and is therefore narrowly tailored to protect the employee's right to seek another position after being discharged.

Legislation banning these belatedly-negotiated non-compete clauses would be consistent with other statutes, such as consumer protection laws and statutes that forbid usurious lending rates. Such laws, which have been enacted to proscribe unfair contracting practices, share a guiding principle with the proposed ban. This principle is that individuals who have no bargaining power should be protected against stronger parties who can contract for disproportionately favorable terms.

Alternatively, the courts could enforce non-compete clauses, but only in cases where the employer has agreed to pay the employee's full salary for any period during which he is restrained from competing.[117] This latter system is known as "garden leave," and is currently used by many employers in England.[118] The system has advantages for both parties. The ex-employee receives reimbursement for any deprivation in his ability to earn a living, and the employer gains the advantage of a predictably enforceable covenant,[119] regardless of when it was signed or whether the employee was involuntarily dis-

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114. *See* Issacharoff, *supra* note 14, at 1804.
115. *Id.* at 1789, 1812.
116. Wilf, *supra* note 67, at 799 n.75.
117. Lembrich, *supra* note 8.
118. *See generally id.*
119. *Id.*

charged. The garden leave system could be a good solution to the non-compete clause dilemma because it "provides employers with the protection they need, [and] is [still] fair to employees."[120]

Widespread use of garden leave arrangements should limit the total costs associated with non-compete clauses by providing an incentive for the employers, who control access to trade secrets and draft non-compete clauses, to narrowly tailor the clauses to their exact needs. Costs should also fall under this system because they would be borne by the employer, who is the best cost avoider, and not externalized to the employee.

A less satisfactory, but nevertheless ameliorating solution would be to enforce post-involuntary termination non-compete clauses only in cases where they were negotiated as separate contracts with separate consideration, and where they could be accepted or rejected by an employee independently of his agreement to a waiver of the employer's liability for wrongful discharge or breach of the employment contract. This solution would strengthen the discharged employee's bargaining position by increasing his options, and should therefore result in contracts that would be less disproportionately favorable to the stronger party.

V. CONCLUSION

Post-involuntary termination covenants not to compete are inherently unconscionable because there is enormous inequality in the bargaining power of the parties, and because the ensuing contract terms are disproportionally favorable to the employer. As a result, employers are too often allowed to "grab" disproportionate benefits when discharged employees are forced to leave. An employee's potential value to a competitor does not become suddenly apparent at the moment of firing, so employers should not be allowed to wait until that moment of employee vulnerability to "bargain" for a non-compete clause.

Non-compete clauses are often unenforceable when an employee has been involuntarily discharged, but even unenforceable clauses may have a very real "chilling" effect. A discharged employee may forego opportunities because he believes the contract might be enforced. A potential employer may also be deterred: a company may be afraid to hire a discharged employee due to fear of a potential injunction and its resulting litigation fees. As a result, there is an uninformed over-compliance with non-compete clauses, and this over-compliance imposes lost opportunity costs while perversely rewarding employers for writing unenforceable contracts.

The enforceability of non-compete clauses is justifiably a matter of public concern.[121] There is a public policy interest in employee mobility,[122] which

120. Lembrich, *supra* note 8, at 2292.

121. Tiefer, *supra* note 2, at 1044; Vanko, *supra* note 3, at 1.

"allows for the transfer of ideas and practices from one corporation to another, and [. . .] increases competitiveness [by providing] for the most efficient use of human resources."[123] In addition, the current unsettled doctrine results in increased litigation, which imposes its own costs on our country's ability to compete in a global economy.

Action is needed to restrain the costs imposed by non-compete clauses and to protect discharged employees who are not equal bargaining parties capable of protecting their own interests.[124] Legislatures and courts should both have a role in resolving the non-compete clause dilemma. Legislatures can help by passing statutes that would ban the most coercive and unconscionable type of non-compete clause, those signed after an employee has been involuntarily discharged. Alternatively, they could pass legislation that would require any non-compete clause signed after an employee is fired to be negotiated separately from his waiver of liability, in order to ensure that the employee can choose to accept or reject the non-compete clause based on its own merit. Courts can also improve the situation by upholding the validity of garden leave arrangements,[125] and by restricting the enforceability of non-compete clauses according to the garden leave standard, which requires an employer to pay the ex-employee's salary for the entire period during which he is restrained from competing.

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122. Wilf, *supra* note 67, at 799.

123. *Id.*

124. Lembrich, *supra* note 8, at 2308.

125. *Id.* at 2293 (noting that "American courts have not ruled on the legitimacy of garden leave provisions").

Incorporation of a Limited Liability Company in Italy

ALESSANDRO BARZAGHI*

This article aims to cover the highlights of the relevant Italian legislation and formalities regarding the incorporation of a limited liability company ("*Società a Responsabilità Limitata*" or "S.r.l."), the simplest type of corporation provided by the Italian system.[1]

Basic features of the S.r.l., such as costs and time frame[2] for incorporation, will be addressed from a practical viewpoint with lawyers and practitioners in mind.

I. INCORPORATION

An S.r.l. can be incorporated either by (i) one party[3] alone (in this case the S.r.l. is referred to as "*Società a Responsabilità Limitata Unipersonale*" and a number of special provisions apply, which will be discussed later) or (ii) by more than one party. In both instances, the incorporation must be performed before a Notary Public[4] in Italy.

In order to incorporate an S.r.l., the party or parties need to draft and submit to the Notary Public a Deed of Incorporation ("*Atto Costitutivo*") and bylaws, and appear before the Notary Public.

The incorporating stakeholder(s) may either appear in person or be represented by a proxy. In the latter case, an attorney or a representative may prepare and send to the incorporator a power of attorney which shall include all relevant information regarding the company and the incorporator such as the incorporator's name, date and place of birth, Italian Fiscal Code[5] if he already

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1. Codice Civile [C.c.] art. 2247-2554 (Italy).

2. Whenever reference is made to "days" to describe the length of time, it is intended to mean "working days."

3. The concept of "party" is intended to refer both to individuals and companies.

4. A Notary Public in Italy, quite different than the case in America, has an extraordinarily important role in the legal profession. The Notary is an expert of law and attains her position after a very selective process. It can be quite costly to incorporate a company in front of a Notary Public in Italy. However, with the scrutiny of the Notary Public, the parties can be assured of the legality and regularity of the incorporation.

5. The taxpayer ID ("Codice Fiscale") is issued by the tax authority ("Agenzia delle Entrate") and is needed for various purposes, not limited to mere identification and various applications with Italian authorities. Such number is mandatory for directors of the new company and the new company itself. In the latter case, the taxpayer ID is the same as the VAT number which is issued to the new company

has one, the same information about the proxy/proxies, name of the new company, corporate seat, amount of stock, stakes owned by each incorporator, and corporate purpose.[6]

Not all individuals or foreign companies are allowed to incorporate as entities in Italy.[7] This depends on whether the foreign country allows Italian individuals or companies to incorporate companies in such country. In a number of cases, treaties are entered into between nations to grant broader rights to their citizens.[8]

II. TIME FRAME

In summary, the time needed to incorporate a basic S.r.l.[9] varies from as few as seven days to as many as thirty to thirty-five days depending on a number of factors, including how expeditious the Notary Public's office is willing to be, how familiar the incorporator is with the Italian system, and whether the incorporator will appear in person in front of the Notary Public.[10]

Generally speaking, from the first contact between the client and counsel, it usually takes two weeks or longer before an appointment for the required meeting with the Notary Public may be arranged. This happens because foreign incorporators are usually not familiar with the Italian system, and it takes some time for their Italian counsels to explain all requirements involved.

Time needed for incorporating a company in Italy also varies depending on whether the incorporator shows up in person in front of the Notary Public or decides to have an attorney or other representative act as his proxy in Italy (see "Incorporation" above).

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once the appearance in front of the Notary Public has taken place. Please note that this number does not in and of itself imply any personal tax liability. In order to apply for a taxpayer ID, a form must be filled out and signed by the applicant and a copy of his passport must be submitted. Taxpayer IDs are usually issued within a very short time (one to three days).

6. A photocopy of the incorporator's passport is also needed.

7. Full reciprocity exists between Italy and the United States for the sake of incorporation of companies.

8. For example, before March of 2003 it was not possible for Turkish nationals or entities having a corporate capital of less than Euro 50.000,00 to incorporate sole stakeholder companies in Italy. This was changed by an Italian–Turkish convention, which was enacted in Italy in March of 2003. Full reciprocity now exists between the two countries in this respect, and Turkish nationals and entities may therefore incorporate sole stakeholder companies in Italy, and Italians may do so in Turkey. If reciprocity lacks, the Notary Public shall refuse to receive the Deed of Incorporation and bylaws of the company.

9. A basic S.r.l. would have standard bylaws provisions and a fairly simple financial structure. For more complex company structures, given the preparation and planning involved, it may take longer to incorporate.

10. Holidays should also be taken into account. In particular, during Christmas and summer holidays the pace of public offices slows down considerably, not to mention that such offices are often closed or understaffed during such holidays. In addition to Christmas and summer, a number of other Italian holidays may delay the process.

In the first instance, where the incorporator shows up in person and signs the deed in front of the Notary Public, it takes four to eight days from the date on which the Incorporation Deed is signed for the company to be finally in operation, assuming that the content of the bylaws has already been agreed on.

In the second instance, where the incorporator does not show up in person, two cases are given:

> a) If the incorporator is a company,[11] a resolution of the directors of the company granting powers to a director or a third party to appoint an Italian representative for the sake of incorporating the new company is required. Time needed for such resolution varies depending on the domestic laws[12] of the country where the incorporating company is located.
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> b) If the incorporator is an individual rather than a company, such individual will be able to give a proxy without any previous action.

It takes five to ten days to obtain the power of attorney required to empower the proxy to appear on the incorporator's behalf. A summary of the process can be described as follows. First, counsel in Italy shall send the draft of the power of attorney to the incorporator, either by email or fax. Second, the incorporator shall sign the power of attorney in front of a local Notary Public. Third, the signature shall be legalized (i) by means of an Apostille pursuant to the Hague Convention of October 5, 1961 or (ii) at the Italian Consulate.[13] If the Apostille procedure is chosen, the incorporator's local counsel will usually be in charge of obtaining it.[14] Finally, the incorporator shall send the authenticated power of attorney to its counsel in Italy who will get it translated and sworn before either a Notary Public or a court.

After the incorporator or his proxy signs the deed, the incorporator should obtain a VAT number *("partita IVA")*. The VAT number may be requested by

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11. If the incorporator is a company, an official certificate stating that the stakeholder is not in voluntary or compulsory liquidation or subject to bankruptcy proceedings (i.e., a certificate of good standing) is required by the Notary Public to perform incorporation.

12. Time required varies depending on whether a formal convocation of the board of directors of the incorporating company is needed within a certain notice period or if written consent is enough.

13. For European countries that were members to the Brussels Convention of 1987 on Abolition of Legalization of Documents, between member states of the European Union, no legalization is actually required, but exclusively a notarization. *See Legalization of Foreign Documents*, Jones Day White Paper (Jones Day, New York, N.Y.), Dec. 2005, at 1, *available at* http://www.jonesday.com/pubs/pubs.aspx.

14. Authorities in charge of issuing the Apostille vary from nation to nation. For example, in the United States the Apostille is issued by the Secretary of the State. According to Italian rules in force for notaries, all pages of the power of attorney, Apostille included, must be stamped together with what is called a conjunction stamp (*"timbro di congiunzione"*). If the proxy is given by a person on behalf of the company, a notarized copy of the company resolution must be attached to the proxy with conjunction stamps. Alternatively, notaries bend the upper left corners of the documents, staple them together, and put only one stamp on such bent angle. Both ways are valid. The purpose of these formalities is to certify that the documents have been legalized together and have not been substituted by the parties with fraud.

filing an application with the VAT Office ("*Ufficio IVA*") in the city where the new company has its registered office. This usually takes one to three days. Then (usually three to four days after the signing of the Deed), the Notary Public requests the company to be registered with the Register of Companies (*"Registro delle Imprese"*) at the Chamber of Commerce.[15] The registration usually takes one to three days.

Before moving on to other chapters, a pivotal issue— the financial means of the company— must be addressed. As it will be indicated in detail under "Corporate Capital," a portion of the corporate capital (or the full corporate capital in case the company has a sole stakeholder) must be deposited with an Italian bank before the Incorporation Deed may be signed.

The amount of capital must be wired to an Italian bank, provided that some rules are complied with.[16] A new, temporary bank account must be opened in the new company's name. Generally, it takes approximately three to five days from the day the wire transfer is effected abroad, to the day the funds are available in the Italian bank account.

Then, after a couple of days, an authorized director may go to the bank, claim the money paid on the company's behalf, and open a definitive bank account on behalf of the new company. This can be done either at the same bank where the money transfer was effected, or at a different one; only at this point may the new company finally operate.

III. LIABILITY FOR CORPORATE ACTIONS

Generally speaking, an S.r.l., as a legal entity, is entirely responsible for obligations taken in its name by its officers while its stakeholders, personally and individually, are not. However, if an S.r.l. is incorporated by a sole stakeholder, and the company becomes insolvent, the sole stakeholder may be liable for all obligations and commitments taken in the name of the company by its officers, without limitation, only in the following cases: (i) if the sole stakeholder has not paid in the full amount of corporate capital; and/or (ii) if the directors of the company or the stakeholder himself fail to inform the Register of Companies that the company has a sole stakeholder, and provide the Register with his personal information.

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15. Recording in the Register of Companies is the formality which clearly confers to the company the capacity to be liable for obligations taken by its officers. Before such record takes place, those acting on behalf of the company, together with those who have actually authorized the operations, are jointly and severally liable for all obligations incurred on behalf of the company.

16. All expenses must be borne by the ordering party abroad, so that the exact amount requested is going to be available on the account. This must be made clear because banks typically charge commissions in lack of different orders. Unfortunately, if the amount on the account is not exactly as per the bylaws, the company may not be incorporated.

IV. BYLAWS

The bylaws provide rules which govern a considerable number of aspects of the S.r.l., and thus must be accurately thought over and drafted as they will govern the way the company shall operate. A draft of the bylaws may be provided by the Italian counsel, and must be finalized with the incorporator in order to conform to the incorporator's specific needs.

V. NAME AND CORPORATE PURPOSE, REGISTERED OFFICE AND DURATION

There are no legal restrictions as to the name of an S.r.l., but the word "S.r.l." shall appear after the chosen name. The use of identical names or those similar to other enterprises must be avoided. Also, the corporate purpose must accurately reflect the company's true area of operation and may not contain generic provisions.[17]

The registered office of the company must be in Italian territory and need not be the same as its administrative office.

The duration of an S.r.l. can be finite or indefinite. In the latter case, the law grants stakeholders the right to withdraw from the company at any time as long as the company is given 180 days notice.[18] A stakeholder who withdraws must be reimbursed the market value of his stake at the time of withdrawal. Therefore, it is more desirable for prospective stakeholders to incorporate an S.r.l. with definite duration if they want to avoid unexpected withdrawals of co-venturers.

VI. CORPORATE CAPITAL

An S.r.l. requires a minimum corporate capital of Euro 10.000,00.[19] In practice, the amount of corporate capital which is adequate for carrying out the corporate purpose may be tailored together with an accountant prior to incorporating the company, and differs depending on the financial structure of the company, its planned expenses and revenues, and the way cash flow is expected to fluctuate. Some companies may experience dramatic increase in their revenues and then months with no revenues whatsoever, while others may benefit from a more steady distribution of costs and revenues.

For example, a company which is bound to enjoy consistent revenues and suffer limited expenditures in its first year may well be equipped with a limited

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17. Clauses such as *"the purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of . . . ."* which are lawful in the United States in states like Delaware, may not be used in Italy.

18. The bylaws can require longer notice, but may not exceed a year.

19. This figure may be higher in specific cases. For an example, see footnote 8.

corporate capital to begin with.[20] However, a company that is bound to bear heavy expenditures with limited revenues during the first year will need a higher corporate capital.

It must be kept in mind that the bigger and more structured the company is, the higher the expenses and potential liabilities may be. To this respect, the number of employees, type and number of contracts, and commitments must be closely evaluated.

The Italian Civil Code attaches relevant consequences to the decrease of money first deposited in the company's coffins as corporate capital. If, as a result of losses, the capital is decreased by more than one third, the directors must call the Stakeholders' Meeting without delay to consider actions to be taken (i.e. further contributions by stakeholders or reduction of corporate capital, provided that it is above a minimum of Euro 10.000,00). In any case, should the meeting of the stakeholders not take any action whatsoever, and on the following financial year the loss is not reduced to less than one third of the corporate capital, a meeting of the stakeholders must be called to approve the balance sheet and to have the registered capital reduced accordingly.

A separate provision states that if the total amount of the capital (as the result of a loss of more than one third of the same) drops below the minimum required capital of Euro 10.000,00, the directors must call a Stakeholders' Meeting without delay to formally resolve a decrease in corporate capital and simultaneously increase the same to the minimum amount required by law (therefore an injection of money from the stakeholders is required).

All these provisions make it advisable that the corporate capital be adequate to the corporate purpose and financial structure of the company from the beginning to avoid frequent calls of the meeting of stakeholders and, in the worst case scenario, frequent injections of money.

VII. CONTRIBUTIONS

Although contributions to the company are generally made in cash, if the bylaws expressly grants such a possibility, other goods that might have economic value may be contributed. When the contribution is money, before the Deed of Incorporation is signed, a deposit with an Italian bank[21] of at least 25% of the initial capital stock of the company must be made. After the incorporation, the Board of Directors of the company may at any time request the stakeholders to pay the outstanding 75% of the capital. If the company is

20. Financial means may be provided to the company during its life by means of loans to the company given by stakeholders.

21. With regard to the transfer of funds, it may be advisable that the incorporator coordinate the wiring with the Italian counsel's bank; this would greatly facilitate the process.

incorporated by a sole stakeholder, the entire capital stock must be deposited in advance.

The Civil Code states that the deposit of money may be substituted by an insurance policy or a bank guarantee of an equal amount. However, this is not yet possible in practice due to a lack of specific regulation.

Non-monetary contributions may be goods (e.g. land), services (e.g. work), or receivables. An estimate of the real value of these contributions must be provided at the time of incorporation so that the correct value is assigned to them. These estimates must be verified and sworn in by an expert, whose name is listed in a special register or by an auditing company. The evaluation should contain a description of the goods, services, or credits, along with the rules used for the purposes of the evaluation and a statement that the value of such goods, services, or credits is at least equal to the value given to the stakes by the stakeholder. This statement shall be enclosed with the Deed of Incorporation.

VIII. STAKES

Interests in the capital stock of an S.r.l. are referred to as stakes ("*quote*") and may not be incorporated in share certificates ("*azioni*"). Stakes are transferable to third parties unless the bylaws limit or exclude such a feature.

Stakes are divided among those who have subscribed to the capital stock of the company. Each stakeholder is the owner of a stake corresponding to the portion of the capital stock he has subscribed to. Therefore, each stake may represent differing amounts depending on the amount of capital stock subscribed to by the stakeholder. Unless otherwise provided in the bylaws, the corporate rights of each stakeholder are proportional to the stake he or she has subscribed to. Nevertheless, the bylaws may provide that a single stakeholder have peculiar rights with regard to the administration of the company or the distribution of profits.

IX. RESOLUTIONS OF STAKEHOLDERS

Stakeholders decide matters which are reserved to them by the bylaws, as well as issues submitted by directors or stakeholders who hold no less than one third of the capital stock. The following decisions must be taken on by stakeholders and may not be delegated to directors:

1) Approval of the balance sheet and distribution of earnings;
2) Appointment of directors (only if the bylaws so provide);
3) Appointment of statutory auditors, or the chair of the board of statutory auditors, or of external auditors (if required by the law; see "Statutory Auditors" below);
4) Amendments to the bylaws;

5) Performing actions to be taken by the company which may result in substantial alterations to the corporate purpose, as spelled out in the bylaws, or in a considerable variation of the rights of the stakeholders.

Usually, decisions are taken through a meeting of stakeholders ("*Assemblea*").

The bylaws set forth how a meeting of stakeholders must be called. Due notice of the agenda must be guaranteed. Unless otherwise restricted by the bylaws, the convocation of the meeting is done by registered letter which must be sent to the place of residence of the stakeholders listed in the ledger book (*"Libro Soci"*) with eight days notice. Stakeholders may be represented by proxies at meetings.

Although the vote of the holders of a majority of the stock having voting power present in person or represented by proxy shall decide any question brought before a meeting, quorums and majorities to pass resolutions are set forth by law. Majorities may, to some extent, be modified by the bylaws.

The bylaws may state that decisions of the stakeholders are taken either (i) through a written document (*"Consultazione scritta"*) prepared by directors and circulated to stakeholders, or (ii) on the basis of express written consent (*"Consenso espresso per scritto"*), which is reached by stakeholders on specific issues. While the consultation is initiated by directors, the written consent is initiated by stakeholders. In any case, these documents must clearly present the subject of the decision and the approval of the stakeholders, and must be reported in the corporate books (see "Corporate Books" below).

X. MANAGEMENT OF THE COMPANY – DIRECTORS

The business of the Corporation is managed, alternatively, by: (i) a board of directors, which must act as a body; or (ii) a sole director acting alone; or (iii) more than one director, each of which may act severally; or (iv) more than one director, who must all act jointly. The directors, other than the first in charge, are elected by stakeholders, and may be either stakeholders or third parties. Directors may well be foreign nationals.

The act of a majority of directors shall be the act of the board, except as may be otherwise specifically provided for in the bylaws. If this is expressly provided by the bylaws, any action required or permitted to be taken at any meeting of the board may be taken without a meeting, either with written consent or a consultation in writing, much like it happens for stakeholders (see "Resolutions of Stakeholders" above).[22]

In carrying out their obligations, directors may be criminally liable if they commit certain violations. A brief overview follows. If the managers produce false information on the company's capital or financial situation, or omit such

22. The difference between written consent and consultation in writing is similar to that between written consultation and express written consent for the decisions of stakeholders.

information that they are required to provide by law in their reports or other documents, in order to deceive the stakeholders or draw unjustified benefits for themselves or others, they may be punished with imprisonment of up to eighteen months. If such acts actually cause capital loss to the stakeholders, the directors may be punished with imprisonment from six months up to three years.

If the directors try to prevent stakeholders or auditors from exercising their rights of supervision or auditing by hiding documents from them, they may be fined up to Euro 10.329,00. If such conduct actually causes damage to the stakeholders, they may be punished with imprisonment up to one year, and the injured party may bring a legal action against them.

The directors are also criminally liable for other violations of duty such as illegal restitution of contribution to the stakeholders, illegal distribution of profits, illegal operation on stakes of the S.r.l. or those of its mother company, illegal operations causing damages to the creditors, and not convoking the meetings when they are required to by law.

XI. STATUTORY AUDITORS

Statutory auditors ("*Collegio Sindacale*") must be appointed when corporate capital is equal to or higher than Euro 120.000,00, and if two of the following conditions are met for two financial years in a row:

a) Total assets shown in the balance sheet equal or greater than Euro 3.125.000,00;
b) Revenues equal to or greater than Euro 6.250.000,00;
c) Average number of employees in each financial year equal or greater than fifty.

Statutory Auditors carry out their task as a body, composed of three or five regular members[23] and two substitute members. They all remain in office for three years. Statutory auditors check compliance of corporate actions with the law and the bylaws of the company with general managing principles and, in particular, scrutinize the adequacy of the organizational, administrative, and accountancy structure of the company. Unless otherwise provided by the bylaws, statutory auditors must also audit the company financial records.

XII. CORPORATE BOOKS

Italian limited liability companies must comply with rules with regard to book keeping. Corporate and accounting books must be compiled as required

23. At least one regular member must be selected from the members listed in the register of accountants ("*Registro dei Revisori Contabili*"), while the others must be professionals in the economic or legal field.

by the law. Among others, the following registers must be kept at the premises of the company or in such other venue as is specified, and must be stamped by a Notary Public on each page.[24] The ledger book (*"Libro Soci"*) records names and places of residence of stakeholders as well as encumbrances on stakes; another book records decisions taken by directors (*"Libro Decisioni Amministratori"*), and another one (*"Libro Decisioni Soci"*) records decisions of stakeholders.

XIII. BALANCE SHEET AND FINANCIAL YEAR

Each financial year,[25] directors of the company must prepare a draft of the balance sheet, which must be submitted to the stakeholders for their approval within the term specified in the bylaws and, in any case, no later than 120 days from the end of the financial year. When particular needs arise, this term may be prolonged by 60 days, (i.e. 180 days total from the end of the financial year). Once the balance sheet has been passed, it must then be filed with the Register of Companies within 30 days from the date of passage. Such filing must be equipped with a list of current stakeholders and of all other individuals who have rights on the stakes.

XIV. COSTS OF INCORPORATION

Costs for incorporation[26] of an S.r.l. in Italy may vary. However, an estimate of average costs for incorporation and basic accountancy of the same follows.[27]

Two estimates are provided, one for a company with minimum corporate capital and the second for a company with corporate capital of Euro 75.000,00.

Twenty percent of professionals fees[28] and translation costs for the proxy and resolution of the foreign corporation (if applicable), which generally runs between Euro 500,00 and Euro 1.500,00, must be added.

An accounting firm usually charges between Euro 4.500,00 and Euro 8.000,00 annually, depending basically on (i) how much the company will be operative and active, (ii) number of invoices issued and to be paid, and (iii) number of employees for bookkeeping, accountancy, balance sheet drafting and

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24. An estimate of costs associated with the stamping of corporate books is given under the "Cost of Incorporation".

25. Financial years, which may not coincide with calendar years, must not be longer than twelve months (except for the first year, which cannot be longer than eighteen months in any case).

26. This is in addition to corporate capital.

27. Please note that it is truly very difficult to provide an accurate estimate of costs if costs vary and taxes change frequently. For example, each Notary Public may charge a different fee for his activity because rate tables have minimums and maximums. Therefore, the estimate above is only a broad reference.

28. To be paid as *"Ritenuta d'acconto,"* anticipation paid to the tax authorities on behalf of the professionals involved.

Estimate A: S.r.l. with corporate capital of Euro **10.000,00**

Action	**Minimum**	**Maximum**
Registration tax on Deed of Incorporation and archive tax:	Euro 200,00	Euro 200,00
Stamps on Deed of Incorporation:	Euro 300,00	Euro 400,00
Filing with the Register of Companies (annual fee):	Euro 530,00	Euro 530,00
Notary Public Fees:	Euro 2.200,00	Euro 2.400,00
Corporate books (cost and stamping costs):	Euro 800,00	Euro 800,00
Lawyers fees (e.g. proxies and bylaws drafting):	Euro 3.000,00	Euro 5.000,00
Accountant fees (e.g. for counseling on corporate capital):	Euro 1.000,00	Euro 2.500,00
TOTAL	**Euro 8.030,00**	**Euro 11.830,00**

Estimate B: S.r.l. with corporate capital of Euro **75.000,00**

Action	**Minimum**	**Maximum**
Registration tax on Deed of Incorporation and archive tax:	Euro 200,00	Euro 200,00
Stamps on Deed of Incorporation:	Euro 500,00	Euro 600,00
Filing with the Register of Companies (annual fee):	Euro 530,00	Euro 530,00
Notary Public Fees:	Euro 2.400,00	Euro 2.600,00
Corporate books (cost and stamping costs):	Euro 800,00	Euro 1.000,00
Lawyers fees (e.g. proxies and bylaws drafting):	Euro 3.000,00	Euro 5.000,00
Accountant fees (e.g. for counseling on corporate capital):	Euro 1.000,00	Euro 2.500,00
TOTAL	**Euro 8.430,00**	**Euro 12.430,00**

filings with the tax authorities and other relevant bodies (such as Social Security).

XV. SOLE STAKEHOLDER COMPANIES[29]

Sole stakeholder companies were not allowed in Italy until a few years ago because the Italian system was generally suspicious of frauds connected with entities created for the sole purpose of creating a corporate veil; thus, shielding the entrepreneur from obligations contracted in the course of business. This has been changed, and sole stakeholder companies are now permitted. However, there are some special rules and safeguards to be complied with.

First, the company letterhead must indicate that the company has a sole stakeholder even though it is not necessary to indicate the name of the sole stakeholder unless the sole stakeholder is a company. In that case, the letterhead shall indicate the name of such company, stating clearly that it has decision-making power and coordinating power over its subsidiary. If the directors fail to make such indications, the company shall be liable for damages.

Second, the contracts between the mother company and its subsidiary, as well as the operations benefiting the sole stakeholder (i.e. the mother company), should be recorded along with the exact date of such contracts and operations in the book which records the decisions of the stakeholders. Otherwise, obliga-

29. For liability issues of a sole stakeholder company initially incorporated as such, see above "Liability for Corporate Actions."

tions to the mother company pursuant to such contracts cannot take precedence over the subsidiary's obligations towards its creditors.

If stakes of an S.r.l. with more than one stakeholder are transferred to a sole stakeholder, then (i) the contributions still owed[30] must be paid within 90 days from the transfer, and (ii) within 30 days from the recording of the transfer in the Stakeholders' Book, the directors must inform the Register of Companies that this company has a sole stakeholder and they must indicate the date on which the transfer occurred.

Should the directors fail to comply with (i) or (ii) above, the sole stakeholder would assume the unlimited liability for all of the company's obligations from the moment he becomes the sole stakeholder (for the violation of only (ii), until the information is duly filed with the Register) and each director of the company is due to pay a fine between Euro 206,00 and Euro 2.065,00.

30. As pointed out previously, if the S.r.l. has more than one stakeholder, the initial payment contributions to an S.r.l. do not need to be 100% of the corporate capital, but cannot be less than 25%.

Jackson v. Birmingham Board of Education: Score One for Equality

ANGELA ASMUSSEN

I. INTRODUCTION

In the twenty-first century, one would like to believe that the degree of inequality between the sexes is moving towards a point where differential treatment is non-existent, but the reality is that women and men continue to be treated differently in our society. One area in particular where the inequality between the sexes is still prevalent is in the disparity of funding provided for women's versus men's athletic programs. Title IX[1] was originally enacted in 1972 to remedy this disparity, but the problem continues to present itself in contemporary times. This issue was faced by the Court in *Jackson v. Birmingham Board of Education*, where the Court was asked to decide whether Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination.[2]

II. FACTS

In *Jackson v. Birmingham Board of Education*, the plaintiff Roderick Jackson (hereinafter "Jackson"), was a physical education teacher at Ensley High School in Birmingham, Alabama and served as the high school's girls' basketball coach.[3] In December 2000, Jackson complained to his supervisors that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities.[4] Some of the disparities that Jackson complained of were that the girls' team: (1) had to practice in the old unheated gym while the boys practiced in the brand new heated facility; (2) was only given two basketballs; (3) was not allowed to use school transportation to travel to away games unless the boys' team was playing at the same location; and (4) was forced to turn over a percentage of the sales from the concession stand at their games whereas the boys' team was allowed to keep one hundred percent of the profits from concessions sold at its games.[5]

Instead of taking action to ameliorate the disparity in treatment between the boys' and girls' teams, the school did nothing.[6] The only response from the school was that Jackson began to receive negative work evaluations and was

1. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2005).
2. Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1502 (2005).
3. *Id.* at 1503.
4. *Id.*
5. John Gibeaut, *Title IX Plaintiff Gets a Chance at a Rebound*, 3 A.B.A. J. E-REPORT 2 (Apr. 2005).
6. *Jackson*, 125 S. Ct. at 1503.

removed as the girls' basketball coach in May 2001.[7] After being terminated as the coach, Jackson brought suit against the Birmingham Board of Education (hereinafter "Board)" in which he alleged that the Board violated Title IX by retaliating against him for complaining to his supervisors about the discriminatory treatment of the girls' basketball team.[8]

The Board's motion to dismiss Jackson's suit on the "ground that Title IX's private cause of action does not include claims of retaliation" was granted by the District Court for the Northern District of Alabama.[9] On appeal, the Court of Appeals for the Eleventh Circuit affirmed the district court's decision holding that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations."[10] The Supreme Court followed by granting certiorari "to resolve a conflict in the Circuits over whether Title IX's private right of action encompasses claims of retaliation for complaints about sex discrimination."[11]

III. HOLDING

In a 5-4 decision written by Justice O'Connor, the Court held that Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination.[12] These claims are included within Title IX because, according to Justice O'Connor, "Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is subjected to differential treatment."[13]

IV. THE COURT'S REASONING

When addressing Title IX's failure to expressly include retaliation as a prohibited form of discrimination, the Court asserted that Title IX cases rely on the broad language of the statute to define "discrimination" on the basis of sex.[14] Although the Board contended that the Court's decision in *Alexander v. Sandoval*[15] supported the conclusion that Title IX's private right of action does not

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7. *Jackson*, 125 S. Ct. at 1503.
8. *Id.*
9. *Id.*
10. Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1334 (2002). Judge Stanley Marcus wrote, "Our task . . . is to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct." *Id.* at 1344-45.
11. *Jackson*, 125 S. Ct. at 1503.
12. *Jackson*, 125 S. Ct. at 1502.
13. *Id.* at 1504.
14. *Id.*
15. Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination).

encompass retaliation, the Court distinguished its holding in *Sandoval* from its decision in this case.[16] The Court held that this case was different from *Sandoval* because the text of Title IX itself (although not expressly), not its regulations, prohibits retaliation.[17]

The Court further held that Jackson's proximity to the original complaint of discrimination was inconsequential because "[t]he statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is subject of the original complaint."[18] The Court reasoned that "[w]here the retaliation occurs because the complainant speaks out about sex-discrimination, the 'on the basis of sex' requirement is satisfied."[19] Further emphasis was placed on the fact that teachers, as opposed to the students who experience the direct impact of the Title IX violation, are in the best position to bring the discrimination to the forefront.[20] Therefore, these individuals should be afforded a redress against any resulting acts of retaliation.

Justice O'Connor also acknowledged the majority's support of the United States' position, taken in an amicus brief, which argued that Congress enacted Title IX "to provide individual citizens effective protection against [discriminatory] practices" and that it "would be difficult, if not impossible, to achieve if a person who complains about sex discrimination did not have effective protection against retaliation."[21] "Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied."[22] The Court's decision provides Jackson the opportunity to offer evidence to support his claim of retaliation under Title IX; however, to prevail on the merits, he will have to prove that the Board retaliated against him *because* he complained of sex discrimination against the girls' basketball team to his supervisors.

V. ANALYSIS

Although the four dissenting members[23] criticized the majority's holding as "contrary to the plain terms of Title IX, because retaliatory conduct is not discrimination on the basis of sex,"[24] appropriate statutory interpretation allows

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16. *Jackson*, 125 S. Ct. at 1507.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1508
21. *Jackson*, 125 S. Ct. at 1507. (citing Brief for United States as Amicus Curiae at 13, Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497 (2005) (No. 02-1672)).
22. *Id.* at 1508.
23. Justice Thomas wrote the dissenting opinion and was joined by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy. *Id.* at 1510.
24. *Id.* at 1510.

one to conclude that the majority correctly held that Title IX creates a private right of action where the funding recipient retaliates against an individual because he has complained about sex discrimination. This is evidenced by examining: (1) the stated purpose of Title IX; (2) a precedent setting case decided by the Court before the enactment of Title IX[25]; (3) the significant differences between Title IX and Title IV; and (4) several circuit court decisions that have interpreted Title IX in the same manner as the Court in *Jackson*.

Title IX specifically states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[26] Although the principal objective of Congress in enacting Title IX was to avoid the use of federal resources to support discriminatory practices, Congress also intended "to provide individual citizens effective protection against those practices."[27]

Congress enacted Title IX just three years after its precedential 1969 decision in *Sullivan v. Little Hunting Park*[28]. In *Sullivan*, the Court "interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition."[29] Based on canons of statutory construction, Congress is assumed to be aware of the Court's decision and therefore, meant for Title IX prohibitions to be in line with the Court's holding in *Sullivan*.[30] Seven years after the enactment of Title IX, the Court in *Cannon v. University of Chicago* held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination.[31] The holding in *Jackson* appropriately follows the Court's reasoning in *Sullivan* because the retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is "discrimination on the basis of sex", just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.

Although the dissenting Justices compare Title IX and Title VII in their analysis, their interpretation of Title VII is not appropriately applied to Title IX because the cause of action in Title IX is implied whereas the cause of action in

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25. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

26. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2005).

27. *Jackson*, 125 S. Ct. at 1508 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979)).

28. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). In *Sullivan*, the Court interpreted a general prohibition on racial discrimination in Rev. Stat. § 1978, 42 U.S.C. § 1982 to cover retaliation against those who advocate the rights of groups protected by that prohibition.

29. *Jackson*, 125 S. Ct. at 1505.

30. The proposition is further supported by the Court's decision in *Cannon v. Univ. of Chicago*, where the Court held that "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] . . . and that it expected its enactment to be interpreted in conformity with [it]." 441 U.S. 677, 699 (1979).

31. *Cannon*, 441 U.S. at 690-93.

Title VII is explicit.[32] Also, Title IX is a broadly written prohibition with only a few narrowly tailored exceptions.[33] The dissent's argument that Congress should have included a specific prohibition against retaliation is misplaced because the statutory text of Title IX does not include a laundry list of covered practices, unlike Title VII, which spells out the conduct that is considered discrimination.[34] Further, Title VII in 43 U.S.C. §2000e-2(a)(1) uses the terminology "because of such individual's sex" when describing the prohibited types of discrimination, whereas Title IX uses "on the basis of sex", an unqualified phrase.[35] The dissent's argument that Congress's use of "on the basis of sex" was meant to be read as "on the basis of *the individual's* sex" is simply not appropriate based on the significant differences between Title VII and Title IX articulated above.

Furthermore, the majority's interpretation is consistent with the Court's previous decisions where it was called upon to interpret Title IX. The Court has repeatedly broadly construed "discrimination" under Title IX to include conduct, such as sexual harassment, which the statute does not expressly mention.[36] In deciding these cases, the Court relied on the text of Title IX, which broadly prohibits a funding recipient from subjecting any person to discrimination "on the basis of sex."[37] Several circuit courts have also interpreted Title IX to afford a private cause of action for retaliation. For example, in *Lowery v. Texas A & M University System*, where a female basketball coach sued the university for retaliation in violation of Title IX, the court held that the coach stated a private cause of action for retaliation in violation of Title IX.[38] Also in, *Preston v. Virginia ex rel. New River Community College*, the court held that retaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX.[39] The court in *Preston* also significantly noted that "[it] previ-

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32. *Jackson*, 125 S. Ct. at 1505.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See generally* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (holding that Congress intended Title IX's private right of action to encompass claims of a recipient's deliberate indifference to sexual harassment); Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274 (1998) (holding that the private right of action encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student); Franklin v. Gwinnett County Pub. School, 503 U.S. 60 (1992) (holding that Title IX authorized private parties to seek monetary damages for intentional violation of Title IX).

37. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2005).

38. Lowery v. Texas A & M Univ. Sys., 117 F.3d 242, 252 (5th Cir. 1997). "While retaliation is technically a form of employment discrimination, it is not independently prohibited by the proscription against discrimination on the basis of sex in federally-funded educational institutions, which is the heart of title IX. Rather, the prohibition against retaliation is intended to vindicate the antidiscrimination principle of title IX." *Id.* at 248 n.6.

39. Preston v. Virginia ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994). Although the *Preston* court affirmed the denial of the employee's motion for reconsideration, the court's holding did recognize that a private right of action existed under Title IX. *Id.* at 205-06. The court wrote, "An

ously concluded that the Secretary of Education's determination that Title IX should be read to prohibit retaliation based on the filing of a complaint of gender discrimination is reasonably related to the purpose of Title IX and therefore is entitled to deference by this court."[40]

VI. IMPLICATIONS OF THE HOLDING

After *Jackson*, Title IX will now be read to prohibit retaliation against third parties as well as intentional acts of sex discrimination against the direct victim. In order "[t]o prevail on the merits, Jackson will have to prove that the Board retaliated against him *because* he complained of sex discrimination."[41] Meeting this burden of proof will likely be difficult for Jackson; however, the ultimate impact of the Court's decision in *Jackson* should not be measured by the eventual outcome of his claim for damages. As Jackson himself said, "The decision [was] a 'win-win' both for schools and students because it will encourage people to complain about discrimination."[42] He has been quoted as saying, "When people know they'll be protected against retaliation, people like myself will be more likely to come forward."[43]

Critics of the Court's decision assert that if a third party victim of retaliation succeeds in proving his or her claim under Title IX the monetary compensation will go directly to that individual instead of to the real victims of discrimination.[44] While this may be technically accurate, the value of the ability of a third party victim to bring a claim under Title IX should not be viewed as a mechanism to merely reap economic compensation, but rather as means for more expansive protection for the "real" victims. This is because the individual athletes, who are being discriminated against, typically do not have the necessary information or sufficient access to appropriate administrators to effectively protest the discriminatory treatment.[45] An adult coach, such as Jackson, is in the unique position to take the initiative to file a complaint to stop the discrimi-

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implied private right of action exists for enforcement of Title IX (citation omitted). This implied right extends to employment discrimination on the basis of gender by educational institutions receiving federal funds (citation omitted). Retaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX." *Id.* at 205-06.

40. *Id.* at 206 n.2.

41. *Jackson*, 125 S. Ct. at 1510 (emphasis in original).

42. Gibeaut, *supra* note 5.

43. *Id.*

44. Kenneth L. Thomas & Ramadanah M. Salaam, *The Face of Title IX: Post-Jackson v. Birmingham Board of Education*, 626 ALA. LAW. 429, 434 (2005). "It can hardly be said that Congress intended these indirect victims to receive relief under the statute and the direct victims to be left with nothing." *Id.* at 434.

45. *See* Joanna Grossman, *Can a Whistle-Blower-Coach Face Retaliation?*, CNNw.com Law Center, *at* http://www.cnn.com/2003/LAW/10/22/findlaw.analysis.grossman.titleIX/index.html (Oct. 22, 2003). "Students . . . may lack the essential information about funding and opportunities that would lead them to discover a school's violation of Title IX. In contrast, coaches are uniquely well suited to notice a recipient school's discriminatory behavior." *Id.*

natory treatment of the student athletes who may not have the foresight or courage to file the complaint themselves.[46] This being true, the Court's decision in *Jackson* should be viewed as widening the scope and availability of assistance for all individuals who are suffering from Title IX violations.

When Jackson had the opportunity to address the Supreme Court in June 2004 he described some of the positive changes that had taken place at Ensley High School since the filing of his lawsuit (prior to the Court's decision),[47] but noted that many of his original complaints had not yet been remedied.[48] Jackson said:

> For example, my girls' team is still forced to frequently practice in the old, unheated gym because the team is not allowed access to the new gym until after the boys' team has finished its practices — which would mean having to stay at school until very late in the evening. And the girls are still not allowed to get the admissions money that's taken in during their games. There is more to be done before Ensley's sports program is fair.[49]

After the Court's decision, Jackson said, "Now the girls get to use the heated gym. And they use regulation fiberglass backboards with breakaway rims."[50] Although these improvements may be described as minor, each improvement represents one step closer to achieving equality for the Ensley High School girls' basketball team.

VII. CONCLUSION

Although there is no guarantee that Jackson will be able to prove that his termination was retaliation for his complaints about the lack of funding for the girls' basketball team, the Court's determination that Jackson should be allowed to provide evidence to prove his claim is a significant step towards furthering equality in women's and men's athletics. The Court's statutory interpretation of Title IX appropriately recognized a third party's claim based on retaliation which now sends a clear message to educational institutions that discriminatory practices cannot be covered up through the use of retaliation against the complaining employee. This decision signals another advancement as our society strives towards equality amongst all our members regardless of their sex.

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46. Grossman, *supra* note 45. "Coaches are . . . better suited to lodge complaints against the institution than their relatively powerless athletes are. Many of them have tenure . . . [a]nd even if they do not have job security, they are more likely, with the perspective of adulthood, to see the importance of standing up for what's right, even at great personal cost." *Id.*

47. Roderick Jackson, Statement to the Supreme Court in *Jackson v. Birmingham Brd. of Educ.* (June 10, 2004) (transcript available on the National Women's Law Center website *at* http://www.nwlc.org). Since Fall 2003, Jackson has served as the acting head coach for the Ensley High School girls' basketball team. In his statement Jackson said, "I was rehired in this capacity once there was a change in the school administration and once my case started getting some publicity in the local press."

48. *Id.*

49. *Id.*

50. Gibeaut, *supra* note 5.

Tenet v. Doe: Procedural Due Process Rights Under the Totten Doctrine

STEPHANIE BRYANT

I. INTRODUCTION

The Fifth and Fourteenth Amendments provide the constitutional guarantee of procedural due process.[1] If the government is to take away one's life, liberty, or property rights, the individual must have the notice and the ability to adequately appeal the deprival.[2] However, in light of national security concerns, the federal government has been afforded, by the Supreme Court, the ability to deny procedural due process rights pertaining to legal matters concerning state secrets.[3] The context of the claims attempting to challenge this denial have arisen under the recovery of employment or disability benefits as property rights.[4] In *Tenet v. Doe*, the Court re-examined the applicability of the state secrets doctrine, entailing the outright denial of procedural due process rights, in civil cases.[5] This paper will analyze *Tenet v. Doe*, its procedural history, and consider the holding in the light of the post September 11th environment.

II. CASE SUMMARY

Decided in 2005, *Tenet v. Doe* was the first case in over 20 years to examine the applicability of the Totten Doctrine and state secrets privilege in civil suits. The respondents, husband and wife, were foreign nationals and enemies of the U.S. during the Cold War.[6] After expressing interest to defect, the Central Intelligence Agency (CIA) persuaded the couple to remain in their positions and conduct espionage activities on behalf of the United States government.[7] In return, the CIA promised the couple travel to the U.S. and financial and personal security for life.[8] Upon completion of the required espionage activities, the respondents defected to the U.S. and became citizens with the help of the CIA.[9] After gaining employment with the state of Washington, with CIA assistance, the respondent agreed that as his salary increased the CIA monetary as-

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1. 16B AM. JUR. 2D *Constitutional Law* § 890 (2005).
2. *Id.*
3. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 970 (3d ed. 2002).
4. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970); Matthews v. Eldridge, 424 U.S. 319 (1976); Perry v. Sinderman, 408 U.S. 593 (1970).
5. 544 U.S. 1 (2005).
6. *Id.* at 3.
7. *Id.*
8. *Tenet*, 544 U.S. at 3.
9. *Id.*

sistance would gradually decrease, until there was a complete discontinuation of benefits, while he was employed.[10]

After company downsizing, the defendant lost his job and was unable to find new employment due to CIA employment restrictions.[11] The couple contacted the CIA for assistance, but were denied benefits.[12] Being unable to provide for themselves, the respondents had the decision of returning to their home country and face legal sanctions or remain in the U.S. under their present condition.[13]

A. PROCEDURAL HISTORY

The respondents requested a declaratory judgment claiming that the CIA violated both substantive and procedural due process rights by denying support and failing to provide a fair internal proceeding for adjudication of their claim.[14] The government moved to dismiss under the *Totten* Doctrine but the District Court held the case could proceed.[15] A divided Court of Appeals held that the *Totten* Doctrine did not bar the respondent's claim, and the due process claim could continue, subject to the Government's evidentiary state secrets privilege.[16] The government appealed to the Supreme Court, which granted certiorari on the issue.[17]

B. MAJORITY OPINION

The unanimous majority opinion, delivered by Justice Rehnquist, held that the *Totten* Doctrine barred the respondents' claim.[18] The Court denied the claim on three issues. First, the Court stated that the *Totten* Doctrine was limited to prohibiting breach of contract claims in espionage agreements, but the Doctrine did not deny due process claims.[19] The Court reasoned that the public policy foundation for the *Totten* Doctrine forbade any suit in a court of law which would disclose matters which the law regards as confidential.[20] Thus, the *Totten* Doctrine precluded judicial review in cases where success of the suit depended on the existence of a state espionage relationship with the government.[21]

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10. *Tenet*, 544 U.S. at 4-5.
11. *Id.* at 5.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Tenet*, 544 U.S. at 5.
16. *Id.* at 6.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Tenet*, 544 U.S. at 6.
21. *Id.*

Second, the Court rejected the Court of Appeals ruling that the *Totten* Doctrine was a recast of the evidentiary state secrets privilege, rather than a categorical bar to claims.[22] The Court reasoned that while it did review the state secrets privilege, the Court did not retreat from the *Totten* holding that a lawsuit premised on espionage agreements is forbidden.[23]

Third, the Court held that the National Security Act of 1947 may not be read to exclude judicial review of constitutional claims by former CIA employees.[24] The Court reasoned that although the due process claim created a serious constitutional question, there was a fundamental difference between an acknowledged employee of the CIA and the instant case, brought by an alleged former spy.[25] The *Totten* Doctrine was plainly implicated in this suit because it prevented the existence of the respondent's relationship with the government from being revealed.[26]

Further, for policy reasons, the Court held that if the state secrets privilege doctrine was found to be inapplicable, the result would be unacceptable.[27] "Even the small chance that a court will order the disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam."[28] Additionally, the suit could force the government to settle individual suits out of the fear that classified information may be leaked.[29]

C. CONCURRING OPINIONS

Justices Stevens and Ginsberg acknowledged that there may be some situations in which a suit may be brought under the *Totten* Doctrine.[30] However, the Justices agreed that in accordance with the doctrine of stare decisis, that the suit be dismissed.[31] Justices Scalia also concurred, holding that the bar set by the *Totten* Doctrine is of a jurisdictional nature and should not be applied as the 'threshold question' in all cases.[32]

III. ANALYSIS

After review of the procedural due process rights and the case precedent following the *Totten* Doctrine, the Court properly concluded that the preclusion of a procedural due process claim was constitutional. However, as the government

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22. *Tenet*, 544 U.S. at 8.
23. *Id.*
24. *Id.* at 10.
25. *Id.*
26. *Id.*
27. *Tenet*, 544 U.S. at 11.
28. *Id.*
29. *Id.*
30. *Id.* at 11-12.
31. *Id.*
32. *Tenet*, 544 U.S. at 11-12.

widens controls over potential state secret information in light of September 11th, the rights of civil litigants should be afforded protection within the court of law.

A. BASIS OF PROCEDURAL DUE PROCESS RIGHTS

Both the Fifth and Fourteenth Amendments afford citizens the opportunity to receive notice and have access to redress their claims in the court of law. *Tenet v. Doe* analyzes property rights secured by the Fifth Amendment.[33] Government benefits may constitute property rights. If a person is already receiving government benefits, he has an interest in their continuance, and the government can not terminate the rights without due process of law.[34] Furthermore, government employment benefits are included as property rights. If a statute or public employer's practices give a person a legitimate claim of entitlement to keep his job, then he has a property interest.[35] Therefore, based on purely constitutional analysis, the plaintiffs in *Tenet v. Doe* have rights vested in both their employment and benefits originally afforded by the CIA. However, in restoring a plaintiff's rights, courts conduct a balancing test weighing the strength of the plaintiff's interest in receiving procedural safeguard versus the government's interest in avoiding extra burdens.[36] Here, in light of the state secrets privilege implied by use of the *Totten* Doctrine in contractual claims with the CIA, the government's burden outweighs the plaintiff's right to hear the claim in court.

B. CASE PRECEDENT: TOTTEN AND THE STATE SECRETS PRIVILEGE

In *Tenet v. Doe,* the Supreme Court upheld the *Totten* Doctrine. In *Totten v. United States,* the Court held that in light of a contractual spy agreement during the Civil War, President Lincoln had the authority to bind the U.S. to contracts with secret agents, and since the nature of the contract was secret, it must remain so.[37] The Court reasoned that since the service stipulated was secret, the information obtained was clandestine and communicated privately, and the employment and service were to be concealed, the plaintiff could not receive compensation for his services rendered.[38] The secrecy of the agreement and forfeiture of disclosure in court was implied by the nature of employment and time of war.[39] Further, the *Totten* Court feared that revealing the nature of the service might compromise or embarrass the government and possibly endanger the person or agent.[40] Therefore, despite applicable property rights, the *Totten*

33. *See generally Tenet*, 544 U.S. 1.
34. Goldberg v. Kelly, 397 U.S. 254 (1970).
35. Perry v. Sinderman, 408 U.S. 593 (1972).
36. Matthews v. Eldridge, 424 U.S. 319 (1976).
37. 92 U.S. 105-06 (1875).
38. *Totten*, 92 U.S. at 106.
39. *Id.*
40. *Id.*

Doctrine forms the basis for an exclusionary bar of the plaintiffs claim in *Tenet*, and is constitutional based on the balancing test found in *Mathews v. Eldridge*.[41]

The holding of *Tenet v. Doe* is also constitutional based on the application of the state secrets privilege. In light of release of secret contract and operations of CIA operatives in a court proceeding, the contextual support for the *Tenet* holding is based upon the state secrets privilege and the Mosaic Theory. The state secrets privilege, used during civil litigation, must be invoked by the government in order to prevent disclosure of matters which could reasonably be seen as a threat to military or diplomatic interests of the nation.[42] In applying the *Totten* Doctrine to the state secrets privilege, the Court held that "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret [. . .] the action [is to be] dismissed on the pleadings [. . . because] the action should never prevail over the privilege."[43] Therefore, since *Tenet v. Doe* concerned secret contractual relations, the subject matter would implicate military and diplomatic interests. The Court's dismissal of the claim was appropriate.

Further, in previous applications of the state secrets privilege in freedom of the press cases, courts have upheld claim dismissal based upon the Mosaic Theory, which when applied to the factual situation of *Tenet v. Doe* justifies the result. Although the Mosaic Theory has not been officially supported by the Supreme Court, its application is relevant in explaining *Tenet*. The Mosaic Theory, utilized in recent cases concerning the War on Terror, states that an open hearing will permit the uncovering of procedures, methods, and techniques that the government uses in fighting the War on Terror.[44] While the sources may not be revealed in a single document, tactics may be woven together to form a composite picture from several documents or cases.[45] Applied to *Tenet*, the contractual relationship and methods used to obtain and secure CIA agents would be revealed and create a risk that could enable enemies in the War on Terror to weave together U.S. tactics, thus establishing a substantial harm.[46] Therefore, because *Tenet v. Doe* implicated a contractual spy arrangement, the state secrets privilege, and the Mosaic Theory, the holding is justified.

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41. 424 U.S. 593 (1972). The Plaintiff, whose Social Security benefits were terminated, brought a suit challenging the constitutionality of administrative procedures established by the Department of Health, Education, and Welfare for Virginia to assess whether there was a continuing disability. While the plaintiff's claim failed, the Court held that employment benefits are a property right protected by the Fifth Amendment of the United States Constitution and that the plaintiff had a constitutionally guaranteed right to be heard at a meaningful time and in a meaningful manner. *Id.*

42. *See* Halkin v. Helms, 690 F.2d 977 (1982); US v. Reynolds, 345 U.S. 1 (1953).

43. *Reynolds*, 345 U.S. at 11.

44. *See generally* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002); North Jersey Media Group v. Ashcroft, 308 F. 3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

45. *Id.*

46. *Id.*

Despite the necessity to retain state secrets, the question remains as to whether methods should be institutionalized to secure adjudication for plaintiffs like those in *Tenet v. Doe*. In *Tenet*, the Court of Appeals held that it would make every effort to adjudicate the claim and protect national security, including in camera proceedings, sealing of records, and security clearances for all parties involved.[47] Although the Supreme Court rejected these methods in *Tenet*, various cases have supported similar protective tactics.[48] This approach would allow for the plaintiff to be heard within a court of law as defined by the Fourteenth and Fifth Amendments, while protecting necessary state secrets. While it is necessary in the War on Terror to secure state secrets, it is my contention that at some level the erosion of constitutionally protected rights should be mitigated. The Court of Appeals attempts to recommend other solutions for balancing both the protection of rights with the non-disclosure of state secrets should be commended. However, because the Court of Appeals opinion was reversed, the Supreme Court reaffirmed the permissive harm plaintiffs endure when they challenging the federal government on a matter containing state secrets. After review of the legal precedent and the growing need to protect constitutional rights, the Supreme Court should have found for the plaintiffs in *Tenet*, or at the very least, remanded the case with the recommendation to pursue alternative methods of secret disclosure.

IV. CONCLUSION

Tenet v. Doe provides a contemporary analysis of containment of state secret information barred by civil contract claims by the *Totten* Doctrine. Although the plaintiffs in *Tenet* have the fundamental right of due process to secure their property rights in government benefits and employment, the Supreme Court properly concluded based on the principle of stare decisis that their claim was barred. In the War on Terror, the necessity to protect state secrets from enemy eyes and the lives of the agents defending the United States outweighs the rights afforded by the Fifth and Fourteenth Amendments. However, in light of the growing concerns over obstruction to personal liberties occurring in the War on Terror, civil litigants in claims arising under *Totten* should be afforded special review processes in order to secure fair adjudication.

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47. *Tenet*, 329 F.3d at 1148-49, 1153 (9th Cir. 2003), *reh'g and reh'g en banc denied*, 353 F.3d 1141 (9th Cir. 2004).

48. *See, e.g.*, Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977) ; In re Under Seal, 945 F.2d 1285 (4th Cir. 1991); Halpern v. US, 258 F.2d 36 (2d Cir. 1958).

Van Orden v. Perry: The Establishment Clause and an Inconsistent Supreme Court

William Di Iorio

I. Introduction

In 1961, the Fraternal Order of the Eagles, a national social, civic, and political organization, presented the State of Texas with a monument containing the Ten Commandments.[1] The Texas legislature placed this monument on the Capitol grounds with sixteen other monuments.[2] This case examines whether that action by the legislature constituted a violation of the Establishment Clause of the First Amendment to the Constitution. The plurality opinion, combined with the concurring and dissenting opinions, expose an absence of a consistent legal standard for such issues. This comment will examine this deficiency and discuss the advantages that the neutrality test offers.

II. Summary of the Case

A. Procedural History

In 1999, Petitioner Van Orden sued the state of Texas, arguing that the monument violated the Establishment Clause and requested that the monument be removed.[3] The District Court found no violation of the Establishment Clause, a determination affirmed by the Court of Appeals.[4] In a plurality opinion, the Supreme Court affirmed.[5]

B. Plurality Opinion

Chief Justice Rehnquist delivered the opinion of the Court and stated the issue as whether the Establishment Clause permits a state to display a Ten Commandments monument on state grounds.[6] The plurality held that this was a constitutional action.[7]

The opinion begins by stating that the Court must find a balance between recognizing the strong role of religion throughout history and the principle that government should not intervene in religious matters.[8] The Chief Justice points

1. Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005).
2. *Id.*
3. *Id.*
4. *Id.* at 2858-59.
5. *Id.* at 2859.
6. *Van Orden*, 125 S. Ct. at 2858.
7. *Id.*
8. *Id.* at 2859.

out that no precedent exists requiring the government to be hostile to religion.[9] Next, the opinion rejects application of the *Lemon*[10] test, stating that it is merely a guide and not binding precedent.[11] From there, the Chief Justice turns to the strong historical interrelation of religion and government, citing George Washington's Thanksgiving prayer proclamations.[12] He concludes that the restrictions on the states cannot be greater than what the Framer's placed on themselves.[13]

While not explicitly invoking a particular test, the Chief Justice seems to abide by a purpose test. If the monument's purpose is purely religious, it would violate the Establishment Clause. If the monument's purpose is historical, with its religious aspects passive in nature, there is no violation. Here, the opinion states that the monument's purpose was to show the historical connection between the Ten Commandments and the American people.[14] While acknowledging that the Ten Commandments are inherently religious, he stated that the religious aspect was entirely passive in this situation. The Chief Justice found support in this argument in noting that the monument stood for forty years before being challenged, and several years after being encountered by the petitioner.[15] Therefore, the presence of the monument did not violate the Establishment Clause.[16]

C. CONCURRING OPINIONS

Justice Breyer served as the fifth vote in favor of holding the monument constitutional, but he did not agree with the Chief Justice's opinion. His concurrence focused on the use of the monument. Initially, he stated that there is no simple test that can adjudicate every Establishment Clause case that may arise.[17] Only given the facts of this case did he advocate a "use" test.[18] He argued that the monument has both religious and secular messages, but also stated that the state intended the secular messages.[19] To bolster this argument, he noted that the Eagles took concrete steps to create something nonsectarian and that the location of the monument was far removed from what would be

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9. *Van Orden*, 125 S. Ct. at 2858.

10. *See generally*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (stating three part test: (1) government action must have secular purpose, (2) government action cannot advance or inhibit religion, and (3) government action cannot foster excessive entanglement with religion).

11. *Van Orden*, 125 S. Ct. at 2861.

12. *Id.*

13. *Id.* at 2862.

14. *Id.* at 2864.

15. *Id.*

16. *Van Orden*, 125 S. Ct. at 2864.

17. *Id.* at 2869.

18. *Id.*

19. *Id.* at 2870.

considered sacred ground.[20] Justice Breyer did echo the Chief Justice's argument as to the duration the monument stood without challenge. Standing for 40 years without challenge, it is reasonable to conclude that those who saw the monument did not view it as the state advocating a particular religious belief.[21] Because the primary use was secular, Justice Breyer argued that there was no violation of the Establishment Clause and even went so far as to say that this act may satisfy the *Lemon* test.[22]

D. DISSENTING OPINION

In his dissent, Justice Stevens advocated a neutrality test for government acts, meaning government may not prefer one religion over another.[23] He believed that a strong presumption against the display of religious symbols on state lands existed.[24] He then argued that the Ten Commandments are not an expression of religion, but an expression of, in this case, a particular sect of the Judeo-Christian faith.[25] He also took issue with the plurality's depiction of the monument as passive.

Justice Stevens first noted that the Eagles hold as a tenet the existence of a supreme being.[26] He also stated that this was not a unique monument, but only one of a great number of similar items distributed throughout the nation.[27] He then described the form of the monument in detail to contradict the passive argument of the plurality. He pointed out that the prominent words on the monument expressed "I AM the LORD thy God" and commands that God be worshipped.[28] He then noted that this version of the Ten Commandments was particular to one Christian sect.[29] In its totality, the form of the monument stated that Texas approved of this god and this particular faith.[30]

Additionally, Justice Stevens pointed out that the presence of the monument would be at odds with the growing number of citizens in this country who do not believe in the Judeo-Christian god or any god at all.[31] Justice Stevens attacked the Chief Justice's historical significance argument, particularly the George Washington example and raised a distinction between the statements of public officials, who the people recognize have individual views, with the state-

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20. *Van Orden*, 125 S. Ct. at 2870.
21. *Id.*
22. *Id.* at 2871.
23. *Id.* at 2875.
24. *Id.*
25. *Van Orden*, 125 S. Ct. at 2874.
26. *Id.* at 2878.
27. *Id.* at 2877.
28. *Id.* at 2873-74.
29. *Id.*
30. *Van Orden*, 125 S. Ct. at 2880.
31. *Id.* at 2881.

ments of the government body, who are to represent all of the people.[32] Justice Stevens added that Thomas Jefferson refused to follow in Washington's footsteps, believing it to violate the Establishment Clause.[33] In furtherance of the neutrality argument, Justice Stevens argued that the original intent of the Framers was to ensure that the government could not establish one Christian faith over another.[34] Other religious faiths, not greatly represented in colonial times, were not contemplated.[35] Because the Texas monument is not religiously neutral, it violates the Establishment Clause.[36]

III. ANALYSIS

A. IMPORTANCE OF SUPREME COURT LEGAL STANDARDS

As the Court hears multiple cases raising similar questions pertaining to a common Constitutional issue, a legal standard arises, often becoming rule-like.[37] Creating such legal standards is one of the many duties of the justices.[38] When the Supreme Court creates such a standard, it creates a system of guidance for lower court judges.[39] Independent actors rely on these announced standards to ensure that their actions comply with the law.[40] If such a standard does not exist, these lower court judges and independent actors have no effective means of self-governing their decisions and actions.

B. ESTABLISHMENT CLAUSE CASES LACK A CONSISTENT LEGAL STANDARD

In many of its Establishment Clause cases, including *Van Orden*, the Supreme Court failed to follow any consistent legal standard or its many precedential cases. Rather, the cases are decided individually, based solely on the facts presented, and often with open disregard of past cases.[41] There is no shortage of cases revealing the befuddling legal standards present in these cases, perhaps none more significant and revealing than a case decided that same day as *Van Orden*.

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32. *Van Orden*, 125 S. Ct. at 2883.
33. *Id.*
34. *Id.* at 2885.
35. *Id.* at 2886.
36. *Id.* at 2890.
37. Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691, 696 (2005).
38. *Id.* at 705.
39. Spencer Overton, *Symposium: Judicial Manageability and the Campaign Finance Thicket*, 6 U. PA. J. CONST. L. 113, 114 (2003).
40. *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 972-73 (1984).
41. *See Van Orden*, 125 S. Ct. at 2861 (Chief Justice Rehnquist states that *Lemon* does not apply as precedent in this case).

1. *McCreary County v. ACLU*, 125 S. Ct. 2722, 126 L. Ed. 2d 729 (2005).

In this case, decided on the same day as *Van Orden*, a county in Kentucky posted copies of the Ten Commandments in its courthouses.[42] In the opinion of the Court, written by Justice Souter, the Court held the county action as unconstitutional, reaching the opposite decision as in *Van Orden*.[43] The basis of the decision involved the overarching religious purpose the county had in displaying the Ten Commandments.[44]

On its face, this case seems to use the same purpose standard announced by Chief Justice Rehnquist in *Van Orden*. However, it was not applied in the same manner. In fact, the dissenting justices in *McCreary* were the plurality in *Van Orden*. Likewise, three of the four plurality justices in *McCreary* were dissenting justices in *Van Orden*. The only reason these two decisions reached opposite results was the involvement of Justice Breyer, who sided with the plurality in each case. Ultimately, his use test, followed only by him, dictated the result of both cases. Clearly, however, the use test is not the legal standard that judges and individuals should be following.

2. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

For more than 30 years, the Lemon test has been favorably cited by a multitude of courts as precedent in Establishment Clause cases.[45] However, as Chief Justice Rehnquist stated in *Van Orden*, many opinions view *Lemon* as merely a guide, not a rule of law. There is little explanation as to how a decision can be viewed in one case as binding precedent and can be viewed as a mere guide in another. To be sure, the Court can alter precedent. However, this usually involves overturning the prior precedent, not reclassifying the precedent as something less concrete.

C. CREATING A MANAGEABLE STANDARD

Until the Court selects a set of standards to govern its Establishment Clause decisions, situations like the *Van Orden-McCreary* dichotomy will be the norm. State actors will be left with confusion as to what types of displays or other uses of religion will be constitutionally acceptable. Without guidance from the Court, these questionable government acts and resulting lawsuits will continue. This does not have to be the case, however. The Court has authored numerous tests, from *Lemon*, to a form of a purpose test, to a form of a use test. Unfortunately, the Court refuses to abide by any of these tests on a consistent basis.

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42. *McCreary County*, 125 S. Ct. at 2727-28.
43. *Id.* at 2745.
44. *Id.*
45. *See generally* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Larkin v. Grendel's Den, 459 U.S. 116 (1982).

As espoused by Justice Stevens in *Van Orden*,[46] the neutrality test provides a more consistent standard that would create more reasonable expectations for government officials and the populace. Under this test, governments cannot show preference to one religion over another.[47] The test reflects a recognition not considered by the *Van Orden* plurality. Chief Justice Rehnquist wrote broadly about religion and ignored the fact that Texas did more than just install a religious monument. Broadly, it installed a Judeo-Christian monument; more specifically, it installed a monument with language recognized by one particular Christian sect.[48] Under the neutrality test, this preference for one sect and one religion over another would be objectively unconstitutional. There is no need to discuss purpose or use, which inevitably leads to subjective determinations and the inconsistency of result present in this line of cases.

While Justice Stevens expressed doubt that the framers would envision something of the likes of the neutrality test,[49] it fits within their original intent. The framers feared state sponsored religion, as was the case under British colonial rule. More directly, the framers feared that the state could discriminate between sects of Christianity.[50] The neutrality test protects against this form of discrimination by barring any preference for one religion or sect thereof over another.

Critics of the neutrality test argue that it is hostile to religion, itself a violation of the Establishment Clause.[51] However, the neutrality test does nothing to bar an individual's right to practice his or her beliefs. Rather, it merely states that government may not give a particular religion the means to practice that faith at the expense of other faiths or nonbelievers. In doing so, the neutrality test actually makes it easier for all religions and non-religions to practice their beliefs without getting the impression that they are acting in opposition to the will of the state.

IV. CONCLUSION

When faced with questions of constitutional rights, the Supreme Court must speak with a clear voice and hold to clearly defined standards such that the nation can have reasonable expectations. In its line of Establishment Clause cases, the Supreme Court has failed in this mission. By adopting the neutrality test in *Van Orden*, the Court can make use of a more objective standard.

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46. *See Van Orden*, 125 S. Ct. at 2889.

47. *Id.* at 2875; *see also* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)(stating that government must not engage in or compel religious practices nor can it show favoritism to one religious sect or between religion and non-religion).

48. *See Van Orden*, 125 S. Ct. 2880-81.

49. *See Van Orden*, 125 S. Ct. 2890-91.

50. *Id.* at 2885.

51. *Id.* at 2867 (Thomas, J., concurring).

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