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Section 8: Update & Looking Ahead

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Monuments in the Texas Capitol building and grounds depict both the secular and religious history of Texas. A Ten Commandments monument was placed forty-two years ago on the side of the capitol opposite the main entrance. There was no legislative history on its placement there, it was not erected with tax dollars, and it requires no maintenance. The court held that a reasonable viewer touring the capitol grounds, informed of the Ten Commandments monument’s history and placement, would not conclude that the state was giving a religious rather than a secular message. The monument was declared constitutionally sound.

Questions Presented: (1) Did Texas lack a secular purpose when they erected the monument? (2) Is the primary effect of the display to advance religion?

THOMAS VAN ORDEN Plaintiff-Appellant,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; DAVID DEWHURST, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; TOM CRADDICK, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; CHRIS HARRIS, in his official capacity as Member of the State Preservation Board; PEGGY HAMRICK, in her official capacity as Member of the State Preservation Board; JOCELYN LEVI STRAUS, in her official capacity as Member of the Texas Preservation Board; CIARLYNN DOERING, in her official capacity as Interim Executive Director, State Preservation Board, Defendants-Appellees.

United States Court of Appeals
For the Fifth Circuit

Decided November 12, 2003

[Excerpt; some footnotes and citations omitted]

HIGGINBOTHAM, Circuit Judge:

The plaintiff, Thomas Van Orden, asks the federal courts to order the State of Texas to remove from the grounds of the State Capitol a granite monument in which the Ten Commandments are etched. In a bench trial, the district court considered documents, testimony, and an extensive stipulation of facts filed by the parties. In a careful opinion, the court rejected the claim of First Amendment violations and entered judgment for the State. The plaintiff appeals. We affirm.
The Capitol, with its surrounding twenty-two acres, was dedicated on May 16, 1888. The first monument was erected on these grounds three years later. It was “a bronze statue of a Texan holding a muzzle-loading rifle atop a Texas Sunset Red granite base.” Names of the Texans who died in the battle of the Alamo are inscribed on its four granite supports. Sixteen additional monuments have since been erected on the capitol grounds, a protected National Historic Landmark maintained by the State Preservation Board.

The Visitor Services of the State provides tours of the Capitol Building with its historic statuary, portraits, and memorabilia, and it publishes a written guide for walking tours of the grounds for visitors who wish to continue with the outdoor displays. The guided tour of the Capitol Building offers a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas. They include a tribute to African American legislators, a Confederate plaque, a plaque commemorating the donors of the granite for the building, and a plaque commemorating the war with Mexico. There is a Six Flags Over Texas display on the floor of the Capitol Rotunda featuring the Mexican Eagle and serpent which as visitors will learn, is a symbol of Aztec prophecy together with the Confederate Seal containing the inscription “Deo Vindice” (God will judge). Should the tour continue to the Supreme Court Building, visitors will find inscribed above the bench the phrase “Sicut Patribus, Sit Deus Nobis” (As God was to our fathers, may He also be to us). Before reaching the Supreme Court building from the Capitol, visitors will encounter four other monuments in the immediate vicinity: a tribute to Texas children; a statue of a pioneer woman holding a child in tribute to the role of women in Texas history; a replica of the Statue of Liberty; and a tribute to the Texans lost at Pearl Harbor.

The Ten Commandments monument was a gift of the Fraternal Order of Eagles, accepted by a joint resolution of the House and Senate in early 1961. It is a granite monument approximately six feet high and three and a half feet wide. In the center of the monument, a large panel displays a nonsectarian version of the text of the Commandments. Above this text, the monument contains depictions of two small tablets with ancient Hebrew script. There are also several symbols etched into the monument: just above the text, there is an American eagle grasping the American flag; higher still, there is an eye inside a pyramid closely resembling the symbol displayed on the one-dollar bill. Just below the text are two small Stars of David, as well as a symbol representing Christ: two Greek letters, Chi and Rho, superimposed on each other. Just below the text of the commandments, offset in a decorative, scroll-shaped box, the monument bears the inscription: “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.”

The parties stipulated that (1) the sparse legislative history “contains no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate Journal entries”; (2) the State selected the site on the recommendation of the Building Engineering and Management Division of the State Board of Control; (3) the expenses “were borne exclusively by the Eagles”; (4) the monument requires virtually no maintenance; and (5) the dedication of the monument was presided over by Senator Bruce Reagan and Representative Will Smith. There is no official record that any other person participated.
The main entry into the Capitol Building is on its south side facing Congress Street. The monument displaying the Ten Commandments is located on the north side of the Capitol Building on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building.

II
The plaintiff argues that Texas “accepted” the monument “for the purpose of promoting the Commandments as a personal code of conduct for youths and because the Commandments are a sectarian religious code, their promotion and endorsement by the State as a personal code contravenes the First Amendment.” He asserts that the district court’s finding that the State had a secular purpose for the display is not supported by the evidence and that a reasonable viewer would perceive the display of the decalogue as a State advancement and endorsement of religion favoring the Jewish and Christian faiths.

The State replies that the display serves a secular purpose as found by the district court and a reasonable observer would not conclude that the State is seeking to advance, endorse, or promote religion by its display. To the contrary, the State observes that the display has been in place without legal attack for over forty-two years and, viewed in context, is part of the state’s commemorative display of significant events and strands of Texas history. It argues that a reasonable person touring the Capitol Building and its historical grounds would not see the display of the decalogue as State endorsement of religion. Rather, with its simple presentation and location between the Capitol Building and the Texas Supreme Court Building, a reasonable viewer would see the monument as a recognition of the large role of the decalogue in the development of Texas law. Equally, with its proximity to the pioneer woman holding a child and to the figures of children at play, it would be seen as a fit location to express appreciation for the work of the Eagles with American youth.

***

IV A
The district court found that the purpose of the legislature was “to recognize and commend a private organization for its efforts to reduce juvenile delinquency.” It gleaned this purpose from the reason stated in the Resolution granting the Eagles permission to erect the monument. The plaintiff concedes that this recited purpose is a valid secular purpose, but contends that it was not the true purpose. Rather, he argues that monuments “are not erected to honor donors and they are not erected to pay tribute [to] their acts of donation. They are erected to pay tribute to and honor the subject or ideal depicted.”

The Legislature, of course, cannot dictate the finding of secular purpose by a bland recitation. The finding of the district court here, however, rests on two powerful realities. First, there is nothing in either the legislative record or the events attending the monument’s installation to contradict the secular reasons laid out in the legislative record, brief as it is; there is nothing to suggest that the Legislature did not share the concern about juvenile delinquency. Second, Texas has a record of honoring the contributions of donors and those they represent, contrary to plaintiff’s unsupported argument. For example, ten years before its resolution accepting the Ten Commandments monument, the Legislature authorized the Boy Scouts of America to install a replica of the Statue of Liberty....

***
Our conclusion that the legislative authorization was supported by a valid secular purpose is reinforced by the related but distinct inquiry whether the primary effect of the display advances or inhibits religion as seen from the eyes of a reasonable observer, informed and aware of his surroundings.

The Ten Commandments have both a religious and secular message. Given this duality, our effects inquiry must focus on the specific facts and context of the display. As Justice Blackmun explained in Allegheny:

The effect of the display depends upon the message that the government’s practice communicates: the question is “what viewers may fairly understand to be the purpose of the display.” That inquiry, of necessity, turns upon the context in which the contested object appears: “[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.”

Returning to our earlier description of the Capitol, we note first that the grounds are designated as a National Historic Landmark that is dedicated to the display of “statues, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today.” The State points to the replica of the Seal of Mexico displayed on the tour path of the Capitol, reminding that it “acknowledges the mystical traditions of the indigenous people of the Southwest, who were displaced by a religious Catholic regime for some 300 years.”

Relatedly, the State suggests that the decalogue in Texas is displayed in a museum setting. The State points out that the Curator of the Capitol is a professional museum curator, with an advanced degree in museum science and the Texas State Preservation Board qualifies as a museum as defined by federal statute....

We need not accept the State’s museum analogy in full measure to acknowledge that, while short of the museum envisioned by Justice O’Connor, a setting which would wholly negate endorsement, the manner in which the seventeen monuments are presented on the grounds portion of the Capitol tour supports the conclusion that a reasonable viewer would not see this display either as a State endorsement of the Commandment’s religious message or as excluding those who would not subscribe to its religious statements.

History matters here. For forty-two years, the monument has stood in Austin without the filing of any legal complaint. This quiescence is remarkable for Travis County, the seat of state government and the home of the University of Texas, whose campus is a stone’s throw away from the Capitol grounds. This Court is well aware that Travis County is not lacking in persons willing and able to seek judicial relief from perceived interferences with constitutional rights. Had this monument been recently installed, the inference of religious purpose would have been stronger. That it has been in place for so long adds force to the contention that the legislature had a secular purpose. As Judge Becker observed:

The reasonable observer would perceive an historic plaque as less of an endorsement of
religion than a more recent religious display not because the Ten Commandments have lost their religious significance, but because the maintenance of this plaque sends a much different message about the religious views of the County. . . . The reasonable observer, knowing the age of the . . . plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a longstanding plaque.

In sum, we are persuaded that Texas does not violate the First Amendment by retaining a forty-two-year-old display of the decalogue. The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government. We are not persuaded that a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude that the State is endorsing the religious rather than the secular message of the decalogue.

To say this is not to diminish the reality that it is a sacred text to many, for it is also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people. The power of that counsel is evidenced by its expression in the civil and criminal laws of the free world. No judicial decree can erase that history and its continuing influence on our laws - there is no escape from its secular and religious character. There is no constitutional right to be free of government endorsement of its own laws. Certainly, we disserve no constitutional principle by concluding that a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed - replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment. A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the decalogue's divine origin. Yet in context even that message does not drown its secular message. So it is here.

AFFIRMED.
School Boards in Ohio erected Ten Commandments monuments on high school grounds. When their constitutionality was questioned, they surrounded the Ten Commandments monuments with other monuments to documents that were influential in the founding of our country. The Court held that there was no evidence that the Ten Commandments monuments were originally erected for a secular purpose, and thus were unconstitutional.

Questions Presented: (1) Did the monuments originally have a secular purpose?; (2) Did the monuments' principle and primary effect neither advance nor inhibit religion? (3) Did the monuments foster "an excessive government entanglement with religion"?

BERRY BAKER and ANONYMOUS PLAINTIFF # 1, Plaintiffs-Appellees, v. ADAMS COUNTY/OHIO VALLEY SCHOOL BOARD, Defendant-Appellant, KENNETH W. JOHNSON, THOMAS D. CLAIBOURNE, RONALD D. STEPHENS, and DOUGLAS W. FERGUSON, Intervening Defendants-Appellants.

United States Court of Appeals
For the Sixth Circuit

Decided January 12, 2004

RONALD LEE GILMAN, Circuit Judge.
In the Fall of 1997, the Adams County/Ohio Valley School Board erected stone monuments inscribed with the Ten Commandments on the grounds of four newly constructed high schools. The Adams County Ministerial Association paid for the four monuments and agreed to indemnify the Board for any litigation expenses. County residents Berry Baker and an anonymous plaintiff sought an injunction against the Board, alleging that the display violated the Establishment Clause of the United States Constitution. After the suit was commenced, the Board modified the display by adding monuments that included excerpts from the Justinian Code, the Preamble to the United States Constitution, and the Magna Carta. The district court granted summary judgment in favor of the plaintiffs and ordered the removal of the Ten Commandments monuments. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

The comprehensive opinion of Magistrate Judge Timothy Hogan provides a complete recitation of the facts. (By consent, the case was decided by a magistrate judge in the district court below.) Only the most pertinent facts are recounted here.
In 1997, the Board erected permanent stone monuments near the entrance of four new high schools within Adams County. Each monument had etchings of the American flag and an eagle on the sides, and bore the following inscription on biblical-looking tablets:

THE TEN COMMANDMENTS
THOU SHALT HAVE NO OTHER GODS BEFORE ME
THOU SHALT NOT WORSHIP ANY GRAVEN IMAGE
THOU SHALT NOT TAKE GOD'S NAME IN VAIN
REMEMBER THE SABBATH TO KEEP IT HOLY
HONOR THY FATHER AND THY MOTHER
THOU SHALT NOT KILL
THOU SHALT NOT COMMIT ADULTERY
THOU SHALT NOT STEAL
THOU SHALT NOT BEAR FALSE WITNESS
THOU SHALT NOT COVET

The Board's president spoke informally with each Board member before accepting the donation of the four monuments from the Ministerial Association. No resolution or minutes document the action taken. After the monuments were erected, the Board adopted a resolution designating the area where the monuments stood as land upon which county residents could erect structures symbolic of local or national history. The Board subsequently installed signs indicating that no costs were borne by the Board and that no endorsement of religion was intended by the display.

On February 9, 1999, Baker and the anonymous plaintiff filed suit against the Board alleging that the monuments violated the Establishment Clause of the First Amendment....

***

The Board, which had not previously articulated a secular reason for exhibiting the original Ten Commandments monuments, then surrounded each monument with four additional monuments of identical size to form a semi-circular wall with the Ten Commandments at the center. Two of the new monuments, placed to the left to the Ten Commandments, bore ... excerpts from the Justinian Code and the Declaration of Independence....

***

The other two monuments were placed to the right of the Ten Commandments and bore ... excerpts from the Preamble to the United States Constitution and the Magna Carta....

***

Finally, plaques were installed at the base of each monument. The plaque for the center monument read:

THE TEN COMMANDMENTS

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the
Declaration of Independence. This understanding of rights as God-given is rooted in the tradition of thought known as ethical monotheism. This is the belief—shared by Muslims, Jews, Christians, and others—in a Divine lawgiver who imposes upon earthly rulers a duty to recognize and respect each person's basic human rights and equal dignity. The Ten Commandments express the fundamental tenets of ethical monotheism. The Commandments remind us of our obligation to one another and to the Creator. They remind us that we owe one another respect. The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Comparable explanations were placed on plaques in front of the other four monuments. Despite these modifications to the original stand-alone display of the Ten Commandments monuments, the district court found that the display of the latter ran afoul of the purpose, effect, and entanglement prongs of the test set forth in Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). It consequently ruled that the display violated the Establishment Clause of the First Amendment.

ANALYSIS

* * *

In Lemon v. Kurtzman, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), the Supreme Court held that Pennsylvania and Rhode Island statutes providing for state aid to church-related elementary and secondary schools violated the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause has been applied to state and local governmental action through the Due Process Clause of the Fourteenth Amendment. See Everson v. Bd. of Educ., 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947) (noting that the Due Process Clause of the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment).

A three-prong test was formulated in Lemon to evaluate Establishment Clause challenges to government action: (1) the action "must have a secular legislative purpose," (2) "its principal or primary effect must be one that neither advances nor inhibits religion," and (3) it must not foster "an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13 (quotation marks and citations omitted). We are "bound to follow [the Lemon] test until the Supreme Court explicitly overrules or abandons it." Adland, 307 F.3d at 479.

The outcome of the present case is controlled by this court's recent decision in ACLU v. McCready County, 354 F.3d 438, 2003 U.S. App. LEXIS 25606, No. 01-5935 (6th Cir. Dec. 18, 2003) (McCready County), which dealt with a nearly identical factual situation. In McCready County, the court upheld a supplemental injunction prohibiting the exhibition of a modified display titled "The Foundations of American Law and Government." The supplemental injunction was granted on the heels of an earlier injunction prohibiting the county and its school board from exhibiting the Ten Commandments alone. In her concurring opinion, Judge Gibbons explained that there was a strong indication of improper purpose behind the modified display in light of:

(1) the inherently religious nature of the Ten Commandments, (2) defendants-appellants' failure to articulate a secular purpose until
after litigation had commenced, (3) the “overtly religious” quality of the second display, (4) the absence of any evidence in the record indicating that the Ten Commandments have been or will be integrated into the school curriculum as part of an appropriate program of study, (5) the absence of any discussion integrating the Ten Commandments into a secular subject matter other than a conclusory assertion about the Declaration of Independence, and (6) the emphasis on the Ten Commandments as the only religious text in the displays[.]

Id. (Gibbons, J., concurring) (citations omitted) (numbers added). These same factors are manifested in the present case. In particular, there is no evidence that the Ten Commandments monuments were originally erected with a secular purpose. The fact that the monument was donated by the Adams County Ministerial Association, a Christian religious organization that also agreed to indemnify the Board for any litigation expenses, implies the opposite. Furthermore, as the district court noted, “there are no contemporaneous minutes, documents, or formal policy explaining the intent or purpose of the School Board in permitting the permanent placement of [the original] monoliths.” The fact that the original displays contained only the Ten Commandments monuments “imprinted the defendants’ purpose, from the beginning, with an unconstitutional taint . . . .” McCreary County (quotation marks omitted).

Failing to set forth a secular explanation until after the litigation had commenced is a further indication that the purported secular justification was belatedly adopted solely to avoid Establishment Clause liability. See id. (citing Adland, 307 F.3d at 481). Furthermore, “the secular purpose requirement is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes.” Id. (quoting Adland, 307 F.3d at 480). In this regard, we note that even as the Board surrounded the Ten Commandments with four other stone monuments engraved with passages from selected historical documents, it added a plaque to the center of the display that stated, in part: “The Commandments remind us of our obligation to one another and to the Creator.” (Emphasis added.)

A failure to satisfy any one of the Lemon test’s three prongs is fatal to government action that is being challenged on Establishment Clause grounds. Edwards v. Aguillard, 482 U.S. 578, 583, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987). Because the Board failed to satisfy the secular-purpose prong, we therefore have no need to address the second and third prongs of the Lemon test.
The enormous windows of the Texas law library, an otherwise musty and lonely place, capture Austin’s gentility frame by frame – a towering oak tree, a garden of yellow roses, the granite rotunda of the state Capitol.

Inside, a homeless man with tired eyes works at a corner carrel in the basement amid his belongings – a duffel bag with a broken zipper, reading glasses he found in a parking lot, chicken-scratch notes sullied with splashes of instant coffee. His carefully parted hair and striped shirt contrast with his stained teeth and dirty fingernails. Armed with scraps of paper and pens he digs out of the trash, he’s been here for two years, trying to define, once and for all, the boundaries of a governmental endorsement of religion.

A former defense attorney whose career collapsed under the weight of a debilitating psychological condition, Thomas Van Orden sued the state of Texas two years ago in federal court. His lawsuit contends a 5-foot-tall monolith to the Ten Commandments, erected on the grounds of the Capitol, violates the 1st Amendment’s ban on “establishment of religion.”

Earlier this month, an appeals court ruled that the monument constitutes a “secular message” and can stay. Today, Van Orden is piecing together a last appeal to the U.S. Supreme Court. A growing chorus of state officials and legal analysts, many of whom initially dismissed Van Orden as an amusement at best, now believe the Supreme Court might take the case in an effort to reconcile a conflicting pile of lower court decisions.

A thoughtful man with an admittedly troubled soul, Van Orden plans to argue the case himself – provided he can find a ride to Washington. “What else am I going to do?” he said. “Sit on a bench in a park?”

Last summer, the nation’s attention was focused on a courthouse in Alabama, where Chief Justice Roy Moore erected a Ten Commandments monument and defied orders to remove it. That became a flashpoint dispute between Christian activists and advocates of the separation of church and state.

But many analysts – and even some evangelical leaders – believed that monument represented such a clear constitutional violation that it was unlikely to set legal precedent. They were not surprised when, in November, the Supreme Court refused to hear Moore’s appeal.

Still, most analysts believe the high court will be forced eventually to wade into the issue, if only because of widespread disagreement among lower courts about when the Ten Commandments can be displayed by the government. If the justices weigh in, they are expected to select another of the 20-odd disputes over the display of the Ten Commandments simmering in courts across the nation. Many believe the
pieces are falling into place for Van Orden’s lawsuit, [...] to reach Washington.

"I want to make this clear: I didn’t sue religion," Van Orden, 59, said. "I sued the state for putting a religious monument on Capitol grounds. You wouldn’t put that statue on a Hindi’s lawn, so why would you put it on the lawn of the Capitol, the home of all people? It is a message of discrimination. Government has to remain neutral."

He stood from the desk that has effectively been ceded to his case by librarians who know him by name and shuffled off in search of a legal brief. Rifling through a storage cabinet, he pulled out a frayed ball of kite string. It’s the one he used to measure the 75-foot span between the Capitol and a granite slab etched with the words of the Ten Commandments, beginning with "I am the Lord thy God."

“This," he said, holding the string next to a window to bathe it in more adoring light, "will be in a museum one day. Like Davy Crockett’s hat."

It’s heady talk for a man who saves money by eating every other day, and by living in a tent. Whether Van Orden can turn his ball of string into a piece of history remains to be seen – and will turn not on the monument itself, but on its surroundings.

In contrast to Moore’s monolith, which dominated the Alabama courthouse rotunda, the Texas monument is one piece in a scattered sculpture garden. Other monuments in the area are dedicated to historic events and people, from Texans who served in the Korean War to the state’s "pioneering women."

That context seems to allow for two legitimate interpretations – that the government is promoting Judaism and Christianity at the exclusion of other religions, as Van Orden argues, and that the government is merely celebrating history, as state officials argue. That’s why many believe the case is a perfect test for the Supreme Court.

"Judge Moore’s case was an in-your-face expression of religion. Even deeply devout Christians and Jews don’t want the Ten Commandments shoved down their throat," said Alan Wolfe, director of the Boisi Center for Religion and American Public Life at Boston College. In contrast, Wolfe said, Van Orden’s case "is about style, about form, rather than content."

"Most people think that we ought to have some kind of religious symbolism in our public life, but it should be very general and not confrontational," Wolfe said. "Americans want it to be capacious and inclusive, not sectarian. This might pass that test."

Would it?

"I’ll give you a good lawyer answer: It depends," said John Ferguson, a Baptist minister, attorney and education coordinator for the First Amendment Center in Tennessee. Ferguson is among those who believe Van Orden’s case has a good shot at reaching the Supreme Court.

"It’s not presented in isolation. So you have to look at why it’s there. If it’s some veiled attempt to promote religion, it can’t stay. If it’s an element of something larger, and it’s done to truly educate the public, then it’s probably OK."
Texas officials have pledged to do whatever it takes to keep the piece where it is.

"The Ten Commandments, undeniably, are a sacred religious text and have an important religious component," said Texas Solicitor General Ted Cruz. "But equally undeniably, they have an important secular aspect. They were a fundamental building block behind Western legal codes and culture."

So far, the state's argument has carried the day.

Last year, Senior U.S. District Judge Harry Lee Hudspeth ruled that the monument has a "valid secular purpose." Hudspeth opened his decision by quoting Rudyard Kipling's "Mandalay," a poem depicting a fun-loving but lawless place: "Ship me somewheres east of Suez ... where there aren't no Ten Commandments an' a man can raise a thirst."

Then last summer, Van Orden appealed to the U.S. 5th Circuit Court of Appeals. He prepared for the hearing by delivering arguments in a University of Texas classroom, with law students sitting as a mock jury. The hearing was in New Orleans, 500 miles east of Austin. Trevor Rosson, 32, the student most involved in his case, gave him a ride.

"The man knows his law," Rosson said. "He was so well prepared it was unbelievable. He'd been working on this for so long it was just implanted in his brain."

In November, the U.S. 5th Circuit agreed that the monument could remain, saying a "reasonable viewer" would not "conclude that the state is endorsing the religious rather than secular message." The ruling puts the court at direct odds with other courts around the country – the scenario when the Supreme Court is most likely to step in.

At issue is a 5-foot-tall tablet depicting an eagle, an American flag and the Ten Commandments. The Fraternal Order of Eagles, a service organization, donated it to the state in 1961 as part of a campaign to provide moral guidance to juveniles. The group had started by passing out scrolls listing the commandments. Movie director Cecil B. DeMille suggested it would be more effective – and, it went unsaid, more effective for promoting his movie "The Ten Commandments" – if monuments were erected instead.

State officials placed the monument next to the Capitol, where it sat, largely unnoticed, for 40 years. Then, along came Van Orden.

Van Orden was born in the East Texas town of Tyler, the third of four siblings. His father died when he was young and his mother, who has since died, took him to Methodist church every Sunday. It is one of many periods in his life that Van Orden won't talk about, insisting that his case should remain focused on constitutional principles, not his past.

"His mother was active in her church, religious, but not fanatical," said his ex-wife, Melanie Curtis. "She helped people, took them food if they needed it. He liked to irritate his mother by making sure he didn't show any affection for the church. But it was just his personality. He knew all the hymns."

After junior college, Van Orden received a scholarship to study law at Southern Methodist University. SMU records confirm that he graduated in 1969. By then a "Bobby Kennedy liberal," he says he was drafted a short time later.
Ordered to serve as a gunner in Vietnam, he instead talked his way into working for the Army's Judge Advocate General, often writing wills for soldiers on the eve of deployment. Later, he was an assistant city attorney and criminal defense lawyer, hopping from Houston to Dallas, then Austin.

He won't talk about his career, but Rosson said Van Orden was involved enough in the attorneys' "scene" that he developed a solid golf swing. Curtis said she frequently went to court to watch him defend accused drug dealers and wife-beaters. "I never saw him lose," she said. They married in 1984, had a daughter a short time later and divorced in 1989.

Around the same time, Van Orden began suffering from a fear of humiliation that caused him to shy from social and professional interaction. The condition killed his career. He lost touch with his family, and by the late 1990s was depressed and homeless.

Unable to afford help, he began visiting libraries to research his condition. He learned enough, he says, to teach himself to recover. He began putting his life back together, though he says he still isn't well enough to work in an office — not that anyone would hire him anyway, he adds. He survives on food stamps and sleeps in his tent in the woods, nestled in a well-heeled Austin neighborhood that he travels to by bus. He won't discuss its location, saying he must protect himself from his unwitting neighbors and drug addicts who would steal his tent.

"I am who I am," he said. "But the nights are hard. I don't like living in the bushes."

Eventually, his confidence renewed, he began dabbling in law again. Each day, en route to a cafeteria where he gets free hot water for his coffee, he passed the monument. He says he began to appreciate its prominence on the Capitol grounds, the way its shadow seemed to seep into the halls of power.

His law license had lapsed, largely because he hadn't paid his State Bar dues. But that only keeps him from representing other people, not himself. So two years ago, he said, he decided to sue.

Kelly Shackelford, chief counsel of the Liberty Legal Institute, a Texas group that lobbies for religious freedom, is among those who believe the Supreme Court might be attracted to the intricacies of Van Orden's case. He said the court must address the issue of whether government can acknowledge a particular religion without being seen as endorsing it. "Is the Ten Commandments religious? Well, yeah, it's religious. So what?" he said. "We don't censor our religious history, any more than we would go into the national museum of art and rip down the Renaissance paintings."

Doug Laycock, a law professor at the University of Texas and a leading expert on the issue, says that's a shortsighted argument. As the joke goes, there are two religions in Texas -- football and Christianity -- and the monument is a less-than-subtle reminder of who runs the Capitol, he said.

"There is no doubt that it is an endorsement," he said. "This moves religious choice from where it belongs, in the private sector, to the public domain. It serves no purpose except for one side to say: 'Hey, we're in charge here.' "

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Now that the time has come to make his last appeal, Van Order is worried – not that he wouldn’t be able to hold his own, but that he won’t be able to get there in the first place, even if the justices take his case. So far, he’s gotten by without money. Taking a case to Washington would be more expensive. Legal briefs must be printed in dozens of booklets, 40 of them just for the court’s research staff. Printing alone would cost $2,000.

“I can do the legal part,” he said. “But the money – that might be something I can’t recover from.”

In recent days, he and a few supporters in Austin have begun talking about handing his case off – possibly to USC law professor Erwin Chemerinsky, who said he’d be happy to take it – in an effort to give the case more of a shot at landing in front of the Supreme Court.

Then again, Van Orden’s made it this far on his own. He has a dream, and he figures he can’t let a little thing like money get in his way.

“I’ll sleep outdoors the night before,” he said. “I’ll get out of the bushes and go to the Supreme Court to argue the case. How about that? Only in America.”
Two Tablets May Renew A High Court Headache;
Disputes in Alabama, Other States Prompt Call For Supreme Court to Issue Definitive Ruling

The Washington Post
August 31, 2003
Manuel Roig-Franzia

Those familiar tablets with the parallel strings of thou-shalt-nots peck out from mossy granite blocks tucked into city hall gardens. They are chiseled into limestone monuments rooted on statehouse grounds and are cast onto bronze plaques that loom over county courthouses.

Some of these Ten Commandments displays were once forgotten, obscured by unintended shrubbery or simply ignored. But a surge in efforts by conservative Christians to place more tablets in public buildings, and the resulting constitutional challenges to both new and existing displays, have transformed the Ten Commandments into the most visible symbol of the moment in the church-state conflict.

Judges at all levels are being tugged, sometimes reluctantly, into a deeply divisive debate over Ten Commandments displays. Their rulings, so many and so seemingly contradictory, have led to a growing clamor for the U.S. Supreme Court to make a definitive statement about where and how the tablets can be displayed.

“There is a line, but it’s not a clear line,” said Eugene Volokh, a law professor at the University of California at Los Angeles who specializes in cases involving the separation of church and state. “There are some white areas and some black areas, but there’s plenty of gray.”

The two-ton monument that workers rolled out of the Alabama Supreme Court rotunda Wednesday might be the best-known Ten Commandments display in the nation, primarily because its champion, Alabama Chief Justice Roy S. Moore, defied a federal court order to remove it.

But 20 or so other cases inching through the courts may eventually become more important, legal experts said. Some displays, such as the Ten Commandments monument on the Texas state capitol grounds in Austin and the tablets on the courthouse in Chester County, Pa., have withstood federal court challenges. Others have been ruled unconstitutional, including a six-foot granite monument to the Ten Commandments placed on the state capitol in Frankfort, Ky., and tablets at four public high schools in Adams County, Ohio.

Some rulings have said that displays grouping the Ten Commandments with other historical documents, such as the Declaration of Independence and the Magna Carta, are constitutional. Other rulings have said the opposite.

“The courts are issuing confusing and conflicting opinions,” said Jay Sekulow, chief counsel of the American Center for Law and Justice, which was founded by religious broadcaster Pat Robertson. “The Supreme Court is going to have to weigh in on this, but I think they’re going to try to
avoid this as long as they can; that’s becoming painfully obvious.”

The U.S. Supreme Court has consistently refused to hear cases about Ten Commandments displays in public buildings since a 1980 decision overturning a Kentucky law that required public schools to display the tablets in every classroom.

Some Ten Commandments proponents hope the high court will pass on hearing Moore’s case because he emphasized religion in his public remarks rather than playing up the historical aspect of the commandments. “Of the cases out there, that’s the worst case legally,” said Matthew Staver, president and general counsel of the Liberty Counsel, which has had some successes advising government clients to install displays coupling the Ten Commandments with historical documents. “It could cause damage to the legal landscape that could adversely affect the other Ten Commandments cases.”

No one is sure exactly how many Ten Commandments displays are in public buildings in the United States, but the highest estimates place the figure in the hundreds, perhaps even the thousands.

A movie promotion might have a lot to do with it.

In the mid-1950s, the director Cecil B. DeMille and the Fraternal Order of Eagles service organization distributed several thousand sets of stone tablets to promote DeMille’s film “The Ten Commandments.” Lawsuits challenging the monuments distributed by the Eagles are popping up across the country. Ken Falk, of the Indiana Civil Liberties Union, said there may be a dozen of the monuments in his state alone. City officials in Everett, Wash., have vowed to fight a lawsuit seeking removal of the Ten Commandments monument they received from DeMille and the Eagles, which for a time was partially hidden by tall grass outside the police station. The statehouse monument in Austin, which came from the Eagles, has been allowed to stay; a similar monument in front of the Elkhart, Ind., municipal building was ordered removed.

The Elkhart case produced the closest thing to a U.S. Supreme Court statement about Ten Commandments displays since the Kentucky schools case. Chief Justice William H. Rehnquist, along with Justices Antonin Scalia and Clarence Thomas, took the rare step of commenting on a decision not to hear the case. Rehnquist wrote that Elkhart’s Ten Commandments monument was “a celebration of its cultural and historical roots, not a promotion of religious faith.” He also pointed out that the U.S. Supreme Court has a carving of Moses with a pair of tablets on a frieze inside its courtroom.

Attorneys for Moore and other Ten Commandments advocates often cite the U.S. Supreme Court frieze as evidence of what they say is a fundamental unfairness in the application of the First Amendment to religious displays. But their opponents cite the frieze just as often, saying it is an example of an appropriate display, because Moses holds tablets with Hebrew lettering and stands alongside other lawgivers, such as Hammurabi and Justinian.

The possible ambiguity, and the lack of a firm Supreme Court mandate, provides an opening for groups that have the means to wage court fights. Moore, for instance, is backed by Coral Ridge Ministries, a Florida-based evangelical group that has collected $375,000 in donations for his ongoing legal
fight to keep, and now to try to return, his monument to the Alabama Supreme Court rotunda. The state of Alabama, which is facing a budget crisis and a $600 million shortfall, may be asked to pay $900,000 to cover the plaintiffs' legal costs.

Despite the high costs for both sides, the courts could swell with more cases soon. Angered by their defeat in Alabama, several fundamentalist groups have vowed to install hundreds of Ten Commandments slabs and plaques in public buildings in the coming months.

Even Moore's monument, now hidden from view in a storage room at the Alabama court building, may someday get a new life and, perhaps, face a new legal challenge: Both candidates for governor in Mississippi, incumbent Ronnie Musgrove (D) and challenger Haley Barbour (R), issued statements last week saying they'd be happy to take it off his hands.
Efforts by three Kentucky counties to camouflage Ten Commandments displays by posting other documents alongside the Decalogue failed in December when a federal appeals court struck down the scheme.

The 6th U.S. Circuit Court of Appeals ruled 2-1 Dec. 18 that the displays at courthouses and public schools in McCrory, Pulaski and Harlan counties were still religious in nature.

Officials had originally posted the Ten Commandments without other additional materials. After a federal court struck down those displays, other items were added, including the words to “The Star Spangled Banner,” excerpts from the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta and the Preamble to the Kentucky Constitution.

The exhibits in the courthouses contained a caption asserting that the Ten Commandments “provide the moral background of the Declaration of Independence and the foundation of our legal tradition.”

The appeals court found this assertion unpersuasive, noting that the caption “offers no explanation how the quotation from the Declaration is in any way connected with the Ten Commandments, which say nothing about men being created equal and with the rights to life, liberty and the pursuit of happiness. The only facial similarity between the two documents is that they both recognize the existence of a deity. The concept of a deity, however, is by no means unique to the Ten Commandments or even the Judeo-Christian tradition. Thus, this solitary similarity hardly demonstrates how the Ten Commandments in particular influenced the writing of the Declaration and, hence, the foundation of our country and legal tradition.”

Liberty Counsel, a Religious Right legal group affiliated with the Rev. Jerry Falwell, represented the counties and has vowed to appeal the American Civil Liberties Union of Kentucky v. McCrory County ruling.

In other news about Ten Commandments displays:

* A federal court in Georgia has ruled that a government-sponsored Ten Commandments display in Habersham County violates the separation of church and state.

U.S. District Judge William O’Kelley ruled that county officials, who had originally displayed the Ten Commandments standing alone, did not make the display constitutional by adding copies of the Magna Carta, the Bill of Rights, the Declaration of Independence and other documents.

O’Kelley reported that his office received death threats after he issued the ruling in the Turner v. Habersham County case. He noted that he had turned the threats over to U.S. marshals and said, “We’ve got a place in the south of Atlanta” for people who make such threats, referring to a federal prison.
O'Kelley noted that he was raised in a “very Christian family” but said the threatening message left on his answering machine “wasn’t very Christian, I can tell you that.”

* The Ten Commandments and seven other documents have been posted in the Iowa statehouse. A local Religious Right group, the Iowa Family Policy Center, originally offered the display to the Iowa Judicial Branch Building, but court officials there refused it. House Speaker Chris Rants (R-Sioux City) then agreed to house it in the legislative chamber.

Aside from the King James Version of the Ten Commandments, the display includes the Magna Carta, the Declaration of Independence, the Bill of Rights and other documents.
Deputy sheriffs cordoned off the entrance to West Union High School with yellow crime-scene tape while those who chose to take a stand remained rooted in front of the gray granite monument.

But they, and the object they sought to protect—a tablet inscribed with the Ten Commandments—soon were taken, one after the other, from the school grounds. The nine protesters responded to warnings to leave with a prayer for the “grace to endure this experience.” Then they were escorted away.

The deputies leading them to patrol cars confronted the nine not with handcuffs, but with consoling pats on the back.

The monument, bearing the Protestant version of the message that the Bible says Moses received from God, had been ordered removed by a federal magistrate. And it was the next to go.

Free of the protesters, Dan and Jon Modlich of Columbus resumed their hammer-and-chisel work. They used a crane to hoist the granite slab onto their truck, then left with a police escort to remove identical monuments at high schools in Peebles, Manchester and Seaman, where similar scenes played out.

In all, about 30 peaceful protesters were detained yesterday and later released without charges.

All four monuments—each bearing the Ten Commandments—were removed.

The acts of civil disobedience were prompted by a federal magistrate’s order a year ago to the Adams County/Ohio Valley school board to remove the tablets.

The magistrate ruled the tablets represent an unconstitutional entanglement of church and state. Appeals by the school board and local ministers have failed. Remove them—or face contempt charges, U.S. Magistrate Judge Timothy Hogan said last month.

Kathy Hull earlier had counseled protesters “to hold on to it so they can’t take off with it.”

Later, she shared a back seat with the Rev. Phil Fulton of Union Hill Church near Peebles. Together, they awaited a ride to the county jail. “I have no regrets at all,” the grandmother of 10 Adams County schoolchildren said.

After local companies refused to play a role in removing the Ten Commandments from school grounds, Modlich Monument of Columbus was tapped for the job.

At West Union High School, Superintendent Pat Kimble sympathetically asked protesters to leave, and Fulton pleaded with protesters to limit their numbers to ease the deputies’ workload.

“We’re common citizens who have a fear of God and believe in living and teaching moral values,” he said. We had to stand up for what is right.”
Adams County resident Berry Baker had prevailed in the lawsuit filed with the assistance of the American Civil Liberties Union.

At first, Baker petitioned the school board to permit him to install 6-foot-tall statues of penises at the high schools.

The rally at Peebles was winding down—protesters were prepared to disperse to the three other high schools—when Baker was seen at the edge of the gathering.

A minister called for the audience to pray for him to find “love and God.” Baker briskly walked away from the rally. Asked what he hoped to see, Baker replied: “The law enforced... They’ll come down; they’re immoral.”

Lely Palmer interrupted him as he strode toward Rt. 41. The Head Start teacher asked to shake his hand and then, in the only public display of support at the time, thanked him.

“Even though I believe in the Ten Commandments, this is a public school,” Palmer said. “It is very inappropriate. We need to concentrate on teaching children to read and write and not insert this issue.”

The tablets were gifts to the district from the Adams County Ministerial Association in 1997, when four new buildings opened.

After the lawsuit was filed, four more tablets joined them. They are inscribed with excerpts from the Preamble to the U.S. Constitution, the Declaration of Independence, the Magna Carta and the Roman Justinian code.

The departure yesterday of the religious tablets was met with prayer and tears by about 400 people who gathered at Peebles High School. In a rally that was part religious revival and part wake, some demonstrators expressed disbelief at the event.

They raised their hands and Bibles skyward, prayed, and then entwined arms and held hands to form a barrier around the monument at Peebles.

The U.S. flag lowered to half-staff in a sign of distress, the audience sang patriotic and religious standards and shouted “amen” to the points offered by a series of speakers.

“This community believes the Ten Commandments provide a moral foundation our students so desperately need,” said the Rev. Ron Stephens of the Peebles Church of God. “This will be but a temporary relocation.”

School board member Joyce King told the crowd: “Our prayers are that these monuments will be put back in front of our schools. Our country would be a lot better off if people would read and live by these monuments.”

Christian activist Dave Daubenmire, the former London High School football coach who stirred controversy in 1999 by leading his players in prayer, was among those who pledged to face arrest by “drawing a line in the sand.”

Calling judges “terrorists in black robes,” Daubenmire said: “Let’s find out how big a jail they’ve got.

“It's our moral obligation to stand here.”

The founder of Adams County for the Ten Commandments said they will be re-erected
on private property pending further court appeals.

“It’s a sad, sad day,” the Rev. Ken Johnson said as he watched the monument taken from West Union High School. “There is a higher moral authority than the courts.”
Debate Lingers As Monument Is Removed From View; Commandments Display Put In Storage in Ala. Courthouse

The Washington Post
August 28, 2003
Alan Cooperman & Manuel Roig-Franzia

Workmen levered a 5,280-pound Ten Commandments monument onto a dolly and wheeled it into a back room at the Alabama Supreme Court building yesterday, ending a confrontation that initially unified evangelical Christians but ended up deeply dividing them.

Evangelicals across the country had cheered two years ago when Alabama’s Chief Justice Roy S. Moore installed the granite marker in the building’s rotunda. But when he disobeyed a federal court order to remove it by Aug. 20, religious conservatives began quarreling among themselves.

Several leading voices on the religious right— including Christian broadcaster Pat Robertson, Southern Baptist minister Richard Land, legal strategist Jay Sekulow and Free Congress Foundation chairman Paul M. Weyrich— have criticized Moore for undermining “the rule of law.”

Other figures with a nationwide Christian following— including Focus on the Family founder James Dobson and Coral Ridge Ministries evangelist D. James Kennedy— have praised him for placing “God’s law” above the changing judgments of human beings.

People on both sides of the debate predicted yesterday that it will continue because conservative Christians are growing increasingly frustrated with federal court decisions and more inclined to civil disobedience. If the U.S. Supreme Court upholds the ruling by the U.S. Court of Appeals for the 9th Circuit that the words “under God” in the Pledge of Allegiance are unconstitutional, “then I think you will see sit-ins and people refusing to pay their taxes,” Land said.

With a “runaway, dictatorial judiciary” that has legalized sodomy, upheld abortion rights and restricted prayer in schools, “we’re getting to a point where there are a lot of people who are being forced to choose between their conscience and obeying court orders,” he said.

In Alabama yesterday morning, demonstrators dropped to their knees in prayer after spotting a five-man work crew gathering around the monument. Some pastors lay prostrate on the ground.

By moving the monument to a storage room that is not open to the public, state officials complied with the federal court order without having to wrestle “Roy’s Rock” past the 100 protesters, some of whom had camped out for a week to prevent its removal.

It took the crew an 11/2 hours of painstaking labor to wheel away the monument with demonstrators watching through the courthouse’s glass doors.

“This is one of the most tragic days for America,” said the Rev. Phil Fulton of Pentecostal Union Hill Church in Peebles,
Ohio. "I feel like our constitutional rights, our religious freedoms, are eroding away."

Even after the monument had disappeared, the protesters could not bring themselves to leave. Instead, their numbers grew. Some activists were roused by urgent calls to nearby hotels. Several hundred had gathered by midday, many vowing to press the fight to place Christian imagery in public buildings in other parts of the country.

David Williams, a spokesman for the state Supreme Court, said lights in the storage room where the monument was placed will remain on 24 hours a day. "It's just symbolic of respect," he said.

Moore has appeared before cheering crowds twice since defying the order from U.S. District Judge Myron H. Thompson. But he stayed away yesterday. "It is a sad day in our country when the moral foundation of our laws and the acknowledgment of God has to be hidden from public view to appease a federal judge," he said in a statement.

Moore still intends to file an appeal with the U.S. Supreme Court. But the high court last week denied his request for a stay, and eight of his colleagues on the state Supreme Court overruled him and ordered the monument's removal. On Friday, Moore's attorneys told Thompson that he would not interfere with the physical removal of the monument.

Moore also was suspended last week by a state judicial commission, which will hold a hearing on whether to discipline or remove him from the bench.

Although Moore has gained the adoration of many evangelical Christians across the country, Alabama's top state officials - who had once supported him - have distanced themselves from his defiance. Both Gov. Bob Riley (R) and Attorney General William H. Pryor Jr. (R) favored the monument's display, but opposed defying a court order.

That is the same position taken by evangelical leaders such as Land and Robertson. Although there is "no question" that the courts erred in declaring the monument an unconstitutional infringement on the separation of church and state, "we are people who respect the role of law," Robertson said in a radio interview this week.

Kennedy, also a religious broadcaster, said he is "a law-abiding citizen. There are, however, some exceptional cases when man's law conflicts with God's law, and in that case . . . according to the New Testament, it is better that we obey God rather than men."

Kennedy cited the war of independence and the civil rights movement as precedents for civil disobedience.

Removing the Ten Commandments from a courthouse rises to that level, he said, because "if we abandon the divine sanction of law in our country and revert merely to men's laws, then we open the door for the kind of tyranny that we saw in the Soviet Union and Vietnam, North Korea and Cuba."

Weyrich, who has been called the "father" of the Christian right, said the movement is now "deeply divided" and that he has taken "enormous heat" from his supporters over his criticism of Moore. "You try to explain, but they won't listen," he said. "As far as they're concerned, this is an issue of good versus evil, and Judge Moore is on the right side."
An ad hoc Alabama Supreme Court on Friday denied the appeal of Roy S. Moore, the former chief justice who was removed from office in November for defying a federal judge's order to stop displaying a Ten Commandments monument in the State Judicial Building in Montgomery.

The temporary court voted 7-to-0 to uphold Mr. Moore's ouster, writing that the evidence against him was so "sufficiently strong and convincing" that the lower court "could hardly have done otherwise." Mr. Moore responded in a statement that the court was "illegally appointed, politically selected," and that "the people of Alabama have a right to acknowledge God and no judge or group of judges has the right to take it from them."

The judicial panel was made up of retired judges drawn at random to stand in for the State Supreme Court. All members of the court, an elected body, had recused themselves from the case.

Mr. Moore's lawyers said he respected the rule of law. "Certainly, federal court orders must be obeyed," said one of the lawyers, Phillip Jauregui. "But unlawful court orders shouldn't be obeyed by other oath-bound officers."

The court said that it lacked the jurisdiction to review the lawfulness of the order itself, and that in any case higher federal courts had reviewed and upheld it.

Mr. Moore had the monument installed in the building's rotunda overnight on July 31, 2001. Judge Myron H. Thompson of Federal District Court ordered it taken from public view, but Mr. Moore refused. He was suspended, the remaining justices sent the granite block to a closet, and the State Court of the Judiciary unanimously removed Mr. Moore from office in November.

Mr. Moore's legal team was incensed two weeks ago when the state agreed to pay $550,000 in plaintiffs' legal bills for the case. Now a group of citizens has filed suit for Mr. Moore to repay the state.

Mr. Moore's team is frustrated.

"One of the problems we've had is we've been asking the federal courts to correct themselves," Mr. Jauregui said. "It's like asking a thief to arrest themselves. And so now the approach that we're taking is saying that this problem needs to be addressed in Congress."

Mr. Moore is supporting legislation to prevent the federal courts from reviewing public acknowledgments of God. Mr. Jauregui is running for Congress. And Tom Parker, Mr. Moore's former spokesman and legal adviser, is running for the State Supreme Court.
Felony Voting Rights

Muntaqim v. Coombe
(01-7260)


At issue was whether the Voting Rights Act of 1965 could be applied to N.Y. Elec. Law § 5-106, which disenfranchised currently incarcerated felons and parolees. The court concluded that the VRA did not apply to the New York law. Applying § 1973 of the VRA to the state law would alter the traditional balance of power between the states and the federal government. The court was not convinced that there was a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Further, there was no clear statement from Congress (either in the language of § 1973 or in its legislative history) that § 1973 applied to state felon disenfranchisement statutes.

Question Presented: Whether a state law that bars felons from voting is immune from challenge under Section 2 of the Voting Rights Act of 1965. (2) Whether the “plain statement rule” of statutory construction may be applied to Section 2 of the Voting Rights Act of 1965.

Jalil Abdul MUNTAQIM, Plaintiff-Appellant

v.

Philip COOMBE, Anthony ANNUCCI, and Louis MANN, Defendants-Appellees

United States Court of Appeals for the Second Circuit

Decided: April 23, 2004
Amended: May 18, 2004

[Excerpt; some footnotes and citations omitted]

CABRANES, Circuit Judge:

We are asked in this case to decide whether the Voting Rights Act (“VRA”), which prohibits voting qualifications that result in the abridgment of the right to vote on account of race, can be applied to a New York State statute that disenfranchises currently incarcerated felons and parolees. Although we recognize that this is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court, we conclude that the VRA, which is silent on the topic of state felon disenfranchisement statutes, cannot be applied to draw into question the validity of New York’s disenfranchisement statute. We believe that, in light of recent Supreme Court [...] the application of the VRA to felon disenfranchisement statutes such as that of New York would infringe upon the states’ well-established discretion to deprive felons of the right to vote. [...] 

Plaintiff-Appellant Jalil Abdul Muntaqim, a convicted felon imprisoned in New York,
appeals from a judgment of the U.S. District Court for the Northern District of New York, granting defendants’ motion for summary judgment and dismissing the complaint in its entirety. […]

The District Court concluded that Muntaqim had failed to state a § 1973 claim because that provision of the VRA is not applicable to New York’s felon disenfranchisement statute. We agree. Under Supreme Court precedent, because § 1973 would alter the constitutional balance between the states and the federal government if it were construed to extend to state felon disenfranchisement statutes such as § 5-106, we look for a clear statement from Congress to support that construction of the statute. Having found no such statement, we hold that § 1973 cannot be used to challenge the legality of § 5-106. […]

**BACKGROUND**

Muntaqim is a black inmate at the Shawangunk Correctional Facility in Wallkill, New York who is currently serving a maximum sentence of life imprisonment. […]

[His] complaint asserts that, even if the New York State legislature did not intend to discriminate when it enacted § 5-106, that statute violates the VRA because it has “resulted” in unlawful dilution of voting rolls in the African-American and Hispanic communities of New York City.” Muntaqim alleges that, although blacks and Hispanics constitute less than thirty percent of the voting-age population in New York State, they make up over eighty percent of the inmates in the state prison system. Moreover, according to the complaint, eighty percent of incarcerated Hispanics and blacks come from “New York City and its environs.” Based on these figures, Muntaqim claims that § 5-106 violates § 1973 both by denying him the right to vote and by “diluting” the so-called black and Hispanic vote in New York City.

**DISCUSSION**

[…] We review District Court determinations on motions to dismiss and motions for summary judgment de novo. […]

**Relevant Statutory Provisions**

Section 5-106 of the New York Election Law provides that no person convicted of a felony “shall have the right to register for or vote at any election” unless he has been pardoned, his maximum sentence of imprisonment has expired, or he has been discharged from parole. Accordingly, no residents of New York State who are presently incarcerated for a felony or are on parole may vote in local, state, or federal elections.

Section 2 of the Voting Rights Act, codified at 42 U.S.C. § 1973 and originally enacted in 1965, prohibits any state limitation on the right to vote that has a racially discriminatory result. In particular, the current version of § 1973(a) provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
42 U.S.C. § 1973(a). The VRA states that "[a] violation of subsection (a) . . . is established if, based on the totality of the circumstances, it is shown that . . . members [of protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The current language of § 1973 was enacted by Congress [...] in response to the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55, (1980). In Bolden, a plurality of the Court held that racially neutral state action violates § 1973 only if it is motivated by a discriminatory purpose. The amended version of § 1973 eliminates this "discriminatory purpose" requirement and, instead, prohibits any voting qualification or standard that "results in the denial of the right to vote "on account of" race.

Applicability of § 1973 to Felon Disenfranchisement Statutes

In Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996), our in banc Court addressed the exact legal question presented by this case—namely, whether § 1973 is applicable to felon disenfranchisement statutes generally and to § 5-106 in particular. Because the ten members of the Court who decided Baker split evenly on its disposition, the opinions in that case have no precedential effect, and the decision of the District Court was left undisturbed. [...]

In an opinion written by Judge Mahoney, [...] five members of our Court concluded that § 1973 is not applicable to felon disenfranchisement statutes because such an application of § 1973 "would raise serious constitutional questions regarding the scope of Congress' authority to enforce the Fourteenth and Fifteenth Amendments and would alter the usual constitutional balance between the States and the Federal Government."

* * *

Five other members of our Court reached the opposite conclusion. [An] opinion authored by Judge Feinberg [...] rejected Judge Mahoney's view that "since 'felon disenfranchisement is a very widespread historical practice that has been accorded explicit constitutional recognition,' applying the Voting Rights Act to § 5-106 would raise 'serious constitutional questions.'" [...] Contrary to Judge Mahoney's view, "felon disenfranchisement statutes often have been used to deny the right to vote on account of race." [...] Judge Feinberg acknowledged the requirement set forth by the Supreme Court in Gregory that Congress articulate a "plain statement" when it intends to alter the state-federal balance of power, but he concluded that "the Voting Rights Act does not alter the constitutional balance between the federal government and the States." Instead, according to Judge Feinberg, § 1973 simply implements the balance that had already been achieved by the Fourteenth and Fifteenth Amendments, which "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." [...] Judge Feinberg concluded that, because the application of § 1973 to state judicial elections "is at least as much of an intrusion of federal authority into state affairs" as is its application to felon disenfranchisement statutes, the Supreme Court would not have applied the plain statement rule in Baker.

* * *
After reviewing the opinions in *Baker*, the District Court in the instant case followed Judge Mahoney’s opinion and concluded that § 1973 “does not limit New York’s authority to disenfranchise felons under Section 5-106.”

In contrast to the District Court in the instant case, two of our sister circuits have recently held that § 1973 applies to felon disenfranchisement statutes. In *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), a divided panel of the Eleventh Circuit, over a dissent by Judge Phyllis A. Kravitch, reinstated claims that the felon disenfranchisement provision of the Florida Constitution violates both the Equal Protection Clause and § 1973.

In *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), a panel of the Ninth Circuit, like the Eleventh Circuit, held that a claim of vote denial based on Washington State’s felon disenfranchisement scheme is cognizable under § 1973.

Since the *Baker* litigation was completed in 1996, the Supreme Court has repeatedly considered the scope of Congress’s enforcement power under the Reconstruction Amendments. In the words of one commentator, “the Rehnquist Court has [since 1997] introduced an entirely new framework for analyzing the scope of Congress’s power under Section 5 of the Fourteenth Amendment ‘to enforce, by appropriate legislation, the provisions of this article.’” [...]

Since 1996, the Supreme Court has repeatedly considered the scope of Congress’s enforcement power under the Reconstruction Amendments. In the words of one commentator, “the Rehnquist Court has [since 1997] introduced an entirely new framework for analyzing the scope of Congress’s power under Section 5 of the Fourteenth Amendment ‘to enforce, by appropriate legislation, the provisions of this article.’” [...]

Finally, there is a longstanding practice in this country of disenfranchising felons as a form of punishment. When the Fourteenth Amendment was ratified, 29 of 36 States had provisions in their constitutions, which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.

For these reasons, we believe that § 1973 cannot be constitutionally applied to New York’s felon disenfranchisement statute merely because it may be constitutionally applied to other facially neutral voting restrictions. Instead, *City of Boerne* and its progeny dictate that the application of § 1973 to § 5-106 can be upheld only if two conditions are met: First, “there must be a congruence and proportionality between the...
injury to be prevented or remedied [by § 1973]" and the prohibition of
nondiscriminatory felon disenfranchisementlaws. *City of Boerne*, 521 U.S. at 520.

Second, Congress must have identified a
"history and pattern of unconstitutional . . .
discrimination" that would be deterred or
prevented by prohibiting or limiting the
power of states to disenfranchise
incarcerated felons.

* * *

In sum, we are not convinced that "there [is]
a congruence and proportionality between
the injury to be prevented or remedied," *i.e.*, the use of vote denial and dilution schemes
to avoid the strictures of the [*...*], "and the
means adopted to that end," [*...] Moreover,
even if there were a sufficient nexus
between the injury to be prevented by §
1973 and the application of § 1973 to § 5-
106, Congress has not identified a "history
and pattern of unconstitutional . . .
discrimination". [*...] Based on these
conclusions, it is apparent to us that the
application of § 1973 to § 5-106 would
disturb the balance of power between the
States and the Federal Government, as
conceived by the Supreme Court.

Because we have concluded that the
application of § 1973 to § 5-106 would alter
the federal balance, the next question is
whether Congress made its intention
sufficiently clear that we need to address the
constitutional issue posed in this case. In
applying the clear statement rule, the
Supreme Court has asked whether Congress
has made its intent to alter the federal balance "unmistakably clear in the language
of the statute."

* * *

Thus, although Congress has not expressly
stated that § 1973 does not apply to felon
disenfranchisement statutes, the one-sided
legislative history of the VRA is sufficient
to raise serious doubts about whether the
statute can be applied to felon
disenfranchisement statutes.

* * *

Thus, in these circumstances, we
conclude that the clear statement
rule is applicable, despite the fact
that, on its face, § 1973 extends to
all voting qualifications. [*...] Because we find that Congress did
not make an unmistakably clear
statement that § 1973 applies to
state felon disenfranchisement
statutes, we will not apply § 1973 to
§ 5-106.

CONCLUSION

* * *

This case raises a difficult question
regarding the applicability of the VRA's
"results" test to a New York statute that
disenfranchises currently incarcerated felons
and parolees. More broadly, it also asks us
to evaluate the impact of *City of Boerne* and
its progeny on Section 2 the Voting Rights
Act, and to apply the clear statement rule in
an unfamiliar context. Accordingly, all three
judges on this panel believe that the issues
presented in this case are significant and, in
light of the differing perspectives among
and within the courts of appeals, warrant
definitive resolution by the United States
Supreme Court.
Disenfranchised without recourse?

National Law Journal
Gary Young
May 31, 2004

A handful of decisions dealing with felon disenfranchisement statutes show continuing uncertainty about the extent of Congress' authority to dictate anti-discrimination policy to the states.

In April, the Second U.S. Circuit Court of Appeals ruled that a New York state law depriving felons of the right to vote while their sentences are running could not be challenged under the Voting Rights Act even if it has a disproportionate effect on the African-American community. Muntaqim v. Coombe, No. 01-7260.

In contrast, last year the ninth and eleventh circuits ruled that such challenges should not be dismissed out of hand, but require an inquiry into "the totality of the circumstances," particularly into possible carry-over effects of discrimination in the criminal justice system.

Two other circuits, the fourth and sixth-in 2000 and 1986 decisions, respectively-assumed without discussion that felon disenfranchisement statutes must pass muster under the Voting Rights Act. But since they ultimately found that the statutes at issue were blameless, they may have assumed so merely "for the sake of argument."

Tea leaves

Although the Supreme Court has not spoken on the precise issue at hand, it has looked at related questions. In 1974's Richardson v. Ramirez, 418 U.S. 24, the court held that felon disenfranchisement statutes do not on their face violate the equal protection clause because another section of the 14th Amendment expressly exempted the states from punishment for felon disenfranchisement.

However, in 1984's Hunter v. Underwood, 471 U.S. 222, the court said that a facially neutral Alabama felon disenfranchisement law violated the 14th Amendment because of evidence it was enacted after the Civil War for the express purpose of depriving African-Americans of the vote. [Neither Richardson nor Hunter dealt with the Voting Rights Act.]

In a 1980 case dealing with at-large election systems, not felon disenfranchisement, a plurality of the court said that the Voting Rights Act is violated only when intent to discriminate is proven. City of Mobile v. Bolden, 446 U.S. 55. Congress responded to Bolden by amending §2 of the act, codified at 42 U.S.C. 1973, to encompass not only intentional discrimination, but also state action that "results" in an abridgement of the right to vote on the basis of race. The amendment also instructed courts to look at the "totality of the circumstances."

Also relevant are a string of cases, including Bd. of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 [2001], in which the Supreme Court has held that Congress' 14th Amendment enforcement powers vis-a-vis the states do not come into play unless it makes formal findings of a history of discrimination.
In Muntaqim, the Second Circuit said that the act could not be extended to felon disenfranchisement statutes in the absence of Congress' express authorization, but also hinted that Congress might then be overstepping the line drawn in Garrett.

The Eleventh Circuit, in Johnson v. Gov. of Fla., 353 F.3d 1287, and the 9th Circuit, in Farrakhan v. Washington, 338 F.3d 1009, both pointed to the results-oriented language of the 1982 amendments, but also seemed to hedge their bets by pointing to possible intentional discrimination at one step removed [i.e., in the criminal justice system].

Dissenters in both courts argued that the majority opinions ignored the federal-state line drawn in Garrett.
Felony Disenfranchisement in the United States

The Sentencing Project

Overview

Since the founding of the country, most states in the U.S. have enacted laws disenfranchising convicted felons and ex-felons. Today, almost all states have disenfranchisement laws. In the last 30 years, due to the dramatic increased use and expansion of the criminal justice system, these laws have significantly affected the political voice of many American communities.

State Disenfranchisement Laws

- 48 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense.
- Only two states - Maine and Vermont - permit inmates to vote.
- 35 states prohibit felons from voting while they are on parole and 31 of these states exclude felony probationers as well.
- Seven states deny the right to vote to all ex-offenders who have completed their sentences. Seven others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period (e.g., five years in Delaware and Wyoming, and three years in Maryland).
- Each state has developed its own process of restoring voting rights to ex-offenders but most of these restoration processes are so cumbersome that few ex-offenders are able to take advantage of them.

Impact of Felony Disenfranchisement

- An estimated 4.7 million Americans, or one in forty-three adults, have currently or permanently lost their voting rights as a result of a felony conviction.
- 1.4 million African American men, or 13% of black men, are disenfranchised, a rate seven times the national average.
- An estimated 676,730 women are currently ineligible to vote as a result of a felony conviction.
- More than 2 million white Americans (Hispanic and non-Hispanic) are disenfranchised.
- Over half a million women have lost their right to vote.
- In six states that deny the vote to ex-offenders, one in four black men is permanently disenfranchised.
- Given current rates of incarceration, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime. In states that disenfranchise ex-offenders, as many as 40% of black men may permanently lose their right to vote.
- 1.7 million disenfranchised persons are ex-offenders who have completed their sentences. The state of Florida had an estimated 600,000 ex-felons who were unable to vote in the 2000 presidential election.
Policy Changes

- **Alabama**: In 2003, Governor Riley signed into law a bill that permits most felons to apply for a certificate of eligibility to register to vote after completing their sentence.
- **Connecticut**: In May 2001, Governor Rowland signed into law a bill that extends voting rights to felons on probation. The law is expected to make 36,000 persons eligible to vote.
- **Delaware**: Until recently, Delaware imposed a lifetime voting ban for felons. In June 2000, the General Assembly passed a constitutional amendment restoring voting rights to some ex-felons five years after the completion of their sentence.
- **Florida**: The Brennan Center and the Lawyers’ Committee for Civil Rights Under Law have a voting rights case pending in the US District Court for the Southern District of Florida challenging the constitutionality of the voting laws that disenfranchise ex-felons. Separate litigation filed by the ACLU contends that the state Department of Corrections is not fulfilling its obligation under current law to aid ex-felons in seeking clemency.
- **Kansas**: In 2002, the legislature added probationers to the category of excluded felons.
- **Kentucky**: In 2001, the legislature passed a bill that requires that the Department of Corrections inform and aid eligible offenders in completing the restoration process to regain their civil rights.
- **Maryland**: In 2002, the legislature repealed its lifetime ban on two-time ex-felons (with the exception of felons with two violent convictions) and imposed a three-year waiting period after completion of sentence before rights can be restored.
- **Massachusetts**: Until the 2000 presidential election, Massachusetts was one of three states that allowed inmates to vote. On November 7, 2000, the Massachusetts electorate voted in favor of a constitutional amendment, which strips persons incarcerated for a felony offense of their right to vote.
- **Nevada**: In 2003, the state approved a provision to automatically restore voting rights for first-time nonviolent felons immediately after completion of sentence.
- **New Mexico**: In March 2001, the Legislature adopted a bill repealing the state’s lifetime ban on ex-felon voting.
- **Pennsylvania**: A Commonwealth Court restored the right to vote to thousands of ex-felons who, as a result, were entitled to vote in the 2000 presidential election.
- **Virginia**: The Virginia legislature passed a law in 2000 enabling certain ex-felons to apply to the circuit court for the restoration of their voting rights five years after the completion of their sentence; those convicted of felony drug offenses must wait seven years after completion. The circuit court’s decisions are subject to the Governor’s approval.
- **Wyoming**: In March 2003, Governor Freudenthal signed a bill to allow people convicted of a nonviolent first-time felony to apply for restoration of voting rights five years after completion of sentence.
## Categories of Felons Disenfranchised Under State Law

<table>
<thead>
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Thomas Johnson is a black resident of Florida who was eager to vote for George W. Bush for President. Johnson, who lives in Gainesville with his wife and five children, is executive director of a nonprofit Christian residential program that helps recently released state prison inmates re-enter society. Johnson likes the Republican principle of self-help, and supports the party’s stance against abortion rights.

But on Election Day, Johnson was unable to vote. In 1992, he was convicted in New York City of selling cocaine and carrying a firearm without a license. When he moved to Florida in 1996, he learned, much to his dismay, that the state bans anyone convicted of a felony from ever voting in any kind of election unless he or she applies for and receives an exemption from the state clemency board—an arduous task.

“I’ve been in this community for five years,” he said. “I’m a taxpayer. I help mold this community through my work. The sheriff is a friend of mine. But voting is the power by which you truly shape and mold, and I’m being denied that. I watch my sons see me stay home when my wife goes off to vote. I’m appalled by it.”

Johnson has plenty of company. Altogether, 500,000 Florida residents—4.6 percent of the state’s voting-age population—have served time behind bars for various crimes and thus are unable to vote because of the ban, which has been on the law books since 1868. A disproportionate number of those residents are black. Nearly 170,000 black adult men in Florida—roughly 25 percent of the state’s black male residents—can’t vote because of a current or past conviction.

In September, the Brennan Center for Justice at New York University School of Law and the Lawyers’ Committee for Civil Rights Under Law, based in Washington, filed a suit on behalf of Johnson and the state’s ex-felon population in U.S. District Court for the Southern District of Florida. Like many Southern states, Florida during Reconstruction adopted a ban on a former felon’s right to vote, which was aimed in part at disenfranchising former slaves. White lawmakers wrote those laws to include what were then regarded as mainly “black” crimes, such as rape and theft. The civil rights lawyers assert that the ban violates the 14th Amendment’s equal-protection clause, as well as the federal 1965 Voting Rights Act.

The Florida case highlights a growing national concern: The increasing number of disenfranchised Americans who are current or former members of the exploding prison population. More than 4 million Americans—36 percent of whom are African-American men—couldn’t vote this year as a result of state laws that ban voting by convicted felons, according to the Sentencing Project, a nonprofit, nonpartisan organization in Washington that’s pressing for an overhaul of sentencing laws and guidelines and conducts research on criminal justice issues. Nearly three-quarters of those felons are on probation or parole; one-third have completed sentences.
Convicted felons and their allies in the civil rights community are challenging the laws in state legislatures, Congress, and the courts. They maintain that the bans are racist, unconstitutional, and simply irrational. These critics, who began their effort in earnest two years ago, are encountering formidable obstacles - politicians of both major parties who are uninterested in tinkering with the laws for fear of appearing soft on crime, and supporters of the restrictions, who insist that the bans are legally secure and just. As a result, advocates of change have made little headway.

The disenfranchisement laws have surfaced in waves over the past two centuries. Some of the restrictions date to the first half of the 19th century, when society viewed voting as a privilege, not a right. State and national lawmakers at that time believed that disenfranchising people who committed serious crimes was a fair part of punishment. After the Civil War, many Southern states included criminal disenfranchisement, along with poll taxes and literacy tests, in their voting laws as a way of denying blacks the vote. At the turn of the century, during the Progressive era, a new logic emerged. States outside of the South used disenfranchisement laws as a way of protecting the purity of the ballot box - or so legislators said. Politicians assumed that criminals would be more inclined to engage in electoral fraud or to band together to rewrite electoral laws even though, analysts say, there was no empirical evidence to support those assumptions.

During the civil rights movement of the 1960s and '70s, a few states relaxed their restrictions. Then, in the 1980s, as crime rates started to climb, many states revived or broadened their bans.

Today, 48 states and the District of Columbia have laws on the books that, in one way or another, disenfranchise people who've been convicted of felonies. Thirty-two states deprive convicted offenders of the vote while they're on parole, and 29 prohibit offenders on probation from voting. In addition to Florida, 12 states disenfranchise for life ex-offenders who have completed their sentences.

Yet certain states held out. Until recently, four states - Maine, Massachusetts, Utah, and Vermont - allowed all felons, even those in prison, to vote. In a 1998 ballot initiative in Utah, however, 80 percent voted to disenfranchise felony inmates. Massachusetts’ voters did the same in November.

Those who support voting bans insist that people who are not willing to follow the law should not be given the power to make the law. “We don’t let everyone vote,” said Roger Clegg, vice president and general counsel for the Center for Equal Opportunity, a conservative organization based in Washington. “We require that people meet a minimum level of trustworthiness and loyalty to our system of government. Consequently, we don’t let children, noncitizens, or people who are certifiably insane vote. Just as these groups don’t meet the basic requirements, those people who commit serious crimes don’t either.”

In general, Republicans are not eager to restore voting rights to ex-felons because most of them are likely to vote for Democrats. Jeff Manza, an associate professor of sociology at Northwestern University, has been studying hypothetical voting habits of felons. “A large portion of the current disenfranchised population is low-income, has a low level of
education, and is single,” Manza said. “And more than 40 percent is black. When you take all of these pieces of information and put them together, you have a demographic group that is inclined to be more favorable to the Democrats.”

Voting-rights advocates, however, argue that, in addition to undermining the nation’s democratic principles, the restriction prevents former offenders from fully rejoining society. They say the bans are particularly damaging today because more and more people—especially blacks—are being locked up for nonviolent drug offenses that are classified as felonies.

These advocates are turning to state legislatures to press for changes. Despite only minor success, their cause may be gaining momentum. Felon advocates scored their biggest victory of the year in Delaware, where the Legislature voted to scale back the state’s lifetime ban on voting; now former offenders can vote again five years after they have completed their sentences. In Alabama and Connecticut, measures that would shorten voting bans passed in the House but were not taken up in the Senate.

“If some of the (Connecticut) senators were concerned that they’d be perceived as soft on crime,” said Miles Rapoport, a former secretary of state in Connecticut who is executive director of DemocracyWorks, a coalition of organizations that pushed for changes.

“Gaining the franchise for any group is a tricky thing,” said Alexander Keyssar, a professor of history and public policy at Duke University and the author of The Right to Vote: The Contested History of Democracy in the United States. “No group has been able to do so until it reaches that historical moment in time when it has political leverage or political allies. Felons have neither. No one wants to run for office saying, ‘I gave the vote to the Boston Strangler.’”

Frustrated by the slow pace of change, John Conyers Jr. of Michigan, the senior Democrat on the House Judiciary Committee, and 37 co-sponsors proposed legislation in March 1999 that would restore the right to vote in federal elections to all people convicted of a criminal offense who are not behind bars. The Judiciary Committee’s Constitution Subcommittee held hearings on the bill later in the year. Despite compelling testimony on the negative impact of disenfranchisement laws on the black community, critics had a strong hand to play: Article I, Section 2 of the Constitution, which grants states the authority to set voting requirements for federal elections, and Section 2 of the 14th Amendment, which explicitly allows states to deny voting rights to people who commit treason and other crimes. Conyers’ bill has remained stuck in committee.

Challenging the restrictive laws in the courts can be tricky. Take the Florida case. In their federal District Court case, attorneys for ex-felons argue that the state’s 1868 law was intended to specifically disenfranchise blacks and thus collides with the 14th Amendment’s equal-protection clause. They also maintain that the law has had a racially discriminatory impact, and therefore violates the 1965 Voting Rights Act.

In a 1985 ruling, Hunter vs. Underwood, the Supreme Court struck down an Alabama disenfranchisement law because, the Justices said, it had been created for purposes of discrimination. In its 1974 Richardson vs. Ramirez decision, however, the Court said that such discriminatory intent must be proven before felon disenfranchisement laws can be struck down.
Because that intent was rooted in only a handful of Southern laws, conservative legal scholars say that the majority of disenfranchisement laws are legally secure.

Still, civil rights lawyers hope that the laws’ disproportionate impact on the black community will become legal grounds for striking them down. The case in Florida—which is still pending—tests that claim. The outcome could strengthen, or erode, the underpinnings of other states’ disenfranchisement laws.
Governor Paul Cellucci discovered a couple of years ago that a group of Massachusetts prison inmates were organizing a political-action committee. Cellucci moved immediately to quash the group. He issued an executive order and then went a step further, filing a state constitutional amendment to deny inmates the vote. Massachusetts is expected to join 47 other states soon in an outright ban on prisoner voting.

Liberals gnashed their teeth over Cellucci’s move. It “sends the wrong message,” said an ACLU lawyer to the Boston Globe, as if letting a bunch of felons lobby the legislature and mail checks to candidates sent a really positive message to society. A key leader of the Massachusetts Prisoners Association was a convicted murderer.

But if Massachusetts jailbirds lose some political freedom, those in other states may win a bit more—because of an embryonic nationwide campaign to liberalize the voting rights of people enmeshed in the criminal-justice system. Thirty-two states currently forbid people on probation or parole to vote, and, in 14 states, a felony conviction can mean disenfranchisement for life. As a result, about 4 million Americans—one in 50 adults—won’t be eligible to vote in this year’s fall elections. And since more than a third of them are black, voting rights for felons is emerging as one of the Left’s hottest civil-rights issues. Republicans may have their neo-cons and paleo-cons; now Democrats are trying to organize a voting bloc of their own, the ex-cons.

In the last twelve months, at least nine states have considered the matter, and Congress held a hearing for the first time on a bill that would override state laws and grant voting privileges to felons on parole, probation, or in halfway houses.

This is a tempting strategy for Democrats on the lookout for new race-baiting opportunities. Human Rights Watch estimates that 13 percent of all black men can’t vote today because of current or prior felony convictions, a rate that balloons to 20 percent in ten states. “In the next generation of black men, we can expect as many as 40 percent of them to lose the vote for some or all of their adult lives,” says Marc Mauer of the Sentencing Project. During a Martin Luther King Day debate, Vice President Gore was asked what he intended to do about this. “I will review it,” he promised gravely.

Voting-rights issues have always been racially charged, and southern blacks were systematically prevented from voting until the 1960s. That memory lingers, and Democrats try to take advantage of it today, even though black and white turnout rates are nearly identical. When Gore speaks to black audiences, for instance, he often mentions that his father supported the 1965 Voting Rights Act (true) and lost his Senate reelection bid because of it (false; his GOP opponent also supported the bill).

Indeed, there’s an urban myth among African Americans that they won’t be able to vote starting in 2007, because that’s the
year a portion of the Voting Rights Act comes up for reauthorization in Congress. This fear is expressed so frequently on black radio stations and in black newspapers that the Department of Justice has posted disclaimers on its webpage rebutting it. But the concern won’t go away, partly because Democrats won’t let it. When Bill Bradley repeatedly said during the primary debates that he would press Congress to make the Voting Rights Act permanent, he was deliberately exploiting black paranoia.

Liberal civil-rights leaders have embraced the ex-con crusade; they will grasp at virtually any cause they can find to sustain their movement in an increasingly non-racist society. Their efforts diminish the achievements of their predecessors, who, of course, toiled to win poll access for law-abiding citizens. They also approach self-parody: "Felony voting restrictions are the last vestige of voting prohibitions in the United States. When the U.S. was founded, only wealthy white men were allowed to vote. Women, ethnic minorities, those who were illiterate, and the poor were excluded," said the NAACP’s Hilary Shelton in House testimony last October. “Yet I have faith that the morally correct path, blazed by the inspiration of a more democratic union, shall ultimately prevail, and that this imperfection in our society too shall be corrected.”

Advocates of felon enfranchisement like to suggest that the U.S. is unusually oppressive when it comes to criminals and voting. France, Germany, and other industrial countries allow inmates to cast ballots. And the guilt-ridden Left, always in search of a racial angle, loves to point out that South Africa’s highest court ruled last year that inmates could vote in national elections. They are somewhat less interested in acknowledging that Yitzhak Rabin’s assassin has voted in Israel (a fact that Rabin’s widow has called “an unprecedented scandal”).

There’s actually a good argument to be made in favor of voting rights for felons who have completed their sentences. “When you pay your debt to society, the government ought to get off your back,” says Charles Sullivan of Citizens United for the Rehabilitation of Errants. This logic makes special sense in the case of nonviolent offenders.

But even stronger arguments can be made against the idea. For one thing, denying the vote to felons is rooted in non-racist historical experience. Bans on it are as old as the Constitution. Unlike a literacy test in 1965 Mississippi, this form of disenfranchisement doesn’t grow out of malign intentions. Furthermore, it’s plausible that communities with a large share of ex-felons receive better representation when these people can’t vote. Texas state representative Harold Dutton, a Democrat who plans to launch a voter-registration drive targeting former criminals in Dallas and Houston, makes this point, albeit unwittingly: “40,000 ex-felons with registration cards is more of a threat than 40,000 ex-felons with guns.” In many jurisdictions, sheriffs and judges are elected.

If Democrats were truly committed to extending the franchise to people who have served out their sentences, rather than using the issue as an anti-GOP bludgeon, their bill in Congress, introduced by John Conyers of Michigan, could attract Republican co-sponsors. It has none. Getting a few ought to be easy; Charles Colson’s Prison Fellowship Ministries, one of the most effective evangelical lobbying organizations on Capitol Hill, supports its content. “We agree with it, but we’re concerned about the partisan way it’s been handled,” says Pat
Nolan of the Justice Fellowship, the public-policy arm of Colson's outfit. "It looks like their objective is partisan advantage rather than changing the law."

Contrast this urgent crusade to give felons the vote with the broad support for an existing restriction on ex-cons. Convicted felons—even nonviolent offenders—are forever barred from possessing firearms. Under federal law, they face a mandatory five-year sentence if they're caught with one. That means accountants who've spent six months in the pokey can't go hunting. The National Rifle Association thinks that's okay. At the same time, liberals are stressing the moral necessity of letting murderers and rapists vote after their release from prison.

It's a topsy-turvy scenario, but an important case study of politics today.
Restoring Felons' Voting Rights A Heated Election-Year Issue In Florida

*Chicago Tribune*
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Debbie Hardy admits she has made some big mistakes. She got hooked on drugs, had nine children out of wedlock and lost custody of them, and she spent six months in jail on a felony charge after getting into a fight with her boyfriend.

Nine years ago, Hardy decided she had had enough. She got off drugs and helped her older sister, Catherine Garvin, do the same. Now 40, Hardy is a manager at Burger King and is caring for two of her oldest children, one of whom is heading to college next year with the other going into the Navy.

In most states, she would have automatically regained her civil rights after completing her jail time and probation. But Florida requires most former inmates to have a hearing before the governor in order to gain restoration of certain rights such as registering to vote and acquiring an occupational license.

"I am trying to do the right thing, but I have had this felony hanging over my head for 12 years," Hardy said. "This time, I will gladly accept my civil rights because I know what it is like to be without them. I always wanted to be a good citizen, but before, I didn’t know how."

Since the 2000 election, when Florida became the battleground to determine the next president, the state has been under intense national scrutiny. Officials have overhauled the election system including replacing the controversial punch-card ballots with electronic machines. They also are re-examining laws that civil rights groups claimed led to the disenfranchisement of thousands of minorities.

As the 2004 presidential election approaches, voter disenfranchisement remains a heated issue in Florida, where Gov. Jeb Bush and other Republicans are determined to re-elect Bush's brother, and Democrats are eager to replace him with John Kerry.

In a series of lawsuits, the NAACP, the American Civil Liberties Union and other groups charge that Florida continues to operate an unfair and chaotic voting system, particularly for an estimated 600,000 felons in the state who have completed their sentences but cannot vote.

In addition, some say, the state is plagued by a flawed voter purge list. In 2000, an undetermined number of legal voters were turned away at the polls because their names inexplicably appeared on a database of felons. The state reportedly had worked to reform the list, but two weeks ago, elections officials were forced to throw it out after it was disclosed that the list shielded virtually all Hispanic felons from being purged.

In response to a lawsuit filed on behalf of the Florida Conference of Black State Legislators, a judge ruled last year that the Florida Corrections Department had failed to notify 125,000 former inmates who completed their terms between 1992 and 2001 that they could seek to have their rights restored.

Bush said that after the court-ordered review, 22,000 felons' rights were automatically restored. The governor also
said that the Office of Executive Clemency had reduced its 38,000-application backlog from a year ago to 8,000. And of those, 21,000 former prisoners' rights were restored.

Florida is among seven states that ban felons from voting. Convicts in prison or who are on probation are not granted certain civil rights.

In an attempt to cut through the backlog, the state in 2001 began automatically restoring rights to people convicted of nonviolent crimes and requiring others only to fill out a form. Those convicted of crimes such as murder or child molestation still must have a hearing.

"Gov. Bush believes that rights should be restored, and he has streamlined the clemency process," said his spokesman, Jacob DePietre.

Political experts said the former prisoners, most of whom are black and presumed likely to vote Democratic, could affect the presidential election in Florida, where George Bush defeated Democrat Al Gore by 537 votes in 2000.

According to Chris Uggen, a sociologist at the University of Minnesota, the outcome of the 2000 election would have been different had the disenfranchised felons been allowed to vote. In a 2002 study, he concluded that had 600,000 disenfranchised felons voted, Gore would have won Florida by 40,000 to 80,000 votes.

"The horrors that occurred in 2000 have not been rectified by the state of Florida and Gov. Bush. They are doing their best to keep people who have served their prison sentence from getting their civil rights restored, and it disproportionately impacts African-Americans and minorities," said Randall Berg, executive director of the Florida Justice Institute in Miami, who filed the lawsuit on behalf of the black state legislators.

The problems, however, began long before Bush became governor, said Courtenay Strickland, director of the American Civil Liberties Union's Voting Rights Project.

"Both parties are to blame for what we are experiencing," said Strickland, who directs monthly voter restoration workshops for felons. "The rules of executive clemency determine what will make the process harder or easier. Gov. Bush could eliminate that bureaucratic hurdle, and he refuses to do it."

Bush, who sits on the clemency board with three of his Cabinet members, has said he does not believe that the review system should be scrapped but believes that the restoration process should be easier.

Prior to 2001, disenfranchised felons who had outstanding court fines or had committed a wide range of crimes had to have a hearing. DePietre, Bush's spokesman, said. Now, outstanding fines and multiple felonies are not issues in determining whether a hearing will be required.

On the second Saturday of the month, dozens of people such as Debbie Hardy come to a thrift shop in Miami run by recovering addicts to take the initial step to restore their rights. In a room upstairs, law-student volunteers help them fill out forms and put together a portfolio.

But even if they qualify to have their rights restored, it could take years before they get to vote. There is a backlog of 8,000 applications, and each year the governor
holds four hearings, at which about 50 cases are heard each time.

Florida law dictates that felons who have completed their sentences are supposed to be handed forms requesting the restoration of their civil rights and be assisted in filling it out before leaving prison.

Since 2001, the Corrections Department has been electronically submitting a list of pending releases to the clemency office. Last week, an appellate court ruled that this method was inadequate and ordered the department to help people submit the forms. "We developed a more streamlined process to provide the information to the clemency office. Now it seems like we might be going backward a little bit," said Corrections Department spokesman Sterling Ivey. "The court is asking us to assist inmates to fill out a form. That is what we were doing prior to the 2000 election."

Voter disenfranchisement is a touchy issue for civil rights leaders, who compare it to Jim Crow laws, literacy tests and poll taxes that kept blacks from voting before the 1965 Voting Rights Act.

In 2001, the NAACP filed a lawsuit that forced Florida to better scrutinize names on its felons database. But other states, particularly in the South, have problems too. Nationwide, more than 4 million Americans, almost half of them black men, are unable to vote because of laws that bar felons, according to the Sentencing Project, a criminal justice research and advocacy group in Washington.

Except for Vermont and Maine, which allow incarcerated people to vote, every state has some voting restrictions for felons. Thirty-three deny voting rights to felons on parole. But only Florida, Mississippi, Alabama, Iowa, Kentucky, Nebraska and Virginia do not automatically restore rights to felons who have completed their sentences. Illinois allows felons on probation or parole to vote.

Some laws, including Florida's, date to Reconstruction, and state rules for granting clemency vary widely.

In Mississippi, felons must file a petition before the Legislature, and lawmakers decide whose rights are restored. Last year, Alabama lawmakers passed a bill allowing some felons to bypass the clemency hearing and obtain a certificate to register to vote. However, most still require a hearing.

"The highest office in the land should have constitutional protections guaranteeing an individual's right to vote," said activist Jesse Jackson. "We have 50 separate and unequal state elections, and all of them have different voter disenfranchisement schemes.

"The civil rights days are not over. We still have unequal voting systems, which begs for a constitutional amendment to grant all Americans equal protection under the law." Changing Florida's law would require amending the state constitution. The ACLU and other groups are gathering petitions to put an amendment on the ballot. A class-action lawsuit filed by the Brennan Center for Justice at New York University on behalf of 600,000 released felons challenging the constitutionality of Florida's law is pending in a federal appeals court.

Meanwhile, people such as Michael Davis, 28, have filed paperwork and are waiting. "Hopefully, getting my civil rights restored can help me as well as others," said Davis, who served time for three felony drug convictions. "I am a different person now, and all I want is a chance. My past is my past. It does not define who I am today."
The 4th Circuit held that the Religious Land Use and Institutionalized Persons Act's (RLUIPA's) goal of exempting prisoners' religious exercise from regulatory burdens in a neutral fashion, as distinguished from advancing religion in any sense, was a permissible secular purpose under the Establishment Clause. Section 3 of RLUIPA did not have the impermissible effect of advancing religion since Congress had simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wished to practice their faiths. Section 3 of RLUIPA did not create excessive government entanglement with religion because while the statute may have required some state action in lifting state-imposed burdens on religious exercise, RLUIPA did not require pervasive monitoring by public authorities. Thus, § 3 of RLUIPA did not create an Establishment Clause violation.

Questions Presented: RLUIPA contains provisions prescribing what religious accommodation policies must be implemented in state prisons ("Prison Provisions").
1. Do the Prison Provisions of RLUIPA violate the Establishment Clause?
2. Does Congress have authority to enact the Prison Provisions of RLUIPA, using the Spending Clause, the Commerce Clause, or any other grant of authority?
3. If the Prison Provisions are constitutional, does the existence of a detailed remedial scheme and/or a special sovereignty interest preclude the application of Ex Parte Young, thereby leaving sovereign immunity as a bar to the federal court injunction sought by the respondent?
of the Lemon test. Because we find that Congress can accommodate religion in section 3 of RLUIPA without violating the Establishment Clause, we reverse. To hold otherwise and find an Establishment Clause violation would severely undermine the ability of our society to accommodate the most basic rights of conscience and belief in neutral yet constructive ways.

I.A.

From 2000 to the present, Madison has claimed to be a member of the Church of God and Saints of Christ, a congregation founded in 1896 and headquartered at Temple Beth El in Suffolk, Virginia. Church members are commonly known as Hebrew Israelites, and they claim to be “followers of the anointed God” who honor but do not worship Jesus Christ. Most importantly for purposes of this case, Madison’s church requires its members to abide by the dietary laws laid out in the Hebrew Scriptures.

The parties dispute the timing of Madison’s conversion and his affiliation with a wide range of other religious groups during his incarceration. What is clear is that in July 2000 and March 2001, Madison informed correctional officials that his religious beliefs required him to receive a kosher diet, defined as a “common fare diet” by the Virginia Department of Corrections. Both requests were approved by local prison officials, but denied by Department of Corrections administrators in Richmond. The Commonwealth rejected Madison’s requests because it determined that Madison already had adequate alternatives from the regular, vegetarian, and no pork daily menus; because it doubted the sincerity of Madison’s religious beliefs; and because it considered Madison’s history of disciplinary problems.

In August 2001, Madison challenged the denial of his request in district court, relying in part on section 3 of RLUIPA. Section 3(a) of RLUIPA states that “no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person — (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.” Section 3(b) of RLUIPA states that Section 3(a) applies whenever the substantial burden at issue “is imposed in a program or activity that receives Federal financial assistance.” In 2002 the Commonwealth Department of Corrections received $4.72 million — approximately 0.5% of its budget — from the federal government, thus triggering the statute’s applicability. Madison’s lawsuit relied on section 4(a) of RLUIPA, which creates a private right of action that allows any person to “assert a violation of this chapter as a claim or defense in a judicial proceeding” and to “obtain appropriate relief against a government.”

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On January 23, 2003, the district court found that section 3 of RLUIPA impermissibly advanced religion by offering greater legislative protection to the religious rights of prisoners than to other fundamental rights that were similarly burdened. The district court therefore rejected Madison’s statutory claim, and simultaneously certified the question of RLUIPA’s constitutionality for interlocutory appeal under 28 U.S.C. § 1292(b). Madison and the United States filed timely petitions with this court to appeal the order, and their petitions were granted.
The legislative and judicial background that led to RLUIPA's enactment are important for considering Madison's appeal. Congress crafted RLUIPA to conform to the Supreme Court's decisions in Employment Division v. Smith, and City of Boerne v. Flores. In Smith, the Court held that laws of general applicability that incidentally burden religious conduct do not offend the First Amendment. The neutrality principle in Smith largely complemented the traditional deference that courts afford to prison regulations that impose burdens on prisoners' rights. At the same time, however, the Smith Court openly invited the political branches to provide greater protection to religious exercise through legislative action.

In 1993, Congress responded to Smith by enacting the Religious Freedom Restoration Act ("RFRA"), which Congress claimed was premised on its remedial powers under section 5 of the Fourteenth Amendment. RFRA prohibited federal and state governments from "substantially burdening" a person's exercise of religion, even as the result of a law of general applicability, unless the government could demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

The Supreme Court's decision in City of Boerne v. Flores, invalidated RFRA as it applied to states and localities. The Court held that the scope of the statute exceeded Congress's remedial powers under section 5 of the Fourteenth Amendment.

While RFRA continued to apply to the federal government, in September 2000, Congress attempted to reinstate RFRA's protection against government burdens on religious exercise imposed by states and localities by enacting the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc et seq. This statute mirrored the provisions of RFRA, but its scope was limited to laws and regulations concerning land use and institutionalized persons. RLUIPA's enactment was premised on congressional findings similar to those made for RFRA, namely, that in the absence of federal legislation, prisoners, detainees, and institutionalized mental health patients faced substantial burdens in practicing their religious faiths.

In passing RLUIPA, Congress sought to avoid Boerne's constitutional barrier by relying on its Spending and Commerce Clause powers, rather than on its remedial powers under section 5 of the Fourteenth Amendment as it had in RFRA....

II.

Among its numerous constitutional challenges to RLUIPA, the Commonwealth contends that the statute violates the Establishment Clause. The district court held that section 3 of RLUIPA violates the Establishment Clause because it singled out the religious exercise rights of prisoners for special protection. The district court explained:

Prison inmates exist in a society of universally limited rights, one that is required by the nature of the institution. When Congress acts to lift the limitations on one right while ignoring all others, it abandons a position of neutrality towards these rights, placing its power behind one system of belief.

The district court stated that "the practical
effect of RLUIPA on the prison system in the United States is to grant religious and professed religious inmates a multitude of exceptions and benefits not available to non-believers." It concluded that "RLUIPA extends far beyond regulations targeting religion, protecting religious inmates against even generally applicable and facially neutral prison regulations that have a substantial effect on a multitude of fundamental rights."

Because Congress had failed to compile "demonstrable evidence that religious constitutional rights are at any greater risk of deprivation in the prison system than other fundamental rights," the district court found that protecting the religious exercise of prisoners violated the Establishment Clause. It concluded that this provision sends "non-religious inmates a message that they are outsiders of a privileged community," and it unconstitutionally advanced religion by providing an inmate with incentives to "claim religious rebirth and cloak himself in the protections of RLUIPA."

The district court’s decision is at odds with two other circuits that have examined this question and found that section 3 of RLUIPA does not violate the Establishment Clause. Courts have also rejected similar Establishment Clause challenges to the Religious Freedom Restoration Act, whose religious accommodation provisions are identical to section 3 of RLUIPA. [The Sixth Circuit], however, has relied extensively upon the district court’s decision in this case to hold that section 3 of RLUIPA does violate the Establishment Clause. It is this conclusion that we must address with care.

This court must review de novo the constitutionality of a federal law. The basic framework for Establishment Clause challenges is well-settled: “first the [targeted] statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” We address each ... prong in turn.

II.A.

We first consider whether section 3 of RLUIPA has a legitimate secular purpose. We are guided here by the Supreme Court’s decision in Corporation of the Presiding Bishop v. Amos, which established that Congress may accommodate the exercise of faith by lifting government-imposed burdens on free exercise. The Amos Court stated that the Establishment Clause seeks to prevent government decisionmakers “from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.” But in commanding neutrality, the Establishment Clause does not require the government to be oblivious to the burdens that state action may impose upon religious practice and belief. Rather, there is “ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’” The Supreme Court therefore held in Amos that “it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”

This alleviation of government burdens on prisoners’ religious exercise is precisely the legitimate secular purpose that RLUIPA seeks to advance. RLUIPA is not designed to advance a particular religious viewpoint or even religion in general, but rather to facilitate opportunities for inmates to engage in the free exercise of religion. This secular goal of exempting religious exercise from
regulatory burdens in a neutral fashion, as distinguished from advancing religion in any sense, is indeed permissible under the Establishment Clause.

To be sure, Congress has no constitutional duty to remove or to mitigate the government-imposed burdens on prisoners’ religious exercise. But the Supreme Court has held that Congress may choose to reduce government-imposed burdens on specific fundamental rights when it deems it appropriate. The Supreme Court “has upheld a broad range of statutory religious accommodations against Establishment-Clause challenges.” These include statutes that allow public school students time off during the day solely for religious worship or instruction, property tax exemptions for religious properties used solely for religious worship, and exemptions for religious organizations from statutory prohibitions against discrimination on the basis of religion. While RLUIPA’s scope may in some ways be broader than the specific religious exceptions that the Supreme Court has previously upheld, the central principle—that Congress may legitimately minimize government burdens on religious exercise—remains the same. Congress here has acted properly in embracing this secular purpose.

II.B.

We next consider whether section 3 of RLUIPA has the impermissible effect of advancing religion. The district court found that RLUIPA impermissibly advanced religion by according special protection only to prisoners’ religious exercise.

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We disagree. “For a law to have forbidden ‘effects’ under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence.” Evidence of the impermissible government advancement of religion includes “sponsorship, financial support, and active involvement of the sovereign in religious activity.” Here, however, Congress has not sponsored religion or become actively involved in religious activity, and RLUIPA in no way is attempting to indoctrinate prisoners in any particular belief or to advance religion in general in the prisons. Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths.

We cannot accept the theory advanced by the district court that Congress impermissibly advances religion when it acts to lift burdens on religious exercise yet fails to consider whether other rights are similarly threatened. There is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner’s religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights.Indeed, the context in which Congress was acting made it sensible for Congress to lift only state-imposed burdens on free exercise through RLUIPA. It was reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate’s First Amendment rights to access pornography. Free exercise and other First Amendment rights may be equally burdened by prison regulations, but the Constitution itself provides religious exercise with special safeguards. And no provision of the Constitution even suggests that Congress cannot single out fundamental rights for
additional protection. To attempt to read a
requirement of symmetry of protection for
fundamental liberties would not only
conflict with all binding precedent, but it
would also place prison administrators and
other public officials in the untenable
position of calibrating burdens and remedies
with the specter of judicial second-guessing
at every turn.

Apart from advancing religion, the district
court further found that RLUIPA may create
incentives for secular prisoners to cloak
secular requests in religious garb and thus
may increase the burden on state and local
officials in processing RLUIPA claims.
This may be true, but it is simply not a
concern under the Establishment Clause.
Any additional burdens that RLUIPA may
impose on states and localities speak more
to the wisdom of the law and to the
disincentives for states to assume their
RLUIPA obligations than to RLUIPA's
validity under the Establishment Clause. We
therefore conclude that section 3 of RLUIPA
has the effect of lifting burdens on
prisoners' religious exercise, but does not
impermissibly advance religion.

II.C.

We further conclude that section 3 of
RLUIPA does not create excessive
government entanglement with religion in
violation of the third prong of the Lemon
test. While the statute may require some
state action in lifting state-imposed burdens
on religious exercise, RLUIPA does not
require "pervasive monitoring" by public
authorities. RLUIPA itself minimizes the
likelihood of entanglement through its
carefully crafted enforcement provisions.
For example, the statute's broad definition
of "religious exercise" to "include any
exercise of religion, whether or not
compelled by, or central to, a system of
religious belief," 42 U.S.C. § 2000cc-
5(7)(A), mitigates any dangers that
entanglement may result from administrative
review of good-faith religious belief.

II.D.

Section 3 of RLUIPA thus satisfies the three
prongs of the Lemon test. The opposite
conclusion, we believe, would work a
profound change in the Supreme Court's
Establishment Clause jurisprudence and in
the ability of Congress to facilitate the free
exercise of religion in this country. It would
throw into question a wide variety of
religious accommodation laws. It could
upset exemptions from compulsory military
service for ordained ministers and divinity
students under federal law, since these
exemptions are not paired with parallel
secular allowances or provisions to protect
other fundamental rights threatened by
compulsory military service. It would
similarly imperil Virginia's and other states'
recognition of a "clergy-penitent privilege,"
which exempts from discovery an
individual's statements to clergy when
"seeking spiritual counsel and advice." Other
specific religious accommodation
statutes, ranging from tax exemptions to
exemptions from compulsory public school
attendance, would also be threatened.

Perhaps more importantly, the principle of
neutrality advanced by the district court
would create a test that Congress could
rarely, if ever, meet in attempting to lift
regulatory burdens on religious entities or
individuals. For example, if Congress sought
to grant religious organizations an
exemption from a particularly demanding
legal requirement, then Congress might have
to grant similar exemptions to radio and TV
stations or secular advocacy groups, absent
congressional findings that free exercise
rights were somehow more endangered by
the law than other rights. Congress would
have to make determinations in every
instance of what fundamental rights are at risk and to what degree they are at risk, and it would be able only to heighten protection for fundamental rights in a symmetric fashion according to these assessments. The byzantine complexities that such compliance would entail would likely cripple government at all levels from providing any fundamental rights with protection above the Constitution’s minimum requirements.

III.A.

The Commonwealth recognized at argument the problematic nature of the trial court’s rationale, but pressed several alternative points in support of affirmance which we feel obliged to address. It first contends that RLUIPA’s mandate for the religious accommodation of prisoners violates the Establishment Clause because it subjects third parties to substantial burdens....

It is true that section 3 of RLUIPA also seeks to have third parties — states accepting federal correctional funds — accommodate religious needs.... Here the Commonwealth has voluntarily committed itself to lifting government-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal correctional funds....

III.B.

The Commonwealth also protests that RLUIPA’s compelling interest test will bind its hands and make it nearly impossible for the Commonwealth to prevail if prisoners challenge burdens on their religious exercise. The district court echoed this concern by proclaiming that “the change that RLUIPA imposes is revolutionary, switching from a scheme of deference to prison administrators to one of presumptive unconstitutionality.”

We do not make light of this concern. RLUIPA may impose burdens on prison administrators as they act to accommodate an inmates’ right to free exercise. But RLUIPA still affords prison administrators with flexibility to regulate prisoners’ religious practices if the Commonwealth “demonstrates that imposition of the burden on that person — (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.”

Moreover, the experience of federal correctional officials in complying with RLUIPA’s predecessor statute, RFRA, suggests that the similar provisions of RLUIPA would not impose an unreasonable burden on state or local prisons....

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IV.

Our society has a long history of accommodation with respect to matters of belief and conscience. If Americans may not set their beliefs above the law, there must be room to accommodate belief and faith within the law. Regardless of the nature of their beliefs, people must pay taxes and observe other secular laws of general applicability. However, legislative bodies have every right to accommodate free exercise, so long as government does not privilege any faith, belief, or religious viewpoint in particular. Section 3 of RLUIPA fits comfortably within this broad tradition.

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The judgment is therefore reversed, and the case is remanded to the district court for further proceedings.

REVERSED AND REMANDED
Federal appeals courts have split on the [constitutionality of the Religious Land Use and Institutionalized Persons Act], with the 4th, 7th and 9th U.S. Circuit Courts of Appeals upholding the law. Madison v. Riter, Nos. 03-6362, 6363; Charles v. Verhogen, 348 F.3d 601 (7th Cir. 2003); and Mayweather v. Newland, 314 F.3d 1062 (9th Cir. 2002). In Riter the 4th Circuit ruled in December that “RLUIPA has the effect of lifting burdens on prisoners’ religious exercise, but does not impermissibly advance religion.”

However, the 6th Circuit held in Cutter v. Wilkinson, that the act violated the establishment clause because it had “the primary effect of advancing religion.”

The circuit split leads many to believe that the Supreme Court will hear a prisoner case before a land-use case. The issues tend to be narrower and federal courts are more accustomed to prisoner-rights claims, says Hamilton. By contrast, she says, “The land-use cases involve the entire zoning process, including decisions by the zoning board.”

However, Weinstein says that the high court would be more interested in a land-use case because “over the last decade the court has undertaken a real reconsideration of the federalism issue.”

Either way, the high court is more than likely to take on Congress once again in a back-and-forth dispute dating to the court’s controversial 1990 decision in Employment Division v. Smith. The court rejected two drug counselors who claimed their First Amendment free exercise rights were violated when they were denied unemployment compensation after they were fired from their jobs for drug usage. The two argued that they ingested peyote for religious reasons. The court held that generally applicable laws that do not target but only incidentally affect religious practices are constitutional so long as they are reasonable.

That latter requirement significantly lowered the burden of proof for local governments, which previously were held to strict scrutiny, meaning municipalities had to show a compelling interest in the regulation, and show that it was implemented in the least restrictive way possible.

Smith created a furor in the religious liberty community, prompting Congress to pass the Religious Freedom Restoration Act in 1993. RFRA required state and federal government officials to show that their regulations met the earlier compelling-interest test.

Congress justified RFRA under the 14th Amendment’s section 5, the enforcement clause, empowering Congress to uphold the amendment via appropriate legislation. However, in a 1997 church land-use case, City of Boerne v. Flores, the Supreme Court ruled 6-3 that RFRA was unconstitutional as applied to the states. The court said Congress exceeded its power under the 14th Amendment in passing RFRA and extending it to the states. Hamilton, who argued for the
municipality in the case, says the court agreed that the reach of RFRA was "breathtaking."

In turn, Congress responded to Boerne with RLUIPA, a more narrowly crafted piece of legislation applying only to land-use and prisoner rights cases.

Like its predecessor, RLUIPA received strong, bipartisan support in Congress. Unlike the failed RFRA, however, Congress based its authority for RLUIPA on the spending and commerce clauses of the Constitution, as well as the 14th Amendment. Thus, the new law applies in cases involving receipt of federal funds, interstate commerce or situations when the government makes individualized assessments for zoning permits.

What the high court will do when it debates RLUIPA is anyone's guess.

"It's hard to predict how the Supreme Court will judge RLUIPA," Picarello says. "[It] was designed to comply with Boerne, not to flout it. But the court in Boerne moved the goal posts under the enforcement clause" of the 14th Amendment. "They could move the goal posts again."
Lawsuit May Force Change in Prison Ban on Beards

The Los Angeles Times
October 7, 2002
Richard Fausset

Ray Morrison believes that shaving his beard would betray the tenets of his Orthodox Jewish faith. At the state prison in Lancaster, where Morrison is serving a 10-year sentence for assault with a semiautomatic weapon, he is paying a price for that belief.

The state Department of Corrections does not allow prisoners to grow facial hair, and Morrison, 38, has been punished nine times for refusing to shave. Since his incarceration in 1997, he has lost phone and visitation privileges, been placed in solitary confinement and sacrificed "good-time" credits that would have reduced his sentence.

"I've said to Raymond, 'Please, please shave the beard,'" said his mother, Donna Goldstein-Kekstadt. Yet her son has refused, she said, saying that he is committed to abide by the rules of the faith he adopted in prison.

California corrections officials imposted the ban on long hair or facial hair on male prisoners in 1997, the year an inmate shaved his beard and walked out, unrecognized, from a San Diego County prison. But in the coming weeks, a federal lawsuit filed by Muslim prisoners in Solano may force the state to allow inmates to grow beards, if it's part of their religious custom.

Security Issue

The prospect frightens prison guards, who say the ability to tell who's who can be a matter of life and death in a maximum-security lockup. But inmate advocates say the change would restore one of the many prisoner privileges lost since the tough-on-crime 1990s, when California corrections officials tightened rules on visitation, exercise, clothing and hairstyles.

"This would be an important step toward recognizing that people in prison do retain certain constitutional rights," said attorney Steve Fama of the nonprofit Prison Law Office in San Rafael.

The challenge to the beard ban, which is under review by the 9th Circuit Court of Appeals, contends that it violates prisoners' 1st Amendment right to exercise their religion. But because prison officials say long beards can hide weapons and drugs, the lawsuit calls for facial hair only a half-inch long or less, said Susan Christian, the attorney for the inmates.

Preliminary Injunction

The 300 Muslims at Solano state prison have been allowed to wear beards since February, when U.S. District Court Judge Lawrence K. Karlton granted a preliminary injunction. California has appealed the lower court's decision. If the appeal is unsuccessful and the state does not take the case to the U.S. Supreme Court, the beard ban would have to be altered for all California prisons, the state attorney general's office said.

That would not sit well with the California Department of Corrections. Spokesman Russ Heimerich said that even short beards
allow inmates to radically alter their appearances, increasing their chances of escape.

“This is more than just a religious freedom issue,” Heimerich said. “It’s a safety and security issue, pure and simple.”

State officials are not worried about whiskers alone. They are also challenging the constitutionality of the federal law that Karlton relied on when he issued the Solano injunction.

That law, the Religious Land Use and Institutionalized Persons Act, creates a more stringent legal test for prison regulations that inhibit religious practices. Before its passage in 2000, prison officials had to prove that such regulations served a legitimate purpose. Now, they must prove that the rules are the “least restrictive” way to achieve security goals.

The California attorney general’s office argues that Congress overstepped its constitutional powers in passing the law. State attorneys have also argued that the law violates the 1st Amendment because it gives religious prisoners more rights than their non-religious counterparts.

In California, Deputy Atty. Gen. Tami Warwick said the law could eventually be used to alter many other prison regulations, costing untold millions and putting prisoners’ rights ahead of prison safety.

The state is facing a number of other lawsuits whose outcomes may hinge on the appeals court’s decision, she said.

Among them is a challenge to the long-hair ban, which has been criticized by Native Americans and Sikhs. Many Native Americans cut their hair only when in mourning, and Sikhs do not cut any body hair.

But Warwick is also worried that the new law could be invoked to protect the most unorthodox and personal concepts of “religious” observance, forcing wardens and guards to sort out esoteric theological issues that even scholars disagree on.

Indeed, the idea that men must wear beards is not shared by all Muslims, nor is it shared by all Jews. While the Muslims at Solano believe the half-inch beard is an acceptable compromise, Morrison refuses to cut his beard at all, Goldstein-Kekstadt said.

Although less-Orthodox Jews might compromise, experts acknowledge that some traditions justify Morrison’s position. But the interpretation of some extremist groups of what constitutes “religion” is proving more troublesome.

In Ohio, for example, some imprisoned white power groups say they are practitioners of Asatru, the pre-Christian religion of the Vikings, according to Todd Marti, an assistant solicitor in the Ohio attorney general’s office. As symbols of their faith, they often wear chains with symbols of the god Thor.

Conveniently, the chains also signify gang rank, Marti said.

Ohio, along with six other states, Puerto Rico and the Virgin Islands, mentioned these concerns in a friend-of-court brief filed earlier this year in support of California’s appeal.

“Under the old law, we had a rational basis for stopping these things,” Marti said. “Now we have to show that we have the least-restrictive regulation.”
Regulations Vary

Grooming regulations at state prison systems vary: Ohio prisoners, for example, are allowed to wear half-inch beards. In federal prisons, facial hair has been allowed since the 1970s. When federal inmates change their appearances, prison guards simply take new security photos of them.

Aaron Levinson, director of the Anti-Defamation League's San Fernando Valley office, has asked California prison officials to switch to a similar system so inmates such as Morrison can grow beards.

The department has rejected the idea. Heimerich has said it would be too expensive and complicated.

Still, Levinson and Goldstein-Kekstadt say they are amazed that prisoners rounded up during the war in Afghanistan have more latitude than Morrison, a U.S. citizen.

Although some of the 600 detainees at Guantanamo Bay, Cuba, were initially forced to shave their beards, they have since been allowed to grow them out, according to Lt. Cmdr. Barbara Burfeind, a U.S. Navy spokeswoman.

"We're bending over backward for the Al Qaeda prisoners," Levinson said. "In California, our own citizens are being treated worse."

Goldstein-Kekstadt is trying to have her son transferred to her home state of Illinois, where state prisoners can grow long beards, but are limited to non-contact visits and subjected to more intense searches.

Thus far, she has been unsuccessful.

While Morrison has been punished at Lancaster for refusing to shave, he has not been forced to remove his beard. In addition to those citations, he has been cited for violations, including fighting and possession of alcohol.

"He's not a model inmate," Lt. Ron Nipper said. "He's got his beard. He can work that out with the courts."
Mr. HATCH. Mr. President, I rise today to introduce a narrowly focused bill that protects religious liberty from unnecessary governmental interference....

Seven years ago, recognizing the need to strengthen the fundamental right of religious liberty, Congress overwhelmingly passed the Religious Freedom Restoration Act (RFRA). Unfortunately, in 1997, in the case of City of Boerne v. Flores, the Supreme Court held that Congress lacked the authority to enact RFRA as applied to state and local governments. In an attempt to respond to the Boerne decision, I introduced S. 2081 earlier this year. Legislation similar to S. 2081 passed the House of Representatives. Yet, concerns were raised by some regarding the scope of S. 2081, and I undertook an effort to seek out a consensus approach. The legislation I am introducing today, which maintains certain provisions of S. 2081, is a tailored version which represents the product of our efforts.

The Religious Land Use and Institutionalized Persons Act of 2000 provides limited federal remedies for violations of religious liberty in: (1) the land use regulation of churches and synagogues; and (2) prisons and mental hospitals.

** * * *

INSTITUTIONALIZED PERSONS

Our bill ... provides that substantial burdens on the religious exercise of institutionalized persons must be justified by a compelling interest. Congressional witnesses have testified that institutionalized persons have been prevented from practicing their faith. For example, some Jewish prisoners have been denied matzo, the unleavened bread Jews are required to consume during Passover, even though Jewish organizations have offered to provide it to inmates at no cost to the government. While this legislation seeks to improve the ability of institutionalized persons to practice their religion, it remains under the complete application of the Prison Litigation Reform Act of 1995.

Both sections are based firmly on constitutional principles that grant Congress its authority. Thus, today’s legislation should withstand the scrutiny that has thwarted our efforts in the past.

As we begin in this effort, it is worth pondering just why America is, worldwide, the most successful multi-faith country in all recorded history. The answer is to be found, I submit, in both components of the phrase “religious liberty.” Surely, it is because of our Constitution’s zealous protection of liberty that so many religions have flourished and so many faiths have worshiped on our soil.

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While this bill provides much needed preservation of our religious liberty, I personally would have preferred a broader approach. I recognize, however, in this shortened legislative year, the long list of
items before the congressional leadership that require their attention. In order to ensure enactment of a measure this year, I think all advocates of a broader approach took a prudent step in embracing a more targeted, consensus bill.

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Mr. KENNEDY. Religious freedom is a bedrock principle in our nation. The bill we are introducing today reflects our commitment to protect religious freedom and our belief that Congress still has the power to enact legislation to enhance that freedom, even after the Supreme Court’s decision in 1997 to strike down the broader Religious Freedom Restoration Act that 97 Senators joined in passing in 1993.

In striking down the Religious Freedom Restoration Act on constitutional grounds, the Court clearly made the task of passing effective legislation to protect religious liberties more difficult. But too often in our society today, thoughtless and insensitive actions by governments at every level interferes with individual religious freedoms, even though no valid public purpose is served by the governmental action.

Our goal in proposing this legislation is to reach a reasonable and constitutionally sound balance between respecting the compelling interests of government and protecting the ability of people freely to exercise their religion. We believe that the legislation being introduced today accomplishes this goal in two areas where infringement of this right has frequently occurred—the application of land use laws, and treatment of persons who are institutionalized. In both of these areas, our bill will protect the Constitutional right to worship, free from unnecessary government interference.

After numerous Congressional hearings on religious liberties, the evidence is clear that institutionalized persons are often unreasonably denied the opportunity to practice their religion, even when their observance would not undermine discipline, order, or safety in the facilities.

Relying upon the findings from Congressional hearings, we have developed a bill—based upon well-established constitutional authority—that will protect the free exercise of religion in these two important areas....

The broad support that this bill enjoys among religious groups and the civil rights community is the result of many months of difficult, but important negotiations. We carefully considered ways to strengthen religious liberties in other ways in the wake of the Supreme Court’s decision. We were mindful of not undermining existing laws intended to protect other important civil rights and civil liberties. It would have been counterproductive if this effort to protect religious liberties led to confrontation and conflict between the civil rights community and the religious community, or to a further court decision striking down the new law. We believe that our bill succeeds in avoiding these difficulties by addressing the most obvious threats to religious liberty and by leaving open the question of what future Congressional action, if any, will be needed to protect religious freedom in America.

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The institutionalized persons section applies the strict scrutiny standard to cases in which the free exercise rights of such persons are substantially burdened. This provision is
based upon Congress’s constitutional authority under the Spending and Commerce powers.

Applying a strict scrutiny standard to prison regulations would not lead, as some have suggested, to a flood of frivolous lawsuits by prisoners, and it will not undermine safety, order, or discipline in correctional facilities. Arguments opposing this provision have been made in the past, but they were based on speculation. Now, the arguments can be proven demonstrably false by the facts.

Since the Religious Freedom Restoration Act was enacted in 1993, strict scrutiny has been the applicable standard in religious liberties case brought by inmates in federal prisons. Yet, according to the Department of Justice, among the 96 federally run facilities, housing over 140,000 inmates, less than 75 cases have ever been brought under the Act—most of which have never gone to trial. On average, over seven years, that’s less than 1 case in each federal facility. It’s hardly a flood of litigation or a reason to deny this protection to prisoners.

Following the enactment of the 1993 Act, Congress also passed the Prison Litigation Reform Act, which includes a number of procedural rules to limit frivolous prisoner litigation. Those procedural rules will apply in cases brought under the bill we are introducing today. Based upon these protections and the data on prison litigation, it is clear that this provision in our bill will not lead to a flood of frivolous lawsuits or threaten the safety, order, or discipline in correctional facilities. Sincere faith and worship can be an indispensable part of rehabilitation, and these protections should be an important part of that process.

In sum, our bill is an important step forward in protecting religious liberty in America. It reflects the Senate’s long tradition of bipartisan support for the Constitution and the nation’s fundamental freedoms, and I urge the Senate to approve it....
Developments of the Law, the Law of Prisons:
IV: In the Belly of the Whale: Religious Practice in Prison

115 Harv. L. Rev. 1891
May 2002

[Excerpt; some footnotes and citations omitted]

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B. Correctional Approaches to Religious Accommodation

[Based on interviews with chaplains and religious program administrators ... between November 2001 and February 2002,[c]orrectional systems appear to take three general approaches in determining whether to accommodate or to deny a religious practice. The first approach may be termed “neutral-restrictive”: maintaining neutrality toward the inmate population by restricting certain religious practices. Some requests for accommodation, for example, are frivolous and manipulative; others, even if sincere, are not “religious” (however that word is to be defined). Still others pose such threats to security that they cannot be granted even in a modified form. Finally, some requests would impose significant administrative burdens for which the institution is unwilling to provide a costly or resource-intensive accommodation. An example of the neutral-restrictive approach is the policy, employed in approximately one-third of the jurisdictions surveyed, of refusing any exemptions from a standardized grooming protocol. By maintaining consistency and minimizing costs, a neutral-restrictive policy has clear administrative advantages — but it is also the most likely to face, and lose, legal challenges.

The second approach may be termed “neutral-accommodating”: policies providing general religious accommodation to religious adherents, but making such accommodation available to any inmate. Examples include a dining policy that provides a vegetarian or no-pork diet to any inmate upon request, or a policy permitting an inmate to attend any religious service. A neutral-accommodating policy is best suited for accommodations that are not substantially more costly for the institution to provide or that can as easily be granted to the overall population as to some discrete subset of qualifying inmates. When taking a neutral-accommodating approach, prison administrators must still determine whether an accommodation sought is “religious” and evaluate the potential impact on security and administration. However, to engage in the generally permitted practice, inmates need not demonstrate any particular commitment or membership in a specific group.

Finally, a correctional system may take a “targeted accommodations” approach: following an exemption-based policy. Under this approach, individual inmates may be granted special diets or the opportunity to possess particular religious items, but the accommodation is not made available to the entire population. Targeted accommodations are awarded generally when correctional administrators are faced with a legal duty to provide a particular accommodation but are reluctant, for administrative reasons, to extend that privilege to the general population. However, inmates with “individualized” beliefs — beliefs that do not fall under easily verifiable doctrines of major religions — are unlikely to be accommodated at all. Targeted accommodations, in addition to the inquiry
required under a neutral-accommodating policy (whether the request is "religious" and "sincere," and what the security and administrative implications are), require the prison to engage in an individually tailored analysis involving either or both of the following questions: Is the inmate a valid member of the religious group? And is the practice a "basic," "essential," or "fundamental" tenet of the religion? The first of these questions, however, is an "unlawful entanglement" with religion, and RLUIPA explicitly invalidates the second. The targeted approach, while still common, may therefore run afoul of both statutory and judicial imperatives.

Outside prison, where people can eat what they choose and groom as they like, there is no "neutral-restrictive" or "neutral-accommodating" — there is only "neutral." Given a neutral law, the state decides only whether or not to grant a targeted exemption from a generally applicable rule. The theory of a religious accommodation or exemption is, in a sense, to bring a religious believer to the same level of well-being as anyone else — to "make whole" someone whose ability to live according to his beliefs is compromised, and who is thereby "injured," by a rule of general law....

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C. Religious Accommodations in Practice

1. Classification. States vary widely in the methods they use to categorize faith groups of inmates, ranging from a neutral-accommodating approach that lists any religion indicated by an inmate, to a targeted approach that permits classification only of "recognized" religions upon an inmate's individualized showing of valid membership or commitment, to a neutral-restrictive approach that groups all religious preferences into a small number of general categories. Of the states surveyed, Texas lists by far the largest number of faith groups, with 144 distinct religious classifications. The average number of religious groups listed by state correctional departments is approximately twenty. States also vary in the methods they use to track inmate religious preferences. While a large majority of states track such preferences using information provided at intake and through any subsequent changes of affiliation, a few state systems track inmate religious numbers solely on the basis of attendance at religious services, and others, particularly smaller systems, simply do not track these data at all.

Some methods of classification, by consolidating religious groups or otherwise limiting religious choices, may restrict an inmate's free exercise of religion. The Texas and Arizona approach of recording religious preferences exactly as indicated by inmates avoids this sort of classificatory imposition. Correctional systems have a clear interest in a simplified process and a legitimate fear that a proliferation of religious affiliations will engender a proliferation of accommodation requests. Combining permissive classification policies with neutral-accommodating guidelines on religious practices and time-and-space usage may alleviate that fear.

Policies governing when and how an inmate may change religious affiliation vary from state to state. All such policies are neutral, in that there is no explicit preference for transferring into or out of a particular religion. In some states, inmates may switch their religious affiliation as often as they like, with no verification process. These permissive policies, however, may prompt inmates to manipulate the system, changing religious affiliation simply to obtain special
privileges. In other states, although inmates may change affiliated religions at will, they must provide some documentation from an authorized religious leader substantiating their commitment to their new faith to obtain the privileges of the new religious group. Approximately one-quarter of the states surveyed restrict the frequency with which inmates may switch designated religious affiliations. Frequency limitations range from bimonthly to annually.

States often accommodate religions at different levels. Institutional interests — security considerations, as well as time, space, and staffing limitations — may mean that some groups are not recognized, while others are placed on varying tiers of accommodation. The Missouri Department of Corrections, for example, maintains three levels of religious accommodation: solitary practitioner, provisional group accommodation, and full group accommodation.

In many instances, states provide general Protestant, general Catholic, and to a lesser extent, general Muslim services, rather than separate denominational services for each religious subgroup (such as Baptist or Nation of Islam). Institutional pressures, such as time and space limitations, as well as the need for staff or volunteers to help organize services, undoubtedly play the predominant role in these decisions. Most states permit a wide range of groups to meet, provided they meet security requirements and can obtain a volunteer sponsor to lead services. A few states require a minimum number of inmate requests before they will schedule time and space for a service, though such decisions are more commonly made on an ad hoc basis.

2. Worship and Pastoral Services. A large majority of the correctional systems investigated take a neutral approach to religious services, opening all services to all inmates regardless of religious affiliation (although subject to movement restrictions and work details). One Nebraska administrator said: “We don’t deny anyone services or classes — inmates are guaranteed one worship a week and can go to any worship. Many are exploring, have no faith background, and so they go to different services.” In virtually all instances, systems are also religion-neutral; all accommodated religions are given roughly equal access to available time and space — generally a minimum of one prayer service per week, and in some cases a weekly study session as well. Policies of general neutrality, in which a correctional system divorces itself as much as possible from religious determinations, maximize the spiritual opportunities available to inmates and insulate the correctional system from charges of discrimination or free exercise violation. The distinction between a neutral-restrictive policy and a neutral-accommodating one, in this instance, would depend on the variety of religious groups accommodated and the degree of flexibility in movement between religious groups.

As indicated above, religious groups with common elements are often merged for worship services. Were it otherwise, administrators argue, institutions would be unable to meet the time and space requirements of a multiplicity of groups....

* * *

3. Diet. Many religions have dietary requirements that make participation in a standard prison meal plan difficult, if not impossible. From the institutional point of view, religious dietary requests add
substantial expense and administrative costs to benefit a small group of inmates. Correctional policies reflect all three approaches—neutral-restrictive, targeted, and neutral-accommodating—in evaluating inmate religious dietary requests. On the farthest end of the spectrum is a policy under which, as one administrator put it, inmates “can choose to take the pork off their plate.” This neutral-restrictive approach is no longer common, however, as courts and correctional systems alike have largely recognized the need to meet the minimal religious requirements of major faith groups.

4. Grooming. As with diet, correctional grooming policies have generated a considerable amount of litigation. Correctional institutions argue that beards and long hair may interfere with quick identification of inmates inside the prison, give an escaping inmate an easy way to change appearance, serve as hiding places for contraband, signal gang affiliation, or may pose a health or hygiene risk. Courts have largely upheld grooming restrictions under both the O'Lone reasonableness standard and the RFRA compelling interest and least restrictive means test, but in some instances have mandated religious exemptions for inmates.

* * *

5. Personal Property. Sacred objects, such as texts, symbolic items, clothing, and ritual paraphernalia, are an integral part of many religions and religious observances. Some objects, such as the kirban dagger that Sikhs wear, pose clear threats to institutional safety, and are therefore restricted even by the most accommodating correctional systems. The reasons for restricting other items may be more nuanced, but still reflect concern for safety and order. Aside from safety issues, prisons prohibit some items on the basis of a determination that the objects are not essential to a religion. In other instances, administrators avoid the issue of whether an object is central to a belief system by permitting inmates to choose up to a fixed number of items, but not mandating which objects...

* * *
Truth is indeed stranger than fiction. Who among us would have believed that a bizarre alliance between Senators Orrin Hatch and Ted Kennedy would produce a sweeping statutory coup d’etat in our constitutional balance of power between state and federal governments? Who would have believed that conservative senators, such as Senator Hatch, would support a law that assaults longstanding principles of state sovereignty by requiring the states to justify every state prison regulation that affects religion under strict scrutiny, even after the Supreme Court explicitly held that such regulations are subject to a reasonableness standard? Who would have believed that they would do so even when such a sweeping federal intrusion into state matters is, at best, of dubious constitutionality and when a virtually identical act of Congress had been struck down by the Supreme Court? This, however, is exactly what happened in September 2000, when Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), which re-enacts the Religious Freedom Restoration Act (“RFRA”) and establishes that state prisons may not regulate inmates’ religious activities unless the State can prove it is narrowly tailored for a compelling state interest.

While it is certainly true that a foolish act of Congress does not necessarily offend the Constitution, it is difficult to overlook the ludicrous implications RLUIPA will have on prisons and society if its constitutionality is upheld. Remarkably, RLUIPA confers greater religious rights on inmates than on free citizens. It is well established that a government regulation affecting the religious activities of free citizens is permissible if the burden on religion is merely “incidental” rather than “intentional.” However, under RLUIPA, a state regulation affecting the religious activities of an inmate is invalid unless the State can prove it is narrowly tailored for a compelling state interest. To the extent that Congress somehow believed these rewards for convicted felons served a noble purpose, RLUIPA’s nobility has already been overtaken by its naivete. In the necessarily closed and perilous confines of state prisons, no good act by prison officials will go unpunished by prisoners who will exploit the benefit for unintended evils. In only two months between the enactment of RLUIPA and the writing of this Article, we have already seen Satanworshiping inmates, as well as one inmate who made up his own religion with a Monday Sabbath so that he would be exempted from his Monday job duties, argue that they are entitled to special rights under RLUIPA. It is in light of exactly these types of problems that the Supreme Court has repeatedly held that prison regulations that burden prisoners’ constitutional rights are valid if they are “reasonable,” and it is for just these reasons, and countless others, that RLUIPA will wreak untold chaos on prisons and society.

RLUIPA’s foolishness is not the end of the Act’s perils, but rather merely the beginning.
RLUIPA re-enacts the language of RFRA, which the Supreme Court explicitly held unconstitutional. In City of Boerne v. Flores, the Supreme Court struck down RFRA because it required a strict scrutiny standard where the Supreme Court had used a less stringent standard, and thus “created” constitutional rights in excess of Congress’s authority in violation of Section Five of the Fourteenth Amendment. Now, in its own words, Congress has reenacted RFRA by passing RLUIPA under its Commerce Clause and federal spending powers.

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Long ago, in the early days of the Republic, Chief Justice Marshall wrote that the “powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” Some argue that many of the ideas from the early Republic should be let to rest, but those that are enshrined in the black letter of our Constitution should not. Congress does not have a police power. Although Congress has the power to regulate commerce between the states, that power does not extend to non-economic activities that have no effect on interstate commerce. Although Congress has constitutional authority to spend for the general welfare, it does not have the authority to regulate for that purpose.

RLUIPA burdens state penal authorities, which have traditionally been subject to exclusive State regulation as long as a deferential reasonableness standard is met, with the arduous burden of justifying prison regulations under strict scrutiny. RLUIPA justifies its sweeping provisions under the Commerce and Spending powers, without any explanation of how prison regulations implicate either commerce or federal spending, and notwithstanding the incompatibility of RLUIPA’s provisions with the plain meaning of those words. The intent of the Framers did not contemplate such use of congressional power, and the decisions of the modern Supreme Court do not tolerate it.

The inevitable judicial review of RLUIPA will provide an opportunity to extend the principles of federalism the Supreme Court has emphasized in recent years to the context of the federal spending power. While it remains to be seen whether the Court goes so far as to disapprove of its 1987 decision in Dole, the Court will undoubtedly recognize that the Federal Spending power, like the Commerce power, is not limitless, and is offended by Acts of Congress, such as RLUIPA, that blur the distinction between federal and state powers that has been enshrined in our Constitution since the birth of our Republic.

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Internet Piracy and User Privacy

Recording Industry of America v. Verizon Internet Services
(03-1579)

Ruling Below (Recording Industry of America v. Verizon Internet Services, 351 F.3d 1229 (D.C. Cir. 2003))

The court of appeals found that a subpoena for customer identity may only be issued to an Internet Service Provider (ISP) that stores infringing material; ISPs must be more than mere conduits. The case was remanded to the district court, with instructions to grant the motion to quash the subpoena.

Questions Presented: Whether §512(h) of the Digital Millennium Copyright Act precludes copyright holders from obtaining the identity of a copyright infringer through issuance of a subpoena to the infringer’s ISP, merely because the infringing material is stored on the infringer’s computer, rather than the service provider’s server?

RECORDING INDUSTRY OF AMERICA, INC., Appellee

v.

VERIZON INTERNET SERVICES, INC., Appellant

United States Court of Appeals, D.C. Circuit

Decided December, 19, 2003

[Excerpt; some footnotes and citations omitted]

GINSBURG, Chief Judge:

This case concerns the Recording Industry Association of America’s use of the subpoena provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512(h), to identify internet users the RIAA believes are infringing the copyrights of its members. The RIAA served two subpoenas upon Verizon Internet Services in order to discover the names of two Verizon subscribers who appeared to be trading large numbers of .mp3 files of copyrighted music via “peer-to-peer” (P2P) file sharing programs, such as KaZaA. Verizon refused
to comply with the subpoenas on various legal grounds.

The district court rejected Verizon's statutory and constitutional challenges to § 512(h) and ordered the internet service provider (ISP) to disclose to the RIAA the names of the two subscribers. On appeal Verizon presents three alternative arguments for reversing the orders of the district court: (1) § 512(h) does not authorize the issuance of a subpoena to an ISP acting solely as a conduit for communications the content of which is determined by others; if the statute does authorize such a subpoena, then the statute is unconstitutional because (2) the district court lacked Article III jurisdiction to issue a subpoena with no underlying "case or controversy" pending before the court; and (3) § 512(h) violates the First Amendment because it lacks sufficient safeguards to protect an internet user's ability to speak and to associate anonymously. Because we agree with Verizon's interpretation of the statute, we reverse the orders of the district court enforcing the subpoenas and do not reach either of Verizon's constitutional arguments.

I. Background

Individuals with a personal computer and access to the internet began to offer digital copies of recordings for download by other users, an activity known as file sharing, in the late 1990's using a program called Napster. Although recording companies and music publishers successfully obtained an injunction against Napster's facilitating the sharing of files containing copyrighted recordings, see A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir.2002); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir.2001), millions of people in the United States and around the world continue to share digital .mp3 files of copyrighted recordings using P2P computer programs such as KaZaA, Morpheus, Grokster, and eDonkey. See John Borland, File Swapping Shifts Up a Gear (May 27, 2003), available at http://news.com.com/21001010261009742.html.

* * *

The RIAA has used the subpoena provisions of § 512(h) of the Digital Millennium Copyright Act (DMCA) to compel ISPs to disclose the names of subscribers whom the RIAA has reason to believe are infringing its members' copyrights. See 17 U.S.C. § 512(h)(1) (copyright owner may "request the clerk of any United States district court to issue a subpoena to [an ISP] for identification of an alleged infringer").

Some ISPs have complied with the RIAA's § 512(h) subpoenas and identified the names of the subscribers sought by the RIAA. The RIAA has sent letters to and filed lawsuits against several hundred such individuals, each of whom allegedly made available for download by other users hundreds or in some cases even thousands of .mp3 files of copyrighted recordings. Verizon refused to comply with and instead has challenged the validity of the two § 512(h) subpoenas it has received.

II. Analysis

* * *

The issue is whether § 512(h) applies to an ISP acting only as a conduit for data transferred between two internet users, such as persons sending and receiving e-mail or, as in this case, sharing P2P files. Verizon contends § 512(h) does not authorize the issuance of a subpoena to an ISP that transmits infringing material but does not
store any such material on its servers. The RIAA argues § 512(h) on its face authorizes the issuance of a subpoena to an “internet service provider” without regard to whether the ISP is acting as a conduit for user-directed communications. We conclude from both the terms of § 512(h) and the overall structure of § 512 that, as Verizon contends, a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity.

A. Subsection 512(h) by its Terms

We begin our analysis, as always, with the text of the statute. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S.Ct. 941, 950, 151 L.Ed.2d 908 (2002). Verizon’s statutory arguments address the meaning of and interaction between §§ 512(h) and 512(a)-(d). [...

Notably present in §§ 512(b)-(d), and notably absent from § 512(a), is the so-called notice and take-down provision. It makes a condition of the ISP’s protection from liability for copyright infringement that “upon notification of claimed infringement as described in [§ 512](c)(3),” the ISP “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.” See 17 U.S.C. §§ 512(b)(2)(E), 512(c)(1)(C), and 512(d)(3).

Verizon argues that § 512(h) by its terms precludes the Clerk of Court from issuing a subpoena to an ISP acting as a conduit for P2P communications because a § 512(h) subpoena request cannot meet the requirement in § 512(h)(2)(A) that a proposed subpoena contain “a copy of a notification [of claimed infringement, as] described in [§ 512](c)(3)(A).” In Subsection 512 c (3)(A) provides that “[t]o be effective under this subsection, a notification of claimed infringement must be a written communication that includes substantially the following”:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is alleged infringed.

(ii) Identification of the copyright work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site. Recording Industry of America v. Verizon Internet, 351 F.3d 1229 (D.C. Cir. 2003).

Verizon maintains the two subpoenas obtained by the RIAA fail to meet the requirements of § 512 c (3)(A)(iii) in that they do not – because Verizon is not storing the infringing material on its server – and cannot identify material “to be removed or access to which is to be disabled” by Verizon.

Here Verizon points out that § 512(h)(4) makes satisfaction of the notification requirement of § 512 c (3)(A) a condition precedent to issuance of a subpoena:

“If the notification filed satisfies the provisions of [§ 512](c) (3)(A) a condition precedent to issuance of a subpoena:

“the clerk shall expeditiously issue and sign the proposed subpoena TTT for delivery” to the ISP. Infringing material obtained or distributed via P2P file sharing is located in the computer (or in an off-line storage device, such as a compact disc) of an individual user. No matter what information the copyright owner may provide, the ISP can neither “remove” nor “disable access to” the infringing material because that material is not stored on the ISP’s servers.
Verizon can not remove or disable one user’s access to infringing material resident on another user’s computer because Verizon does not control the content on its subscribers’ computers.

The RIAA contends an ISP can indeed “disable access” to infringing material by terminating the offending subscriber’s internet account. This argument is undone by the terms of the Act, however.

As Verizon notes, the Congress considered disabling an individual’s access to infringing material and disabling access to the internet to be different remedies for the protection of copyright owners, the former blocking access to the infringing material on the offender’s computer and the latter more broadly blocking the offender’s access to the internet (at least via his chosen ISP). Compare 17 U.S.C. § 512(j)(1)(A)(i) (authorizing injunction restraining ISP “from providing access to infringing material”) with 17 U.S.C. §§512(j)(1)(A)(ii) (authorizing injunction restraining ISP “from providing access to a subscriber or account holder who is engaging in infringing activity by terminating the accounts of the subscriber or account holder”).

* * *

According to the RIAA, the purpose of § 512(h) being to identify infringers, a notice should be deemed sufficient so long as the ISP can identify the infringer from the IP address in the subpoena. Nothing in the Act itself says how we should determine whether a notification “includes substantially” all the required information; both the Senate and House Reports, however, state the term means only that “technical errors such as misspelling a name” or “supplying an outdated area code” will not render ineffective an otherwise complete § 512 c (3)(A) notification. S.Rep. No. 105–190, at 47 (1998); H.R.Rep. No. 105–551 (II), at 56 (1998). Clearly, however, the defect in the RIAA’s notification is not a mere technical error; nor could it be thought “insubstantial” even under a more forgiving standard. The RIAA’s notification identifies absolutely no material Verizon could remove or access to which it could disable, which indicates to us that § 512 c (3)(A) concerns means of infringement other than P2P file sharing. […]

In sum, we agree with Verizon that § 512(h) does not by its terms authorize the subpoenas issued here. A § 512(h) subpoena simply cannot meet the notice requirement of § 512 c (3)(A)(iii).

B. Structure

Verizon also argues the subpoena provision, § 512(h), relates uniquely to the safe harbor in § 512 c for ISPs engaged in storing copyrighted material and does not apply to the transmitting function addressed by the safe harbor in § 512(a).

* * *

[We agree that the presence in § 512(h) of three separate references to § 512 applies only to ISPs engaged in storing copyrighted material and not to those engaged solely in transmitting it on behalf of others.]

We think it clear, therefore, that the cross-references to § 512 c (3) in §§ 512(b)-(d) demonstrate that § 512(h) applies to an ISP storing infringing material on its servers in any capacity – whether as a temporary cache of a web page created by the ISP per § 512(b), as a web site stored on the ISP’s server per § 512 c, or as an information locating tool hosted by the ISP per § 512(d).
— and does not apply to an ISP routing infringing material to or from a personal computer owned and used by a subscriber.

C. Legislative History

In support of its claim that § 512(h) can—and should—be read to reach P2P technology, the RIAA points to congressional testimony and news articles available to the Congress prior to passage of the DMCA. These sources document the threat to copyright owners posed by bulletin board services (BBSs) and file transfer protocol (FTP) sites, which the RIAA says were precursors to P2P programs.

We need not, however, resort to investigating what the 105th Congress may have known because the text of § 512(h) and the overall structure of § 512 clearly establish, as we have seen, that § 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others. Legislative history can serve to inform the court’s reading of an otherwise ambiguous text; it cannot lead the court to contradict the legislation itself. See Ratzlaf v. United States, 510 U.S. 135.

In any event, not only is the statute clear (albeit complex), the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; P2P software was “not even a glimmer in anyone’s eye when the DMCA was enacted.”

* * *

The Congress had no reason to foresee the application of § 512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along. Had the Congress been aware of P2P technology, or anticipated its development, § 512(h) might have been drafted more generally. Be that as it may, contrary to the RIAA’s claim, nothing in the legislative history supports the issuance of a § 512(h) subpoena to an ISP acting as a conduit for P2P file sharing.

D. Purpose of the DMCA

Finally, the RIAA argues Verizon’s interpretation of the statute “would defeat the core objectives” of the Act. [...]. We are not unsympathetic either to the RIAA’s concern regarding the widespread infringement of its members’ copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress; only the “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.” See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431, 104 S.Ct. 774, 783, 78 L.Ed.2d 574 (1984). [...]

III. Conclusion

For the foregoing reasons, we remand this case to the district court to vacate its order enforcing the July 24 subpoena and to grant Verizon’s motion to quash the February 4 subpoena. So ordered.
A federal appeals court yesterday ruled that Internet account providers do not have to give record companies the names of computer users who share songs online, dealing a sharp blow to the industry’s efforts to crack down on illegal copying of digital music. The ruling throws out two lower-court decisions that gave the Recording Industry Association of America (RIAA) the right to subpoena the names of thousands of suspected users of file-sharing software programs without first filing lawsuits.

The association sued 382 people and warned 398 others in a widely publicized campaign to scare the estimated 60 million U.S. music swappers, and the parents of those who are teens, into giving up the practice and buying songs instead.

The association settled with 220 defendants—some for thousands of dollars — while 1,054 swappers signed “amnesty letters” vowing to erase their song files and promising never to steal music again. Consumer advocates and Internet providers hailed yesterday’s ruling as an affirmation of privacy rights for Internet users in the face of a mass attack by a single industry.

The recording association said it would not be deterred from protecting the business of its members and promised additional lawsuits, saying it would seek the names in a more time-consuming way.

The RIAA contended that it was entitled to expedited subpoenas issued by court clerks, rather than judges, under a 1998 law designed to protect copyrighted works in the digital age. Although industry sleuths could track down the numerical Internet address of someone using file-sharing software, they could not take legal action without getting names and physical addresses of the swappers from their Internet access providers.

The music industry has suffered at the hands of services such as Kazaa, Morpheus, Grokster and LimeWire, which by some estimates have cost it more than $5 billion a year worldwide. But the subpoenas were fought by Verizon Communications Inc.’s online division, which provides Internet access to 2.1 million consumers.

The company was forced to begin turning over names in April after a lower-court judge ruled against it.

Verizon argued that the privacy and safety of its customers would be compromised if the subpoenas were not issued by judges, who first review their validity. The company also argued that the Digital Millennium Copyright Act prohibits Internet providers from being held responsible for what moves across their networks.

The law, the company said, only requires network owners to remove illegal material from their central computers. When consumers use file-sharing, or peer-to-peer, services, the songs they trade reside on their personal computers.

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit agreed
unanimously. "Verizon cannot remove or disable one user's access to infringing material resident on another user's computer because Verizon does not control the content on its subscribers' computers," said the ruling, written by Chief Judge Douglas H. Ginsburg.

Perhaps more damaging for the recording industry, and for the movie and software industries, whose works also are traded online, the court declared firmly that the law was not designed to account for file-sharing technology. It is up to Congress to fix that if it chooses, the court ruled.

"We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights," Ginsburg wrote. "It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens . . . the motion picture and software industries."

Cary Sherman, president of the RIAA and a former Verizon lawyer, said his organization has not decided if it will appeal the ruling to the U.S. Supreme Court or ask Congress to change the DMCA. Sen. Orrin G. Hatch (R-Utah), chairman of the Senate Judiciary Committee and a musician, said he would push Congress to streamline the subpoena process.

Sherman said his group would file a first wave of "John Doe" lawsuits in January. Such suits are filed when the identity of the defendant is unknown. If a judge deems the suits valid, subpoenas to get the names and addresses of those using file-sharing software would be issued to Internet service providers, which have vowed to honor them.

"We think they can have the same deterrent by following the standard legal process," said Sarah B. Deutsch, Verizon's associate general counsel. "They wanted to have an expedited process, even if it trampled on user privacy and safety."

Less certain is the fate of an unknown number of people whose names already have been turned over to the RIAA by Internet service providers. The RIAA has declined to say how many subpoenas it served; Verizon estimates it at about 4,000.

The RIAA could use the names as the basis for lawsuits, but the defendants might be able to argue that their names were obtained through subpoenas now ruled unlawful. "That one could keep lawyers happy for a long time," said Peter P. Swire, an Ohio State University law professor who helped Verizon with its case.

But legal experts said that those who had already settled were unlikely to be able to recoup any payments to the RIAA. And Sherman warned against anyone trying.

"If anybody tried to claim that somehow a settlement or pending litigation is somehow tainted by the process by which their name was provided, it would simply encourage us to file a new lawsuit and get exactly the same information in another way," Sherman said. "At that point, the settlement figure would be that much higher because of additional legal expenses."

Still, Tim Davis, a New York artist and a lecturer at Yale University, said he intends to try.

Davis was one of the first song swappers targeted by the RIAA, and settled for $7,000 on the advice of his lawyers.
“I would do anything it takes to get the money back,” said Davis, who said he downloaded only 300 songs. “My hope is there could be a class-action suit of the people who did settle.”

The ruling comes as legal alternatives to file sharing are gaining ground. Apple Computer Inc.’s iTunes, the top-selling legal online music store, announced this week it had sold 25 million songs since its rollout in April.

Similar services have sprung up in iTunes’s wake, while use of file sharing appears to be dropping.
Just as the music business was making headway in its fight against rampant online piracy, a court ruling has threatened the industry's comeback effort.

With music sales down over 14% since 1999 - thanks largely to online sharing, CD burning and dissatisfaction over prices—the industry this year rolled out initiatives designed to drive music from Internet file-trading services and revive legitimate music buying. Since September, the rate of decline in music sales has slowed.

But a ruling Friday by the U.S. Court of Appeals for the District of Columbia is likely to hamper one of the industry's most important strategies: lawsuits against illegal file sharers. The court struck down a lower court's ruling that had ordered Verizon Communications Inc. to turn over the identities of customers suspected of sharing music via Internet peer-to-peer services. The ruling will make it more cumbersome for the recording industry to learn the identities of major online music swappers—and thus significantly impede the record labels' ability to quickly file large batches of lawsuits against these individuals.

The industry in September began filing hundreds of such suits, a move that provoked an outcry. “Everyone that hears about these cases is most struck by the arbitrariness of it,” said Tim Davis, a New York City photographer and part-time lecturer at Yale University who was sued by the Recording Industry Association of America and recently settled for about $10,000.

There were early signs the lawsuits had the intended effect. According to recently compiled data from Nielsen SoundScan, the three-year slide in music sales began to slow dramatically on almost precisely the same date the suits were filed, amid massive publicity.

The data show that sales of CD albums and singles had been down from the year-previous week for 34 of the 36 weeks prior to the start of the legal barrage. Since the initial wave of suits was filed, however, weekly sales have been up, year-over-year, for 11 out of 14 weeks. Until early September, sales for the year had fallen 8.4% compared with the same period in 2002; as of last week, sales had rebounded enough that they were off only 2.2% for the year.

At the same time, data from Nielsen NetRatings show that usage of Kazaa, the biggest of the peer-to-peer services, is down sharply, from a high of over 17.4 million unique users per month in March to 7.6 million in October. Other, similar services haven't shown the same dramatic declines, but their audiences are smaller. That momentum is seriously threatened now, as online music users may no longer feel the legal heat. The RIAA had cited a section of the 1998 Digital Millennium Copyright Act in seeking to compel Verizon to turn over the names of two users it believed were sharing music files illegally. A lower court agreed with the recording industry.

But writing for a unanimous three-judge appeals panel, Chief Judge Douglas
Ginsburg ruled that the digital copyright law didn’t apply to the case at hand, because Verizon was merely a conduit for the copyrighted material, and didn’t host it on its computers.

Until Friday’s ruling, lawyers for the RIAA had a relatively straightforward means of suing people they believed were sharing copyrighted music. Simply by submitting a form with a court clerk, the RIAA’s lawyers could automatically obtain subpoenas compelling Internet-service providers to turn over the names of people whose Internet accounts were suspected of hosting copyrighted music files for online distribution. The industry could then either file a lawsuit against the individual or, as it has more recently, send warning letters seeking to settle cases before they were filed. Now, however, the RIAA’s lawyers will be forced to engage in a more burdensome and expensive process that involves filing suits against anonymous “John Doe” defendants, and then obtaining subpoenas for the users’ identities from a judge. “It’s a huge victory for all Internet users and consumers,” said Sarah Deutsch, a lawyer for Verizon. “They were engaged in an online fishing expedition.”

Cary Sherman, president of the RIAA, called the decision “disappointing from a procedural perspective,” but said it wouldn’t affect his organization’s overall strategy. “This doesn’t change our ability to sue,” Mr. Sherman said. “And it doesn’t change the fact that uploading and downloading music is illegal.” He said the RIAA hasn’t decided whether to appeal the ruling to the U.S. Supreme Court, or to pursue congressional help in changing the law so that it applies more specifically to peer-to-peer services, which didn’t exist at the time the digital-copyright law was written.

Nonetheless, the Verizon case and others show how difficult it is for record companies to make a legal stand against piracy that stems from the elusive peer-to-peer services. Last April, another federal court ruled similarly that Grokster and another peer-to-peer service, Morpheus, weren’t liable for whatever illegal purposes users might put them to. Also on Friday, a Dutch court reached the same conclusion in a case against Kazaa.

Friday’s appeals-court ruling also has implications for the movie industry, which hasn’t yet been hit by widespread piracy but is preparing for it. The Motion Picture Association of America hasn’t yet decided to follow the music industry in filing suits against individuals, although some studios have been eager to do so. Hollywood executives noted that the battle against piracy also involves offering consumers better legal access to digital versions of movies and music, as well as the development of technologies to make it harder to make digital copies.

The recording industry has already been pursuing those other paths, with varied results. One of the most successful gambits has been the rollout of affordable, convenient, legal music downloading services like Apple Computer Inc.’s iTunes Music Store. According to Nielsen SoundScan, the year-to-date music industry sales drop of 2.2% would be 4.7% without the inclusion of paid digital downloads.

Universal Music Group, a unit of Vivendi Universal SA, took another tack, slashing wholesale prices on most of its releases by as much as 25%, and suggested retail prices by as much as 32%, to less than $13. Universal’s plans called for it to make up the revenue largely through a bump in volume. The company didn’t specify how much it
needed sales to increase, but industry insiders estimated it would need a lift of about 20% to make up the difference.

But so far, Universal may not be getting the bump it hoped for. Jim Urie, president of Universal Music and Video Distribution, said “it’s too early to tell if [the program] is a success or a failure.” He added that the retail pricing changes under the program “were much slower to hit than we’d anticipated.”
As growing swarms of online pirates continue plundering music's treasure chests, the $12 billion recording industry could be facing a walk down the plank. Computer users download an estimated 2.6 billion music files monthly; most are illegal. Aggressive legal action, drastic security measures and sophisticated counterattacks may not be enough to slow, much less halt or reverse, the illegal downloading that is taking a significant bite out of record sales. In its third year of slumping revenue, the recording industry has little reason to expect a turnaround.

"The record companies are history," says James Hetfield of Metallica, the band that stood up to file-swapping juggernaut Napster. "They won't be around much longer unless they get with it and morph into something new that's going to help get music directly to the masses. The Internet is about as direct as it gets. Putting a CD in a store is like putting a rotary-dial phone in front of a kid: 'What's that? There's no antenna.' Downloading is a sobering change."

Some punishing numbers that have labels down for the count: Record sales in the world's top 10 markets declined 6.8% in 2002, according to the International Federation of the Phonographic Industry. Research estimates that piracy accounts for 40% of the global decline. First-quarter album sales (144.7 million units) are down 10% from 2002 (160.7 million), according to Nielsen SoundScan. Roughly 1.7 billion blank CDs were sold in 2002, up 40% over 2001. The use of broadband, enabling quick downloads, grew 9% from October to March. After early missteps, the five major labels — Universal, Warner, Sony, BMG and EMI — and the trade group Recording Industry Association of America are pursuing new anti-piracy approaches that may be too little and too late.

Among the strategies that are taking aim at file-swappers:

Suing them into submission Strategy: Verdicts have gone both ways so far. A federal court ruled April 25 that peer-to-peer file-swapping systems like Morpheus and Grokster are not acting illegally since they don't track traffic. But the decision does say users are violating copyright law. Another ruling reaffirmed the industry's right to compel Internet providers to supply identities of suspected copyright violators. So the legal focus shifts to file sharers.

Last week, four college students sued by the industry agreed to shut down their campus file-sharing networks and pay up to $17,500 each. While it's implausible for labels to chase down every bandit, making examples of prolific abusers might scare off others. Drawbacks: Pursuing students is far from cost-effective and will likely harden attitudes that labels — whose prices for CDs have never dropped despite plunging production costs — are rip-off agents. Downloaders who wouldn't dream of shoplifting a CD at Tower blithely swipe songs from cyberspace without a twinge of guilt. Getting music gratis is only half the thrill; there's also a kick involved in joining a rebel cult and beating an overpriced
Creating instant martyrs of file sharers can only intensify that sentiment.

"The image of record companies is so negative that peer-to-peer users aren't bothered by questions of legality," says Charly Prevost, former executive at Liquid Audio, which provides software for secure Net music.

Outmaneuvering them technologically

Strategy:

Several trumpeted safeguards are in use or in development, but labels also are resorting to wily tactics, including "spoofing," or flooding cyberspace with defective files that confound users. Also possible are more drastic measures that would lock up users' computers.

Drawbacks:

Users have devised ways to skirt file-sharing hurdles. And declaring open war by freezing computers or Internet connections is no way to win back consumers. Decoy tracks from Madonna's American Life antagonized fans and prompted hackers to temporarily disable her Web site.

Rehabilitating them Strategy: Warner Bros. Records chairman Tom Whalley says, "I'm pushing for awareness and education ... to let fans know that stealing music hurts artists and people who make a livelihood off music."

Parents also are natural targets for the campaign:

"Years ago, we were under attack for our morality," Whalley says. "As a result, we put parental-guidance stickers on records. Don't parents know their children are stealing from the Internet? The people who spoke out against record companies are turning their heads in their own households. It's a moral issue."

Last week, the RIAA began an instant-message campaign that sends automated warnings to those distributing or downloading copyrighted music, reminding violators that the act harms artists.

It's an uphill battle. Among Americans 12 and up, 28% have downloaded music, 18% within the past month, according to Ipsos-Reid marketing research firm. Of those 12 to 17, 48% downloaded music in the past month. And 42% of all file-sharers reported they copied a CD rather than buy it. An Ipsos-Reid study shows that only 9% say file-sharing is wrong, and just 20% say it hurts artists. Many file-sharers consider the RIAA volley a hostile nuisance.

Enticing them to buy Strategy: Convenience and comfort may be the keys. Internet access options offer a parallel, says analyst Phil Leigh of Raymond James and Associates.

"The best way to combat piracy is to remove the incentive by providing a better alternative," he says. "The vast majority of us pay for Internet access. You can get it for free, but you have to live with constant pop-up ads and limitations. Only a tiny fraction of the public does that. We pay for Internet access because we cannot abide the annoyances. The renegade (file-sharing) networks have an abundance of pop-up ads, spyware, decoy files, viruses and sporadic crashes."

Until recently, label-sanctioned sites were turnoffs. They were "expensive and the user experience was unsatisfying," Prevost says. "All the legal systems were difficult to use." Apple's newly launched iTunes "is a positive evolutionary step" toward weaning users off illegal sites, Prevost says. "It's
completely addictive, easier than Amazon. It’s easier than the illegal sites. If you go to Kazaa for a popular track, you find 100 to pick through, and the quality is questionable. At Apple, it’s fast, smooth, no typos, excellent quality.”

Apple reports that iTunes sold more than 1 million digital songs in its first week. Competitors Pressplay, MusicNet and Listen have struggled to attract what analysts say is less than a combined 300,000 monthly subscribers. Apple offers 200,000 tracks at 99 cents each, with more songs to be posted today.

But meanwhile, the file-sharing cosmos is expanding. Recordable CDs outsell prerecorded music CDs by more than 2 to 1. Monster song-swapping service Kazaa has 218 million registered users. Sluggish dial-up connections, long an impediment to easy downloading, are on the wane as broadband spreads rapidly outside the corporate and university sectors to the residential realm, inviting more throngs into the free-for-all.

Once dismissed as fringe alarmists, doomsayers who predicted the demise of the music biz are breaching the walls of denial at labels, where alarming statistics are forcing a reassessment of old-school leadership and obsolete business models.

To survive, labels have to jump on the bandwidth wagon, says Prevost. “The delivery of music is critical,” he says. “Labels have to figure out how to use the Internet, not replace it. We’re seeing the end of the beginning of the industry.” Leigh says, “The chances of the labels reversing the trend toward Internet distribution are about as slim as an Apache Indian being elected pope. The labels have been intellectually aware of this for two or three years. Now they’re feeling it at a gut level.”

Labels headed for extinction?

Could the giant labels vanish? Some say collapse or serious shrinkage is inevitable if the perilous disconnect between corporations and customers persists. It started when labels ignored the Internet’s rise and technological advances that sowed the seeds of online piracy. They resisted adapting to a changed environment and then fought the uprising rather than co-opting it early enough to foil thieves and lure loyal buyers. Says Leigh: “The labels anticipated that Internet distribution would arrive when Marriott opened a hotel on Mars. They didn’t know what to do, so they proceeded on the characteristic path of litigation and legislation. But these peer-to-peer networks are as hard to stamp out as the Hydra. Cut off one head, and two grow in its place.”

Established acts are watching profits plunge and prospects diminish as CD sales, the bread and butter for most recording artists, sink. Linkin Park took extreme precautions during recording and pre-release promotion of current album Meteora, and while the effort paid off in preventing leaks, the disc’s entire contents were up for grabs online as soon as the album landed on shelves. Metallica is braced for a similar brushfire when St. Anger hits retail on June 10. The band hopes to lure buyers with such incentives as a DVD of rehearsals, a CD-ROM peek into the band’s upcoming video game and an elaborate booklet.

“The idea was to throw out a bone that you won’t get in a download,” Hetfield says. He’s relieved that security measures so far have thwarted leaks. “Recording was like working in a bank. The hard drives were in a safe. Nothing left the studio. But then you hand it off to the record company to mass-produce it, and you have to let it go.”
Despite precautions, songs from Radiohead’s aptly titled Hail to the Thief, due June 10, are circulating on the Net. When live versions of songs from 2000’s Kid A saturated Napster within hours of the concert, Radiohead initially was amused that “there was suddenly this really cool global distribution system,” says Adam Sexton of Macrovision’s Audio Group. “Then it sunk in: ‘What does this mean to our album?’ The business was a bit caught off guard by the rapid spread of Napster. It was voiced as a theoretical problem before. By the time they realized they had a problem, it was already immense, and the genie was out of the bottle.”

Internet music looting “definitely got ahead of us,” says Whalley. “We got caught short in the beginning, and now we’re catching up. We’re the first industry really hurt by this. The movie industry will benefit from our suffering.”

Tightened in-house security is preventing pre-release leaks. Of four Warner albums in the top 10, none reached the Internet before landing in stores. “Once it hits the airwaves or is sent to retail, we lose control,” Whalley says. Yet he sees cause for optimism. “The business is reinventing itself, and I’m excited to take on that challenge. You’ll never wipe out piracy; no industry can. But we have a good chance of reaching the average, honest music fans out there and turning them around. The future is bright.”

In the technology tug-of-war, the industry is gaining ground. Macrovision, which ships about 10 million copy-protected CDs internationally each month, helps labels combat piracy by producing “dual session” CDs that allow music to be played on PCs but inhibit file-trading and CD burning. The company, in conjunction with Microsoft, can produce protected CDs that let music be saved on a PC, exported to a portable player and burned onto a recordable CD but not uploaded and traded online.

“What we basically aim to do is put speed bumps up so that average consumers will say they might as well just buy it,” Sexton says. The new configuration “gives consumers the flexibility they have come to expect. The rest of the world has moved ahead of the U.S. and taken an aggressive stance to protect intellectual property. Our goal (in the USA) is to have some test releases out in the summer and some major releases this fall so that by Christmas we’ll see widespread use of copy protection on CDs.”

Also in development is “controlled burning,” in which songs burned onto a blank CD can’t be copied. “We have got to get music piracy back to a level that the industry can still survive with, so it’s not one copy begets a thousand begets a million,” Sexton says.

**Far-reaching cultural effects:**

If industry efforts fail, the fallout will hurt more than the bean counters and stockholders. A crippled system would send ripples through myriad businesses and pop culture itself. A marketplace built around a physical artifact — the silver disc inside a shrink-wrapped jewel box — would shrivel.

“I don’t see the day anytime soon when brick-and-mortar stores will be obsolete,” Whalley says. “People will still enjoy browsing CD bins. But we’ll see fewer stores. And the independent accounts around college campuses have been or are being put out of business by online piracy.”

If piracy spreads unabated, the very culprits stand to suffer losses as well. “The industry would not be able to produce and market the
number of new artists it's offered historically," RIAA president Cary Sherman says. "It would mean far less investment in music. Record companies make money by selling music. There are very few other revenue streams available. If they can't sell music because people are downloading or burning it for free, they'll take fewer risks on fewer artists.

"If it weren't for Norah Jones having a record contract, her music would still be enjoyed by a few people in Texas at clubs. EMI invested in her and marketed her music, and now it's enjoyed by people all over the world. We have one of the most rich and vibrant cultures in the world, and it would be criminal if all of that disappeared, or contracted, because of uncontrolled Internet piracy."

Metallica drummer Lars Ulrich, branded as greedy by some fans for his criticism of online thievery, says the band fought for principles, not profit. "It's not the Metallicas and Madonnas and Linkin Parks and Bruce Springsteens that take the hardest hit, it's the 10 developing bands each label has on its roster every month," Ulrich says. "That gets trimmed to three. Instead of getting $1 million to make videos and tour, you go home if nothing happens in the first five minutes of that project. Young artists won't have a chance." Hetfield chimes in, "What about the band that's on the cusp of make it or break it? It's so ironic that a band won't be successful because the people who really like their stuff are stealing it."
The recording industry says downloading music from the Internet is ruining our business, destroying sales and costing artists such as me money.

Costing me money?

I don’t pretend to be an expert on intellectual property law, but I do know one thing: If a record executive says he will make me more money, I’d immediately protect my wallet.

Still, the Recording Industry Association of America (RIAA) is now in federal court trying to gain new powers to personally target Internet users in lawsuits for trading music files online. In a motion filed with the U.S. District Court for the District of Columbia, the RIAA is demanding that an Internet service provider, Verizon, turn over the name and contact information of one of its Internet subscribers who, the RIAA claims, might have unauthorized copies of songs on a home computer.

Attacking your own customers because they want to learn more about your products is a bizarre business strategy, one the music industry cannot afford to continue. Yet the RIAA effectively destroyed Napster on such grounds, and now it is using the same crazy logic to take on Internet service providers and even privacy rights.

The RIAA’s claim that the industry and artists are hurt by free downloading is nonsense. Consider my experience: I’m a recording artist who has sold multiple platinum records since the 1960s. My site, janisian.com, began offering free downloads in July. About a thousand people per day have downloaded my music, most of them people who had never heard of me and never bought my CDs.

Welcome to ‘Acousticville’

On the first day I posted downloadable music, my merchandise sales tripled, and they have stayed that way ever since. I’m not about to become a millionaire as a result, but I am making more money. At a time when radio playlists are tighter and any kind of exposure is hard to come by, 365,000 copies of my work now will be heard. Even if only 3% of those people come to concerts or buy my CDs, I’ve gained about 10,000 new fans this year.

That’s how artists become successful: exposure. Without exposure, no one comes to shows, and no one buys CDs. After 37 years as a recording artist, when people write to tell me that they came to my concert because they downloaded a song and got curious, I am thrilled.

Who’s really hurt by free downloads? The executives at major labels who twiddled their thumbs for years while company after company begged them to set up “micropayment” protocols and to license material for Internet-download sales.

Listen up

Many artists now benefit greatly from the free-download systems the RIAA seeks to destroy. These musicians, especially those
without a major-label contract, can reach millions of new listeners with a downloadable song, enticing music fans to buy a CD or come to a concert of an artist they would have otherwise missed.

The RIAA and the entrenched music industry argue that free downloads are threats. The music industry had exactly the same response to the advent of reel-to-reel home tape recorders, cassettes, DATs, minidisks, VCRs, music videos, MTV and a host of other products and services. I am not advocating indiscriminate downloading without the artist’s permission. Copyright protection is vital. But I do object to the industry spin that it is doing all this to protect artists. It is not protecting us; it is protecting itself.

I hope the court rejects the efforts of the music industry to assault the Internet and the music fans who use it. Speaking as an artist, I want us to work together — industry leaders, musicians, songwriters and consumers — to make technology work for all of us.

Janis Ian’s popular-music credits include 17 major-label albums, nine Grammy nominations and 37 years of experience in the music industry.
Oregon Death with Dignity Act

Oregon v. Ashcroft

Ruling Below: 368 F.3d 1118; 2004 U.S. App. LEXIS 10349

Appellees, the State of Oregon and others, challenged the Ashcroft Directive, published at 66 Fed. Reg. 56,607, because it criminalized conduct specifically authorized by Oregon’s Death with Dignity Act. The court held that the Ashcroft Directive was unlawful and unenforceable because it violated the plain language of the Controlled Substances Act (CSA), because it contravened Congress’ express legislative intent, and overstepped the bounds of the U.S. Attorney General’s statutory authority. The court found that the CSA was enacted to combat drug abuse. The court further found that to the extent that the CSA authorized the federal government to make decisions regarding the practice of medicine, those decisions were delegated to the Secretary of Health and Human Services, not to the Attorney General.

Question Presented: Whether the attorney general under the federal CSA may criminalize activity of doctors and pharmacists that is expressly authorized by state statute?

State of OREGON, et. al., Plaintiff-Appellee
v.
John ASHCROFT, et. al., Defendant-Appellant

United States Court of Appeals for the Ninth Circuit

Decided May 26, 2004

[Excerpt; some footnotes and citations omitted]

TALLMAN, Circuit Judge:

A doctor, a pharmacist, several terminally ill patients, and the State of Oregon challenge an interpretive rule issued by Attorney General John Ashcroft which declares that physician assisted suicide violates the Controlled Substances Act of 1970 (“CSA”), 21 U.S.C. §§ 801-904. This so-called “Ashcroft Directive,” criminalizes conduct specifically authorized by Oregon’s Death With Dignity Act, Or. Rev. Stat. § 127.800-897. We hold that the Ashcroft Directive is unlawful and unenforceable because it violates the plain language of the CSA, contravenes Congress’ express legislative intent, and oversteps the bounds of the Attorney General’s statutory authority. The petitions for review are granted.

* * *

The Ashcroft Directive purports to interpret and implement the CSA, which Congress enacted as Title II of the Comprehensive...
Drug Abuse Prevention and Control Act of 1970. The stated purpose of the CSA is "to provide increased research into, and prevention of, drug abuse and drug dependence . . . and to strengthen existing law enforcement authority in the field of drug abuse." This legislation is designed to deal in comprehensive fashion with the growing menace of drug abuse in the United States[."").

** * * *

In 1984, Congress amended the CSA to give broader authority to the Attorney General. The Attorney General is now authorized to revoke a physician's prescription privileges upon his determination that the physician has "committed such acts as would render his registration . . . inconsistent with the public interest[.""] 21 U.S.C. § 824(a)(4). When determining which acts are inconsistent with the public interest, the Attorney General must consider the following factors:

1. The recommendation of the appropriate State licensing board or professional disciplinary authority;
2. The applicant's expertise in dispensing . . . controlled substances;
3. The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances;
4. Compliance with applicable State, Federal, or local laws relating to controlled substances;
5. Such other conduct which may threaten the public health and safety.

Although this provision gives the Attorney General new discretion over the registration of health care practitioners, Congress explained that "the amendment would continue to give deference to the opinions of State licensing authorities, since their recommendations are the first of the factors to be considered." S. Rep. No. 98-225, at 267 (1984).

Against this backdrop of federal regulation, in 1994, the State of Oregon enacted by ballot measure the country's first law authorizing physician assisted suicide. Oregon's Death With Dignity Act authorizes physicians to prescribe lethal doses of controlled substances to terminally ill Oregon residents according to procedures designed to protect vulnerable patients and ensure that their decisions are reasoned and voluntary. Oregon voters reaffirmed their support for the Death With Dignity Act on November 4, 1997, by defeating a ballot measure that sought to repeal the law.

Soon thereafter, several members of Congress, including then-Senator John Ashcroft, urged then-Attorney General Janet Reno to declare that physician assisted suicide violated the CSA. She declined to do so. In a letter dated January 5, 1998, Attorney General Reno explained that the CSA was not "intended to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." She concluded that "the CSA does not authorize [the Drug Enforcement Administration ("DEA")] to prosecute, or to revoke DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law."

With a change of administrations came a change of perspectives. On November 9, 2001, newly appointed Attorney General
John Ashcroft reversed the position of his predecessor and issued the Directive at issue here. The Ashcroft Directive proclaims that physician assisted suicide serves no "legitimate medical purpose" under 21 C.F.R. § 1306.04 and that specific conduct authorized by Oregon’s Death With Dignity Act “may ‘render [a practitioner’s] registration . . . inconsistent with the public interest’ and therefore subject to possible suspension or revocation.” The Directive specifically targets health care practitioners in Oregon and instructs the DEA to enforce this determination “regardless of whether state law authorizes or permits such conduct by practitioners.”

To be perfectly clear, we take no position on the merits or morality of physician assisted suicide. We express no opinion on whether the practice is inconsistent with the public interest or constitutes illegitimate medical care. This case is simply about who gets to decide. All parties agree that the question before us is whether Congress authorized the Attorney General to determine that physician assisted suicide violates the CSA. We hold that the Attorney General lacked Congress’ requisite authorization. The Ashcroft Directive is invalid because Congress has provided no indication—much less an “unmistakably clear” indication—that it intended to authorize the Attorney General to regulate the practice of physician assisted suicide. By attempting to regulate physician assisted suicide, the Ashcroft Directive invokes the outer limits of Congress’ power by encroaching on state authority to regulate medical practice.[...]

The Ashcroft Directive not only lacks clear congressional authority, it also violates the plain language of the CSA. We hold that the Directive exceeds the scope of federal authority under the CSA, misconstrues the Attorney General’s role under the statute, and fails to follow explicit instructions for revoking physician prescription privileges.

The CSA expressly limits federal authority under the Act to the “field of drug abuse.” Contrary to the Attorney General’s characterization, physician assisted suicide is not a form of drug “abuse” that Congress intended the CSA to cover. Physician assisted suicide is an unrelated, general medical practice to be regulated by state lawmakers in the first instance. Glucksberg, 521 U.S. at 735, 737 (O’Connor, J., concurring).

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The Attorney General misreads the CSA
when he concludes that he may evaluate the public interest “based on any of the five factors identified in the statute.” OLC Memo at 3 (emphasis added). The CSA clearly provides that all five public interest factors “shall be considered.”

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In sum, the CSA was enacted to combat drug abuse. To the extent that it authorizes the federal government to make decisions regarding the practice of medicine, those decisions are delegated to the Secretary of Health and Human Services, not to the Attorney General. The Attorney General’s unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician assisted suicide and far exceeds the scope of his authority under federal law. We therefore hold that the Ashcroft Directive is invalid and may not be enforced.

The petitions for review are GRANTED. The injunction previously entered by the district court is ORDERED continued in full force and effect as the injunction of this court.

DISSENT: WALLACE, Senior Circuit Judge, dissenting:

As my colleagues in the majority suggest, this case is not about the ethics or public policy implications of physician-assisted suicide. We need not decide whether the federal government or the states is better equipped to regulate physician-assisted suicide. Setting aside the public policy aspects of physician-assisted suicide that evoke passionate feelings, this case involves a single legal question: is the Attorney General’s interpretation of 21 C.F.R. § 1306.04(a) entitled to deference? Because our past decisions command deference to the Attorney General’s interpretive rule, I would deny the petition for review on the merits.

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Petitioners argue first that deference to the Ashcroft Directive is not warranted because the Attorney General did not satisfy the APA’s notice-and-comment rulemaking procedures. See 5 U.S.C. § 553 (requiring that agencies give “interested persons” notice of proposed rules and “an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation”). The United States counters that the APA does not require notice and comment here, because the Ashcroft Directive is an interpretive rule, not a legislative rule. If the Ashcroft Directive is “genuinely an interpretive rule, it is valid despite the absence of notice and comment procedures.”

We distinguish interpretive and legislative rules by asking (1) whether, absent the rule, there would be an inadequate legislative basis for an enforcement action; (2) whether the agency “explicitly invoked its general legislative authority”; and (3) whether “the rule effectively amends a prior legislative rule.” Id. “If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.”

The Ashcroft Directive does not bear any of these three hallmarks of a legislative rule. First, even absent the Ashcroft Directive, the Attorney General could bring an enforcement action because the Controlled Substances Act itself prohibits distributing a controlled substance without a prescription, 21 U.S.C. § 829(a), and preexisting Department of Justice regulations declare that “[a] prescription for a controlled
substance to be effective must be issued for a legitimate medical purpose," 21 C.F.R. § 1306.04(a). Second, the Attorney General did not expressly invoke his statutory authority to "promulgate . . . any [legislative rules] . . . which he may deem necessary and appropriate for the efficient execution of his functions under" the Controlled Substances Act. Third, although the Ashcroft Directive contradicts former-Attorney General Reno's 1998 statement, the Ashcroft Directive is not inconsistent with any legislative rule.

The Ashcroft Directive does not purport to "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." Instead, like other interpretive rules, the Ashcroft Directive is "essentially hortatory and instructional," clarifying what the Controlled Substances Act means when applied to a narrowly defined situation. Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984); see also Hemp, 333 F.3d at 1087 (explaining that interpretive rules "explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule"). Thus, General Ashcroft's failure to give Petitioners advance notice and an opportunity to comment does not invalidate the Ashcroft Directive.

The majority asserts that the Attorney General lacks authority to decide whether physician-assisted suicide is consistent with "the public interest" and a "legitimate medical practice" under the Controlled Substances Act and its implementing regulations because Congress intended to preserve the states' traditional authority to make these determinations. This argument ignores the Controlled Substances Act's text and controlling Supreme Court decisions.

[It is axiomatic that the meaning of federal law is a federal question.] [...] State law may be relevant to certain provisions of the Controlled Substances Act, see, e.g., 21 U.S.C. § 823(f) (instructing the Attorney General to consider state-law violations when deciding whether a physician's registration would be contrary to the public interest), but nothing in the Controlled Substances Act plainly evinces a congressional intent to define "the public interest" solely according to state law. On the contrary, section 823 instructs the Attorney General to identify acts "inconsistent with the public interest" by reference to a variety of sources, including a physician's federal conviction record, compliance with "Federal . . . laws relating to controlled substances," and "other conduct which may threaten public health and safety." Id. The majority's contention that the Attorney General cannot suspend or revoke a physician's registration without state authorization ignores Mississippi Band's "plain indication" rule and contravenes Congress's clearly expressed intent.

The majority also cites Washington v. Glucksberg, 521 U.S. 702, 735, 737, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997) (O'Connor, J., concurring), for the position that the Attorney General must defer to the Oregon Act because "physician-assisted suicide is an unrelated, general medical practice to be regulated by the States in the first instance." Glucksberg, however, addressed states' authority to prohibit physician-assisted suicide in the absence of federal regulation; the case did not answer the question whether Congress may exercise its Commerce Clause power to deny physicians access to controlled substances for physician-assisted suicide. Rather than place federalism limitations on the federal government's authority to restrict physician-assisted suicide, Justice O'Connor's concurring opinion stressed that
“there is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill . . . individuals . . . and the State’s interests in protecting those who might seek to end life mistakenly or under pressure.” Id. at 737. Simply put, courts should defer to the political process instead of interposing hasty constitutional constraints.

* * *

Glucksberg does not require the Attorney General to interpret the Controlled Substances Act and its implementing regulations according to state standards of professional conduct. Rather, the Supreme Court’s decision stands for the broader proposition that federal courts generally should keep their distance, allowing the political process to decide whether and how to regulate physician-assisted suicide. The majority’s shortsighted decision to declare the Ashcroft Directive invalid has precisely the opposite effect.

* * *

Finally, the majority argues that the Ashcroft Directive exceeds the Attorney General’s statutory authority because Congress has not clearly authorized the Attorney General to upset the delicate balance between federal regulation of controlled substances and state control of medical practices. As support for this conclusion, the majority invokes the Supreme Court’s recent analysis in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 148 L. Ed. 2d 576 (2001): 1) whether the statute in question regulates commerce or any sort of economic enterprise; 2) whether the statute contains any express jurisdictional element which might limit its reach to a discrete set of cases; 3) whether the statute or its legislative history contains express congressional findings that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.

The Ashcroft Directive clearly satisfies McCoy’s first and the last criteria. The Ashcroft Directive regulates economic transactions: physicians generally prescribe and dispense controlled substances for a fee. There is no indication here, as there was in Raich with regard to medicinal marijuana,
that drug-induced physician-assisted suicide "does not involve [the] sale, exchange, or distribution" of controlled substances. Raich, 352 F.3d at 1229. The link between these transactions and their effect on interstate commerce is not attenuated simply because relatively few Oregonians use controlled substances for assisted suicide. We evaluate whether an activity's link to interstate commerce is attenuated by assessing whether its effect on interstate commerce is sufficiently direct, Solid Waste, 531 U.S. at 195; McCoy, 323 F.3d at 1123-24, and we assess individual provisions as "parts of a wider regulatory scheme" (i.e., the Controlled Substances Act), which regulates a field of drug-related activity that has "a 'substantial affect' on interstate commerce," Tisor, 96 F.3d at 375. Here Congress naturally and directly reduces the amount of a controlled substance that flows through the interstate channels when it prohibits the substance's distribution for a particular use. Thus, the link between drug prescriptions and interstate commerce is sufficiently direct and substantial even if the drugs ultimately are used in intrastate activities such as physician-assisted suicide and the activities' disaggregated effect on interstate commerce is small.

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Having demonstrated the fallacies of the foregoing challenges to the Ashcroft Directive, I now consider what standard of review this court should apply when assessing the Ashcroft Directive's validity. The degree of deference we accord an interpretive rule depends upon whether the rule constructs a statute or an agency regulation.

If the Ashcroft Directive represents a statutory interpretation, it enjoys deference as defined in Skidmore v. Swift & Co., 323 U.S. 134, 89 L. Ed. 124, 65 S. Ct. 161 (1944). Omohundro v. United States, 300 F.3d 1065, 1067-68 (9th Cir. 2002). Under Skidmore, "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140. Especially relevant under Skidmore is the fact that the Ashcroft Directive reverses the agency's earlier interpretation.[...]

If the Ashcroft Directive interprets an agency regulation, rather than the Controlled Substances Act itself, we must accord it "substantial deference." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 129 L. Ed. 2d 2381 (1994). Under this highly deferential standard, our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. [...]

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In my view, the Ashcroft Directive constitutes an interpretation of a regulation rather than a statutory interpretation. The Ashcroft Directive's single interpretive act is to "determine that assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 C.F.R. § 1306.04 (2001)." Ashcroft Directive, 66 Fed. Reg. at 56,608. The Petitioners point to General Ashcroft's warning that prescribing a controlled substance to assist suicide may render a physician's registration subject to suspension or revocation under section 824(a)(4). This statement was not an interpretation of the Controlled Substances Act.
Act, however, but an explanation of the logical consequences flowing from General Ashcroft’s interpretation of 21 C.F.R. § 1306.04. If assisting suicide is not a “legitimate medical purpose,” the direct result is that a physician cannot prescribe controlled substances for this purpose without violating Controlled Substances Act section 829 and thereby risking suspension or revocation of their registration under sections 823 and 824.

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Although I am convinced of the merits of my legal argument, I admit that even if I persuaded one of my colleagues to join me, my opinion would not be a final chapter. Those who are uneasy with my position (as I assume Petitioners will be) should see its limited grasp. The Ashcroft Directive constitutes a final agency action, but it surely will not be the last word on physician-assisted suicide. The Ashcroft Directive does not spell the end of the public’s “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide,” Glucksberg, 521 U.S. at 735, nor does it halt states’ extensive and serious evaluation of physician-assisted suicide and other related issues,” Glucksberg, 521 U.S. at 736, 737 (O’Connor, J., concurring). State legislators may supplement the Ashcroft Directive’s sanctions, and they may authorize alternative methods for assisting suicide that do not involve the prescription of controlled substances.

More to my point, the Ashcroft Directive is not even an immutable expression of federal policy. A change in presidential administrations or a shift in the current President or Attorney General’s perspective might precipitate the Ashcroft Directive’s rescission. Certainly, Congress is free to enact legislation limiting or counteracting the Ashcroft Directive’s effects. Although opinions differ over the propriety of assisted suicide, I fully subscribe to Justice O’Connor’s canny observation that there is simply “no reason to think that the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the [government]’s interests in protecting those who might seek to end life mistakenly or under pressure.” Id. In short, we should trust the democratic process.
Atty. Gen. John Ashcroft on Tuesday directed U.S. Drug Enforcement Administration agents to go after Oregon doctors in assisted-suicide cases, saying it is against federal law to dispense or use controlled medications to help a terminally ill patient die.

The move by Ashcroft, a strident critic of assisted suicide, was aimed at overruling an Oregon law that allows doctors to help patients who want to hasten their deaths.

Ashcroft’s memo specifically allows for the revocation of drug prescription licenses of doctors who participate in an assisted suicide using federally controlled substances. His directive did not authorize criminal prosecution of those doctors.

In a memo to DEA Administrator Asa Hutchinson, Ashcroft said that assisted suicide is not a “legitimate medical purpose” for prescribing, dispensing or administering federally controlled substances. He said that the use of such drugs by physicians to manage patients’ pain is medically valid.

The action reignited the national debate over assisted suicide. It drew praise from anti-abortion groups and criticism from those who support doctors’ efforts to help patients who want to take a cocktail of barbiturates to end their pain and suffering.

Ashcroft’s directive reverses a June 1998 declaration by his predecessor, Janet Reno. She barred federal agents from moving against doctors who, in keeping with the requirements of Oregon’s assisted-suicide law, help terminally ill patients end their lives. That law was passed by voters in 1994, but because of court battles did not take effect until October 1997.

Within hours of Ashcroft’s announcement, Oregon officials vowed to go to court to obtain an injunction blocking the directive. Supporters and opponents alike predicted that the Supreme Court would ultimately decide the matter.

“It’s beyond my comprehension why, in the face of what’s happening in the world today, that this would be a priority of any type for our attorney general,” said George Eighmey, executive director of the Compassion in Dying Federation in Oregon.

The Oregon group was one of many that said Ashcroft’s directive would have a chilling effect on doctors nationwide over fears that their prescription decisions will be second-guessed by drug agents with no medical expertise.

Critics of assisted suicide, including anti-abortion organizations and some religious groups, hailed Ashcroft’s action. Some said it would protect the elderly and infirm in Oregon from pressure to take their own lives.

“This is a carefully crafted ruling that reassures doctors about their ability to prescribe federally controlled drugs to relieve pain while ensuring that the federal government does not facilitate assisted suicide,” said Burke Balch, director of
medical ethics at the National Right to Life Committee.

Balch said the only doctors who will face increased scrutiny are those who fill out state paperwork admitting that they have participated in an assisted suicide.

"It's not like the DEA is going in anywhere, trying to second-guess doctors," Balch said. Neither the attorney general nor his aides commented publicly on the directive, which resembled a legal brief and contained little in the way of explanation or Ashcroft's reasons for issuing it.

"We're letting the memo speak for itself," said one Justice Department official.

Ashcroft's memo cited the Supreme Court's ruling in a medical marijuana case earlier this year that federal law regulating controlled substances is uniform throughout the United States, and cannot be superseded by state law.

Therefore, Ashcroft concluded, Oregon's law permitting doctor-assisted suicide is now legally out of step with the law of the land.

Ashcroft told Hutchinson that drug agents around the nation, particularly in Oregon, should resume enforcement of a DEA policy prohibiting the dispensing of controlled substances to assist suicides. Hutchinson said in a statement that he will instruct agents to do so immediately.

"I am pleased that this issue has been clarified for the American public," said Hutchinson, until recently a GOP congressman from Arkansas. "DEA will continue to maintain consistency in striking the balance between relieving pain and preventing the abuse of pain medication."

Under Oregon's Death With Dignity Act, doctors may provide—but not administer—a lethal prescription to terminally ill adult state residents. The law requires the assessment of two physicians that the patient has less than six months to live, has chosen to die voluntarily and is able to make health care decisions.

Seventy Oregon residents have used the law to end their lives. Another half dozen or so patients have completed the application process and have their prescriptions in hand; a few dozen more are in the middle of the application process and could be affected by Ashcroft's directive.

Barbara Coombs Lee of Compassion in Dying Federation said the relatively small number of suicides has disproved opponents' predictions that the law would cause a dramatic increase in suicides. "We now have four years of very careful implementation during which we have only seen a few people use the law under extraordinary and compelling circumstances," she said.

She rejected Ashcroft's linking of the assisted-suicide issue with the medical marijuana case, in which the Supreme Court essentially put an Oakland "buyers' club" out of business.

In its ruling in May, the court said there is no exception in federal drug laws for the medical use of marijuana to ease pain from cancer, AIDS and other illnesses.

"It's easy to distinguish the federal government's ability to put these buyer clubs out of business from what the federal government is trying to do in this case, which is override state determination of what is [a] legitimate medical purpose for medication already in common use and
under regulation by the state,” Lee said. “Marijuana is not a medication in common use.”

Oregon officials plan to argue that Ashcroft’s directive would have “dramatic and irreversible repercussions on the state,” said Kevin Neely, spokesman for the Oregon attorney general’s office. He said state lawyers would go to U.S. District Court in Portland today to seek a temporary restraining order and a preliminary injunction to bar enforcement of Ashcroft’s directive.

“Today’s Department of Justice decision was inevitable, as it simply restated federal law,” said Republican Sen. Gordon Smith, an opponent of the state law.

Democratic Sen. Ron Wyden, who blocked legislation in Congress that would have outlawed assisted suicide, accused Ashcroft of ignoring the will of the state’s voters and of compromising medical care throughout the country.
Court Rejects Ashcroft; Backs Suicide Law

Los Angeles Times
May 27, 2004
Henry Weinstein

Atty. Gen. John Ashcroft lost a major round Wednesday in his attempt to block Oregon's assisted-suicide law, as a federal appeals court panel ruled that his efforts exceeded his authority.

Since Oregon's so-called Death With Dignity law went into effect in 1997, 171 people - most of them with cancer - have used the law to hasten their deaths, according to the state's Department of Health Services.

Ashcroft, who began campaigning against Oregon's law when he was a U.S. senator from Missouri, tried to block it in November 2001 by issuing an order aimed at doctors. The order said physicians who dispensed lethal barbiturates to patients under Oregon's law would be violating the federal statute designed to restrict narcotics trafficking and illegal diversion of drugs.

Under that policy, the Justice Department would have been able to go to court to strip doctors who assisted in suicides of their right to prescribe medicine.

That effort by Ashcroft "far exceeds the scope of his authority under federal law," Judge Richard A. Tallman wrote in the opinion for the U.S. 9th Circuit Court of Appeals in San Francisco.

Ashcroft's "unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician-assisted suicide" and is "unlawful and unenforceable," Tallman wrote.

The 9th Circuit is known for its liberal opinions and has frequently been reversed by the U.S. Supreme Court on high-profile issues.

But in this case Tallman, a former federal prosecutor appointed to the court by President Clinton, is generally considered one of the appeals court's more conservative members.

Moreover, the Supreme Court considered assisted-suicide cases from two states in the late 1990s, ultimately upholding Oregon's right to enact its law, so the justices may have little desire to revisit the issue, legal analysts said.

In one of those cases, the high court said that "the earnest and profound debate" around the country "about the morality, legality and practicality of physician-assisted suicide" should be left to state lawmakers.

Oregon is the only state to have enacted a physician-assisted suicide law. Many others, including California, ban the practice.

In order to invoke the law and obtain the lethal barbiturates, a patient must demonstrate to two physicians that he has no more than six months to live. Doctors have to be convinced that a patient is mentally competent to make the decision, and the patient must administer the medicine to himself.

"By criminalizing medical practices specifically authorized under Oregon law, the Ashcroft directive interferes with
Oregon's authority to regulate medical care within its borders," Tallman wrote.

"The Ashcroft directive not only lacks clear congressional authority, it also violates the plain language of the Controlled Substances Act," he wrote.

"We express no opinion on whether the practice is inconsistent with the public interest or constitutes illegitimate medical care," Tallman wrote, referring to assisted suicides. "This case is simply about who gets to decide," he added, noting that the law had been approved twice by Oregon voters, in 1994 and 1997.

Tallman was joined in the 2-1 opinion by Judge Donald Lay.

The dissenting judge, J. Clifford Wallace, said the court should have accorded "substantial deference" to Ashcroft's conclusion that physician-assisted suicide did not serve a "legitimate medical purpose."

Ashcroft had the authority to take the action he did, and "Congress is free to enact legislation limiting or counteracting" the attorney general's order if it disapproves, Wallace wrote.

Justice Department spokesman Charles Miller said department attorneys were reviewing the decision and would not immediately comment.

Even some legal scholars who are ordinarily in tune with Ashcroft's positions said they thought the attorney general was on shaky legal ground.

"As someone who often approves of the work of the attorney general and who also thinks assisted suicide is morally indefensible, I understand John Ashcroft's motivations to intervene in this matter," said Douglas Kmiec of Pepperdine Law School.

"Yet, on the law, his regulatory intervention was more questionable," he added. "The Supreme Court rightly held that the issue of assisted suicide is one to be debated and resolved at the state level, and Congress did not clearly provide otherwise in the Controlled Substances Act."

The ruling was hailed by Oregon officials as well as patients who support the law.

Don James, a 78-year-old retired schoolteacher from Portland who was one of the plaintiffs challenging Ashcroft's order, said he was delighted with the ruling.

James, who has prostate cancer and is confined to a wheelchair, said he was on heavy medication though he was not yet terminally ill.

"I'm not in a hurry to die. I want to stay active as long as I can," he said. "I'm not sure what I will do when that moment comes, but I wanted the option" of hastening death.

James, a registered Republican, added, "I resent that Ashcroft meddled in our affairs in this democracy to try to deprive us of something we want."

George Eighmey, executive director of the Oregon chapter of Compassion in Dying, the organization that led the battle to get the suicide law enacted, also praised the ruling.

"I believe today's decision by the 9th Circuit has been a huge victory for Oregon and for all Oregonians who believe in end-of-life choices," he said. "We hope the message is received by Atty. Gen. Ashcroft that it is
time for him to keep his hands off Oregon’s law and Oregonians.”

But N. Gregory Hamilton, a doctor from Portland and the former president of Physicians for Compassionate Care, an organization opposed to the Oregon law, denounced the ruling.

“It’s amazing that a federal court would allow any state to nullify federal regulatory authority and federal law,” he said. “If Oregon is allowed to exempt itself from federal law about the misuse of controlled substances for the purposes of overdosing patients, what is to stop any state from exempting itself from other important federal regulations and laws?”

Oregon Right to Life officials also criticized the decision and expressed hope that Ashcroft would appeal further.

Gayle Atteberry, executive director of the group, called the ruling a tragedy.

Some patients who become eligible for the lethal barbiturates “are then abandoned to depression instead of receiving the help they need,” she said.

Arthur Caplan, director of the Center for Bioethics at the University of Pennsylvania, said, however, that abuses foreseen by the law’s opponents had not occurred in Oregon.

The suicide law has not been used as often as predicted, in part because Oregon’s doctors and nurses have done a good job on end-of-life palliative care, he said.

After voters passed the law, Ashcroft was among several members of Congress who urged then-Atty. Gen. Janet Reno to take action against physicians who applied it. In 1998, Reno said such action was unwarranted. Ashcroft reversed that decision when he became attorney general.

The next day, U.S. District Judge Robert E. Jones in Portland issued a temporary restraining order blocking the Ashcroft directive.

“To allow an attorney general – an appointed executive whose tenure depends entirely on whatever administration occupies the White House – to determine the legitimacy of a particular medical practice ... would be unprecedented,” Jones, an appointee of President Reagan, wrote a few months later in an opinion making the restraining order permanent.

The Justice Department appealed, setting the stage for Wednesday’s ruling.
Euthanizing the CSA

*National Review*

May 27, 2004

Wesley J. Smith

By now it has been widely reported that the Ninth Circuit Court of Appeals "upheld" the assisted-suicide law in Oregon by a vote of 2-1 in Oregon v. Ashcroft yesterday. Not so: The validity of the Oregon law was never at stake in the case. Regardless of whether Ashcroft or the State of Oregon prevailed in the case, physician-assisted suicide would have remained legal within Oregon's borders.

The case is actually very narrow and arcane, but important nonetheless in a way that transcends the pros and cons of assisted suicide. The question before the court was whether Ashcroft exceeded his legal authority when, in 2001, he interpreted the federal Controlled Substances Act (CSA) as prohibiting doctors from prescribing federally regulated drugs for use in assisted suicide on the basis that hastening death is not a "legitimate medical purpose" for the use of drugs under federal law.

The majority ruled that he did. First, it found that the states have the near-exclusive right to regulate medical practice within their borders and that Ashcroft's directive violated that constitutional principle of federalism. But as dissenting justice J. Clifford Wallace pointed out, even Ashcroft conceded that Oregon physicians would still have been free to use lethal substances not regulated by the CSA to help kill patients without running afoul of federal law. They would merely have been precluded from using substances regulated by the feds under the purview of the CSA.

The majority next found that the sole purpose of the CSA is to prevent "drug abuse," interpreting that term to mean addiction. But Wallace's dissent points out, quite accurately, that controlled substances can be abused in ways besides being taken as addicting substances. "The Act targets all 'improper use of controlled substances,'" Wallace wrote, "and gives the Attorney General discretion to decide whether registering a physician to dispense drugs 'is consistent with public health and safety.' Reasonable minds might disagree as to whether physician-assisted suicide constitutes an 'improper use' of a controlled substance, but nothing in the Controlled Substances Act precludes its application to physician-assisted suicide."

Finally, the majority ruled that if the federal government was going to act to prevent the use of federally controlled substances in assisted suicide, the secretary of Health and Human Services should have undertaken the action rather than the attorney general. Wallace disagreed. Now there's an issue to get the blood boiling!

Even though the scope of decision itself was quite narrow, its impact could be disturbingly broad. For one thing, it seems to fly in the face of the United States Supreme Court's unanimous approval of federal policy over "medical marijuana." In United States v. Oakland Cannabis Buyers' Cooperative, the high court ruled that while California was certainly free to legalize medical marijuana under state law, this did not prevent the federal government from enforcing the anti-marijuana Controlled Substances Act. If federal law is not nullified by a state declaring it a legitimate medical act for a physician to recommend...
cannabis to patients to palliate pain, how can the federal government be prohibited from enforcing the CSA against doctors who use controlled substances to intentionally kill patients?

Of greater concern is that the majority's decision threatens the uniform enforcement of the CSA throughout the nation. Under the ruling, the states in effect have the power to determine what constitutes legitimate medical uses of controlled substances under federal law as part of their power to regulate the practice of medicine within their borders. This could lead to chaos, since it could conceivably mean that the federal government would be forced to adopt 50 different approaches to enforcing the medical aspects of the CSA.

Consider the following hypothetical—but not fanciful—situation: Oregon allows physicians to participate in assisted suicide, but only for terminally ill patients. Washington State prohibits physicians from participating in any assisted suicide. But California and Florida pass laws permitting assisted suicide for the disabled and for the elderly who are “tired of living,” as well as the terminally ill. In Oregon, a doctor who prescribed barbiturates in lethal dosage for a non-terminally ill disabled person would have broken Oregon law, and hence, could also be prosecuted for violating the CSA. But if the same doctor prescribed the same drugs to the same person in California, no federal law would have been broken. Yet, if she prescribed controlled substances to a dying person in Washington, once again, she would have violated federal law because her prescribing would not be a legitimate medical act in that state.

Nor, it is important to stress, would such chaos be limited to the use of controlled substances for assisted suicide. What if a state passed a law permitting morphine to be used to create euphoria as a “treatment” for depression or anxiety? If states truly have the unlimited right to impose their views on the federal government as to what constitutes a legitimate medical use of federally controlled substances, the federal government would be bound to respect even the most idiosyncratic policy. The result could be the utter disintegration of the CSA and a total fracturing of national drug policy, at least as it relates to the medical use of narcotics.

What to do? Ashcroft might be tempted to request the full Ninth Circuit Court of Appeal to review the decision, a process known as an en banc hearing. This would be a mistake, in my view. The Ninth Circuit is often quite radical in its rulings, but the majority decision was appropriately narrow in scope. Moreover, Judge Wallace issued a powerfully reasoned dissent. It is unlikely that another bite at the apple would garner a better result.

No, the best bet is for Ashcroft to try and take the case directly to the United States Supreme Court. The importance of this case far exceeds the public-policy pros and cons of assisted suicide. At stake is whether the federal government can retain ultimate authority over federal regulations promulgated under the Controlled Substances Act or whether we are in the midst of devolving regulatory power over drug policy to each of the 50 states.

Attorney Wesley J. Smith is a senior fellow with the Discovery Institute, an attorney for the International Task Force on Euthanasia and Assisted Suicide, and a special consultant to the Center for Bioethics and Culture. He filed an amicus curiae brief in Oregon v. Ashcroft on behalf of Physicians for Compassionate Care.
In Oregon, Choosing Death Over Suffering

New York Times

June 1, 2004

John Schwartz and James Estrin

* * *

Perhaps the most surprising thing to emerge from Oregon is how rarely the law has actually been used.

“We estimate that one out of a hundred individuals who begin the process of asking about assisted suicide will carry it out,” said Ann Jackson, executive director of the Oregon Hospice Association.

Since 1997, 171 patients with terminal illnesses have legally taken their own lives using lethal medication, compared with 53,544 Oregonians with the same diseases who died from other causes during that time, according to figures released by the Oregon Department of Health Services in March.

More than 100 people begin the process of requesting the drugs in a typical year. Doctors wrote 67 prescriptions for the drugs in 2003, up from 24 in 1998. Forty-two patients died under the law in 2003 compared with 16 in 1998.

Many patients say they want to have the option to end their lives if the pain becomes unbearable or if they are sliding into incompetence while still thinking clearly.

“I’d say it’s less than 50-50 that I’d ever do this thing,” said Don James, a retired school administrator with advanced prostate cancer who has not yet received his pills.

A Desire to Be in Control

A second surprise has been the kind of people who use the law. They are not so much depressed as determined, said Linda Ganzini, a professor of psychiatry at Oregon Health Sciences University. She led a recent survey of 35 doctors who had received requests for suicide drugs. The doctors described the patients as “feisty” and “unwavering.”

A third lesson is that for most of those who seek assisted suicide, the greatest concern appears not to be fear of pain but fear of losing autonomy, which is cited by 87 percent of the people who have taken their lives with the drugs. Only 22 percent of the patients listed fear of inadequate pain control as an end-of-life concern, perhaps a sign that pain management has improved over the years.

And though opponents of the law argued that patients would feel pressured by families and even insurers to end their lives early out of financial concerns, so far concerns of being a burden to family have been cited by 36 percent of patients, and financial concerns by just 2 percent. The surveys show that the standard version of health care for terminally ill patients might not be what these patients are looking for, Dr. Ganzini said. The standard version of care says, in effect, “we’re going to take care of you,” she said. But “for them, the real problem is other people taking care of you.”
Ms. Jackson said the surveys were changing the hospice association's practices.

In 1994, the group opposed the Death With Dignity law. Now the hospices work directly with programs like Compassion in Dying, a group that is involved in 75 percent of Oregon's assisted suicides. Thanks to the surveys of patients seeking assisted suicide, Ms. Jackson said, her organization learned that half the people who rejected hospice care did so because "they thought that hospice was condescending or arrogant."

Now the hospices fit their treatments to patients who seek assisted suicide and emphasize that their wishes will be respected, she said.

Opponents of the Oregon law like Dr. Kenneth Stevens, chairman of the department of radiation oncology at the Oregon Health and Science University in Portland, say it violates the fundamental tenet of medicine. Dr. Stevens argues that doctors should not assist in suicides because to do so is incompatible with the doctor's role as healer.

"I went into medicine to help people," he said. "I didn't go into medicine to give people a prescription for them to die."

Dr. Stevens heads an organization, Physicians for Compassionate Care, that opposes assisted suicide and the Oregon law. Members of his group, he said, tend to be "people of faith," who believe that assisted suicide violates their religious principles. But they base their opposition to the law on moral and ethical grounds, arguing that it leads down a slippery slope toward euthanasia and patient abuses.

He recalled the struggle of his wife, who died of cancer in 1982. In the weeks before she died, he said, her doctor offered her an "extra-large prescription" for painkillers.

"As I helped her into the car, she said, 'He wants me to kill myself,'" Dr. Stevens recalled. "It just devastated her that her doctor, her trusted doctor, subtly suggested that."

Others who initially opposed the law, like the hospice group, say they have learned to live with it. Michael Bailey, for example, took out a loan in 1994 to fight the Death With Dignity act. His daughter has Down syndrome, and he said that at the time he could see a straight line between voluntary assisted suicide and forced euthanasia for the handicapped.

Now Mr. Bailey says he has not seen any abuses. "I don't see that there's ever been a scandal," he said, "and the numbers are not huge." Still, he does not support the law. "If it was up to me, I'd say no, but I don't think there's any great human rights crisis here," he said.

Support for the law crosses ideological lines, said Nicholas van Aelstyn, a lawyer in San Francisco who works with Compassion in Dying. Some commentators have characterized the movement as a liberal cause, but "to most of the people exercising it, it's a libertarian issue," he said. "Many of our clients are die-hard Republicans who don't want government interfering in their lives."

That certainly describes Mr. Wilson, who calls himself a "staunch conservative" and says Mr. Ashcroft is "dead wrong" about the Oregon law.

The support for the law in Oregon, Mr. James said, reflects the pioneer spirit that flows from the wagon trains that brought the early settlers. "They were pretty well-
educated, family-oriented people willing to hack a new life out of this wilderness,” he said. “Pretty independent folks.”

Those who drafted the Death With Dignity Act say they did not try to come up with a political document that would warm the heart of Jack Kevorkian, or that would permit euthanasia, which is repugnant to a significant portion of the population. Instead, they say, they carefully drew up a law that they believed would gain support of everyone except the most determined opponents, and that was loaded with safeguards against abuse.

Doctors have long made lethal doses of drugs available to patients inclined to end their struggle against disease, said Eli Stutsman, president of the board of the Death With Dignity National Center.

“We took something that was already happening, and we wrote a law around it,” he said.

Opponents had argued that Oregon would become a magnet for people seeking suicide, so the law’s provisions were restricted to the state’s residents.

The law also sets a high barrier to getting the life-ending medications, giving patients the chance to change their mind up to the last moment. A patient must make two oral requests for the drugs and one written request after a 15-day waiting period. Two doctors must determine that the patient has less than six months to live, a doctor must decide that the patient is capable of making independent decisions about health care and the doctor has to describe to the patient alternatives like hospice care.

The law also requires that the drugs be self-administered by the patient, rather than given by a doctor or family member, to avoid involuntary euthanasia. The death certificate, under the law, must state the cause of death as the underlying disease, not suicide.

That provision pleases Mr. James. “I don’t like the word ‘suicide,’” he said, because “if I’m really on a path, the natural path” toward death, and “just hastening it a little bit, I don’t call that suicide.”

Mr. Wilson’s family supports him in his wishes, although his wife, Viola, says she is against the general idea.

“This is his thing, not mine,” she said. “It’s not the way I’d go.”

Her views flow from her religious beliefs, she said.

“I’m inclined to think that I have a purpose in life until I go,” she said. “God has a plan for me, and I’m here until he says it’s time to go.”

She said she liked her husband’s idea of having family members gather in a kind of living wake, however.

“That would be fine,” she said. “You should celebrate the life instead of worry about the death.”

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This past May, a divided panel of the U.S. Court of Appeals for the Ninth Circuit held that the federal government could not prohibit doctors from using prescription drugs for assisted suicide in Oregon. Specifically, the court invalidated a directive issued by Attorney General John Ashcroft in November 2001 declaring that assisted suicide was not a “legitimate medical purpose” under the Controlled Substances Act (CSA), and that doctors who wrote prescriptions to hasten their patients’ deaths could be subject to federal prosecution, even where such prescriptions are legal under state law. With the court’s ruling, doctors in Oregon are once again free to prescribe drugs in lethal doses to hasten the death of terminally ill patients pursuant to Oregon’s Death with Dignity Act. The federal government sought rehearing of the court’s opinion, but just last week the petition was denied. Apparently not a single judge voted for en banc review.

Opponents of doctor-assisted suicide, including many prominent conservatives, sternly denounced the Ninth Circuit’s ruling and hope the Justice Department takes the case to the Supreme Court. After all, any court decision paving the way for a generation of Dr. Kevorkians must be worthy of condemnation and reversal, particularly if issued by the Ninth Circuit. This is a predictable and understandable response to the court’s decision in Oregon v. Ashcroft. It is also wrong.

The question before the Ninth Circuit was not whether Oregon’s decision to allow doctor-assisted suicide is moral or wise. Nor was it whether the federal government has the power to preempt state policy choices concerning prescription drugs or medical practice. Rather, the narrow question before the court was whether the CSA authorizes the attorney general to prosecute or otherwise sanction doctors who help their patients to commit suicide where legal under state law. Given the lack of any language in the CSA authorizing such action, and the states’ traditional role in the regulation of medical practice, the court found the attorney general had overreached.

Under existing federal regulations, the attorney general may prosecute a doctor who prescribes a controlled substance for anything other than a “legitimate medical purpose.” States are primarily responsible for the licensing and regulation of medical professionals. Therefore, the definition of “legitimate medical purpose” has historically been a function of state law. Prior to 2001, the federal government never sought to define “legitimate medical purpose” beyond requiring that physicians only dispense prescriptions in the course of their “professional practice.” “The principle that state governments bear the primary responsibility for evaluating physician-assisted suicide follows from our concept of federalism, which requires that state lawmakers, not the federal government, are the primary regulators of professional medical conduct,” wrote Judge Richard Tallman for the court’s majority. Absent a clear statement from Congress, this traditional division of powers must remain.
It is neither for the courts nor the executive—whether represented by the attorney general or any other executive officer—to adopt uniform national rules proscribing private conduct absent a constitutional command or congressional authorization. This is particularly true where, as here, the executive seeks to extend federal regulation into an area traditionally left to the states. As offensive as it is when Congress extends federal regulatory authority beyond traditionally recognized constitutional limits, it is far worse—not to mention undemocratic—when the equivalent action is taken unilaterally by the executive or the courts. As the Supreme Court has noted time and again, the historic police powers of the states are not to be superseded unless it is "the clear and manifest purpose of Congress."

It is likely that, under existing Commerce Clause precedent, the federal government could prohibit the use of controlled substances for doctor-assisted suicide if it so chose, yet the CSA does not do it. One can search the CSA's language and legislative history and never find anything approaching a clear statement that Congress sought to prohibit doctor-assisted suicide. Indeed, Congress has never enacted a law to prohibit the practice. To the contrary, in 1999 and 2000 Congress explicitly considered—and failed to adopt—such legislation. Federal law prohibits the use of federal funds or facilities for doctor-assisted suicide, but Congress never took the next step. It has neither directly prohibited the use of controlled substances for such purposes nor delegated the authority to do so to the executive branch.

Whether or not one agrees that doctor-assisted suicide is a matter best left to the states, the only proper basis for federal preemption is the enactment of legislation. There is no justification for displacing the traditional state role in medical regulation through administrative fiat. Such unilateral executive action in the face of express congressional inaction was improper when the Food and Drug Administration sought to regulate tobacco as a drug, and when the Environmental Protection Agency suggested it could regulate carbon dioxide and other greenhouse gases as pollutants. It is no more proper here.

Writing on NRO, Wesley J. Smith suggested that Oregon v. Ashcroft "threatens the uniform enforcement of the CSA throughout the nation," and that this "could lead to chaos" as different states adopt different approaches to doctor-assisted suicide. According to Smith, the decision suggests states "have the unlimited right to impose their views on the federal government as to what constitutes a legitimate medical use of federally controlled substances." This is simply not the case: The decision does not allow state legislation to preempt federal law. Rather, in this one instance, it makes federal law dependent upon relevant state standards unless and until Congress specifies the contrary.

Smith conjured a bugaboo of variable state standards compromising the consistency of federal law, yet it is hardly revolutionary for federal crimes to be defined by applicable state laws. Under 27 U.S.C. 122, it is against federal law to transport alcoholic beverages into a state in violation of state law. This regulatory approach embraces federalism principles by enlisting the federal government only insofar as federal assistance is necessary to allow states to define local standards based upon community tastes and preferences without undue interference from neighboring jurisdictions. Whatever its other merits, this regulatory regime has hardly led to chaos.
The regulation of prescription drugs also varies more than Smith and others would suggest. As detailed in the June 1 Wall Street Journal, some states allow medical professionals other than doctors to prescribe certain controlled substances. Several states allow pharmacists to prescribe immunizations or smoking-cessation drugs without a doctor's visit, while in other states psychologists may prescribe antidepressants and anti-anxiety drugs. Still other states authorize limited prescription powers to optometrists, midwives, and nurse practitioners. Even the CSA is less than uniform, as a state conviction for a drug-related offense or state suspension of a medical license is a sufficient basis for the federal government to revoke a doctor's registration. In other words, whether a doctor is able to prescribe drugs under federal law is already a function the law and policy of the state in which he opts to practice.

Contrary to some conservative claims, Oregon v. Ashcroft is hardly an example of radical jurists run amok. Nonetheless, the decision may well be overturned by the Supreme Court. Administrative law Professor William Funk, of Oregon's Northwestern Law School at Lewis & Clark College, observes that the majority opinion is poorly argued, even if correct on the merits. The Supreme Court has shown itself quite deferential to assertions of federal authority—a handful of recent federalism decisions notwithstanding—so it may well defer to the Justice Department's claims.

Irrespective of the ultimate legal resolution in this case, it is important for conservatives to step back and consider the principles at issue. Doctor-assisted suicide may well be a grievous wrong. But this does not justify any and all legal doctrines to prohibit it. Federalism and separation of powers are the ultimate bulwarks against government tyranny. Without a doubt, these divisions of legal authority may frustrate the adoption of worthy policies, but they are necessary to prevent the excessive concentration of federal power. Granting states the freedom to experiment with better policies absent federal interference necessarily allows them the freedom to adopt unwise or immoral laws. On this issue, as in many others, we cannot enjoy the benefits of federalism without suffering the costs.

As the late Frank Meyer, one of National Review's founding contributors and longtime senior editors, noted, "The genius of the American Constitution rests in the institutionalization of the limitation of power, in the division of power so that it is held by a number of separate and distinct organs." This is the heart of federalism. Meyer argued time and again that to compromise this structure, even for the most noble policy goal, is shortsighted folly—if not itself suicidal. Conservatives should not be so blinded by their opposition to assisted suicide that they lose sight of this important truth.
Why Ashcroft is Wrong on Assisted Suicide

Commentary
February 2002
Nelson Lund

Alone among the American states, Oregon has legalized physician-assisted suicide. This step was thoroughly debated and solemnly taken by the voters of Oregon not once but twice. In 1994, a narrow majority approved the policy in a formal referendum, and a much larger majority rejected a repeal initiative three years later.

But now, in a ruling issued last November 9, Attorney General John Ashcroft has reversed a decision of his predecessor, Janet Reno, and decided that Oregon doctors may no longer use federally regulated drugs to assist their patients in committing suicide. This decision raises important and troubling questions. Although I support the goal of discouraging physician-assisted suicide, I also believe that Ashcroft is pursuing that goal in a way that may undermine a fundamental constitutional principle.

To see why the Attorney General’s approach to the problem is questionable, we need to begin with a closer look at the problem itself. In my view, the people of Oregon made a serious mistake in legalizing assisted suicide. Much of the current enthusiasm for this practice is driven by a perfectly understandable yearning for patient autonomy and by an equally understandable reluctance to let the frequently arrogant medical profession force us to endure degrading, technologically extended deaths. Unfortunately, the legalization of assisted suicide is a big step down a road that will finally reduce patient autonomy rather than enhance it.

We need not go down this road. The fear that obsessive doctors will inflict a demeaning death by means of high-tech “heroic measures” is entirely legitimate, but no patient need consent to unwanted medical treatments, and directives given in advance can guard against their use on those who are unconscious. And if doctors are too often ignoring “do not resuscitate” orders, as they may be, the answer is hardly to give them a new power that can easily be used to substitute their judgment for their patients’ as to whether a life is worth living. Yet this is exactly the power that the people of Oregon have decided to give their physicians.

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Three principal benefits arise from leaving the states to deal with local concerns. First, a multiplicity of jurisdictions creates choices that enable citizens to achieve the mix of policies that most closely satisfies their individual wants and needs. Second, and closely related, federalism promotes competition among jurisdictions: state governments that commit serious errors in satisfying their residents’ preferences incur the costs of emigration (and immigration foregone) by the taxpayers who make government possible. Finally, the allocation of political power to the state level inhibits the ability of national government to shift costs and benefits from one place to another, and thus to create incentives for pork-barrel policies whose costs exceed their benefits.

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People can and do have different preferences about this issue, which are presumably based on their differing assessments of the risks and benefits to themselves and those they care about. Convinced though I am that the risks of allowing physician-assisted suicide outweigh the benefits, it would be silly to pretend that no benefits exist, and presumptuous to suppose that I might not be wrong. Nor is it easy to see why Oregon and other state governments should be considered less capable than the federal government of settling on appropriate policies in the light of new experience and information, including new developments in medicine and the medical profession.

When the Supreme Court wisely declined to create a constitutional right to assisted suicide, Justice Sandra Day O'Connor pointed out that in this area there was no obvious need for judicial intrusion:

Every one of us at some point may be affected by our own or a family member’s terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the state’s interests in protecting those who might seek to end life mistakenly or under pressure.

For the very same reason, there is no obvious need for the federal government to interfere with Oregon’s experiment.

That is hardly to say there will be no bad effects from Oregon’s new policy. To the contrary, vulnerable people will likely be pressured to end their lives prematurely; others will become more distrustful of doctors, and perhaps less willing to submit to treatment. Some physicians will take another big step away from their proper role as healers and comforters, and will become increasingly corrupted by the very different role of deciding whose lives are worth living. Euthanasia of nonconsenting victims is also entirely possible.

As bad as these effects may be, however, they will be visited almost entirely on Oregonians, and will not threaten the citizens of other states. Nor will Oregon’s policy necessarily spread to other states. Every state in the union remains free to outlaw physician-assisted suicide and to enforce its laws as vigorously as it sees fit.

* * *

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A 1996 federal law that defines marriage as “a legal union between one man and one woman” is constitutional, a federal judge in Tacoma, Wash., ruled Tuesday. It is the first decision of a federal court to address the constitutionality of the law, the Defense of Marriage Act.

The decision is not binding on other courts, and the question of the constitutionality of the marriage law is likely to give rise to many decisions in coming years.

The Tacoma decision arose from a bankruptcy filing. Lee and Ann Kandu, two American women, were married in British Columbia in August 2003 and filed a joint bankruptcy petition in Tacoma two months later. The Justice Department opposed the joint filing, saying the federal marriage law forbade it.

The Defense of Marriage Act, signed into law by President Bill Clinton in 1996, has two significant provisions. One says that only married couples made up of a man and a woman can qualify for rights and benefits under federal programs that take marital status into account. A report by the General Accounting Office in 1997 said more than 1,000 federal laws were affected.

The second significant provision of the marriage law allows states to decline to recognize same-sex marriages from other states. That aspect of the law was not an issue in Tacoma.

In that decision, Judge Paul B. Snyder of Federal Bankruptcy Court considered the interaction of the marriage law and the bankruptcy code. A bankruptcy law allows spouses to file joint petitions. But the marriage law specifies that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

Judge Snyder ruled that there was no fundamental constitutional right to marry someone of the same sex and that it did not violate the equal-protection clause of the Constitution to allow opposite-sex couples to marry but to prohibit same-sex couples from doing so.

The government argued that the differing treatment was justified as “rationally related to the legitimate government interest in encouraging the development of relationships optimal for procreating and childrearing.”

Judge Snyder accepted that rationale, but reluctantly.

“This court’s personal view,” he wrote, is “that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples.”

He said he was required to give Congress great deference in reviewing the marriage law.

“This court cannot say,” Judge Snyder continued, that the “limitation of marriage to
one man and one woman is not wholly irrelevant to the achievement of the government's interest.”

Contact information was not available for the petitioner in the bankruptcy case, Lee Kandu, who represented herself without a lawyer. Ann C. Kandu died in March.

Susan Sommer, a lawyer with Lambda Legal Defense and Education Fund, said Judge Snyder should have been more skeptical.

“The judge applied a sort of rubber-stamp approach,” Ms. Sommer said. “There is a fundamental right to marry that applies without exception to all people. You can’t dole out fundamental rights only to some.”

This month, a state court judge in Seattle ruled that same-sex couples were entitled to marry under the state’s Constitution. Though that case did not involve the federal marriage law, its reasoning about whether the state’s interest in promoting procreation can justify a ban on same-sex marriages was sharply at odds with that of Judge Snyder.

“The precise question,” the judge in the Seattle case, William L. Downing of King County Superior Court, wrote, “is whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation. There is no logical way in which it does so.”

Judge Downing stayed his decision pending review by the Washington Supreme Court.

The sole state in which same-sex couples can marry is Massachusetts, under decisions of its Supreme Judicial Court. Yesterday, a trial judge in Boston upheld a 1913 state law that prevents marriage licenses from being issued to couples from outside the state if their marriages would be illegal where they live.
A Tacoma bankruptcy judge ruled Tuesday that the 1996 Defense of Marriage Act is constitutional the first such ruling in the country by a federal judge.

When Ann and Lee Kandu decided last October they’d have to file for bankruptcy, they were on the edge of catastrophe. They both had been diagnosed with cancer the same week, they were unable to work and their debts were mounting.

Naturally, the couple checked the box on the bankruptcy form that said they were married.

That seemingly simple truth, and what inevitably flowed from it, has turned into a legal battle with nationwide implications one that has drawn the scrutiny of federal-government lawyers, civil-rights groups and conservative activists, and resulted in a first-of-its-kind court ruling Tuesday.

The issue? The pair, both women, were together 13 years before they were legally married last summer in British Columbia. Getting sick and going broke has made them a sort of test case for the implications of the Defense of Marriage Act (DOMA) as it collides with the recent wave of same-sex marriages.

“When Ann and I filed for bankruptcy,” Lee Kandu said, “this wasn’t about making a case for same-sex marriage. It was about dealing with our life situation. We were not trying to change the laws. We were not trying to push an issue. We were just trying to get through it.”

Tuesday, a U.S. Bankruptcy Court judge in Tacoma ruled in the Kandus’ case that DOMA, which defines marriage as the union of a man and a woman, is constitutional. It is the first such decision by a federal court since the law was passed in 1996. And while the ruling will have little precedential value, it gives a glimpse of legal battles to come, as gays begin to encounter the ordinary hurdles of life for the first time as legally married couples.

“One thing that it really illustrates is how pervasive the rights and benefits are that come with marriage and how many different settings I think we’re going to start seeing this issue pop up in,” said Jamie Pedersen, a Seattle lawyer with Lambda Legal. “The simple fact is there are going to be many people getting married in Canada and Massachusetts and hopefully here as well, and there are thousands of ways that every one of those couples is affected by marriage.”

Gay-marriage opponents, such as Liberty Counsel, lauded the decision as a “welcome step toward preserving the traditional definition of marriage as between one man and one woman,” the group’s president, Mathew Staver, wrote in a statement.

He praised Bankruptcy Judge Paul B. Snyder for “exercising judicial restraint and interpreting’ rather than ‘creating’ the law.”

For Lee Kandu, the situation has become even more difficult, both emotionally and legally. Ann Kandu died in March, thousands of dollars in debt. Now creditors
can go after their Castle Rock, Cowlitz County, home to satisfy her debts.

She filed her own legal briefs in the case, arguing that DOMA violates their rights of equal protection and due process, among other constitutional protections. She likened her situation to that of interracial couples wrongly prohibited from marrying.

In a 30-page opinion, Snyder disagreed, saying Congress had a right to enact DOMA.

“This court’s personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the court’s ultimate decision,” Snyder wrote. “It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues.”

But for Lee Kandu, the decision means the pair cannot discharge their debts jointly through bankruptcy the way other married couples do. They can’t refile separately, as single people with joint debt might do, because one is deceased.

And Lee Kandu said because the house was still in Ann Kandu’s name when they filed for bankruptcy, it can’t be protected through her own bankruptcy filings, though it’s in her name now. That leaves her facing the loss of the home they shared.

“We were just in a devastating position,” she said. “The two of us ended up with cancer at the same time. We were trying to make the best of it.”

Several months after their marriage, a doctor told Ann Kandu her cancer was fatal. “We filed for bankruptcy shortly thereafter just because we wanted to be able to save some sort of security for me, which I think is reasonable.

“For an opposite-sex couple, it would still be this horrendous experience, but there would be some legal protections,” Lee Kandu said.
Bush Has The Wrong Remedy to Court-Imposed Gay Marriage

The National Journal
March 13, 2004
Stuart Taylor Jr.

"Because of the full faith and credit clause of the Constitution (which makes every state accept 'the public Acts, Records, and judicial Proceedings of every other State'), gay marriage can be imposed on the entire country by a bare majority of the state supreme court of but one state [. . .] The 1996 Defense of Marriage Act? Nonsense. It pretends to allow the states to reject marriage licenses issued in other states. But there is not a chance in hell that the Supreme Court will uphold it."

So says columnist Charles Krauthammer. Not so fast, contends my colleague Jonathan Rauch: "The U.S. Supreme Court is unlikely to impose one state's gay marriages on the whole country."

Since columnists disagree, let’s go to the scholars. Professor Lea Brilmayer of Yale Law School sides with Rauch: "Marriages have never received the automatic effect given to judicial decisions. They can be refused recognition in other states without offending full faith and credit," she said in congressional testimony on March 3. But others agree with professor Larry Kramer of New York University's law school, who wrote in 1997, "States cannot selectively discriminate against each other's laws, [and] Congress cannot authorize them to do so."

This debate is of more than academic interest. Much of the energy behind the Bush-backed proposal to ban gay marriage by constitutional amendment comes from fear of nationwide imposition of gay marriage by a kind of judicial chain reaction. The same fear gave birth to the federal Defense of Marriage Act of 1996, known as DOMA, which authorizes states to ignore gay marriages performed in other states, and the "little DOMA" laws in 38 states, which declare their intent to do just that.

Is this fear of a nationwide, judicially engineered redefinition of marriage plausible? Yes, somewhat, although it’s likely to take several years if it happens at all. Is the proposed constitutional ban on gay marriage a justifiable response? No, emphatically. There are ways to get the courts out of the gay-marriage business without tying the hands of future voting majorities who may – and, I hope, will – eventually come to see gay marriage as good for us all.

The most direct and sweeping way for the Supreme Court to impose gay marriage is also the least likely. That would be to legalize gay marriage everywhere by announcing that the 14th Amendment’s equal protection clause (or the due process clause, or both), which the Court used in 1967 to strike down laws against interracial marriage, can no longer tolerate the man-woman definition of marriage that has been a cornerstone of civilization for the past few thousand years.

Last June’s decision in Lawrence v. Texas, which used the due process clause to strike down all state laws making it a crime to have gay sex, led Justice Antonin Scalia to suggest in a bitter dissent that the Court had set the stage to declare a right to gay marriage. But there is a big difference between ruling that gays cannot be branded
criminals and ruling that they must be given the privileges of marriage. Few serious analysts expect the justices to take that big a leap unless and until public opposition to gay marriage softens to the point that they could pull it off without provoking a firestorm.

The stealthier way to promote gay marriage, and the way that is most feared by opponents, would be the full-faith-and-credit two-step: Step one is for the justices to watch from the sidelines while state courts in Massachusetts and perhaps elsewhere use their state constitutions to impose gay marriage upon their own electorates. Step two would be for the Court to require that other states recognize those marriages and, in the process, to strike down all of the defense-of-marriage acts.

Brilmayer and some others say the justices will not take step two. And the traditional judicial interpretation of the full faith and credit clause is on their side. While the norm has always been for states to recognize marriages celebrated in other states, “the full faith and credit clause has never been understood to require recognition of marriages entered into in other states that are contrary to local ‘public policy’ [representing] deeply held local values,” as Brilmayer testified. Under this “public policy” doctrine, states have been free to disregard marriages in other states between first cousins, people too young to marry in their home states, people who remarried after quickie Nevada divorces, and (before 1967) people of different races.

But Brilmayer’s views are disputed by dozens of law review articles arguing that DOMA, the 38 state DOMAs, and (many add) even the long-standing “public policy” doctrine, are all unconstitutional, at least in the gay-marriage context. Gay-advocacy groups have prepared a well-orchestrated litigation campaign to use the full faith and credit clause to force recognition of gay marriages across the country. And Justice Anthony M. Kennedy has provided them with powerful ammunition with his majority opinions in both Lawrence and the 1996 decision in Romer v. Evans, which used the equal protection clause to strike down a Colorado referendum barring adoption of gay-rights laws anywhere in the state. Both decisions held that animus against homosexuals — which Scalia called “moral disapprobation” — is an irrational and illegitimate basis for some, if not necessarily all, anti-gay laws. It would not be a great leap to extend this logic to strike down DOMA and its state-law clones, and then to carve a gay-marriage exception into the public policy doctrine.

“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” Justice Oliver Wendell Holmes Jr. once said. In that spirit, I prophesy that Kennedy, his four more-liberal colleagues, and possibly Justice Sandra Day O’Connor, will seek to promote gay marriage but will proceed cautiously, with their fingers to the winds of public opinion. They may begin by issuing narrowly drawn decisions enforcing state court judgments — which other states have almost always been required to honor — such as judicially approved property settlements in divorce decrees growing out of Massachusetts gay marriages. And when these justices sense that the time is ripe — assuming that those who remain on the Court have the votes — they will apply the full-faith-and-credit two-step to ban states from discriminating against other states’ gay marriages in any way.
This prospect leaves me quite conflicted. While I strongly support gay marriage, I oppose its imposition by judicial fiat. And while judicial activism at its best can build public consensus for long-overdue reforms, I am concerned that the courts have increasingly crossed the line from exercising healthy activism into usurping legislative powers, disdaining representative government, and casually casting aside tradition in the guise of interpreting the Constitution.

So I have some sympathy for the idea of amending the Constitution to prohibit any judicial decision construing that document to require recognition of any gay marriage. (The problem of state courts in Massachusetts and elsewhere inventing state constitutional rights can and should be handled at the state level.) Because amending the Constitution is a grave step that risks unintended consequences, I am not yet ready to support that approach, as long as the Supreme Court proceeds cautiously and incrementally on gay marriage. But a sudden, broad decision requiring all other states to honor Massachusetts’ gay marriages, for example, might persuade me that the time has come to reclaim some of the rights of the people to govern themselves.

By no stretch of the imagination, however, is the proposed amendment behind which Bush has placed his prestige an appropriate way to protect representative government. Quite the contrary. The first clause of the so-called Musgrave amendment (sponsored by Rep. Marilyn Musgrave, R-Colo.) would impose a uniform federal definition of marriage upon the whole country: “Marriage in the United States shall consist only of the union of a man and a woman.” This amounts to an anti-democratic, anti-federalist effort to ban all state legislatures, for all time, from experimenting with gay marriage – even if and when most voters in most states come to support gays’ right to wed. And public opinion appears to be headed in that direction: Although polls still show voters opposing gay marriage by a ratio of about 2-to-1, the numbers appear to be softening over time. Especially significant is that young voters are far more open to gay marriage than old ones.

In this sense, the president’s position on gay marriage has something in common with that of the Massachusetts court: Neither is willing to defer to democratic governance. While the court has imposed its definition of marriage on today’s voters, Bush seeks to impose his own definition on their children and grandchildren.
Supreme Court Paved Way for Marriage Ruling With Sodomy Law Decision

*The New York Times*
November 19, 2003
Linda Greenhouse

In its gay rights decision five months ago striking down a Texas criminal sodomy law, the Supreme Court said gay people were entitled to freedom, dignity and "respect for their private lives." It pointedly did not say they were entitled to marry.

In fact, both Justice Anthony M. Kennedy, in his majority opinion for five justices, and Justice Sandra Day O'Connor, in her separate concurring opinion, took pains to demonstrate that overturning a law that sent consenting adults to jail for their private sexual behavior did not imply recognition of same-sex marriage, despite Justice Antonin Scalia's apocalyptic statements to the contrary in an angry dissent proclaiming that all was lost in the culture wars.

The Texas case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," Justice Kennedy wrote. And Justice O'Connor wrote: "Unlike the moral disapproval of same-sex relations - the asserted state interest in this case - other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."

And yet, despite the majority's disclaimers, it is indisputable that the Supreme Court's decision in Lawrence v. Texas also struck much deeper chords. It was a strikingly inclusive decision that both apologized for the past and, looking to the future, anchored the gay-rights claim at issue in the case firmly in the tradition of human rights at the broadest level.

And it was this background music that suffused the decision Tuesday by the Massachusetts Supreme Judicial Court that same-sex couples have a state constitutional right to the "protections, benefits, and obligations of civil marriage." The second paragraph of Chief Justice Margaret Marshall's majority opinion included this quotation from the Lawrence decision: "Our obligation is to define the liberty of all, not to mandate our own moral code."

"You'd have to be tone deaf not to get the message from Lawrence that anything that invites people to give same-sex couples less than full respect is constitutionally suspect," Professor Laurence H. Tribe of Harvard Law School said in an interview. Professor Tribe said that had the Texas case been decided differently - or not at all - "the odds that this cautious, basically conservative state court would have decided the case this way would have been considerably less."

The Massachusetts decision was based on the state's Constitution, which Chief Justice Marshall described as "if anything, more protective of individual liberty and equality than the federal Constitution." She said the Massachusetts Constitution "may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life."

Clearly, the state ruling, Goodridge v. Department of Public Health, was not compelled by the Supreme Court's decision in Lawrence v. Texas and, given its basis in state law, cannot be appealed to the Supreme
Whether it will influence other state high courts remains to be seen. A similar case in the New Jersey state courts was dismissed this month at the trial level and is now on appeal.

Yet just as clearly, the Massachusetts decision and the Lawrence ruling were linked in spirit even if not as formal doctrine. The Goodridge decision “is absolutely consistent with and responsive to Lawrence,” Suzanne Goldberg, a professor at Rutgers University Law School who represented the two men who challenged the Texas sodomy law in the initial stages of the Lawrence case, said in an interview. Ms. Goldberg added: “It’s impossible to overestimate how profoundly Lawrence changed the landscape for gay men and lesbians.”

Professor Goldberg said that sodomy laws, even if not often enforced, had the effect of labeling gays as “criminals who deserved unequal treatment.” With that argument removed, discriminatory laws have little left to stand on, she said, adding that the Supreme Court “gave state courts not only cover but strength to respond to unequal treatment of lesbians and gay men.”

The Massachusetts court considered and rejected the various rationales the state put forward to defend opposition to same-sex marriage. These included providing a “favorable setting for procreation” and child-rearing and defending the institution of marriage.

“It is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage,” Chief Justice Marshall said. Noting that the plaintiffs in this case “seek only to be married, not to undermine the institution of civil marriage,” she said, “The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.”

The decision will usher in a new round of litigation. The federal Defense of Marriage Act anticipated this development by providing that no state shall be required to give effect to another state’s recognition of same-sex marriage.

On the books since 1996, the law has gone untested in the absence of any state’s endorsement of same-sex marriage. With 37 states having adopted laws or constitutional provisions defining marriage as between a man and a woman, same-sex couples with Massachusetts marriage licenses may soon find themselves with the next Supreme Court case in the making.
States' Recognition of Same-Sex Unions May Be Tested

The Washington Post
November 19, 2003
Charles Lane

Alarmed by a 1996 Hawaii court case that raised the prospect of legalized same-sex marriage, Congress and 37 states enacted laws designed to keep the phenomenon from spreading across the country.

It was a kind of legal flood-control system, built from statutes that defined marriage as the union of one man and one woman, designed so that no state would have to recognize a same-sex marriage from another state.

Now, because of the Supreme Judicial Court of Massachusetts, Americans are about to find out whether this containment structure can stand up under pressure.

If the ruling goes into effect six months from now as the court envisions, and if same-sex couples carrying Massachusetts marriage licenses settle in other states, it probably will be only a matter of time before someone goes to court claiming the right to have a same-sex marriage recognized outside the Bay State, legal analysts on both sides of the issue said.

“The floodgates will be tested,” said Dale Carpenter, a law professor at the University of Minnesota.

It is likely they will hold, at least initially, legal analysts said. Hawaii’s ruling was never put into practice because the state’s voters adopted a constitutional amendment permitting a ban on same-sex marriages. Supreme courts in states where the legislature has spoken only recently against same-sex marriage probably would not strike down those laws.

The U.S. Supreme Court’s landmark decision in June to overturn state same-sex sodomy laws, Lawrence v. Texas, celebrated the dignity of same-sex relationships and clearly helped inspire yesterday’s Massachusetts decision. But the court said in Lawrence that it was not expressing a view on same-sex marriage, and few believe that the justices are eager to take on the issue soon.

Still, the impact of the Massachusetts ruling is not only legal but also emotional and political. It could ultimately reverberate in ways that may not be apparent from a reading of black-letter law as it exists today.

“I very much feel this case has a lot of resonance with what the California Supreme Court did in 1948 when it became the first to strike down a ban on interracial marriage,” said Mary L. Bonauto, the lawyer who represented the seven same-sex couples who won in Massachusetts yesterday. “That was at a time when nine out of 10 Americans still opposed interracial marriage and no court had ever ruled in favor of it.”

The post-1996 legislation, known in its federal version as the Defense of Marriage Act (DOMA), reinforced Supreme Court doctrine, which interprets the U.S. Constitution to require states to give “full faith and credit” to one another’s court judgments — but not necessarily to their legislative or administrative acts. If Kansas started issuing driver’s licenses to 14-year-
olds, for example, police in next-door Missouri still could order drivers younger than 16 off the roads.

"It is settled that states are not required to recognize every marriage performed in every other state," Carpenter said. "And they're not required to do so when they have a public policy contrary to recognizing that marriage."

This is why most of the state versions of DOMA include explicit language declaring that same-sex marriage is contrary to their public policy.

Still, it is possible that at least one state, Vermont, which has a law recognizing civil unions, would recognize a Massachusetts marriage, and the same might happen in California, which recently adopted a domestic partnership law that gives same-sex couples marriage-like status.

And in the states that do not have DOMAs yet, said Matthew Coles, director of the American Civil Liberties Union's Lesbian and Gay Rights Project, "courts are likely to find an absence of public policy."

Another line of attack against the federal and state DOMA legislation would be to argue that, by denying those who wish to form same-sex couples a right that is enjoyed by opposite-sex couples, they violate the constitutional guarantee of equal treatment under the law.

The ACLU is currently pressing such a claim in a Nebraska federal court, arguing against the state's constitutional amendment on marriage, adopted by referendum in 2000, which prohibits the legislature from adopting any measure that would recognize same-sex marriage, civil unions or domestic partnerships.

The ACLU believes it has a strong case based on a 1996 Supreme Court ruling that invalidated a Colorado constitutional amendment. The amendment would have abolished state anti-discrimination laws benefiting gay men and lesbians, Coles said.

Still, in most cases, the equal protection argument would require advocates to convince courts that opposition to same-sex marriage is so irrational that no reasonable legislator could have voted for it, legal analysts noted. That argument won in Massachusetts but probably would not in, say, Alabama.

Matthew D. Staver, president and general counsel of Liberty Counsel, which opposes same-sex marriage in courts and legislatures nationwide, noted that trial and appeals courts in Arizona, New Jersey and Indiana have recently dismissed equal-protection claims in same-sex marriage cases. But those cases will be appealed.

Still well over the horizon is the question of what states would do in the case of a same-sex couple that had married and then divorced in Massachusetts. If the divorce court awarded one member of the couple some of their property in another state, would he have a right to expect that state's courts to enforce the judgment?

The answer is probably yes, said William Eskridge, a law professor at Yale University. Though the second state would not have to recognize the marriage license, a divorce decree — resulting from an adversarial judicial proceeding — is the kind of action that the Supreme Court has required the states to recognize mutually, he said.
The political right and left in America share one unfortunate habit. When they don’t get their way in courts of law or state legislatures they immediately seek to undercut all opposition by proposing an amendment to the Constitution.

As they say, bad habits die hard. Apparently White House lawyers and the Senate Judiciary Committee are currently examining the merits of a constitutional amendment, pending in the House of Representatives, to deny any and all “legal incidents” of marriage (in layman’s terms, any of the hundreds of legal benefits and obligations of the legal institution of marriage) to all unmarried couples, be they homosexual or heterosexual. They should reject this approach out of hand.

When I authored the Defense of Marriage Act, which was passed overwhelmingly by both chambers of Congress and signed into law by President Clinton in 1996, I was under intense pressure from many of my colleagues to have the act prohibit all same-sex marriage. Such an approach, the same one taken by the Federal Marriage Amendment, would have missed the point. Marriage is a quintessential state issue. The Defense of Marriage Act goes as far as is necessary in codifying the federal legal status and parameters of marriage. A constitutional amendment is both unnecessary and needlessly intrusive and punitive.

The 1996 act, for purposes of federal benefits, defines “marriage” as a union between a man and a woman, and then allows states to refuse to recognize same-sex marriages performed in other states. As any good federalist should recognize, this law leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.

Following the Defense of Marriage Act, 37 states prohibit same-sex marriage and refuse to recognize any performed in other states, while a handful of states recognize domestic partnerships, one state authorizes civil unions, and a couple of others may have marriage on the horizon. In the best conservative tradition, each state should make its own decision without federal government interference.

Make no mistake, I do not support same-sex marriages. But I also am a firm believer that the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit.

No less a leftist radical than Vice President Dick Cheney recognized this when he publicly said, “The fact of the matter is we live in a free society, and freedom means freedom for everybody. . . . And I think that means that people should be free to enter into any kind of relationship they want to enter into. It’s really no one else’s business in terms of trying to regulate or prohibit behavior in that regard. [. . .] I think
different states are likely to come to different conclusions, and that’s appropriate. I don’t think there should necessarily be a federal policy in this area.”

The vice president is right. There shouldn’t be a constitutional definition of marriage. As an institution, and as a word, marriage has very specific meanings, which must be left up to states and churches to decide. The federal government can set down a baseline — already in place with the Defense of Marriage Act — but states’ rights demand that the specific boundaries of marriage, in terms of who can participate in it, be left up to the states.

This also means that no state can impose its view of marriage on any other state. That is the federal law already on the books. I drafted it, and it has never been successfully challenged in court. Why, then, a constitutional amendment?

I worry, as do supporters of the constitutional amendment on marriage, that a nihilistic amorality is holding ever greater sway in the United States, especially among the young. Similarly, I agree that the kernel of basic morality in America — the two-parent nuclear family — has eroded under the influence of the “me” generation, which has left us with an astronomical divorce rate and a tragic number of hurting families across the country.

Restoring stability to these families is a tough problem, and requires careful, thoughtful and, yes, tough solutions. But homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution.

The writer was a Republican representative from Georgia from 1995 to 2003. He currently practices law in Georgia and writes and consults extensively on civil liberties issues.
The Supreme Court ruled by a 5-to-4 vote today that the government cannot prohibit doctors from performing a procedure that opponents call partial-birth abortion because it may be the most medically appropriate way of terminating some pregnancies.

The decision declared unconstitutional the Nebraska law before the court and, in effect, the laws of 30 other states. In addition, the bill to create a federal ban on the procedure, which President Clinton has vetoed twice and which may reach his desk again this year, would also be unconstitutional under the court’s analysis: like all the other laws, it does not contain an exception for the health of the pregnant woman.

The decision, with a majority opinion by Justice Stephen G. Breyer, was analytically broader than many people expected, finding fault not only with the law’s concededly imprecise language, but with the absence of an exception for women’s health. Excerpts, Page A26. At the same time, the 5-to-4 vote was unexpectedly close for a court where support for the underlying right to abortion has been counted as 6 to 3.

The combination of the broad ruling and the close vote led Janet Benshoof, president of the Center for Reproductive Law and Policy, which represented the Nebraska doctor who challenged the law, to describe the day as one for “Champagne and shivers.” The immediate reaction from politicians and advocates on both sides of the abortion debate made it likely that the court’s future composition would be the subject of greater than usual focus during the remainder of this election year. Page A26.

The decision, one of four today that totaled 391 pages, came on the final day of the court’s term.

“Partial-birth abortion” is the term opponents of abortion use to describe a method that doctors use infrequently to terminate pregnancies after about 16 weeks. Anti-abortion forces coined the term in the mid-1990’s and have focused on graphic descriptions of the procedure as a way of undermining public support for abortion. The ruling today represents a significant setback to that strategy.

Justice Anthony M. Kennedy’s dissenting opinion was a major surprise to both sides of the abortion debate. Not only his disagreement with the majority, but also the terms in which he expressed his views both in this case and in a second abortion-related decision today indicated Justice Kennedy’s deep unease with a 1992 decision, of which he was a joint author, that had reaffirmed the right to abortion. The second decision upheld restrictions on demonstrations outside abortion clinics.

Emphasizing what he described as the “consequential moral difference” between the “partial-birth” method and other abortion procedures, Justice Kennedy said that in its
1997 law, Nebraska "chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life."

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg in an opinion concurring with the majority, said it was "simply irrational" to find a fundamental difference in one procedure over another. Justice Stevens said it was "impossible for me to understand how a state has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman" in exercising the constitutional right to obtain an abortion.

Eight of the nine justices — all but David H. Souter, who joined Justice Breyer's majority opinion — wrote opinions in the case, Stenberg v. Carhart, No. 99-830. In addition to Justices Souter, Stevens and Ginsburg, Justice Sandra Day O'Connor joined the majority opinion. In addition to Justice Kennedy, Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas wrote dissenting opinions.

In striking down the Nebraska law, the majority went further than the federal appeals court whose decision the court upheld today. The United States Court of Appeals for the Eighth Circuit, in St. Louis, had found Nebraska's law unconstitutional because, while it was ostensibly aimed only at a particular type of late-term abortion, its vague wording would chill doctors in performing a common second-trimester abortion procedure that undoubtedly had constitutional protection under the Supreme Court's precedents.

The Supreme Court agreed with that analysis but went on to rule that even a more precisely worded statute that avoided that problem would still be unconstitutional in the absence of a health exception.

Surveying medical opinion on the subject, Justice Breyer said there was a "substantial likelihood" that the method at issue was "a safer abortion method in certain circumstances." He added, "If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences."

Justice Breyer called the ruling "a straightforward application" of the court's 1992 ruling in Planned Parenthood v. Casey, which reaffirmed the 1973 ruling in Roe v. Wade. But the dissenters disagreed and said the decision went further in the direction of protecting an unqualified right to abortion. Justice Kennedy, an author of the Casey decision, said the ruling today was based on a "misunderstanding" of that decision and "contradicts Casey's assurance that the state's constitutional position in the realm of promoting respect for life is more than marginal."

James Bopp, general counsel of the National Right to Life Committee, which drafted the model law on which the Nebraska statute and many of the others were based, called the decision a "radical expansion of the right to abortion."

Under the Nebraska law, a doctor who performed a "partial-birth abortion" that was not necessary to save a woman's life faced a sentence of up to 20 years in prison. The law was successfully challenged in Federal District Court in Omaha by Dr. Leroy Carhart and has never taken effect. Dr. Carhart and his wife, Mary, were in the courtroom today.

The statute defined the procedure as "an abortion procedure in which the person
performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” That was defined further to mean “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof” before terminating the pregnancy.

Nebraska’s attorney general, Don Stenberg, argued that the state Legislature meant to ban one specific procedure, known in the medical profession as dilation and extraction, or D & X. In that procedure, used beginning in about 16 weeks of pregnancy when the fetus’s head has grown too big to pass safely through an undilated cervix, doctors seeking to keep the fetus as intact as possible for various reasons extract it feet first and then use a sharp instrument to collapse the fetal skull.

But the lower courts found, and the majority today agreed, that the statutory definition of what Nebraska was prohibiting also applied to a procedure known as dilation and evacuation, or D & E, which is used much more commonly for abortions after the first trimester of pregnancy. In this procedure, the fetus is dismembered during the abortion, meaning that a “substantial portion” of it may be pulled into the vagina while the fetus is still alive.

In his opinion, Justice Breyer said the court had to review the statute as it was written, and did not have authority to accept the attorney general’s invitation to make it narrower. Consequently, Justice Breyer said, all doctors using the D & E method “must fear prosecution, conviction and imprisonment,” making the law an “undue burden upon a woman’s right to make an abortion decision.” To that extent, the decision tracked the ruling last year by the Eighth Circuit. Where the majority today went further was in its insistence that even a more precisely written law needed to have an exception to protect women’s health, in addition to the provision to save the life of the mother, which Nebraska’s law and the other states’ laws have.

Further, Justice Breyer made it clear that the health exception had to go beyond “situations where the pregnancy itself creates a threat to health.” He said that although the medical testimony was somewhat equivocal, the court accepted the view that “a statute that altogether forbids D & X creates a significant health risk” and would be unconstitutional for that reason alone.

In the second abortion decision today, the court ruled 6-to-3 that a Colorado law aimed at protecting abortion clinic patients and doctors from harassment by protesters did not violate the protesters’ First Amendment rights. The decision, Hill v. Colorado, No. 98-1856, upheld a ruling by the Colorado Supreme Court. Within 100 feet of the entrance to any health care facility, no one may make an unwanted approach within eight feet of another to talk or pass out a leaflet.

Justice Stevens wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O’Connor, Souter, Ginsburg and Breyer. Justices Scalia, Thomas and Kennedy dissented. Justice Scalia and Justice Kennedy read their impassioned dissenting opinions in the courtroom this morning for more than half an hour, making clear that this First Amendment debate was in many respects a proxy for the court’s ongoing abortion debate.
In a major victory for antiabortion forces after an eight-year struggle, Congress yesterday gave final approval to legislation banning a particularly controversial procedure for ending pregnancies, ensuring a legal showdown that could help define the scope—and limits—of abortion rights in the United States.

Voting 64 to 34, the Senate joined the House in passing the measure to prohibit what abortion foes call a “partial-birth” procedure and to punish doctors who violate the ban with fines and as many as two years in prison.

The bill, which the House approved 281 to 142 earlier this month, now goes to President Bush, who has indicated that he is eager to sign it into law. But opponents plan to challenge the measure in court and to seek an injunction to bar its enforcement, relying in part on the legislation’s failure to allow such an abortion to protect a woman’s health, as required by earlier court decisions.

As described in the bill, the procedure, generally performed during a pregnancy’s second or third trimester, involves a physician puncturing the skull of a fetus and removing its brain after it is partially delivered.

Sen. Sam Brownback (R-Kan.), a leader in the fight for the bill, said after the vote: “This is an enormous day” for the country. But Sen. Barbara Boxer (D-Calif.), an opposition leader, called it “a very sad day for the women of America.”

Bush said in a statement: “This is very important legislation that will end an abhorrent practice and continue to build a culture of life in America.”

In the 30 years since the Supreme Court’s Roe v. Wade decision, which established a woman’s constitutional right to have an abortion, Congress has never banned a specific procedure, although it has repeatedly restricted federal funding for abortions, including barring payments to Medicaid patients.

Sponsors said the legislation was designed to end an especially brutal procedure that Sen. Jeff Sessions (R-Ala.) described as “a stain on the conscience of America.”

But foes of the measure said its language is broad enough to cast legal doubt over other, more common abortion procedures. They said the bill is “step one,” as Sen. Tom Harkin (D-Iowa) put it, toward the eventual destruction of abortion rights in this country.

In part because of such disagreements, there are no reliable figures on how many abortions might be banned under the new law. Critics of the procedure say thousands of such abortions are performed annually; its defenders say they are relatively rare.

As they did in earlier debates, the bill’s sponsors surrounded themselves with large, made-for-television sketches of fetuses. Supporters focused on the procedure, while opponents emphasized the broader issue of abortion rights.
“We cannot allow this kind of brutality to corrupt us,” said Sen. Rick Santorum (R-Pa.), who led the fight for the bill.

“Women’s right to choose is in greater danger now than it has been at any time since the Supreme Court issued the Roe v. Wade decision 30 years ago,” said Sen. Frank Lautenberg (D-N.J.).

In yesterday’s vote, 17 Democrats joined 47 Republicans in backing the legislation, while 30 Democrats, three Republicans and one independent voted against it. Virginia’s senators voted for it; Maryland’s senators opposed it.

The first “partial-birth” abortion bill was introduced in 1995, after Republicans won control of both houses of Congress. It was passed twice in the late 1990s but was vetoed by President Bill Clinton.

Another effort stalled in 2000 after the Supreme Court, in a 5 to 4 decision, struck down a Nebraska statute that was similar in most respects to the bill that Congress was considering. The court found the Nebraska law insufficiently specific in defining the procedure to be banned and flawed because it did not include an exception for protecting a woman’s health.

The bill got another chance this year after Republicans regained the Senate majority, putting them in control of both houses and the White House.

The key legal question is whether the current bill's drafters have changed the measure enough to pass muster with the Supreme Court.

Backers of the legislation say they defined the procedure with all the specificity that the court might require and addressed the health issue by asserting in a series of findings that such an abortion is never needed for health reasons.

But critics said the bill fell short on the grounds of both specificity and health. They predicted that the Supreme Court will strike it down.

Three separate lawsuits against the measure are planned by the Planned Parenthood Federation of America, the Center for Reproductive Rights and the National Abortion Federation. The latter will be represented by the American Civil Liberties Union.
Partial-birth Ban Debated in Court

Washington Times
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Amy Fagan

The federal ban on partial-birth abortions is too broad and unconstitutionally threatens women’s access to abortion, an attorney for plaintiffs argued at the beginning of one of three federal court challenges of the new law yesterday.

Attorneys for the government, meanwhile, argued that Congress was right to ban the “inhumane procedure.”

Even before President Bush signed the bill into law in November, it was challenged by pro-choice groups in federal district courts in New York, Nebraska and California. The trials began yesterday and will range from two to four weeks.

“Our evidence will show the court [that] the act unconstitutionally compromises a woman’s right to reproductive choice,” said Stephen Hutt, an outside attorney for the National Abortion Federation, which, along with the American Civil Liberties Union, is challenging the federal law in New York.

“It would, and frankly seems intended to, remove the range of abortion alternatives available to women in the second trimester that have been proven to be safe,” he argued before the court.

Supporters of the law say Congress narrowly wrote the language to apply to one type of abortion, in which a living fetus is almost fully delivered before its skull is pierced and its brain removed.

The law bans this procedure except when needed to save the life of the mother.

“Evidence at trial will illuminate that partial-birth abortion is never medically necessary and is an inhumane procedure that should be banned,” Assistant U.S. Attorney Sean H. Lane told the court.

Opponents say the law is just as unconstitutional as a Nebraska ban on partial-birth abortion that was overturned by the Supreme Court in 2000. The court said Nebraska’s definition of the procedure was too broad and the law didn’t include an exception for the mother’s health.

“The federal ban suffers from the same two fatal flaws,” said Louise Melling, director of the ACLU Reproductive Freedom Project.

In place of a health exception, Congress has included a findings section stating that, based on the extensive congressional-hearing record, a partial-birth abortion is never necessary to preserve health and is outside the standard of medical care.

The remaining court challenges were brought by the Center for Reproductive Rights on behalf of Dr. LeRoy Carhart, the Nebraska abortionist who successfully challenged his state ban, and the Planned Parenthood Federation of America in San Francisco.

The Supreme Court is expected to have the final say, however.

“This is the beginning of a very long legal road that ultimately leads to the Supreme Court,” said Jay Sekulow, chief counsel of
the American Center for Law and Justice, a group that supports the ban.

Douglas Johnson, legislative director for the National Right to Life Committee, said he hopes either the votes or composition of the high court changes by the time that happens.

“We believe that this law will ultimately be reviewed by the Supreme Court, where five justices in 2000 said Roe v. Wade guarantees the right to perform abortions at will,” Mr. Johnson said. “We can only hope that by the time this law reaches the Supreme Court, there will be at least a one-vote shift away from that extreme and inhumane decision.”

Mr. Sekulow attended the court challenge in New York yesterday and said, “Round one so far has been a good one for the United States.”

He said the plaintiffs’ attorney told the judge that testimony would be graphic and discomforting at times, and government attorneys seized on this warning, emphasizing that the testimony is disturbing “because the procedure itself is discomforting, raw and blurs the line between live birth and abortion.”

Mr. Sekulow predicted the issue of fetal pain will play a key role in the trials.

An estimated 2,200 to 5,000 partial-birth abortions are performed annually in the United States, most during the fifth or sixth months of pregnancy. Mr. Johnson said that it has been medically established that a fetus at this stage can feel pain and is even more sensitive to pain than a newborn or an older child.
Abortion opponents won a major victory recently by pushing a “partial-birth” abortion ban through Congress, but that victory could turn sour when the case reaches the Supreme Court.

Why? First, because a 5-4 court struck down a similar Nebraska law three years ago. But there’s another, far more consequential reason: Over the past decade, a different majority – led by conservatives Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas – has struck down other federal laws that attempted to regulate activities traditionally left to the states. This majority has also held Congress to a strict interpretation when it used constitutional language such as the Interstate Commerce Clause to claim federal jurisdiction, which is exactly what Congress did in enacting the abortion ban. Ironically, these are the same three justices who have reliably supported abortion opponents in defending state anti-abortion laws. And now the court will have to choose.

In keeping with its pattern of decisions that enhance states’ rights and curtail federal power in the name of “federalism,” the court may well decide that Congress lacks the authority to pass any law banning or regulating abortions. That result would not only extinguish the new law, it would decimate much of the rest of the “pro-life” agenda, in particular the wish to secure nationwide bans on such practices as euthanasia, cloning and stem-cell research. So the question is: Will Rehnquist, Scalia and Thomas keep their federalism faith, even if that requires betraying political allies on the religious right?

Their quandary does not revolve around an abstract philosophical tension between states’ rights and big government, but rather around a specific matter of law. Congress justified the new abortion law on the basis of the commerce clause, the constitutional provision that authorizes it to “regulate commerce among the states.” The law imposes criminal sanctions on practitioners who, “in or affecting interstate or foreign commerce,” perform the banned procedure. Until recently, this drafting technique might have raised no eyebrows. Beginning in the New Deal era, Congress reflexively invoked the commerce clause as a catch-all to legitimize laws which, like the new abortion ban, address activity that is neither “interstate” nor “commerce.” The Supreme Court went along, never once overturning a federal statute on the grounds that it exceeded Congress’s commerce clause power.

But in 1995, in a case known as United States v. Lopez, the court canceled its blank check to Congress. With great rhetorical fanfare, a 5-4 court majority led by Rehnquist struck down the 1990 Gun Free School Zones Act, which made it a federal crime to possess a firearm within 1,000 feet of a school, as outside the bounds of the commerce clause. And in 2000, in United States v. Morrison, the same majority, using the same grounds, invalidated the 1994 Violence Against Women Act, which authorized federal civil lawsuits to redress gender-based violence against women.
Rehnquist prescribed two new rules in his landmark opinions: First, that Congress cannot regulate activities merely because they "affect" interstate commerce, but only if they "substantially affect" it; second, if an activity is not commercial or economic in nature, its effects on interstate commerce will not be considered "substantial" merely because, if repeated many times over, the aggregate effect might arguably be substantial. In Morrison, Rehnquist made clear that he and his allies meant business, brusquely dismissing voluminous congressional findings that the aggregate impact of gender-motivated violence damaged the national economy. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," he wrote.

If Rehnquist and his four colleagues (Justices Anthony Kennedy and Sandra Day O'Connor often join Thomas and Scalia to form this majority) take to heart what the chief justice wrote in Lopez and Morrison, they will have two options when the latest abortion law reaches them. They can take the high ground and strike the law down on the basis that it addresses activity which, in line with the spirit as well as the letter of those cases, "the states may regulate and Congress may not." Or in deference to Congress, they can construe the statute narrowly to avoid (technically) invalidating it altogether, by strictly limiting its scope to activities that actually occur in interstate commerce. In that event, as veteran Supreme Court litigator Alan Morrison has observed, the long and bitter struggle for this law could end up barring late-term abortions on interstate flights, train trips and highways, but not much else.

The three most ardent champions of states' rights – Rehnquist, Scalia and Thomas – are passionate critics of Supreme Court decisions that invalidated state anti-abortion laws. If they join the majority from the Nebraska case and reject the new federal law, the movement that calls itself "pro-life" will be hard-pressed to blame rejection of abortion bans on an arrogant band of liberal ideologues. More importantly, however, the movement's other major targets – euthanasia, cloning and stem-cell research – are inherently no more "in or affecting interstate commerce" than is abortion. Except to the extent that such practices can be curbed by cut-offs of federal funding, they, too, could be beyond Congress's grasp.

Of course, the conservative justices could suspend their distaste for untethered federal power, which they displayed not only by striking down the Gun Free School Zones law and the Violence Against Women Act, but by limiting other social legislation as well, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act. They could recycle any number of once-commonly used artifices, such as positing that late-term abortions are performed with instruments previously circulated in interstate commerce. But if they strain to distinguish recent precedents in order to save legislative artifacts of the religious right, they will sorely wound their federalism crusade, validating liberal charges that it is a selectively applied sham.

Logically, abortion rights advocates should jump at the chance to confront their judicial adversaries with so painful a dilemma. Why have they not done so? Perhaps because they and their political allies abhor the Rehnquist court's restrictions on federal civil rights, environmental, health care and other major 20th-century social legislation. Their failure to unsheathe this weapon may stem from a wish to avoid bolstering the legitimacy of the still-fragile federalism jurisprudence.
Their judicial allies — Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer — continue to dissent from the majority's incursions on federal power. They continue to assert that the new doctrinal protections for states' rights are incorrect and "not the law."

But whatever discomfort abortion rights advocates may feel about a states' rights assault on the latest abortion law, sooner or later the issue will arise. For one thing, their litigators have a professional, ethical obligation to make every reasonable argument available to advance the goals of their clients who, as medical practitioners, seek to perform abortions without exposure to liability or litigation. When the hands of abortion rights advocates are forced, all parties may feel that they have been put on the spot. Their mutual unease could reinforce criticisms that the court's federalism campaign is a solution without a problem, and certainly without a constituency.
A federal judge in San Francisco yesterday struck down a federal law that banned a form of abortion, saying it created a risk of criminal liability for virtually all abortions performed after the first trimester. The law, the Partial Birth Abortion Ban Act, enacted in November, makes it a crime for doctors to perform any "overt act" to "kill the partially delivered living fetus."

In a 117-page decision, the judge, Phyllis J. Hamilton, ruled that the law was unconstitutional in three ways. She said that it placed an undue burden on women seeking abortions, that its language was dangerously vague and that it lacked a required exception for medical actions needed to preserve the woman's health.

The decision was the first ruling on the merits of the law. Two other cases, in Nebraska and New York, are pending. All three judges had halted enforcement of the law while they conducted trials.

The federal law is similar to a Nebraska law struck down by the Supreme Court in 2000, and yesterday's decision did not surprise legal experts. Groups opposing abortion said yesterday that they hoped the new cases would give the Supreme Court an opportunity to reconsider.

The White House said it would continue to fight for the law.

"The president strongly disagrees with today's California court ruling, which overturns the overwhelming bipartisan majority in Congress that voted to pass this important legislation," the president's press secretary, Scott McClellan, said in a statement. "The president is committed to building a culture of life in America, and the administration will take every necessary step to defend this law in the courts."

A Justice Department spokesman said that lawyers were studying Judge Hamilton's decision and that the department would continue to litigate the other two cases vigorously.

The California case was brought by the Planned Parenthood Federation of America and a local affiliate, and they were later joined as plaintiffs by the city and county of San Francisco. Yesterday's decision follows a three-week trial in March and April before Judge Hamilton, who was appointed by President Bill Clinton.

Beth H. Parker, a San Francisco lawyer who represented Planned Parenthood, said the decision was "an enormous victory."

"It reaffirms that the government has no role in this very intimate decision between the woman and her physician," Ms. Parker added. "Today's decision also gives physicians the comfort that they don't have to be concerned that the procedures performed can expose them to two years in prison for violating the act."

Ms. Parker, of the San Francisco law firm Bingham McCutchen, said the decision would protect doctors who work for local governments, as well as doctors affiliated with Planned Parenthood clinics around the
nation. Judge Hamilton declined, however, to issue a broader nationwide injunction, in deference, she said, to the Nebraska and New York courts.

Dennis Herrera, the city attorney in San Francisco, said the decision would allow the city to deliver a complete array of health care options.

"The population that we service at San Francisco General Hospital," Mr. Herrera said, "many of them indigent and from the minority communities, will continue to have services and counseling available to them with respect to their reproductive rights."

Substantial passages in Judge Hamilton’s decision concerned nomenclature. "The term 'partial-birth abortion,'" she wrote, "is neither recognized in the medical literature nor used by physicians who routinely perform second trimester abortions." She referred to the procedure as intact dilation and evacuation. It is also sometimes called dilation and extraction. The law defines the procedure as one in which the doctor "deliberately and intentionally vaginally delivers a living fetus" until either the head or the body up to the navel is "outside the body of the mother" and then kills it.

Judge Hamilton’s ruling turned largely on the testimony of medical experts. She said they had demonstrated that the contested procedure was a variant of and in some ways safer than the most common form of abortion used in the second trimester of pregnancy, which she called dilation and evacuation by disarticulation, in which the fetus is typically not removed intact.

In that and other forms of abortion, Judge Hamilton found, "the fetus may still have a detectable heartbeat or pulsating umbilical cord when uterine evacuation begins" and thus "may be considered a ‘living fetus.’" That means, she wrote, that the law could apply to ban such abortions as well.

In the 2000 Supreme Court decision concerning the Nebraska law, the court ruled that the Constitution forbids placing "undue burdens" on the right to abortion.

The California plaintiffs said the 2003 law created a burden because common abortion methods could violate the law. The government said the law was meant to apply only to the disfavored procedure.

Judge Hamilton, relying on the Supreme Court decision, agreed with the plaintiffs. She also noted that the law did not distinguish between procedures used before fetal viability and those used after, when the government may regulate or ban abortion except where it is necessary for the preservation of the life or health of the woman.

In ruling that the law is unconstitutionally vague, Judge Hamilton wrote, "It deprives physicians of fair notice and encourages arbitrary enforcement." She objected in particular to what she said were the ambiguous terms "partial-birth abortion" and "overt act."

Finally, Judge Hamilton said that the law did not include a crucial exception required by the Supreme Court. In the Nebraska case, the court ruled that such laws must include an exception for the preservation of the life or health of the woman. The federal law provides an exception for the woman’s life but not for her health.

Government lawyers said this was defensible, since, they said, the procedure is never medically necessary.
Judge Hamilton disagreed, ruling that the procedure is sometimes required and can be safer than other forms of abortion. In those other procedures, she wrote, fetal parts are sometimes left in the uterus, creating a risk to the woman's health. The contested procedure is typically shorter, reducing the risk for complications from anesthesia. And relatively intact fetuses can be used in autopsies, which can help in the planning of further pregnancies.

The government suggested that doctors fearful of prosecution under the law “could simply effect fetal demise before performing the procedure to escape liability under the act,” Judge Hamilton wrote. The plaintiffs responded that they should not be required to perform an additional medical procedure “that poses some risk and no benefit to the patient solely to protect themselves from liability.”
U.S. Court in New York Rejects Partial-Birth Abortion Ban

New York Times
August 27, 2004
Julia Preston

A federal judge in New York ruled yesterday that a federal law banning a rarely used method of abortion was unconstitutional because it did not exempt cases where the procedure might be necessary to protect a woman’s health.

The ruling, by Judge Richard Conway Casey, came in a challenge brought by the National Abortion Federation and seven doctors to a November 2003 law that bans the method known as partial-birth abortion.

Judge Casey determined that the Supreme Court required, in a decision four years ago, that any law limiting abortion must have a clause permitting doctors to use a banned procedure if they determine that the risk to a woman’s health would be greater without it.

The Supreme Court ruling “informed us that this gruesome procedure may be outlawed only if there exists a medical consensus that there is no circumstance in which any women could potentially benefit from it,” Judge Casey wrote. The Supreme Court’s opinion struck down a state law in Nebraska.

The New York case, which was argued by lawyers from the American Civil Liberties Union, was one of three cases challenging the partial-birth abortion law. On June 1, a federal judge in California ruled the law unconstitutional on similar but broader grounds than Judge Casey cited. The Justice Department has appealed that decision. The ruling is a new blow to legislation that abortion opponents have hailed as one of their most significant victories. President Bush strongly backed the bill.

Attorney General John Ashcroft said in Washington yesterday that the Justice Department would continue to defend the law vigorously and would appeal the ruling. A department statement quoted President Bush, who had said the law would “end an abhorrent practice and continue to build a culture of life in America.”

The ruling by Judge Casey, in United States District Court for the Southern District of New York, makes it considerably less likely that the Bush administration will be able to implement the law as it is currently written. It also will shift the focus of the abortion debate back to the Supreme Court and its cornerstone 1973 ruling in Roe v. Wade upholding a women’s broad right to abortion.

At issue is a procedure, generally used in the second or third trimester of pregnancy, that involves partially extracting an intact fetus from a woman’s uterus and then killing it by emptying the brain from the skull. Also known as DandX, for dilation and extraction, it has been used in cases of rare or unanticipated severe medical complications of pregnancy.

After listening to doctors describe the procedure in detail during 16 days of hearings this spring, Judge Casey wrote that it is “gruesome, brutal, barbaric and uncivilized.” He cited medical experts’
testimony that the procedure subjects the fetus to "severe pain."

He also dismissed much of the testimony by A.C.L.U. witnesses, saying he did not believe that many of their "purported reasons for why DandX is medically necessary are credible; rather they are theoretical or false."

But Judge Casey was even more pointedly critical of Congress, saying that it had voted for the law without seriously examining the medical issues. "This court heard more evidence during its trial than Congress heard over the span of eight years," the judge wrote.

He found that Congress, in writing the law, had ignored furious dissension among doctors over the safety and necessity of the disputed abortion. The lawmakers had overlooked testimony in their own hearings, he said, and based the bill on the conclusion that partial-birth abortion is "never necessary."

The law includes an exception if there is a risk to a woman's life, but not a broader exception if a doctor decides that there is a risk to a patient's health. A violation is a felony punished with up to two years in jail and fines up to $250,000.

The A.C.L.U. suit did not center on defending the procedure, but on contesting the limitations in the law on doctors' and women's ability to determine medical care.

"This is a great day for women's health, because it means the Constitution holds that doctors will treat women's health and not Congress," said Talcott Camp, an A.C.L.U. lawyer in the case.