INSIDE: Revisiting Our First and Second Amendment Rights, Health Care Reform and More

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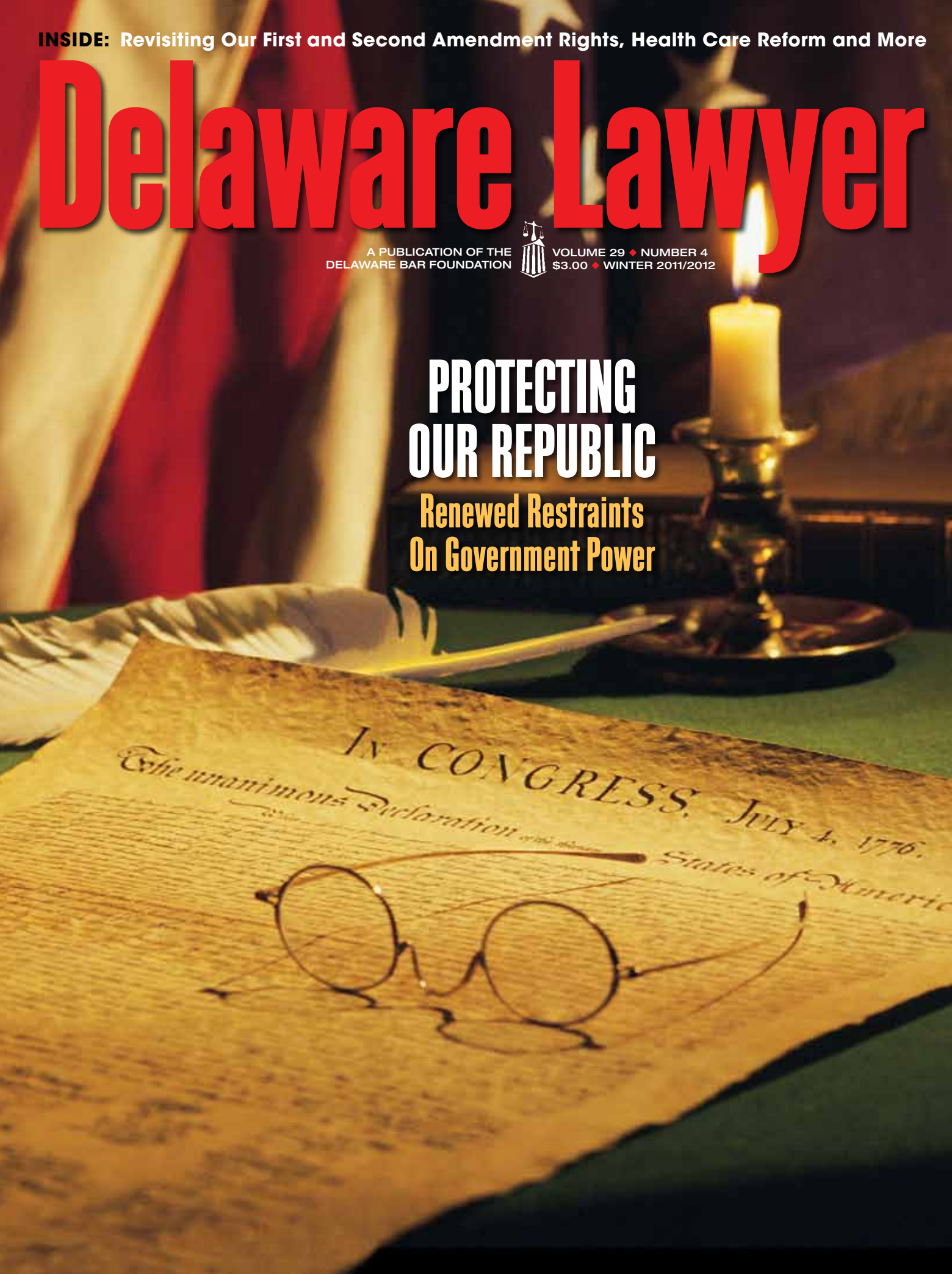
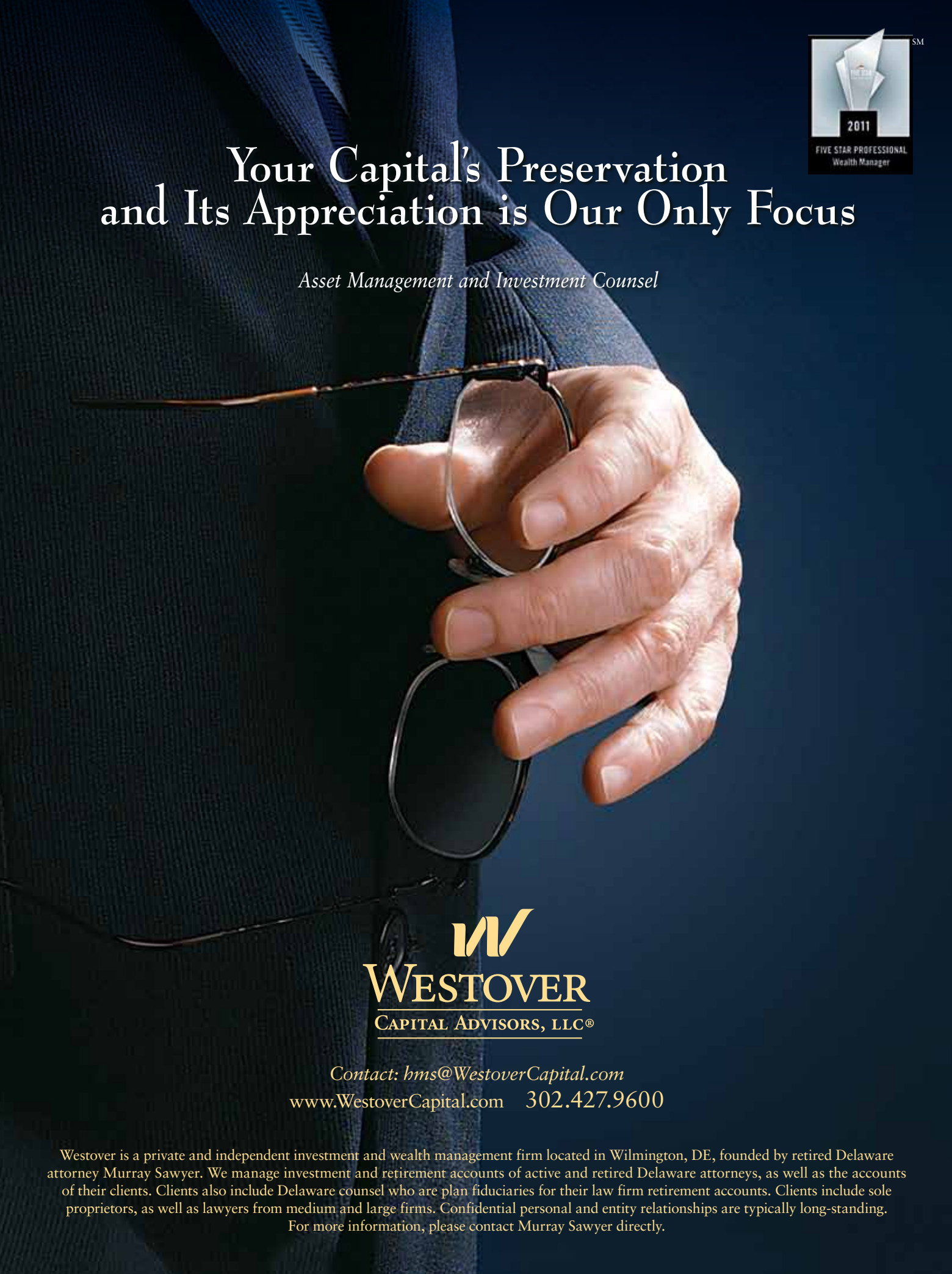
Renewed Restraints On Government Power

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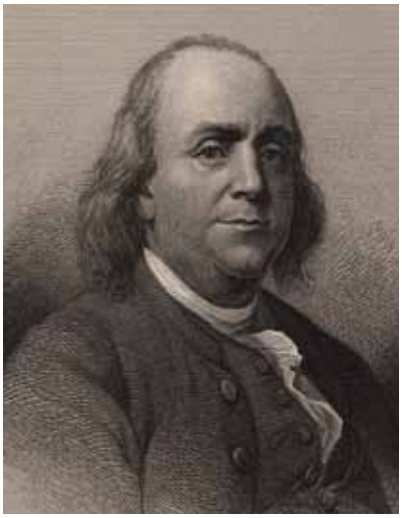

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Gregory A. Inskip

The statesmen who designed and implemented our Constitution sought to protect our freedom by several expedients, discussed in the essays that follow. They divided power between state and federal governments, separated powers among executive, legislative and judicial branches, and expressly protected specific liberties in bills of rights in federal and state constitutions.

The result, according to Benjamin Franklin, was "a Republic, if you can keep it." Andrew Jackson later voiced a similar caution "that eternal vigilance by the people is the price of liberty and that you must pay that price if you wish to secure the blessing." *Farewell Address*, March 4, 1837.

Our freedom obviously depends on a military strong enough to deter foreign tyrants and honorable enough to respect civilian rule. Lasting freedom also depends on a civil society honest enough to read and respect the constitutional guarantees, and brave enough to assert them at need.

The rights that the founders bequeathed to us reinforce each other and are strengthened by exercise. Criticism of tyrants is fatal in places like Zimbabwe and unthinkable in North Korea. In the United States we expect people to speak freely and we do so to expose governmental corruption and incompetence. We throw the bums out of office before they become entrenched.

In other cultures, fearless speech is not always enough. The corrupt regimes of Syria and Iran are using their monopoly on armed force to suppress dissent from an unarmed people. Would-be tyrants cannot hope to achieve easy repression here, where the same citizens who enjoy freedom of speech also enjoy the right to keep and bear arms.

But government continues to grow in size and intrusiveness, perhaps most insidiously in electronic surveillance of our travels, habits and communications and associations with others. As Superior Court Judge Jurden commented, "The advancement of technology will continue *ad infinitum*. An Orwellian state is now technologically feasible. Without adequate judicial preservation of privacy, there is nothing to protect our citizens from being tracked 24/7." *State v. Holden*, 2010 WL 5140744 (Del. Super. Ct.) at *8, appeal dismissed *State v. Holden*, No. 30, 2011 (February 1, 2012).

In Holden police had tracked a defendant's movements by surreptitiously placing a GPS device on his car, without obtaining a search warrant. The Superior Court suppressed the evidence, holding that "Delawareans reasonably expect to be free from prolonged 24-hours-a-day surveillance. Use of GPS technology without adequate judicial supervision infringes upon the reasonable expectation of privacy and absent exigent circumstances or a warrant issued upon probable cause, violates Article I, § 6 of the Delaware Constitution." *Id.*

Happily the United States Supreme Court has construed the Fourth Amendment the same way in a case decided as this issue goes to press, *United States v. Jones*, No. 10-1259. (January 23, 2012).

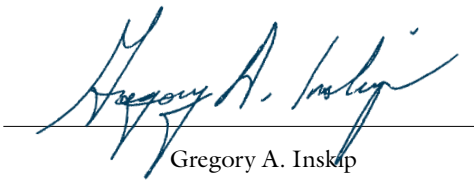
Meanwhile, state and federal bureaucrats have advocated that GPS systems be installed in our motor vehicles to track where and how far we drive, and to tax us based on miles driven:

http://www.cnn.com/2011/11/18/travel/pay-per-mile-transportation/index.html;

http://www.thetruthaboutcars.com/2011/05/white-house-disowns-pay-per-mile-tax-plan/

Many of us would hold that if surveillance is improper when done by a police detective investigating a suspected criminal, then it is far worse when done by a bureaucracy seeking to spy on and control the movements of citizens in private life. Unfortunately we are afflicted with policymakers with different values.

Franklin, Jackson and Orwell warned us: an expansive government is watching. We must maintain countervailing vigilance if we hope to keep our free republic in more than name.



Gregory A. Inskip

We Remember Peter E. Hess

We write to remember our colleague and fellow Board of Editors member, Peter E. Hess, who passed away on January 12, 2012. He was just 52 years old. A graduate of Brandywine High School, Peter obtained his bachelor's degree from The University of Virginia ("The University" as he liked to tell his friends), where he majored in History, Government and Economics. He obtained his J.D. from Tulane Law School in 1984.

A history and war buff, as well as an accomplished diver, Peter developed a specialty in admiralty and maritime law. His love for maritime history preservation and underwater exploration in particular led to his involvement in several underwater shipwreck explorations, including a dive to the USS Monitor. He was very active in the Explorers Club, holding many leadership positions, including Chairman of the Philadelphia Chapter, and Chairman of the Club's Legal Committee. His impact on divers' rights within maritime law is remembered by many of his colleagues.

Peter had the gift of optimism, an infectious smile, and a quick wit. He will be missed by many people who knew and loved him. We extend our condolences to his son, Benjamin, and the rest of his family and friends.

Ronald K.L. Collins

is the Harold S. Shefelman Scholar at the University of Washington, School of Law. Before coming to U.W. in 2010, he was a scholar at the First Amendment Center in Washington, D.C. He clerked for Justice Hans A. Linde on the Oregon Supreme Court and was a Supreme Court Fellow under Chief Justice Warren Burger. He is the editor of *The Fundamental Holmes: A Free Speech Chronicle and Reader* (Cambridge University Press, 2010), the co-author of *We Must Not Be Afraid To Be Free: Stories About Free Speech in America* (Oxford University Press, 2011) and *On Dissent* (Cambridge University Press, forthcoming). His other co-authored works include *The Death of Discourse* (2nd ed. 2005) and *The Trials of Lenny Bruce* (2002).

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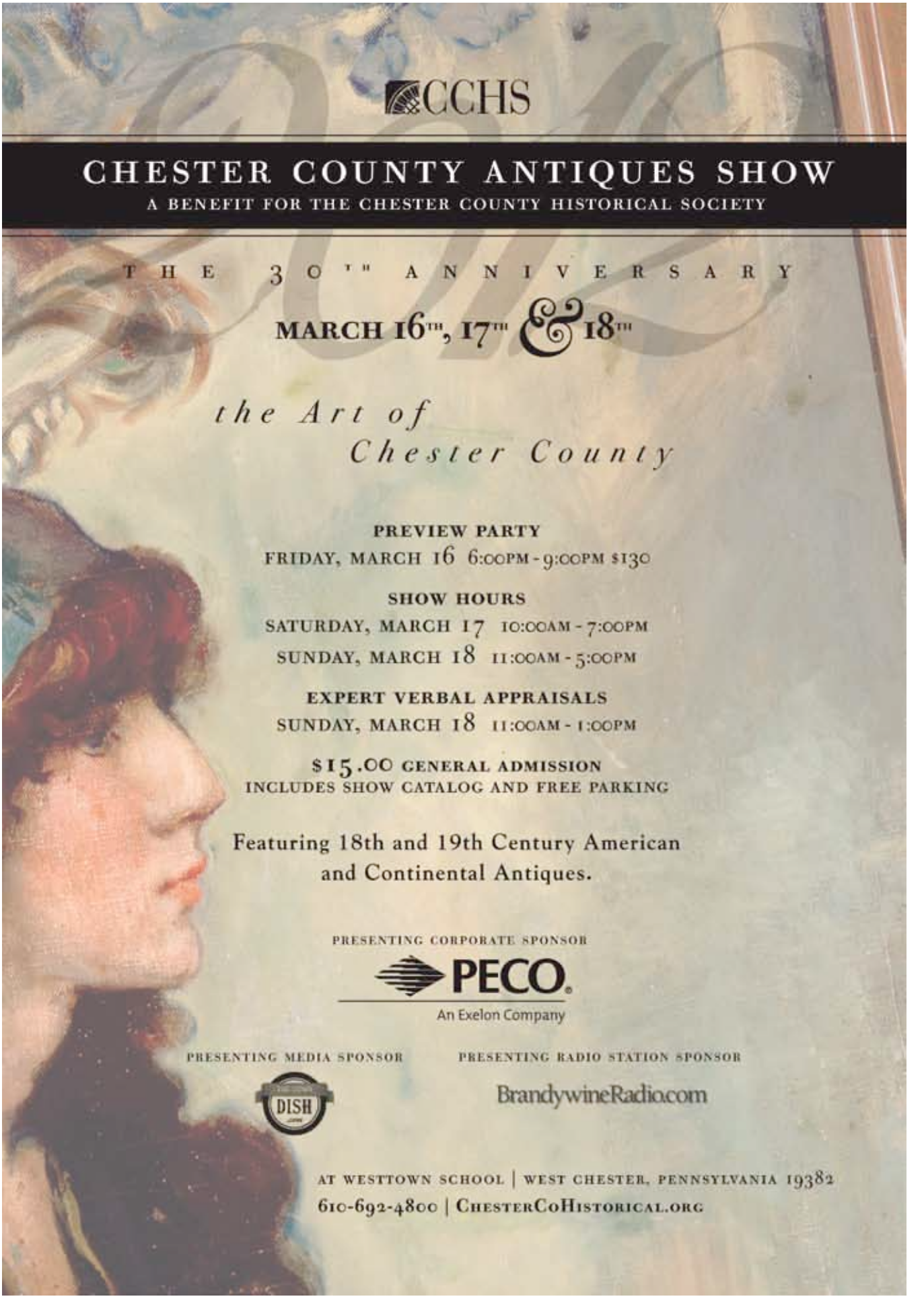
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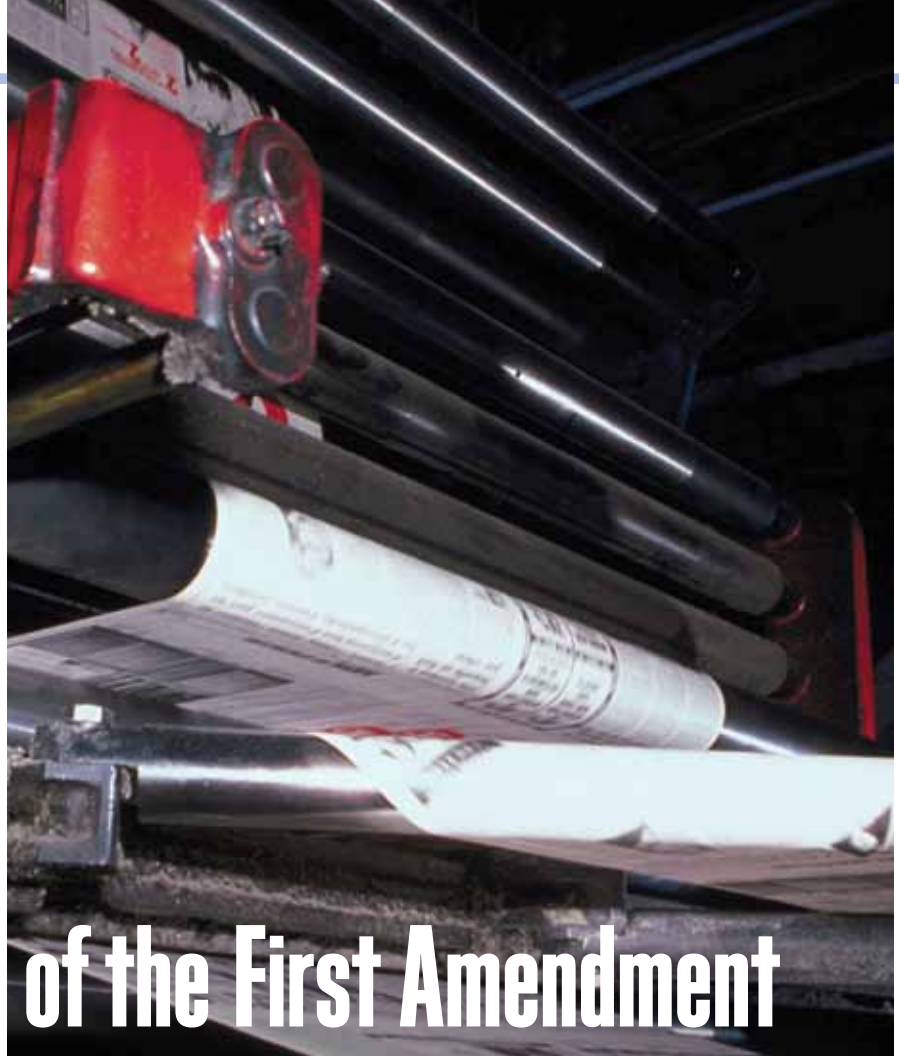


The Speech & Press Clauses of the First Amendment

The text set down by the Framers is the starting point for understanding our modern freedoms.

We believe in words and in the power of words to shape our collective destiny. Such is our secular faith when it comes to our Founders and the Constitution and the Bill of Rights they bequeathed to us. However much is argued over their meanings, this much cannot be gainsaid: Those words inscribed on parchment demarcate, at least, the *beginning* of any interpretive journey. We may hold steadfast, or we may explain or even redefine, but our interpretive quest always starts with the text, that sacred secular script handed down to us by those we call the Framers.

So what of the text of the First Amendment? How does it determine our constitutional fate? Before answering that question, it is salutary to first have a little constitutional history under our conceptual belt.

By What Delegated Authority Granted?

Before there was an explicit prohibition against abridging freedom of speech and press, constitutional liberties were thought to be protected by strictly confining the *federal* government's *authority* to act.

In that regard, the fear of some in 1787 was that *Congress* had been delegated too much power. Consider, for example, the concerns expressed by a writer echoing James Wilson in an October 24, 1787, statement in the *Freeman's Journal* (Philadelphia):

> What controul can proceed from the federal government to shackle or destroy that *sacred palladium* of national freedom, *the liberty of the press*? What! Cannot Congress, when possessed of the immense authority proposed … restrain the printers,

and put them under regulation[?]"[1]

Similar fears were expressed by numerous others, primarily the anti-Federalists. Hence, it was that mammoth grant of Article I power conferred on Congress that struck fear into Republican hearts of the likes of Thomas Jefferson, James Madison and others of similar beliefs. The "omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion [and] freedom of the press," among other rights, greatly troubled Jefferson, as he told Madison in a December 20, 1787, letter.[2]

Without an express bill of rights — "fetters against doing evil" as Jefferson tagged it in a February 7, 1788, letter to Alexander Donald[3] — the government could all too readily deny liberty.

The Federalist response was that those powers not *expressly* given were reserved to the people. Thus, since Congress (and the other two branches as well) was nowhere granted explicit power to abridge freedom of speech or the press, it therefore lacked any *authority* to regulate in this area.

This claim did not comfort the anti-Federalists. Besides, as the anti-Federalist pamphleteer known as the Federal Farmer wrote on January 20, 1788: The Article I, section 8 "power to tax the press at discretion is a power to destroy or restrain the freedom of it."[4] And this though "[a]ll parties agree that the freedom of the press is a fundamental right and ought not to be restrained by any taxes, duties, or in any manner whatever."

Since Congress' power was so vast, it could easily "annihilate the freedom of the press" and others' rights, complained Cincinnatus in the *New York Journal* on November 1, 1787.[5]

What, then, could be done to stop this "engine of imposition and tyranny"? That concern, expressed by Cincinnatus (November 8, 1787, *New York Journal*[6]) and others, is what led to the creation of the First Amendment with its bar against Congress making laws abridging the freedoms of speech, press, assembly and petition.

Express Limitations

The period between 1787, when the Constitution was signed, and 1791, when the Bill of Rights was ratified, was a tense one. The inalienable rights of the people had to be expressly delineated *and* the powers of the federal government likewise had to be expressly limited. Without such assurances, the Constitution of 1787 might never have seen the constituting light of day.

Moreover, mere platitudes, as those used in some of the state constitutions, were no substitute for more commanding restrictions explicitly declared. In this regard, consider the wording of Section 23 of the 1776 Delaware Declaration of Rights concerning press freedoms: "That the liberty of the press ought to be inviolably preserved."[7]

Worse still, the document contained no express guaranty barring the government from abridging freedom of speech. It was just such shortcomings that James Madison, the primary drafter of the First Amendment, sought to cure, though as against the *federal* government alone.

Such thinking informed Madison's June 8, 1789, proposal to the House, which in relevant part read:

> That in article 1st, section 9, between clauses 3 and 4 of the Constitution, be inserted these clauses, to wit, … The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.[8]

With this proposal Madison sought to limit Congress' lawmaking powers in a section of Article I concerned with restraints on legislative prerogatives. Had his proposal passed, the freedoms guaranteed by the First Amendment would have been situated between Article I's restrictions on bills of attainder and ex post facto laws (clause 3) and the limits on the taxing power (clause 4).

Wherever located, was the Madisonian proposal worded strongly enough to offset the vast powers otherwise conferred on Congress by the Constitution of 1787?

Charles Pinckney of South Carolina thought not; he expressed his view years earlier in a proposed amendment suggested at the Philadelphia Convention on May 29, 1787: "The legislature of the United States shall pass no law on the subject of religion [or] touching or abridging the liberty of the press . . . ."[9]

This idea of an *express* limitation on legislative power caught on. By September 4, 1789, the Senate had considered a bill of rights proposal that declared: "That Congress shall make no law, abridging the freedom of speech or of the press, or the right of the People peacefully to assemble and consult for their common good, and to petition the Government for a redress of grievances."[10]

Though revisions were made, the "Congress shall make no law" language survived and became the supreme law of the land. But what of abridgments of First Amendment freedoms by *other* branches of the federal government, that is to say the executive and judicial branches?

Jefferson had noted this kind of problem in a March 13, 1789, letter to Francis Hopkinson: "What I disapproved of from the first moment . . . was the want of a bill of rights to guard liberty against the legislative *as well as the executive branches* of the government, that is to say to secure freedom in religion, freedom of the press" and other freedoms.[11]

As for the states, Madison was sensitive to the need to rein in their powers over fundamental freedoms. To that end, he had proposed the following provision to be included in Article I,

Section 10 of the Constitution: "No state shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases."[12]

The proposal failed, and it was not until the twentieth century that the various provisions of the First Amendment finally applied to the states by way of the Due Process Clause of the Fourteenth Amendment.

"Congress Shall Make No Law" — Why Just Congress?

Its brevity (only 45 words) is a testament to the genius of its drafting:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The *make no law* prohibition of the First Amendment is unique to the rights of that guaranty. For nowhere else in the Constitution and its 27 amendments are the powers of government so boldly restrained. Even under the Third Amendment, soldiers can sometimes be quartered in our homes if "prescribed by law." And while other provisions of the Constitution permit government to act only when expressly authorized, no other provision bans outright the *making* of a law.

Why was the Amendment confined to but one branch of the federal government? Today, as every law student knows, the First Amendment not only applies to the states but also to the executive and judicial branches as well. If the word *Congress* was the textual touchstone, how in Madison's name could its provisions ever restrain the other branches? Though Supreme Court opinions offer little guidance on this account, a dollop of eighteenth century constitutional logic might help to explain how such a feat might be accomplished in a way faithful to the text.

The power to make laws is vested in the Congress; the power to enforce laws is left to the executive; and the power to interpret laws is for the judiciary. By that constitutional logic, the executive could never enforce a law abridging any of the five freedoms protected by the First Amendment if Congress was barred from making such a law in the first instance. Similarly, the judiciary could never interpret and thereafter apply a law abridging such rights for the same reason.

By that measure, a restriction on Congress' lawmaking powers was a limitation on the powers of the other two branches of government as well. Justice Hans Linde (for whom I once clerked) made the point ably decades ago:

> If government acts without a basis in valid law, the court need not find facts or weigh circumstances in the individual case. When a constitutional prohibition is addressed to lawmakers, as the First Amendment is, the role that it assigns to courts is the censorship of laws, not participation in government censorship of private expression.[13]

Another argument, among others, is also plausible. The anti-Federalist objections to the Constitution of 1787 reveal that *if* any branch of government had the constitutional power to abridge our expressive and religious freedoms, then Congress with its vast powers would be that branch, the *sole* branch. Thus, only its powers were limited when it came to our First Amendment freedoms.

The Federalists thought Congress had no such power; the anti-Federalists thought it did; but both would have agreed that neither the executive nor the judicial branch had any such delegated authority in need of restriction by way of constitutional amendment.

If this is so, then by what authority today can a court, aided by an executive agent, prosecute, say, the press for failing to reveal a confidential source? For surely such judicial and executive actions implicate that "freedom of the press" against which even Congress cannot make a law "abridging" it. By that constitutional yardstick, for the judiciary or executive to "authorize" any such actions after-the-fact would be to act in contempt of the Constitution, or so the old-fashioned line of constitutional thinking might have it.

Abridging? Why Not Restricting, Prohibiting or Respecting?

Abridging. It's an old-world word. It derives from a Middle English word (meaning *deprive*) and before that from the Old French (*abbreviate*), and before that from Latin (*cut short*). For example, think of when a book or story is abbreviated — cutting short its narrative and depriving the reader of the complete message.

It was a word used by our Founders, but not those who drafted the Declaration of Independence or the Constitution of 1787 or even the early state declarations of rights. It made its American constitutional debut in the First Amendment.

So why *that* word? Why not other words like "respecting" (as in the Establishment Clause), or "prohibiting" (as in the Free Exercise Clause), or the "ing" form of "restrained" (as used in the 1776 Virginia Declaration of Rights[14]) or "deprived" (as used in James Madison's June 8, 1789, proposal to the House[15]) or "infringed" (as used in a July 28, 1789, House Committee report[16])?

Well, it's hard to say. The surviving historical records reveal little, Supreme Court decisions say nothing, and scholarship on the matter is meager. And though the word is commonplace in constitutional parlance, it is nonetheless one about which we are never quite sure of its meaning.

Etymologically speaking, abridging is when someone else, particularly

the government, cuts off what we say or write. To abridge is to abbreviate, to command brevity. Such a command means that a censor — one who scrutinizes a work for objectionable content — can shorten any message by deleting as much as he or she wishes.

Constitutionally speaking, all of this is abhorrent because Americans should be able to speak our minds uninterrupted. Thus, no "previous restraints" on freedom of speech or of the press.

By this measure, to permit the government to abridge expression is to allow for the perpetuation of half-truths. One only gets that side of the truth that the government wants us to hear or read or see. In the name of censorial brevity, the "whole truth" is not permitted and neither is the "full story" or the "uncut" movie. Censors fear the specter of the abundance of *unabridged* communicative liberty.

When, for example, the Federal Communications Commission prohibits, during specified hours, the reading of the unedited version of Allen Ginsberg's poem *Howl* on the radio, or bans the broadcast of the uncensored *Sopranos* on television, it is surely "abridging" our freedom of expression, even if our Supreme Court mistakenly declares otherwise.[17] So, too, when Congress restricts campaign contributions by permitting citizens and corporations to give some money but not the full amount they desire to give to a candidate or cause to show their support.

And when the National Park Service allows some people to assemble at the inaugural parade but not others, and does so because of the content of their messages, it abridges the First Amendment by depriving them and us of a full array of viewpoints. In this sense, "viewpoint discrimination" is necessarily linked to "abridging."

Of course, there is more to the meaning of "abridging" — that trigger word in the First Amendment — than what I have sketched out here. Our usage of the term has developed in wide-ranging ways over the centuries. And it must be noted that the word "abridged" is found in the 14th (equal protection, privilege and immunities, due process), 15th (race and voting), 19th (women's suffrage), 24th (poll taxes), and the 26th (18-year-old vote) amendments to our Constitution. So "abridging" or "abridged" has multiple meanings both under the First Amendment and under other amendments.

Still, we should remember that Madisonian idea that equated *abridging* with government attempts to "cut short" the many messages of "We the People." Half-truths, condensed government records, redacted judicial documents, abridged literary works, and word-sanitized TV programming are all antithetical to a vibrant First Amendment. They trade government-ordered brevity for the fullness of freedom.

A Few Concluding Thoughts

To be sure, there is more in the text of the First Amendment that merits careful attention. For example, what is *speech*?[18] And who exactly is the press?[19] Does "*no law*" really mean, as Justice Hugo Black contended, no law?[20] Moreover, how does all of this textual concern play out when it comes to applying the First Amendment to the states?[21]

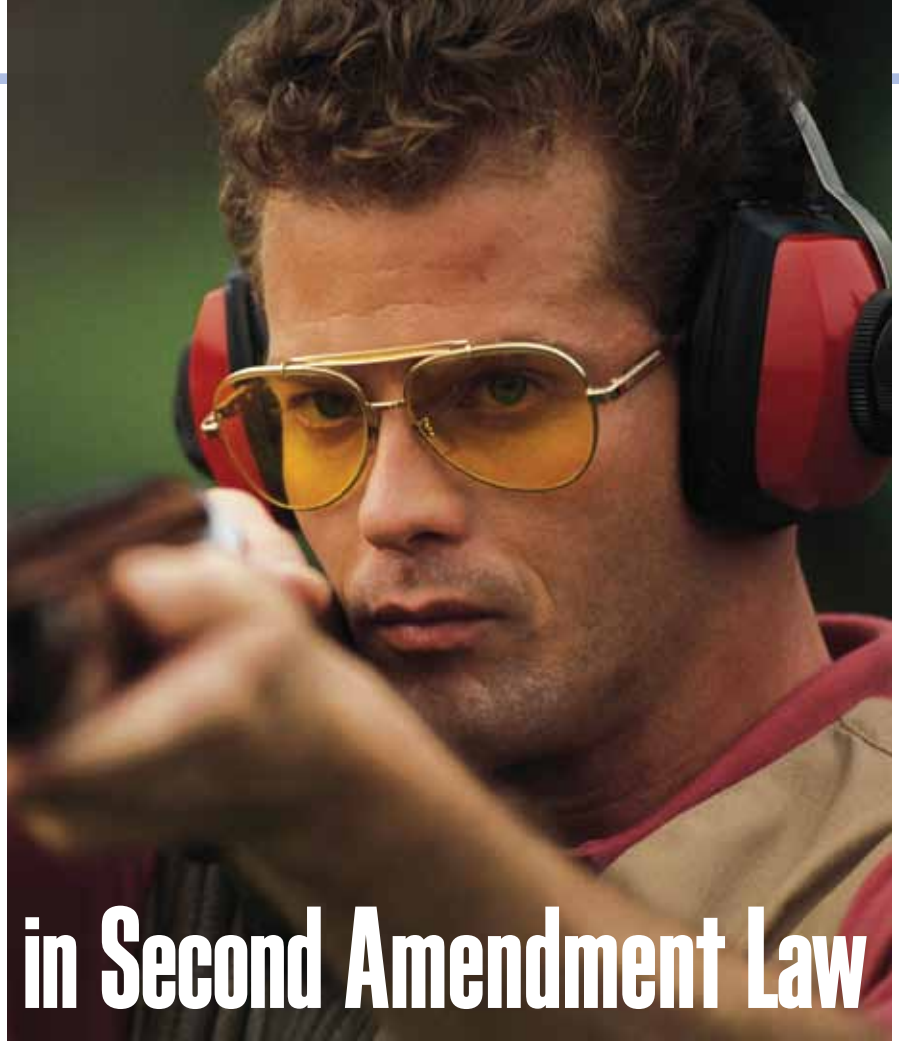
While those are matters necessarily left to another interpretive day, it should suffice for now to conclude with this: The first word of freedom can, even in these days of doubt, be the final word in terminating tyranny. ◆

Portions of this article previously appeared on the First Amendment Center's website.

FOOTNOTES

1. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (Oxford University Press, 1997), at pp. 103-104 (emphasis in original) (hereinafter CBR).
2. *Id.* at p. 116.
3. *Id.*
4. *Id.* at p. 109.
5. *Id.* at p. 106.
6. *Id.*
7. *Id.* at p. 93.
8. *Id.* at p. 83.
9. *Id.* at p. 101.
10. *Id.* at p. 86.
11. *Id.* at p. 116 (emphasis added).
12. House of Representatives, June 8, 1789, *Annals of Congress*, 1st Congress, 1st Session, pp. 434-435.
13. Hans A. Linde, "Courts and Censorship," 66 *Minnesota Law Review* 171 (1981).
14. *CBR, supra* note 1, at p. 96.
15. *See supra* note 12.
16. *CBR, supra* note 1, at p. 84.
17. Compare *FCC v. Pacifica* 438 U.S. 726 (1978) (upholding FCC indecency policy) *with Fox Television Stations, Inc. v FCC*, 613 F. 3d 317 (2nd Cir. 2010) (striking down on vagueness grounds the FCC's indecency policy). The *Fox* case is before the U.S. Supreme Court and should be decided in the 2011 Term.
18. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting exceptions to the First Amendment), and *Morse v. Frederick,* 551 U.S. 393 (2007) (Thomas, J., concurring) ("In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools.").
19. *See, e.g.*, Christina Abello, "Bloggers not protected in shield law under consideration in Senate," September 18, 2009, http://www.firstamendmentcoalition.org/2009/09/bloggers-not-protected-in-shield-law-under-consideration-in-senate/.
20. *See* Edmund Cahn, "Justice Black and First Amendment Absolutes: A Public Interview," *37 New York University Law Review* 549, 553 (1962), and Hugo L. Black, *A Constitutional Faith* (1969) at p. 45.
21. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 723 (1931) (Butler, J., dissenting) ("The decision of the Court . . . gives to freedom of the press a meaning and a scope not heretofore recognized, and construes 'liberty' in the due process clause of the Fourteenth Amendment to put upon the states a federal restriction that is without precedent."), and *Roth v. United States,* 354 U.S. 476, 496 (1957) (Harlan, J., concurring and dissenting in parts) ("the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases.").

Dan M. Peterson
and Stephen P. Halbrook



A Revolution in Second Amendment Law

Recent Supreme Court decisions have given new life to the right of citizens to keep and bear arms.

It is no exaggeration to say that in the past four years Second Amendment jurisprudence has been radically transformed. In all of our constitutional history, no provision of the Bill of Rights has undergone such a rapid and profound revolution in its interpretation.

Decisions by the lower federal courts over the past fifty years had nearly killed off any enforceable right to keep and bear arms under the federal Constitution. But reports of the death of that right were premature. Two decisions by the United States Supreme Court – *District of Columbia v. Heller*[1] in 2008 and *McDonald v. City of Chicago*[2] in 2010 – have restored it to vibrant life.

Until recently, Supreme Court precedent on the right to keep and bear arms was sketchy. Several decisions by the Supreme Court in the late nineteenth century discussed the Second Amendment, most notably *United States v. Cruikshank* and *Presser v. Illinois*.[3] Those cases affirmed the then prevailing rule that the Second Amendment, like other provisions of the Bill of Rights, operated only as a limitation on the federal government, not on the states.

The only substantive Second Amendment decision by the Supreme Court in the twentieth century was the enigmatic *Miller* case decided in 1939.[4] That decision held that a federal statute which banned interstate transport of a short-barreled shotgun without registering it and paying a $200 tax, absent any evidence in the record that the arm had militia utility, did not violate the Second Amendment.

The opinion was based on an incomplete record, and was rendered without briefing or oral argument on behalf of the defendant. The reasoning in *Miller*

was obscure, and for decades thereafter both pro- and anti-Second Amendment forces cited portions of the opinion as supporting their respective – and opposite – positions.

Although *Miller* resolved little, the Supreme Court remained silent on the Second Amendment for the rest of the century, except for passing references in a few cases.[5]

During that interval, the lower federal courts relied principally on two doctrines to deprive the Second Amendment of any meaningful effect. First, following the Supreme Court's pronouncements in *Cruikshank* and *Presser*, many courts continued to hold that state laws restricting the possession, carry, or use of firearms could not be challenged under the Second Amendment.[6] During the mid-twentieth century, the modern process of "selective incorporation," which applied the First Amendment, the Fourth Amendment, and most other provisions of the Bill of Rights to the states, had vastly altered the constitutional landscape. Nevertheless, without action by the Supreme Court, many federal courts declined to "incorporate" the Second Amendment to apply against the states.

The second doctrine used to nullify the force of the Second Amendment was the "collective right" theory. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The "collective right" theory seized on the prefatory "militia" language to insist that the Second Amendment was a right held by the people collectively, *i.e.*, by the states, and was limited to protection of militia-related activities. The ostensible corollary was that citizens had no individual right enforceable in the courts to keep and bear arms for non-militia purposes.[7]

In the recent *Heller* and *McDonald* decisions, both of these doctrines were blown out of the water by the Supreme Court. In *Heller*, the Court held that the second part of the Second Amendment – stating that "the right of the people to keep and bear Arms, shall not be infringed" – is the operative clause. The case was brought by a resident of Washington, D.C., who wished to possess a handgun for self-protection at home. At that time, D.C. law imposed a complete ban on civilian possession of handguns, other than a few that were grandfathered, and all firearms had to be stored in an inoperable condition.

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Heller dismantled the "collective right" theory, held that an individual has a constitutional right to possess a handgun in the home for purposes of self-defense, and struck down the requirement that the gun be stored in an inoperable condition. The Court did not make findings regarding the extent of the right outside the home because that issue was not presented by the case. Regarding the types of weapons protected by the Second Amendment, the Court noted that the right extends to arms "typically possessed by law abiding citizens for lawful purposes," including handguns.[8]

Significantly, the Court declined to employ any sort of "interest-balancing" test to determine the law's constitutionality, as Justice Breyer had advocated in his dissent. Justice Scalia's opinion for the 5-4 majority noted that the right to keep and bear arms cannot be balanced away:

> The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[9]

Whether the Second Amendment is "outmoded" in light of changing societal conditions might be debatable, the Court noted. But it affirmed that one thing is not debatable: "it is not the role of this Court to pronounce the Second Amendment extinct."[10]

The District of Columbia is a federal enclave, not a state. So, the question that was immediately presented in *Heller's* wake was whether this individual, enforceable right to keep and bear arms applies only to restrictions imposed by federal law, or to state and local firearms laws as well. It did not take long to find out.

Like the District of Columbia, the City of Chicago had an almost complete ban on handguns. Chicago's ordinance was challenged immediately after *Heller*. In *McDonald v. City of Chicago*, the only question presented to the Supreme Court was whether the Second Amendment applies to the states by incorporation through the Fourteenth Amendment. In 2010, the Supreme Court held that it does, thus opening up state and local laws to Second Amendment challenges.[11]

The Supreme Court has now elevated a constitutional protection that was nearly moribund to a vital right on a par with other provisions of the Bill of Rights. When some respondents in the *McDonald* case suggested "that the Second Amendment should be singled out for special – and specially unfavorable –

treatment," the Court replied succinctly: "We reject that suggestion."[12]

Although strongly affirming the existence of the right, and clarifying some aspects of its applicability, *Heller* and *McDonald* have left open many issues for later decision. Lower courts are grappling with those issues now, but it will be years before they are resolved.

A fundamental, unresolved question is the level of constitutional scrutiny – *e.g.*, strict scrutiny, intermediate scrutiny, or rational basis review – to be applied to restrictions on the right to arms. *Heller* rejected rational basis review[13] and, as noted, also rejected Justice Breyer's proposed "interest balancing" method, which is equivalent to intermediate scrutiny.[14] It suggested that D.C.'s law infringed so deeply on the core Second Amendment right that it should be struck down categorically, observing that, "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights," D.C.'s ban on handguns in the home "would fail constitutional muster."[15]

The *McDonald* opinion described the right to keep and bear arms as "fundamental" so many times that it is difficult to count them. Under traditional analyses, that would mean that any direct infringements on Second Amendment rights should be subject to "strict scrutiny."[16]

Since *Heller*, however, several federal Courts of Appeals have applied only intermediate scrutiny in Second Amendment challenges.[17] An instructive contrast is provided by a recent Third Circuit case and an even more recent Seventh Circuit case.

In *United States v. Marzzarella*,[18] the defendant was convicted of possessing a handgun with a serial number that had been obliterated in violation of 18 U.S.C. § 922(k). The Third Circuit could not conclude that "possession of unmarked firearms in the home is excluded from the right to bear arms" and, accordingly, addressed the level of constitutional scrutiny to be applied.[19]

The *McDonald* opinion described the right to keep and bear arms as "fundamental" so many times that it is difficult to count them.

The Court observed that "unmarked firearms are functionally no different from marked firearms."[20] So, unlike D.C.'s handgun ban in Heller, § 922(k) "leaves a person free to possess any otherwise lawful firearm he chooses – so long as it bears its original serial number."[21] Because "§ 922(k) was neither designed to nor has the effect of prohibiting the possession of any class of firearm," the Court believed that the proper standard was intermediate scrutiny.[22]

In *Ezell v. City of Chicago*,[23] by contrast, the Seventh Circuit applied a more exacting standard of review, akin to strict scrutiny, in a follow-up challenge to Chicago's firearms ordinances. Four days after *McDonald* was decided, Chicago enacted a new ordinance that did not ban all possession of handguns, but made firearms ownership difficult, expensive, and legally perilous. Among numerous other requirements and restrictions, the new ordinance required training at a gun range in order to possess a firearm. At the same time, it prohibited all gun ranges within the city.

After observing that broad firearms prohibitions are probably categorically unconstitutional, the Seventh Circuit stated that " a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end."[24] Chicago's range ban "prohibits the 'law-abiding, responsible citizens' of Chicago from engaging in target practice in the controlled environment of a firing range."[25] The Court described this as "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense."[26]

Accordingly, the Seventh Circuit directed that the ban on ranges be enjoined, along with several other ordinance provisions that effectively prevented the right to possess and discharge firearms outside the home for purposes of maintaining proficiency and satisfying the range training requirement.

A passage in *Heller* that was no doubt designed to soothe potential critics of that decision has instead led to significant uncertainties. *Heller* offered the reassuring comment that:

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[27]

The Court remarked in a footnote that such prohibitions were "presumptively lawful."[28]

There has been a tendency by some courts to analogize very dissimilar facts to the "presumptively lawful" prohibitions described in *Heller*, thus greatly expanding the scope of those prohibitions. Unsurprisingly, lower courts since *Heller*, including the Third Circuit, have upheld laws banning possession of firearms by felons.[29] But does that mean

that individuals can be stripped of their Second Amendment rights because they have committed a simple misdemeanor? Some courts, reasoning by analogy, think so.[30] Is a private driveway analogous to "sensitive places such as schools and government buildings?" At least one court believes it is and that carrying a firearm can accordingly be banned in the driveway of a private home.[31]

And what does "presumptively lawful" mean? Does it mean that conduct subject to such prohibitions is outside the scope of the Second Amendment altogether? That there is a rebuttable presumption of constitutionality? Or does it simply mean that the Supreme Court was predicting that such provisions may be upheld after appropriate constitutional scrutiny?

Another area of major uncertainty is the scope of the right. Does the right to bear arms extend outside the home? To "bear arms" means to "carry" them. The plain meaning of the language of the Second Amendment thus protects a right to carry arms outside the home. Nevertheless, quite a few lower court decisions have limited *Heller* to its facts and have refused to recognize any Second Amendment right to bear arms outside the four walls of a person's dwelling.[32] Some courts have specifically stated that they will not recognize such a right absent Supreme Court direction to do so.

Notably, the Third Circuit has hinted in dictum that the Second Amendment "must" protect other rights which can only be exercised outside the home, such as hunting, and bearing arms "as a bulwark against potential government oppression."[33]

Requirements to register firearms, and the prerequisites for registration, may also receive a fresh look in some jurisdictions. After *Heller* was decided, D.C. amended its laws to impose more stringent registration requirements on all firearms. These were challenged in a follow up lawsuit dubbed *Heller II*. The D.C. Circuit upheld some of the provisions, but remanded the case for consideration of the constitutionality of other provisions.

Requirements to register firearms, and the prerequisites for registration, may receive a fresh look in some jurisdictions.

The Court upheld the basic requirement that handguns be registered, but found that provisions relating to registration of long guns were "novel," not "longstanding," and needed to be examined as to their constitutionality.[35] The D.C. Circuit also found that certain registration provisions that applied both to handguns and long guns were "novel," such as the requirement that applicants demonstrate knowledge of D.C. gun laws, a vision test, training requirements, a ban on registering more than one pistol every 30 days, a three-year registration renewal requirement, ballistic tests on pistols, and other provisions.[36] It therefore remanded for further proceedings on those requirements as well.

The interplay between the Second Amendment and state constitutional provisions protecting the right to keep and bear arms will likely be the subject of future jurisprudence. State constitutions can certainly provide greater protection for that right than exists under federal constitutional law. Delaware has a unique history in this regard.

The Delaware constitutional convention in 1791 considered three proposals to include a written guarantee of the right to keep and bear arms in Delaware's revised constitution. A select committee reported a detailed declaration of rights which included the following guarantee, taken directly from the Pennsylvania Declaration of Rights: "The right of the citizens to bear arms in defence of themselves, and the state, shall not be questioned."[37]

However, during the Revolution, Whigs had been disarmed by Tories, and Tories in turn disarmed by Whigs (convention member Richard Bassett, a Tory, had himself been disarmed).[38] There were also allegations that two other members had encouraged their followers to carry guns at the Sussex County election in 1787.[39]

Thus, although there was little disagreement about confirming an individual right to bear arms in self-defense, there was considerable uneasiness on the part of convention members about groups of armed men who might purport to act "in defense of the state" (such as during elections). Despite several attempts, the convention therefore could not agree on the language to be used to define the right, and the amended constitution was adopted in 1792 without inclusion of a specific guarantee.[40]

In 1986 and 1987, both houses of the legislature passed an amendment to the Bill of Rights by a two-thirds majority, thereby adding an express right to keep and bear arms to the Delaware Constitution. It reads: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use."[41]

This is among the broader formulations of the right that appear in state constitutions, and in particular it clearly does not limit exercise of the right to the home, as some courts suggest about the Second Amendment. Should future case law limit the federal right under the Second Amendment, it is possible that

citizens of Delaware could have a stronger right to be armed than residents of many other states.

If anything is certain about the rapidly developing subject of the federal and state rights to keep and bear arms, it is that uncertainty will persist. Second Amendment jurisprudence promises to continue to be one of the most dynamic areas of constitutional law for years to come. ◆

FOOTNOTES

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2. *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

3. *United States v. Cruikshank*, 92 U. S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); see also *Miller v. Texas*, 153 U.S. 535 (1894).

4. *United States v. Miller*, 307 U.S. 174 (1939).

5. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

6. See, e.g., *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269 (7th Cir. 1982) (argument that Second Amendment protects against state encroachments "borders on the frivolous"); *Fresno Rifle and Pistol Club v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

7. Decisions from the federal Courts of Appeals adopting some version of the collective right theory, or denying individuals any Second Amendment protection for private use or possession of firearms, are cited in Justice Stevens' dissent in *Heller*, 554 U.S. at 638 n.2. In a thoroughly researched opinion prior to *Heller*, the Fifth Circuit rejected the collective right theory, and held that the Second Amendment protects an individually enforceable right to possess arms for non-militia purposes. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

8. *Heller*, 554 U.S. at 625.

9. *Id.* at 634.

10. *Id.* at 636.

11. The plurality opinion stated that the Second Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment. Justice Thomas, concurring, opined that it applied to the states through the Privileges or Immunities Clause.

12. *McDonald*, 130 S.Ct. at 3043.

13. *Heller*, 554 U.S at 628 n.27.

14. *Id.* at 634-35, 689-91.

15. *Id.* at 628-29.

16. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973).

17. *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010) (individual convicted of misdemeanor crime of domestic violence); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (drug addict); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (person subject to domestic violence protective order).

18. *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

19. *Id.* at 95.

20. *Id.* at 94.

21. *Id.* at 97.

22. *Id.*

23. *Ezell v. City of Chicago*, 651 F.3d. 684 (7th Cir. 2011).

24. *Id.* at 708.

25. *Id.*

26. *Id.*

27. *Heller*, 554 U.S. at 626-27.

28. *Id.* at 626-27 n. 26.

29. *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *see also, e.g., United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010).

30. *People v. Delacy*, 122 Cal. Rptr.3d 216 (Cal. Ct. App. 2011), *cert. denied* 2012 WL 117549 (U.S. Jan. 17, 2012).

31. *People v. Yarbrough*, 86 Cal. Rptr.3d 674 (Cal. Ct. App. 2008).

32. *See, e.g., Williams v. State*, 10 A.3d 1167 (Md. 2011), *cert. denied* 2011 WL 4530130 (U.S. Oct. 3, 2011); *Masciandaro v. United States*, 638 F.3d 458 (4th Cir. 2011), *cert. denied* 2011 WL 2516854 (U.S. Nov. 28, 2011).

33. *Marzzarella*, 614 F.3d at 92 (citing *Heller*). The Second Amendment rights recognized in *Ezell* also involved conduct outside the home.

34. *Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558, at *16 (D.C. Cir. Oct. 4, 2011) ("*Heller II*").

35. *Id.* at *7.

36. *Id.* at *8.

37. *Minutes of the Convention of the Delaware State*, 22 (Dec. 17, 1791); see also Pennsylvania Declaration of Rights, Art. XXI (1790).

38. Harold B. Hancock, *The Loyalists of Revolutionary Delaware* (Newark: University of Delaware Press, 1977), 48-50.

39. *Documentary History of the Ratification of the Constitution*, Merill Jensen ed. (Madison: State Historical Society of Wisconsin, 1976), vol. 3, at 62, 97.

40. A detailed discussion of the 1791 convention and political concerns at that time relating to the right to keep and bear arms is contained in Stephen P. Halbrook, *The Founders' Second Amendment* 295-98 (2008).

41. Del. Const. Art. I, § 20.

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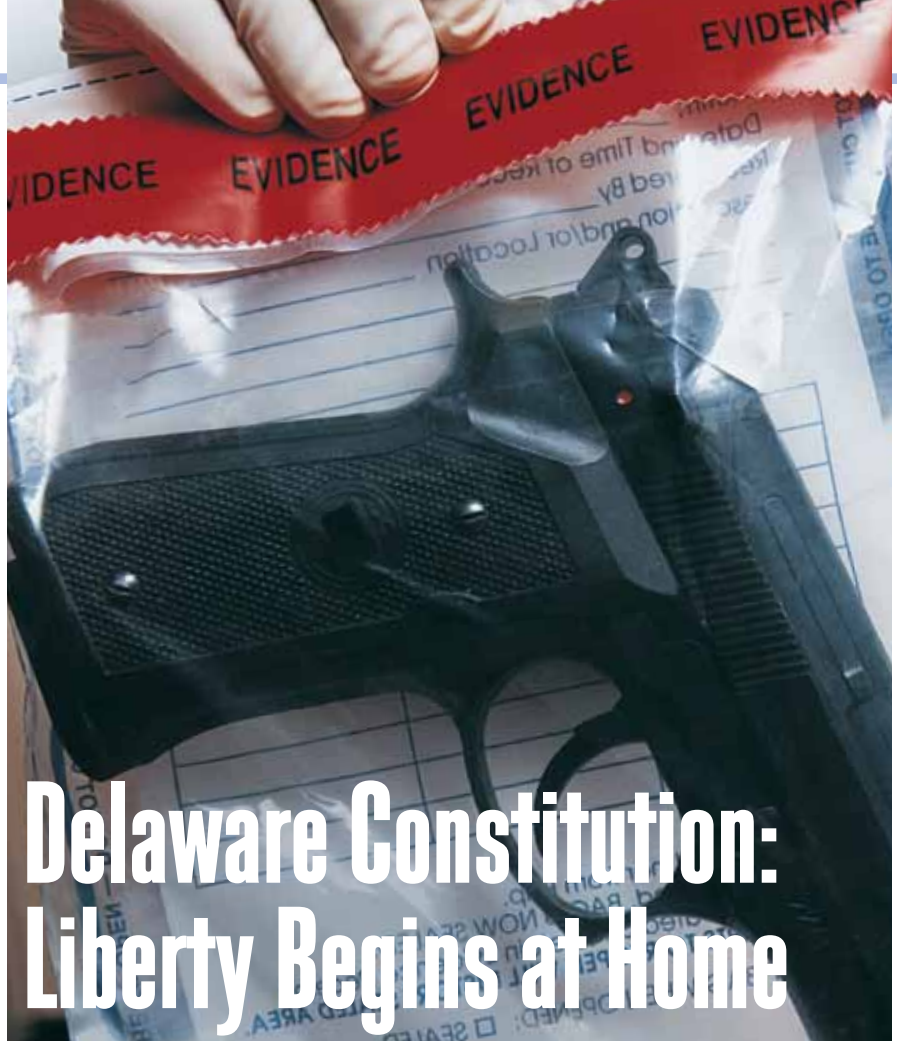

Article I of the Delaware Constitution: Liberty Begins at Home

In many cases, our State constitution may provide more rights and protections than the U.S. Constitution.

In a 1977 article addressing the importance of state courts to the protection of fundamental rights, Justice William Brennan observed:

> *Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment – that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one.*[1]

He could not say that today. With limited exceptions,[2] the United States Supreme Court has backed away from the role Justice Brennan lauded because of a change in personnel.[3] Thus, for Delaware, it remains for judicial application of the Delaware Constitution to carry that burden. History shows it can.

Days before adopting Delaware's first constitution in 1776, convention delegates adopted the Declaration of Rights and Fundamental Rules of the Delaware State, which guaranteed Delawareans many of the basic liberties they enjoy today: freedom of religion; enjoyment of life, liberty, and property; freedom of the press; free elections; a remedy at law for every injury in goods, lands or person; trial by jury of facts

where they arise; freedom from search or seizure without a warrant under oath naming or describing the place or person to be searched; and procedural rights in criminal prosecutions, including the right to counsel, the right against self-incrimination, the right to confront accusers and witnesses and to examine evidence, the right to a speedy trial by an impartial jury, conviction only by a unanimous jury, freedom from excessive bail, fines, and cruel and unusual punishment.[4]

New state constitutions were adopted in 1792, 1831 and 1897. Article I of each of those constitutions preserved and expanded these common law rights and added others, *e.g.*, elections shall be free *and equal*; the right of assembly; no criminal proceedings by information; no double jeopardy; no suspension of the writ of *habeas corpus*; guarantee of bail for most prisoners; and consideration of the health of prisoners in the construction of jails.[5]

When the present state constitution was adopted in 1897, the convention delegates understood that if a fundamental right were omitted from the Delaware Constitution, Delawareans would, in most cases, lose that protection from state action.[6] Accordingly, they provided protections against state government power that stand independent from federal court decisions.

Given the system of dual sovereignty established by the United States Constitution and the right of state courts to apply their constitutions as they see fit,[7] scholars have noted that turning to state constitutions for the protection of fundamental rights offers something for both liberals and conservatives: it is a way to continue the expansion of constitutional rights, while at the same time providing the triumph of federalism.[8]

"It is undisputed … that the Delaware Constitution may provide broader protections than the United States Constitution,"[9] and Delawareans "enjoy more rights, more constitutional protections, than the Federal Constitution extends to them."[10] The Delaware Supreme Court has the free and unfettered right to interpret and apply Article I of the Delaware Constitution without deference to federal court decisions.[11] It has established criteria for determining whether a provision of the Delaware Constitution is broader than its federal counterpart,[12] and has repeatedly recognized ways in which the Delaware Constitution provides greater protection of individual liberty than the Bill of Rights.

Scholars have noted that turning to state constitutions for the protection of fundamental rights offers something for both liberals and conservatives.

Examples of Delaware's greater constitutional protection of individual liberty pervade the criminal law. For example, in *Hammond v. State*,[13] the Delaware Supreme Court declined to follow a U.S. Supreme Court ruling that there can be no due process violation for failure to preserve evidence that lacks apparent exculpatory value, unless the police act in bad faith.[14] It ruled instead that under Del. Const. Art. I, § 7, "fundamental fairness, as an element of due process"[15] requires consideration of the entire record whenever police have failed to preserve evidence that *could* have been favorable to the defendant. Police conduct is only one of the relevant facts.[16]

Delaware has repeatedly recognized that Art. I, § 6 provides broader search and seizure protections than the Fourth Amendment.[17] In fact, even the term "seizure" has a broader meaning under Art. I, § 6. A "seizure" occurs for Fourth Amendment purposes only after the state has applied physical force or the suspect submits to the state's assertion of authority, but it occurs for Art. I, § 6 purposes when a reasonable person would believe he or she is not free to ignore police presence.

Post-seizure actions of a suspect may not be used to justify the seizure. Thus, where police did not have probable cause to stop a suspect, Art. I, § 6 prevented the admission of contraband he discarded while running away, although it would not have been excluded under the Fourth Amendment.[18]

In a recent case, *State v. Holden*, Superior Court found Art. I, § 6 to be more protective than three of the four pertinent Court of Appeals decisions had found the Fourth Amendment to be. In *Holden*, the Superior Court ruled that, absent exigent circumstances, Art. I, § 6 requires authorities to obtain a warrant before attaching a GPS transmitter to a private automobile for long-term surveillance.[19]

An appeal in *Holden* was dismissed after the U.S. Supreme Court mooted the Delaware issue by affirming the one Court of Appeals decision that had required a warrant.[20]

The Delaware Constitution gives criminal defendants rights to a twelve-member jury and conviction only by a unanimous verdict.[21] The U.S. Constitution does not, although it requires unanimity for conviction by a six-member jury.[22]

Requirements for a knowing waiver of counsel are more stringent under the Delaware Constitution. Where police obtain a statement by interrogating a suspect who has received *Miranda* warnings, but has not been told his attorney has contacted the police in an effort to reach him, *Moran v. Burbine*,[23] held that the Fifth Amendment right to counsel did not prevent use of the statement at trial.[24] In contrast, the Delaware Supreme Court ruled in *Bryan v. State* that the Art. I, § 7 right to counsel would bar its use.[25]

The Fifth and Fourteenth Amendment guarantees of due process of law find their analogues in Del. Const. Art. I, §§ 7, 9, which require application of the "law of the land" to criminal prosecutions and actions for civil redress. Numerous Delaware Supreme Court decisions state that "due process" and "the law of the land' "have substantially the same meaning."[26]

However, *Bryan*, like *Hammond v. State*, indicates that, at least in the criminal rights context, Delaware due process protection may be stronger. Its opinion finding a greater right to counsel under Delaware law characterized the "denial of the assistance of counsel [a]s a violation of the due process of law guaranteed by" Art. 1, § 7.

While most decisions recognizing Delaware's stronger constitutional protections are in criminal cases,[27] no doctrine prevents recognition under the Delaware Constitution of broader rights of free speech and religious freedom than have been found under the First Amendment. Recognition of broader protection would be consistent with Delaware's constitutional history.

In the case of free speech rights, it is mandated by that history. Prior to a 2003 amendment, Article I, § 5 of the Delaware Constitution did not explicitly address free speech rights.[28] Delawareans had all of the free speech rights provided by the First Amendment, through the Fourteenth Amendment incorporation,[29] and an Opinion of the Justices stated "it is probable that the free press provision of the Delaware Constitution Art. 1, § 5, has the same scope as the First Amendment."[30]

An individual right provided by the federal constitution that is absent from the Delaware Constitution is the right to equal protection.

Notwithstanding that protection of free speech, the General Assembly, presumed to know of existing statutes when it enacts a new statute on the same subject matter,[31] amended Article I, § 5 to add references to free speech and recognition of the "invaluable rights" of "free communication of thoughts and opinions."[32] This additional language would have no effect if it did not provide protection for free speech beyond that provided by the First Amendment. Under basic statutory construction principles, it must be given effect.[33]

The text of the Delaware Constitution also supports greater protection for religious freedom. While the First Amendment simply states, "Congress shall make no law respecting an establishment of religion …," the drafters of Del. Const. Art. I, § 1 took care to provide that "no person shall or ought to be compelled to attend any religious worship."[34] Would religious observance – prayer – at a governmental meeting violate Art. I, § 1 even if it did not violate the Establishment Clause? The issue is open, particularly where public officials conduct prayer in the context of proceedings involving a significant public interest.

An individual right provided by the federal constitution that is absent from the Delaware Constitution is the right to equal protection. Unlike a majority of states, Delaware has no explicit equal protection clause in its constitution.[35] Like every state, it has an equal accommodations statute, and that statute prohibits state agencies from discriminating in the provision of service on the basis of race, age, marital status, creed, color, sex, disability, sexual orientation or national origin.[36]

But the statute supplies no private right of action, and victims seeking redress under state law may only file complaints before the Human Relations Commission.[37] Review of appellate decisions shows that two-thirds of Commission decisions for claimants have been reversed.[38] The limited statutory right is a poor substitute for a constitutional right that may be enforced in court.

Fulfillment of the "birthright guarantees" recognized by Justice Brennan is essential to continued liberty, especially in these difficult times. Now, more than ever, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[39]

Cynics may cite the hoary comment that "no matther whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns [sic],"[40] but thanks to Delaware's nonpartisan selection process for judges[41] that is not a Delaware problem, and Delaware courts are free to carry out that injunction to the best of their ability. ◆

FOOTNOTES

1. Brennan, *State Constitutions and the Protection of Individual Rights*. 90 Harv. L. Rev. 489, 490 (1990).

2. *E.g., Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) (free speech rights of corporations); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (recognizing individual Second Amendment right to keep and bear arms); *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (Second Amendment applies to states).

3. Justice John Paul Stevens observed in a 2007 interview that, except perhaps for Justice Ginsburg, "every judge who's been appointed to the court since [1971] has been more conservative than his or her predecessor." *New York Times Magazine*, Sept. 23, 2007.

4. *See The Delaware Constitution of 1897: The First One Hundred Years*, (R.J. Holland and H.B. Rubenstein, eds., Delaware State Bar Association 1997), p. 285-87.

5. *See id*., Appendices.

6. *Id*. p. 83.

7. *Jones v. State*, 745 A.2d 856, 866 (Del. 1999); *Sanders v. State*, 585 A.2d 117, 145 (Del. 1990).

8. Chemirinsky, *Two Cheers for State Constitutional Law*, 62 Stan. L. Rev. 1695, 1696-97 (2010); Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081, 1081 (1985).

9. R.J. Holland, *The Delaware State Constitution: A Reference Guide* (2002), p. 42.

10 *Sanders, supra*, at 145. Delaware is not alone in this regard. More than 350 state court decisions have found greater protection in state constitutions than in the Bill of Rights. *See* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y. U. L. Rev. 535, 548 (1986); 1 Joseph G. Cook, *Constitutional Rights of the Accused* § 2:8 (3d ed. 2011).

11. *Dorsey v. State*, 761 A.2d 807, 814 (Del. 2000) (citing Sanders, *supra*, at 145).

12. *See Jenkins v. State*, 970 A. 2d 154, 158 (Del. 2009) ("To present properly an alleged violation of the Delaware Constitution, a defendant must discuss and analyze one or more of the following non-exclusive criteria: 'textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes.'") (quoting *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008)).

13. 569 A.2d 81 (Del. 1989).

14. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988).

15. *Hammond*, 569 A.2d at 87.

16. *Id.; see also, Deberry v. State*, 457 A.2d 744, 753 (Del. 1983) (stating that "when loss of evidence has severely prejudiced the accused, the degree of culpability of the State is immaterial").

17. *E.g., Jones v. State*, 745 A.2d 856, 865-66 (Del. 1999); *Dorsey, supra* at 817.

18. *Jones, supra*, 745 A.2d at 862, 869, 874.

19. *State v. Holden*, 2010 Del. Super. LEXIS 493, *13-14 (Del. Super. Ct. December 14, 2010). One of the authors of this article submitted an *amicus* brief supporting the warrant requirement in the Delaware Supreme Court.

20. *State v. Holden*, No. 30, 2011 (ORDER) (February 1, 2012); *U.S. v. Antoine Jones*, No. 10-1259 (decided January 23, 2012).

21. *Claudio v. State*, 585 A.2d 1278, 1301 (Del. 1991).

22. *Burch v. Louisiana*, 441 U.S. 130 (1979).

23. 475 U.S. 412, 422-23 (1986).

24. *Bryan v. State*, 571 A.2d 170, 177 (Del. 1990).

25. *Id.*

26. *E.g., Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011); In *the Matter of Carolyn S.S.*, 498 A.2d 1095 (Del. 1984). See also, R.J. Holland, *supra* n.9, at 47.

27. Greater protection has been recognized in the civil context as well. *See, e.g., Opinion of Justices*, 216 A.2d 668 (Del. 1966) (Article X, Section 3 of Delaware Constitution prohibits use of state funds for transporting students to parochial schools); *In matter of Tavel*, 661 A.2d 1061 (Del. 1995) (right of incompetent persons to refuse medical intervention).

28. R.J. Holland, *supra* n. 9, p. 35; 74 Del. Laws ch. 112 (1972)).

29. *Schneider v. New Jersey*, 308 U.S. 147 (1939).

30. *Opinion of the Justices*, 324 A.2d 211, 213 (Del. 1974).

31. *State v. Fletcher*, 974 A. 2d 188, 193 (Del. 2009).

32. 74 Del. Laws ch. 112 (2003).

33. *See, e.g., State, Dep't of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982). *But see, 896 Associates, LLC v. Gillespie*, 2008 Del. Ch. LEXIS 264 (not acknowledging the additional language).

34. Del. Const., Art. I, § 1.

35. Review of all fifty state constitutions indicates that twenty-seven explicitly provide for equal rights. In *Hughes v. State*, 653 A.2d 241, 243 n.3 (Del. 1994) the Court acknowledged an opinion finding equal protection to be embodied in Maryland's "law of the land" constitutional provision, which is similar to Del. Const., Art. I § 7, but concluded that it was unnecessary to reach the question under Delaware law.

36. 6 Del. C. §§ 4502, 4504.

37. *Miller v. Spicer*, 602 A 2d 65 (Del. 1991).

38. A Westlaw search shows six out of nine rulings for claimants were reversed.

39. *Mapp v. Ohio*, 367 U.S. 643, 663 (1961) (quoting Boyd v. U.S., 116 U.S. 616 (1886).

40. *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 Fordham L. Rev. 2187 (quoting Finley Peter Dunne, *Mr. Dooley's Opinions* 26 (1901)).

41. *See* Del. Const. Art. IV, § 3; Executive Order Number 4 (March 27, 2009).

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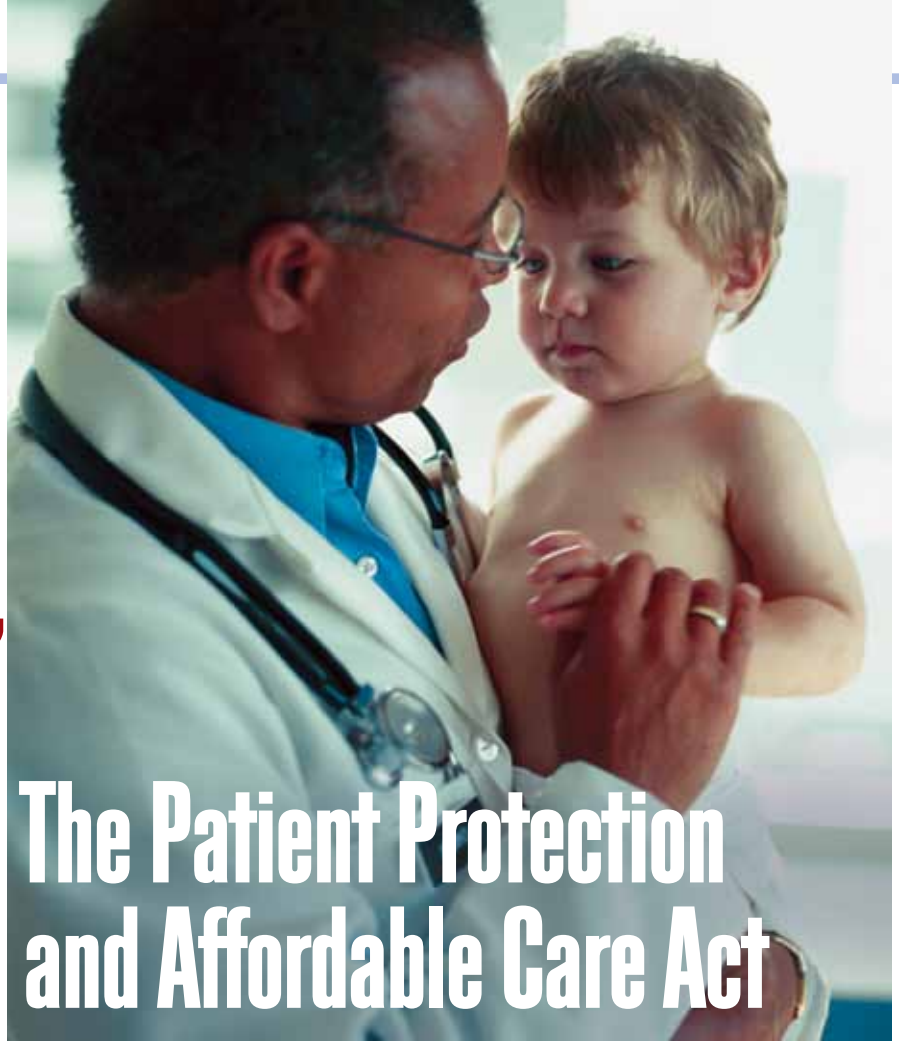

Federalism, Liberty and Preemption: The Patient Protection and Affordable Care Act

The hotly contested healthcare reform law raises perennial issues on the prerogatives of Congress, the States and individuals in our federal system.

There is nothing more basic to the Constitution and the Bill of Rights than the elusive concept of liberty. When the Constitution was adopted, liberty was principally conceived as freedom from government power, and the States that ratified the Constitution were concerned that the newly-created central government might pose a threat to both the sovereignty of those States and the freedom of their citizens. Consequently, the Constitution reserved to the States all powers not delegated to the Federal Government, denied to the States, or necessary and proper for the exercise of enumerated responsibilities of the Federal Government.[1]

More than 100 years later, during the Progressive Era and the subsequent New Deal, Theodore Roosevelt and his distant cousin Franklin Roosevelt envisioned action by the Federal Government less as a threat to liberty and more as a tool to promote new liberties for individuals by restraining the power of private wealth and promoting economic security.[2] Today, our nation lives with both of those legacies, unable to decide which to emphasize and unwilling to lose either.

The uneasy bedfellows of State's rights, individual liberty and progressive government wrestle with one another under the constitutional umbrella of federalism. Within that context, two legal issues often arise: what are the powers of the Federal Government and, when the Federal Government does act within its proper scope, to what extent has it pre-empted the States?

These issues are often seen as a battle over sovereignty between the Federal Government and the States. But there are liberty interests at stake in the answers to both of these questions. The reservation of powers to the States was intended by the framers of the Constitution to protect "fundamental liberties," prevent an "excessive accumulation of power in one branch," and "reduce the risk of tyranny and abuse from either front."[3]

The most current and prominent issue of federal power concerns the constitutional challenges to the Patient Protection and Affordable Care Act passed by Congress in 2010. One of the challenges is that the "private mandate" in that Act is beyond the power of Congress to regulate commerce. In essence, the mandate requires most persons to obtain health insurance or pay a penalty or tax (the characterization of the payment being disputed).

Here there is a palpable collision between the classic "progressive" objective of providing affordable health care to all and the classic "libertarian" objective of precluding government from mandating private decisions.[4] Pending before the United States Supreme Court is an appeal from the Eleventh Circuit's decision holding that the individual mandate contained within that Act exceeds the power of the Federal Government to regulate commerce.[5]

Beyond this high-profile constitutional battle, there is the less prominent but no less important issue of federal preemption. Even when acting within its proper sphere, Congress may leave to the States significant latitude also to act within the same area. The sharing of responsibilities between the Federal Government and the States promotes other values important to liberty. Those include tolerating the diversity of cultures among the States and providing opportunities for experimentation — both of which are often the end products of liberty.[6]

Can the Federal Government compel every person to purchase health insurance from private insurance companies?

The Patient Protection and Affordable Care Act

The basis for the constitutional challenge to the Patient Protection and Affordable Care Act is almost intuitive: can the Federal Government compel every person to purchase health insurance from private insurance companies? If so, is there any limit to the products or services the Federal Government may compel us to purchase?

These two questions go to the core of the Eleventh Circuit's conclusion that the Act exceeds the power of the Federal Government under the Commerce Clause. Two other circuits — the D.C. Circuit[7] and the Sixth Circuit[8] — have concluded that the Constitution does allow this mandate, and the Supreme Court has accepted an appeal of the Eleventh Circuit's opinion.

Briefing on that appeal will be completed in early March, a three-day, five-and-one-half-hour oral argument is scheduled in late March and a decision is expected by the end of June, 2012.

The fundamental difference between the Circuits does not turn upon any disagreement over the scope of the commerce power as articulated by the Supreme Court for more than 50 years. Rather, the difference seems to turn upon whether this admittedly unique use of federal power transgresses a limitation to the commerce power inherent in federalism's concern about liberty.

This is a limitation on the commerce power never before articulated — perhaps because that power has never before been used in this manner. And this new limitation — as articulated by the Eleventh Circuit — applies to the Federal Government but not the States. Thus, Massachusetts may compel its citizens to purchase health insurance, but the Federal Government may not do likewise.

The Eleventh Circuit and other Circuits agree that Congress has the power to regulate and has regulated both the market for health insurance and the market for health care.[9] The Circuits further agree that Congress may regulate purely intrastate economic conduct by individuals if that conduct — when aggregated — may rationally be perceived by Congress as affecting interstate commerce.[10]

It is further agreed that "Congress can regulate purely intrastate activity that is not itself *'commercial'*... if it concludes that failure to regulate that class of [noncommercial] activity would undercut the regulation of the interstate market."[11] And the Circuits also seem to agree that the distinction between action and inaction — which the plaintiffs in each case assert as the boundary line for Congress's power over commerce — is not a persuasive or workable distinction by itself.[12]

The Circuits also decline to classify the decision not to purchase health insurance as "noneconomic activity"

— another distinction pressed by the plaintiffs.[13]

Although the Eleventh Circuit argues that the mandate in the Act is overbroad, it does not hold that it was irrational for Congress to conclude that an individual's decision to forego health insurance could have substantial effects on the interstate markets for health insurance and health care. The mandate is intended to prevent the uninsured from shifting the cost of their care to persons with insurance or health care providers, thereby increasing the cost of both health care and health insurance for others.

Although the Eleventh Circuit argues that the cost-shifting may not be as substantial as Congress perceived, there is no dispute it occurs.[14] In addition, the Eleventh Circuit affirmatively states that another objective of the Act is to compel the healthy and the young — who might otherwise not purchase insurance — to purchase insurance to contribute to the care of the less healthy and older.[15]

The Eleventh Circuit concludes: "Thus, *even assuming that decisions not to buy insurance substantially affect interstate commerce*, that fact alone hardly renders them a suitable subject for regulation."[16]

What then ultimately renders the mandate an unsuitable subject for regulation? It is the degree of intrusion on liberty. What drives the Eleventh Circuit to differ with the other Circuits is *not* some basic difference over the scope of the commerce power as traditionally articulated or some difference in assessing the impact of the mandate on interstate commerce.

Rather, it is a concern for liberty, and the Eleventh Circuit says as much. It begins its analysis with the "first principle" that the limitation on Congress's power "was adopted by the Framers to ensure protection of our fundamental liberties."[17] The Court states:

> …We must look not only to the action itself but also its implications for our constitutional structure… While these structural limitations are often discussed in terms of federalism, their ultimate goal is the protection of individual liberty.[18]

The mandate is intended to prevent the uninsured from shifting the cost of their care to persons with insurance or health care providers.

The emphasis on the liberty interest also is evident when the Eleventh Circuit confronts the most expansive precedent on the scope of the commerce power — the decision in *Wickard v. Filburn*.[19] The distinction the Eleventh Circuit draws between *Wickard* and the present case turns upon the degree the regulation intrudes upon individual liberty, not any distinction between effects on commerce or the nature of the commerce.

In *Wickard*, the Supreme Court held that Congress's wheat production quotas were constitutional as applied to a plaintiff farmer's home-grown and home-consumed wheat. Roscoe Filburn wanted to grow wheat to feed his family in excess of the acreage permitted to him under the Agricultural Adjustment Act of 1938.

Despite the fact that Filburn's conduct was solely intrastate in nature and his conduct alone would not have any significant effect on interstate commerce, the Supreme Court concluded Congress had the power under the Commerce Clause to prohibit him from growing wheat for his family to eat.

And the intended effect of this prohibition was to force him to purchase wheat in the market, thereby supporting the price of wheat in a period of deflation.

The Eleventh Circuit concludes that the holding in *Wickard* does not justify the individual mandate in the Act. The Court explains that the reason this prohibition on growing wheat was constitutional — and the mandate to purchase insurance is *not* — has to do with the extent of the intrusion on the liberty of the individual.

According to the Eleventh Circuit, Mr. Filburn was not compelled to purchase wheat for his family in the market. He had other alternatives available to him. "The wheat-acreage regulation imposed by Congress…was a limitation — not a mandate — *and left Filburn with a choice*. The Act's economic mandate to purchase insurance, on the contrary, leaves no choice and is more far-reaching."[20]

In short, it is not a difference in the effect upon commerce or the nature of the commerce that distinguishes *Wickard* from the mandate in the Act; it is the degree of intrusion on individual liberty. The Eleventh Circuit states:

> Although this distinction appears, at first blush, to implicate liberty concerns not at issue on appeal, in truth it strikes at the heart of whether Congress has acted within its enumerated power. Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon

them by the federal government.[21]

The D.C. Circuit expressly addresses and rejects this argument:

> Appellants' view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that seems more redolent of Due Process Clause arguments. But it has no foundation in the Commerce Clause. The shift to the "substantial effects" doctrine in the early twentieth century recognized the reality that national economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce.
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> * * * *
>
> That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before — but that seems to us a political judgment rather than a recognition of constitutional limitations. It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family.[22]

The liberty constraint that the Eleventh Circuit finds in the Commerce Clause makes new law, but it serves as the only reasoned basis for the difference in its decision and those of the other Circuits (or prior precedent). In dissent, Judge Marcus of the Eleventh Circuit argues that the Act's intrusion on individual decision-making would survive scrutiny under substantive due process analysis, unless the Supreme Court were to revive the *Lochner* line of cases, which was used to invalidate much of the Progressive Era and New Deal legislation as intruding upon economic liberty.[23]

Perhaps the Eleventh Circuit has established a new foundation for individual liberty, embedded in the structure of federalism.

Thus, according to the dissent, the protection accorded to liberty under the Due Process Clause of the 14th Amendment would not prevent the States from mandating the purchase of health insurance — as Massachusetts has done — but the liberty constraint the Eleventh Circuit majority imposes under the Commerce Clause does inhibit the Federal Government from intruding on the same individual economic decisions.

Yet if federalism is founded on a concern for liberty from Federal intrusion, as distinct from intrusion by the States, then perhaps the Eleventh Circuit has established a new foundation for individual liberty, embedded in the structure of federalism. Ultimately, the United States Supreme Court must address this issue if it is to affirm the Eleventh Circuit.[24]

Preemption and a Cooperative Federalism

Even if the Supreme Court disagrees with the Eleventh Circuit and holds that the Patient Protection and Affordable Care Act does not unconstitutionally infringe upon liberty interests, or issues a ruling invalidating the mandate to purchase health insurance which allows other provisions of the law to remain in effect, questions about the relationship between Federal and State law are likely to remain and play a prominent role in the implementation of the Act.

Sprinkled liberally through the Patient Protection and Affordable Care Act are numerous provisions which either preempt or preserve various State laws relating to health insurance, or which allow States flexibility in the implementation of the Act which may be difficult to interpret and apply.

Significant issues are also likely to arise regarding the extent to which the law impliedly preempts State law or imposes requirements which sufficiently conflict with State laws so as to require the preemption.

To the extent the Patient Protection and Affordable Care Act, and other Federal laws, fail to provide clear and explicit rules relating to the relationship between Federal and State law, substantial costs may be imposed upon the States, the Federal Government and the private sector. These costs include uncertainty about whether and to what extent State laws are preempted, which may increase transactional costs and deter economic activity and generate expensive and socially unproductive litigation to determine the scope and extent of Federal preemption.

Similarly, the failure to clearly distinguish between Federal and State responsibilities may generate disputes regarding the respective jurisdiction

of Federal and State courts which may delay and impede the efficient resolution of disputes. Disputes about the extent of Federal authority, and perceptions that an excessive concentration of power is being vested in the Federal Government, may also contribute materially to the polarization of political discourse and may impede the development of a broad social consensus needed to effectively implement Federal healthcare legislation and develop solutions to the many problems which confront our society in many other areas.

Creating an effective division of responsibilities between the Federal Government and the States both with respect to healthcare legislation and in other areas poses difficult challenges because our Constitution does not create a bipolar system in which States are prohibited from enacting laws governing matters subject to Federal law.

Instead, our Constitution has created a system of shared responsibilities and overlapping authority in which Federal action does not automatically preempt State law, but only does so to the extent expressly provided for in Federal laws and regulations, or to the extent necessary to avoid inconsistencies between Federal and State law, or as necessary to achieve the fundamental objectives of Federal laws or regulations.

In addition, the closely related scope of the power to regulate interstate commerce delegated to the Federal Government and the scope of police powers reserved to the States makes substantial areas of overlapping Federal and State responsibilities inevitable.[25]

Where Federal and State authority overlaps substantially, as in the Patient Protection and Affordable Care Act, litigation to resolve disputes regarding the extent of Federal preemption of State law is inevitable. While the Federal judiciary plays an important role in resolving these disputes, the courts cannot be relied upon to determine the most efficient and effective manner in which to balance Federal and State responsibilities. As unelected officials, judges cannot and should not exercise legislative powers or participate in the administration of governmental programs, but should limit their role to the interpretation of Federal law, determining Congressional intent, and defining the outer limits of Federal power.

Where Federal and State authority overlaps substantially, litigation to resolve disputes regarding the extent of Federal preemption of State law is inevitable.

As a result, it is primarily the responsibility of the political legislative and regulatory process, through the interaction between the Federal Government and the States, to create and preserve an effective balance of Federal and State roles.[26] Unfortunately, far too often Federal action is taken without due regard to its impact upon State law and without a careful and deliberate allocation of Federal and State responsibilities.

There is a broad and bi-partisan consensus that improved efforts are needed to create a more effective system of cooperative federalism. Both Presidents Reagan and Clinton issued executive orders intended to improve the balance of Federal and State responsibilities by directing federal agencies to respect the role of State governments and avoid the preemption of State law whenever possible and to consult with and coordinate their actions with State officials.[27]

Shortly after his inauguration, President Obama also issued a Presidential Memorandum embracing the objectives of the Reagan and Clinton executive orders which directed federal agencies to review and re-evaluate the preemptive impact of all federal regulations issued within the last 10 years.[28]

Pursuant to the Presidential Memorandum, the Administrative Conference of the United States recently developed detailed recommendations regarding procedures to be followed by Federal agencies in adopting regulations which may expressly or impliedly preempt State laws.[29]

For these efforts to be successful more extensive discussion and dialogue about the benefits of cooperative federalism is required and more specific guidance should be developed regarding how to best allocate responsibilities between the Federal Government and the States. One current project which may contribute to these efforts is the establishment of a Federalism and State Law Committee by the Uniform Law Commission.

The Committee, working in cooperation with the National Governor's Association and other state government organizations, has launched an effort to focus Federal and State attention on these important issues. Other participants in this effort are the Council of State Governments, the Center for State Courts, the National Association of Attorneys General, the National Council of State Legislatures, and other state government organizations.

One important focus of the efforts of the Uniform Law Commission and its partners is to develop a set of principles of "cooperative federalism."[30] These principles will articulate the importance of maintaining a healthy balance of Federal and State responsibilities, the costs and harms associated with the failure to do so, and will stress the importance of cooperative action by all participants in the political process to achieve these objectives.

The principles will further attempt to define the respective roles of Federal and State government, and of other participants in this process, and articulate more specific criteria and standards for the allocation of responsibilities between the Federal Government and the States.

Hopefully, principles of this type, developed without reference to specific policy decisions, will provide useful guidance in resolving questions about how best to balance Federal and State responsibilities, both with respect to healthcare legislation, and in other areas. ◆

More information about these activities is available at the Web Site of the Uniform Law Commission at www.nccusl.org. This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting an attorney.

One important focus of the efforts of the Uniform Law Commission and its partners is to develop a set of principles of "cooperative federalism."

FOOTNOTES

1. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 74 U.S. 700, 725 (1869); Tafflin v. Levitt, 493 U.S. 455, 458 (1990); and *Lane County v. Oregon*, 74 U.S. 71, 76 (1869).

2. Sandel, Michael J., *Justice: What's the Right Thing to Do?* (2009) at 218-219.

3. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985).

4. The irony of this collision is that the individual mandate at issue is a product of a compromise that sought to provide affordable care within an existing free market structure of private insurance, as opposed to a government-funded (through taxes) health insurance or health care system. In fact, the mandate at issue was sought by the insurance industry to facilitate its ability to provide coverage for pre-existing conditions and for premiums based upon community rating. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 547 (6th Cir. Mich. 2011)

5. *Florida v. United States HHS*, 648 F.3d 1235 (11th Cir. Fla. 2011) *cert. granted* 181 L. Ed. 420 (U.S. 2011). The pending appeal raises another challenge relevant to federalism. The state plaintiffs argue that the Act's expansion of the Medicaid program violates an asserted limitation on Congress's power under the Spending Clause. The Eleventh Circuit holds — contrary to decisions in some other Circuits — that the Tenth Amendment prohibits the Federal Government from imposing conditions on federal aid to the States that are so onerous as to compel the States to enact policies or programs Congress is without the power to enact directly, but the Eleventh Circuit also holds that the expansion of Medicaid under the Act does not violate that limitation. *Florida*, 648 F.3d at 1263-69. The Supreme Court directed briefing and argument on this issue as well as the challenge to the individual mandate.

6. There are other reasons less directly related to individual liberty that support the delegation of decision-making to the States, such as allowing decisions to be made at the level of government closest to the activity at issue.

7. *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (cert. petition on hold).

8. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. Mich. 2011) (cert. petition on hold).

9. *Florida*, 648 F.3d at 1271, 1293 and 1302-1303 (Slip Op. at 73, 126 and 147-148); *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *41.

10. *Florida*, 648 F.3d at 1269 (Slip Op. at 68-69); *Thomas More Law Ctr.*, 651 F.3d at 541-543; and *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *41.

11. *Florida*, 648 F.3d at 1270 and 1277 and *Thomas More Law Ctr.*, 651 F.3d at 541-543.

12. "…We are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case. Although the Supreme Court's Commerce Clause cases frequently speak in activity-laden terms, the Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce — perhaps, in part, because it has never been faced with the type of regulation at issue here." *Florida*, 648 F.3d at 1286.

13. *Florida*, 648 F.3d at 1287; *Thomas More Law Ctr.*, 651 F.3d at 547-549 and *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *42-48.

14. *Florida*, 648 F.3d at 1293-1296 and 1299-1303.

15. *Florida*, 648 F.3d at 1299-1300.

16. *Florida*, 648 F.3d at 1293.

17. *Florida*, 648 F.3d at 1284.

18. *Florida*, 648 F.3d at 1284.

19. 317 U.S. 111, 63 S. Ct. 82 (1942).

20. *Florida*, 648 F.3d at 1292.

21. *Florida*, 648 F.3d at 1292.

22. *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *50-51 and 54.

23. *Florida*, 648 F.3d 1361-1365.

24. The Supreme Court could sustain the Act by relying upon the taxing power or defer the issue based upon the Anti-Injunction Act.

25. *Hamilton v. Kentucky*, 251 U.S. 146, 156 (1919).

26. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

27. Executive Order 12612, 52 F.R. 41685 (October 26, 1987); Executive Order 13132, 64 F.R. 43255 (August 10, 1999).

28. 74 F.R. 24963 (May 22, 2009).

29. Administrative Conference of the United States, Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*, (December 9, 2010).

30. *See* http://www.nccusl.org/Committee.aspx?title=Federalism.

Timothy Jay Houseal

OF COUNSEL: Michael N. Castle

Soon after DLA Piper (the largest law firm in the world, with offices on every continent except Antarctica) opened an office in Wilmington, Delaware, they focused their recruiting on Michael N. Castle.

This lawyer-statesman enjoys unique credibility and name recognition based on the diverse experiences and achievements of a career of more than 48 years. Mike Castle has served as a litigation associate, Deputy Attorney General, small firm partner, solo practitioner, State Representative, State Senator, Lt. Governor, two-term Governor, and U.S. Congressman.

He is the longest-serving Congressman in Delaware history (18 years), and some refer to him by that title. Many others have settled on calling him Governor Castle again because it is frequently considered to be the most prestigious position that he occupied and, as it turns out, is the office that he enjoyed the most. In person he insists on being called Mike.

Michael N. Castle was born and raised in Wilmington and attended the Tower Hill School. His father, James M. Castle, Jr., was a patent attorney with the DuPont Company. Mike decided against attending his father's alma mater, the University of Pennsylvania (founded by Benjamin Franklin, his fifth great grandfather on his mother Louisa Bache Castle's side), in favor of Hamilton College. He selected Hamilton because he preferred a smaller school and had the opportunity to play basketball there.

His father did not push him into a legal career, but Mike became intrigued by the study of law on his own after taking a constitutional law course at Hamilton taught by Professor Channing Richardson. After graduation, he did well enough on the Law School Aptitude Test to be accepted at Georgetown University Law School. His goal was to return to Delaware to practice law.

Mike Castle passed the Delaware bar exam in 1964. Januar Bove and Thomas Lodge recruited him to serve as a litigation associate at the firm then known as Connolly Bove & Lodge where he worked on a wide variety of matters in all three Delaware counties, including commercial litigation, insurance, worker's compensation, real estate, banking, and even some criminal defense work.

In order to gain more trial experience, Mike and colleague F.L. Peter Stone began serving as part-time Deputies Attorney General. On his very first day as a "DAG," Mrs. Doris Harris, who would today be referred to as a paralegal, handed him a stack of 34 Court of Common Pleas cases to try or plead that day.

Despite this baptism by fire, Mike enjoyed the fast-paced trial work so much that he and Pete Stone formed a new law partnership known as Stone & Castle, accepting conflict and referral work from CB&L and other firms while continuing to practice part-time as DAG's.

Mike now explored his other professional interest – public service. In 1966, he was elected to the Delaware House for one term and then served in the State Senate from 1968 to 1976. In 1976, he returned to full-time legal practice and formed another law partnership with Carl Schnee, a well-known criminal defense attorney, who later became Delaware's United States Attorney.

Encouraged by then-Governor Pierre du Pont to become his re-election campaign running mate, Michael N. Castle returned to the political arena and was elected Lt. Governor in 1980. Unfortunately, an Ethics Opinion concluded that Schnee & Castle's criminal defense practice and regulatory work presented possible conflicts of interest with the new Lt. Governor's public office. The partnership was dissolved. Mike Castle began a solo practice that was soon augmented by the hiring of an associate and later partner Stephen W. Spence.

In 1984, Mike Castle left the active practice of law when he was elected the 69th Governor of Delaware, a position that he held until 1992. In that year, he was elected to the House of Representatives and served in that office until 2011. Whether in executive or legislative office, Mike Castle earned a reputation for practical and consensus-building statesmanship, which served the State and Nation well.

At DLA Piper, Castle works primarily out of the firm's Wilmington and Washington, DC, offices. He is a partner in the firm's Government Affairs practice group and focuses on financial services, international trade, healthcare, and energy matters. Not surprisingly, he has also been called upon by clients, educational institutions, and non-profit entities to give talks on a variety of legal and regulatory topics and other issues of public interest.

Castle has found the specialization in the practice of law and the tremendous advances in technology to be the most significant changes from when he began his career in the 1960s. He is thankful that his new firm has the extensive resources to assist him on both fronts. Mike counsels new lawyers to seek out opportunities to gain trial experience early in their careers by serving in the Department of Justice, by applying for judicial clerkships, and by accepting pro bono litigation assignments through DVLS, CLASI, the Office of the Child Advocate, and other non-profit activities. Mike also encourages attorneys to round out their legal experience by running for public office or by getting involved in political campaigns.

The balanced career and advice of Michael N. Castle are in keeping with the admonition of his ancestor Ben Franklin: "Let each part of your business have its time." ◆

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