School of Law
UNIVERSITY OF GEORGIA

Prepare.
Connect.
Lead.

Georgia Law Review

Volume 46 | Number 1 Article 1

2011

Table of Contents

Follow this and additional works at: https://digitalcommons.law.uga.edu/glr

Part of the Law Commons

Recommended Citation

(2011) "Table of Contents," *Georgia Law Review*: Vol. 46: No. 1, Article 1.
Available at: https://digitalcommons.law.uga.edu/glr/vol46/iss1/1

This Table of Contents is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Georgia Law Review by an authorized editor of Digital Commons @ University of Georgia School of Law. Please share how you have benefited from this access For more information, please contact tstriepe@uga.edu.

GEORGIA LAW REVIEW

VOLUME 46 FALL 2011 NUMBER 1

DEDICATION & REMEMBRANCE .... *Hillary Claire Miller* i

ARTICLES

The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis.. *A. Benjamin Spencer* 1

The Third Branch of our federal government has traditionally been viewed as the least of the three in terms of the scope of its power and authority. This view finds validation when one considers the extensive authority that Congress has been permitted to exercise over the Federal Judiciary. From the beginning, Congress has understood itself to possess the authority to limit the jurisdiction of inferior federal courts. The Supreme Court has acquiesced to this understanding of congressional authority without much thought or explanation.

It may be possible, however, to imagine a more robust vision of the Judicial Power through closer scrutiny of the history and text of Article III of the U.S. Constitution. The Constitution vests Judicial Power of the United States exclusively in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This Article reviews historical evidence that reveals that delegates to the Federal Convention considered and rejected language that would have given Congress express authority to manipulate the jurisdiction of inferior federal courts. This fact, coupled with repeated indications by the Framers and by the delegates to state ratifying conventions that the independence of the Judicial Branch from each of the other branches was of paramount importance, may give some weight to an understanding of the Judicial Power that challenges—or at least may moderate—

our understanding of Congress's authority to withhold from the inferior federal courts some portion of the Judicial Power vested in them under Article III.

Promulgating Proportionality .... *William W. Berry III* 69

Two lines of cases have dominated the Supreme Court's Eighth Amendment death penalty jurisprudence: the Furman–Gregg line of cases emphasizes the need to adopt rules to eliminate the arbitrariness inherent in unguided capital sentencing by juries, while the Woodson–Lockett line of cases emphasizes the opposite concern—the need for juries to make individualized sentencing determinations—highlighting the inadequacy of rules.

At first glance, these competing aims create some internal tension, if not outright conflict. In his concurrence in Walton v. Arizona, *Justice Scalia argued that this conflict was irreconcilable: "[t]he latter requirement [of individualized factual determinations] quite obviously destroys whatever rationality and predictability the former requirement [of limitations on jury discretion] was designed to achieve . . . ." And the Court has done little to reconcile this conflict. Indeed, recently in* Kennedy v. Louisiana, *Justice Kennedy stated, "this case law . . . is still in search of a unifying principle."*

This Article attempts to provide just that—a unifying principle—through the concept of "proportionality." As herein construed, proportionality requires that the applicable punishment be commensurate with the crime in both a relative and absolute sense. Using this principle, the Article develops a framework by which to apply the Court's Eighth Amendment jurisprudence, incorporating both lines of cases in a way that alleviates the inherent tension of pursing the competing goals of general consistency and case-specific consideration.

This Article, then, argues that the Supreme Court ought to apply the Eighth Amendment in capital cases solely in terms of two distinct types of proportionality—absolute and relative. Specifically, the model requires that the state court (and jury) determine the issue of absolute proportionality first, narrowing the individuals eligible for the death penalty using case-specific mitigating facts. The state courts (typically through appellate review) must then

determine the issue of relative proportionality, further narrowing the cases in which the offender is eligible to receive capital punishment.

*Part I of the Article describes the "*Walton *problem"—the apparent tension between the Furman–Gregg arbitrariness principle and the Woodson–Lockett individualized determination principle. In Part II, the Article defines the concept of proportionality, describing both its absolute and relative forms. In Part III, the Article articulates a new model for implementing the Eighth Amendment that solves the* Walton *problem. Finally, in Part IV, the Article demonstrates how proportionality can serve as the unifying principle for the Court's capital jurisprudence.*

When Delegation Begets Domination: Due Process of Administrative Lawmaking................ *Evan J. Criddle* 117

In federal administrative law, the nondelegation doctrine purports to forbid Congress from entrusting its essential legislative powers to administrative agencies. The Supreme Court developed this doctrine during the nineteenth century to safeguard republican values embedded in the Constitution. Over time, however, the Court has loosened the doctrine's grip, permitting federal agencies to wield broad lawmaking powers subject to minimalist "intelligible principles" established by Congress. The Court has defended this approach on pragmatic grounds, arguing that Congress cannot perform its essential legislative function without entrusting lawmaking authority to administrative agencies. What the Court has never adequately addressed, however, is the extent to which congressional delegation potentially undermines liberty by instituting domination—the capacity for arbitrary state action. Although the Court continues to invoke the nondelegation doctrine's republican ideals, it has yet to articulate a coherent legal theory to explain how its anemic review of congressional delegations can be squared with the Constitution's liberty-promoting checks and balances.

This Article contends that courts can reconcile administrative lawmaking with the Constitution's republican design, but only if they abandon the nondelegation doctrine's antiquated separation of powers

rationale. In its place, courts should focus upon due process as the primary constitutional constraint on congressional delegation. Although the link between delegation and due process has received only sparse attention in legal scholarship, the Supreme Court has employed due process analysis in a variety of cases involving both state and federal delegations. Three general principles inform these cases: to ensure that congressional delegation does not beget domination, agency lawmaking must be (1) constrained by a basic substantive standard, (2) channeled through fair and deliberative administrative procedures, and (3) subject to political accountability and judicial review. This subterranean due process model challenges the conventional wisdom that due process is inapplicable to agency rulemaking. It also has a variety of important—and potentially controversial—implications for other areas of federal administrative law, including the scope of Chevron *deference, the Administrative Procedure Act's applicability to presidential lawmaking, and the constitutional status of federal delegations to states, tribes, private entities, and international organizations.*

NOTES

Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony .... *Michael McDonnell Hill* 213

The case of Troy Davis shows how difficult it is for a convicted criminal defendant to obtain postconviction review of witness recantations. Convicted of murder on the testimony of nine eyewitnesses, Davis spent over a decade petitioning for judicial review of the recantations of seven of those witnesses before the U.S. Supreme Court ordered an evidentiary hearing in 2009. Concurrently, the DNA revolution continued to prove the innocence of an increasing number of convicted inmates across the nation, and the majority of those convictions had relied on eyewitness testimony. If these scientific advances suggest that eyewitness identification is not as reliable as once thought, then the traditional judicial skepticism of

eyewitness recantations is an outmoded vehicle that inhibits truth-seeking and disserves criminal justice.

This Note argues that Georgia courts should more readily grant evidentiary hearings for a criminal defendant who files an extraordinary motion for new trial, but only when the motion is based on witness recantations and the defendant's conviction relied primarily on eyewitness testimony. To achieve this end, the General Assembly should amend the Criminal Code so that courts in the future weigh a recanting witness's credibility against the testimony offered at trial. By doing so, Georgia can serve as a model for other states. Otherwise, in the absence of compelling physical evidence against a defendant, ignoring recantations of trial testimony encourages additional appeals, diminishes social confidence in the courts, and ultimately fails to achieve the finality that the criminal justice system seeks.

Market Realities Do Not Embody Necessary Economic Theory: Why Defendants Deserve a Safe Harbor under Section 2 of the Sherman Act for Exclusive Dealing .... *Danielle Nicole Paschal* 249

Exclusive dealing agreements are a form of vertical restraint. They are often procompetitive and treated as presumptively legal. Although claims against anticompetitive agreements may be pursued under numerous antitrust laws, claims have been brought more recently under section 2 of the Sherman Act. Antitrust laws generally focus on the percentage of foreclosure. Section 2 of the Sherman Act, though, requires a smaller percentage of foreclosure of distribution channels than other antitrust laws. Analysis under section 2 of the Sherman Act also focuses on the actual effects of the agreement in the relevant market. Determining the agreement's actual effects on the relevant market requires weighing the procompetitive benefits of the agreement against any possible anticompetitive effects.

This Note examines the historical and current treatment of exclusive dealing agreements and the importance of economic theory underlying exclusive dealing. This Note argues that anticompetitive effects are easier to allege and demonstrate through hard data than potential

procompetitive benefits, which often require defendants to rest their arguments on economic theory. Given that courts today have indicated a desire to rest their decisions on market realities rather than economic theory, defendants are at a disadvantage under section 2 of the Sherman Act. This Note proposes that the adoption of a safe harbor for defendants who foreclose less than 30% of the relevant market would remove the disadvantage placed upon defendants.

VOLUME 46 FALL 2011 NUMBER 1
GEORGIA LAW REVIEW ASSOCIATION, INC.
© 2011