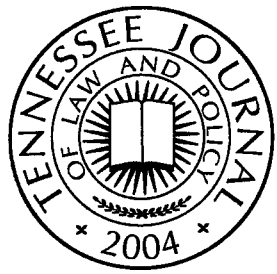
Tennessee Journal of Law and Policy

Volume 3 | Issue 2 Article 1

March 2014

TJLP (2006) Volume 3 Number 2



The TENNESSEE JOURNAL OF LAW AND POLICY is published semi-annually and edited by students of the University of Tennessee College of Law. The publisher is the TENNESSEE JOURNAL OF LAW AND POLICY, 1505 W. Cumberland Ave., Knoxville, Tennessee 37996-1810. The domestic subscription rate is $20.00 per volume, and the foreign subscription rate is $25.00 per volume. Unless notice to the contrary is received, the TENNESSEE JOURNAL OF LAW AND POLICY assumes that a renewal of the subscription is desired. All claims of non-receipt of an issue should be made within six months of date of publication if claimant wishes to avoid paying for the missing issue. To order back issues, contact William S. Hein & Co., Inc. at 1285 Main Street, Buffalo NY 14209-1987, or call toll free at (800) 828-7571. POSTMASTER: Send address changes to: TENNESSEE JOURNAL OF LAW AND POLICY, 1505 W. Cumberland Ave., Knoxville, Tennessee 37996-1810.

ISSN 1940-4131

http://www.law.utk.edu/students/tjlp/tjlphome.htm

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ST. GEORGE TUCKER'S SECOND AMENDMENT: DECONSTRUCTING "THE TRUE PALLADIUM OF LIBERTY"

Stephen P. Halbrook[1]

> A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding, may learn his own rights, and know when they are violated . . . .
>
> – St. George Tucker[2]

Introduction

The Bill of Rights, according to the above view, is designed to inform ordinary citizens of their rights. Its meaning is not a monopoly of the governmental entities whose powers the Bill of Rights was intended to limit. By

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[1] Attorney at Law, Fairfax, Va.; Ph.D. Florida State University, J.D. Georgetown University; former philosophy professor, Tuskegee University, Howard University, George Mason University. Books include A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989); FIREARMS LAW DESKBOOK (2007); FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866 -1876 (1998); THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984, 2000); THE FOUNDERS' SECOND AMENDMENT (forthcoming). Argued Printz v. United States, 521 U.S. 898 (1997), and other Supreme Court cases. See further www.stephenhalbrook.com.

[2] ST. GEORGE TUCKER, *View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. D at 308 (William Young Birch & Abraham Small 1803).

knowing when their rights are violated, the citizens may signify their displeasure through mechanisms, such as the ballot box and the jury box, and may resort to speech, the press, assembly, and petition to denounce the evil. The Second Amendment "right of the people to keep and bear Arms"[3] was intended to serve as the ultimate check, which the Founders hoped would dissuade people at the helm of state from seeking to establish tyranny.[4]

Although humble people generally think that they are among "the people," a segment of the not-so-humble appear to disagree when it comes to the right of "the people" to keep and bear arms.[5] Did the Founders mean what they seem to have said, or were their words too complex for the common people to understand? The following article seeks to provide some insights into that question through an examination of the writings of St. George Tuck-

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[3] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

[4] This view was expressed just ten days after Madison proposed the Bill of Rights in Congress:

> As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

"A Pennsylvanian," Tench Coxe, *Remarks on the First Part of the Amendments to the Federal Constitution*, FED. GAZETTE, June 18, 1789, at 2; *see* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347, 367 (1999).

[5] "Half (50%) of the American population *wrongly believe* the Constitution gives every citizen the right to own a handgun." HEARST REPORT, THE AMERICAN PUBLIC'S KNOWLEDGE OF THE U.S. CONSTITUTION 27 (The Hearst Corp. 1987) (emphasis added).

er and a recent reevaluation of those writings.

When Thomas Jefferson was elected as President of the United States in 1801, students from the College of William and Mary celebrated with a glass of wine at the house of their acclaimed professor, Judge St. George Tucker.[6] Tucker was already at work writing what would be the first and foremost treatise on the Constitution and Bill of Rights. Published in 1803 and known as Tucker's *Blackstone*, the work included the English jurist's *Commentaries* along with Tucker's reflections on the American system.[7]

During the American Revolution, Tucker had smuggled in arms from the West Indies at the behest of Governor Patrick Henry,[8] and as a militia colonel, Tucker fought against British forces.[9] After the Revolution, Tucker practiced law. Tucker, along with James Madison and Edmund Randolph, was appointed to the Annapolis Convention of 1786.[10] The Annapolis Convention served as a

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[6] MARY HALDANE COLEMAN, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY 127 (The Dietz Press 1938).

[7] Tucker's Appendix, "the first disquisition upon the character and interpretation of the Federal Constitution, as well as upon its origin and true nature," was for years used as a textbook in Virginia and other states in the early republic. J. Randolph Tucker, *The Judges Tucker of the Court of Appeals of Virginia*, 1 VA. L. REG. 789, 793-94 (1896); *see* Stephen P. Halbrook, *St. George Tucker: The American Blackstone,* 32 VA. B. NEWS, Feb. 1984, at 45-46.

[8] Halbrook, *supra* note 7, at 47. In 1775, Tucker heard Patrick Henry's famous "Liberty or Death" speech, and left one of only three detailed accounts of that debate. TYLER COIT MOSES, PATRICK HENRY 145 (reprinted New York 1980) (1887).

[9] COLEMAN, *supra* note 6, at 35, 48-58. Tucker was appointed major of the Chesterfield militia, which he led to join General Greene in North Carolina. With sword and pistol, he dashed about on his horse Hob at the Battle of Guilford Court House, rallying the wavering militiamen and taking a bayonet wound in the leg. Halbrook, *supra* note 7, at 47. Tucker eventually received a promotion to lieutenant colonel of a troop of horsemen in the Virginia militia, and was actively involved in the siege of Yorktown when Cornwallis surrendered. *Id.*

[10] Halbrook, *supra* note 7, at 47.

warm-up for the Philadelphia Convention of 1787, which framed the federal Constitution.[11] However, Tucker was known to have joined with George Mason and Patrick Henry in opposing its adoption without a bill of rights.[12] In 1788, as the States debated the proposed federal Constitution, Tucker was appointed judge of the General Court of Virginia.[13] After serving on the Court of Appeals of Virginia,[14] President James Madison appointed Tucker United States District Judge for the Eastern District of Virginia in 1813.[15]

In 2006, the Institute of Bill of Rights Law at the William and Mary College of Law held a symposium on the influence of St. George Tucker on American law.[16] Professor Saul Cornell of Ohio State University presented a paper on Tucker's views on the right to bear arms.[17] As Cornell notes, "St. George Tucker described the Second Amendment as 'the true palladium of liberty.'"[18]

As the first major commentator on the Constitution, Tucker's views should be accorded close scrutiny,[19] particularly on an issue like the Second Amendment, which has received little attention from the Supreme Court.[20] Profes-

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[11] *Id.*

[12] *Id.*; *see* Letter from James Madison to Thomas Jefferson, (Oct. 24, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON, 279-81 (Boyd ed., 1955).

[13] Halbrook, *supra* note 7, at 47.

[14] *See, e.g.*, Halbrook, *supra* note 7, at 49.

[15] "Biographical Sketch of the Judges of the Court of Appeals," 8 Va. (4 Call.) 627 (1827).

[16] *Institute of Bill of Rights Law Symposium: St. George Tucker and His Influence on American Law*, 47 WM. & MARY L. REV. 111 (2006).

[17] Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1123 n.* (2006).

[18] *Id.* at 1123; *see* TUCKER, *supra* note 2, at 300.

[19] "[T]he Supreme Court has cited Tucker in over forty cases." David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV., 1359, 1376.

[20] "Our most recent treatment of the Second Amendment occurred in

sor Cornell has emerged as perhaps the leading exponent of the view that the Second Amendment recognizes no individual right to possess arms, and instead protects a civic duty to bear arms in the militia.[21] Accordingly, an analysis of Tucker's views on the issue reveals much of importance on the Second Amendment, and an analysis of Cornell's views on Tucker may reveal more about the position that the Amendment eschews any individual right.

In his article, Cornell seeks to refute "supporters of gun rights" who misinterpret Tucker as espousing that "the right to bear arms was originally understood to protect an individual right to keep and use firearms for personal self-defense, hunting, and any other lawful activity."[22] Referring to the controversy over "gun rights and gun control," Cornell avers, "The individual rights misreading of Tucker

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United States v. Miller, 307 U.S. 174 (1939) . . . . The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." Printz v. United States, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring). Only in recent years has the Second Amendment been accorded detailed scrutiny by the federal courts of appeals. *Compare* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (Second Amendment "protects the rights of individuals, including those not then actually a member of any militia . . . to privately possess and bear their own firearms . . . ."), *cert. denied*, 536 U.S. 907 (2002), *with* Silveira v. Lockyer, 312 F.3d 1052, 1060 (9th Cir. 2002) (adopting "the 'collective rights' model, [which] asserts that the Second Amendment right to 'bear arms' guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons."), *petition for reh. denied*, 328 F.3d 567, 568 (9th Cir. 2003), *cert. denied*, 540 U.S. 1046 (2003).

[21] Cornell is the Director of the Second Amendment Research Center at the John Glenn Institute, Ohio State University. Cornell, *supra* note 17, at 1123 n.*. According to the Freedom States Alliance, a firearm prohibition lobby, Cornell's new book "blows away the NRA myths about the Second Amendment." (E-mail solicitation from info@freedomstatesalliance.com, Sept. 19, 2006); *see* SAUL CORNELL, A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (Oxford University Press 2006).

[22] Cornell, *supra* note 17, at 1123.

is merely the latest example of how constitutional scholarship has been hijacked for ideological purposes in this bitter debate."[23]

I. "THE PALLADIUM OF LIBERTY": TUCKER'S BLACKSTONE *VERSUS* CORNELL'S TUCKER

Debunking the individual-rights "hijackers" of the Second Amendment, Professor Cornell refers to "the often-quoted passage describing it [the Second Amendment] as the 'palladium of liberty'" at least five times,[24] but he strangely fails to provide the actual quotation or to acknowledge its contents. Providing Tucker's actual quotation or acknowledging its contents would be worthwhile in order to determine the extent of the constitutional hijacking by scholars who read the Second Amendment as protecting individual rights.

After quoting the text of the Amendment, Tucker began as follows:

> This may be considered as the true palladium of liberty. . . . The right of self defence is the first law of nature: in most governments, it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[25]

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[23] *Id.* at 1124.

[24] *Id.* at 1123-25, 1137, 1143.

[25] TUCKER, *supra* note 2, at 300. The above is similar to Tucker's style in explaining, a few pages earlier, the freedom of the press protected by the First Amendment as follows:

Cornell's thesis is that Tucker, along with the Founders in general, saw the Second Amendment as guaranteeing a "state right" to maintain a militia, excluding an individual right to have and carry arms for self defense, which the legislature is free to curtail or prohibit. Tucker's comment, however, clearly espouses the view that the Second Amendment protects the individual right to bear arms and to use them for self defense – "the first law of nature."[26]

The above quotation did not mention the militia although Tucker certainly saw the militia as the republican alternative to a standing army. After all, the right to arms for defense extended to protection from both individual criminals and public tyranny.

Moreover, as noted, Tucker saw any prohibition on the right "under any colour or pretext whatsoever" as dangerous to liberty.[27] He explained further,

> In England, the people have been disarmed, generally, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calcu-

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> [A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.

Id. at 297. The above was quoted in the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring). Justice Black found in Tucker's work "the general view held when the First Amendment was adopted and ever since." *Id.* at 296.

[26] TUCKER, *supra* note 2, at 300.

[27] *Id.*

> lated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty.[28]

Thus, when explaining how the right to keep and bear arms was violated in England, Tucker pointed in part to English game laws that prohibited individuals from keeping guns, even at home.[29] He said nothing about any laws that disarmed militias. This silence is inconsistent with Cornell's thesis that the right to bear arms protects only militias from being disarmed.

Tucker also referred to the English Declaration of Rights of 1689, which stated, "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[30] This was a right of Protestant "Subjects" – not militiamen – to "have Arms for their Defence," and Tucker referred to this right as the English variety of "the right of bearing arms" with-

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[28] *Id.*

[29] Although English game laws were in some cases enforced in a manner to prevent subjects from keeping guns, English judicial precedents actually held that the people at large could keep arms at home, and that guns could be seized only when actually being used contrary to the hunting prohibitions. *See* Rex v. Gardner, 87 Eng. Rep. 1240 (K.B. 1739); STEPHEN HALBROOK, THAT EVERY MAN BE ARMED 51-53 (1984) (analyzing other cases).

[30] An Act Declaring the Rights and Liberties of the Subject, 1 W. & M. 2, c. 2 (1689) (Eng.).

out imposing any militia context.

Blackstone had written that "a reason oftener meant, than avowed, by the makers of forest or game laws" was "for prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . ."[31] Historically, conquerors, who founded the European kingdoms, endeavored "to keep the *rustici* or natives of the country . . . in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting . . . ."[32] Feudal laws thus "prohibit[ed] the *rustici* in general from carrying arms" and severely proscribed hunting.[33]

Commenting on Blackstone's text, Tucker again juxtaposed the limited right to have arms under the English Declaration with the game laws. "In the construction of these game laws it seems to be held, that no person who is not qualified according to law to kill game, hath any right to keep a gun in his house."[34] Because only persons with an income of 100 pounds per annum were qualified to hunt, "it follows that no others can keep a gun for their defence; so that the whole nation are completely disarmed, and left at the mercy of the government, under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentlemen."[35] Tucker concluded that "[i]n America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty."[36]

Again, Tucker discussed the right to keep and bear arms as protecting the liberty to keep a gun for defense in the home and to carry arms, including for hunting. No mention was made of state militia powers or bearing arms

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[31] WILLIAM BLACKSTONE, 2 COMMENTARIES *412 (Tucker ed., 1803).
[32] *Id.* at *413.
[33] *Id.*
[34] *Id.* at *414 n.3.
[35] *Id.*
[36] *Id.*

in a militia. Cornell disregards the above passages altogether.

Although declining to quote the words of Tucker's "palladium of liberty" text, Cornell notes that Justice Joseph Story used the same allegory in his *Commentaries on the Constitution*. Cornell states, "While individual rights scholars have often cited Story in modern Second Amendment scholarship, they have studiously avoided examining his own analysis of the original understanding of the Second Amendment."[37] Cornell proceeds to quote a comment by Justice Story regarding Congress' militia power being "concurrent with that of the states."[38]

As with Tucker, Cornell studiously avoids mention of the content of Story's analysis of the Second Amendment, much less does he quote any of Story's "palladium of liberty" statement. Story's interpretation is unmistakable:

> The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.[39]

Story cited Tucker for that proposition as well as for the following proposition about the right of subjects "to

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[37] Cornell, *supra* note 17, at 1131.

[38] *Id.*

[39] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1001, at 708 (1833), citing, *inter alia*, Tucker, *supra* note 2, at 300. "Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'" Printz v. United States, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (citation omitted).

have arms for their defense" under the English Declaration of Rights: "But under various pretenses the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege."[40] Story was referring to possession of arms by individuals, not by militias. Although Story also stressed the importance of a well-regulated militia, this view was hardly inconsistent with the individual right to have arms.[41]

Having left the reader in the dark about what Tucker and Story actually said on "the palladium of liberty," Cornell asserts that for both, "Protection of states' rights, not individual rights, was the issue that had prompted the inclusion of the Second Amendment."[42] Aside from the constitutional vocabulary that governments (federal and state) have only "powers" and not "rights," and that only individuals have "rights,"[43] the Second Amendment was prompted by the perceived need to protect the right of individuals to keep and bear arms, which would encourage a well-regulated militia.

II. A CONSTITUTIONAL RIGHT TO ARMS FOR SELF DEFENSE?

Blackstone's *Commentaries* analyzed the right to have arms in the first chapter, entitled "Of the Absolute Rights of Individuals," of the first book, entitled "Of the

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[40] STORY, *supra* note 39, § 1891 at 747.

[41] Elsewhere, Story fused the individual right with the need for a militia quite neatly as follows: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450, at 319 (Regnery Gateway, Inc. 1986) (Harper 1859).

[42] Cornell, *supra* note 17, at 1132.

[43] *Compare* U.S. CONST. art. I, § 8 *and* U.S. CONST. amend. X (federal and state "powers") *with* U.S. CONST. amends. I, II, IV, *and* IX ("rights" of the people).

Rights of Persons." Therein he referred to "auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[44] Besides the right to petition, Blackstone included among these auxiliary rights the following:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2 [the Declaration of Rights], and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[45]

To the above, Tucker counterpoised the following: "The right of the people to keep and bear arms shall not be infringed. Amendments to C. U. S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government."[46] Although Cornell refers to this statement of Tucker, he fails to quote it and asserts that it does "not address the question of individual self-defense."[47] Yet the discussion concerns a "right of the

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[44] WILLIAM BLACKSTONE, 1 COMMENTARIES, *93, *141 (Tucker ed., 1803).
[45] *Id.* at *144.
[46] *Id.* at *144 n.40. Tucker referred to the Second Amendment as Article Four of the Amendments because that was the original numbering Congress used when submitting the amendments to the States for ratification.
[47] Cornell, *supra* note 17, at 1146.

subjects" to use arms for "self-preservation" when the law is inadequate, and no mention is made of the militia. Indeed, to Blackstone's above words, Tucker added the following further note:

> Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us, Vol. II, p. 412, "that the prevention of popular 'insurrections and resistence to government by disarming the bulk' of the people, is a reason oftener meant than avowed by the makers of the forest and game laws."[48]

Again, the forest and game laws repressed the right of individuals to keep arms, in order to enable the ruling monarchy to control the commoners. Such laws had no applicability to "State's rights" to maintain a militia – indeed, England had no States – or to bearing arms in a militia. Tucker clearly saw the Second Amendment as prohibiting infringements on the individual right to have arms.

Contending that the right to have arms in the English Declaration had no self-defense component, Cornell argues that this auxiliary right, "the right to have arms," was aimed at preventing the violence of oppression, not defending oneself against thieves."[49] But Blackstone made no distinction between defense against robbers or tyrants, nor did he limit defense to organized groups and exclude individual defense. Indeed, the right of having arms vindicated the rights to "personal security" and "personal liber-

[48] BLACKSTONE, *supra* note 44, at *144 n.41.
[49] Cornell, *supra* note 17, at 1146.

ty." As Blackstone further explained,

> In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen . . . . And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.[50]

The use of arms "for self-preservation and defense" could be applied to an individual or a collective group. An aggressor could be a single murderer or a renegade military force that stages a coup d' état and overthrows the constitution. Contrary to Cornell, Blackstone did not limit self-preservation to some kind of elusive collective right and eschew individual defense.

Tucker made further references to infringement of the individual right to bear arms, which Cornell fails to mention. Tucker explained how the British Parliament would violate basic rights in the guise of some necessary objective, but that Congress had no such power. He reiterated that in England the game laws "have been converted into the means of disarming the body of the people," and that "the acts directing the mode of petitioning parliament, [sic] and those for prohibiting riots: and for suppressing assemblies of free-masons, [sic] are so many ways for preventing public meetings of the people to deliberate upon their public, or national concerns."[51] By contrast, Congress

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[50] BLACKSTONE, *supra* note 44, at *143-44.
[51] TUCKER, *supra* note 2, at 315.

had "no power to regulate, or interfere with the domestic concerns, or police of any state . . . nor will the constitution permit any prohibition of arms to the people; or of peaceable assemblies by them, for the purposes whatsoever, and in any number, whenever they may see occasion."[52]

In short, the Bill of Rights precluded "any" ban on arms "to the people" or of their peaceable assemblies. Tucker wrote "the people," not "the militia," and he obviously had in mind the rights protected by the First and Second Amendments.

This pattern is pervasive. Cornell argues that Tucker, in his discussion of the law of treason, sharply contrasted "the common law right to keep or carry firearms and the constitutional right to bear arms" in a militia.[53] Regarding the law of treason in England, Sir Matthew Hale observed in *Pleas of the Crown* that "the very use of weapons by such an assembly, without the king's licence, unless in some lawful and special cases, carries a terror with it, and a *presumption* of warlike force, &c."[54] Tucker commented that "[t]he bare circumstance of having arms, therefore, of itself, creates a *presumption* of warlike force in England, and may be given in evidence there, to prove *quo animo* the people are assembled."[55] Cornell acknowledges that statement but then avoids any reference to what Tucker proceeded to ask:

> But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In

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[52] *Id.* at 315-16.

[53] Cornell, *supra* note 17, at 1147.

[54] ST. GEORGE TUCKER, *Concerning Treason*, *in* 5 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. B at 19 (1803).

[55] *Id.*

> many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.[56]

As usual, Cornell avoids the embarrassing quotations. As an example of exercising "the right to bear arms" as "secured in the constitution," Tucker referred to a man "going out of his house *on any occasion*" – not just for a militia muster – with "his rifle or musket in his hand." Cornell's veiled reference to the above two sentences revises them to say that, in Tucker's view, "the mere fact of traveling armed with a musket did not by itself create any presumption of illegality."[57]

Cornell intersperses with the above a discussion of the prosecutions arising out of the Whisky and Fries rebellions. Cornell states, "The defense and prosecution in the resulting cases conceded that traveling armed with militia weapons did not enjoy constitutional protection when those weapons were used outside of the context of militia-related activity."[58] He cites a trio of reported cases for that proposition, but these cases do not support this proposition. In *State v. Mitchell*,[59] the Attorney General argued the unremarkable proposition that "to assemble in a body, armed and arrayed, for some treasonable purpose, is an act of levying war[.]"[60] No one, however, mentioned the constitutional status of traveling with militia arms, whether when on or off duty.

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[56] *Id.*

[57] Cornell, *supra* note 17, at 1148-49 n.152.

[58] *Id.* at 1148 (citing United States v. Fries, 3 U.S. (3 Dall.) 515 (Pa. D. 1799); United States v. Mitchell, 2 U.S. (2 Dall.) 348, 26 F. Cas. 1277 (Pa. D. 1795) (No. 15,788); United States v. Vigol, 2 U.S. (2 Dall.) 346 (Pa. D. 1795)).

[59] 2 U.S. at 348.

[60] *Id.* at 354.

III. JUDICIAL REVIEW: INVALIDATING INFRINGEMENTS ON LIBERTY OR DICTATING TO THE MILITARY COMMAND?

Cornell's rendition of Tucker is long on Cornell's characterizations and citations to recent law review articles supporting the "collective rights" view of the Second Amendment but woefully short on Tucker's actual words. This pattern also arises when Cornell discusses Tucker's views on judicial review. Cornell claims that Tucker conjured up a scenario of "federal disarmament of the militia" in a discussion about whether courts could declare laws unconstitutional.[61]

Tucker made no such mention about the militia. In the reference cited by Cornell, Tucker contended that judicial review is particularly applicable to laws purportedly passed not under an enumerated power, but under the "necessary and proper" clause, which violated the Bill of Rights guarantees. A court may declare a federal criminal law unconstitutional in the following circumstance:

> If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms, is a mere nullity; and any man imprisoned for bearing arms under such an act, might be without relief; because

[61] Cornell, *supra* note 17, at 1138 (citing TUCKER, *supra* note 2, at 289).

> in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.[62]

In the above quotation, Tucker referred to a law prohibiting "any person" – not a militia – from bearing arms. Judicial review would be initiated by "any man" imprisoned for bearing arms, rather than a State claiming federal usurpation of its militia power or an individual claiming rejection by a militia force. In short, the Second Amendment protected individuals from federal laws which would prohibit possession of arms and impose imprisonment for having arms.

Tucker expanded on this analysis of judicial protection for the right to keep and bear arms in a further passage. Cornell refers to a passage's page number but neither quotes the passage nor summarizes its content.[63] Tucker wrote,

> If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or

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[62] TUCKER, *supra* note 2, at 289. Tucker adhered to the then-incipient view that the courts are duty bound to declare statutes contrary to the constitution as void. In a General Court case decided in 1793, Judge Tucker opined that the Virginia Constitution of 1776, being the sovereign act of the people and hence the supreme law, "is a rule to all departments of the government, to the judiciary as well as to the legislature . . . ." Kamper v. Hawkins, 1 Va. Cas. 20, 23 (Va. Gen. Ct. 1793). Chief Justice John Marshall would espouse that view in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[63] Cornell, *supra* note 17, at 1138 (citing TUCKER, *supra* note 2, at 357).

> to keep and bear arms; it would, in any of these cases be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act. . . . The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing it's shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.[64]

The right to have arms, under the above view, was on par with freedom of religion, speech, and assembly, and abridgment of any of these rights should be declared unconstitutional. The judiciary had a special responsibility to protect these "rights of the individual."

Cornell, who refuses to quote the relevant passages, refers to "The modern individual rights misreading of Tucker," and asserts, "[t]he danger that Tucker apprehended was federal disarmament of the state militias."[65] He adds, "If Federalists tried to restrict the right to bear arms in the militia, Tucker believed that federal courts should strike down such laws as unconstitutional."[66] Tucker, however, never mentioned the militia in the above passages, not even once.

As for the alleged "right to bear arms in the militia," those conscripted into the militia apparently have a "right" to do that which they are ordered to do on pain of fines or imprisonment. It is a rather curious "right" to do some-

[64] Tucker, *supra* note 2, at 357.
[65] Cornell, *supra* note 17, at 1139.
[66] *Id.* at 1139-40.

thing one is forced to do. As for those who are not conscripted into the militia, they have an even more radical "right" to be so conscripted.

Specifically, based on the same passage from Tucker quoted above, Cornell asserts that to Tucker "the right to bear arms in a well-regulated militia was a judicially enforceable privilege and immunity of federal citizenship."[67] Aside from the fact that Tucker did not say or even imply that, the implications of this statement are astonishing. It suggests that a person who is not a member of a militia could file a federal lawsuit and obtain a judicial decree ordering those in authority to accept such person as a militia member and further ordering that such person be able to bear arms. Could such person also choose which arm he or she would like to bear, as well as decide where and when to do so? Such a doctrine is inconsistent with the fundamental concept of compelled enrollment into a military force and its system of command.

Tucker himself noted that the 1792 Militia Act "establishing an uniform militia throughout the United States, seems to have excluded all but free white men from bearing arms in the militia."[68] Indeed, the Act provided in

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[67] *Id.* at 1126 (citing Tucker, *supra* note 2, at 356-57). Cornell claims that this view was adopted by Republicans in the Department of Justice during Reconstruction, but only cites two works supportive of the view that Reconstruction Republicans held the Second Amendment to be a right of individuals, including freed slaves, which was incorporated against the States by the Fourteenth Amendment. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257-66 (1998); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 viii (1998). The Department pursued criminal indictments in federal courts alleging that the individual rights of freedmen to assemble and to have arms under the First and Second Amendments were violated by private conspirators. *See* HALBROOK, FREEDMEN, chapters 6-7.

[68] ST. GEORGE TUCKER, *On the State of Slavery in Virginia*, *in* 2 BLACKSTONE'S COMMENTARIES, app. H at 37 n. Elsewhere, Tucker summarized the militia law in part as follows:

part that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizen shall reside . . . ."[69] Even within that limited class, various occupations, from government officials to persons involved in crucial transportation services, were exempt from the militia.[70]

According to the Cornell thesis, the people not qualified by law to be in the militia because of age, sex, race, occupation, not being able-bodied, or simply not being needed had a judicially enforceable right under the Second Amendment to enlist in the militia so that they could "bear arms." The above statutory limitations presumably should have been declared unconstitutional by the courts.

Moreover, the Act also required every person enrolled in the militia to "provide himself with a good musket or firelock," as well as other equipment, and required him to "appear, so armed, accoutered and provided, when called out to exercise, or into service . . . ."[71] Under

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> Every able bodied white male citizen of the respective states, of the age of eighteen, and under forty-five years of age (except certain persons particularly excepted, and all persons who now are, or may be excepted by the laws of the respective states) shall be enrolled in the militia: and every person so enrolled shall, within six months, provide himself with arms, &c. as directed by the act, and shall appear so armed, &c. when called out to exercise, or into service. *Id.* at 409 n.

[69] Act of May 8, 1792, ch.33, §1, 1 Stat. 271, 271 (1792).
[70] *Id.* § 2.
[71] *Id.* § 1.

the Cornellian constitutional right to bear arms in the militia, however, one not called out to exercise or into service would have a judicially enforceable right to be called out to the militia. Such person would also presumably have the right to decide what kind of arms to bear, even if contrary to what the law and the militia command prescribed.

In short, Cornell is so intent on deconstructing the ordinary reading of the Second Amendment – that the people have a right to keep and bear arms – that he conjures up the unprecedented fantasy that a federal court could dictate to military authorities, including the personnel of a militia force together with their functions and arms. Reality was and remains otherwise. A militiaman's refusal to peel potatoes when so commanded because he felt entitled to "bear arms" would be insubordination – not the exercise of a constitutional right – and could lead to a court-martial.

Tucker's views, as expressed in his edition of Blackstone, were originally formulated in his law lectures presented at the William and Mary College of Law. These lectures, according to Cornell, do "not support the individual rights view," and Tucker "explicitly described the Second Amendment as a right of the states . . . ."[72] For once, Cornell presents an actual quotation from Tucker, instead of the usual snippet or failure to quote anything. In this quotation, Tucker states that a State may choose "to incur the expence of putting arms into the Hands of its own Citizens for their defense," and that would not "contravene" federal authority.[73] "[T]o contend that such a power would be dangerous" – on the basis that federal law might be resisted or withdrawal from the Union might occur – "would be subversive of every principle of Freedom in our Government."[74] Tucker added that this quotation was the view of the first federal Congress because it proposed what

[72] Cornell, *supra* note 17, at 1125.
[73] *Id.* at 1129.
[74] *Id.* at 1129-30.

became the Second Amendment, which Tucker quotes. "To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the [Tenth Amendment]."[75]

This statement is consistent with both the power of the state to arm its citizens, which is implied in both the Militia Clause of the Second Amendment and in the reserved powers guarantee of the Tenth Amendment, and the right of the citizens to keep and bear such arms, which is explicit in the Second Amendment's operative clause. In short, the states had a reserved power to arm the militia, and this reservation did not violate any power delegated to the federal government. Contrary to Cornell, Tucker did not assert that the Second Amendment secures nothing more than a state militia power.

Tucker's above views from his law lectures reappeared in his *View of the Constitution,* which was published as an appendix to his edition of Blackstone. The subject was the Militia Power in Article I, Section 8 of the Constitution, which delegates power to Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . ."[76]

The objective of this provision, according to Tucker, could be traced to the Virginia Bill of Rights, which declared "that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural,

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[75] *Id.* at 1130. Indeed, the Constitution was clear when it prohibited military powers to the States. *E.g.*, U.S. CONST. art. I, § 10, cl. 3 ("No State shall . . . keep Troops . . . in time of Peace").

[76] U.S. CONST., art. I, § 8, cl. 16.

and safe defence of a free state . . . ."[77] Tucker recalled the proposed amendment by the Virginia Convention that ratified the Constitution in 1788: "that each state respectively should have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress should omit or neglect to provide for the same."[78] (As discussed below, that provision was rejected by Congress when it considered amendments in 1789.) Any "uneasiness upon the subject, seems to be completely removed," Tucker continued, by the Second Amendment.[79] "To which we may add, that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government."[80]

The above was consistent with Tucker's other comments in the *View* on the Second Amendment. Recognition of the right of the people to have arms promoted a well-regulated militia. Contrary to Cornell, the two concepts are hardly irreconcilable.

As noted above, the Virginia Convention proposed a state power to provide for the militia should Congress neglect to do so. This was among the structural amendments concerning federal and state powers that the convention proposed. Virginia also proposed an entirely separate list of "unalienable rights," including "[t]hat the people have a right to freedom of speech," and "[t]hat the people

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[77] Tucker, *supra* note 2, at 273 (quoting Virginia Declaration of Rights, Art. XIII (1776)).

[78] *Id.*; *see* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (Jonathan Elliot ed., 1836) [hereinafter 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

[79] Tucker, *supra* note 2, at 273.

[80] *Id.* The focus of Tucker's discussion was the Militia Power, not the Second Amendment, which was mentioned only once. *Id.* at 273. Cornell cites these same pages and claims: "This discussion of the Second Amendment clearly frames the issue in terms of the militia." Cornell, *supra* note 17, at 1138.

have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state . . . ."[81]

When the first federal Congress considered amendments to the Constitution, the proposed bill of rights was considered separately from the structural amendments. The Senate passed provisions, which would become the First and Second Amendments, rejecting inclusion of an anti-standing army provision in the latter.[82] St. George Tucker was informed of these Senate proceedings.[83]

The Senate considered separately, and rejected, all structural amendments to the Constitution, including the Virginia proposal: "That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . ."[84] The linguistic differences are unmistakable: this posited the "power" of the "state" to organize, arm, and discipline its militia, in contrast with the "right" of "the people" to keep and bear arms.

John Randolph wrote to St. George Tucker about the Senate action as follows: "A majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They are afraid that the Citizens will stop their full

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[81] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 78, at 659.

[82] JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 70-71 (Gales & Seaton 1820) [hereinafter JOURNAL OF THE FIRST SESSION OF THE SENATE].

[83] Letter from Theodorick Bland Randolph to St. George Tucker (Sept. 9, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, at 293 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

[84] JOURNAL OF THE FIRST SESSION OF THE SENATE, *supra* note 82, at 75.

career to Tyranny & Oppression."[85]

Cornell, without any reference to the Senate's consideration of the amendment regarding the State militia power, mistakes Randolph's letter as concerning the Second Amendment, and asserts: "As Randolph's letter to Tucker suggests, the issue before the Senate was control of the militia, not an individual right to use guns for personal defense or hunting."[86] Yet the Senate passed the individual right to have arms and rejected the state power to maintain militias. It cannot be the case that, by declaring the right of the people to keep and bear arms, Congress actually intended to declare the power of States to maintain militias – the very proposal Congress rejected.

The Senate then returned to the bill of rights, passing a form of the First Amendment similar to the final version, and rejecting a proposal to add "for the common defence" after "bear arms" in the Second Amendment.[87] Had it succeeded, recognition of "the right of the people to keep and bear arms for the common defense" would have still guaranteed an individual right to keep arms, but could have been interpreted as allowing arms to be borne only for the common defense.

Cornell denies that the Senate's rejection of the words "bear arms *for the common defense*" "establishes that they intended to protect an individual right," claiming that "Randolph's letter casts the choice to excise this language in a radically different light."[88] To the contrary, Senate action on the Second Amendment was entirely separate from its action on the State militia power, which was the subject of Randolph's letter.[89]

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[85] Letter from John Randolph to St. George Tucker (Sept. 11, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 83, at 293.

[86] Cornell, *supra* note 17, at 1129. Strangely, Cornell describes the Senate action as a defeat, rather than a victory, for the Federalists. *Id.*

[87] JOURNAL OF THE FIRST SESSION OF THE SENATE, *supra* note 82, at 77.

[88] Cornell, *supra* note 17, at 1129 (citations omitted).

[89] Cornell makes a single oblique reference to the failed State-militia-

IV. THE LINGUISTICS OF "BEARING ARMS": "BEAR" DOES NOT MEAN CARRY, AND "ARMS" DOES NOT MEAN HANDGUNS

Under Tucker's above linguistic usage, the term "bear arms" simply means to carry a weapon, whether for defense, hunting, militia purposes, or other reasons. However, Cornell argues that "bear arms" had an almost exclusively military usage.[90] The evidence for this argument is underwhelming.

The first state bill of rights to use the term "bear arms" was that of Pennsylvania in 1776, which stated, "That the people have a right to bear arms for the defence of themselves and the state . . . ."[91] Cornell denies that such language denotes an individual right, since it did not refer to the singular "right to bear arms in defense of himself and the State," as did one or more state bills of rights in the nineteenth century.[92] Yet "defense of themselves"

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power amendment, yet endeavors to attribute its meaning to the Second Amendment: "Anti-Federalists failed to obtain their primary goal of securing structural amendments to the Constitution that would have shifted power back to the [S]tates. . . . Although an amendment restricting federal control over the militia was rejected, the adoption of the Second Amendment was understood, at least by some, to provide some protection for the state militias." *Id.* at 1133 (citations omitted).

[90] *Id.* at 1140-44.

[91] Pennsylvania Declaration of Rights art. XIII (1776). Ignoring this guarantee, Cornell asserts, "A few efforts had been made to incorporate this common law principle [to bear a gun in self-defense] into state bills of rights during the Founding Era, but those efforts inevitably failed." Cornell, *supra* note 17, at 1144. His only example is that the Virginia Declaration of Rights did not include Jefferson's proposal that "[N]o freeman shall ever be debarred the use of arms . . . ." *Id.* (citing THOMAS JEFFERSON, *The Virginia Constitution, First Draft (1776)*, *in* 2 THE PAPERS OF THOMAS JEFFERSON 329, 344 (Julian P. Boyd ed., Princeton University Press 1950)). Actually, none of Jefferson's draft bill of rights was included.

[92] Cornell, *supra* note 17, at 1141. The first constitution to use the phrase "defense of himself and the State" was the Mississippi Constitu-

meant self defense, otherwise, it would redundantly mean "defense of the state."

Moreover, Pennsylvania kept that same clause in a 1790 revision as follows: "That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."[93] James Wilson, president of the convention that adopted the provision, a leading Federalist, and later Supreme Court Justice, explained the guarantee in a discussion of homicide "when it is necessary for the defence of one's person or house."[94] He continued,

> [I]t is the great natural law of self-preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognised in the constitution of Pennsylvania. "The right of the citizens to bear arms in the defence of themselves shall not be questioned." This is one of our many renewals of the Saxon regulations. "They were bound," says Mr. Selden, "to keep arms for the preservation of the kingdom, and of their own persons."[95]

Cornell argues that only "isolated examples" exist of the phrase "bear arms" used in an individual, non-military sense, "an idiosyncratic text such as the *Dissent of*

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tion. *See* MISS. CONST. art. I, § 23 (1817).

[93] PA. CONST. art. IX, § XXI (1790).

[94] 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 84 (Lorenzo Press 1804).

[95] *Id.* (citations omitted); *see* Nathaniel Bacon, An Historical and Political Discourse of the Laws and Government of England, *in* 1 COLLECTED FROM SOME MANUSCRIPT NOTES OF JOHN SELDEN, ESQ. 40 (D. Browne & A. Millar 1760) ("Freemen . . . were bound to keep Arms for the preservation of the Kingdom, their Lords, and their own persons").

the Pennsylvania Minority" being one example.[96] The *Dissent of the Pennsylvania Minority* was a proposal by Anti-Federalists in the Pennsylvania convention that ratified the Constitution in 1787 for a bill of rights, including the following:

> That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .[97]

When the Bill of Rights was being debated in the House of Representatives in 1789, Representative Frederick A. Muhlenberg, who was then the Speaker of the House and had also been president of the Pennsylvania Ratification Convention, wrote, "[I]t takes in the principal Amendments which our Minority had so much at Heart . . . ."[98] The Second Amendment was merely a more concise version of the above, sans its laundry list of purposes and exceptions.

Cornell cites no proposed or adopted constitutional guarantee that limited the terms "bear arms" as a "right" for purely military use. He refers to a game bill that Jefferson drafted and that Madison proposed to the Virginia legislature in 1785.[99] The bill provided for deer hunting seasons outside one's enclosed land, punishing a violator with a fine, and being bound to his good behavior. If within a

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[96] Cornell, *supra* note 17, at 1140 n.103.

[97] 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen ed., State Historical Society of Wisconsin 1976).

[98] Letter from Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 83, at 280.

[99] Cornell, *supra* note 17, at 1141.

year "he shall bear a gun out of his inclosed ground, unless whilst performing military duty," the defendant would be in violation of his recognizance.[100] Because this bill refers to "bear[ing]" an arm when deer hunting or otherwise *not* on military duty, Cornell's claim that "this text undermines the claims of individual rights theorists" is difficult to understand.[101]

While ignoring Tucker's repeated use of "bear arms" above to refer to individual use, Cornell points to Tucker's work on slavery to show that the term "bear arms" was "a legal term of art that clearly implied the use of arms in a public capacity, not a private one."[102] Writing in 1796, Tucker noted that free Negroes "were formerly incapable of serving in the militia, except as drummers or pioneers, but now I presume they are enrolled in the lists of those that bear arms, though formerly punishable for presuming to appear at a muster-field."[103] Tucker republished his essay on slavery in the *Commentaries* with new notations, including the following in regard to the comment that free blacks were enrolled in the militia: "This was the case under the laws of the state; but the act of 2 Cong. c. 33, for establishing an uniform militia throughout the United States, seems to have excluded all but free white men from bearing arms in the militia."[104]

Despite the military assistance of free blacks and even slaves in the Revolution, they were deprived of civil rights, such as, "All but housekeepers, and persons residing upon the frontiers are prohibited from keeping, or carrying any gun, powder, shot, club, or other weapon offensive or

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[100] THOMAS JEFFERSON, *A Bill for Preservation of Deer, in* 2 THE PAPERS OF THOMAS JEFFERSON 443-44 (Julian P. Boyd ed., 1950).
[101] Cornell, *supra* note 17, at 1141.
[102] *Id.* at 1142.
[103] ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA 20 (Philadelphia 1796).
[104] TUCKER, *supra* note 68, at 37 n.

defensive."[105]

Tucker referred above to free blacks, who were enrolled on the militia lists to "bear arms," as well as the later exclusion of all but whites "from bearing arms in the militia." In neither instance did he limit the term "bear arms" to militia service, and in the latter, he specified that the bearing of arms was "in the militia." Tucker used the terms in the broadest manner in his plan for the emancipation of slaves, in which he proposed civil restrictions such as, "Let no Negroe or mulattoe be capable . . . of keeping, or bearing arms, unless authorised so to do by some act of the general assembly . . . ."[106] He explained that "by disarming them, we may calm our apprehensions of their resentments arising from past sufferings . . . ."[107]

Referring to the above prohibition on blacks "keeping, or bearing arms," Cornell claims: "According to Tucker's analysis, blacks would be prohibited from keeping arms in their home, or from appearing at muster and being

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[105] TUCKER, *supra* note 103, at 20. Tucker also referred to the Virginia act of 1680, renewed in 1705 and 1792, which "prohibited slaves from carrying any club, staff, gun, sword, or other weapon, offensive or defensive. This act was afterwards extended to all Negroes, mulattoes and Indians whatsoever, with a few exceptions in favor of housekeepers, residents on a frontier plantation, and such as were enlisted in the militia." *Id.* at 55. He noted about such laws the following: "From this melancholy review it will appear that . . . even the right of personal security, has been, at times, either wholly annihilated, or reduced to a shadow." *Id.* at 57.

[106] TUCKER, *supra* note 103, at 93. Tucker added in a footnote to the above: "See Spirit of Laws, 12, 15, 1. Blackst. Com. 417." *Id.* In that passage, Blackstone relied on Montesquieu for the proposition that slaves, excluded from liberty, envy and hate the rest of the community, and thus warned "not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen." BLACKSTONE, *supra* note 31, at *417-18. Montesquieu warned of "the danger of arming slaves is not so great in monarchies as in republics." 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 243 (Thomas Nugent transl., 1899).

[107] TUCKER, *supra* note 103, at 95.

issued arms they might bear as part of the militia."[108] Yet Tucker said nothing about any militia muster or being issued arms – the prohibition was on "bearing arms" in any form, which meant carrying arms in any manner, just as under the slave codes.

In explaining the term "bear arms," Cornell not only constricts the word "bear" to one narrow meaning, but also does the same with the word "arms." Militia weapons such as muskets were constitutionally protected (albeit limited to militia use), while "civilian firearms," "ordinary guns," and "personal arms such as pistols" were not.[109]

However, pistols were indeed militia arms. Officers in troops with horses were required by the 1792 Militia Act to "be armed with a sword and pair of pistols."[110] Tucker himself fought in battles in the Revolution as a militia officer armed with sword and pistol.[111] Not surprisingly, Cornell finds nothing to cite from Tucker to substantiate his claim.

Instead, Cornell quotes from an anonymous letter to the editor writing on the Massachusetts Constitution of 1780 to the effect that "the legislature have [sic] a power to controul [arms] in all cases, except the one mentioned in the bill of rights . . . ."[112] Cornell adds, implying that he is summarizing the author, "Personal arms such as pistols were not treated in the same way as militia weapons such as muskets."[113] Yet the author said absolutely nothing about that subject. "In the absence of any law prohibiting the ownership or use of personal firearms" – Cornell's words, not the author's – "'the people still enjoy, and must continue so to do till *the legislature shall think fit to inter-*

[108] Cornell, *supra* note 17, at 1142.
[109] *Id.* at 1151.
[110] Act of May 8, 1792, ch. 33, 1 stat. 272 § 4.
[111] Halbrook, *supra* note 7, at 47.
[112] Cornell, *supra* note 17, at 1151 (quoting *Scribble Scrabble*, CUMBERLAND GAZETTE (Portland, Maine), Dec. 8, 1786).
[113] *Id.*

dict.'"[114]

Moreover, the context of the above was the Massachusetts Constitution, which provided, "The people have a right to keep and bear arms for the common defence."[115] The above author commented elsewhere, "All men . . . have . . . a right to keep and bear arms for their common defense, to kill game, fowl . . . . The [Massachusetts] Bill of Rights secures to the people the use of arms in common defence; so that, if it be an alienable right, one use of arms is secured to the people against any law of the legislature."[116] The federal Second Amendment includes no limitation on the use of arms to the common defense, a clause which – as discussed above – was explicitly rejected.

Running far a field of Tucker, Cornell also references an 1837 Georgia law that prohibited the sale and possession of pistols.[117] He neglects to mention that the Georgia Supreme Court declared that law unconstitutional under the Second Amendment, explaining that

> The right of the whole people, old and

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[114] *Id.* (quoting *Scribble Scrabble,* CUMBERLAND GAZETTE (Portland, Maine), Jan. 26, 1786). Another author writing in the same newspaper noted, "The idea that Great Britain meant to take away their arms, was fresh in the minds of the people; therefore in forming a new government, they wisely guarded against it." *Senex,* CUMBERLAND GAZETTE (Portland, Maine), Jan. 12, 1787. This contradicts Cornell's thesis that pistols were not constitutionally protected, since British General Thomas Gage confiscated pistols as well as other firearms from the inhabitants of Boston. RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (Little Brown & Co. 1903) ("[T]he people delivered to the selectmen 1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses"). In the Declaration of Causes of Taking Up Arms of July 6, 1775, the Continental Congress decried Gage's seizure of the arms of the people of Boston. 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1779, 151 (Worthington Chauncey Ford ed. 1905).

[115] Massachusetts Declaration of Rights, art. XVII (1780).

[116] *Scribble-Scrabble*, CUMBERLAND GAZETTE (Portland, Maine), Jan. 26, 1787.

[117] Cornell, *supra* note 17, at 1151 n.165.

> young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*. . . .[118]

That interpretation is consistent with Tucker's remark that liberty is endangered where "the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited . . . ."[119] Aside from the fact that pistols were militia arms, Tucker's statements against the English game laws demonstrate that firearms in general, including hunting arms, were constitutionally protected. Tucker contrasted the rights of Americans under the Second Amendment with England, where "the people have been disarmed, generally," so that "not one man in five hundred can keep a gun in his house . . . ."[120]

CONCLUSION

Cornell asserts that Tucker's "writings fit neither the modern collective nor individual rights models. In his more mature writings, Tucker thus approached the right to bear arms as both a right of the states and as a civic right."[121] Aside from that not being Tucker's approach,

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[118] Nunn v. State, 1 Ga. 243, 251 (1846).
[119] TUCKER, *supra* note 2, at 300.
[120] *Id.*
[121] Cornell, *supra* note 17, at 1126.

that *is* the "collective rights" model. Denial that a "right" is individual necessarily implies that it is "collective." The ideas of a state "right" to bear arms and of a person's "civic right" to bear arms in the militia are two basic variants of the collective rights model.

Having turned Tucker completely on his head, Cornell expresses indignation about scholars who read Tucker's words in their literal and ordinary way,

> Far too much scholarly energy has been wasted in the great American gun debate trying to twist history to produce a usable past. While both sides in this debate have played the law office history game on occasion, partisans of the individual-rights view have been far more aggressive in pushing their ideological agenda. . . . Reinterpreting the Second Amendment as an individual right does more than simply distort history for ideological purposes, it also does great violence to the text of the Constitution . . . [122]

Although Cornell is certainly correct in adding that one cannot erase the Militia Clause from the text, one also may not erase the substantive right. Those who deny that the Second Amendment protects individual rights have failed to articulate any inconsistency between recognition of the right of the populace to have arms and the resultant encouragement of a militia.

The irony cannot be lost that Tucker, in his lectures at William and Mary College of Law, explained the ramifications of the Second Amendment as an individual right in detail, and that two centuries later, at the same College of Law, in a symposium dedicated to Tucker's legacy, his

[122] *Id.* at 1154.

views on the Second Amendment were obliterated. This obliteration is accomplished by repeated veiled references to "the often-quoted passage describing it [the Second Amendment] as 'the true palladium of liberty,'"[123] without ever quoting that passage or any of the other rich passages in which Tucker analyzed the broad character of the right to keep and bear arms.

That brings us back to Tucker's insight that a bill of rights is intended not only to instruct government on its limits, but also to "giv[e] information to the people."[124] Every person, even the most humble, therefore "may learn his own rights, and know when they are violated . . . ."[125] Tucker synthesized the Founders' aspirations in favor of a declaration of rights that was more than a scrap of paper. This was the vision of the Founders with respect to every provision of the Bill of Rights, not excluding the Second Amendment.

[123] *Id.* at 1123-25, 1137, 1143.
[124] TUCKER, *supra* note 2, at 308.
[125] *Id.*

TAXING THE WAR ON DRUGS: TENNESSEE'S UNAUTHORIZED SUBSTANCE TAX

Charles Traughber

I. INTRODUCTION

In 2005, the Tennessee Legislature passed a law that granted the Tennessee Department of Revenue (hereinafter TDOR) the authority to levy a tax on unauthorized substances.[1] This law requires drug dealers to pay a tax based on the type and amount of unauthorized substance they possess.[2] Following payment of the tax, the TDOR issues the drug dealer a tax stamp that must be attached to the "unauthorized substances to indicate payment."[3] A drug dealer arrested for possession of an unauthorized substance, absent an affixed tax stamp, faces not only criminal prosecution for the possession of the substance, but also an assessment of the tax, a penalty, and interest accrued on the unpaid tax.[4] The legislative purpose of this tax is to "generate revenue for state and local law enforcement agencies."[5]

Opponents of illegal drug taxes fear that the imposition of these taxes infringes upon federal constitutional rights. The most prevalent arguments arise from the taxes' inherent problems with the rights against self-incrimination

[1] 2004 Tenn. Pub. Acts 803. A tax on narcotics may be referred to as an "illegal drug tax," "controlled substance tax," or an "unauthorized substance tax."
[2] TENN. CODE ANN. § 67-4-2803 (2006).
[3] *Id.* § 67-4-2805.
[4] *Id.* § 67-4-2807.
[5] *Id.* § 67-4-2801; *see also id.* § 67-4-2809(b)(2) (dispensing 75% of the revenue to the local governments and the remaining 25% of the revenue to the state's general fund).

and double jeopardy.[6] A weaker argument may be made that a person who discharges a tax obligation should have the legal right to execute the activity associated with that tax.[7]

A Tennessee Chancery Court struck down Tennessee's unauthorized substance tax as unconstitutional.[8] Davidson County Chancellor Richard Dinkins ruled that the tax violated the Double Jeopardy Clause and the right against self-incrimination.[9] This ruling, however, was only applicable to Jeremy Robbins, who was arrested on federal drug charges and then ordered to pay the unauthorized substance tax.[10] Chancellor Dinkins found that "levying the tax and charging someone with a crime was equivalent to double jeopardy . . . ," and "buying the stamps violated a person's right to avoid self-incrimination."[11]

The Tennessee Court of Appeals for the Eastern Section also found that Tennessee's unauthorized substance tax was unconstitutional.[12] Rather than finding the tax unconstitutional on federal constitutional grounds, the court looked to the Tennessee Constitution.[13] The Court determined that the tax was in essence a privilege tax allowable under the Tennessee Constitution Article II, Section 28.[14]

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[6] *See generally* U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . .").

[7] *But see* § 67-4-2810.

[8] Sheila Burke, *Judge Overturns Illicit-Drugs Tax*, THE TENNESSEAN, July 12, 2006, at 1A.

[9] *Id.* Chancellor Dinkins also ruled that Tennessee's unauthorized substance tax violated substantive due process because the law was invalid on its face. *See id.*

[10] *Id.*

[11] *Id.*

[12] Waters v. Chumley, No. E2006-02225-COA-R3-CV, 2007 WL 2500370, at *1 (Tenn. Ct. App. Sept. 6, 2007).

[13] *Id.* at *1.

[14] *Id.* at *2.

For this reason, the tax was deemed subject to the limitation that it "must not be arbitrary, capricious or wholly unreasonable."[15] Consequently, since "[t]axation of [a] privilege is . . . carried on . . . under protection of the state,"[16] and the tax is levied on "an activity the Legislature has previously declared to be a crime, not a privilege," the court concluded the tax was "arbitrary, capricious, and unreasonable . . . ."[17]

Taxes on unauthorized substances have not been enacted in every state. Thus far, twenty-seven states have at some point enacted a tax on illegal drugs.[18] State legislatures that have not passed a tax on illegal drugs are now examining the benefits of taxing narcotics. More specifically, these states are interested in the revenue raising capability of taxing the illegal drug trade. Many state

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[15] *Id.* (citing Hooten v. Carson, 209 S.W.2d 273, 274 (Tenn. 1948))
[16] *Id.* at *3 (citing Bank of Commerce & Trust Co. v. Senter, 260 S.W.2d 144, 148 (Tenn. 1924)).
[17] *Id.*
[18] *See, e.g.*, ALA. CODE § 40-17A-1 (2006); CONN. GEN. STAT. ANN. § 12-651(a) (West 2006); GA. CODE ANN. § 48-15-1 (West 2006); IDAHO CODE ANN. § 63-4201 (2006); 35 ILL. COMP. STAT. ANN. 530/1 (West 2006); IND. CODE ANN. § 6-7-3-1 (West 2006); IOWA CODE ANN. § 453B (West 2006); KAN. STAT. ANN. § 79-5201 (2005); KY. REV. STAT. ANN. § 138.870 (West 2006); LA. REV. STAT. ANN. § 47:2601 (West 2006); MASS. GEN. LAWS ch. 64K § 1 (West 2006); MINN. STAT. ANN. § 297D.01 (West 2006); NEB. REV. STAT. § 77-4301 (2006); NEV. REV. STAT. § 372A.070 (West 2006); N.C. GEN. STAT. § 105-113.107 (LexisNexis 2003); OKLA. STAT. tit. 618, § 450.1 (West 2006); 72 PA. CONS. STAT. ANN. § 7204(17) (West 2006) (used in Zimmerman v. Commonwealth of Pennsylvania, 449 A.2d 103 (Pa. Commw. Ct. 1982) to tax illegal drugs); TENN. CODE ANN. § 67-4-2803 (West 2006); TEX. TAX CODE ANN. § 159.201 (Vernon 2006); UTAH CODE ANN. §59-19-101 (West 2006); WIS. STAT. ANN. § 139.88 (West 2006) (found unconstitutional by State v. Hall, 557 N.W.2d 778 (Wis. 1989)); ARIZ. REV. STAT. ANN. § 42-1203.01D (West 1990) (repealed 1997); COLO. REV. STAT. ANN. § 39-28.7-101 (West 2006) (repealed 1996); FLA. STAT. ANN. § 212.0505 (West 2006) (repealed 1996); MONT. CODE ANN. § 15-25-101 (2006) (repealed 1995); N.M. STAT. ANN. § 7-18A-1 (West 2006) (repealed 1995).

legislatures have also enacted illegal drug taxes because drug dealers acquire large sums of tax-free money.[19] Regardless of the motive, illegal drug taxes provide many states with the machinery to generate revenue on illegal commercial activity that would otherwise be excluded from assessment.[20]

Many law-abiding, tax-paying citizens may agree with a tax on illegal drugs because of their belief that individuals involved in the illegal drug trade should contribute to the tax burden placed on society. Despite these opinions, the issues that arise from taxing the illegal drug trade—the inherent problems with constitutional safeguards and the effectiveness of obtaining tax revenue—should cause public apprehension.

First, this Note will provide a brief synopsis of the evolution of illegal drug taxes and discuss Tennessee's interest in using an illegal drug tax to assist in the war on drugs. Next, this Note will describe, specifically, the operation of Tennessee's unauthorized substance tax. In conclusion, this Note will examine the effects that illegal drug taxes have on the constitutional privileges against self-incrimination and double jeopardy, noting that the State of Tennessee has not streamlined a collection process for its unauthorized substance tax.

II. CREATION OF ILLEGAL DRUG TAXES

Illegal drug taxes have their origins in federal legislation and the United States' authority to lay taxes and regulate commerce. The Constitution gives the federal government the ability "[to] lay and collect [t]axes" and "[t]o regulate Commerce . . . among the several States . . .

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[19] Christian D. Stewart, *Double Jeopardy – State Drug Tax Statutes Go up in Smoke:* Department of Revenue v. Kurth Ranch, *114 S. Ct. 1937 (1994)*, 74 NEB. L. REV. 221, 226 (1995).

[20] *Id.* at 227.

."[21] In 1864, Congress used this power to enact legislation that required people involved in the business of selling lottery tickets or liquor to obtain a license from the federal government.[22] In the *License Tax Cases*, seven separate defendants from various states contested their convictions for non-payment of the lottery and liquor licenses.[23] The defendants challenged whether they could be convicted for non-payment of the lottery and liquor licenses, even though the laws of their states prohibited these activities.[24] The Supreme Court held that the licenses were a "mere form of imposing a tax," and "it [was] not necessary to regard these laws as giving such authority" to conduct these businesses.[25] This decision provided an avenue for state legislatures to tax illegal drugs while maintaining that payment of the tax had no bearing on the illegality of the drug.

Years after the Supreme Court's decision in the *License Tax Cases*, Congress enacted the Revenue Act of 1913.[26] This law levied a tax on income from any "lawful business."[27] The subsequent Revenue Act of 1916 removed the word "lawful" from the previous Revenue Act.[28] The removal of the word "lawful" implied that "illegal

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[21] U.S. CONST. art. I, § 8, cl. 1, 3; *see also* U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several States, and without regard to any census or enumeration.") (emphasis added).

[22] United States v. Vassar (*License Tax Cases*), 72 U.S. 462, 463 (1866).

[23] *Id.* at 464.

[24] *Id.* at 464-65.

[25] *Id.* at 471; *see also* Marchetti v. United States, 390 U.S. 39, 44 (1968) (noting that the Supreme Court "has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation . . . .").

[26] Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114 (1913) (amended 1916).

[27] *Id.* § 2B, 38 Stat. at 167; *see also* Frank A. Racaniello, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657, 658 (1992).

[28] Revenue Act of 1916, Pub. L. No. 64-271, § 2(a), 39 Stat. 756, 757 (1916).

businesses" were now required to identify themselves for tax purposes.[29] Consequently, this Act may be read to require people involved in the illegal drug trade to report their income to the federal government for tax purposes.

The first federal laws that imposed a tax specifically on narcotics were the Harrison Narcotics Tax Act of 1914[30] and the Marijuana Tax Act of 1937.[31] These laws did not explicitly outlaw any substances, but instead made it illegal to transfer certain substances without payment of a tax.[32] Nevertheless, the high rate of tax imposed by these acts may have had a profound deterring effect that likely contributed to the eventual outlaw of the substances covered under each act.[33]

Although these laws may have assisted the federal government in its growing fight with the war on drugs, the Marijuana Tax Act was later found unconstitutional by the United States Supreme Court in *Leary v. United States*.[34] The *Leary* decision may have initially prevented states from enacting their own illegal drug taxes. Nonetheless, "[i]n 1983, Arizona became the first state" to levy a tax on illegal drugs.[35] Other states soon followed, resulting in the

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[29] Eric J. Dirnbeck, *The Supreme Court Confiscates an Unjust Weapon Used in the "War on Drugs"*: Department of Revenue v. Kurth Ranch, *114 S. Ct. 1937 (1994)*, 20 S. ILL. U. L.J. 353, 354 (1996).

[30] Narcotics Tax Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (1914) (this act placed a tax on opiates and coca leaves, which are used in the production of cocaine).

[31] Marijuana Tax Act of 1937, Pub. L. No. 75-237, 50 Stat. 551 (1937) (repealed 1970).

[32] *See id.*; Harrison Narcotics Tax Act of 1914, Pub. L. No. 63-223, 38 Stat. 785; *see also* Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 508 (1990).

[33] For example, people who did not pay the marijuana tax were obligated to pay $100 per ounce per transfer and $2,000 for any violation of the act. Marijuana Tax Act of 1937, Pub. L. No. 75-237, 50 Stat. 554-56 (repealed 1970).

[34] Leary v. United States, 395 U.S. 6, 53-54 (1969).

[35] Christina Joyce, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLINE J. PUB. L. & POL'Y 231

present day number of twenty-seven states that have enacted some form of an illegal drug tax.[36]

III. TENNESSEE'S INTEREST IN ENACTING AN ILLEGAL DRUG TAX

Senator Randy McNally (R-Oak Ridge) sponsored Tennessee's unauthorized substance tax.[37] He "proposed the law to take money out of the drug trade and recover some of the cost of prosecuting and jailing drug offenders."[38] His early estimates projected the legislation would generate 3.6 million dollars per year.[39] The one-time cost to the State of Tennessee to create the ten-person agency to oversee the tax was 1.2 million dollars.[40]

When compared to other states, Tennessee's drug problem may be unique and slightly understated. Geographically, Tennessee touches eight states—more than any other state in the nation. Drug trafficking often involves the transportation of large volumes of narcotics between many states before the product reaches its final destination. For this reason, the flow of narcotics to and through Tennessee is likely impacted by any adjacent state's drug activity.

Moreover, illegal drugs are often linked to violent criminal activity, and Tennessee's violent crime rate ranks

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(1991); *see also* ARIZ. REV. STAT. ANN. § 42-1203.01D (West 1990) (repealed 1997).

[36] *Id.* at 231 (South Dakota and Florida enacted their statutes in 1984, and Minnesota followed suit two years later).

[37] Bonna de la Cruz, *Tennessee Targets Dealers, Users with New Levy*, THE TENNESSEAN, Dec. 29, 2004, at 1A; *see also* N.C. GEN. STAT. § 105-113.107 (LexisNexis 2003).

[38] Cruz, *supra* note 37, at 4A.

[39] *Id.* at 1A.

[40] *Id.*

fifth among all states.[41] Because of its location and the violent nature of the drug trade, Tennessee has a compelling interest in preventing illegal drug activity from increasing within its borders. The Tennessee Legislature may be under the assumption that a tax on narcotics could somehow deter the illegal drug trade and at the same time, provide funding to combat its spread.

The seriousness of Tennessee's illegal drug problem is apparent from the increasing amount of methamphetamine produced, distributed, and used in the state. It has been reported that Tennessee accounts for three-fourths of all methamphetamine lab seizures in the Southeast.[42] Tennessee trails only Illinois, Indiana, and Missouri in the number of methamphetamine lab seizures nationwide.[43] Under Tennessee's unauthorized substance tax, the state could expect large revenues from its frequent number of methamphetamine lab seizures.

Tennessee's methamphetamine problem also causes Tennessee taxpayers to incur additional out-of-pocket expenses. Each methamphetamine lab has an estimated cleanup cost of between $2,500 and $7,500,[44] and people jailed for methamphetamine usage have extensive long-term adverse health effects that are often treated while they are in jail.[45] High crime rates are also attributed to methamphetamine usage.[46] Tennessee's unauthorized substance tax could be expected to offset these indirect costs placed on Tennessee residents.

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[41] Drug Enforcement Administration, http://www.usdoj.gov/dea/pubs/states/tennessee2005.html (last visited June 15, 2006).
[42] *Id.*
[43] *Id.*
[44] Judd Matheny, *Meth Problem Growing at a Fast Pace,* TULLAHOMA NEWS, Apr. 1, 2004, http://www.mapinc.org/tlcnews/v04/a10.htm?135-%20meth%20problem.
[45] *Id.*
[46] *Id.*

IV. OPERATION OF TENNESSEE'S UNAUTHORIZED SUBSTANCE TAX

Most unauthorized substance taxes are constructed in the form of an excise tax on certain types and amounts of illegal drugs.[47] When Tennessee's unauthorized substance tax went into effect on January 1, 2005, it became the twenty-third state in the union to implement an excise tax on illegal drugs.[48] Tennessee's unauthorized substance tax was modeled after North Carolina's controlled substance tax.[49]

Tennessee's tax is levied on unauthorized substances possessed, either actually or constructively, at various rates.[50] The tax is only applicable to drug dealers[51] who possess an unauthorized substance.[52] A drug dealer is required to pay the tax "within forty-eight hours of coming into possession of unauthorized substances."[53] If the tax for the unauthorized substances is not paid within the required time, then the tax is considered delinquent, and the dealer will suffer a penalty and accrued interest.[54] In addition, if a drug dealer is found with an unauthorized substance lacking a tax stamp, it is presumed that the dealer has been in possession of the substance for more than forty-eight hours.[55]

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[47] Cruz, *supra* note 37, at 1A.
[48] *Id.* at 4A.
[49] *Id.*
[50] *Id.*
[51] *See* TENN. CODE ANN. § 67-4-2802 (a)(3)(A), (B) (2006) (a dealer is a person who actually or constructively possesses more than forty-two and one-half grams of marijuana, seven or more grams of any other unauthorized substances that are sold by weight, or ten or more dosage units of any unauthorized substance that is not sold by weight).
[52] *Id.* § 67-4-2806.
[53] *Id.*
[54] *Id.*
[55] *Id.*

After the drug dealer pays the tax, the TDOR issues tax stamps equal to the payment received in taxes.[56] Next, the drug dealer is required to indicate payment of the tax by affixing the tax stamp to the possessed unauthorized substance.[57] Tennessee's unauthorized substance tax provides that "information obtained pursuant to [payment of the tax] is confidential and, unless independently obtained, may not be used in a criminal prosecution other than . . . for a violation of [the tax]."[58]

V. THE FIFTH AMENDMENT AND ILLEGAL DRUG TAXES

A. SELF-INCRIMINATION

The constitutionality of taxing illegal activities was originally reviewed by four Supreme Court cases in the late 1960s.[59] The Court found in each case that the Fifth Amendment privilege against self-incrimination prevented the imposition of sanctions from federal tax evasion of illegal activities.[60] *Leary* was the only case of the four that involved the Fifth Amendment's use against a tax on illegal drugs.[61] The defendant, Timothy Leary,[62] was, among

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[56] *Id.* § 67-4-2805(a).
[57] *Id.* § 67-4-2806.
[58] *Id.* § 67-4-2808.
[59] *See generally* United States v. Leary, 395 U.S. 6 (1969) (illegal activity was possession of marijuana); Haynes v. United States, 390 U.S. 85 (1968) (illegal activity was possession of a sawed-off shotgun); Grosso v. United States, 390 U.S. 62 (1968) (illegal activity was wagering); Marchetti v. United States, 390 U.S. 39 (1968) (illegal activity was wagering).
[60] *Leary*, 395 U.S. at 26; *Haynes*, 390 U.S. at 100-01; *Grosso*, 390 U.S. at 67; *Marchetti*, 390 U.S. at 48.
[61] *Leary*, 395 U.S. at 16 (at issue was the Marijuana Tax of 1937 that was later repealed due to the Court's decision).
[62] Timothy Leary was a well-known drug enthusiast and one-time Harvard professor. He is most noted for his famous saying, "turn on,

other things, indicted on charges of having "knowingly transported, concealed, and facilitated the transportation and concealment of marihuana [sic] without having paid the transfer tax imposed by the Marihuana [sic] Tax Act."[63]

The pivotal issue in *Leary* was the construction of the Marijuana Tax Act of 1937.[64] The statute required "the taxpayer . . . 'register his name or style and his place or places of business' at the nearest district office of the Internal Revenue Services."[65] The Court concluded that "[i]f read according to its terms, the Marihuana [sic] Tax Act compelled petitioner to expose himself to a 'real and appreciable' risk of self-incrimination . . . ."[66]

The test for determining whether an illegal activity tax is unconstitutional on self-incrimination grounds is promulgated by *Marchetti v. United States*.[67] The test considers the following: "(1) whether the regulated activity is in an area" of the law saturated with criminal statutes or directed toward a specific group suspected of criminal activity; (2) whether the obligation to pay the tax creates a "real and appreciable risk of self-incrimination;" and (3) whether the payment of the tax may be "a significant link

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tune in, drop out," which was in reference to drug use. *See* Harry Ransom Humanities Research Center, *Timothy Leary Collection*, http://www.hrc.utexas.edu/research/fa/leary.html.

[63] *Leary*, 395 U.S. at 11.

[64] *Id.* at 12.

[65] *Id.* at 14.

[66] *Id.* at 16; *see also* Haynes v. United States, 390 U.S. 85, 97 (1968) (finding a statute taxing illegal firearms exposed the taxpayer to a risk of self-incrimination); Grosso v. United States, 390 U.S. 62, 67 (1968) (finding a statute taxing illegal wagering exposed the taxpayer to a risk of self-incrimination); Marchetti v. United States, 390 U.S. 39, 60-61 (1968) (finding a statute taxing illegal wagering exposed taxpayer to a risk of self-incrimination).

[67] Marchetti v. United States, 390 U.S. 39 (1968).

in the chain of evidence" to bring about criminal proceedings or establish guilt.[68]

Tennessee's unauthorized substance tax satisfies the first factor of the *Marchetti* test; the tax is imposed on unauthorized substances, which carry criminal sanctions.[69] In addition, the tax is only applicable to drug dealers, who are a specific group suspected of criminal activity.[70]

Applying the second factor of the *Marchetti* test, some state courts have decided their state's illegal drug tax is unconstitutional on the basis that the tax may compel the disclosure of identifying information.[71] Illegal drug taxes in other states have withstood constitutional scrutiny because courts have found safeguards that protect identifying information from dissemination.[72] In *State v. Hall,*[73] the Supreme Court of Wisconsin held that the state's tax on controlled substances unconstitutionally compelled self-incrimination.[74] The second factor of the *Marchetti* test was fundamental to the court's determination. Analyzing

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[68] Sisson v. Triplett, 428 N.W.2d 565, 571 (Minn. 1988) (citing *Marchetti*, 390 U.S. at 47-48).

[69] *See, e.g.*, TENN. CODE ANN. § 39-17-417 (2006).

[70] *Id.* § 67-4-2802(a)(3)(A)-(B).

[71] *See, e.g.*, Fla. Dep't of Revenue v. Herre, 634 So. 2d 618, 621 (Fla. 1994) (holding that Florida's illegal drug tax violated both the Fifth Amendment and the state constitution's right against self-incrimination); State v. Smith, 813 P.2d 888, 890 (Idaho 1991) (finding that the 1989 version of Idaho's illegal drug tax violated Fifth Amendment protections).

[72] *See, e.g.*, Briney v. State Dep't of Revenue, 594 So. 2d 120, 123 (Ala. Civ. App. 1991) (holding that a taxpayer could not reasonably suppose that information provided to the tax department would be available to prosecuting authorities or establish a significant link in the chain of evidence); State v. Durrant, 769 P.2d 1174, 1180, 1182-83 (Kan. 1989) (holding that Kansas' illegal drug tax prohibited the disclosure of information to be used against a taxpayer in any criminal proceeding not connected to the enforcement of the tax act, unless independently obtained).

[73] State v. Hall, 557 N.W.2d 778 (Wis. 1997).

[74] *Id.* at 783.

the second factor, the court chose to evaluate separately "the purchase and the affix and display requirements" of Wisconsin's controlled substance tax.[75]

The purchase requirement was found to be self-incriminating because the dealer was compelled to reveal to the government his drug dealing status and that he possessed or intended to possess a quantity of a controlled substance, which was usually a large amount.[76] Moreover, the Wisconsin Supreme Court found the purchase requirement, due to the "exception for 'independently obtained information,'" allowed law enforcement to place an agent outside locations where tax stamps were sold.[77] This would permit law enforcement to take photographs and follow taxpayers at its option.[78] Nevertheless, the court found that the option of purchasing tax stamps by mail alleviated any anonymity issues a taxpayer might encounter by paying the controlled substance tax in person.[79]

The affixation requirement of Wisconsin's controlled substance tax presented an entirely different concern with respect to self-incrimination. The affixation of a tax stamp to a narcotic was deemed to demonstrate that the dealer "knowingly and intentionally possesse[d] a particular quantity of unlawful drugs."[80] The court concluded that this information would be available to the prosecution in order to prove that the defendant knew the substance possessed was controlled under Wisconsin law.[81]

In *Hall*, the Supreme Court of Wisconsin also found that Wisconsin's controlled substance tax satisfied the final factor of the *Marchetti* test. The tax was deemed to only allow a taxpayer "protection from direct—not derivative—

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[75] *Id.* at 784.
[76] *Id.* at 785.
[77] *Id.* at 785-86.
[78] *Id.*
[79] *Id.* at 786.
[80] *Id.*
[81] *Id.*

use of information obtained by the [Wisconsin Department of Revenue] through compliance with the statute."[82] The court found that the tax allowed "the State to use compelled information" to obtain investigative leads that could later be used in criminal proceedings.[83]

There are many similarities between Tennessee's unauthorized substance tax and Wisconsin's controlled substance tax. Much like Tennessee's tax, Wisconsin's tax requires taxpayers to purchase tax stamps that must be attached to an illegal drug.[84] Also, Wisconsin's controlled substance tax does not demand identifying information for the purchase of tax stamps, but the tax does allow independently obtained information to be used in criminal prosecutions.[85]

In light of *Hall*, the second and third factors of the *Marchetti* test will lead Tennessee's unauthorized substance tax to the same fate as Wisconsin's controlled substance tax. First, people who purchase unauthorized substance tax stamps reveal their intent to distribute illegal drugs. Moreover, the TDOR website does not state where or how people may purchase tax stamps.[86] Upon calling the TDOR's office, potential taxpayers find no readily available alternative to buying tax stamps directly from the TDOR's central office in Nashville.

The taxpayers' only option to satisfy the tax may be to appear in person at the TDOR's central office. Nothing in Tennessee's unauthorized substance tax prevents law enforcement from keeping twenty-four hour surveillance of

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[82] *Id.* at 787.
[83] *Id.*
[84] *Compare* TENN. CODE ANN. § 67-4-2805 (2006) *with* WIS. STAT. ANN. § 139.89 (West 2001 & Supp. 2006).
[85] *Compare* TENN. CODE ANN. § 67-4-2808 *with* WIS. STAT. ANN. § 139.91 (West 2001 & Supp. 2006).
[86] Tennessee Department of Revenue, http://www.state.tn.us/revenue/faqs/unauthsubfaq.htm#unauth4 (last visited Nov. 29, 2006).

the TDOR's central office.[87] Accordingly, taxpayers may be subject to police surveillance while discharging their tax obligation for the distribution of an unauthorized substance. The police may subsequently use this surveillance to corroborate previous notions of a suspect already under investigation for the distribution of illegal drugs or gain new leads on suspects involved in the illegal drug trade.

For these reasons, taxpayers may be apprehensive about traveling to the TDOR's central office to obtain tax stamps. Thus, taxpayers may inquire about receiving the tax stamps via mail. This inquiry requires taxpayers to supply their residential addresses, their P.O. Boxes, or their acquaintances' addresses, all of which compromise the taxpayers' anonymity, despite the ruling in *Hall*. Tennessee's unauthorized substance act invokes no penalties that prevent employees of the TDOR from relaying information concerning a taxpayer to law enforcement.[88] Therefore, any of this information could be given to law enforcement to be used as a link to the taxpayer. Requesting the stamps via mail would still expose the taxpayer to a risk of disclosing identifying information to law enforcement.

The last factor of the *Marchetti* test is also satisfied by Tennessee's unauthorized substance tax. Tennessee's tax does not forbid the use of "independently obtained" information in a criminal prosecution.[89] The language of the statute permits the state to use compelled information to obtain investigative leads that could later be used to bring about criminal proceedings. As a result, any information obtained by law enforcement from surveillance or any other "independent" method may be used in the prosecution of a taxpayer for the possession of an unauthorized substance.

The unequivocal language of Tennessee's unauthorized substance tax avoids the affixation problem discussed

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[87] *See* TENN. CODE ANN. § 67-4-2808 (2006).
[88] *See id.* §§ 67-4-2801 to 2811.
[89] *Id.* § 67-4-2808.

in *Hall*. Although "knowingly" is the requisite intent to convict a person for possession of an unauthorized substance in Tennessee,[90] Tennessee's unauthorized substance tax provides that tax stamps may not be used in a criminal prosecution for the possession of an unauthorized substance.[91] The reader should note, however, that people who purchase an unauthorized tax stamp would only do so if they were aware that they possessed an unauthorized substance. Once they attach the tax stamp to the unauthorized substance, they are admitting they know the substance they possess is unauthorized under Tennessee law. Prosecutors may not be able to enter tax stamps overtly into evidence, but the prosecutors are likely to keep the unauthorized substances in their original packaging, which could include an affixed tax stamp. At trial, a juror may be hard pressed to disregard inadmissible evidence that remains on admissible evidence.

B. DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[92] Case law has interpreted the Double Jeopardy Clause to protect against three distinct situations: (1) "a second prosecution for the same offense after acquittal"; (2) "a second prosecution for the same offense after conviction"; and (3) "multiple punishments for the same offense."[93] Under the latter situation, the Supreme Court has had difficulty in determining what constitutes a multiple punish-

[90] *See id.* § 39-17-417(a)(4) ("It is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to manufacture, deliver or sell the controlled substance.").
[91] *See id.* § 67-4-2808.
[92] U.S. CONST. amend. V.
[93] *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

ment. In *Ex parte Lange,*[94] in which the defendant paid a fine and suffered imprisonment for his crime, the Supreme Court held against the imposition of another punishment from the same verdict because "to do so is to punish him *twice* for the same offence."[95] In *United States v. Halper,*[96] the Court concluded monetary penalties from a civil statute imposed after a criminal prosecution also constituted a multiple punishment and therefore violated the Double Jeopardy Clause.[97]

Department of Revenue of Montana v. Kurth Ranch[98] gave the Court the opportunity to examine whether a tax could be considered a multiple punishment under a Double Jeopardy analysis.[99] The question before the Supreme Court in *Kurth Ranch* was "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense."[100]

Although the Court found Montana's illegal drug tax was high, neither the tax's lofty assessment nor deterrent purpose classified it as punishment.[101] No doubt existed that Montana's illegal drug tax was implemented to

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[94] Ex Parte Lange, 85 U.S. 163 (1873).
[95] *Id.* at 175 (emphasis in original).
[96] United States v. Halper, 490 U.S. 435 (1989).
[97] *Id.* at 449-50.
[98] Dep't of Revenue of Mon. v. Kurth Ranch, 511 U.S. 767 (1994).
[99] *Id.* at 767.
[100] *Id.* at 769. The State of Montana enacted a tax on the storage and possession of illegal drugs and provided that the state would be able to collect the tax after the offenders satisfied their fines and obligations. *Id.* at 770 (citing MONT. CODE ANN. §§ 15-25-101 to 123). The Montana Department of Revenue was given authority to adopt rules to oversee the tax. *Id.* at 770-71. The agency promulgated rules that required the taxpayers to pay the tax sometime after their arrests and placed the taxpayers under no obligation to file or pay the tax unless arrested. *Id.* at 771.
[101] *Id.* at 780.

deter the drug trade, but the Montana Department of Revenue claimed, and the Court accepted, that many taxes, such as those on cigarettes and alcohol, are high and to some extent motivated by deterrence.[102] Nonetheless, the high rate of Montana's illegal drug tax did "lend support to the characterization of the [tax] as punishment," although this factor alone was not dispositive.[103]

The Court found two "unusual features" that made Montana's illegal drug tax especially problematic with the Double Jeopardy Clause.[104] First, the tax was shown to be conditioned strictly on criminal activity.[105] The Court considered this condition to be significant because it demonstrated that the tax had purposes other than raising revenue; the tax also had punitive and prohibitory purposes.[106] Second, the tax was "exceptional" because "it [was] levied on goods that the taxpayer neither own[ed] nor possesse[d] when the tax [was] imposed."[107] Montana's illegal drug tax required payment of the tax only after the offender had been arrested and displaced of the illegal drug. The Court found "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."[108]

The *Kurth Ranch* decision essentially employed a three-part test to determine whether a tax is punitive and thus infringes on an individual's right against double jeopardy. The test employs the following: (1) whether the tax's rate is high enough to make it a significant deterrent; (2) whether the tax is conditioned on the commission of a crime; and (3) whether the tax levies on goods the taxpayer

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[102] *Id.* at 780-81.
[103] *Id.* at 781.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 783.
[108] *Id.*

no longer owns nor lawfully possesses when the tax is assessed.

Tennessee's unauthorized substance tax satisfies the first factor of the *Kurth Ranch* test. The tax is imposed on various unauthorized substances as follows: $0.40-$3.50 for each gram of marijuana depending on the type, $200 for each gram of any controlled substance or low-street value drug sold by weight, $50 for each ten dosage unit of any low-street value drug that is not sold by weight, and $200 for each ten dosage unit of any other controlled substance that is not sold by weight.[109] These rates may be regarded as high enough to sustain an argument that Tennessee's unauthorized substance tax is a significant deterrent. For example, Tennessee's tax enforces approximately the same tax rate on marijuana as Montana's illegal drug tax, which the *Kurth Ranch* court characterized as "a remarkably high tax."[110]

As aforementioned, Tennessee's unauthorized substance tax is based on North Carolina's controlled substance tax. North Carolina's model has stood firm in state court against attacks from the second and third factors of the *Marchetti* test. For example, in *State v. Ballenger*,[111] the court distinguished North Carolina's controlled substance tax from Montana's illegal drug tax by finding it "contain[ed] neither of the 'unusual features' upon which the Supreme Court relied in *Kurth Ranch* to conclude that Montana's dangerous drug tax constituted punishment for double jeopardy purposes."[112] The court was persuaded by the fact that North Carolina's tax levies an assessment forty-eight hours after a drug dealer comes into possession

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[109] TENN. CODE ANN. § 67-4-2803 (2006).

[110] *Kurth Ranch*, 511 U.S. at 780. The high end of Tennessee's tax on marijuana imposes $3.50 per gram (or approximately $98 per ounce), which is analogous to Montana's illegal drug tax that levied $100 per ounce on marijuana. *See id.* at 780 n.17.

[111] State v. Ballenger, 472 S.E.2d 572 (N.C. Ct. App. 1996).

[112] *Id.* at 574.

of a controlled substance rather than imposing the tax after the drug dealer has been apprehended by law enforcement.[113] From this fact, the court inferred that the tax is not levied on the commission of a crime, and the controlled substance is not confiscated and destroyed before the tax can be imposed.[114]

The *Ballenger* decision is unpersuasive in light of the *Kurth Ranch* holding. First, North Carolina's controlled substance tax is unsuccessful in circumventing the requirement of avoiding a tax that is conditioned on the commission of a crime. The *Ballenger* court fails to consider North Carolina law regarding controlled substances.[115] The court neglects the fact that it is illegal for any person to possess a controlled substance in North Carolina.[116] This fact alone suffices as a violation of the *Kurth Ranch* condition. A person must be in possession of a controlled substance to be subject to North Carolina's controlled substance tax.[117] Thus, one could reasonably argue that North Carolina's controlled substance tax is predicated on the commission of a crime.

Additionally, North Carolina's controlled substance tax may be said to violate the second "unusual feature" of the *Kurth Ranch* decision. It is almost absurd to assume that a drug dealer will satisfy an illegal drug tax before the narcotic is seized by law enforcement. Drug dealers are unlikely to pay the tax out of a reasonable suspicion that the purchase, affixation, and display of a tax stamp may

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[113] *Id.*
[114] *Id.*
[115] *Id.* at 575.
[116] *See* N.C. GEN. STAT. § 90-95(a)(3) (LexisNexis 2003).
[117] *See, e.g.*, Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 781 (1994) (noting that "the tax assessment not only hinges on the commission of a crime" but "is also exacted only after the [potential] taxpayer has been arrested for precise conduct that gives rise to the tax obligation . . . .").

signify admission to a crime.[118] Consequently, when law enforcement seize the controlled substance without an affixed stamp, the dealer, who out of fear of self-incrimination has not paid the tax, has been disposed of and is no longer in control of the narcotic. More importantly, it cannot be argued that the drug dealer ever lawfully owned the controlled substance. [119] Given that Tennessee's tax is modeled after North Carolina's tax, it will incur the same constitutional problem with the Double Jeopardy Clause.

VI. COLLECTING REVENUE FROM TENNESSEE'S UNAUTHORIZED SUBSTANCE TAX

Tennessee's unauthorized substance tax was contemplated to generate millions of dollars in revenue for the state's general fund and local and state law enforcement agencies.[120] Since its inception in January of 2005, the results have not been as encouraging as estimates envisioned. According to the TDOR, the tax garnered only $340,000 in its first year.[121] This figure is further diluted by the fact that the Drug Investigation Division of the Tennessee Bureau of Investigation reported that from 2005 to the first half of 2006 it seized 5,340 grams of crack cocaine; 111,064 grams of powder cocaine; 4,309 pounds of bulk marijuana; 12,897 marijuana plants; 9,169 grams of methamphetamine; 88 methamphetamine labs; and 5,912

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[118] *See, e.g.*, Leary v. United States, 395 U.S. 6, 16 (1969).

[119] N.C. GEN. STAT. § 90-95(a)(3); s*ee Kurth Ranch*, 511 U.S. at 783 (finding that the tax was levied on goods that were no longer in possession of the taxpayer and "never lawfully possessed," which gave the drug tax "an unmistakable punitive character").

[120] Cruz, *supra* note 37, at 4A.

[121] TENNESSEE DEPARTMENT OF REVENUE, REVENUE COLLECTIONS (Dec. 2005), http://state.tn.us/revenue/pubs/2005/coll200512.pdf; REVENUE COLLECTIONS (June 2005), http://state.tn.us/revenue/pubs/2005/coll200506.pdf (last visited June 15, 2006). These figures only calculate actual collections and do not factor in assessments as a result of the tax. *Id.*

dosage units of ecstasy.[122] This information also suggests that the tax is not recovered as easily as predicted.

Notably, the state spent $1.2 million to establish the TDOR agency that administers the unauthorized substance tax. The yearly maintenance of this agency was projected to cost an additional $800,000.[123] Although it may be premature to evaluate the successfulness of the tax, the early returns are definitely not consistent with initial projections.

Diminutive returns also raise questions about the validity of the tax. Not surprisingly, only $1,300 in tax stamps were collected in the tax's first year of existence.[124] These returns should cause concern over whether the unauthorized substance tax is arbitrary. If drug dealers are not purchasing unauthorized substance tax stamps, and the tax is only assessed and never recovered, then the presumption may be that Tennessee's unauthorized substance tax is clearly to punish drug dealers.

VII. CONCLUSION

Tennessee's unauthorized substance tax has the potential to raise constitutional concerns each time it is enforced. Undoubtedly, the tax will come under scrutiny for the abridgment of the Fifth Amendment rights against self-incrimination and double jeopardy. Additionally, Tennes-

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[122] TENNESSEE BUREAU OF INVESTIGATION, ANNUAL REPORT (2004-2005), at 5, http://www.tbi.state.tn.us/Info%20Div/Color%20-%20TBI%2004-05%20Annual%20Report.pdf (last visited June 15, 2006).

[123] Cruz, *supra* note 37, at 1A.

[124] TENNESSEE DEPARTMENT OF REVENUE, REVENUE COLLECTIONS (Dec. 2005), http://state.tn.us/revenue/pubs/2005/coll200512.pdf; REVENUE COLLECTIONS (June 2005), http://state.tn.us/revenue/pubs/2005/coll200506.pdf (last visited Jun. 15, 2006). The purchase of $1,300 worth of tax stamps does not necessarily signify that those stamps were purchased to affix to an unauthorized substance. Those stamps could have been purchased for other reasons (*e.g.*, as collector's items).

see has not streamlined a process to recover revenue from the tax. If the unauthorized substance tax is to remain under Tennessee law, the State of Tennessee must ensure that the tax does not have any characteristics that would lead the general public to believe its purpose is arbitrary or abusive of constitutional rights. Because of these concerns, the Tennessee Legislature should reconsider the legitimacy of Tennessee's unauthorized substance tax.

THE CONFUSION OF *PHILIP MORRIS*: HOW THE SUPREME COURT CAME TO HOLD THAT PUNITIVE DAMAGES CANNOT BE USED TO PUNISH FOR HARM TO NON-PARTIES, BUT THAT JURORS ARE ALLOWED TO CONSIDER HARM TO NON-PARTIES WHEN DECIDING TO IMPOSE PUNITIVE DAMAGES

Anne Passino

I. INTRODUCTION

In *Philip Morris USA v. Williams*,[1] the United States Supreme Court examined the constitutional propriety of a large punitive damages award levied against a defendant tobacco company in favor of a single plaintiff. A jury had awarded $821,000 in compensatory damages and $79.5 million in punitive damages to the widow of a heavy cigarette smoker for her husband's smoking-related death because the tobacco company knowingly and falsely promoted smoking as safe.[2] The Court held that permitting a jury to base any part of a punitive damages award upon a desire to punish the defendant for harming non-parties amounted to a taking of "property" from the defendant in contravention to the Constitution's Due Process Clause.[3]

In granting review of *Philip Morris*, the Supreme Court attempted to clarify what a jury may properly consider when determining a punitive damages award. Unlike other recent punitive damages cases, the Court asked, independently of whether the award could be considered "grossly excessive," only whether such a large award to a

[1] Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).
[2] *Id.* at 1061.
[3] *Id.* at 1060.

single plaintiff[4] offended due process.[5] The Court concluded that although it is constitutionally acceptable for a jury to consider the potential and actual harm to non-parties as probative evidence of reprehensibility, a jury must not use its verdict to punish potential or actual harm to non-parties.[6] In at least the context of mass torts, *Philip Morris* purports to satisfy the substantive due process concerns of arbitrariness and unfairness with a procedural mechanism.[7]

This synopsis argues that *Philip Morris*, which has been characterized as a boon to both corporations and plaintiffs, does no more than re-cast a "distinction without a difference,"[8] leaving jurors with little more guidance than previous punitive damages jurisprudence provided. By creating a procedural mechanism that variously permits and prohibits jurors from using the same evidence in their calculation of punitive damages, the Court has ensured that it will continue to revisit and revise this area of the law.

II. DEVELOPMENT OF PUNITIVE DAMAGE ANALYSIS

A. *A Brief History of Punitive Damage Jurisprudence*

The modern era of Supreme Court punitive damages jurisprudence began in 1991 when, in *Pacific Mutual*

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[4] *Id.* at 1066 (Stevens, J., dissenting). However, it should be noted that a state statute would have required that the punitive damages awarded to this single plaintiff be subject to a state statute that makes such awards payable in whole or in part to the State, rather than to the private litigant. *Id.* (citing OR. REV. STAT. § 31.735(1) (2003)).

[5] *Id.* at 1063.

[6] *Id.* at 1064, 1065.

[7] *Id.* at 1065.

[8] Editorial, *Class Actions in Drag: The Supreme Court Splits More Differences on Punitive Damages*, WALL ST. J., Feb. 21, 2007, at A16, *available at* http://www.opinionjournal.com/forms/printThis.html?id=110009694.

Life Insurance Co. v. Haslip,[9] the Court attempted to settle the "long-enduring debate" about the propriety of punitive damages.[10] Prior to this decision, the Court repeatedly declined to address whether the Due Process Clause limited punitive damages awards.[11] Instead, trial courts and juries were guided by the common law.[12] "Under the traditional common-law approach, the amount of the punitive award [was] initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct."[13] And, in large part due to the longstanding history of this approach, the Court rejected challenges that punitive damages necessarily violated due process.[14]

To buttress its conclusion that punitive damages are not per se violative of either the Due Process or Excessive Fines Clauses of the Constitution, the Court pointed to the many "enactments during the period between 1275 and 1753 [that] provided for double, treble, or quadruple damages."[15] This ancient calculation of "reasonableness" formed the basis for the Court's twentieth-century assertion that an award four times the amount of the awarded compensatory damages, "may be close to the line . . . [of] constitutional impropriety."[16] Although larger awards have

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[9] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).
[10] *Id.* at 8.
[11] Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 430 (2004).
[12] *Id.* at 432.
[13] *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15.
[14] *Id.* at 40 (Kennedy, J., concurring) ("Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair.").
[15] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581 (1996).
[16] *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24.

since been upheld, the Court's due process analysis retains its ratio-based common law roots.

B. *The Court Acknowledges Due Process and Sets Up a Three-Guidepost Test for Excessiveness*

In *Haslip*, the Supreme Court first acknowledged that the Due Process Clause imposes at least some procedural constraints on the size of punitive damages.[17] There, because an instruction guided the jury's discretion[18] and state common-law required judicial review[19] of the award's excessiveness, the Court was satisfied that the defendant had received procedural due process.

Substantive due process was addressed two years later in *TXO Productions Corp. v. Alliance Resource Corp.*[20] In *TXO*, the Court upheld a punitive award that was nearly 526 times larger than the compensatory award, declining to find the award "grossly excessive."[21] "It is appropriate to consider the magnitude of the *potential harm*

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[17] Franze, *supra* note 11, at 433.

[18] *Haslip*, 499 U.S. at 19-20 ("The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory. . . . ").

[19] *Id.* at 20 ("[T]rial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' Among the factors . . . [for consideration] are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'desirability of discouraging others from similar conduct,' the impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'"). Judicial review remains a required feature of punitive damages claims. *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution that prohibited – with limited exceptions – judicial review of punitive damage awards for excessiveness).

[20] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

[21] *Id.* at 454, 462.

that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."[22] Justifying such a large departure from the four-to-one ratio, Justice Kennedy noted that "a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so."[23]

Three years later, in *BMW of North America, Inc. v. Gore*,[24] the Supreme Court reversed a punitive damages award. In so doing, the Court articulated three "guideposts" to determine whether an award is unconstitutionally excessive under the Due Process Clause such that the defendant cannot be said to have "fair notice" of punishment and penalty: (1) "the degree of reprehensibility" of the defendant's conduct, (2) "the disparity between the harm or potential harm suffered . . and [the] punitive damages award," and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[25] At least in part because the *BMW* jury had improperly been permitted to consider similar, but lawful, out-of-state conduct in its award calculation, the Court concluded that the award was excessive.[26] The Court did not address

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[22] *Id.* at 460. In this case, the claim was brought in response to a failed fraudulent scheme, so the Court opined that the ratio between punitive and compensatory damages would be less "shocking" had the scheme been successful. *Id.* at 462.

[23] *Id.* at 467 (Kennedy, J., concurring).

[24] BMW of N. Am., Inc. v. Gore, 517 U.S. 562 (1996).

[25] *Id.* at 574-75. In his dissent, Justice Scalia suggests that these "guide posts" are worthless because, "the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed." *Id.* at 599 (Scalia, J., dissenting).

[26] *Id.* at 571, 573.

whether a jury may consider out-of-state unlawful conduct.[27]

C. *Post*-BMW *Clarifications Leading up to* State Farm

With *BMW*, the Court had finally established standards for post-verdict review of punitive damages awards. However, lower courts came to divergent conclusions about how to interpret and implement the "guideposts," and the Court was criticized for not having provided true guidance and for leaving many questions unanswered.[28] Unfortunately, the next punitive damages case did not enable the Court to answer substantive questions about the guideposts, though it did set the standard of review for appellate courts "considering the constitutionality of the punitive damages award."[29] In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court reasoned that because punitive damages are "quasi-criminal" and non-factual determinations,[30] appellate courts should apply a *de novo* standard of review, as they do in "analogous cases" where deprivations of life, liberty, and property are at stake.[31] The Court explained

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[27] *Id.* at 573 n.20.

[28] Franze, *supra* note 11, at 428 n.29.

[29] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 426 (2001).

[30] *But see id.* at 446, 445 (Ginsburg, J., dissenting) (arguing (1) that "a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings and (2) that the proper standard is abuse of discretion because of both the Seventh Amendment and the differences between a trial court's experience in the courtroom and an appellate court's removed vantage point).

[31] *Id.* at 434. As in previous punitive damages cases, Justices Thomas and Scalia dissented, taking the position that the Constitution does not limit punitive damages awards; in this case, however, Justice Thomas agreed with the majority that the proper standard was *de novo* while Justice Scalia only conceded that *de novo* was the proper standard

that *de novo* review is particularly appropriate in areas of the law where the standards "acquire content only through application," so that independent appellate review helps "to maintain control of, and to clarify, the legal principles," and "'unify precedent' and 'stabilize the law.'"[32]

Then, in 2003, the Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell,*[33] a case in which a punitive damages award 145 times larger than the compensatory damages award was held to be unconstitutionally excessive under each of the *BMW* guideposts.[34] Although the Court found the case to be "neither close nor difficult,"[35] it clarified that to determine "reprehensibility," one should consider whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evidence an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[36]

As these factors relate to similar, lawful out-of-state conduct with a "nexus" to the plaintiff, the Court stated that such evidence of reprehensibility may be considered as demonstrative of "deliberateness and culpability," but, however probative, it may not be used to punish.[37] Punish-

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because it best comported with precedent from which he originally dissented in favor of abuse of discretion. *Id.* at 443-44.

[32] *Id.* at 436.

[33] State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408 (2003).

[34] *Id.* at 418.

[35] *Id.* at 418.

[36] *Id.* at 419.

[37] *Id.* at 422.

ing for non-party harm would violate due process because one plaintiff's claim would serve as proxy for improperly arguing "the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis . . . ."[38]

Finally, the *State Farm* Court reviewed the proper standard of analysis for ratios of punitive to compensatory awards and concluded that, "[s]ingle-digit multipliers are more likely to comport with due process . . . ."[39] Upward departures may be possible, the court allowed, where (1) "a particularly egregious act has resulted in only a small amount of economic damages," (2) "the injury is hard to detect," or (3) "the monetary value of non-economic harm might have been difficult to determine."[40] Combined with the Court's latest clarification about ratio-calculations, for three years, *State Farm* permitted the inference that *un*lawful out-of-state conduct and resulting harm to non-parties, might be properly considered by a fact-finder and used to increase punitive damages under the "reprehensibility" guidepost.

III. *PHILIP MORRIS*'S PROCEDURAL HISTORY

A. *Pre*-State Farm *Trial and Appellate Review*

Mayola Williams, the widow of Jesse Williams, a smoker, brought suit against Philip Morris USA for "negligence and fraud, asserting a causal connection between Jesse Williams' smoking habit and his death."[41] At trial, a jury found that Philip Morris, the manufacturer of the deceased's favorite cigarette brand, had been negligent and

[38] *Id.* at 423.
[39] *Id.* at 425.
[40] *Id.* at 425.
[41] Williams v. Philip Morris Inc., 127 P.3d 1165, 1167 (Or. 2006).

had engaged in deceit.[42] The trial judge rejected the defendant's suggested instruction on punitive damages[43] and instead instructed the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."[44] The jury then awarded the plaintiff $821,000 in compensatory damages for the negligence and fraud claims and $79.5 million in punitive damages for the

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[42] *Philip Morris*, 127 S. Ct. at 1061.

[43] The proposed jury instructions read:

> If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.
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> (1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.
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> . . . . .
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> (2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct -- that is, how far the defendant has departed from accepted societal norms of conduct.

Philip Morris, 127 S. Ct. at 1068-69.

[44] *Philip Morris*, 127 S. Ct. at 1061.

fraud claim.[45] The trial judge remitted the punitive damages award to $32 million which, after both sides appealed, was restored by the Oregon Court of Appeals to the full $79.5 million found by the jury.[46] After the Oregon Supreme Court denied review, the U.S. Supreme Court granted certiorari and ordered that the case be remanded to the Oregon Court of Appeals in light of its recent *State Farm* holding.[47]

B. *The State Courts Attempt to Comply with* State Farm

Upon remand, the Oregon Court of Appeals upheld its prior findings, prompting the Oregon Supreme Court to grant review.[48] There, Philip Morris argued that the jury instruction on punitive damages made it likely that the $79.5 million award was a punishment for harms to persons other than the plaintiff, in violation of the Due Process Clause.[49] Like the state appellate court, the Oregon Supreme Court rejected Philip Morris' arguments, finding the punitive damage award not "grossly excessive" because the Constitution does not prohibit a state jury from using punitive damages to punish harm caused to non-parties by the defendant.[50] Philip Morris then petitioned the U.S. Supreme Court for certiorari which the Court again granted.

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[45] *Id.* at 1061; *Williams*, 127 P.3d at 1171.
[46] *Philip Morris*, 127 S. Ct. at 1061.
[47] *Id.*
[48] *Id.*
[49] *Id.* The defendant also argued that the nearly 100 to 1 ratio of the punitive damages award to the compensatory damages award exceeded the traditional and suggested maximum of 9 to 1 ratios that "are more likely to comport with due process" because they demonstrate a "reasonable relationship" between the harm suffered by the plaintiff. *Id.* at 1061 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575-85 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).
[50] *Philip Morris*, 127 S. Ct. at 1062.

C. *The Supreme Court Grants Review for the Second Time and Establishes a New Rule*

Philip Morris raised two issues in its appeal: (1) whether "Oregon had unconstitutionally permitted it to be punished for harming nonparty victims," and (2) "whether Oregon had in effect disregarded 'the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.'"[51] However, the U.S. Supreme Court structured its analysis so that by answering the first question, it did not need to answer the second question.[52]

Writing for the Court, Justice Breyer began with the proposition that the purpose of punitive damages is to "punish unlawful conduct and deter its repetition,"[53] but concluded that there is "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others."[54] As such, *Philip Morris* holds that punitive damage awards must be examined under a "constitutional standard"[55] that permits evidence of harm to others to be used in the jury's assessment of reprehensibility but that prevents such evidence from being used in the jury's assessment of punitive damages.

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[51] *Id.* at 1062.

[52] *See id.* at 1063 ("Because we shall not decide whether the award here at issue is 'grossly excessive,' we need now only consider the Constitution's procedural limitations.").

[53] *Id.* at 1062.

[54] *Id.* at 1063. To clarify, the Court says that *State Farm* permitted the consideration of potential harm to the plaintiff alone and that *BWM* left the question open, though "punitive damages calculations [described by the Court as "error-free"] likely included harm to others in the equation." *Id.* at 1063.

[55] *Id.* at 1065.

IV. "CONSTITUTIONAL TORT REFORM": MORE GUIDELINES WITHOUT MORE GUIDANCE

A. *Private Plaintiffs and the Problem of Implementation*

Philip Morris is the unfortunate heir of the problems inherent in previous Supreme Court opinions on punitive damages.[56] Despite the evolving, complex standards propounded by the Court to help evaluate punitive damage awards for "gross excessiveness," reviewing courts still have little more guidance than an "I know it when I see it" standard.[57] Because the Court has not formulated standards that produce predictable results,[58] it must repeatedly revise

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[56] Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law–Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1244 (2006) ("The Court's recent punitive damages cases are, as a group, the least consistent with the traditional model [of adjudicating cases]. They provide little prediction force, tread the most oppressively on state power, and, in general aspects, lack reasoned or persuasive analytical bases.").

[57] In *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993), Justice O'Connor wrote in her dissenting opinion that:

> In my view, due process at least requires judges to engage in searching review where the verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion. As Justice Stevens observed in a different context, "one need not use Justice Stewart's classic definition of obscenity -- 'I know it when I see it' -- as an ultimate standard for judging" the constitutionality of a punitive damages verdict "to recognize that the dramatically irregular" size and nature of an award "may have sufficient probative force to call for an explanation."

[58] In *State Farm*, the Utah Supreme Court attempted to apply the *BMW* standards (which caused it to reinstate the $145 million punitive damages award), but the Supreme Court granted certiorari and not only found the award excessive in light of the same standards but stated that such a determination was "neither close nor difficult." *State Farm*, 538

its substantive due process analysis which consequently grows more nuanced with each case. Paradoxically, these are nuances that Supreme Court justices[59] and law professors[60] struggle with but that jurors must implement.

As a result of the confused precedent, cries for further "tort reform" are frequently the response to large punitive damages awards.[61] However, to contextualize the size of the awards and to understand the difficulty that the Court faces in crafting true reform, one must first accept that when a defendant is a major player in the globalized economy and perpetrates a harm on countless people, this is a very different claim than that with which traditional negligence analysis dealt.[62] So, although reform has been sought through state and federal legislatures, in cases like *Philip Morris*, the U.S. Supreme Court has also been involved in "constitutional tort reform."

Judicially-initiated "tort reform" is perhaps best understood as the Court's attempt at checking the theoretical-

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U.S. at 418. Similarly, when the Supreme Court remanded *Philip Morris* to the Oregon Supreme Court with directions to reevaluate the $79.5 million punitive damages award in light of *State Farm*, the Oregon Supreme Court found the full amount justified under U.S. Supreme Court precedent, but the U.S. Supreme Court reversed and found the award violated due process. *Philip Morris*, 127 S. Ct. at 1060.

[59] *Philip Morris*, 127 S. Ct. at 1067 (Stevens, J., dissenting).

[60] Posting of Ethan Leib to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2007/02/punitives_and_p.html (Feb. 21, 2007, 04:10 EST).

[61] *See, e.g.*, Franze, *supra* note 11, at 423 ("A jury recently awarded a single plaintiff $28 billion in punitive damages. That's *billion*, as in nine zeros–all to one person. Given the frequent reports of multimillion dollar verdicts, it is easy to become desensitized to 'skyrocketing' punitive damages awards.").

[62] *See* Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779, 811-12 (2004) ("In applying the tenets of the modern concept of due process to the frequent and often large punitive damage awards imposed by state courts today, the Court has found it necessary to create a substantial new body of constitutional law.").

ly unlimited liability to which individual defendants like State Farm and Philip Morris are subjected when each victim of a mass tort is allowed to bring a separate action against a defendant corporation. Ideally, a balance should be struck which would permit individual victims of mass torts to have their "day in court" but which would also try to protect defendants from arbitrary, excessive punishments and "civil double jeopardy."[63] Commentators disagree as to whether *Philip Morris* helps resolve this paradox of scale[64] and in whose favor.[65]

The practical issue the Court faced in *Philip Morris*, then, was how to deal with evidence of aggregate harm to non-parties when such harm formed the basis for the plaintiff's suit. In consumer-manufacturer suits, the Court had

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[63] *Cf. BMW*, 517 U.S. at 592-93 ("Some economists . . . have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from a wrongdoer the total cost of the harm caused. . . . Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.") (Breyer, J., concurring).

[64] Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE, Feb. 21, 2007, *available at* http://www.slate.com/toolbar.aspx?action=print&id=2160286 ("[The opinion] is not an example of clarity. It is, instead, what happens when you're lucky enough to be in a position to delegate to others the implementation of unworkable rules.").

[65] *Compare* Editorial, *Shielding the Powerful*, N.Y. TIMES, Feb. 21, 2007, at A20, *available at* http://www.nytimes.com/2007/02/21/opinion/21wed1.html?ei=509 ("[The decision] is a win for corporate wrongdoers. It stretches the Constitution's guarantee of due process in a way that will make it easier for companies that act reprehensibly to sidestep serious punishments."), *with* Editorial, *Reigning in Juries*, L.A. TIMES, Feb. 22, 2007, at A18, *available at* http://www.latimes.com/news/printededition/asection/la-ed-tobacco22feb22,1,5904297.story ("The U.S. Supreme Court went further this week – though not far enough – in reigning in juries in civil cases that award outlandish punitive damages . . . . Breyer has brought some clarity to a confused area of the law.").

to decide how large a role evidence that Philip Morris produced and marketed cigarettes to more people than Mr. Williams should play in Mr. Williams' private suit against Philip Morris. The Court's solution is to allow the evidence to be presented but to guide the jury's discretion and thereby prevent the jury from holding a defendant accountable for the entire universe of the defendant's harmful conduct. Evidence of harm to non-parties may be used, the Court holds, to show reprehensibility; it may not be used, however, "to punish a defendant directly on account of harms it is alleged to have visited on nonparties."[66]

There is, however, a "practical problem"[67] created by the *Philip Morris* holding: how will a reviewing court know if the jury did, in fact, use the properly admitted evidence for an improper purpose? Without specifying the appropriate procedure, the Court cautions that states must "provide *some* form of protection" in the form of procedures that prevent "an unreasonable and unnecessary risk of any such confusion occurring."[68] This will not be an easy task. The jury instruction proffered by Philip Morris but ultimately rejected by the trial court judge contained what would turn out to be the majority's distinction, but Justice Ginsburg warns that, "A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge."[69] If this is true, it would appear that rather than buttressing procedural safeguards, *Philip Morris* further entrenches the Court in its position of fighting excessive judgments one case at a time with *de novo* judicial review[70] and "extra-constitutional" reasoning.[71]

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[66] *Philip Morris*, 127 S. Ct. at 1064.
[67] *Id.* at 1065.
[68] *Id.* at 1065.
[69] *Id.* at 1069 (Ginsburg, J., dissenting).
[70] *Cf.* Editorial, *Class Actions in Drag: The Supreme Court Splits More Differences on Punitive Damages*, WALL ST. J., Feb. 21, 2007, at A16, *available at*
http://www.opinionjournal.com/forms/printThis.html?id=110009694

Large punitive damages awarded to individual plaintiffs are the most susceptible to being overturned post-*Philip Morris* because the Court did not provide adequate guidance about what safeguards will pass constitutional muster. Even–perhaps especially–if the jury is given instructions based on the Court's own language distinguishing between reprehensibility and punishment, defendants will rightfully argue that any evidence of large-scale harm offered in one aspect of the trial will likely bleed over into the jury's determination of punitive damages.

B. Philip Morris *May Require Class Actions to Punish Corporate Wrongdoing*

Philip Morris is also significant because it may mark the beginning of the constitutionalization of class actions for mass tort lawsuits. By prohibiting juries from punishing for harm to "strangers to the litigation,"[72] the Court effectively holds that aggregate harm may only be punished when a critical mass of victims bring a joint suit.[73]

As the author of *Philip Morris*, Justice Breyer emphasizes procedural and, arguably,[74] quasi-substantive, due

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(arguing that the Court's reliance on judicial discretion rather than rooting decisions in the Constitution improperly privileges the judiciary over other branches).

[71] Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE, Feb. 21, 2007, *available at* http://www.slate.com/toolbar.aspx?action=print&id=2160286.

[72] *Philip Morris*, 127 S. Ct. at 1063.

[73] In addition, under the *Philip Morris* rule, it is possible that any harm that resulted from Philip Morris' conduct that was not victim-specific (like an increase in teen smoking over a period of time) could not be punished.

[74] *See Philip Morris*, 127 S. Ct. at 1067 (Thomas, J., dissenting) ("It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the

process concerns like adequate notice and equal application of the law. A preview of the opinion's procedural perspective can be seen in Justice Breyer's *BMW* concurrence.[75] In the name of procedural due process,[76] Justice Breyer takes an individualized perspective of harm, so that the scope of Philip Morris' harmful conduct is relevant to the Court only insofar as it affects the present plaintiff. Thus, the Court does not make analytical adjustments to the procedural due process formula to compensate for the unique relationship between consumers and manufacturers, a relationship where harm accrues in individuals despite the fact that companies do not specifically target individuals, except insofar as each individual forms an indistinguishable part of the collective consumer class.

In *TXO*, the Court had suggested that "It is appropriate to consider . . . the possible harm to other victims that might have resulted if similar future behavior were not deterred."[77] In order to overrule *TXO* and *BMW*,[78] the *Philip Morris* Court imported language from *Lindsey v. Nor-*

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substantive due process regime this Court has created for punitive damages").

[75] BMW of N. Am., Inc. v. Gore, 517 U.S. 562, 587 (1996) (Breyer, J., concurring) ("This constitutional concern [that there be legal standards for punitive damages], itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.").

[76] *Philip Morris*, 127 S. Ct. at 1063 (naming the "fundamental due process concerns" to be "risks of arbitrariness, uncertainty and lack of notice").

[77] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993).

[78] *Philip Morris*, 127 S. Ct. at 1063 (arguing that *TXO* and *BMW* do not conflict with the Court's current holding). *But see* Posting of Dan Markel to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2007/02/philip_morris_u.html (Feb. 20, 2007, 16:40 EST) ("The Court today invokes TXO and BMW as support or silence for its position that harm to non-parties may not be considered other than to determine reprehensibility. This is only possible by ignoring the language quoted above from TXO.").

met:[79] "[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'"[80] *Lindsey* involved a challenge to a landlord-tenant statute.[81] Referencing language from such a small-scale dispute involving no punitive damages does not appear apposite to a claim like that in *Philip Morris* which spanned the twentieth century and affected millions of consumers. Although it is true that *Lindsey* is often invoked by defendants in large class actions, *Philip Morris* is the fist time it has appeared in the Court's punitive damages cases.[82]

The Court's use of *Lindsey* could suggest that plaintiffs like Mrs. Williams cannot avoid procedural due process violations by joining as many parties as possible to the suit, because if there are too many co-plaintiffs, a defendant can argue that any punitive damages will have to be based on statistical evidence and that statistics and formulas of damage to aggregate plaintiffs do not enable defendants to present "every available defense."[83] Given these considerations, the practical significance of the Court's reliance on *Lindsey* will depend on how broadly or narrowly the

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[79] Lindsey v. Normet, 405 U.S. 56, 66 (1972).

[80] *Philip Morris*, 127 S. Ct. at 1063 (quoting *Lindsey*, 405 U.S. 66). The Court explained that if Philip Morris were punished for harm to non-parties, it could not defend by showing that the victim was not entitled to damages "because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary. *Id.* at 1063. However, this argument ignores that punitive damages are to punish and deter wrongful conduct and that in this example, Philip Morris' conduct was deceptive regardless of whether individual smokers were deceived.

[81] *Lindsey*, 405 U.S. at 58 (quoting from a case in which a surety company claimed a due process violation because of lack of notice of a bond hearing).

[82] Posting of Mark Moller to Cato @ Liberty, http://www.cato-at-liberty.org/2007/02/21/philip-morris-v-williams-and-class-actions (Feb. 21, 2007, 14:07 EST).

[83] *See generally id.* (analogizing from *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir.2007)).

language of "every available defense," is read by the Court. Thus, for now, it would appear that in order to effectuate the punishment and deterrence purposes of punitive damages, plaintiffs must unite as a class, but a class that is not too large that individual defenses cannot still be offered.

C. *The Effect of the Changing Face of the Supreme Court on Punitive Damages*

Justice Stevens, the author of *Cooper Industries*, *BMW*, and *TXO*, dissented in *Philip Morris*. In his dissent, Justice Stevens refers to the majority's holding as a "novelty" whose "nuance eludes" him.[84] The proper analysis, he suggests, would acknowledge the separate purposes of compensatory and punitive damages, because, "To award *compensatory damages* to remedy such third-party harm might well constitute a taking of property,"[85] but that *"punitive damages* are a sanction for the public harm the defendant's conduct has caused on threatened."[86] His dissent is significant not only because Justice Stevens is the oldest member of the Court and the author of three major punitive damages decisions of the 1990's, but also because Justice Stevens had been part of the *State Farm* majority that emphasized "single-digit"[87] ratios as the measure of constitutionality; here, by comparative omission, he would have held the *Philip Morris* one hundred to one ratio acceptable. With the replacements of Justices Rehnquist and O'Connor, it is possible that higher ratios, even where the compensatory damages are as high as in *Philip Morris*, might be okay

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[84] *Philip Morris*, 127 S. Ct. at 1066-67 (Stevens, J., dissenting).
[85] *Id.* at 1066 (Stevens, J., dissenting) (emphasis added).
[86] *Id.* at 1066 (Stevens, J., dissenting) (emphasis added). By comparison, Justice Thomas dissents because he characterizes the majority's holding as pretending to be procedural when it is "simply a confusing implementation of the substantive due process regime this Court has created for punitive damages." *Id.* at 1067 (Thomas, J., dissenting).
[87] *State Farm Mut. Auto. Ins.v. Campbell*, 538 U.S. 408, 425 (2003).

(so long as the jury does not consider extra-punitive information).

Three other justices dissented in *Philip Morris*, but none joined Justice Stevens' reasoning. Indeed, Justice Ginsburg, joined by Justices Thomas and Scalia, accepted the majority's distinction as cogent but found that the State properly guided the jury's discretion in this case.[88] In effect, then, eight of nine justices agreed to constitutionalize another element of punitive damages analysis. Highlighting the ideological inconsistencies[89] so prevalent in punitive damages cases and getting a jab in at her colleagues, Justice Ginsburg proclaimed that she would, "accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent."[90]

As for the newest members of the Court, because *Philip Morris* both sets aside a jury-formulated, state court-sanctioned $79.5 million judgment and further constitutionalizes punitive damages, it is perhaps unexpected that Justice Alito and Chief Justice Roberts joined Justice Breyer's majority opinion. The commentators are split on the significance of the newest justices' alignment with the majority: some claim it "demonstrate[s] their awareness that when punitive-damage awards grow large enough, real issues of justice and fairness (and thus due process) are implicated,"[91] while others chide the conservative justices

[88] *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

[89] For another inconsistency regarding the principles of federalism and comity, procedural due process seeks to minimize "the risk that punitive damages awards . . . impose one State's (or one jury's) policies (*e.g.*, banning cigarettes) upon other States," *id.* at 1064, but in the name of quashing arbitrary punitive damage awards, the Court overturned a judgment that the highest court in Oregon upheld. As such, the Court privileged a federal-level consistency among the states' awards over federalism itself.

[90] *Id.* at 1069 (Ginsburg, J., dissenting).

[91] Editorial, *Class Actions in Drag: The Supreme Court Splits More Differences on Punitive Damages*, WALL ST. J., Feb. 21, 2007, at A16,

for disregarding the "bedrock conservative policy that legislatures, not judges, make these policy calls."[92] In this five to four split decision, Justice Kennedy appears to have broken the tie, as has become his wont on the Roberts Court. Interestingly, two conservative and two liberal justices joined the majority while two conservative and two liberal justices dissented. As the hypothesized tie-breaker, Justice Kennedy, the author of *State Farm*, may have joined the majority on the basis of finding the ratio of compensatory to punitive damages excessive. Alternatively, *Philip Morris* may truly signal a new course for punitive damages led by the newest members of the Court.

V. CONCLUSION

Justice Brennan's concern that "punitive damages are imposed by juries guided by little more than an admonition to do what they think is best,"[93] was articulated before the Supreme Court attempted to guide juries' discretion, but after nearly twenty years of trying, juries are now guided by a combination of confusing directions with fine distinctions. *Philip Morris*, an opinion untried by application, appears to favor (1) corporate defendants, by limiting the evidence that individual plaintiffs can use to bolster punitive damage awards, and (2) classes of plaintiffs, by not ruling that the $79.5 million award was per se excessive, so long as the jury's discretion was guided. Like previous punitive damages cases, *Philip Morris* grabbed

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available at http://www.opinionjournal.com/forms/printThis.html?id=110009694.

[92] Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE, Feb. 21, 2007, *available at* http://www.slate.com/toolbar.aspx?action=print&id=2160286.

[93] Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 432 (2004) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)).

headlines with its multi-million dollar reversal of fortunes, but the true significance will likely be more subtle as lower courts attempt to implement the Court's holding.

KELO V. CITY OF NEW LONDON: THE SWEEPING GRANT OF GOVERNMENT POWER AND THE CONDEMNATION OF AMERICAN PROPERTY RIGHTS

Ian P. Hennessey

On June 23, 2005, the United States Supreme Court issued its ruling in the now infamous case of *Kelo v. City of New London*.[1] In its first major ruling on eminent domain since 1984,[2] the Court decided whether a city's exercise of its eminent domain power to transfer property to private developers complied with the "public use" requirement of the Fifth Amendment.[3]

In 1984, the Court held that under the Fifth Amendment, a government may use its eminent domain power as long as it is "rationally related to a conceivable public purpose" as defined by the legislature.[4] Because of the Court's ruling, virtually no check on government use (or abuse) of eminent domain to seize property from private individuals and transfer it to private entities now exists.

This article is divided into three main sections. In the first section, I will briefly summarize the development of law concerning eminent domain, focusing mainly on cases cited by the Court in its opinion. In the second section, I will summarize the *Kelo* case, beginning with its factual background and lower court decisions and ending with a summary of the Court's treatment of the case. In the third section, I will analyze and critique the Court's reasoning as well as the alternative approaches offered by the other Justices. In the process, I will argue that the Court's deference to legislative determinations is not only a flawed

[1] Kelo v. City of New London, 545 U.S. 469 (2005).
[2] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
[3] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
[4] *Midkiff*, 467 U.S. at 241.

argument but also threatens to diminish the fundamental right of property.

DEVELOPMENT OF THE LAW

Nowhere in the Constitution is the power of eminent domain enumerated. Rather, the power is implied by the Fifth Amendment,[5] which states, in relevant part, that private property shall not be "taken for public use, without just compensation."[6] The scope of "public use" was not elaborated by the Framers.

Early Court rulings supported the notion that "public use" was interpreted narrowly. In *Calder v. Bull*,[7] Justice Chase declared that a legislative act that purports to "take *property* from A. and give it to B" would be "contrary to the *great first principles* of the *social compact*" and "cannot be considered a *rightful exercise* of *legislative* authority."[8]

By the dawn of the twentieth century, the Court gradually abandoned the natural law principles articulated by Justice Chase in favor of what the Court now refers to as "the broader and more natural interpretation of public use as 'public purpose.'"[9] In *Clark v. Nash*,[10] the Court deter-

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[5] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[6] *Id.*

[7] Calder v. Bull, 3 U.S. 386 (1798).

[8] *Id.* at 388.

[9] Kelo v. City of New London (*Kelo IV*), 545 U.S. 469, 480 (2005); *see, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896).

mined whether a taking in which a state government condemned privately owned land to be used as an irrigation ditch to irrigate other privately owned land violated the "public use" requirement of the Fifth Amendment.[11] The Court upheld the taking by deferring to the determinations of the state courts.[12] Similarly, in *Strickley v. Highland Boy Gold Mining Co.*,[13] the Court determined whether a taking in which the state condemned privately owned land to be used as an aerial right of way for a privately held mining company violated the "public use" requirement of the Fifth Amendment.[14] The Court again upheld the taking and emphasized "the inadequacy of use by the general public as a universal test."[15]

By 1916, the abandonment of "use by the general public" as the test for determining "public use" was considered established law.[16] However, the Court maintained that "the question [what is a public use] remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."[17]

In *Berman v. Parker*,[18] the Court considered whether the taking of a non-blighted department store as part of a broader urban renewal project violated the "public use" requirement.[19] Under the proposed redevelopment project, Congress planned to condemn a large blighted area of the District of Columbia for the construction of roads and public buildings and to "lease or sell the remainder as an enti-

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[10] Clark v. Nash, 198 U.S. 361 (1905).
[11] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *Clark*, 198 U.S. at 367.
[12] *See Clark*, 198 U.S. at 369-70.
[13] Strickley v. Highland Boy Gold Mining, Co., 200 U.S. 527 (1906).
[14] *See id.* at 529.
[15] *Id.* at 531.
[16] *See* Mount Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916).
[17] Cincinnati v. Vester, 281 U.S. 439, 446 (1930).
[18] Berman v. Parker, 348 U.S. 26 (1954).
[19] *See id.* at 29-31.

rety or in parts to a redevelopment company, individual, or partnership."[20] Although the petitioner's department store was not blighted, it was nonetheless designated for taking, and the Court upheld the taking.[21] The Court stated that the government's eminent domain power was coterminous with "the police power," the definition of which "is essentially the product of legislative determinations addressed to the purposes of government . . . ."[22] The Court determined that, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ."[23] Therefore, "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[24]

Three decades later, in *Hawaii Housing Authority v. Midkiff*,[25] the Court again considered the "public use" requirement, this time in response to efforts by the State of Hawaii designed to break up the concentration of land ownership in its state by allowing for the transfer of fee simple title from lessors to lessees, at the election of the lessees, through condemnation proceedings.[26] The Court upheld the taking and reiterated that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police power."[27] Therefore, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose," the Court will not hold "a com-

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[20] *Id.* at 30.
[21] *Id.* at 34.
[22] *Id.* at 32.
[23] *Id.*
[24] *Id.*
[25] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
[26] *See id.* at 231-33.
[27] *Id.* at 240.

pensated taking to be proscribed by the Public Use Clause."[28]

THE *KELO* DECISION

The dispute in *Kelo v. City of New London*[29] emerged from a planned redevelopment of the Fort Trumbell area of New London, Connecticut, which suffered from a poor economy and high unemployment.[30] In wake of its worsening economic condition, the city of New London reactivated the New London Development Corporation (NLDC), a private nonprofit entity established to assist the city of New London in planning economic development.[31]

In 1998, the pharmaceutical giant, Pfizer, Inc., announced that it would open a major research facility in the Fort Trumbell area.[32] Hoping to draw momentum for economic revitalization from Pfizer's arrival, the NLDC drafted an integrated development plan that focused on ninety acres of the Fort Trumbell area, including a waterfront conference hotel, a small urban village consisting of restaurants, shops, office space, residences, several marinas, a pedestrian river walk, a state park, a United States Coast Guard Museum, and other proposed improvements.[33] In addition, the NLDC would enter into long-term ground leases with private developers – for nominal rent – in exchange for the developers' promise "to develop the land according to the" plan drafted by the NLDC.[34] The NLDC believed that the plan would revitalize New London's

[28] *Id.* at 241.
[29] Kelo v. City of New London, 545 U.S. 469 (2005).
[30] *See id.* at 472-73.
[31] *See id.* at 473.
[32] *See id.*
[33] *See id.* at 474.
[34] *See id.* at 476 n.4.

economy by creating new jobs and generating tax revenue.[35]

"[A]pproximately 115 privately owned properties," including those owned by the petitioners, were located in the area designated for redevelopment by the NLDC.[36] Of the fifteen properties in the Fort Trumbell area owned by the petitioners, ten were "occupied by the owner or a family member," whereas "the other five [were] held as investment properties."[37] To acquire the land necessary to realize the ambitious development plan, New London authorized the NLDC to condemn land through eminent domain proceedings.[38]

Although the NLDC succeeded in negotiating the purchase of most of the property located in the Fort Trumbell area, it failed to convince the petitioners to sell.[39] In November 2000, the NLDC began condemnation proceedings to acquire the petitioners' properties.[40] Petitioners filed suit claiming, in part, that the proposed taking of their property for a "public benefit" violated the "public use" requirement of the Fifth Amendment.[41] The trial court granted injunctive relief to the petitioners.[42] On appeal, the Supreme Court of Connecticut held that all the proposed takings were valid.[43] The court concluded, *inter alia*, that the proposed takings qualified as a "public use" under both the Connecticut and United States Constitutions,[44] stating that "economic development projects . . . that have the

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[35] *See id.* at 474.
[36] *See id.* at 473-74.
[37] *Id.* at 475.
[38] *See id.*
[39] *See id.*
[40] *See id.*
[41] *See id.*
[42] *See* Kelo v. City of New London (*Kelo I*), No. 557299, 2002 WL 500238, at *112 (Conn. Super. Ct. Mar. 13, 2002).
[43] Kelo v. City of New London (*Kelo II*), 843 A.2d 500, 574 (Conn. 2004).
[44] *Id.* at 527.

public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions."[45] Following the ruling of the Supreme Court of Connecticut, the petitioners appealed to the Supreme Court of the United States, which granted certiorari.[46]

OPINION OF THE COURT

The Supreme Court focused its inquiry on "whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment . . . ."[47] The Court held that the takings "unquestionably serve[d] a public purpose" and therefore, satisfied the "public use" requirement of the Fifth Amendment.[48]

The Court began its inquiry by dismissing as illegitimate any use of the eminent domain power, which attempts to "take the property of A for the sole purpose of transferring it to . . . B," even if paid just compensation.[49] However, the majority emphasized that the Court had "long ago rejected any literal requirement that condemned property be put into use for the general public."[50] By the Court's reasoning, such a narrow view of the "public use" requirement was not only "difficult to administer" but also "impractical given the diverse and always evolving needs of society."[51] Citing its precedent in *Strickley*[52] and

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[45] *Id.* at 520.
[46] Kelo v. City of New London (*Kelo III*), 542 U.S. 965 (2004).
[47] Kelo v. City of New London, (*Kelo IV*) 545 U.S. 469, 472 (2005).
[48] *Id.* at 484.
[49] *Id.* at 477.
[50] *Id.* at 480 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
[51] *Id.*

Clark,[53] among other cases, the Court reaffirmed its rejection of the "narrow test" requiring use by the general public.[54] Instead, the Court chose to embrace what it called "the broader and more natural interpretation of public use as 'public purpose.'"[55] Thus, although conceding that New London was not "planning to open the condemned land . . . to use by the general public" and that the private lessees would not "in any sense be required to operate like common carriers, making their services available to all comers,"[56] the Court concluded that these facts alone did not violate the "public use" requirement.

Rather, the Court turned its analysis to whether the development plan served a "public purpose."[57] Relying on its precedents in *Berman* and *Midkiff*,[58] the Court reaffirmed that "[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[59] As long as "the legislature's purpose is legitimate and its means are not irrational" the Court will not pass judgment "over the wisdom of the takings."[60]

The Court rejected the petitioners' argument for the establishment of a "bright line rule"[61] preventing the transfer of condemned property to private entities, holding that its precedents "foreclose[d] this objection" because "the government's pursuit of a public purpose will often benefit

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[52] *See* Strickley v. Highland Boy Gold Mining, Co., 200 U.S. 527, 531 (1906).
[53] *See* Clark v. Nash, 198 U.S. 361, 368 (1905).
[54] *Kelo IV*, 545 U.S. at 480-81.
[55] *Id.* at 480.
[56] *Id.* at 478-79.
[57] *Id.* at 480.
[58] *Id.* at 484-85.
[59] *Id.* at 480.
[60] *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984)).
[61] *Id.* at 484.

individual private parties."[62] Citing its precedent in *Midkiff*, the Court stressed that a "taking's purpose and not its mechanics" determined "public use."[63]

The Court also rejected the petitioners' argument that economic development takings "should require a 'reasonable certainty' that the expected public benefits will actually accrue."[64] The Court responded that such heightened scrutiny "would represent an even greater departure from our precedent"[65] in which the legislature's stated purpose was subjected only to a rational basis test.[66] The Court determined that "[t]he disadvantages of a heightened form of review are especially pronounced" in economic development takings because the "required postponement of the judicial approval" necessary for such a test would "impose a significant impediment to the successful consummation of many such plans."[67]

ANALYSIS

The *Kelo* ruling presents a twofold, mutually reinforcing problem: (1) no concrete, objective definition of what constitutes a "public use" exists and (2) the "public use" requirement is satisfied solely upon the legislative determination that the use is "public" and that the taking is "legitimate." Thus, the government's power to condemn land through eminent domain is virtually unchecked, and fundamental property rights are at the mercy of the government officials' whims.

To comply with the Fifth Amendment, a taking must be for "public use." The definition of "public use" must be clearly defined to determine the limits on govern-

[62] *Id.* at 485.
[63] *Id.* at 482.
[64] *Id.* at 487.
[65] *Id.* at 487-88.
[66] *Id.*
[67] *Id.* at 488.

ment power. The Court fails to provide such a definition, rather electing to adopt whatever the legislative body determines to be a "public purpose" under its "longstanding policy of deference to legislative judgments . . . ."[68] Indeed, the Court announced that as long as "the legislature's purpose is legitimate and its means are not irrational" the Court will not pass judgment "over the wisdom of [the] takings."[69] In *Kelo*, the sufficient "public purpose" that the NLDC determined was "new jobs and increased tax revenue."[70] In reality, this purported public use was simply the aggregate collection of private benefits (new jobs) and the government benefit of increased revenue (new taxes). The Court announced only one exception to its deference to legislative determinations: circumstances in which the government attempts to condemn privately held land "for the purpose of conferring a private benefit on a particular private party."[71] However, as Justice O'Connor noted, "[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."[72] Thus, as Justice O'Connor noted in her dissent, "it is difficult to envision anyone but the 'stupid staff[er]' failing" the Court's rational basis scrutiny.[73]

For her part, Justice O'Connor suggested a definition of "public use" that attempts to reconcile the majority opinion that she authored in *Midkiff*.[74] Justice O'Connor's proposed test would allow governments to transfer condemned property to private entities only under special cir-

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[68] *Id.* at 480.
[69] *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984)).
[70] *Id.* at 483.
[71] *Id.* at 477 (citing *Midkiff*, 467 U.S. at 245).
[72] *Id.* at 502 (O'Connor, J., dissenting).
[73] *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025-26 n.12 (1992)).
[74] *Midkiff*, 467 U.S. at 231.

cumstances. Thus, takings that transfer condemned property to private entities would still comply with the "public use" requirement if they involve the elimination of "existing property use . . . to remedy harm."[75] Unfortunately, Justice O'Connor's test is equally vulnerable to the deference afforded by the Court to legislative determinations because without a clear definition, "harm" is a subjective standard. In the end, legislatures would merely shift the emphasis of their findings to discover a "harm" rather than a "public purpose." Unless the Court determined a more precise meaning of "harm," or in the alternative, the level of harm needed to justify condemnation, Justice O'Connor's test cannot effectively guarantee the property rights of those whose property is targeted for taking.

As Justice Thomas noted in his dissent, "the most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property . . . ."[76] Under Justice Thomas' approach, takings would only satisfy the "public use" requirement when the public actually used the property.[77] Thus, the extent of a court's inquiry would be simply to determine "whether the government owns" the subject property or whether "the public has a legal right to use, the taken property."[78] Consequently, the traditional power of eminent domain would remain intact, allowing governments to take land for public buildings and for common carriers who serve the public at large. Private property, however, would be protected against transfers to private entities that do not serve the public at large. This approach would prevent the possibility of transfers designed to confer private benefits on certain, favored private

[75] *Kelo IV*, 545 U.S. at 500.
[76] *Id.* at 508 (Thomas, J., dissenting); *see id.* at 506-11.
[77] *Id.* at 521.
[78] *Id.* at 517.

entities with only "incidental public benefits."[79] Although his formulation is strict, Justice Thomas presents the only concrete, objective definition of "public use" that draws a clear line between what a government can and cannot do.

The Court's decision to abstain from an objective definition of "public use" does not only result in the failure to define the outer limits of government power. At the very least, the Court is guilty of begging the question: the legislature's purpose must be public, but the legislature determines what constitutes a public purpose. Allowing the legislature to determine whether the use is "public" and whether the taking is "legitimate" is both unnecessary and unjust. The public interest, as presented by the legislative body, is already represented in the court proceeding by the government's attorneys. It is unnecessary for a court to represent the government's position as well. Furthermore, legislative determination is unjust because no disinterested review of the proposed taking's legitimacy exists. By way of analogy, it would be as if the law required a court to defer to the prosecutor's determination of a criminal defendant's guilt. In this type of situation, how are landowners afforded any meaningful due process under the Fifth Amendment when the Court has stacked the odds so heavily in favor of the government? As Justice O'Connor stated, "[a]n external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning."[80]

Perhaps sensing these problems, Justice Kennedy proposed a "meaningful rational basis" test for a "narrowly drawn category of takings" involving "private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use

[79] *See id.* at 502 (O'Connor, J., dissenting).
[80] *Id.* at 497.

Clause."[81] Kennedy concludes that the Court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . ."[82]

However, it is difficult to see how Justice Kennedy's test is in any way "meaningful." By preserving "the presumption that the government's actions were reasonable and intended to serve a public purpose,"[83] Justice Kennedy's test provides little reason to believe that a property owner could mount a successful challenge to a legislature's stated intentions. Justice O'Connor also criticized Kennedy's test, complaining that it failed to specify "what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not."[84] For his part, Justice Kennedy declined to "conjecture as to what sort of cases might justify a more demanding standard . . . ."[85]

However, Justice Kennedy's reservations, as well as the objections of Justices Thomas and O'Connor, indicate the deeper, far more pernicious problem presented by the majority opinion: virtually no check exists on the government's ability to take property from its citizens based on even the slightest pretense.

The *Kelo* decision, however, was not a revolutionary gesture. The majority opinion is unquestionably consistent with takings precedent, as it has evolved over the last two centuries. Instead, the *Kelo* decision represents the dangerous and perverse culmination of that evolution. The result is that the Takings Clause has emerged as a sword of government power rather than a shield for individual property rights.

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[81] *Id.* at 493 (Kennedy, J., concurring).
[82] *Id.* at 491.
[83] *Id.*
[84] *Id.* at 502 (O'Connor, J., dissenting).
[85] *Id.* at 493 (Kennedy, J., concurring).

Dangerously absent from the Court's analysis is the basic acknowledgment that property is a fundamental right that the Takings Clause shields. James Madison, the architect of the Constitution and the original drafter of the Takings Clause,[86] "feared that the government's power to take property, if left unrestricted, could jeopardize private property rights."[87] Thus, this concern was enshrined: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."[88] In 1792, just months after the ratification of the Bill of Rights, James Madison declared, "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[89] As Justice Thomas correctly noted in his dissent, the Framers understood property as a "natural, fundamental right,"[90] and as such, "it is 'imperative that the Court maintain absolute fidelity to' the [Public Use] Clause's express limit on the power of the government over the individual, no less than with every other liberty express-

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[86] *See* JAMES MADISON, WRITINGS 443 (Jack N. Rakove ed., Literary Classics of the United States, Inc. 1999).

[87] Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1,9 (2006) (citing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 314-15 (1996) ("noting that Madison's 'concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property' and that 'by 1787 a decade of state legislation had enabled Madison to perceive how economic and financial issues could forge broad coalitions across society, which could then actively manipulate the legislature to secure their desired ends'")).

[88] U.S. CONST. amend. V.

[89] MADISON, *supra* note 86, at 515.

[90] *Kelo IV*, 545 U.S. at 510 (Thomas, J., dissenting).

ly enumerated in the Fifth Amendment or the Bill of Rights more generally."[91]

Confronted with the conflict between an expansive government power and an express fundamental right, deference should have been paid to the petitioners' property rights rather than the City's determinations of "public purpose." Although the Court pays tribute to Justice Chase's famous statement in *Calder v. Bull*,[92] which forbids "a law that takes *property* from A and gives it to B,"[93] the Court would do well to acknowledge Justice Chase's immediately preceding statement, which forbids "a law that makes a man *a Judge in his own cause*."[94] Instead, the Court has chosen to make the government the judge in its own cause in determining the existence of a "public use" and for the very purpose of taking property from A and giving it B.

In *Kelo*, the Court breached its duty to protect fundamental individual rights from the government's ambitious and intrusive designs. Although greatly expanding the definition of "public use," the Court simultaneously refused to include any corresponding protection of individual property rights in its analysis. At the very least, the Court's analysis should have balanced legislative interests against the individual property rights of the affected landowners. Although the Court imposes strict demands and heightened scrutiny in virtually every other scenario in which government action impedes on constitutional rights, the Court has proved remarkably timid about applying such protections to property rights in takings cases. However, as James Madison said, "[i]f the United States mean to obtain or deserve the full praise due to wise and just governments,

[91] *Id.* at 507 (internal quotations omitted).
[92] *Id.* at 478 n.5 (majority opinion).
[93] Calder v. Bull, 3 U.S. 386, 388 (1798).
[94] *Id.*

they will equally respect the rights of property, and the property in rights . . . ."[95]

CONCLUSION

The Court's decision in *Kelo v. City of New London* will stand as a case in which the Court failed to acknowledge and to protect fundamental property rights guaranteed under the Constitution. Instead, the Court chose to defer entirely to the judgment of the legislative entities whose aim was to deprive its citizens of their fundamental rights and to transfer their property to other private entities, all in the name of creating "new jobs and increased tax revenue."[96] Confronted with these facts, the Court should have applied a heightened standard of review to protect private property owners against this highly questionable application of the eminent domain power. The Court refused, and in so doing, "all private property is now vulnerable to being taken and transferred to another private owner . . . who will use it in a way that the legislature deems more beneficial to the public . . . ."[97]

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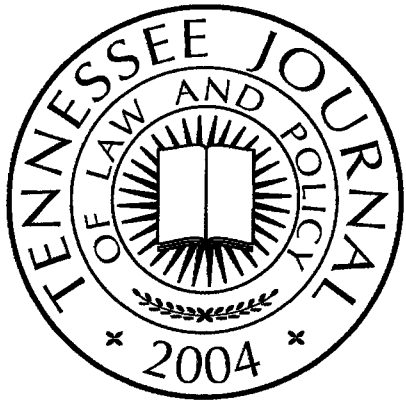
[95] MADISON, *supra* note 86, at 517.
[96] *Kelo IV*, 545 U.S. at 483.
[97] *Id.* at 494 (O'Connor, J., dissenting).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