STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM

EIGHTH EDITION

2016 Supplement

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This update letter is designed to provide instructors with information on recent developments since the 8th edition of the casebook was published in December 2014. Instructors should also bear in mind that the casebook was originally published by LexisNexis, but as of January 2016, publication and distribution will be handled by Carolina Academic Press http://www.cap-press.com/ .

The following table of contents tracks the table of contents for the casebook itself, and is designed to help users identify where updated material is provided in this Update. The convention used in the update is to reference only sections and notes where additional material has been provided.

We hope that this update letter will assist you in teaching this important and interesting course.

Please feel free to contact the authors with questions or suggestions.

Sincerely,

Judith Welch Wegner (senior editor) (judith_wegner@unc.edu) (on behalf of the co-authors)
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CHAPTER 1: AN OVERVIEW OF STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM

C CONSTITUTIONAL LIMITATIONS ON STATE AND LOCAL LEGISLATION

[1] Equal Protection and Substantive Due Process

BAKER V. STATE

NOTES AND QUESTIONS

Baker v. State is widely acknowledged as the leading state court decision that struck down denial of the right to marry to same-sex couples as a matter of state constitutional law.

In June 2015, a divided United States Supreme Court reached a similar result under the federal constitution in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Justice Kennedy's controlling opinion rested on both due process and equal protection grounds. In his due process analysis, Justice Kennedy concluded that marriage is a fundamental right for four major reasons. In his view, the right to personal choice regarding marriage is inherent in the concept of individual autonomy (citing *Loving v. Virginia*). In addition, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals (citing *Griswold v. Connecticut*). The right to marry is also protected as a means of safeguarding children and families. It draws meaning from related rights of childrearing, procreation, and education (citing *Pierce v. Society of Sisters*), and is important in protecting children from the stigma of being raised in a "lesser" family whose adults are not allowed to marry (citing *United States v. Windsor*). Justice Kennedy also explained that since marriage is a keystone to the country's social order, and states have treated it as a central principle, same-sex couples cannot be locked out of this central institution. He then turned to equal protection analysis (citing *Lawrence v. Texas* as requiring that same-sex couples wishing to marry may not be prohibited from enjoying the benefits and rights associated with marriage). The Court ultimately held that states must allow same-sex couples to marry and recognize marriages of same-sex couples that had previously occurred in other states. Justice Kennedy included an appendix listing state and federal lower court decisions (including *Baker*) that had addressed the issue of same-sex marriage. *Id.* at 2608.

Notably, *Obergefell* built upon the earlier decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), which had struck down the federal Defense of Marriage Act in part on federalism grounds. *Windsor* had concluded that the DOMA legislation reflected deliberate action by Congress to intervene in a punitive way to deny states' longstanding role in defining marriage and addressing family issues (by allowing other states to deny marriages sanctioned by fellow states) and to purposely and irrationally disadvantage same-sex married couples authorized to marry under state law. For further discussion of federalism issues, see updates for Chapter 7 below.

It is likely that *Windsor* and *Obergefell* will have been considered in constitutional law classes prior to students' enrollment in state and local government law. In light of that fact, the discussion of *Baker* might be reframed slightly to focus on issues raised in the following Note ("A Note on Whether an Independent State Constitutional Law is Justified or Necessary," on page 23 of the 8th edition of the casebook). Students might be pressed to review the nuances of rationales stated in *Baker* and those that they have become familiar with in considering *Obergefell* and *Windsor*. The

Court in *Obergefell* rejected the proposition that it should defer reaching a definitive resolution on the issue of the constitutionality of denying the right to marry to same-sex couples. Students might also be pressed to think further about the relationship between state and federal constitutional law with an eye to related questions. If a majority of state courts and state legislatures have determined that same-sex marriage should be recognized, but a significant minority have reached the opposite conclusion, how should the competing views affect federal court judgments, if at all?

Following *Windsor* and *Obergefell* students may find it harder to appreciate the extent to which state constitutions, such as Vermont's, may impose more stringent due process and equal protection standards than is usual under the federal constitution. As a result, it may be useful to give more attention to the crucial decision (cited in *Baker*) in *State v. Ludlow Supermarkets, Inc.,* 448 A2d 791 (Vt. 1982) ,that struck down a Sunday closing law that discriminated based on the size of retail establishments. This decision, like *Baker*, relies on the Common Benefits Clause of the Vermont Constitution, and stands in sharp contrast with approaches to the relaxed equal protection standards that would be applied as a matter of state law.

A NOTE ON WHETHER AN INDEPENDENT STATE CONSTITUTIONAL LAW IS JUSTIFIED OR NECESSARY

For a thoughtful set of articles on state constitutions and economic liberties, see *Symposium on Economic Liberties and State Constitutions*, 9 N.Y.U. J. L. & LIBERTY 605 (2015). For a discussion of the influence of federal law on state constitutional interpretation, see Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016). For observations on what state and federal constitutional law interpretations have borrowed from each other, see Steven G. Calabresi, Sarah Agudo & Katherine Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue,* 9 N.Y.U. J. L. & LIBERTY 685 (2015).

[2] State Legislative Power: Grant v. Limitation

UTAH SCHOOL BOARDS ASSOCIATION v. UTAH STATE BOARD OF EDUCATION

A growing number of state legislatures have directed that college campuses must allow those on their premises to carry fire arms. See http://www.ncsl.org/research/education/guns-on-campus-overview.aspx . Students and faculty have expressed strong views about the risks associated with such practices, particularly in light of the growing number of shoots on campus. For an engaging discussion of issues relating to rights to carry guns, worries about gun violence and legislative prerogatives, instructors might wish to consider another important Utah case, *University of Utah v. Shurtleff*, 144 P.3d 1109 (UT 2006). *Shurtleff* involved a claim by University officials that the University was an autonomous constitutional entity that could enforce a policy prohibiting students, faculty and staff from carrying guns, notwithstanding state legislation that prohibited any restriction on carrying guns on public or private property. The court concluded that under the state constitution the legislature could not limit the right to bear arms, and that only the legislature could define the lawful use of arms.

D LOCAL GOVERNMENT

[1] Local Government Types and Organization

[f] Local Government Trends

The U.S. Census has recently noted important changes in demographic patterns involving population growth in urban areas in different parts of the country. http://www.census.gov/newsroom/press-releases/2016/cb16-81.html . William H Frey, of The Brookings Institution, has offered some important observations based on review of these most recent data and earlier census data. See *Mid-decade, big-city growth continues*, www.brookings.edu/blogs/the-avenue/posts/2016/05/23-mid-decade-big-city-growth-frey. Frey notes that for more than half of big cities (those over 500,000 in population) the rate of growth for the first half of the current decade (2011-2015) exceeded that of the prior decade (2000-2010) as a whole. Sunbelt and west coast cities had the greatest growth rate increases. Changes have also occurred in trends affecting growth of primary cities and their surrounding suburbs, including differences distinguishing those located in "Sun Belt" versus "Snow Belt" locales. Both primary cities and suburbs in the Sun Belt are growing at a substantially higher rate than their counterparts in the Snow Belt, and suburbs are growing at a slightly faster rate than core cities in the Sun Belt. During the decade 2000-2010, suburbs in major metropolitan areas experienced nearly three times the pace of growth as did primary cities, but, since 2011, suburban growth rates trail primary city growth. However, in the "Snow Belt" (northeast and mid-west) combined core city and suburban growth rate declined since 2010, while the combined rate of core city and suburban growth in the "Sun Belt" has remained constant or increased slightly. "Snow Belt" core cities are growing faster than in the prior decade, but more slowly than in the south and west, while their suburbs are growing less rapidly than the core cities in the "Snow Belt" region. They experienced a spike in growth early in the current decade but in many places that growth has declined as the Sun Belt migration continues.

E CONSTITUTIONAL LIMITATIONS ON THE AUTHORITY OF STATES OVER LOCAL GOVERNMENTS

NOTES AND QUESTIONS

HUNTER v. CITY OF PITTSBURGH

6. *State constitutions.* In dictum, *Hunter* raised the possibility that a future challenge might be raised based on a claim that reorganization of local governments could implicate the rights of a particular local government to hold property in a proprietary capacity. Such a challenge has recently been raised in North Carolina in connection with the state legislature's action to realign governmental structures affecting the public water supply and sewage system involving the City of Asheville and surrounding Buncombe County. See *City of Asheville v. State of North Carolina*, 777 S.E.2d 92 (NC App. 2015). State legislation had transferred oversight of the Asheville water and sewage system to the surrounding county, based on the legislature's perception that the County included many public utility districts that had been built earlier and that Asheville had tried to

charge higher rates to outlying county areas in order to augment its budget (rather than only covering utilities-based charges). The case has now been argued before the North Carolina Supreme Court, with a range of issues being presented, including whether water/sewer utility property is proprietary in character, and whether legislative action to regulate such property (although framed in generic terms) violates the state constitution's special legislation provision.

G SPECIAL DISTRICTS

For a thoughtful discussion of special districts, see Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971 (2013) (discussing special districts as an alternative to municipal incorporation). See also Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014) (discussing localism and public education).

CHAPTER 2: LOCAL GOVERNMENT POWERS AND STATE PREEMPTION

A THE DISTRIBUTION OF POWER PROBLEM

Recent Reflections on the Police Power.

For a recent discussion of the scope of the police power, see Brian Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. LAW. 625 (2015). Professor Ohm provides a helpful historic and present-day overview of judicial understandings of the scope of the "police power," as well as issues relating to the distribution of related power between state and local governments. See also Stephen R. Miller, *Community Rights and the Municipal Police Power,* 55 SANTA CLARA L. REV. 675 (2015) (providing an historical overview of evolving understandings of local police power and considering issues posed recent efforts in some local jurisdictions to articulate "community rights" such as a "right to pure water").

Dean Daniel Rodriguez has also weighed in with a modern-day reconception of the police power, but in his case the focus is on the role of the police power as to the states. See Daniel Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J. L. & LIBERTY 662 (2015). Dean Rodriguez argues that scholarly literature on state police power has "withered away" and needs to be re-engaged by a consideration of both internal (structural limits and specific provisions regarding rights and liberties), and external limits (federalism) on state authority. In addition, attention needs to be paid, in his view, to states' regulatory objectives (perhaps distinguishing safety, health, and welfare), and techniques (perhaps distinguishing between different approaches to regulation and delegation of authority).

Based on these considerations, Dean Rodriguez urges that more attention be paid to the implications of differences between federal and state constitutions (the federal Constitution involves a grant of power, while states enjoy inherent powers subject only to limitation under state constitutions). He also argues for greater attention to the linkage between how positive rights are defined and fostered the extent of the police power as a source of power to achieve such ends. He suggests that more attention needs to be paid to the relationship between economic liberties and the extent of the police power. Dean Rodriguez also contends that consideration should be given to regulatory tactics and institutional choices made by the states, particularly in light of the more elaborate and nuanced details embodied in state constitutions. Ultimately, in his view, the most significant safeguards bearing on state police power are those provided by structural provisions of state constitutions as interpreted by the courts.

Fresh Tensions between State Legislatures and Urban Governments.

Governing magazine has recently documented a growing chasm between conservative state legislatures and cosmopolitan cities whose leaders increasingly seek to adopt progressive policies on such issues as discrimination, environmental hazards, living wages, and more. See Alan Greenblatt, *We Interrupt This Program*, GOVERNING 24 (April 2016). The author cites a myriad of recent examples including action by the Missouri legislature to ban St. Louis from adopting a minimum wage and prohibiting use of plastic bags, and the recent action by Texas's Governor to ban state funding for sheriffs' offices that failed to prosecute undocumented immigrants in cities that have declared themselves to be "sanctuaries." Perhaps the most infamous action is that of the North Carolina General Assembly in eviscerating Charlotte's extension of bathroom privileges to

transgender individuals. The General Assembly also prohibited cities from requiring public contractors to pay living wages, and disallowed protections against employment discrimination on any grounds (although they legislature modified this provision at the end of their 2016 short session). Some have suggested that the increasingly visible fractures reflect fundamental partisan differences between Republican-dominated state legislatures and urban areas dominated by Democrats. Others suggest that rural populations may see major urban areas as the equivalent of "Wall Street," garnering resources and thriving economically while rural areas lose population and wither. Other suggest that with a declining number of Democratic governors, the Obama administration's moves to work directly with cities has resulted in some partisan backlash. See Daniel Vock, *At Odds*, GOVERNING 24 (June 2016).

Highlighting both the historical trends highlighted early in this Chapter, and these more recent developments reflecting present-day political conflicts should engage students deeply in related issues. As discussed subsequently, are either statutory power regimes or home rule systems adequately positioned to resolve conflicts in policy preferences between major cities, suburbs, and more rural communities and state legislatures as constituted today?

C CONSTITUTIONAL HOME RULE

[2] Defined (or *Imperio*) Home Rule Powers

For a recent analysis of home rule in Ohio, see Jonathan Angarola, *Ohio's Home-Rule Amendment: Why Ohio's General Assembly Creation Regional Governments Would Combat the Regional Race to the Bottom Under Home-Rule Principles*, 63 CLEV. ST. L. REV. 865 (2015) (tracing history and regional implications of Ohio home rule provisions).

CITY OF MIAMI BEACH v. FLEETWOOD HOTEL, INC.

NOTES AND QUESTIONS

3. *Powers of taxation.* For a recent thoughtful article on the implications of limiting local governments' taxing authority, see Erin Adele Sciarfe, *Powerful Cities? Limits on Municipal Taxing Authority and What to Do about Them*, 91 N.Y.U. L. REV. 292 (2016) (arguing that state law should grant municipal governments "presumptive taxing authority" that parallels municipal regulatory authority and that should be similarly subject to state preemption law).

D STATUTORY PREEMPTION AND CONFLICT

MILLER V. FABIUS TOWNSHIP BOARD

NOTES AND QUESTIONS

2. *More examples.* In addition to the examples provided, instructors may wish to raise additional recent "hot topic" examples concerning state preemption of local regulation.

c. Obesity and Soft Drinks. Some cities, such as New York, have tried to intervene by regulating disclosures or portions of soft drinks made available to their citizens. Can the states pre-empt local government regulations of soft drink portions? See Patrick M. Steel, *Obesity Regulation Under Home Rule: An Argument that Regulation by Local Governments is Superior*

to Administrative Agencies, 37 CARDOZO L. REV. 1127 (2016); Alana Sivin, *Striking the Soda Ban: The Judicial Paralysis on the Department of Health,* 28 J.L. & HEALTH 247 (2015);

d. *Fracking*. Fracking (fracturing of subsurface minerals layers by hydraulic means to release oil and gas) has become an important arena in which state and local government authority has been contested. For discussion of related developments, see Jamal Knight Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, 28 TUL. ENVTL. L.J. 297 (2015). Local governments have been concerned by the impacts of fracking on local water quality, while states have sought to foster uniform approaches to "fracking" in order to foster economic development. See also Elena Pacheco, *It's a Fracking Conundrum: Environmental Justice and the Battle to Regulate Hydraulic Fracturing*, 42 ECOLOGY L.Q. 373 (2015); Rebecca Fischer, *Are the West's Water Resources Fracked? A Study on the Effects of Fracking and How States and Localities Are Responding*, 46 ENVTL. L. 257 (2016). Would the results of a preemption challenge differ under states that rely on statutory powers, *imperio* home rule, or legislative home rule?

CHAPTER 3: ALTERNATIVE MODELS FOR LOCAL GOVERNMENT

A INTRODUCTION

[1] Political Fragmentation, the Decline of Central Cities, Continuing Suburban Growth and Sprawl

[a] Urban priorities

[i] *2015 Menino Survey of Mayors (Boston University Initiative on Cities, Jan. 2016)*

In a survey of 89 mayors (63 mayors of cities with a population over 100,000) from 31 different states, mayors overwhelmingly saw infrastructure as their greatest challenge in the next five years. Big ticket priority areas were roads, mass transit, and water, wastewater, and storm water facilities. When asked to select just one big project investment, mass transit came out as the top priority. One mayor noted that because it is impossible to expand roads in a built city, investments should be made in mass transit. Boston University, Initiative on Cities, *2015 Menino Survey of Mayors* 12 (Jan. 2016). Seventy per cent of the mayors surveyed supported bike accessibility improvements, even at the expense of motor vehicle lanes. *Id. at* 15. The mayors also supported police reforms, programs to address and support low income residents, efforts to improve fiscal stability, and mayoral accountability. Mayors surveyed expressed little confidence in the ability of federal and state governments to assist them to face these challenges. They particularly wanted to change state laws relating to local government revenue raising options and the distribution of state revenue. *Id.* at 4. The majority felt that local autonomy was unfairly limited by state governments. *Id.* at 33.

[ii] *Other concerns.*

Fragmentation, the changing roles of central cities, urban decay, and sprawl continue to be topics of interest. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014) (examining high-poverty, insolvent United States cities, pinpointing the underfunding of pensions as the cause of insolvency rather than sprawl, raising the issue of the extent to which public services can be cut without impairing habitability, and arguing for a warranty of habitability that goes beyond landlord/tenant relations into the domain of local government law); Steve P. Calandrillo, Chryssa V. Deliganis & Andrea Woods, *Making "Smart Growth" Smarter*, 83 GEO. WASH. L. REV. 829 (2015) (outlining impediments to the effectiveness of state growth management laws; arguing that a broader multi-state or national approach to land use planning is needed so as to avoid political pressures at the local level; and advocating the use of urban growth boundaries and Maryland's system of priority funding as successful smart growth tools); Colin Gordan, *Patchwork Metropolis: Fragmented Governance and Urban Decline in Greater St. Louis*, 34 ST. LOUIS U. PUB. L. REV. 51 (2014) (chronicling home rule in the St. Louis metropolitan area, failed attempts for metropolitan consolidation, and the damage caused by the failure to overcome the proliferation of many municipalities within a metropolitan area); Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. HAW. L. REV. 39 (Winter 2015) (arguing that municipal comprehensive plans do not ensure sprawl reduction); Robert Liberty, *Stopping Low-Density Rural Residential Sprawl*, 15 VT. J. ENVTL. L. 124 (Fall 2013) (outlining various measures to reduce rural sprawl and advocating the use of a hybrid approach that would include a variety of measures to reduce sprawl); Paige Pavone, *Smart Sprawl? Green Aspirations*

and the Lowdown on High-Density Suburbia, 40 COLUM. J. ENVTL. L. 145 (2015) (student note) (criticizing high-density suburban developments, referred to as high-density islands, which are facilitated by smart growth zoning tools, but cause environmental degradation); Brent T. White, Simone M. Sepe, & Saura Masconale, *Urban Decay, Austerity, and the Rule of Law*, 64 EMORY L. J. 1 (2014) (providing evidence that urban decay and the lack of investment in urban infrastructure undermines the rule of law).

[2] Localism Versus Regionalism

Scholars are focusing increasingly on racial and class inequities resulting from localism. They are making proposals to expand the reach of regionalism. See Jonathon Angarola, *Ohio's Home-Rule Amendment: Why Ohio's General Assembly Creating Regional Governments Would Combat the Regional Race to the Bottom Under Current Home-Rule Principles*, 63 CLEV. ST. L. REV. 865 (2015) (calling upon the Ohio General Assembly to pass legislation authorizing the creation of regional governments in the state to ensure greater inter-local coordination and to make metropolitan areas more globally competitive; also noting the lack of consciousness about regional interdependencies in Ohio's strong home rule localities); Patience A. Crowder, *(Sub)Urban Poverty and Regional Interest Convergence*, 98 MARQ. L. REV. 763 (2014) (proposing regional interest convergence methodology to reduce regional inequities stemming from poverty and race and class discrimination by aligning interests of localists and regionalists in such areas as economic development, regional planning, and public-private partnerships); Nestor Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 23 (2013) (supporting the case for regionalism rather than localism by arguing that the so-called "creative class" with its mobility to pick and choose among metropolitan areas creates competition among regions; accordingly the Tiebout model of local choice should be redirected to interregional competition rather than local competition with respect to these high-capital mobile workers who demand public goods on a regional scale that can best be provided by regional governance); Michèle Finck, *The Role of Localism in Constitutional Change*, 30 J. L. & POL. 53 (2014) (using the gay rights movement as a case study to show how the creation of local norms at the municipal level can result in state and federal constitutional change); Gerald E. Frug, *The Central-Local Relationship*, 25 STAN. L. & POL'Y REV. 1 (2014) (arguing for a regional legislative body or similar political process (rather than the existing United States structure that features a fixed division of authority) in which all localities would participate to reach collectively driven decisions affecting their region, a process that takes account of how different levels of government are distinctive, interdependent, and interrelated as recognized in the South African Constitution); Terrence Jones, *Toward Regionialism: The St. Louis Approach*, 34 ST. LOUIS U. PUB. L. REV. 103 (2014) (describing how voter rejection of St. Louis City-County consolidation led to cooperative regionalism arrangements, involving a one-function-at-a-time approach, in the areas of waste disposal, education, cultural institutions and the arts, public safety, transportation, tourism and sports venues, parks and open space, health care for the indigent, and economic development); Jason Moreira, *Regionalism, Federalism, and the Paradox of Local Democracy: Reclaiming State Power in Pursuit of Regional Equity*, 67 RUTGERS U. L. REV. 501 (2015) (advocating the use of state centralized power to achieve greater regional equity that has not been realized under existing forms of regionalism and localism); Timothy Polmateer, *How Localism's Rationales Limit New Urbanism's Success and What New Regionalism Can Do About It*, 41 FORDHAM URB. L. J. 1085 (2014) (arguing that the success of new urbanism, focusing on pedestrian-friendly, mixed-use city centers, relies upon regional programs and their ability to encourage cooperation

among local stakeholders); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416 (2014) (arguing for the creation of regional governance structures to mandate or incentivize resource sharing among neighboring school districts so as to equalize educational opportunities for those disadvantaged by the race- and class-based exclusionary effects of localism and metropolitan fragmentation)

B METROPOLITAN GOVERNANCE

[1] Consolidation and Federation

Following the events in Ferguson, Missouri, attention has been given to whether consolidation of the city of St. Louis with the 90 municipalities in St. Louis County could provide more clarity to regional leadership and create greater tax equity. One commentator has argued that consolidation does not necessarily change inequities and fragmentation because the consolidation may not result in the elimination of municipalities and can shift control away from the central city to suburban residents. In addition, a governmental body covering a larger geographical area can result in less attention given to citizen and neighborhood needs. See Aaron M. Renn, *The Myths of Municipal Mergers*, GOVERNING (Jan. 2015), http://www.governing.com/columns/eco-engines/gov-ferguson-and-splintered-governance.html .

NOTES AND QUESTIONS

2. *Per capita income in central cities v. suburbs*. Suburban poverty continues to grow. In an update to its 2011 report on the growth of concentrated poverty in central cities versus suburbs, the Brookings Institute reports for the period covering 2008-2012 as follows:

- Concentrated poverty remains highest in large cities (23%) compared to 6.3% in suburbs.
- The suburbs experienced the largest growth of residents living in concentrated poverty areas with a pace of growth at three times the pace of growth in cities.
- Of the poor residents living in the nation's 100 largest metro areas, 26% were located in the suburbs in 2008-2012, in contrast to 18% in 2000.
- Since 2000, poor residents living in city high-poverty neighborhoods grew by 21% whereas in the suburbs the growth rate was 105%.

Elizabeth Kneebone, *The Growth and Spread of Concentrated Poverty, 2000 to 2008-2012*, (Brookings Institute, July 31, 2014).

4. *Tax equity issues.* See David Libonn, *From Cautionary Example to "City on a Hill": Revitalizing Saint Louis May Require an Innovative Regional Taxation Model*, 91 WASH. U. L. REV. 1035 (2014) (arguing for the adoption of a inter-local revenue sharing plan in the St. Louis metropolitan area, modeled on the Twin Cities program, to help reduce socio-economic differences among municipalities and better equalize the distribution of resources among them).

[2] Multi-Purpose Regional Agencies

Portland's Metro

Portland's Metro is empowered to establish and amend as necessary a regional urban growth boundary (UGB). For a discussion of the issues Metro has faced in this role and in designating urban and rural reserves, see Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, 93 OR. L. REV. 455 (2014). The article discusses a number of legal challenges to Metro's

activities in these areas, and it also offers observations about Metro's strengths and challenges in administering a regional planning system. See also Edward J. Sullivan, *Resolving Urban Land Disputes: Lessons from the Portland, Oregon Region*, 38 No. 8 ZONING & PLANNING LAW REPTS. NL 1 (2015). In this article, Mr. Sullivan discusses urban growth conflicts involving Metro between 1979 and 2005 and examines new rules enacted by the state legislature to fix perceived shortcomings. He offers several interesting lessons of use for planning on a regional scale. He points out that it is easier for a motivated interest group to influence a centralized body than for such a group to dominate decision making when control is spread among a number of decentralized planning bodies.

Twin Cities Metropolitan Council

For a very insightful review of the Twin Cities Metropolitan Council, see Susan Haigh, *The Metropolitan Council*, 40 WM MITCHELL L. REV. 160 (2013). The article, authored by a past chair of the Metropolitan Council, presents an overview of the Council, including its role and scope of authority. The article also discusses future priorities of the Council and its next long-term comprehensive planning guide, Thrive MSP 2040, which will include an expanded focus on sustainability, equity, and economic growth. The article further discusses the Council's focus on transit-oriented development and its implementation.

The Council recently adopted a 2040 Transportation Policy Plan to provide policy direction and to set forth investment priorities. See Met Council, *2015 Accomplishments, Adopting the Transportation Policy Plan*, http://www.metrocouncil.org/About-Us/why-we-matter/Record-of-Accomplishments.aspx. The plan identified a Regional Bicycle Transportation Network for the first time. *Id.*

NOTES AND QUESTIONS

1. *Elected versus appointed officials on metropolitan regional agencies*.

A recent article argues that the Met Council's unelected governance structure makes it "a popular political target." Brendan Ballou, *A Future for the Met* Council, 12 U. ST. THOMAS L. J. 131, 140 (2015). Proposals to make the Council more accountable are discussed in the article, including (1) direct elections of its members, (2) a change in its composition to a mix of gubernatorial appointees and elected officials, (3) retention of gubernatorial appointments of members, but require appointees to obtain resolutions of support from a certain number of municipalities within geographical districts, and (4) retention of gubernatorial appointments of members, but require voter approval of appointees. *Id.* at 142-45. The author concedes that it is unlikely that present or future governors will agree to give up their substantial control of Met Council through their ability to appoint its members. *Id.* at 142.

[3] Single-Purpose Regional Agencies

5. *Regional transportation authorities*. Following the rejection in 2012 by Atlanta metro voters of a Transportation Local Option Sales Tax, which would have raised over $7 billion for 157 transportation projects throughout the 10-county region, the Georgia Regional Transportation Authority (GRTA) continued to focus on its regional express bus system that reduces the number of single-occupant vehicles on state roadways. See Georgia Regional Transportation Authority, Overview, http://162.144.61.22/~grtaorg/newgrta15/wp-

content/uploads/2015/11/grta_factsheet_1_10_14.pdf (last visited 06/10/2016). No mass transit initiatives appear to be on the horizon for GRTA.

In contrast to the outcome of the *Marshall* case, the use of tolls to finance a new tunnel was upheld in *Elizabeth River Crossing OPCO, LLC v. Meeks*, 749 S.E.2d 176 (VA 2013). The circuit court held that the tolls constituted unconstitutional taxes because the state legislative body had exceeded its authority by delegating the setting of the toll rates to the Virginia Department of Transportation and a private entity as authorized by the Public-Private Transportation Act. The plaintiffs had argued that the tolls were taxes because their primary purpose was to raise revenue; further they were not voluntary contractual payments because users had no reasonable transportation alternatives but to use the tunnel. The Virginia Supreme Court overruled the circuit court and held that the tolls were valid "user fees because (1) the toll road users pay the tolls in exchange for a particularized benefit not shared by the general public, (2) drivers are not compelled by government to pay the tolls or accept the benefits of the . . . [tunnel] facilities, and (3) the tolls are collected solely to fund the . . . [tunnel], not to raise general revenues." *Id.* at 302.

[4] Councils of Government and Metropolitan Planning Agencies

NOTES AND QUESTIONS

1. Transportation planning. Fixing America's Surface Transportation Act or "FAST Act" went into effect in December, 2015. For a summary of FAST Act see Transportation.gov, U.S. Department of Transportation, *The Fixing America's Surface Transportation Act or "Fast Act"*, https://www.transportation.gov/fastact. See also U. S. Department of Transportation, Federal Highway Administration, Fixing America's Surface Transportation Act or "FAST ACT" [(Public Law 114-94 – FAST Act, United States Code (reflecting changes made by FAST Act), and Conference Report (H. Rept. 114-357)], http://www.fhwa.dot.gov/fastact/legislation.cfm; Fast Act Conference Report to Accompany H.R. 22 (full text of bill), https://www.congress.gov/congressional-report/114th-congress/house-report/357/1?q=%7B%22search%22%3A%5B%22fast+act%22%5D%7D&resultIndex=1; American Road and Transportation Builders Association, 2015 "Fixing America's Surface Transportation Act", A Comprehensive Analysis, http://www.artba.org/newsline/wp-content/uploads/2015/12/ANALYSIS-FINAL.pdf. FAST Act adds two new factors to the list of factors MPOs are required to consider. MPOs must now consider whether a project improves the resiliency and reliability of transportation system and reduces or mitigates storm water impacts of surface transportation. 23 USC. §134 (h) (1) (I). A further inquiry is whether travel and tourism will be enhanced. 23 USC. §134 (h) (1) (J).

C NEIGHBORHOOD GOVERNMENT AND CITIZEN PARTICIPATION

Whether citizen participation and efficiency are enhanced by further localizing local government in the areas of education and historic preservation are analyzed in Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014). Examining Tiebout model assumptions, identified as "mobility, knowledge, no externalities, and efficient production" (*Id.* at 1352), the article provides criteria for evaluating whether practices at the sub-local government level promote efficiencies in the delivery of public goods (*Id.* at 1363) and revive democracy through citizen participation (*Id.* at 1378).

Neighborhood Government in Los Angeles

For an essay discussing Dean Erwin Chemerinsky's recollection of Los Angeles's Charter Reform in 1999 that led to the creation of city Neighborhood Councils, see Erwin Chemerinsky & Sam Kleiner, *Federalism from the Neighborhood Up: Los Angeles's Neighborhood Councils, Minority Representation, and Democratic Legitimacy*, 32 YALE L. & POL'Y REV. 569 (2014). The essay credits the Councils with bringing "traditionally underrepresented communities into the political process. *Id.* at 577. The Councils are also credited with the ability to exercise a check on city operations and to mobilize action against the city on key issues that affect neighborhood residents. *Id.* at 579.

NOTES AND QUESTIONS

1. The role of neighborhoods in proposals to remake the city. Renewed focus is occurring on the role of a local government's relationships with more localized or neighborhood sub-groups or bodies. See Daniel B. Rodriguez & Nadav Shoked, *Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities' Bike Share Plans*, 42 FORDHAM URB. L. J. 123, 161-65 (2014). The authors describe micro-localism as the "empowerment of bodies or groups located below the city." *Id.* at 161. Differing global legal regimes result in the creation of different types of sub-local units whose scope of powers or functions vary. These sub-local units include: statutorily created sub-geographical units with their own mayor and council (Montreal and Paris), elected *communas* that are created by the city legislature and exercise control over streets and parks (Buenos Aires), boroughs in London with their own powers and elected officials, 16 districts and one county comprising the municipality of Shanghai, community boards with only an advisory function and appointed membership by city-level representatives (New York City), informal micro-local bodies created voluntarily by local residents who advise city aldermen (Chicago), formal neighborhood associations with defined powers, formal neighborhood associations with solely advisory or administrative powers, voluntary neighborhood associations without formal decision-making powers, and individuals or groups that have been granted the power, on behalf of neighborhood residents, to sue the city. *Id.* at 162-65.

3. District of Columbia. In *Kingman Park Civic Association v. Gray*, 27 F. Supp. 3d 142 (D. D.C. 2014), the U.S. District Court for the District of Columbia held that the failure to give formal notice to ANC Commissioner Blacknell of the proposed construction of a car barn and power substation on a high school historic-landmark site was harmless when through actual notice the Commissioner had the opportunity for meaningful participation to oppose the proposed construction. *Id.* at 170. The court further dismissed the plaintiff's claim that the defendant violated the "great weight" requirement because the plaintiff failed to give any written recommendations of the ANC related to the proposed construction and failed to send its letter to the agency responsible for implementing the project. *Id.* at 166, 170.

D PRIVATIZATION OF LOCAL PUBLIC SERVICES AND GOVERNMENT

For a discussion of trends in the privatization of policing, see Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633 (2014). The article sets forth the positive and negative effects of outsourcing police functions. It reviews Camden, New Jersey's dissolution of its police force, whose functions were outsourced to the county, as a model that other cities might follow; and argues that scarce

public resources following the Great Recession and a change in campaign finance law may lead to greater privatization of public police forces. *Id.* at 635-37. For a discussion of concession contracts in which local governments lease infrastructure assets over a long term in exchange for upfront monies, see Kelsey Hogan, *Protecting the Public in Public-Private Partnerships: Strategies for Ensuring Adaptability in Concession Contracts*, 2014 COLUM. BUS. L. REV. 420 (2014). The article analyzes the benefits and drawbacks from these public-private partnerships and presents strategies to provide flexibility and control in concession contracts, arguing that best practices and substantive limits governing the terms of these contracts should be put in effect to ensure the public interest is protected. *Id.* at 430-35, 461.

In *Veolia Water Indianapolis, LLC v. National Trust Insurance Co.*, 3 N.E.3d 1 (IN) on reh'g 12 N.E.3d 240 (IN 2014), the Supreme Court of Indiana held that a for-profit company that failed to provide an adequate supply of water to fight a fire was not entitled to the common law sovereign immunity that would have been granted to the city in such case. *Id.* at 9-10. The court reasoned that granting such immunity would deter private, for-profit companies from curbing negligence and that a need to protect the public treasury against extensive negligence awards was not at stake in the case of the liability of private, for-profit entities. *Id.* at 9.

NOTES AND QUESTIONS

2. Accountability to the public. For arguments in favor of prison privatization see Richard P. Seiter, *Private Prisons: Myths, Realities & Educational Opportunities for Inmates*, 33 ST. LOUIS U. PUB. L. REV. 415, 420 (2014) (arguing that private prisons are accountable to the public and do not reduce quality due to the profit motive).

E RESOLVING CONFLICTS AMONG LOCAL GOVERNMENTS

NOTES AND QUESTIONS

1. *Judicial tests*. For a recent application of the *County of Monroe* balancing test, see *County of Herkimer v. Village of Herkimer*, 25 N.Y.S.3d 839 (N.Y. Sup. Ct. 2016) involving an amendment to a village zoning law that barred the construction of a county jail in the village. After applying the *County of Monroe* balancing test, the court held that the county was immune from the village's zoning restrictions. *Id.* at 538.

(d) *Legislative intent rule.* A balancing test was rejected in favor of the application of a statutory guidance test in *Village of Logan v. Eastern New Mexico Water Utility Authority*, 357 P.3d 433 (N.M. 2015). There the Authority refused to abide by the Village's zoning ordinance that required the Authority to obtain a special use permit to construct water supply infrastructure. The New Mexico Supreme Court characterized the land use dispute as one "between co-equal political subdivisions of the state concerning activities on non-state-owned land." *Id.* at 435. To resolve the dispute, the court stated that pursuant to New Mexico law "courts review the statutory powers assigned to each entity to ascertain whether the Legislature intended that one entity's local zoning ordinances apply to the other entity's activities." *Id.* at 436. Finding that the Authority was empowered "in a manner greater than that allowed to municipalities such as the Village regarding land use regulation," including its larger geographical jurisdiction and its power of eminent domain, the Supreme Court held that the statutory guidance test applied to grant the Authority immunity from the Village's zoning ordinance. *Id.* at 437. The Supreme Court found

that the Authority's statutory purpose would be frustrated by requiring it to comply with municipal zoning ordinances. *Id.*

In Pennsylvania, the legislative intent rule is relied upon first to resolve disputes between two subdivisions of the Commonwealth. In *Southeastern Pennsylvania Transportation Authority v. City of Philadelphia*, 101 A.3d 79 (PA 2014), the Southeastern Pennsylvania Transportation Authority, a metropolitan transportation authority, claimed it was not subject to a City of Philadelphia anti-discrimination ordinance because it was a Commonwealth agency beyond the legal reach of a home-rule jurisdiction granted authority only over its municipal affairs. *Id*. at 83. The court rejected a superior entity rule based on the claimant's status as a superior versus inferior governmental entity. *Id.* at 86-87. In resolving a lawsuit between two entities authorized to be created by the Commonwealth, the court held that the judicial task was "to determine, through an examination of the relevant statutes, which entity the legislature intended to have preeminent powers." *Id.* at 87. In the absence of express legislative intent, the court, citing precedent, ruled that legislative intent could be determined by "a consideration . . . of the consequences of a particular interpretation." *Id.* Although not discussed, such a consideration of consequences would most likely involve a balancing of interests.

F NON-STRUCTURAL COOPERATIVE ARRANGEMENTS

[1] Intergovernmental Cooperation

NOTES AND QUESTIONS (Page 202)

1. Judicial construction of cooperation statutes. *Hutchinson v. City of Madison*, 987 N.E.2d 539 (IN App. 2013), involved an interlocal agreement between a city and a county in which the county gave the city the authority to pursue a road improvement project on land within the county. A state statute authorized county-municipality agreements and required that the agreements should provide *"[t]he specific functions and services to be performed or furnished by the county on behalf of the municipality*." *Id.* at 544. The court rejected the plaintiff's claim that the interlocal agreement was invalid because it contemplated no services by the county and explicitly stated that the county had no obligation for the project other than to grant the city authorization to perform the project as set forth in the agreement. *Id.* at 544. The court found that the statutory language did not require a county to provide specific services and found an exchange of promises in the county's agreement to give up its right to undertake the project. *Id.*

Following the dissolution of California redevelopment agencies in 2011, the City of San Diego established a successor agency as authorized by law, and thereafter the city, the successor agency, and the City of San Diego Housing Authority entered into a Third Amended and Restated Joint Exercise of Powers Agreement to reconstitute a joint powers authority, called a Financing Authority. See *San Diegans for Open Government v. City of San* Diego, 195 Cal.Rptr.3d 133 (Cal. App. 2015). The court upheld the creation of the successor agency to take the place of the redevelopment agency and its ability to participate in the amended third joint powers agreement.

7. *Interstate compacts*. For a discussion of interstate, intergovernmental agreements, see Jeffrey B. Litwak, *State Border Towns and Resiliency: Barriers to Interstate Intergovernmental Cooperation*, 50 IDAHO L. REV. 193 (2014). The article points out the necessity for such agreements to handle cross border issues such as emergency response in localities located on or

near state or international borders. *Id.* at 196-198. Interstate intergovernmental agreements are distinguished from interstate compacts in the article, and barriers to interstate intergovernmental agreements are discussed. One barrier stems from state statutes that treat these cross-border agreements as if they constituted more formal interstate compacts. *Id.* at 201-08. The second barrier is derived from the power of one unit versus the mutuality of powers issue that affects intergovernmental cooperation and is discussed on page 197-98 of the case book. *Id.* at 208-11. If one state grants more expansive powers to its localities under the unit of one rule while a bordering state restricts intergovernmental agreements to situations where all municipalities to the agreement are required to possess the power to fulfill the terms of the agreement, intergovernmental cooperation may be hindered. *Id.* at 208-11. The article also raises the issue of whether federal law can provide independent authority for interstate intergovernmental cooperation and preempt state law that prevents such cooperation. *Id.* at 210-15.

For a recent case interpreting provisions of the Red River Compact, see *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013). The Court held that the Red River Compact did not preempt Oklahoma's water statutes, which prevented water diversion outside of the state, because the Compact did not grant the signatory states cross-border rights to access a shared pool of water. *Id.* at 2136. The Court also found that the Oklahoma statutes did not violate the Commerce Clause. *Id.* at 2136-37. For an analysis critical of the *Tarrant Regional Water District* decision, see Alexandra Campbell-Ferrari, *Managing Interstate Water Resources: Tarrant Regional and Beyond*, 44 TEX. ENVTL L. J. 235, 241-60 (2014). The article also argues that Congress should establish a national water resources management plan to apportion interstate water resources equitably and to guide states' water resource plans. *Id.* at 264. Further, the article advocates that interstate compacts should not defer to state regulation on interstate waters in intrastate regions; rather, interstate compacts should comprehensively regulate interstate water resources irrespective of intrastate water locations. *Id.* at 264-65.

CHAPTER 4: STATE AND LOCAL GOVERNMENT FINANCE

B POLICY ISSUES IN PUBLIC FINANCE

[1] Taxation and Assessments

A developing issue in real property taxation in 2015 is the availability of the exemption from real property taxes for non-profit higher education and medical facility institutions. Two decisions in the New Jersey Tax Court hold that the facilities that conduct business or "for-profit" activities of these institutions do not warrant tax-exempt status. In *Fields v. Trustees of Princeton University***,** 28 N.J. Tax 574, 2015 N.J. Tax LEXIS 17 (Tax Ct. 2015), the court held the university's activities were for profit and real property tax exempt status should be denied. Likewise, the New Jersey Tax Court held in *AHS Hospital Corp v. Morristown Memorial Hospital* (28 N.J. Tax 456, 2015 N.J. Tax LEXIS 12 (Tax. Ct. 2015)) that some hospital activities were for profit and real property tax exempt status should be denied. The New Jersey Legislature attempted to codify the holding in *Fields* by enacting Senate Bill 3299 on December 7, 2015 which provides continued property tax exemption for certain nonprofit hospitals with on-site for-profit medical providers, but requires these hospitals to pay community service contributions to host municipalities, and establishes a Nonprofit Hospital Community Service Contribution Study Commission. New Jersey Governor Christie declined to sign the bill reportedly because he suggested a two-year moratorium on lawsuits by municipalities against non-profit institutions for real property taxes is better policy to provide a period to study the issue and develop a uniform state-wide solution (See E. Young, *Christie Wants Moratorium on Towns Seeking Hospital Payments*, Bloomberg Business, March 18, 2016).

Similarly, on Jan. 5, 2016, the Illinois Fourth District Appellate Court ruled in *The Carle Foundation v. Cunningham Township***,** 45 N.E.3d 1173 (Il. App. 2016) that Illinois state law providing for property tax exemptions for certain non-profit hospitals is unconstitutional. The Illinois Supreme Court has granted review. The case involved an action brought by the Carle Foundation against the City of Urbana and other taxing jurisdictions in which the hospital sought to recover real property taxes that it paid under legal protest during the period from 2004 to 2011. Plaintiff claimed that the statute (35 ILCS 200/15-86) that uses a monetary test to determine which hospitals are eligible for a property tax exemption was unconstitutional under article IX, section 6 of the Illinois Constitution of 1970. That section provides: "The General Assembly by law may exempt from taxation…property used exclusively for…charitable purposes." The court held that the statute exceeds the terms and conditions of article IX, section 6 because it does not require the subject property to be "used exclusively … for charitable purposes" and instead "grants an exemption on the basis of an unconstitutional criterion, i.e., providing services or subsidies equal in value to the estimated property tax liability."

The New Jersey and Illinois rulings indicate a growing trend in states questioning property tax exemptions for non-profit institutions. As cities and counties continue to lose tax revenue because of property tax exemptions, non-profit institutions are becoming potential targets to increase real property tax revenues. These cases also point to state tax policy requiring users of municipal services, regardless of real property tax exempt status, to pay for the services received or from which they benefit, suggesting a user fee concept to replace the traditional tax-exemption. See A.

Godkin, M. Mobilia, *Emerging Equities in Paying for Municipal Services—The Problem with the Real Property Tax*, 19 NEW YORK BUSINESS LAW JOURNAL, No. 1. at 59 (Summer 2015) for a discussion of how tax-exempt institutions might be charged for the cost of municipal services they receive.

[2] Non-Property Tax Revenues

The collection of sales taxes and hotel occupancy taxes from internet on-line travel companies (OTC) is becoming an important issue in states' efforts to increase non-property tax revenues. Two related cases provide examples of different outcomes on whether these companies must collect and remit municipal taxes that apply to hotel accommodations based on a judicial interpretation of state law. In *Expedia, Inc. v. City and County of Denver*, 2014 WL2980979 (CO App. 2014), the Colorado Court of Appeals held that the City and County Lodger's Tax ordinance does not include the OTC's fees within its designated tax base. Strictly construing this taxing provision against the government, the court held that the tax does not apply to such fees. The court remanded with directions to vacate all of the tax assessments against the OTCs. The Colorado Supreme Court granted certiorari to review the matter. See 2015 WL 5215961 (CO 2015). In a similar case, *Expedia, Inc. City of New York Department of Finance*, 22 N.Y.3d 121 (NY 2013), the New York Court of Appeals held that the expansion of the City's tax on hotel occupants applied to fees earned by OTC, overturning the trial and appellate court decisions which held the tax violated the New York Constitution. The Court of Appeals found the tax to be a proper exercise of the City's broad authority supported by the plain language of the local law to expand the City's tax on hotel occupants to fees by OTC intermediaries that facilitate hotel reservations.

[3] Borrowing Money

New types of "social impact bonds" are gaining favor with millennial investors for projects certified to help curb global warming. Known generally as "green bonds," these securities may take the form of any of the types of municipal bonds described in Chapter 4, Part F, Borrowing, p. 331 of the casebook 8th edition. Because their purpose may not comport with traditional "public purposes" of local governments subject to the restrictions on borrowing in state constitutions (see Part C, Constitutional Limitations and Protections, Borrowing, p. 225), they are often authorized and issued by conduit issuers (see casebook Part F, Borrowing, p. 360).

In February, 2016, the New York State Metropolitan Transportation Authority (MTA) issued $782.5 million of its first green bonds. The associated projects include renewable energy, clean transportation and sustainable water management. From an investment banker's point of view, green bonds broaden the investor base in municipal bonds by appealing to persons who give consideration to social factors such as the environment, education and health care in guiding their investment decisions. The proceeds of "green bonds" are used by public and private entities alike to fund investments with environmental benefits, such as to reduce carbon emissions or promote the construction of renewable energy infrastructure.

Since 2010 U.S. state and local governments have issued about $7.5 billion of green bonds, according to data compiled by Bloomberg. See M. Bruan, *New York City Subways Court Millennials with Green Bonds*, BLOOMBERG BUSINESS, February 10, 2016. This Bloomberg

article notes that Seattle's transit agency, the Central Puget Sound Regional Transit Authority, issued about $940 million of green bonds in August, 2015, the largest-ever green municipal bond issue. Proceeds were used to expand Seattle's light-rail system and refinance higher-cost debt. The Bloomberg article continues:

> To comply with green bond principles, issuers need to show to non-profit standards setters like the London-based Climate Bonds Initiative how they determined the projects were eligible, ensure bond proceeds are spent on the designated projects and provide annual reports on the impact of the investments. Some issuers also hire outside consultants to review project selection and evaluation. The MTA's bonds, backed by system-wide revenues, will be certified under standards set by the Climate Bonds Initiative. The MTA agency hired Sustainalytics, an Amsterdam-based firm, to verify compliance with the guidelines.

Although the Climate Bonds Initiative certification process is "voluntary," it allows issuers to demonstrate to investors, the users of the mass transit and commuter systems, and other stakeholders that green bonds meet international standards for climate integrity, management of proceeds and transparency in a preliminary bond offering statement (see Part I, Federal Law Regulation of Public Finance – Disclosure, p. 412 of the casebook). Green bonds relate well to the United Nations Climate Change Conference ("UN Conference") held in Paris in November/December, 2015. Banks, companies and organizations as diverse as The World Bank, HSBC Holdings, GDF Suez and Southern Power have all completed green bond offerings, illustrating the bonds' popularity with a diverse set of issuers.

What specifically qualifies as a "green bond"? The category remains vaguely defined and without a universally recognized standard. As a result, some issuances may not necessarily be as "green" as others. One benchmark that has emerged as a recognized measure of a green bond's level of authenticity is the International Capital Market Association's ("ICMA") Green Bond Principles. These principles include:

- *Use of Proceeds* – Green project categories should provide clear environmentally sustainable benefits, which, where feasible, will be quantified by the issuer.
- *Process for Project Evaluation and Selection* – The bond issuer should outline the decision-making process it follows to determine the eligibility of projects using green bond proceeds.
- *Management of Proceeds* – Bond proceeds should be appropriately tracked by the bond issuer using a formal process.
- *Reporting* – Bond issuers should provide, at least annually, a list of projects that bond proceeds have been allocated toward, including a description of the projects, the amounts disbursed and the expected environmentally sustainable impact.

[http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/green-bonds/green-bond-principles/]

Green bond principles align well with the increased origination of property assessed clean energy ("PACE") assessments and PACE bonds in the U.S (discussed later in this update under

Special Assessment Bonds). All proceeds of PACE assessments are allocated to the construction of renewable energy and energy efficiency improvements to real property.

Somewhat related to "green bonds" are "resilience bonds." Resilience bonds are designed to fund local governments and utilities against losses incurred through frequent severe weather events. States, local governments and utilities may be underinsured against potential catastrophic losses, particularly where aging or failing infrastructure (roads, bridges, tunnels, sewer and water systems, etc.) are involved.

In a recent report (see S. Vaijhala, J. Rhodes, *Financing Infrastructure through Resilience Bonds* [Blog], Metropolitan Policy Program, Brookings Institution, December 15, 2015), the author proposes linking catastrophic insurance coverage with capital investment in resilient infrastructure (i.e., flood barriers, harden bridges and roads, etc.) which reduce expected losses from disasters. The connection between insurance and infrastructure is important and designed to reduce risk, similar to how quitting smoking or exercising regularly lowers life insurance costs. In the case of resilient infrastructure, investing in coastal protection or seawalls may help avoid physical and financial disaster. Resilience bonds combine these two different types of investments: (i) traditional catastrophe bonds, and (ii) savings in the cost of insurance that can be returned to the cost of financing resilient infrastructure projects. The author offers five reasons why states and local governments should consider resilience bonds:

- Federal and state disaster relief funds are stretched thin.
- Rapid response funding should be a priority rather than waiting years for state and federal government funding commitments to materialize.
- Meeting insurance compliance requirements is getting more complex.
- Availability and affordability of insurance is a growing problem.
- Resilient infrastructure is especially difficult to finance with traditional revenue and payback models, because the benefits are often diffuse and realized far into the future.

[http://www.brookings.edu/blogs/the-avenue/posts/2015/12/16-financing-infrastructure-through-resilience-bonds-vajjhala]

The attractiveness, if not the challenge to economic feasibility, of resilience bonds was highlighted at the recent UN Conference held in Paris. http://www.brookings.edu/research/reports2/2015/11/17-paris-climate-talks The recent climate change agreement drafted at the UN Conference highlights how cities and countries around the world have committed to investing to increase resilience.

QUESTIONS

1. *Other uses?* Are there other "green bond"- type purposes worth considering? What about national security bonds to defend against acts of terror by radical jihadists? Are there lessons from recent attacks in Brussels and Paris that suggest specialized infrastructure bonds should be considered at the state and local level to keep people and property safe? What entity should issue the bonds pursuant to what purpose? How would the bonds be paid for? Would the same socially conscious investors in "green bonds" be interested in resilience bonds or national security bonds?

2. *More information.* Useful resources to learn more about social impact bonds (sometimes called "pay for success financing") include: *SIB Review - Practitioner's Toolkit - A Comprehensive Set of Pay for Success Tools*, http://www.sibreview.com/toolkit/, and *Authorizing Pay for Success Projects – A Legislative Review and Model Pay for Success Legislation*, http://www.thirdsectorcap.org/wp-content/uploads/2016/03/Authorizing-Pay-for-Success-Projects-Legislative-Review.pdf.

[4] Managing State and Local Government Finances

The elephant in the room in public finance is public sector pensions and retirement benefits. Getting public pension growth and payments to retirees under control is the number one expense item threatening fiscal stability for states and local governments. Billions of dollars in pension obligations faced by states and local governments across the country have many politicians calling for some type of reform. A commission appointed by New Jersey Gov. Chris Christie wants to freeze the state's current pension plan, while in California, Gov. Jerry Brown has signed a bill that increases the retirement age, among other things. In Illinois, Gov. Bruce Rauner wants to eliminate overtime in the determination of pension benefits. When states and local governments have attempted to reduce public sector pension benefits to balance the annual budget and reduce structural deficits, the public employee unions sue to stop these measures. Paying for and funding public pensions and addressing the accrued liabilities therefor is an unresolved matter that significantly impacts the credit of states and local governments. For more information on public pensions, see http://publicplansdata.org/

In two related state supreme court cases dealing with legislative reductions of public employee pension benefits, the Illinois Supreme Court in *In re Pension Reform Litigation*, 32 N.E.3d 1 (IL 2015) held void and unenforceable such legislation as an impairment of rights and protections provided in the Pension Protection Clause of the state constitution, not defensible as a reasonable exercise of the State's police power. New Jersey has taken a different approach where pension benefits are not guaranteed by the state constitution. The New Jersey Supreme Court in *Burgos v. State,* 118 A3d 175 (NJ 2015), upheld such pension reduction legislation on the theory that a contract requiring fixed appropriations for pension benefits in future years violates the state's constitutional debt limit clause. The *Burgos* case relies on *Lonegan v. State* (included in the casebook at Part F, page 351) for the proposition that a multi-year pension payment contract is debt requiring a vote of the people under the state constitution, turning the decision in *Lonegan* on its head. The *Lonegan* case holds that annual legislative appropriations to a state agency is not debt of the state itself. Had the *Borgos* court been presented with the *Lonegan* case (decided twelve years earlier) today, the court may have struck down New Jersey's appropriation-backed bond scheme. See also *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 50 N.E.3d 596 (IL 2016), where the Illinois Supreme Court follows its holding in *Pension Reform Litigation* and voids benefit reducing legislation on state constitutional grounds.

Resorting to Chapter 9 of the federal bankruptcy code to knock out state constitutional and statutory protections of public sector pensions may be tempting given the bankruptcy court's ability to apply the federal Supremacy Clause to affect contracts of all kinds (including state constitutional guaranties of pensions) in arriving at a plan of adjustment to exit bankruptcy.

Tempting as that may be, eligibility for admission to Chapter 9 proceedings is rigorous (see Part H, Fiscal Stress, State Oversight and Bankruptcy, casebook p. 442). Merely alleging that public pension unfunded labilities are incapable of being satisfied is not a basis for admission to bankruptcy. See A. Hedlund, *Supremacy's Claws: How Two Judges are Changing the Pension Debate*, THE DEAL PIPELINE, March 11, 2015 (discussing the adjustment to pensions by bankruptcy courts in the matters of Stockton, CA and Detroit, MI). Similarly, a 2014 study conducted by the Boston College's Center for Retirement Research indicates that financing unfunded pension liabilities with pension obligation bonds, has actually impaired the credit of some issuers. See A. Munnell, J. Aubry, M. Cafarelli*, An Update on Pension Obligation Bonds*, Center for Retirement Research at Boston College, July, 2014). Solving the public sector pension liability problem will be the most important issue in sustaining state and local government fiscal stability over the next decade.

C CONSTITUTIONAL LIMITATIONS AND PROTECTIONS

[1] State Constitutions – Tax Uniformity, Double Taxation, Public Purpose/Lending of Credit

In a case brought to determine the valid distribution of taxes collected for several municipal special taxing districts, in *Turner County v. City of Ashburn*, 749 S.E.2d 685 (GA 2013), the Georgia Supreme Court held the state law unconstitutional in that by providing that a trial court is required to determine the distribution of tax proceeds, the statute violated the constitutional principal of separation of powers. The court said such distribution must be left solely to legislative discretion and is not a matter for determination by the courts.

[2] Federal Constitution – Due Process. Equal Protection, Others

[a] Due Process

NOTES AND QUESTIONS

3. *Notice problems.* In *Fury v. City of North Bend*, 177 Wash. App. 1015 (WA App. 2013), failure to provide due notice of increased construction costs resulted in the annulment of special assessments. North Bend passed an ordinance for construction of a sewer system, specifying the cost would be approximately $11.7 million, upon receipt of a petition from property owners. When the City then expanded the improvement district to accommodate more parcels, the City determined the increased size of the district required construction of a gravity sewer system, which would cost approximately $19 million. The City did not pass a new ordinance specifying the material change in design and cost of the improvement; rather, it proceeded with construction and approved construction contracts by resolution. Under RCW 35.43.100, the passage of the ordinance creating an improvement district triggered a 30–day window in which the affected property owners could file suit to challenge the improvement district. Because the City did not pass a new ordinance after determining it would build a gravity system, the property owners did not have the opportunity to protest the substantially increased cost of the improvement until after the assessments were imposed. The appeals court annulled the assessments on the parcels at issue, allowing the City to pursue a reassessment.

D REVENUES

[1] Real Property Tax

[a] Design and Operation

For recent thoughtful observations about the property tax and its effect on local political economies, see Darien Shanske, *Revitalizing Local Political Economy Through Modernizing the Property Tax*, 68 TAX L. REV. 143 (2014). Professor Shankske observed:

> As the Great Recession dramatically illustrated, state and local governments need a more stable revenue source… [but] there has been [little] experimentation with the … tax on real property. [Professor Shanske then cited the efficiency and stability of property taxes, as well as structural weaknesses such as burdens on those with fixed incomes who would be less affected by taxes on income. He also suggested ways to make the collection of property taxes less burdensome, such as withholding them from income and treating them as part of a larger income tax system]. [Under my reform proposal], … the property tax and income tax systems would be integrated, [and] property tax liability could also be deferred (and perhaps forgiven) when the property tax liability grows to be too high as a percentage of income. Such a regime of incorporating income tax elements into the property tax would allow local taxpayers to respond directly to the relative merits of proposed public projects and services without concern for insuring themselves against future liquidity problems

QUESTIONS

1. *Reducing burdens*? Do you agree with the author that *collection* of the real property tax through an income tax system is as important as calculating the tax as discussed in Part D, Revenues, p. 251? What internet-based technologies could be applied to facilitate tax collection? Would such technologies obviate the need for having an income tax system in place (not all states impose income taxation)? How would the property owner be assured that the lien of the real property tax has been satisfied/discharged by paying the tax through an app on a mobile device?

[2] Special Assessments

SARASOTA COUNTY v. SARASOTA CHURCH OF CHRIST, INC.

NOTES AND QUESTIONS

1. Tax or special assessment?

In *Kane v. Township of Williamstown*, 836 N.W.2d 868 (MI App. 2013), the voters in Williamstown Township approved a proposal to allow for the creation of a special assessment district under a 1951 statute as amended, in order to raise money by special assessment for furnishing police protection. The Williamstown Township Board of Trustees adopted Resolution

2010–96, which provided that the special assessment on residential property would be $150, the special assessment on commercial property would be $250, and the special assessment on vacant property would be $0. Thereafter, petitioner received a tax bill requiring payment of $150 on his residential property and $250 on his commercial property. Petitioner appealed to the Michigan Tax Tribunal, arguing that any such special assessment must be based on each property's taxable value and not a uniform fee. At issue was whether MCL 41.801, which permits a township to assess an *ad valorem* special assessment, also permits a township to assess and implement a uniform-fee special assessment. The court of appeals concluded that it does.

The salient portion of the provision required the township supervisor "to spread the assessment levy on the taxable value of all of the lands and premises in the district that are to be especially benefited by the police and fire protection, *according to benefits received* …." (emphasis added). As a result of the statute's plain language requiring that any assessments be based "according to the benefits received," if a township determines that the properties in the district are all to benefit equally, then those properties will need to be assessed equal amounts as a matter of law. Petitioner contended that because the assessments must be levied "on the taxable value of all the lands," any such assessments must be *ad valorem* and not uniform. However, the court held that spreading the assessment levied on taxable value is not the same as basing the assessment on taxable value.

Similarly, in *Commerce Park Associates 1, LLC v. Houle*, 87 A.3d 1061 (RI 2014), property owners brought a declaratory judgment action challenging the legality of sewer assessments, naming as defendants the town tax collector, finance director, town, and sewer authority. The Superior Court granted the town's motion to dismiss, but denied its request for sanctions. Property owners appealed. The Supreme Court of Rhode Island held that the appeals process set forth in statute governing petitions for relief from any assessment of taxes did not apply to any sewer assessments or charges levied by the town pursuant to its authority under its enabling act, and the Superior Court did not abuse its discretion in denying property owners' request for sanctions. Sewer assessments and charges did not constitute "taxes" for appeal purposes, and thus, the appeals process set forth in the statute governing petitions for relief from any assessment of taxes did not apply to any sewer assessments or charges levied by the town pursuant to its authority under town's enabling act. The town enabling act referred to the means of raising funds in order to cover the cost and maintenance of sewer system as assessments and annual charges, and specifically distinguished between that portion of the cost and construction of the sewer works that would be paid for by the town through its general tax levy and the portion to be paid for by assessments and annual charges against individual parcels of property.

2. Calculation of special benefits.

In *110 Wyman, LLC v. City of Minneapolis***,** 861 N.W.2d 358 (MN App. 2015), property owners in the city's downtown special services district challenged service charges for special services provided by the city. The District Court granted city's motion for summary judgment. Property owners appealed. The Court of Appeals held that the special-benefit standard did not apply to service charges imposed on property owners under the special services districts statute. A statutorily-imposed "reasonably related" special services standard, rather than common law special-benefit standard, applied to landowners' challenge to charges imposed on property owners in the special service district in the city's downtown for special services provided. Services provided, including security, marketing and promotion, graffiti removal, landscaping, and

administrative services, were too difficult to measure in terms of benefit to the properties served, as required by the special-benefit standard. Under the "reasonably related" standard applied by the city's governing body to create a special service district by ordinance, propriety of service charges imposed was to be measured by charges proportionate to the city's cost of providing such services, rather than by a special-benefit standard.

For another case upholding special assessments for municipal services traditionally funded by the real property tax, see *Morris v. City of Cape Coral*, 163 So.3d 1174 (FL 2015). There, the City filed a complaint to validate special assessments for purposes of funding the city's fire-protection services. The circuit court entered judgment of validation and property owners appealed. The Supreme Court of Florida held that the City had the legal authority to levy special assessments for purposes of funding the city's fire-protection services. It employed a two-tier methodology for assessing developed and undeveloped property, and the court concluded that the method was a reasonable one for apportioning costs associated with providing fire-protection services and was not arbitrary. Finally, the court ruled that property owners had not been denied procedural due process. The City had contracted for a study to determine the best method to apportion the costs of fire services, and by adopting the approach recommended in the study, attempted to apportion costs based on the general availability of fire protection services to all property owners in tier 1 (developed property) and in tier 2 (undeveloped property), providing the additional benefit to improved property owners of protecting structures from damage.

[3] User Charges

In a case arising out of Virginia, *Corr v. Metropolitan Washington Airports Authority*, 740 F.3d 295 (4th Cir. 2014), motorists who used toll roads brought an action against the airport authority claimed that there had been an illegal exaction of taxes, in violation of the Due Process Clause and the guarantee of republican form of government. They also asserted that the arrangement violated the Virginia Constitution. The District Court dismissed the action. The Court of Appeals on appeal held that motorists had standing, and tolls were user fees and not taxes prohibited by the Virginia Constitution. Motorists paid tolls in exchange for a particularized benefit of expanding the rail system and for use of the roads, motorists voluntarily chose to use toll roads, motorists who objected to tolls could take another route, and tolls were collected solely to fund the rail system.

QUESTION

But what if the motorist has no alternative non-toll route? Under Oregon law, "the registered owner of a subject vehicle shall pay a per-mile road usage charge for metered use by the subject vehicle on the highways in Oregon." See O.R.S. § 319.885. Apparently an app installed in the car keeps track of the miles and the State sends the owner a tax bill periodically. But what if someone else is driving the owner's car? What if the app discloses personal information about where drivers have traveled, effectively invading their privacy: Are any streets not subject to the per-mile tax; if so, how is that calculated? Are poor people charged the same rate per mile as rich people (making the charge highly regressive?). What's wrong with just setting up good old fashioned tolls with toll barriers and EZ Pass?

[4] Sales, Income and Other Taxes

[b] Gross Receipts Tax

Effective January 1, 2016, the Seattle City Council amended the Seattle Municipal Code (Ordinance No. 122564) to end the square footage business tax. The square footage business tax was enacted in response to state legislative changes codified in RCW chapter 35.102. Specifically, since January 1, 2008, municipal gross receipts business taxes have required the apportionment of service income under a two-factor apportionment formula comprised of a payroll factor and a service income factor. The City feared that the change in calculating taxable service income would lead to a substantial decrease in business license tax revenue. Thus, the square footage business tax was intended to complement the business license tax and to protect against adverse revenue impacts. As a result of improving economic conditions and the City's ability to adapt over time, the City Council unanimously approved simplifying its tax code by ending the square footage business tax and the Seattle Municipal Code was amended to reflect this change. Although the repeal of square footage business tax affords businesses with physical locations in the City some relief, the two-factor service income apportionment calculations can be convoluted and may have a substantial impact on a business' bottom line.
(http://www.andersentax.com/pressroom/repeal-of-seattle-square-footage-business-tax)

E EXPENDITURES

[1] The Annual Budget

Declining state and local government revenues from otherwise reliable sources can adversely impact the annual budget process. For example, in February 2016, North Dakota Governor Jack Dalrymple ordered most state agencies to cut their budgets by a little more than 4% in an effort to cover a $1 billion revenue shortfall that the press characterized as "unprecedented." The consensus opinion is that the decreased revenues from the production and sale of oil in the state, stemming from lower oil prices, is responsible for the bulk of the revenue deficit. North Dakota's state agencies had to make budget cuts for 2016, the largest in gross dollars in the state's history. Furthermore, the state is planning to draw $497.6 million from the state's Budget Stabilization Fund, leaving only around $75 million "in the rainy day fund for what [the Governor] called the 'unlikely event' that the July revenue forecast would be even worse." In addition, some North Dakota officials have speculated aloud that the budget shortfall will put pressure on the legislature to tap into the state's $3.5 billion trust fund for oil taxes. With the global decline in oil prices, extraction and refining, North Dakota will not be the only state or local government struggling with decreased revenues as a result of lower oil and natural gas prices. See generally:
http://www.post-gazette.com/powersource/latest-oil-and-gas/2016/02/01/North-Dakota-governor-orders-cuts-amid-1B-budget-shortfall-3/stories/201602010158

What are the expected impacts on annual budgets from growing OPEB obligations? A 2016 study by Boston College's Center for Retirement Research makes these important observations: (i) aggregate unfunded OPEB liabilities are an estimated $862 billion – nearly two thirds of which is held at the local level; (ii) these unfunded liabilities are equivalent to 28 percent of the unfunded

liabilities of pensions (using the OPEB interest rate for pensions); and (iii) while OPEB liabilities are large, several factors – such as sponsors' flexibility to scale back benefits – limit their potential drain on resources. See A. Munnell, J. Aubry, and C. Crawford, *How Big a Burden Are State and Local OPEB Benefits?* Center for Retirement Research, Boston College, (March, 2016).

When budget deficits appeared in 2015 and 2016, the Louisiana legislature increased the general sales tax rate and eliminated exclusions from the tax. See, *Today is the day. Tax hikes hit Louisiana April 1*. http://www.wwltv.com/money/everyone-in-louisiana-will-pay-more-taxes-starting-friday/110586767 (March, 2016). Is a general across-the-board sales tax increase likely to increase revenues or encourage taxpayers to seek living in lower-tax jurisdictions? Which taxpayers/citizen groups are most likely to act to avoid sale tax increases?

[2] Categories of Expenditures

[f] Mandated Expenses

Judgments owing to creditors are not usually thought of as "mandated" expenses because they are or should have been budgeted expenses even if not yet not paid. Further, judgments can be financed with municipal bonds to satisfy the debt. But when the creditor attempts to attach local government funds, those funds are exempt from execution. In *Regional Utility Service Systems v. City of Mount Union*, 874 N.W.2d 120 (IA 2016), a judgment creditor garnished the city's bank account when the city failed to pay a judgment. The city moved to quash the garnishment on grounds the bank account was exempt from execution. The District Court denied the motion. On appeal the Iowa Supreme Court of Iowa held that general funds in a municipal bank account constitute "other public property" exempt from execution so long as they are necessary and proper for carrying out the general purpose for which the municipality is organized. They also concluded that substantial evidence supported the trial court's finding that general funds were necessary to the general purposes for which the city was organized.

[4] Tax and Expenditure Limitations

For recent articles on tax and expenditure limits see, P. Resnick, C. Brown, D. Godshall, *Measuring the Impact of Tax and Expenditure Limits on Public School Finance in Colorado*., (Lincoln Institute of Land Policy, August 2015) (suggesting that the result of the Taxpayers Bill of Rights is greater inequality and inconsistency, and surprisingly, a greater tax burden for most Coloradans); Justin M. Ross, Madeline Farrell & Lang Kate Yang, *Indiana's Property Tax Caps: Old Idea, New Approach, and Surprising Incentives,* 35 PUBLIC BUDGETING & FINANCE 18 (2015), doi: 10.1111/pbaf.12073 (discussing Indiana property tax caps tied to a fixed percentage of market value, resulting in structural deficits and surprising problems when overlapping local governments make simultaneous spending choices); E.J. McMahon,
Make New York's Property Tax Cap Permanent – It's Working, NEW YORK POST (June 2, 2012) (citing reduced local government budget increases resulting from the 2% limit on successive years' real property tax levy increases).

F BORROWING

[1] Introduction to Borrowing

[a] Authority to Borrow

Savage v. State, 774 S.E.2d 624 (GA 2015), is a classic case connecting a county subject to constitutional debt limits with a development authority's power to issue revenue bonds or appropriation-backed bonds for a sports stadium without such constitutional restraints. The connection is an "intergovernmental agreement" wherein the authority issues the bonds and the county pays for the bonds' debt service through annual appropriations. As in cases cited in the casebook, taxpayers cried foul. They claimed that the county's annual payments, although subject to appropriation, were certainly not revenues contemplated by the Special Fund theory, but merely a series of annual payments constituting synthetic debt which should be subject to constitutional restraints (who but the county taxpayers would be funding annual appropriations to the authority for its bonds?). The Georgia Supreme Court held that the intergovernmental agreement did not violate the Intergovernmental Contracts Clause or the Debt Limitation Clause of the state constitution, nor was the county's promise to pay for bonds was regulated by the Debt Limitation Clause. In addition, the court concluded that the county's promise to levy real property taxes to satisfy obligations under the intergovernmental agreement (should stadium revenues fall short) was based in contract not on debt authorization. Finally, the intergovernmental agreement did not violate either the Gratuities Clause or the Lending Clause of the state constitution.

[b] Issuing Bonds and Notes

2. Validation, Estoppel and Recitals.

In lieu of estoppel by publication of a bond resolution (see p.329 of the casebook) some states conduct a judicial validation hearing on notice by publication. A recent Louisiana case considered this approach. See *Louisiana Local Government Facilities and Community Development Authority v. All Taxpayers*, 165 S0.3d 68 (LA 2015). There, the Louisiana Local Government Environmental Facilities and Community Development Authority (the "LCDA") brought a motion pursuant to the state's Bond Validation Act ("BVA") to establish the validity and legality of a proposed issuance of Property Assessed Clean Energy Special Assessment Revenue Bonds (PACE bonds, discussed below). Pursuant to the BVA, the LCDA named as defendants all taxpayers, property owners, citizens of the State of Louisiana, and nonresidents owning property or subject to taxation therein (because PACE bonds are paid through special assessments on real property, as discussed *infra*) and sought an order directing the publication of the motion in the LCDA's official newspaper and the time and place fixed for the hearing. No objections to the motion were filed. The trial court found that insufficient notice had been given, and the Court of Appeals rejected that view, although affirming the trial court on grounds that the bond resolution had not been entered into the record. The Supreme Court, in a per curiam opinion, held that the legislature had not specified what evidence was required to validate the bond package, but had instead specified that "[n]o court in which a proceeding to invalidate or sustain bonds is brought shall invalidate the bonds unless it finds substantial defects, material errors and omissions in the incidents of such bond issue." The Supreme Court accordingly remanded for entry of judgment.

In *Garden Homes Woodlands Co. v. Town of Dover* (p. 238 of the casebook), the court found posting and publication of a notice of a public hearing to establish an improvement district violative of due process against out-of-state property owners. If you applied the decision in *Garden Homes* to the LCDA case, how would you provide notice to achieve due process to "all taxpayers?" Would you consider electronic communication? Should all taxpayers have an app for government notices?

[2] Types of Issues

[a] General Obligation Bonds

A NOTE ON DEBT LIMITS

A recent case from New York seems to be stating the obvious. See *O'Brien v. New York State Com'r of Educ.*, 975 N.Y.S.2d 205 (NY App. 2013), the School District's Board of Education approved a resolution to upgrade the School District's facilities at an expected cost of $9.9 million. The Board contemporaneously approved a resolution which, subject to voter approval, authorized the issuance of bonds to finance the project and voted to hold a special election to obtain voter approval thereof. Before the vote, petitioner-taxpayer filed a petition with the Commissioner of Education challenging the School District's approval of the bond resolution. Petitioner's primary contention was that the amount of debt authorized in the bond resolution violated the School District's constitutional debt limit. Hence, the question presented: for purposes of the debt limit calculation, should the new debt be included at the time authorized, or instead when actually issued? The appeals court concluded that indebtedness is not incurred for purposes of calculating the School District's constitutional debt limit until bonds are actually issued and sold to investors for consideration.

[b] Revenue Bonds

WINKLER v. WEST VIRGINIA SCHOOL BUILDING AUTHORITY

NOTES AND QUESTIONS

3. "Tax-exempt" leasing.

In building facilities for public use (parks, roads, schools, water systems, etc.), local governments and contractors often endeavor to avoid competitive bidding rules and debt incurrence restraints in the belief that the project can be put on line better, faster, cheaper (BFC). The classic approach to BFC is a "turnkey" project where the local government leases underdeveloped land to a developer, issues tax-exempt bonds to finance the cost of the project, hands over the proceeds of borrowing to the developer, and several months later leases the finished facility from the developer under a long-term lease. The bonds are repaid with the rents paid on the lease to the developer. The developer makes its money by taking a cut of the bond proceeds.

All of this is nicely laid out in *Davis v. Fresno Unified School District*, 187 Cal.Rptr.3d 798 (CA App. 2015), where the taxpayer filed suit against the school district and the contractor, challenging a noncompetitive bid contract between the district and contractor for construction of

a middle school building to be leased to the contractor and leased back to the district. Petitioner also alleged conflict of interest (contractor was an adviser to the district) and that the middle school was never used for educational purposes by the district. The Court of Appeal held that an exception to competitive bidding in the statute permitting school boards to construct schools under lease-leaseback contracts was applicable to the entire lease-leaseback arrangement. It concluded that a true lease (i.e., payment of economic rent) versus a financing lease (i.e., rent is debt service on a financial obligation that looks like debt and may violate legal restraints on incurring debt) is required to satisfy the competitive bidding exception for lease-leaseback agreements. In addition, the terms of the lease supported the taxpayer's allegation that the lease-leaseback agreement was not a true lease. The court concluded that the district was required to use the school building for a period of time during lease term to qualify for the competitive bidding exception, and that, accordingly, the taxpayer had alleged facts sufficient to support a theory that the lease was subject to competitive bidding due to the district's failure to satisfy statutory criteria for use as a school.

4. *Special assessment bonds.* Property Assessed Clean Energy (PACE) loans have been available in California, Florida, New York and other states starting in 2010, but lending as well as securitization of these loans has lagged far behind in California, largely due to a series of lawsuits challenging the program's legal and valid status. Typically, under enabling law, local governments can issue revenue bonds to provide financing for residents and businesses that use bond proceeds to make energy conservation, renewable energy, and wind resistance improvements, and have *ad valorem* (or non-*ad valorem*, depending on state law) assessments placed on their property tax bills as liens to repay the debt.

Two recent Florida Supreme Court rulings, *Thomas v. Clean Energy Coastal Corridor*, 176 So.3d 249 (FL 2015) and *Reynolds v. Leon County Energy Imp. Dist.,* 176 So.3d 254 (FL 2015), could help move the assessment-based PACE bond law into application. The plaintiffs argued that the financing agreements for the PACE programs included the unlawful use of judicial foreclosure to foreclose on delinquent borrowers. While California uses PACE bonds for solar panels, the biggest use of PACE financing in Florida is to make houses and other buildings hurricane-proof ("resilience bonds"). The Florida court held that the "judicial foreclosure" language in the enabling legislation does authorize mortgage foreclosure but is not fatal to the law's validity. It further held that the enabling law did not grant a superior lien to the special assessment for PACE bonds, and that resulting liens did not violate the state constitution.

PACE bonds are promoted by investment bankers and investment funds which administer programs for special assessment districts (i.e., the Clean Energy Green Corridor District, which includes Miami, South Miami, Pinecrest, Palmetto Bay, and Miami Shores, communities that total about 650,000 people) to save energy costs and prevent disasters. Their use in Florida goes beyond energy efficiency improvements (i.e., siding, HVAC, insulation, etc.) and renewables (i.e., roof-top solar panels) but expands to hurricane resiliency (i.e., storm windows, foundation and roof strengthening). See N. Colomer, *Why Florida May Be the Next Big Source of PACE Bonds*, THE BOND BUYER (December 30, 2015).

[c] Appropriation-Backed Bonds

In re *Oklahoma Development Finance Authority for Approval of Oklahoma State System of Higher Educ. Master Real Property Lease Revenue Refunding Bonds*, *Series 2013A***,** 312 P.3d 926

(OK 2013), the Supreme Court of Oklahoma took up a challenge to several projects concerning the "Master Lease Program" of the Oklahoma State Regents for Higher Education authorized by 70 O.S.2011 §§ 3206.6–3206.6b. This Act enables the Oklahoma State Regents for Higher Education to provide lease financing for colleges and universities which are part of the Oklahoma State System for Higher Education. The Oklahoma Development Finance Authority (ODFA) is the conduit issuer of the bonds and sought the approval of the bonds, the proceeds of which would be used to build various projects. The Oklahoma Supreme Court held that bonds issued by on behalf of the Regents by ODFA did not violate the balanced budget provisions of the state constitution because the Legislature had no authority to direct the ODFA's or the Regents' spending decisions so that those decisions were independent of the State. Because these bonds were payable only by the Regents, they could not become debts of the state as a matter of law. The Regents had the sole constitutional authority to disburse funds appropriated to them in a lump sum by the Legislature (i.e., once the Legislature appropriates to the Regents, the court will turn a blind eye to how the Regents apply the money). The Legislature cannot be forced to appropriate funds to repay the bonds because it has no authority to dictate such a specific expenditure to the Regents.

[3] Conduit Structure and Finance

NOTES AND QUESTIONS

Comparing contexts. Compare *Savage v. State* (discussed at the outside of this update, under "borrowing" and *Oklahoma Development Authority for Approval* (discussed just above) with *Burgos v. State* (discussed with regard to pensions)? What is missing in the *Burgos* facts which if it existed may have resulted in a different holding and insulated New Jersey from the claim that fixed pension payments were unconstitutional debt? What if the legislative appropriations in *Burgos* were to a conduit as in *Lonegan* rather than directly to the state pension fund?

Conduits can be abused if their primary purpose is to sidestep constitutional and statutory restraints to issuing state and local government debt. See Kenneth Bond, *Local Development Corporations in the Eye of the Comptroller*, NYSBA, 29:3 MUNICIPAL LAWYER (Fall 2015). When abuse occurs, the U.S. attorney and the SEC may not be far behind. In joint actions by the U.S. Attorney for the Southern District of New York and the SEC, a town supervisor and executive director of the conduit were arrested for securities fraud, with the government alleging that town funds were misappropriated (and then covered up) to pay debt service on conduit bonds issued to finance a minor league baseball stadium, a project voted down by the residents of the town. See *Ramapo Supervisor Arrested in Federal Fraud Case*, NEW YORK TIMES (April 14, 2016.)

Conduits can also impose fiscal liability on local governments by requiring them to provide monetary subsidies on projects that may not be economically feasible. The local government's attempt to limit such fiscal liability is difficult to enforce. In *Regional Convention and Sports Complex Authority v. City of St. Louis*, S.W.3d , 2016 WL 1319085 (MO App. 2016), taxpayers sought to intervene in defending a fiscal restraint ordinance adopted by the City Council requiring (i) preparing a fiscal note, (ii) holding a public hearing, and (iii) obtaining voter approval before the City paid subsidies to a conduit sports authority that issued bonds to finance a new football stadium – not an unreasonable position for city taxpayers who would be footing the bill for multi-million dollar professional sports personnel to enjoy playing ball in a new stadium. The

court would hear none of it. Instead, it held that an intervener's level of interest must be high and consist of a direct and immediate claim, not a mere, consequential, remote or conjectural possibility of being affected as a result of the action. Does it seem that the court upheld the interests of the political establishment over the burden of taxpayers, or is this reasoning persuasive? What if the St. Louis stadium operated at a loss and the city pays subsidies outside the annual budget? Would the SEC bring a securities fraud action claims against city officials as in the Ramapo, New York minor league baseball stadium matter? Would the City's fiscal restraint ordinance (declared unconstitutional by the court in prior litigation) serve as a defense?

G ECONOMIC DEVELOPMENT

[3] Tax Increment Financing

Tax increment financing come about after a lot of public input and negotiation, leading to complex and often unclear understanding of the terms of the documents. The following two cases illustrate the point. See also S. Peterson, *Tax Increment Financing: Tweaking TIF for the 21st Century*, URBAN LAND MAGAZINE, (June 13, 2014).

In *Kohl's Illinois, Inc. v. Marion Cty. Bd. of Revision*, 20 N.E.3d 711 (OH 2014), property owners appealed a decision of the county board of revision that dismissed property owners' valuation complaint concerning real property tax assessments. The tax increment financing agreement ("TIF agreement") to which the real property was subject contained a "no-contest covenant" which purported to preclude the developer and property owners from contesting assessed valuations of *improvements* on the real property for real property tax purposes. On appeal, the Supreme Court of Ohio held that the TIF agreement's no-contest covenant did not impose jurisdictional limitation on the county board of revision to adjust real property valuations. Instead, County commissioners and the board of education had the burden of advancing the covenant as a defense and property owners were not required to establish that the covenant did not bar their complaint. The TIF agreement's section allowing property owners to contest certain taxes, assessments, and government charges did not contradict the covenant (which addressed only valuation for property-tax purposes of the value of improvements).

In *GAI Consultants, Inc. v. Homestead Borough*, 120 A.3d 417 (PA Comm. 2015), the Borough of Homestead appealed from the entry of judgment against it by the Court of Common Pleas. The primary basis of the appeal was Homestead's contention that the four-year statute of limitations for contract actions barred claims asserted by certain taxing jurisdictions to require the Redevelopment Authority of Allegheny County (Authority) to reimburse property tax refunds for pre–2010 tax years pursuant to a tax increment financing (TIF) agreement. The trial court concluded that the TIF agreement was a "continuing contract" and therefore the statute of limitations would not begin to run until the termination of the contractual relationship in 2018, thereby keeping open the period during which claims for tax refunds can be filed for the term of the TIF Agreement (plus four years under the statute of limitations). On appeal, Homestead asserted that section 13 of the TIF agreement did not impose an obligation on the taxing jurisdictions to demand reimbursement from the TIF Fund and that the Authority had the obligation under the contract to pay the refund to owners of real property subject to the TIF agreement. Homestead also claimed that every failure of the Authority to cause a refund to be

paid from the TIF fund when the right to a refund came due created an immediate injury to the taxpayer, and any taxing jurisdiction that paid the refund from its general fund adversely impaired its annual budget and would be impermissibly burdened by requiring it to make unforeseen adjustments to its budgeting and planning based upon lower than expected net TIF revenue distributions. Finally, Homestead argued that the statute of limitations began to run on the day a taxpayer became entitled to a property tax refund and any claim for reimbursement by a taxing jurisdiction more than four years after the determination by the Authority lowering an assessment was barred. The appeals court agreed with the trial court that the TIF agreement is a continuing contract and that Section 13 of the TIF agreement did not impose an obligation on the Authority to immediately pay refunds on tax assessment appeals or set a deadline for the taxing jurisdictions to make claims for reimbursement on refunds paid. The TIF agreement therefore met the test for a continuing contract, and the reimbursement claims were not barred by the statute of limitations.

[4] State Incentives for Economic Development

[a] Payments in Lieu of Taxes

In *AHF-Bay Fund, LLC v. City of Largo,* 169 So.3d 133 (FL App. 2015), a tax exempt 501(c)(3) organization (Developer) acquired property and planned to develop it into affordable housing for persons with low to moderate income pursuant to chapter 420, Florida Statutes. As set forth in section 196.1978, Florida Statutes (2000), affordable housing projects owned by a 501(c)(3) organization are exempt from ad valorem taxation. To finance the project, Developer entered into a "payment in lieu of taxes" (PILOT) agreement with the City wherein the City would issue tax-exempt bonds in exchange for the Developer agreeing to make annual payments to the City in an amount equal to the portion of ad valorem taxes to which the City would otherwise be entitled to receive if Developer were not a tax-exempt entity. The City issued the bonds and the Developer built the project. But the Developer failed to make the payments as required by the terms of the PILOT. As a result, the City sued, and the trial court entered summary judgment. Developer appealed the judgment in the City's favor. The District Court of Appeals reversed, holding that based on the statutory exemption from ad valorem taxation as set forth in section 196.1978, the City did not have authority to collect ad valorem taxes from the Developer via enforcement of the PILOT agreement. Moreover, the PILOT agreement violated public policy of promoting affordable housing for low to moderate income families and was therefore void. The court also stated that a PILOT agreement that requires a party to make payments that are the equivalent of ad valorem taxes that would otherwise be due but for a statutory tax exemption violates article VII, § 9(a) of the Florida Constitution, which permits municipalities to impose taxes only as authorized by law. The court concluded: "Finally, we recognize that PILOT agreements similar to the one in this case abound in municipalities throughout Florida. Thus, the magnitude of our opinion holding that these types of agreements violate Florida law may pose a significant hardship on municipalities that rely on such payments to meet their budget requirements." The Florida Supreme Court granted review, 2015 WL 8564747 (FL 2015).

It is paradoxical that IRS Rev. Bul. 2008-14, T.D. 9429 (11/24/08) requires PILOT payments to be directly related to the real property taxes that would have been levied (rather than an arbitrary amount equal to debt service on a bond issue in order for the interest on PILOT-backed bonds to

be tax-exempt), while the court in *AHF-Bay Fund, LLC* finds such approach violative of the state constitution when applied to tax-exempt properties.

A NOTE ON PUBLIC-PRIVATE PARTNERSHIPS

Publicly funded infrastructure projects have proved to be a reliable source of local job creation and economic advancement, providing many socially and economically disadvantaged residents with a pathway to join the middle class. Projects procured through public-private partnerships can provide these opportunities as well, according to a new report published by In the Public Interest and the Partnership for Working Families, entitled *Building American While Building Our Middle Class: Best Practices for P3 Infrastructure Projects* (March 2016) (https://www.inthepublicinterest.org/building-america-while-building-our-middle-class/) The report outlines best practices that can be incorporated into P3 agreements, such as the adoption of policies that set job quality and income thresholds, inclusive hiring, apprenticeship and other types of training opportunities and oversight of efforts to ensure fair employment practices. The report also recommends that P3 partners enter into community workforce agreements, potentially with labor unions, "that establish targeted hiring goals, training opportunities and jobs for communities of need." See also Kenneth Bond, *Developments in Public Finance Policy Shaping the Need for Counsel*, in NAVIGATING PUBLIC FINANCE TRENDS AND REGULATIONS, (Christopher Brewer et al. eds.) (Thompson Reuters, July, 2014), which discusses legal issues in structuring a P3 infrastructure finance project.

H FEDERAL LAW REGUATION OF PUBLIC FINANCE – TAX EXEMPTION

The 8th edition of this casebook for the first time introduced separate parts on federal tax law (Part H), federal securities law (Part I), and fiscal stress/municipal bankruptcy (Part J) in the public finance chapter, because those areas of law significantly affect public finance law. Since the publication of the 8th edition, the most significant changes in public finance law have occurred not in the development and interpretation of state law, but in the pervasive intrusion of extensive (and some might say excessive) federal regulation. The net effect of more restrictive rules on tax-exempt financing, penalties and fines levied against issuers and underwriters over administrative failures to file information with the federal government in the name of "protecting investors," and the cost and time spent on resolving fiscal imbalances in the federal bankruptcy courts have limited access to communities to the capital markets for needed infrastructure improvements and made that access very expensive and unnecessarily complex.

[2] Requirements for Tax-Exempt Financing

[a] State or Political Subdivision

On February 22, 2016 the Internal Revenue Service (IRS) issued proposed treasury regulations (REG-129067-15) revising the definition of "political subdivision" for the purpose of tax-exempt bonds (the "Proposed Regulations"). The Proposed Regulations are a codification of Technical Advice Memorandum (TAM-12760-12) beginning on p. 391 (the "TAM"). A public hearing on the proposed regulations was scheduled for June 6, 2016. The purpose of the proposed regulations

is to provide guidance as to how the IRS intends to prospectively define a "political subdivision" for purposes of allowing political subdivisions to issue tax-exempt bonds under Section 103 of the Internal Revenue Code of 1986, as amended (the "Code"). The Proposed Regulations will mainly impact special districts formed by developers to provide infrastructure for new development.

Section 103 of the Code provides that interest on certain bonds issued by states and political subdivisions will be exempt from federal income tax. Traditionally, provided that a governmental entity possessed one or more of these sovereign powers--(i) the power to tax, (ii) the power of eminent domain, or (iii) the police power--the governmental entity is deemed to be a political subdivision, eligible to issue tax-exempt bonds under Section 103 of the Code. In 2013, however, the IRS issued the TAM, challenging tradition that a governmental entity possessing one or more of the three sovereign powers alone was enough to ensure the entity was in fact a political subdivision eligible to issue tax-exempt bonds. The Proposed Regulations, codifying the TAM, provide a new three-part test for determining whether an entity qualifies as a political subdivision:

1. The entity must possess the right to exercise a substantial amount of at least one sovereign power (the "Sovereign Power Test");
2. The entity must serve a governmental purpose (the "Governmental Purpose Test"); and
3. A State or local government must exercise control over the entity (the "Control Test").

Unlike the Sovereign Power Test and the Governmental Purpose Test, the Control Test is a substantial deviation from the current regulatory regime.

The Proposed Regulations define "control," for purposes of the Control Test, as an ongoing right or power to direct significant actions of the entity and suggest the following significant rights or powers, on a discretionary and non-ministerial basis, will constitute control:

1. Right or power to elect a majority of the governing body of the entity.
2. Right or power to elect a majority of the governing body of the entity in periodic elections of reasonable frequency.
3. Right or power to approve or direct the significant uses of funds or assets of the entity in advance of that use.

The Proposed Regulations further provide that control, for purposes of the Control Test, may be vested in one or both of the following:

1. State or local governmental unit possessing a substantial amount of each of the sovereign powers and acting through its governing body or through its duly authorized elected or appointed officials in their official capacities; or
2. An electorate established under applicable state or local law of general application, provided the electorate is not a "private faction."

For this purpose, an electorate is a "private faction" if the outcome of the exercise of control is determined by the votes of an "unreasonably small" number of private persons. The proposed regulations provide that whether the number of private persons is unreasonably small will be determined based on all of the facts and circumstances, but also conclusively affirm that a private

faction will always exist if the combined votes of three voters with the largest shares of votes can determine the outcome. The proposed regulations provide a safe harbor whereby a private faction will not exist provided a combined vote of more than 10 voters with the largest shares of votes in the electorate can determine the outcome.

Public finance attorneys, represented by the National Association of Bond Lawyers, have called the Proposed Regulations arbitrary and offensive and an imposition on the powers of states and local governments reserved under the Ten Amendment, in effect using the Supremacy Clause to invalidate state and local government law. However, it appears that Treasury officials hold the view that the tax exemption of interest on municipal bonds is a "federal subsidy" and believe the federal government plays a role in determining how that subsidy is used. The jurists in *Pollack v. Farmers' Loan and Trust Company* (an 1895 opinion referenced at p. 390 of the casebook) must be rolling in their graves. See also L. Hume & E. Fallor, *Bond Lawyers Blast Proposed Political Subdivision Rules*, THE BOND BUYER (March 10, 2016).

QUESTIONS

Would the Proposed Regulations put an end to tax-exempt financing for economic development through IDBs where non-government persons control the entity which leases or uses the project? Could any P3 projects have a tax-exempt financing component where commercial lenders and institutional investors have ownership of the public facility? Where is the lawsuit under violation of the 10th Amendment to force rescission of the Proposed Regulations?

G FEDERAL REGULATION OF PUBLIC FINANCE – DISCLOSURE

[2] Securities Liability Under the "Anti-Fraud" Provisions

In the Matter of Westlands Water District, Release No.10053 / March 9, 2016, Release No. 3752 / March 9, 2016, Fed. Sec. L. Rep. P 81328 (C.C.H.), 2016 WL 2880073, involved alleged fraudulent accounting where the company, a Fresno-based regional irrigation water supplier, was penalized by the SEC for fraudulent accounting practices in connection with financial disclosures in official statements for bonds issued in 2010 and 2012. The issue revolved around "coverage," the percentage of net revenues after expenses to pay debt service on bonds. Here, the company covenanted to maintain 125% coverage. However, owing to the drought in California in recent years, it had less water to sell (the supply was regulated by the U.S. Department of the Interior, Bureau of Reclamation). So, to maintain the coverage of 125%, the company had to raise the price of water. That being politically impalatable, the company appropriated money from reserve funds and debt service funds dedicated to other bonds, all without telling the investors. Although bondholders did not lose money, the undisclosed shifting of funds to disguise a deficit cost investors when the company's credit rating was downgraded.

In *Cromeans v. Morgan Kegan & Co., Inc.*, 2016 WL 127593 (W.D. MO 2016), municipal bond purchasers brought a class action against the underwriter, alleging it made material misrepresentations and omissions in an offering statement. The underwriter filed a third-party complaint against the issuer (a local government), seeking indemnification and contribution to the

extent the underwriter might be liable to bond purchasers. The issuer moved to dismiss the third-party complaint based on sovereign immunity. The court held that the Missouri legislature had not expressly waive sovereign immunity for municipalities in enacting the Missouri Securities Act. Issuance of municipal bonds was a governmental, rather than proprietary, function so that the municipality was entitled to the sovereign immunity defense in the underwriter's action against the municipality for indemnity and contribution to the extent the underwriter might be liable based on alleged misrepresentations and omissions contained in offering statement. The court did not agree with the underwriter's argument that the municipality was not entitled to sovereign immunity because it engaged in for-profit, and therefore proprietary, functions in connection with the issue of the bonds. Although the only benefit that the municipality's residents might have received from the facility was some degree of economic stimulation, that alone still qualified as an essential governmental purpose.

[4] When Negligence Applies – The Intermediaries

Municipal advisors are intermediaries. Investment bankers of municipal bonds have for many years been subject to a prohibition against making political contributions to public officials from whom they wish to do bond underwriting business in Rule G-37 promulgated by the Municipal Securities Rulemaking Board (MSRB). In February 2016 the MSRB extended the prohibition of Rule G-37 covering pay-to-play practices to include municipal advisors. The new regulations extend the MSRB's well-established municipal securities dealer pay-to-play rule to municipal advisors, including those acting as third-party solicitors, beginning August 17, 2016. The MSRB's proposed amendments to its longstanding Rule G-37 on political contributions and prohibitions on the municipal securities business, were deemed approved on February 13, 2016 under provisions of the Securities Exchange Act of 1934, as amended. The MSRB expects that new regulations will curb, at a minimum, the appearance of *quid pro quo* corruption in the awarding of municipal advisory business and provide greater transparency regarding municipal advisors' political contributions. Consistent with the existing MSRB rule for dealers, the new regulations generally prohibit municipal advisors from engaging in municipal advisory business with municipal entities for two years if certain political contributions have been made to officials of those entities who can influence the award of business.

The establishment of pay-to-pay regulations for municipal advisors completes the core set of regulations the MSRB prioritized for development in 2013 as a result of its mandate from the Dodd-Frank Wall Street Reform and Consumer Protection Act. The act expanded the MSRB's mission to protect municipal entities and required it to establish regulations for municipal advisors. Municipal advisors are now subject to supervisory and compliance obligations (MSRB Rule G-44) and will be subject to new MSRB rule provisions on core standards of conduct (Rule G-42) and limitations on gift-giving (Rules G-20, G-37) that go into effect in 2016. In addition, the MSRB launched a pilot professional qualification exam for municipal advisors, in advance of putting a final exam in place. See: http://www.msrb.org/~/media/Files/Regulatory-Notices/Announcements/2016-06.ashx

[5] Expanding Role of the MSRB

The SEC, in carrying out its Municipal Continuing Disclosure Cooperation (MCDC) initiative, announced on June 18, 2015 that it entered into cease and desist orders and fined 36 municipal securities financial institutions with "securities fraud" alleging "between 2010 and 2014 the 36 firms violated federal securities laws by selling municipal bonds using offering documents that contained materially false statements or omissions about the bond issuers' compliance with continuing disclosure obligations." The next step in MCDC may be the SEC's taking similar action against issuers themselves. (See: link to the SEC announcement: www.sec.gov/news/pressrelease/2015-125.htm). The SEC's action completes its sweep of underwriters under the voluntary enforcement program and tees up the SEC's first round of issuer settlements. The SEC found that between 2011 and 2014, the underwriting firms sold municipal bonds using offering documents that contained materially false statements or omissions about the issuers' compliance with their continuing disclosure obligations. The SEC also found that the underwriting firms failed to conduct adequate due diligence to identify the misstatements and omissions before offering and selling the bonds to their customers. In all, 72 underwriters have been charged under the voluntary self-reporting program targeting material misstatements and omissions in municipal bond offering documents since the MCDC initiative was launched in March 2014.

J FISCAL STRESS, STATE OVERSIGHT AND BANKRUPTCY

[3] Municipal Bankruptcy

NOTES AND QUESTIONS

2. *Fiscal Stress as a National Issue.*

While the San Bernardino case moved to settlement of its plan of adjustment giving bondholders about 40 percent of their investment, and other Chapter 9 cases filed several years ago wind up, the focus on municipal bankruptcy has shifted to the Commonwealth of Puerto Rico.

Puerto Rico and its public authorities have over $70 billion of bonds outstanding and in jeopardy of default – Puerto Rico does not have the revenues to pay its debts. Were it a municipal corporation with consent of a state to file under Chapter 9, bankruptcy proceedings larger than the scale of Detroit would be likely. But Puerto Rico is not a municipal corporation (neither is it a state but a state may not file in bankruptcy under Chapter 9). To address the pending default on its public authority debt, the Puerto Rico legislature on June 25, 2014 enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (the "Recovery Act"). The Recovery Act would have, among other things, (i) eliminated remedies for certain secured creditors, including the right to appoint a receiver, (ii) permit debtors to use cash collateral or debtor in possession financing, and (iii) stay claims of pre-petition creditors, similar to the stay of creditor claims in Chapter 9.

However, in 2015 in *Franklin California Tax-Free Trust v. Commonwealth of Puerto Rico* 85 F.Supp.3d 577 (D.P.R., 2015), the federal district court held that the Recovery Act was expressly preempted by section 903 of the Bankruptcy Code and was therefore unconstitutional. According to the trial court, the legislative history of section 903 evidenced a clear intent to reserve the power to adjust municipal debts for the federal government. The trial court concluded that the Recovery Act stood as an obstacle to section 903's stated purpose to permit nonconsensual adjustments of municipal debt under a uniform federal law. The trial court also denied the Commonwealth's motion to dismiss the plaintiffs' claims under the Contract Clause and certain of the plaintiffs' claims under the Takings Clause. The trial court emphasized "Congress's decision not to permit Puerto Rico's municipalities to be Chapter 9 debtors…reflects its considered judgment to retain control over any restructuring of municipal debt in Puerto Rico. Congress, of course, has the power to treat Puerto Rico differently than it treats the fifty states." The Court of Appeals affirmed, 805 F.3d 322 (1st Cir. 2015). The United States Supreme Court granted review.

In June 2016, the United States Supreme Court held that Section 903(1) pre-empted Puerto Rico's Recovery Act. In an opinion by Justice Thomas, the Court held that Puerto Rico *was not* a "State" for purposes of the Bankruptcy Code's Section 109 "gateway" provision that controls who may be a debtor. It could therefore not authorize its municipalities to seek relief under Chapter 9. The Court further concluded that Puerto Rico *is* a State for other purposes under the Act, including Chapter 9's express preemption provision, and as a result the Puerto Rico Recovery Act was preempted. See *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016).

QUESTIONS

Given Puerto Rico's dilemma of ineligibility for Chapter 9 protection and the difficulty in crafting a fiscal stability solution directly with Congress, should Chapter 9 be amended to permit states to file for bankruptcy protection? The argument is made by P. Coy in *The Case for Allowing U.S. States to Declare Bankruptcy*, BLOOMBERG BUSINESSWEEK, January 21, 2016. The author points out that if states become mired in further financial trouble – i.e., the mounting pension and OPEB liabilities that GAAP standards and federal regulators increasingly require be disclosed to investors in detail – some kind of bankruptcy solution may be a better option than a "taxpayer bailout." What constitutional issues would be involved in permitting states to seek Chapter 9 protection? How would the Tenth Amendment or the Contract Clause be applied? If a taxpayer bailout is sought in lieu of bankruptcy protection, what would the bailout look like? If budget cuts were required, what services would be eliminated? Could the private sector intervene using P3 techniques to replace state and local government service providers more efficiently and economically? If the bailout is through new debt, how would the debt be authorized – by a vote of the people envisioned under traditional state constitutional restraints or by a public authority? If appropriation-backed debt of a public authority were authorized, would future legislatures have any motivation to continue making annual appropriations for debt service?

CHAPTER 5: SERVING THE PUBLIC SECTOR: OFFICERS AND EMPLOYEES

A THE CIVIL SERVICE SYSTEM, THE LEGAL LANDSCAPE, AND POLITICAL CONSIDERATIONS

Privatization and Its Implications

Although the pace of privatization seems to have slowed as the economy has stabilized, scholarly insights about privatization continue to evolve. Important recent analyses include the following: Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211 (2013) (arguing that contracts for services such as prisons and welfare administration tend to result in low quality services because due to limited competition costs of poor services are not internalized by the parties; and suggesting that such public-private contracts should be interpreted to include a mandatory obligation to act in furtherance of the public interest); Wendy Netter Epstein, *Public-Private Contracting and the Reciprocity Norm*, 64 AM. U. L. REV. 1 (2014) (drawing on literature relating to behavioral economics, contending that more open-ended contracts would lead to better service from private providers and urging reconsideration of typical public-private contract strategies that have tended to incorporate extremely detailed technical requirements). Privatization of prisons has continued to raise questions. See also Michael Anderson, *If You've Got the Money, I've Got the Time: The Benefits of Incentive Contracts with Private Prisons,* 34 BUFF. PUB. INT. L.J. 43 (2015-16) (arguing that governments should rethink contract structures for private prison services in order to experiment with cost-reimbursement contracts and outcome-based incentives); Dan Weiss, *Privatization and Its Discontents: The Troubling Record of Privatized Prison Health Care*, 86 U. COLO. L. REV. 725 (2015) (contending that when government contracts incorporate cost-cutting incentives such as those linked to fix-rate payments and cost-sharing, they discourage oversight and undercut provision of adequate emergency medical services for inmates).

[1] Nonpartisan Eligibility Requirements

FELIX v. NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES

NOTES AND QUESTIONS

2. c. *Residency requirements and job characteristics*. For an interesting recent case involving government licensees rather than employees, see *Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013) (upholding Missouri residency requirement applicable to licensees who wished to sell liquor at wholesale, based on the 21st Amendment, and a determination that the state legislature could have legitimately believed that wholesales governed predominantly by Missouri residents would be more apt to be socially responsible and promote temperance).

[2] Patronage and Political Activity

BRANTI v. ELROD

NOTES AND QUESTIONS

4. *Positions subject to patronage dismissals.* In a recent case, the Eleventh Circuit ruled that the office of deputy sheriff in Georgia was subject could be filled on a patronage basis, notwithstanding its treatment as a city civil service position, where the deputy served as the agent of the sheriff. See *Ezell v. Wynn,* 802 F.3d 1217 (11th Cir. 2015).

A NOTE ON GOVERNMENT EMPLOYEE SPEECH AND ACTIVITIES

Scholars continue to do important work in exploring the intellectual frameworks that govern government employee speech and activities. See, e.g., Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601 (2016) (challenging the assumption that public and private employment are analogous, particularly since government employers with obligations to achieve publicly defined purposes do not have the kind of wide discretion allowed private employers, are not subject to the same market pressures applicable in the private section, and need their employees to observe improper government conduct and serve as whistleblowers for the public good).

As this exceedingly strange presidential election year proceeds apace, new First Amendment questions are likely to be posed. See, e.g., Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41 (2016) (reviewing state laws that prohibit knowingly false campaign speech on material facts where there is a showing of actual malice and recent standards that require such speech to have demonstrable harm; urging further Supreme Court review of the law relating to false campaign speech and suggesting an approach that parallels commercial speech doctrine as a means of addressing related concerns).

Exception: Public Employee Speech Pursuant to Official Duties

Garcetti and its Aftermath.

Academics have continued to criticize *Garcetti*, even as the Supreme Court has limited that decision's breadth. For a recent academic critique, see Jason Zenor, *This is Just Not Working for Us: Why After Ten Years on the Job It is Time to Fire Garcetti,* 19 RICH. J.L. & PUB. INT. 101 (2016) (reviewing lower court case law applying *Garcetti,* explaining that lower courts have extended that case to cover any speech that is a product of job duties even if the speech would serve the public interest, and arguing that *Garcetti* should be refocused with an emphasis on the public trust, rather than the employee-employer relationship). Other scholars have contended that speech by lawyers (as was the case in *Garcetti*) and other professionals should be given special consideration. See Renee Newman Knake, *Lawyer Speech in the Regulatory State*, 84 FORDHAM L. REV. 2099 (2016) (discussing lawyer speech); Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289 (2015) (discussing other professionals including physicians who have recently been directed to make disclosures about abortion and constrained in discussing gun violence); Erika Schutzman*, We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019 (2015) (reviewing conflicting court of appeals decisions).

The Supreme Court has also begun to limit *Garcetti* on an inch-by-inch basis. The casebook discusses one of these recent limitations as addressed in *Lane v. Franks* (protecting testimony by public employees under subpoena on First Amendment grounds). See also Lemay Diaz, *Truthful Testimony as the "Quintessential Example of Speech as a Citizen": Why Lane v. Franks Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565 (2016) (discussing *Lane*). More recently, in *Heffernan v. City of Peterson, New Jersey*, 136 S. Ct. 1412 (2016), the Supreme Court held that an employee was entitled to challenge an action by a public employer who had demoted the employee for engaging in protected public activity, even though the employer's actions were based on a mistaken believe about the employee's behavior.

B INTEGRITY IN GOVERNMENT SERVICE: CONFLICTS OF INTEREST

CITIZENS FOR DES MOINES, INC. v. PETERSEN

NOTES AND QUESTIONS

2. *Self-dealing involving contracts.* For a recent analysis of bribery and public corruption from the perspective of lawyers involved in white collar crime representation, see Steven Harrison, Erin Choi, Brian Ganjei, Heidi Schumann, *Public Corruption*, 52 AM. CRIM. L. REV. 1455 (2015).

3. Land use. For a recent review of ethics issues involving land use practice, see Patricia E. Salkin & Darren Stakey, *Further Developments in Land Use Ethics*, 47 URB. LAW. 739 (2015).

7. *Special issues: judges and ethical constraints*. For a recent case upholding state regulation of judicial candidates' speech during an election, see *Williams-Yulee v. Florida Bar*, 135 S. Ct 1656 (2015) (upholding Florida's ban on direct financial solicitation by judicial candidates in the face of First Amendment challenge); see also Michael Linton Wright, *Williams-Yulee v. Florida Bar: Judicial Elections, Impartiality, and the Threat to Free Speech*, 93 DENV. L. REV. 551 (2016) (discussing case).

A NOTE ON GOVERNMENT LAWYERS' ETHICAL RESPONSIBILITIES

Several recent articles provide useful insights into the roles of government attorneys. See, e.g., Craig Leen, *The Ethical and Effective Representation of Government Employees by Government Attorneys*, 45 STETSON L. REV. 397 (2016) (discussing representation of public employees); Elizabeth Chambliss & Dana Remus, *Nothing Could be Finer? The Role of Agency General Counsel in North and South Carolina*, 84 FORDHAM L. REV. 2039 (2016) (discussing the role of agency general counsel in the context of two nearby states); Margaret H. Lemos, *Privatizing Public Litigation,* 104 GEO. L.J. 515 (2016) (considering whether representation by public entities could be privatized and what benefits and burdens would result).

C SERVING IN THE SUNSHINE: PUBLIC RECORDS, OPEN MEETINGS, AND RELATED LEGAL AND ETHICAL OBLIGATIONS OF PUBLIC OFFICIALS AND EMPLOYEES

NEW YORK TIMES COMPANY v. CITY OF NEW YORK FIRE DEP'T

NOTES AND QUESTIONS

2. Exemptions: privacy. For a recent analysis of theoretical issues relating to sunshine laws and privacy, see Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125 (2015) (proposing a multi-factor test for sensitive information); Jennifer A. Brobst, *Reserve Sunshine in the Digital Wild Frontier: Protecting Individual Privacy Against Public Records Requests for Government Databases*, 42 N. KY. L. REV. 191 (2015) (considering public records requests for databases including private information).

3. Covered entities and covered records. There is growing interest in accessing records maintained by foundations associated with universities, although those entities are typically incorporated and distinct nonprofit entities. See Alexa Capeloto, *Private Status, Public Ties: University Foundations and Freedom of Information Laws*, 33 QUINNIPIAC L. REV. 339 (2015) (arguing for access to related records).

There continues to be an insatiable interest in accessing records that may contain titillating or scandalous information. See, e.g., *Shane v. Parish of Jefferson*, 2015 WL 8225830 (La., 2015) (allowing access to emails concerning political activity relating to economic development commission); *The Tennessean v. Metropolitan Government of Nashville*, 2016 WL 1084422 (Tenn. 2016) (denying media requests for access to records concerning alleged rape and university football players given that records were relevant to pending or contemplated criminal action); *Citizens Action Coalition of Indiana v. Koch*, 2016 WL 1572610 (IN, 2016) (in connection with request for access to legislator's correspondence with business organizations in connection with particular legislation, concluding that the public records statute applied to the General Assembly and its members, but finding that a determination whether particular correspondence was work-product was non-justiciable).

The federal FOIA legislation was amended in 2016. See https://www.congress.gov/bill/114th-congress/senate-bill/337 . Changes in the federal law may affect state law going forward.

A NOTE ON GOVERNMENT LAWYERS' ETHICAL RESPONSIBILITIES

Important new insights about the role of government attorneys continue to be documented, not only as to local government attorneys but also as to state agency attorneys. See Elizabeth Chambliss & Dana Remus, *Nothing Could be Finer? The Role of Agency General Counsel in North and South Carolina,* 84 FORDHAM L. REV. 2039 (2016) (providing an in-depth comparative analysis of agency counseling functions). The roles of state attorney generals have also evolved. See Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229 (2015) (reviewing state attorney general amicus participation in cases before the U.S. Supreme Court, finding that before 2000 that there was relatively little partisanship in merits-stage briefs, but that after 2000, AG coalitions were decided more partisan, particularly among Republican AG's.)

D UNIONS, COLLECTIVE BARGAINING, AND STRIKES

Public employee unions have faced repeated challenges arising from the current anti-union and anti-public-employee political climate. Among these challenges have been those relating to whether public unions could continue to enjoy the right to have all represented public employees contribute union dues through payroll deduction, even if such employees are not union members. See *Friedrichs v. California Teachers Ass'n*, 2014 WL 10076847 (9th Cir. 2014), affirmed by an equally divided Court, 136 S.Ct. 1083 (2016). In this case, the district court had dismissed a suit by public school teachers who were not union members and who had argued based on the First Amendment that they should not have to pay agency fees. The Ninth Circuit had affirmed the trial court, and the U.S. Supreme Court, following Justice Scalia's death, affirmed the Ninth Circuit ruling by an equally divided Court. For discussions of this this important issue, see Jake Wasserman, *Gutting Public Sector Unions: Friedrichs v. California Teachers Association*, 11 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 229 (2016); Aaron Tang, *Public Sector Unions, The First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144 (2016); Cynthia Estlund, *Are Unions a Constitutional Anomaly*? 114 MICH. L. REV. 169 (2015).

CHAPTER 6: GOVERNMENT LIABILITY

A STATE LAW

[1] The General Demise of Municipal Tort Immunity

For a comprehensive review of the governmental-proprietary distinction, see Hugh D. Spitzer, *Realigning the Governmental-Proprietary Distinction in Municipal Law,* Seattle L. Rev. (2016), Available at SSRN: http://ssrn.com/abstract=2702198 or http://dx.doi.org/10.2139/ssrn.2702198 (providing a comprehensive overview of the contexts in which the governmental-propriety distinction has been applied, and arguing for a split between government sovereign powers and government services categories as part of this common analysis).

[3] Continued Immunity for Discretionary Activities

PEAVLER v. BOARD OF COMMISSIONERS OF MONROE COUNTY

NOTES AND QUESTIONS

5. Applying the discretionary function exception in other contexts. For a recent Georgia case considering the obligation of cities to provide medical care to prison inmates, see *City of Atlanta v. Mitcham,* 769 S.E.2d. 320 (GA, 2015) (in case brought by prisoner contending that prison's failure to address diabetes and insulin levels had resulted in permanent injuries, concluding that state tort law claims was not cognizable given governmental immunity).

KOLBE v. STATE

NOTES AND QUESTIONS

2. Special duty. See *Repko v. County of Georgetown*, 416 S.C. 22 (S.C. App. 2016) (in negligence case brought by landowner, challenging decisions by county to reduce financial guarantees posted by developer who had left infrastructure incomplete, concluding that landowner's claims fell within special duty exception, and remanding for determination whether county was grossly negligent).

5. Rejecting the public duty rule. In an important decision, the Illinois Supreme Court abolished the public duty rule in that state. See *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952 (Ill. 2016). The case involved a wrongful death action by a decedent's estate against the county, fire protection district, ambulance crew and 911 operator. The case tracked the history of governmental immunity in Illinois. The Illinois Supreme Court's majority concluded that it should abandon the public duty rule and special duty exception for three reasons: "(1) the jurisprudence has been muddled and inconsistent in the recognition and application of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete." Two justices concurred and three dissented.

B SECTION 1983 OF THE FEDERAL CIVIL RIGHTS ACT

COLLINS v. CITY OF HARKER HEIGHTS

NOTES AND QUESTIONS

3. *The private actor problem.* For a recent discussion of the "private actor" problem in the context of private university police acting on campus property, see Leigh J. Jahnig, *Under School Colors: Private University Police as State Actors Under § 1983,* 110 NW. U. L. REV. 249 (2015) (discussing the extent to which private university police should be treated as state actors).

CHAPTER 7: FEDERALISM

A FRAMING THE DEBATE: THE MEANING OF "FEDERALISM" IN HISTORICAL AND PRESENT CONTEXT

Recent scholarship on Federalism in general. Scholarly debates about the nature and implications of federalism continue unabated. See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview,* 123 YALE L.J. 1889 (2014). In this article, Professor Gerken provided an overview of an important symposium on federalism, including thoughtful articles by other scholars. She argued that any account of federalism needs to incorporate the following considerations: (1) a tally of the ends served by devolution, (2) an inventory of the governance sites that matter, (3) an account of what gets the system up and running, (4) a description of how the national and local interact, and (5) "rules of engagement" to guide those interactions. She also began a fresh exploration of the assumptions underlying "federalist" and "nationalist" views and further explored "the new nationalism" in a subsequent article. See Heather Gerken, *Federalism and Nationalism: Time for a Détente?* 59 ST. LOUIS U. L.J. 997 (2015). In the latter article, Professor Gerkin distinguishes between those who believe in traditional federalism (emphasizing devolution and state-centered aims) and those who believe in traditional nationalism (emphasizing centralization and nationalist aims). She argues that the work of "new nationalists" has cast into question the assumption that decentralization favors state aims while centralization favors nationalist goals. She also contends that the "new nationalists imagine states and localities as sites for working out conflict and waging the fight over national values and national politics," *id*. at 1003, in effect upending traditional assumptions. Additional articles on federalism by noted scholars are included in symposia associated with the two Gerken articles in the respective law reviews.

Recent developments regarding "equal sovereignty." As noted in the discussion of recent developments affecting voting rights in Chapter 8 below, the United States Supreme Court has recently employed the notion of "equal sovereignty" (and the associated concept of state "dignity") to re-calibrate longstanding assumptions about federalism in certain contexts. See *Shelby County v. Holder*, 133 S.Ct. 2612, 2623 (2013) (striking down the coverage formula employed in establishing preclearance requirements applicable to a limited number of states under the federal Voting Rights Act). Many thoughtful observers questioned the basis for the core assertion that the Constitution contains "a fundamental principal of equal sovereignty among the States." See Leah M Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (exploring the "equal sovereignty" principle, explaining that concept's role with regard to the admissions of new states to the union, developing the related notion of "state dignity," concluding that *Shelby County's* to deploy this historic concept in the context of the Voting Rights Act "rests on highly questionable ideas related to state dignity"). Others have acknowledged that the majority in *Shelby County* did a relatively poor job in explaining the "equal sovereignty" concept and wrestling with its history, but after reviewing pertinent history conclude that a narrower understanding of the "equal sovereignty" principle is justified not as a guarantee of state equality in all respects but instead as recognizing the importance of states having an equal capacity for self-government). See Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L. J. 1087 (2016).

The effect of hyper-partisanship. Many observers have been concerned by the hyper-partisan deadlocks that have largely stymied congressional action and led to impasses between the Congress and the executive branch during President Obama's tenure. How have these dynamics affected the understandings and realities of federalism in the current era? For a thoughtful analysis claiming that the Obama Administration has in important ways relied upon the states to advance key policy objectives, and thus has had to be more responsive to state demands and more bipartisan in character, see Jessica Bulman-Pozen & Gillian E. Metzger, *The President and the States: Patterns of Contestation and Collaboration under Obama*, PUBLIUS: THE JOURNAL OF FEDERALISM, advance access, (first published online May 21, 2016), *doi:10.1093/publius/pjw008.* The authors consider examples such as the use of No Child Left Behind waivers, grants for infrastructure improvements, strategies for Medicaid expansion, incorporation of state law in environmental regulation relating to greenhouse gases, and responses to state legalization of marijuana use. They also pose questions for the future including whether more state differentiation in policy will result in the future (rather than national uniformity); whether the strong role of the White House and the States in driving such changing dynamics will affect separation of powers at the national level; and the future holds more compromise or more political partisanship. See also Jessica Bulman-Pozen, Executive Federalism Comes to America, 102 Va. L. Rev. 953 (2016) (including expanded discussion of similar topics and possible future outcomes).

PROBLEM 7-1: E-CIGARETTES

The e-cigarette problem included in the 8th edition remains a timely one. In May 10, 2016 the federal Food and Drug Administration issued its final rule *Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, VIII. Regulation of Electronic Nicotine Delivery Systems (Including e-Cigarettes) and the Continuum of Nicotine-Delivering Products,* 81 Fed. Reg. 28973 (May 10, 2016) (amendment 21 C.F.R. Parts 1100, 1140, and 1143). The FDA "deemed" e-cigarettes, "vapes" and other electronic nicotine delivery systems (and their parts and components, other than accessories) to be "tobacco products" falling under its jurisdiction. For statistics showing the increasing use of e-cigarettes by young people, see http://www.fda.gov/TobaccoProducts/Labeling/ProductsIngredientsComponents/ucm456610.htm

For a recent discussion of New York City's regulation of e-cigarettes, see Sarah L. Hernandez, *Let's Clear the Air: Regulating Electronic Cigarette Use in New York City*, 81 BROOK. L. REV. 301 (2015) (also discussing state level regulation). For a discussion of the inter-relationship between the Tobacco Master Settlement Agreement and e-cigarettes, see Chad M. Zimlich, *What is a Cigarette? Electronic Cigarettes and the Tobacco Master Settlement Agreement*, 50 WAKE FOREST L. REV. 483 (2015). Developments relating to tobacco regulation that are also relevant to e-cigarettes are discussed in connection with a Note in the subsequent section of this Chapter on regulatory federalism.

B REGULATORY FEDERALISM

[1] Federal Preemption

LORILLARD TOBACCO COMPANY v. REILLY

NOTES AND QUESTIONS

1. Preemptive power of federal agencies: general principles and their application

a. *Assisted suicide and marijuana*. As more states have adopted plans to allow marijuana use not only for medicinal but also for recreational purposes, a thought-provoking puzzle has arisen. Is the current practice in which the federal government continues to treat marijuana as a controlled substance, while states increasingly legalize its use an anomaly in the federalism landscape, or is it a détente between federal and state authorities that might be brought to bear in other contexts in the future? See, Dean M. Nickles, *Federalism and State Marijuana Legislation*, 91 NOTRE DAME L. REV. 1253 (2016) (surveying text of state legislation, suggesting that some of the specific texts are designed to address federalism concern, and contending that regulation of marijuana may be a unique case).

b. *Lending*. For a recent discussion of preemption and Dodd-Frank, see Dori K. Bailey, *Preemption Principles: Weighing the Impact of Dodd-Frank*, 34 No. 7 BANKING & FIN. SERVICES POL'Y REP. 1 (2015) (discussing nuances of preemption as applied to banks).

c. *Medical devices.* For a thoughtful prediction of future preemption issues under the Medical Device Amendments of 1976, see George Horvath, *Recovery and Preemption: The Collision of the Medicare Secondary Payer Act and the Medical Device Amendments*, 103 CAL. L. REV. 1353 (2015) (observing that subsequent legislative amendments to Medicare, the Medicare Secondary Payer Act, granted federal authorities the right to seek recovery from manufacturers of defective medical devices that had been paid for through Medicare, including rights arising from state tort claims; but contending that federal preemption doctrine is likely to preempt Medicare recipients state tort claims).

d. *Drugs*. For a recent discussion of preemption and regulation by the Food and Drug Administration, see Catherine M. Sharkey, *States v. FDA,* 83 GEO. WASH. L. REV. 1609 (2015) (discussing lower court cases involving a Massachusetts ban on an FDA-approved opioid analgesic drug and a Vermont law mandating labeling of genetically-engineered food; asking whether federal regulators or courts are best situated to determine whether states regulating food and drug safety intrude inappropriately into federal agency jurisdiction; and proposing that courts reviewing implied obstacle preemption challenges to state regulatory ventures should consider whether the federal agency regards state regulations as in conflict with national regulatory goals and whether the federal agency had established processes allowing states to explain how state regulations fit within the federal regulatory framework).

e. *Emerging issues: drones.* Drones (unmanned flying devices with multiple potential uses by police, reporters, farmers, commercial businesses, and hobbyists) have received increasing attention for both the benefits and risks that they may create. While the Federal Aviation Administration (FAA) has comprehensive authority as to aircraft safety, airports and many related matters, their regulatory authority as to "model airplanes" has historically been limited. States and

localities have asserted significant interests relating to protecting privacy, assuring proper police practices, and preserving peace and quiet and in some locales may want to impose more stringent requirements. The FAA has recently issued a directive requiring drone operators to register with the agency. For useful background on this interesting question, see Nate Vogel, *Drones at Home: The Debate Over Unmanned Aircraft in State Legislatures*, 8 ALB. GOV'T L. REV. 204 (2015) (discussing state legislation); Gregory S. McNeal, *Drones and the Future of Aerial Surveillance*, 84 GEO. WASH. L. REV. 354 (2016) (discussing FAA regulation and privacy issues); Timothy T. Takahasi, The Rise of the Drones—The Need for Comprehensive Federal Regulation of Robot Aircraft, 8 ALB. GOV'T L. REV. 63 (2015) (arguing that comprehensive federal regulation in the area is needed).

f. *Emerging issues: quarantines*. Another emerging preemption issue concerns quarantines and isolation orders in connection with dread diseases that may emerge in the tropics but be transported by travelers or other disease vectors onto American soil. The memory of the Ebola epidemic in 2014 may well remain in student memories, including the differing views and actions of the Centers for Disease Control and some state governors in dealing with medical personnel returning from aiding those suffering abroad. The current risk from the Zika virus (that has been shown to cause brain defects in utero and Guillame-Barre syndrome among other ailments) is likewise on the minds of many. Often public health decisions regarding quarantines and insolation requirements are made at the state level, taking into account advice from federal experts. Could federal authorities impose more stringent requirements on states and localities, and if so, under what conditions? See Katye M. Jobe, *The Constitutionality of Quarantine and Isolation Orders in an Ebola Epidemic and Beyond,* 51 WAKE FOREST L. REV. 165 (2016) (discussing developments during the Ebola epidemic and considering the extent to which Congress could intervene more forcefully under its taxing, spending, or commerce clause powers); Eang L. Ngov, *Under Containment: Preempting State Ebola Quarantine Regulations*, 88 TEMP. L. REV. 1 (2015) (discussing various types of federal preemption and related implications).

A NOTE ON NEXT STEPS IN TOBACCO REGULATION

The 8th edition of the casebook reported on a number of important developments affecting tobacco regulation, including revised preemption provisions. This Chapter's introductory problem concerns e-cigarettes, which reflects a new generation of the "tobacco wars." The recently released regulations governing tobacco products (including but not limited to e-cigarettes) are cited there.

Implications of 2009 legislation. For a recent case interpreting the revised preemption provisions under the 2009 legislation, see *Independents Gas & Service Stations Ass'n, Inc v. City of Chicago*, 112 F.Supp.3d 749 (N.D. Ill. 2015) (upholding city regulation banning sale of flavored tobacco products within 500 feet of schools, in the aftermath of changes in the preemption provisions of the federal statute discussed in *Lorillard*). For suggestions regarding roles that might be played by state and local governments in connection with menthol in tobacco products, see Michael Freiberg, *The Minty Taste of Death: State and Local Options to Regulate Menthol in Tobacco Products*, 64 CATH. U. L. REV. 949 (2015) (discussing options including those relating to prohibition or regulation of sales, tax and price policies, age of sale, disclosure and marketing restrictions).

Litigation in the aftermath of the new legislation. In the meantime, litigation has continued in connection with packaging requirements discussed in the text. *R.J. Reynolds Tobacco Co. v. Food*

and Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012), was overruled by an en banc decision in a subsequent non-tobacco case, *American Meat Institute v. United States Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (in case involving federal Department of Agriculture regulations requiring meat industry to include packaging information showing county-of-origin of products, holding that government interests in addition to correcting deception could be raised in support of directive to disclose purely factual information in commercial context, and that the government had sufficient interest to require disclosures of county-of-origin). For further discussion of related cases and nuances, see Note, *First Amendment—Compelled Commercial Disclosures—D.C. Circuit Limits Compelled Commercial Disclosures to Voluntary Advertising—National Ass'n of Manufacturers v. SEC, 800 F.3d 518 (D.C. Cir. 2015), reh'g en banc denied, No. 13-5252 (D.C. Cir. Nov. 9, 2015)*, 129 HARV. L. REV. 819 (2016).

In additional litigation, *United States v. Philip Morris*, 2016 WL 509279 (D.D.C. 2016), reported on the most recent turns in litigation by the United States against tobacco interests under the Racketeer Influenced and Corrupt Organizations Act (RICO). The trial judge held that the tobacco interests could be required to add additional corrective language to disclosures on cigarette packages as directed by the court, in light of showing that prior statements had been deliberately deceptive to the public. The tobacco companies have filed an added appeal. For an article discussing the extent to which speech can be compelled in commercial contexts, see Jonathan Adler, *Compelled Commercial Speech and the Consumer "Right to Know*," 58 ARIZ. L. REV. 421 (2016) (arguing that compelled disclosures about genetically-modified food likely would not withstand First Amendment scrutiny).

[2] Reserving Rights to the States: The Tenth Amendment

NEW YORK v. UNITED STATES

NOTES AND QUESTIONS

1. Commandeering

c. Handguns. For a recent case concluding that the federal Protection of Lawful Commerce in Arms Act (PLCAA) preempted state negligence claims, did not violate the Tenth Amendment, and did not violate due process requirements, see *Delana v. CED Sales, Inc.,* 2016 WL 1357209 (Mo. 2016) (en banc) (concluding that wife of decedent who was shot by his mentally ill daughter could not bring action against gun sellers for negligence or negligent entrustment).

e. Gambling on sports. For discussion of National Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3rd Cir. 2013), see Joshua M. Peles, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act,* 22 Jeffrey S. Moorad Sports L.J. 149 (2015) (arguing that the Tenth Amendment's anti-comandeering principle should have provided grounds to find the federal PASPA statute unconstitutional); Justin Willis McKithen, *Playing Favorites: Congress's Denial of Equal Sovereignty to the States in the Professional and Amateur Sports Protection Act*, 49 GA. L. REV. 539 (2015) (contending that the equal sovereignty principle that gained recent prominence in the

Shelby County v. Holder, discussed at the outset of this chapter, could provide an alternative basis for striking down PASPA because of provisions grandfathering Delaware, Montana, Nevada, and Oregon and allowing them to operate legalized sports betting).

f. *Emerging issues: homeland security and immigration.* Two emerging issues are likely to raise Tenth Amendment issues in the future. First, a number of states have questioned Presidential proposals to resettle Middle Eastern refugees in the United States, while localities elsewhere have in some instances insisted on maintaining their status as "sanctuary cities" whose police are discouraged from assisting federal authorities in crackdowns on undocumented immigrants. For discussion of homeland security and the implications of the anti-commandeering principle, see Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313 (2015).

g. *Emerging issues: municipal bankruptcy.* As discussed in Chapter 4 of this update, municipal bankruptcy has continued to command attention in the aftermath of ground-breaking developments involving Detroit, Michigan. Section 904 of the federal Bankruptcy Act states that "Notwithstanding any power of the court, *unless the debtor consents or the plan so provides*, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with-- *(1) any of the political or governmental powers of the debtor;* (2) any of the property or revenues of the debtor; or (3) the debtor's use or enjoyment of any income-producing property" (emphasis added). For a thoughtful account of the Detroit bankruptcy proceedings and reflections on related questions of federalism, see Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55 (2016).

2. Coercion

c. Requirements under the "REAL ID" Act of 2005. For a recent discussion of hardships created by the REAL ID Act for those residing in Massachusetts, see Jacqueline A. Miller, *Constitutional Law—The REAL ID Act: Violating Massachusetts Residents' Right to Travel and the Tenth Amendment*, 38 W. NEW ENG. L. REV. 127 (2016).

4. Politics and voting. As noted at the beginning of this Chapter of the update letter, an important Voting Rights Cct decision, *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612, was decided by the United States Supreme Court in 2013. The decision struck down the formula used in determining which localities were subject to preclearance requirements. As previously noted, the decision, authored by Chief Justice Roberts, relied on federalism analysis including the recently resurrected "equal sovereignty" doctrine.

5. Standing. For recent analysis of the *Bond* decision, see Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85 (2014) (criticizing *Bond*). For a broader discussion of when states can sue the federal government, see Tara Leigh Grove, *When Can a State Sue the United States?* 101 CORNELL L. REV. 851 (2016) (arguing that states should have broad standing to sue the federal government to protect state law, but not to oversee federal agencies' implementation of federal law).

B FISCAL FEDERALISM

[2] Conditional Spending

SOUTH DAKOTA v. DOLE

NOTES AND QUESTIONS

2. Clear statement. For a comprehensive analysis of "consent procedures" employed in federal spending grants to the states, see Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561 (2015) (discussing the myriad forms of consent protocols, their influence on state decisions whether to join federal programs, and their implications for the future as Congress relies increasing on federal-state cooperation to achieve its objectives and use of such procedures increasingly

3. *Independent constitutional bar.* For an interesting analysis of possible "coercion" and independent unconstitutional condition claim, see E.H. Morreim, *EMTALA: Medicare's Unconstitutional Condition on Hospitals*, 43 HASTINGS CONST. L.Q. 61 (2015) (discussing the implications of the Emergency Medical Treatment and Active Labor Act of 1986, its requirements that every hospital with Medicare contracts and an emergency department must screen and stabilize anyone with a potential emergency condition who arrives there and is unable to pay, and argues that the legislation gives rise to a taking and violates the bar against unconstitutional conditions).

4. Spending Clause, health care, and "coercion." In a second decision from 2015, the Supreme Court again interpreted the Affordable Care Act, this time in order to determine whether federal tax credits were available to those who purchase health insurance on the federal exchange. See *King v. Burwell*, 135 S.Ct. 2480 (2015) (in decision by Chief Justice Roberts, upholding this use of federal tax credits in the face of challenges based on statutory interpretation). For discussion of *King,* see Mila Sohoni, *The Problem with "Coercion Aversion": Novel Questions and the Avoidance Canon*, 32 Yale J. on Reg. Online 1 (2015).

Scholarship on *NFIB v. Sebelius* continues to pursue related questions. See, e.g., Brian Galle*, Does Federal Spending "Coerce" States? Evidence from State Budgets*, 108 NW. U. L. REV. 989 (2014) (empirical study demonstrating that increases in federal revenue are related to statistically significant increases in state revenues); Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off,* 124 YALE L. J. 248 (2014) (critiquing and rejecting arguments against funding cut-offs; arguing that more frequent threats to cut off federal funds would provide a useful motivation for non-compliance grantees, and suggesting further research); Ravika Rameshwar, *NFIB's New Spending Clause: Congress' Limited Authority to Prevent Campus Sexual Assault under Title IX,* 70 U. MIAMI L. REV. 390 (2015) (arguing that *NFIB* has likely limited the extent to which Congress could expand Title IX to address sexual assault on campuses more effectively, but that creating some sort of separate, less extensive program might facilitate such action).

CHAPTER 8: THE STATE LEGISLATURE

A SPECIAL LEGISLATION

A recent analysis of both state and federal law provides an unusually helpful framework for considering the rationale behind prohibitions on special legislation. See Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014). Professor Zoldan contrasts federal law (which does not include a prohibition on "special legislation") and compares it to state law (where many state constitutions contain prohibitions on special legislation or requirements for uniformity in legislation). He reviews history, text and philosophical considerations in order to make the claim that a principle of legislative generality should be accorded constitutional significance. He offers a taxonomy of special legislation including civil benefit special legislation, civil detriment special legislation, criminal benefit special legislation, and criminal detriment special legislation, and contends that there is little coherence across these categories. After tracing the history of related concepts, he argues that a principal of legislative generality should be embraced, along with necessary modifications to special legislation doctrine. Is it helpful to focus on the benefits of generality as a way of understanding prohibitions on special legislation?

For other commentary on special legislation, see Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012); Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2013-14)

ANDERSON v. BOARD OF COMMISSIONERS OF CLOUD COUNTY

NOTES AND QUESTIONS

2. Closed classes. For a recent case illustrating the issues with closed versus open classes, see *Gallardo v. State*, 336 P.3d 717 (AZ 2014) (upholding statute according counties of at least 3 million population to add two additional members to community college board for a total of seven members with four year terms, in contrast to others accorded a total of five members with six year terms; concluding that statute met standards of rationality, inclusivity and elasticity, since statute could have application beyond Maricopa County in the future). *See also Corman v. National Collegiate Athletic Ass'n*, 93 A.3d 1 (2014) (class created by endowment protocol in Pennsylvania in aftermath of Penn State sexual abuse scandal did not violate special legislation standard).

6. *Special legislation enacted by municipalities*. For a recent case involving special legislation and municipal regulation, see *Dowd Grain Company, Inc. v. County of Sarpy*, 867 N.W.2d 599 (Neb. 2015) (upholding overlay district with designated rights for grandfathered plats).

7. Emerging issues: categorical distinctions. A recent decision by the Supreme Court of Nebraska distinguished between different categories of regulation, allowing an exemption from smoking ban for hotel guestrooms, but under special legislation standards prohibiting exemptions for tobacco retail outlets and cigar bars. See *Big John's Billiards, Inc. v. Nebraska,* 852 N.W. 3d 727 (NE 2014).

IN RE BELMONT FIRE PROTECTION DISTRICT

NOTES AND QUESTIONS

1. Finding a justification. Not only cities, but rural areas, can be singled out in ways that give rise to special legislation challenges. For a recent case of this sort, see *State v. Buncich*, N.E. 3d , 2016 Ind. LEXIS 209 (IN 2016). *Buncich* involved the state legislature's establishment of a "small precincts" committee in Lake County, with the directive to identify "small precincts" of 500 or fewer voters and determine whether they could be consolidated. Lake County had approximately 15% of all "small precincts" in the state, and 130 of its 525 precincts qualified as small, more than double that of any other county. The next highest numbers were in Allen Count (57 small precincts out of 338) and Marion County (19 small precincts out of 600). The bipartisan committee identified 76 Lake County precincts amenable to consolidation, and concluded that consolidation could save $43,000 per election. The legislation (that focused only on Lake County) was challenged by Democratic precinct committee chairpersons as "special legislation" since in 27 other counties "small precincts" constituted a third or more of all precincts. The Indiana Supreme Court found that although the legislation was "special" but that it was nevertheless permissible since the "relevant traits of the affected area are distinctive such that the law's application elsewhere has no effect," and that the "inherent characteristics of the affected locale justify local legislation."

B DELEGATION OF POWER

[1] Delegation to Administrative Agencies and Officials

STOFFER v. MOTOR VEHICLE CASUALTY CO.

DEPARTMENT OF BUSINESS REGULATION v. NATIONAL MANUFACTURED HOUSING FEDERATION, INC.

NOTES AND QUESTIONS

3. Public health concerns and separation of powers principles. A recent Indiana case considered whether under the "distribution of powers" clause of the Indiana Constitution, the legislature could delegate to the state Pharmacy Board the authority to adopt rules declaring certain compounds to be "synthetic drugs," thereby giving rise to criminal liability for possession and distribution of such compounds. See *Tiplick v. State*, 43 N.E.3d 1259 (IN 2015). The court explained that establishment of criminal law was an inherently legislative function, the legislature "can make a law delegating power to an agency to determine the existence of some fact or situation upon which the law is intended to operate," as it had done in giving the Pharmacy Board the authority it relied upon here.

5. Adoption of guides promulgated by private entities. For a recent twist on this question, see *Protz. V. Workers' Compensation Appeal Board (Derry Area School District),* 124 A.3d. 406 (Pa. Comm. 2015) (invalidating provision of Workers' Compensation Act relating to medical examinations and impairment ratings that allowed initial ratings to be determined by independent state-licensed, board-certified, clinically-active physicians, where such physicians would apply the most recent impairment standard set by a guide developed by the American Medical Association

rather than the guide in effect at the time of the legislation, and where such physicians might have a self-interest in their decisions, unlike a governmental agency that would have no such interest. The state supreme court has granted review.

MILLER v. COVINGTON DEVELOPMENT AUTHORITY

NOTES AND QUESTIONS

1. Delegation of policy-making functions. A recent Pennsylvania case considers the risks that can arise when broad policy-making discretion is afforded. See *West Philadelphia Achievement Charter Elementary School v. School District of Philadelphia*, 132 A.3d 957 (PA 2016). The Pennsylvania legislature had adopted a "distress law" that provided for the Secretary of Education to appoint a "school reform commission" (SRC) with very extensive powers to oversee a financially distressed school district, including the power to suspend state Board of Education regulations and provisions of the School Law, and to suspend or revoke the charters of charter schools. When the SRC for the Philadelphia school district sought to impose conditions on some charter schools, implement its own charter school policy, and limit some rights of charter schools, one sued, claiming that the legislation violated the non-delegation rule because of the breadth of powers given the SRC, the lack of standards to guide its discretion, and the risk of arbitrariness.

[3] Delegation to Local Governments

STATE EX EL. CITY OF CHARLESTON v. COGHILL

NOTES AND QUESTIONS

1. Invalidating delegations to municipalities. For an interesting recent case involving local government, delegation to private parties, and special legislation, see City of Damascus v. Brown, 337 P.3d 1019 (Or. App. 2014). The City of Damascus was incorporated in 2004 and was required to have adopted a comprehensive plan and zoning regulations within four years. It did not. Subsequently, the legislature adopted narrow legislation allowing property owners within its jurisdiction to withdraw from the city. The court concluded that this special legislation had delegated legislative power to private parties and thus invalidated the provisions.

CHAPTER 9: THE ROLE OF THE JUDICIARY

A. IN ORDINARY STATE AND LOCAL GOVERNMENT ISSUES: OCCUPATIONAL AND PROFESSIONAL LICENSING

[1] Licensing Under State Law

Tour guides and the First Amendment. An interesting recent development concerns challenges to licensing standards involving tour guides in Washington, D.C. and New Orleans, Louisiana. *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), concerned a District of Columbia ordinance that required those seeking to serve as paid tour guides to past a written examination covering knowledge of history and buildings in the District and pay a $200 registration fee. *Kagan v. City of New Orleans, La*., 753 F.3d 560 (5th Cir. 2014) involved a constitutional challenge to similar testing requirements as well as a drug testing requirement and a requirement not to have been convicted of a felony in the past two years applicable to tour guides in New Orleans. The cases reached opposite conclusions. The Court of Appeals for the District of Columbia Circuit applied an intermediate level of scrutiny to strike down the licensing requirement as unjustified by the District's interest in protecting its tourism industry and assuring visitors that guides had a minimum level of competence, asserting that the general test did not particularly advance government objectives when applied to specialty tour guides and claiming that the market for tour guides would take care of itself. The Fifth Circuit regarded the regulations as unrelated to any content-based viewpoint and thus supportable under the City's rationales of informing and protecting visitors. For discussion of these decisions, see Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015) (critiquing the *Edwards* decision and similar developments in which the First Amendment is being used to attack commercial regulation as potentially ushering in a return to the pre-*Lochner* era); Julianna M Deyo, *A Tale of Two Cities: The Constitutionality of Tour Guide Licensing Requirements*, 90 TUL. L. REV. 671 (2016) (discussing both decisions and contending that testing requirement was unwarranted given other alternatives such as self-regulation within the tourism industry or certification as opposed to licensing options).

Federal role in licensing? The Obama White House and Treasury Department issued an important study on occupational licensing in July 2015. See *Occupational Licensing: A Framework for Policymakers*, available at https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf. (discussing justifications and trends in licensing, developments such as telework in the evolving marketplace, reform strategies, best practices, and relevant research that showed uncertain relationships of licensing to occupational performance but higher costs often associated with licensing requirements).

WATCHMAKING EXAMINING BOARD v. HUSSAR

STATE EX REL. WHETSEL v. WOOD

NOTES AND QUESTIONS

1. Rationales and analysis. For a recent discussion of permissible and impermissible rationales for occupational licensing by a conservative scholar, see Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J. L. & PUB. POL'Y 209 (2016). Larkin argues that occupational licensing regimes could be struck down if shown to involve political corruption or as bribery and extortion (illegitimate state interests under equal protection analysis), or as illegal delegation to private interests for purposes of the due process clause.

2. Rational relationship test. Although most state courts have continued to apply rational basis review, at least Texas courts have begun to apply a higher standard of scrutiny. See *Patel v. Texas Department of Licensing and Regulation*, 469 S.W. 3d 69 (Tex. 2015). *Patel* involved a challenge by practitioners of "eyebrow threading" (use of cotton thread to shape eyebrows) against requirements that they be licensed as cosmetologists or estheticians in order to pursue their preferred line of work. The Texas Supreme Court first reviewed three different formulations of the relevant standard of review under the Texas Constitution's due process clause (requiring no denial of property or liberty but for "due course of the law of the land"). The threaders asserted that three distinct standards had emerged under the courts' interpretation of the Texas Constitution. The first ("real and substantial") required that the legislature have a proper purpose for a particular statute, that there be a real and substantial connection between that purpose and the language of the statute as applied in practice, and that the statute works an excessive or undue burden on the person challenging the relation of the statute to its purposed purpose. *Id*. at 80-81. The second approach ("rational basis including consideration of evidence") was similar to the federal due process standard, *id*. at 81-82. The third approach ("no evidence rational basis") would not require review of evidence but only conceivable justification for the government regulation (not necessarily demonstrably relied upon or proven by evidence) and whether the action was arbitrary. *Id* at 82. In the 5-3 decision, the Court concluded that the first standard was the one that should apply, and determined that the training required for cosmeticians and estheticians was more comprehensive and costly than needed for threaders to safely perform the functions they sought to deliver. For more detailed discussion of the case, see Kevin C. Smith, *Unspooling the Furrowed Brown: How Eyebrow Threaders Will Protect Economic Freedom in Texas*, 48 TEX. TECH L. REV. ONLINE EDITION 71 (2016).

For recent commentary on the possible rationales in support of different levels of scrutiny and an argument for adoption of intermediate scrutiny as a preferred standard, see Alexandra L. Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411 (2016)

A NOTE ON LICENSING BOARDS AND ADMINISTRATION

A NOTE ON LEGISLATION TO REFORM LICENSING

For a recent Bureau of Labor Statistics research report on state efforts to reform licensing laws, see Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, MONTHLY LABOR REVIEW, May 2015, available at http://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-

states.htm (discussing recent reform efforts relating to barbers, private investigators, naturopaths and others and concluding that most such efforts founded because of lobbying by associations of licensed professionals and the high cost of sunset reviews by state agencies). Notably, the report indicates that watchmakers were de-licensed in Minnesota in 1983 after the number of watchmakers in the state fell below 100, and in Wisconsin in 1979 when the board charged with their licensure was abolished).

In April 2016, Tennessee adopted legislation calling for a wholesale review of occupational licensing and opportunities to challenge associated "entry regulations" on grounds that they are "not demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives; or that the entry regulations are necessary but can be effectively served by regulations less burdensome to economic opportunity." Tenn. Public Chapter 1053, available at http://share.tn.gov/sos/acts/109/pub/pc1053.pdf (April 2016).

[2] Licensing and Federal Antitrust Law

The opening problem was based on a pending Supreme Court case involving teeth-whitening. The United States Supreme Court struck down the North Carolina dental board's actions in issuing cease and desist orders to non-dentists offering teeth whitening services *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015). The North Carolina Dental Board was constituted as described in Problem 9-2. It was shown to have acted against the non-dentists based upon complaints from fellow dentists.

The Supreme Court, in a 6-3 decision by Justice Kennedy, provided significant guidance concerning the future application of the *Parker* state action immunity doctrine as to occupational licensing going forward, focusing on the operation of the *Midcal* case discussed in the casebook, and adding further depth to its analysis. *Midcal* had employed a two-prong test that allowed state immunity to apply to the actions of private parties only if there was a "clearly articulated and affirmatively expressed" judgment that favored anticompetitive activities as a matter of state policy, and if there was "active state supervision" of the private parties involved. The *Dental Board* decision put more teeth into the "active state supervision" requirement by rejecting the claim that mere designation of a regulatory board as a "state agency" was sufficient to meet the "active supervision" requirement for purposes of the federal antitrust laws (albeit that a regulatory board may be a state agency for other purposes). Instead, where a state has "delegated regulatory power" to "active market participants," there is too great a risk that anti-competitive motives will influence resulting policies and practices. To satisfy the "active supervision" requirement in instances where "market participants" play such an active role, it is essential that there be substantive (not just procedural) review of the regulatory board's decisions, the supervisor must have power to modify or veto such decisions, and the supervisor itself may not be an active market participant.

States have scrambled to review their regulatory board structures since the Dental Board decision and have considered a variety of responses. One particularly convincing approach to the decision was offered in an opinion by the California Attorney General. See 2015 Cal. AG LEXIS 2 (Sept. 10, 2015). That decision emphasized that all types regulatory board decisions are not necessarily equally affected by the Supreme Court decision. For example, decisions that place boundaries around certain types of occupational practice and thus shape competitive markets are more clearly within the *Dental Board* area of concern than those involving discipline of licensed practitioners (where court proceedings or other forms of appeal provide due process protections

and risks of anti-competitive behavior are not as high). The Federal Trade Commission has also offered guidance on its intended interpretation of the decision. See https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

In the meantime, there have been a number of legal challenges against licensing regulations brought on antitrust grounds. See, e.g., *Teladoc, Inc. v. Texas Medical Board*, 2015 WL 8773509 (W.D. Texas, 2015). This decision involved a challenge to Texas regulations requiring doctors to first undertake an in-person ("face-to-face") examination before providing other medical services such as prescribing drugs, and thus limiting the scope of "telemedicine." The challenger to the regulation wanted to allow licensed physicians in Texas and elsewhere to provide prescriptions after reviewing medical records and talking with the patient by phone, and based their challenge to the rules on antitrust grounds and commerce clause claims. The trial court held that the Medical Board had the burden of showing that it could sustain a claim of immunity based on the *Parker* doctrine. The Medical Board was largely composed of "market participants." While its actions could be reviewed by the state office of administrative hearings, in the courts, and by the state legislature through a "sunset" review, none of these forms of review satisfied the "active supervision" requirements.

In contrast, disciplinary action by a medical licensing board against a chiropractor for holding herself out as able to reverse diabetes and other conditions through diet counseling was found not to have an anticompetitive effect and was upheld. See Petrie v. Virginia Board of Medicine, 2016 WL 2851166 (4th Cir., 2016) (unpublished).

For an extensive review of occupational licensing and antitrust law affecting the health care professions prior to the *Dental Board* decision, see Roger D. Blair, & Christine Piette Durrance, *Licensing Health Care Professionals, State Action and Antitrust Policy*, 100 IOWA L. REV. 1943 (2015).

B IN MAJOR POLICY DECISIONS

[1] Reappointment and Voting Rights

[a] The One Person-One Vote Principle in Legislative Apportionment

Legislative apportionment. A number of recent articles have reviewed the history of the one person-one vote principal and offering interesting perspectives on older cases. See Guy-Uriel E. Charles, Luis Fuentes-Rohwer, *Reynolds Reconsidered*, 87 ALA. L. REV. 485 (2015) (discussing historical context for early decisions); Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J.L. & PUB. POL'Y 371 (2016) (using archival information to trace evolution of Supreme Court doctrine from sweeping propositions toward greater restraint); Frank Sachia, *Excising Federalism: The Consequences of Banker v. Carr Beyond the Electoral Arena*, 101 VA. L. Rev. 2263 (2015) (discussing political question doctrine and related issues).

Political gerrymandering.

As discussed in the casebook, the Supreme Court has held out the possibility that political gerrymandering might be subject to constitutional review in the right set of circumstances. Recent cases challenging what are alleged to be extremely partisan redistricting plans may push this

question once again toward the United States Supreme Court. Challengers in recent days have developed statistical methods of demonstrating the extreme and enduring extent of gerrymandering that often takes place away from the public eye. One recent model calculates the "efficiency gap" (that is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast). See *Whitford v. Nichol*, 2015 WL 9239016 (W.D. Wis. 2015) (describing Democratic voters' challenge to state legislative districts based in part on demonstration of significant efficiency gaps); *Whitford v. Nichol*, 2016 WL 1390040 (W.D. Wis. 2016) (concluding that there were factual issues as to whether high efficiency gap necessarily resulted in discriminatory effect, plaintiffs had burden of proving discriminatory intent at trial, but plaintiffs had carried their initial burden by showing that there were alternative neutral means by which redistricting could be accomplished without such high efficiency gaps). See also *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (FL. 2015) (upholding lower court finding that state legislature had been shown to have had partisan intent that shaped districts); 179 So.3d 258 (FL. 2015) (following remand, concluding that certain districts failed to meet statutory fairness requiring and upholding trial court decision on alternative to be used).

Concerned with the adverse effects of partisan gerrymandering in adding to political dysfunction, a growing number of commentators have developed theories about how such practices might be addressed. See, e.g, Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107 (2016) (arguing that political advantage is not a legitimate state interest); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and law: A Diagnostic Applied to Six Cases*, 14 ELECTION L. J. 312 (2015) (proposing a test that would compare a party's district median vote percentage to its district mean vote percentage and applying that standard to multiple cases). For a scathing critique of recent practices involving partisan gerrymandering, see David Daley, RATF**DED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY (2016) (the title term was first used in Woodward and Bernstein's ALL THE PRESIDENT'S MEN, to reference political dirty tricks).

A number of states have moved toward bi-partisan or non-partisan redistricting commissions as a means of moving beyond intensifying partisanship and incumbent protection dynamics. The National Conference of States Legislatures retains background information on redistricting commissions. See http://www.ncsl.org/research/redistricting.aspx . The United States Supreme Court upheld Arizona's use of an independent congressional redistricting commission created by ballot initiative in the face of a challenge by state legislators, finding that the legislature had standing, state statutes creating redistricting procedures for the commission were permissible, and no violation of the federal Elections Clause occurred). See *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015). See also *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016) (upholding independent redistricting commission's design of state legislative districts where population disparities reflected good faith efforts to comply with federal Voting Rights Act and preclearance requirements).

Population base. In 2016, the Supreme Court resolved a lingering question about what population should be counted for purposes of federal one person-one vote analysis. See *Evenwel v. Abbott*, 126 S. Ct. 1120 (2016) (concluding that state and local jurisdictions could draw

legislative districts based on total population, in light of history, precedent and practice; reserving question whether drawing districts based on voter-eligible population rather than total population).

State roles and federal roles. Much of this discussion has focused on the role of the federal courts in shaping state legislatures in accordance with federal constitutional principles. For an interesting discussion of the role of state courts in other facets of election law and voting rights, see Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1 (2016). For discussion of the range of federal statutes implicating elections (including, for example, the "Motor Voter" Act), see Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747 (2016).

Interconnected issues: the big picture. For a broader vision of how the multiple issues in this section of the casebook (legislative apportionment, gerrymandering, voting rights and more) are related, see Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 YALE L. J. 400 (2015).

[b] Application of "One Person-One Vote" to Local Governments

AVERY v. MIDLAND COUNTY

NOTES AND QUESTIONS

3. Judicial selection. The one person-one vote rule applies to "elections." But what counts as an "election" when it comes to judicial selection? The North Carolina legislature by statute sought to modify the process for selection of state supreme court justices by implementing a "retention" process whereby voters would opt to keep or not to keep a sitting supreme court justice. If the voters did not vote to retain the justice, the Governor could appoint another individual to the seat. This proposed system was successfully challenged on grounds that an amendment to the state constitution would have been required to deviate from the long-established system of elections between competing candidates. *Faires v. State Bd. of Elections*, 2016 WL 865472 (N.C.Super., 2016), *aff'd by an equally divided court*, 784 S.E.2d 463 (N.C. 2016).

4. Population disparity. Delineation of school board voting districts can also present challenging issues. See, e.g., *Navajo Nation v. San Juan County*, 2015 WL 8493980 (D. Utah, 2015). In this case, the court considered practices of San Juan County, Utah, with a population of approximately 15,000 and a size of about 8,100 square miles. By state law, the county school district was to be covered by a board of five members, elected from single-member districts of approximately equal population. Experts testified that deviations as to one of the school districts stood at a level of between 35% and 40%, while others deviated by approximately 10%. The districts were in part designed in this fashion so that each district was linked to two to three public schools. The court considered the range of approaches to judicial review of one person-one vote claims since *Reynolds*, finding that some courts had applied strict scrutiny while others had employed some type of intermediate scrutiny. Concluding that there were "legitimate considerations incident to the effectuation of a rational state policy," the court weighed the "the character and magnitude of the asserted injury" against the "precise interests put forward" by the County, "taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights [as reflected in the population differences among the districts]." San Juan County had offered five justifications for its districting practices: its geographic profile, survey section lines and polling places, consistent belief and practice, difficulties in drawing districts with

10% or less population deviations, and nature of the deviation in terms of impact on whites and Native Americans. The court ultimately concluded that a prima facie case had been made showing substantial deviation from one person-one vote principles, and that the proffered government justifications were insufficient to justify the difference. The Navajo Nation also successfully challenged county commission election districts as in violation of the Equal Protection Clause. See *Navajo Nation v. San Juan County*, 2016 WL 697120 (D. Utah 2016) (invalidating districts using strict scrutiny standard).

5. Litigation in the aftermath of the 2010 census. For a summary of the Supreme Court's decision in the *Alabama Legislative Black Caucus* case, see the initial section of this Chapter's update. For a discussion of the importance of the 2020 Census and suggestions about possible associated voting rights challenges, see Michael Hurta, *Counting the Right to Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment*, 94 TEX. L. REV. 147 (2015).

SALYER LAND CO. V. TULARE LAKE BASIN WATER STORAGE DISTRICT

NOTES AND QUESTIONS

[c] Voting Rights in Local Elections

TOWN OF LOCKPORT v. CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.

NOTES AND QUESTIONS

HOLT CIVIC CLUB v. CITY OF TUSCALOOSA

NOTES AND QUESTIONS

1. Residents v. nonresidents. For an interesting twist on the residents v. nonresidents question, see *Public Integrity Alliance, Inc. v. City of Tucson*, 805 F.3d 876 (9th Cir. 2015), rehearing en banc granted, 820 F.3d 1075 (9th Cir. 2016). The case involved a novel hybrid system used by the City of Tucson in selected local city council members. Council candidates must reside in one of six wards with roughly equal population. There is an initial first-stage primary in which candidates for council run in partisan primaries in each ward, and only those living in a given ward may participate in these primaries. Ten weeks after partisan candidates have been selected in each ward's primaries, the general election is held in which all voters in the city vote for their preferred candidate for each ward (that is, have the opportunity to vote for six council candidates, one from each of the six wards, notwithstanding where they live). Voters challenged this system, saying that the initial primary process allowing only in-ward voters to participate in selected candidates from a given ward denied them the opportunity to select candidates for whom they would ultimately vote in the general election and who would consequently represent them.

The original three-judge panel split, with the majority concluding that the Tucson system should be judged as a single election system in which some voters were denied the right to participate equally in the initial primary selection process that narrowed candidates down by ward. The majority cited *Lockport* as standing for the proposition that residential distinctions could not

be used to distinguish between voters with identical interests. The majority seemed to think that the system would cause those elected to favor the views of the constituents in the ward from which they were initially chosen. The dissenting judge used a more flexible standard of review, concluding that in the absence of any indication of invidious discrimination against voters the federal court lacked grounds to "tell a municipality how to run its local elections," and that Tucson should not be forced to choose between a wholly at large or wholly ward-based system rather than the system it had used since 1930. The dissenting judge also accepted the city's justification for the system as persuasive, since the city believed that the system meant that members of the council would represent specific ward interests while also being held accountable for attending to the interests of the citizens of the city as a whole. It remains to be seen how the court, sitting en banc, will resolve the matter.

A NOTE ON THE FEDERAL VOTING RIGHTS ACT AND ITS SIGNIFICANCE

Recent developments: Shelby County, Ala. v. Holder and its aftermath. As noted briefly at the end of Chapter 1 of the 8th edition of the casebook, and elsewhere in this update, the United States Supreme Court significantly limited the potential for the federal Voting Rights Act to curb state and local actions that might limit the rights of voters. See *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013). In a decision authored by Chief Justice Roberts, the Court's majority concluded that the formula for determining which jurisdictions would be subject to "preclearance" by the United States Justice Department could no longer be justified in order to impose these requirements on only some of the states, thus obliterating a system that had provided an opportunity for review before action could be taken that would result in discriminatory practices adversely affecting the right to vote. For discussion of this important case see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113 (2015). For another recent Supreme Court involving Voting Rights Act challenges, see *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) (in challenge to state legislative redistricting based on state's efforts to among other things minimize districts' deviation from precisely equal population and avoid retrogression as to racial minorities' ability to elect preferred candidates, concluding that racial gerrymandering claims had to be analyzed on a district-by-district basis, equal population goal was not a factor for the purposes at hand, and section 5 of the Voting Rights Act did not require a covered jurisdiction to maintain a particular numerical minority percentage for purposes of redistricting).

As a result of *Shelby County*, Section 2 of the Voting Rights Act and constitutional challenges now provide the principal bases on which discriminatory practices can be challenged under federal law. For discussion of Section 2 after *Shelby County*, see Christopher S. Elmendorf & Douglas M. Spender, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143 (2015); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015).

In ensuing years, many primarily Republican state legislatures have adopted new restraints on voting claimed to be necessary in order to protect the integrity of elections. These restraints have taken a number of forms, including requirements that voters produce designated forms of identification in order to vote, limits on where college students can vote, limits on the length of "early voting" periods, and more. Democrats and voters have challenged these changes under the Voting Rights Act, federal and state constitutions.

This is not the first time that such questions have arisen. In an earlier case, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld Indiana voter identification requirements in principal, while noting that a different decision might be warranted if actual adverse effects on voting participate could be shown. The appellate courts and United States Supreme Court have begun to address some of the more recent challenges, but it is likely that related issues will remain unresolved through the upcoming 2016 presidential election cycle. For example, Texas's voter identification provisions were originally found in part to give rise to violations of the First and Fourteenth Amendments, produce discriminatory results in violation of the Voting Rights Act, reflect a discriminatory purpose in violation of the Voting Rights Act and Fourteenth and Fifteenth Amendments, and constitute an unconstitutional poll tax under the Twenty-fourth Amendment and Equal Protection Clause. See *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Tex, 2014). The Fifth Circuit granted a stay of the order on appeal, 769 F.3d 890 (5th Cir. 2014). The United States Supreme Court denied a motion to vacate the stay, with three justices dissenting and offering their reasoning in a written opinion, 135 S.Ct. 9 (2014). The Fifth Circuit again took up the matter, *Veasy v. Abbott*, 796 F.3d 487 (2015). It concluded that the trial court had insufficient evidence to conclude that the law had a discriminatory purpose, and had wrongly concluded that the requirements constituted an unconstitutional poll tax. However, the court concluded that the district court did not err in concluding that the law disproportionately impacted Hispanic and African-American voters and that the law interacted with social and historical conditions in the state to cause an inequality in the electoral opportunities enjoyed by African-American and Hispanic voters. The Fifth Circuit then granted en banc review. See *Veasy v. Abbott*, 815 F.3d 958 (5th Cir. 2016). Challenges are also pending as to voter identification and related changes in North Carolina, Wisconsin, Ohio, and Alabama, among others. For a thoughtful discussion of related federalism concerns, see Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553 (2015) (questioning deference to states in connection with election administration).

[2] Educational Funding and Policy Choices

[a] School Finance and Traditional Public Schools

[ii] Funding Frameworks

A NOTE ON RECAPTURE ("ROBIN HOOD") STRATEGIES

As explained in the casebook, Texas is the leading state that has developed a different type of "equalization" system that involves a "Robin Hood" approach to redistribution of tax revenues as among school districts. The Texas Supreme Court again considered the state's funding system in *Morath v. The Texas Taxpayer and Student Fairness Coalition*, 59 Tex. Sup. Ct. J. 711, S.W. 3d , 2016 WL 2853868 (Tex. May 16, 2016). As noted in the casebook, lower court proceedings had begun in 2014 to review the state legislature's 2013 funding program. The Texas Supreme Court noted that more than half of the state's 1,000+ school districts had joined in the litigation, resulting in a record exceeding 200,000 pages, 1,508 findings of fact and 118 conclusions of law.

The school districts' challenge was based on claims that the school system was constitutionally inadequate, unsuitable, and financially inefficient in violation of the state's constitution; that the statewide ad valorem tax was unconstitutional; that funding for charter schools was

constitutionally inadequate; and that English language learners and economically disadvantaged students did not receive constitutionally adequate and suitable education. The Texas Supreme Court upheld the legislature's actions as constitutionally sufficient. Reviewing various state constitutional provisions, it held that the constitutional requirement of "general diffusion of knowledge" did not require adequate funding or adequacy in class size, tutoring, interventions for special needs students, nurses or security guards. It further held that student achievement generally was adequate to satisfy the "general diffusion of knowledge" requirement, as were English language learners' and economically disadvantaged students' performance, notwithstanding disparities in performance compared to others. The public school system also satisfied state constitution's "financial efficiency" requirement and "qualitative efficiency" requirement. The Legislative Budget Board's failure to comply with a statute requiring the Board to calculate funding necessary to achieve state educational policies did not violate the state constitution.

In a related case, school districts had sued the Commissioner of Education claiming that the Commissioner had miscalculated districts' excess revenue when determining how much of the local tax revenue could be taken back from districts for redistribution. See *Williams v. Sterling City Independent School District*, 447 S.W.3d 505 (Tex. Ap. 2014). The Court of Appeals held that the Commissioner's actions could be challenged as ultra vires acts (notwithstanding the statutory ban on appeals from the Commissioner's decisions), concluded that the school funding statute limited class back of excess revenue to only certain revenues as specified in the statute, and that the trial court's order that the Commissioner issue credits to affected school districts provided permissible prospective relief. An appeal was taken to the Texas Supreme Court. A divided court reversed, concluding that the statutory limits on review of the Commissioner's decisions controlled. See *Morath v. Sterling City Independent School District*, 2016 Tex. LEXIS 570, S.W.3d (June 24, 2016).

[iii] The First Wave: Challenges Under Federal Law

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ

NOTES AND QUESTIONS

4. Exceptional cases. Plyler v. Doe remains important protection for children of undocumented immigrants. For a recent case study of educational services for unaccompanied migrant children in Oakland, California, see Jeanette M. Acosta, *The Right to Education for Unaccompanied Minors*, 43 HASTINGS CONST. L.Q. 649 (2016).

6. Property tax as essential to school finance systems. A number of states have faced challenges arising from property tax cuts that have adversely affected education funding. What kinds of challenges might be employed? Cases relying on the First Amendment, among other claims, have been unsuccessful. See *State United Teachers, ex rel. Magee v. State*, 31 N.Y.S. 3d 618 (N.Y. App. 2016) (challenge against statute requiring 60% supermajority of voters to impose property tax levy exceeding specified limit rejected; although taxpayers had standing they failed to state claim under education article of state constitution, equal protection, fundamental right to vote, and free speech); *Petrella v. Brownback*, 787 F.3d 1242 (10th Cir. 2015) (in case arising from Kansas, challenging state cap on school districts' ability to raise extra money by levying additional

property taxes, concluding case was not moot, statutory cap did not violate right to free speech or right to association, cap was subject to rational basis review not strict scrutiny, and cap served legitimate government interest in promoting equity in educational funding). For additional insight about possible property tax reforms, see Alissa Gipson, *Attempting to Reform the Use of Local Property Taxes to Finance Education: A Strategic Approach*, 16 HOUS. BUS. & TAX. L. J. 147 (2016) (focusing on Alabama).

7. The evolving federal role in education. Notwithstanding Rodriguez's conclusion that the federal constitution does not guarantee a fundamental right to education or provide equal protection against disparities based on wealth, the federal government has played an important role in creating incentives for innovations in educational policy and practice. Some recent developments are worth noting here. The much lamented requirements of "No Child Left Behind" were moderated by the 2015 reauthorization of the underlying statute. During the Obama administration, more states were given waivers from NCLB requirements in return for engaging in desired innovation. See Derek Black, *Federalizing Education by Waiver*, 68 VAND. L. REV. 607 (2015). An increasing number of states also rejected the use of "common core" standards under an initiative initially instigated by state superintendents of schools, challenging the venture as on that reflected federal intrusion and overreach. See Neelam Takhar, *No Freedom in a Ship of Fools: A Democratic Justification for the Common Core State Standards and Federal Involvement in K-12 Education*, 26 HASTINGS WOMEN'S L. J. 355 (2015); Judson N. Kempson, *Star-Crossed Lovers: The Department of Education and the Common Core*, 67 ADMIN. L. REV. 595 (2015). For a discussion of the updated federal elementary and secondary education legislation (the "Every Student Succeeds Act"), see Madison Shoffner, *Education Reform from the Two-Sided Congressional Coin*, 45 J.L. & EDUC. 269 (2016) (discussing increased discretion for the states). For a more general discussion of education federalism, see Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959 (2015) (reviewing historical developments and arguing for a stronger federal role).

[iv] The Second Wave: Inequality and Wealth in State Courts

SERRANO v. PRIEST

NOTES AND QUESTIONS

4. Ongoing litigation in California.

The casebook references pending litigation in California. The California Court of Appeals recently rendered a decision in *Campaign for Quality Education v. State*, 246 Cal.App.4th 896 (Cal. App. April 20, 2016). The case involved claims by school districts, taxpayers and others, seeking injunctive relief on grounds that school children were entitled under the state constitution to "an education of some quality," and, alternatively, that the state legislature had failed to meet its obligations since it employed an "irrational" educational funding system. In a divided opinion, the court declined to recognize a "right to education of some quality," and concluded that state constitutional provisions did not constrain how the legislature allocated public school funding. For a very thoughtful analysis of California's right to education, from Serrano to the present, see Anne D. Gordon, *California Constitutional Law: The Right to an Adequate Education*, 67 HASTINGS

L.J. 323 (2016) (discussing history of California constitution, *Serrano* and subsequent cases, and areas of continuing uncertainty, and value of standards-based adequacy requirement).

California has also been on the forefront in addressing challenges to public school teacher tenure, brought on the theory that required retention of inadequate teachers interferes with students' educational rights. See *Vergara v. State*, 202 Cal. Rptr.3d 262 (Cal. App., May 3, 2016) (in case by public school students claiming that teacher tenure statutes violated equal protection, holding that students assigned to grossly ineffective teachers were not a sufficiently identifiable group for equal protection purposes and statutes did not inevitably cause low-income and minority students to be disproportionately assigned to grossly ineffective teachers so as to violate equal protection requirements). For discussion of teacher tenure issues see Derek Black, *Taking Teacher Quality Seriously,* 57 WM. & MARY L. REV. 1597 (2016); Derek Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75 (2016). Some have suggested that a movement to address teacher quality at the local level could represent a "new wave" of education reform litigation. See Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929 (2015).

5. Other states' experience with equal protection claims. To keep up with ongoing developments in school funding litigation, it's worth keeping up with policy-oriented websites. For example, see National Education Access Network, http://schoolfunding.info/ (based at Columbia University Teachers College); http://lawprofessors.typepad.com/education_law/ (maintained by University of South Carolina Law Professor Derek Black); Educational Law Center, http://www.edlawcenter.org/ (nonprofit resource center based in New Jersey). For a discussion of developments in Colorado, see Molly A. Hunter and Kathleen J. Gebhardt, *State Level School Finance: Legal Precedent and the Opportunity for Educational Equity: Where to Now, Colorado*? 50 U. RICH. L. REV. 893 (2016).

A NOTE ON STATE CONSTITUTIONAL PROVISIONS IN EDUCATION

Thorough and efficient. For a recent review of the *Abbott* litigation from New Jersey, See Ashley Higginson, *Abbott Gets an F; Courts Can Provide Extra Credit*, 16 Rutgers Race & L. Rev. 289 (2015) (suggesting changes in New Jersey approach).

[v] The Third Wave: Kentucky, Adequacy, and Beyond

ROSE v. COUNCIL FOR BETTER EDUCATION, INC.

NOTES AND QUESTIONS

2. Defining an adequate education. Rose is widely regarded as a very influential opinion even outside the state of Kentucky. For an interesting perspective on the ways in which state courts' have influenced each other in the area of school finance litigation, see Shane A. Gleason & Robert M. Howard, *State Supreme Courts and Shared Networking: The Diffusion of Education Policy*, 78 ALB. L. REV. 1485 (2015). For a comprehensive discussion of the backdrop of *Rose*, see Anne Newman, REALIZING EDUCATIONAL RIGHTS (Oxford, 2013).

5. Separation of powers. In addition to the cases cited, there seems to have been a growing reticence among other courts to engage in substantive review of intransigent school finance problems. For example, in a 2014 decision, the Rhode Island Supreme Court concluded that

intervening in a public school funding dispute would violate principles of separation of powers. See *Woonsocket School Committee v. Chafee*, 89 A.3d 778 (2014). In a 2015 decision, the Pennsylvania Commonwealth Court invoked the judicial abstention doctrine applicable to political questions in declining to review the merits of an equal protection and education clause challenge brought under the state constitution. See *William Penn School District v. Pennsylvania Dep't of Educ.*, 114 A.3d 456 (Comm. Pa. 2015). For consideration of related issues, see Anthony Bilan, *The Runaway Wagon: How Past School Discrimination, Finance, and Adequacy Case Law Warrants a Political Question Approach to Education Reform Litigation*, 91 NOTRE DAME L. REV. 1225 (2016).

Some states have tried to take a middle ground in dealing with separation of powers concerns. For example, in 2014, the South Carolina Supreme Court rendered a detailed decision holding the state's educational finance system unconstitutional because it failed to assure children an adequate public education. See *Abbeville County School Dist. v. State*, 767 S.E.2d 157 (S.C. 2014) (concluding that a challenge to the state's funding system was justiciable and that the state funding system violated the state constitution's education clause). The court also ordered both plaintiff school districts and the state to submit periodic updates on their progress in reaching compliance with the court's remedial orders. See *Abbeville County School Dist. v. State*, 780 S.E.2d 609 (S.C. 2015) (indicating that the court would review developments shortly after the end of the 2016 legislative session).

Kansas provides a contrasting story. In *Gannon v. State*, 319 P.3d 1196 (KS 2014), the state supreme court held that school districts had standing and could raise justiciable claim that state constitution specially placed authority and responsibility to finance public school system on the state legislature; state constitution's adequacy provision required that the financing system be reasonably calculated to have all public school students meet or exceed standards set by state board of education; state funding system had established unconstitutional, wealth-based disparities in education funding by withholding all capital outlay state aid payments to which certain school districts would otherwise be entitled and also had created unconstitutional wealth-based disparities by prorating and reducing supplemental general state aid payments to which certain school districts were otherwise entitled).

The Kansas state legislature stood firm in the face of the court's mandate. Then, the court spoke again in May 2016, with firmness of its own. In *Gannon v. State*, 2016 WL 3063848 (KS, May 27, 2016) (per curiam) the court explained that the state constitution's force as based on the express will of the people; noted that the constitution had empowered and obligated the legislature to make suitable provision for finance of educational interests; explained the court's role in reviewing legislative enactments; emphasized that courts consider whether school districts have reasonably equal access to substantially similar educational opportunity through similar tax effort; emphasized that the state had not carried its burden to show it had cured unconstitutional inequities; and found that provisions of state legislation could not be severed. The legislature ultimately acted in response to the court's threat to shut down the state's schools if the funding dispute had not been resolved. See http://www.kasb.org/wcm/_NB/16/NB0629a.aspx (Kansas Association of School Boards discussion of developments). The state legislature had threatened to move forward with a proposed state constitutional amendment that would have limited the court's jurisdiction over school funding matters in the future, but failed to gather the votes needed to move forward with that threat. See http://www.kansas.com/news/politics-

government/article85792762.html .

7. Gauging progress. For a recent analysis of how well Kentucky schools have fared in meeting the *Rose* standards in the aftermath of legislative action, see Joshua A. J. Collins, *On the Constitutional Sufficiency of the Modern Kentucky School System*, 53 U. LOUISVILLE L. REV. 351 (2015) (contending that the Kentucky funding system presently fails to meet the full requirements of *Rose* and may be subject to future challenges).

8. Special problems: overburden. For a recent discussion of the special problems facing urban and migrant school children, see Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children*, 2015 B.Y.U. EDUC. & L. J. 271 (2015)

9. Next waves of litigation. It is difficult to predict how the next generation of school finance litigation might proceed. For scholarly insights on related issues, see Rebecca I. Yergin, *Rethinking Public Education Litigation Strategy: A Duty-Based Approach to Reform*, 115 COLUM. L. REV. 1563 (2015) (positing a new approach that might be used in the context of Connecticut school finance litigation, and arguing for a system that would establish a duty for responsible administration of public schools); Madeline Davis, *Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation,* 2016 B.Y.U. Educ. & L. J. 117 (2016) (reviewing school finance litigation in Ohio, New Jersey, and Washington State, and suggesting alternative litigation strategies); David Hinojosa*, "Race- Conscious" School Finance Litigation: Is a Fourth Wave Emerging*? 50 U. RICH. L. REV. 869 (2016) (suggesting that attention should return to race-based discrimination, using examples from New Mexico and North Carolina).

10. Equality v. adequacy. For a thoughtful discussion of the relationship between equality and adequacy, see Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014) (discussion tension between equality and adequacy).

[b] Charter Schools: New Possibilities, New Challenges

GRANT OF CHARTER SCHOOL APPLICATION OF ENGLEWOOD ON THE PALISADES CHARTER SCHOOL

NOTES AND QUESTIONS

1. *Facial challenges and more.* More recent leading cases that have raised constitutional issues as to charter schools include *League of Women Voters of Washington v. State*, 355 P.3d 1131 (WA 2015) (holding that state charter school act violated provisions of state constitution relating to common school construction fund). Courts in other states have allowed charter schools to proceed while limiting constraints sought by school districts. See, e.g., *Richard Allen Preparatory Charter School v. School Dist. of Philadelphia*, 123 A.3d 1101(PA Comm. 2015) (district did not have authority to impose enrollment cap on charter school or dictate system of student assessment).

3. Accountability. For a recent review of issues raised by charter schools in New Jersey, see Franklin Barbosa, *An Unfulfilled Promise: The Need for Charter School Reform in New Jersey*, 39 SETON HALL LEGIS. J. 359 (2015) (discussing statutory revisions to charter school legislation in New Jersey). For studies on state and national trends involving performance of

students enrolled in charter schools, see the Center for Research on Educational Outcomes, Stanford University, https://credo.stanford.edu/ .

4. Fish or fowl? Should charter schools be subject to the same requirements regarding public records law and similar requirements that are applicable to public schools? See Thomas A. Kelley III, *North Carolina Charter Schools' (Non-?) Compliance with State and Federal Nonprofit Law*, 93 N.C. L. REV. 1757 (2015) (discussing issues such as public records compliance).

5. Emerging issues. The charter school movement has generally been driven by expectations regarding parental choice on behalf of children. For a thoughtful analysis of associated issues regarding "choice." See Daniel E. Rauch, *School Choice Architecture*, 34 YALE L. & POL'Y REV. 187 (2015) (discussing implicit constraints on school choice and possible fixes). The principal case arose in New Jersey. Do other states have similar constraints and experiences? For an analysis of the Virginia experience, see Katherine N. Lehnen, *Charting the Course: Charter School Exploration in Virginia*, 50 U. RICH. L. REV. 839 (2016).

In the aftermath of Hurricane Katrina, New Orleans endeavored to resurrect its public school system relying on charter schools. For analysis about the effectiveness of this strategy, see Robert Gardia, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 FORDHAM URB. L. J. 613 (2015).

The principal case addressed public school districts' fears that diversion of public funds to charter schools would impair budgets needed to serve students at traditional public schools in the district. Are such fears justified? For a November 2015 report on New Jersey's funding of traditional and charter public schools see Danielle Farrie & Monette Johnson, *Newark Public Schools Budget Impacts of Underfunding and Rapid Charter Growth* (Education Law Center, 2015), http://www.edlawcenter.org/publications.html (finding that a combination of underfunding and charter school expansion had resulted in 20% decline in spending for Newark's traditional public schools in the period 2008-2015). Another recent study has focused on the impact of charter schools in Ohio. See Jason B. Cook, *The Effect of Charter Competition on Unionized District Revenues and Resource Allocation*, available from the National Center for the Study of Privatization in Education at Columbia University's Teachers College, http://ncspe.tc.columbia.edu/center-news/the-impact-of-charter-schools-on-district-school-budgets/ . Cook, a doctoral student at Cornell, reviewed budget data from 1982 to 2013 and reached two major conclusions: (1) competition with charter schools reduced federal, state and local support for district schools; and (2) charter competition drove down local funding because residential property values were depressed and schools redirected revenue from instruction expenses to facility improvements.

CHAPTER 10: THE CHIEF EXECUTIVE

The casebook's coverage on state executive orders and gubernatorial vetoes is generally quite up-to-date. It is worth noting that challenges regarding executive orders and vetoes change with the times. For example, principal cases in the casebook concern such matters as executive orders relating to binding arbitration in labor negotiations with public employees, and line item vetoes in appropriations bills. More recent cases on related themes include *City of Cerritos v. State of California*, 239 Cal. App. 4th 1020 (Cal. App. 2015) (upholding Governor's emergency directive and legislative action to dissolve redevelopment agencies); and *State ex rel. Cisneros v. Martinez,* 340 P.3d 597 (N.M. 2014) (upholding Governor's veto of judicial salary increases).

An issue of likely significance in coming days is the action of Virginia Governor Terry McAuliffe to extend the right to vote to previously disenfranchised felons. McAuliffe issued an executive order that explained his decision in terms of the state constitution's allowing the Governor to remove political disabilities consequent upon conviction. For the text of the executive order, see https://governor.virginia.gov/newsroom/newsarticle?articleId=15008 . Republican leaders of the Virginia House and Senate have sued to block the executive order. See Laura Vozella, *GOP sues to block McAuliffe order to let 200,000 Virginia felons vote*, WASHINGTON POST, May 23, 2016, https://www.washingtonpost.com/local/virginia-politics/gop-sues-to-strip-209k-felons-from-va-voter-rolls/2016/05/23/ef2587a8-20e4-11e6-aa84-42391ba52c91_story.html (discussing challenge in Virginia Supreme Court to executive order asserting that the Governor exceeded his authority by addressing the circumstances of convicted felons en masse rather than individually).

CHAPTER 11: JUDICIAL RELIEF AND CITIZEN CONTROL OF GOVERNMENTAL ACTION

A THROUGH THE STATE COURTS

[1] Mandamus

STATE EX REL. PARKS v. COUNCIL OF THE CITY OF OMAHA

NOTES AND QUESTIONS

1. When mandamus is available. For recent cases illustrating the range of situations in which mandamus may be sought, see *West Virginia Dep't of Health and Human Services v. E.H.*, 778 S.E.2d 643 (W.VA 2015) (in institutional reform litigation relating to conditions in mental health institutions, ordering state agency to develop plan to implement consent order and to increase worker pay); In re Perez, 2016 WL 116178 (Tex. App. 2016) (action by county commissioner candidate seeking to compel county party officials and election administrator to remove another candidate's name from primary ballot on grounds that the other candidate was required to both reside in and be a registered voter in a given precinct when allegedly that candidate was not a registered voter there).

3. The magic word "shall." For a recent example that considered the need for a clear duty to act in the context of a mandamus suit, see *Philadelphia Firefighters' Union, Local 22 v. City of Philadelphia*, 119 A.3d 296 (PA 2015) (firefighters on promotional list sought to compel city officials to appoint them to desired positions using mandamus action; court concluded that neither home rule provisions nor civil service regulations required immediate appointments to the positions in question).

[2] Prohibition, Certiorari, and Quo Warranto

FAMILY COURT v. DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

NOTES AND QUESTIONS

1. Basis for writ. A recent Ohio case provides another good example. See State ex rel. Dir., Ohio Dep't of Agriculture, 2016 WL 2908741 (OH 2016) (in case concerning seizure of animals under the Ohio Dangerous Wild Animals and Restricted Snakes Act, where owner had not secured requisite permit, concluding that agency director had sole discretion to determine whether dangerous animals should be returned to owner, and issuing writ of prohibition to trial judge denying trial judge's claim of jurisdiction to return animals).

A NOTE ON CERTIORARI AND QUO WARRANTO

Quo Warranto. For a recent illustration of the use of the writ of *quo warranto*, see *State ex rel. Schmidt v. City of Wichita*, 367 P.3d 282 (KS 2016) (granting writ of quo warranto in suit by state to declare null and void a city ordinance that reduced severity level of first-offense convictions for possession of 32 grams or less of marijuana and related drug paraphernalia if defendant was 21 years of age or older).

[3] Taxpayer Standing and Injunction

ST. CLAIR v. YONKERS RACEWAY, INC.

NOTE

Many suits relying on taxpayer standing involve public expenditures. For a recent case illuminating concepts of taxpayer standing, see *McCafferty v. Oxford American Literary Project, Inc.,* 484 S.W.3d 662 (AR 2016) (taxpayer standing not available in suit against nonprofit that received loan from state university where funds loaned were not public funds generated from tax dollars). For another recent case illuminating efforts by professors to claim standing to address homelessness issues in Vermont, see Baird v. city of Burlington, 136 A.3d 223 (VT 2016) (in case brought by professors against city, challenging trespass ordinance adopted in response to perceived increase in homeless population in downtown area, finding that professors lacked standing to sue on behalf of others, assert overbreadth doctrine, or assert derivative taxpayer theory, where professors were not themselves threatened with enforcement of ordinance.

RATH v. CITY OF SUTTON

NOTES AND QUESTIONS

1. When an injunction is available. For a recent case considering the intersection of taxpayer standing, remedial injunctions, and state ballot initiatives, see *Huff v. Wyman*, 361 P.3d 727 (WA 2015) (en banc) (in suit to enjoin statutory initiative regarding state taxes and fees from being placed on the ballot, holding that plaintiffs had taxpayer standing, action was justiciable, but plaintiffs lacked a clear legal wright to relief as required to obtain injunction).

BRENT v. CITY OF DETROIT

NOTES AND QUESTIONS

A NOTE ON CITIZEN STANDING

For a recent case that illuminates a careful litigation strategy that sought to find standing for at least some of several differently situated plaintiffs, see *State ex rel. Walgate v. Kasich*, 2016 WL 1129369 (OH 2016) (corporate taxpayer, citizens and others brought suit against state officers challenging constitutionality of statutory amendments governing casinos and video lottery terminal games and related constitutional amendment regarding casino gambling; court concluded that citizens failed to show personal interest distinct from others or alleged injuries traceable to state's action; parents and teacher did not have standing to bring challenge against purported diversion of lottery and casino proceeds from educational use; corporate taxpayer did not have standing as contributor to special fund for schools in connection with exemption of gambling casinos from paying commercial activity tax; gaming operator adequately alleged standing insofar as he claimed that he was not able to engage in casino gaming due to privileges given to others).

For recent scholarship regarding standing for state actors and municipalities, see Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585 (2015) (considering differences between private party and government standing); Kaitlin Ainsworth Caruso,

Associational Standing for Cities, 47 CONN. L. REV. 59 (2014) (considering standing for cities in federal court under associational standing principles).

B THROUGH LOCAL INITIATIVE AND REFERENDUM

For recent thoughtful scholarship on initiatives and referenda, see Henry Noyes, *Direct Democracy as a Legislative Act*, 19 CHAP. L. REV. 199 (2016) (discussing history of initiative and referendum in the United States, and asserting that such ventures are "legislative acts" in some cases); John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAP. L. REV. 61 (2016) (reviewing constitutional initiative processes in a number of states, associated experiences, and scholarly analyses); Matt Childers & Mike Binder, *The Differential Effects of Initiatives and Referenda on Voter Turnout in the United States, 1890-2008*, 19 CHAP. L. REV. 35 (2016) (discussing historical patterns); Joshua J. Bishop, *Standing in for the State: Defending Ballot Initiatives in Federal Court Challenges*, 2015 B.Y.U. L. REV. 121 (2015) (discussing *Hollingsworth v. Perry);* Sanford V. Levinson & William D. Blake, *What Americans Think about Constitutional Reform: Some Data and Reflections,* 77 OHIO ST. L. J. 211 (2016) (discussing popular interest in state constitutions and analyzing patterns evident in state referenda).

NOTES AND QUESTIONS

1. Authorizing the initiative and referendum. Not every initiative or referendum can be brought to the voters. See, e.g., *Redd v. Bowman*, 121 A.3d 341 (NJ 2015) (in suit by mayor and city council president to declare invalid a petition submitted by city voters for adoption of an ordinance that would prohibit city from joining newly-formed county police force and abolishing municipal police department, concluding that ordinance was not an improper divestment of municipal governing body's legislative power and was not prohibited by preemption, but was prohibited from being submitted to voters since circumstances had changed).

4. Can a court hear a pre-election challenge to an initiative? For a recent case relating to pre-election review of challenges to an initiative see *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 369 P.3d 140 (WA 2016) (en banc) (concluding that city and county residents seeking to challenge proposed local initiative relating to zoning changes, water rights, workplace rights and rights of corporations had standing to challenge initiative and that initiative exceeded scope of local legislative initiative authority).

WITCHER v. CANON CITY

NOTES AND QUESTIONS

A NOTE ON RACIAL DISCRIMINATION IN THE INITIATIVE AND REFERENDUM PROCESS