CONSTITUTIONAL LAW

Constitutional: Civil Rights § 1983

Crocker v. Pleasant,
778 S.2d 978 (Fla. 2001)

FACTUAL BACKGROUND

John Crocker, the petitioners' son, was found dead without identification in West Palm Beach. After three days, the West Palm Beach police officer assigned to the investigation obtained the Crocker's names and address and sent a request to the Miami Shores Police Department that they have the parents call the officer. The officer again teletyped Miami Shores Police Department stating that a note to contact him would be sufficient since Miami Shores was unable to reach the parents. Thereafter, the officer released the decedent for burial to Palm Beach County, and made no further effort to contact the parents. Before the burial, the Crockers filed a missing-person's report, which was available to Palm Beach County, and distributed flyers of their son's picture. Through the Crockers' efforts, six months later they learned of their son's death and burial.

PROCEDURAL HISTORY

The Crockers sued both the City of West Palm Beach and Palm Beach County under 42 U.S.C. Section 1983 alleging a deprivation of their constitutionally-protected property interest in their deceased son's body, and a violation of their right to procedural due process under the Fourteenth Amendment to the United States Constitution prior to such deprivation. In response, the City and County filed motions for judgment on the pleadings, relying on *State v. Powell*, 497 S.2d 1188 (Fla. 1986), and *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 S.2d 673 (Fla. 1995). The trial court granted both motions. On appeal, relying solely on *Powell*, the Fourth District Court of Appeal affirmed the trial court's order and certified the question whether all Section 1983 claims founded upon interference with an interest in a dead body are precluded by *Powell*. The Florida

Supreme Court answered the question in the negative, holding that *Powell* did not preclude the Crockers' action, and remanded the case for further analysis.

COURT'S ANALYSIS

Section 1983 provides a cause of action for a person who has been deprived "of any rights, privileges, or immunities secured by the Constitution and laws," by a state employee. Thus, a deprivation of a Fourteenth Amendment right gives rise to a cause of action under Section 1983. However, to maintain an action under Section 1983, a person claiming a deprivation of due process under the Fourteenth Amendment must establish the existence of a *constitutionally-protected* property or liberty interest. State law dictates whether an individual has a property interest, quasi-property interest, or a legitimate claim of entitlement. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

In Florida, statutes and case law support the view that the next of kin have a legitimate claim of entitlement to the remains of a decedent for burial or similar lawful disposition. For example, Florida Statutes Section 245.07 provides that a county may not bury or cremate a body until a reasonable effort has been made to contact the relatives of the deceased. Further, *Kirksey v. Jernigan*, 45 S.2d 188, 189 (Fla. 1950), held that a spouse or next of kin has a right to possess the body for burial or any other lawful purpose, and that an actionable wrong occurs when that body is unlawfully withheld.

The decision reached in the present case is consistent with other state and federal case law. *See Whaley v. County of Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995) (holding that, under Michigan law, the next of kin have a "legitimate claim of entitlement" to possess the body of a deceased relative and to prevent its mutilation); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (holding that, under Arkansas law, the next of kin have a "quasi-property right" in the body of a deceased relative). Although the decision in *Crocker* established a substantive property right in the possession of a deceased relative's body, federal law provides whether that right is a *constitutionally-protected* property interest. Because this appeal was based on a ruling on a motion for judgment on the pleadings, the court limited its holding and ruled only on the state issue, concluding that Florida law recognizes such a property interest. Further, the court explained that *Powell* relates only to the corneal-removal statute at issue in

that case, and does not preclude all Section 1983 claims based on interference with an interest in a dead body.

ISSUES ON REMAND

Despite the fact that the Crockers have a property right in the body of their deceased son, the City and County argued that there was no "deprivation" of that right, and thus no constitutional violation, because the West Palm Beach police officer did not deliberately deprive the petitioners of their right to possess their son's body. In fact, the Crockers admitted that they could not prove willful or malicious conduct on the part of the police officer. However, in *Crocker*, the police officer's conduct was characterized as "egregious" by the Fourth District Court of Appeal, and some federal circuits have found that "recklessness" or "deliberate indifference" gives rise to a Section 1983 claim. *Stemler v. City of Florence*, 126 F.3d 856, 865–866 (6th Cir. 1997); *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996). Being beyond the scope of the certified question, the Florida Supreme Court did not decide whether the Crockers would be able, as a matter of law, to prove that a "deprivation" had occurred.

In addition, the Court did not address whether the Crockers had an adequate state remedy in light of *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 S.2d 673, 676 (Fla. 1995) (holding that either physical injury or willful and wanton conduct is required to support a state cause of action against a state employee). The City and County argued that if an adequate state remedy exists, then there is no constitutional violation despite a deprivation because the petitioners failed to show a lack of due process. In response, the Crockers argued that even if they could prove the *Gonzalez* requirement, their claim would fail because of the sovereign-immunity defense available to the City and County. The Court declined to address this issue because it was not within the scope of the certified question, and the Fourth District did not address it.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 4, § 12.210.20 (Charles R.P. Keating & J. Jeffrey Reinholtz eds., 3d ed., Clark Boardman Callaghan 1992).
- Erwin Chemerinsky, *Practicing Law Institute: Procedural Due Process Claims*, 16 Touro L. Rev. 871 (2000).

Natalia Kirayoglu

Constitutional Law: Due Process

Crepage v. City of Lauderhill,
774 S.2d 61 (Fla. Dist. App. 4th 2000)

In an adversarial preliminary hearing to litigate the issue of probable cause under the Florida Contraband Forfeiture Act, twenty-four hours' notice of the hearing to the accused is insufficient to meet the procedural-due-process requirements under the Florida Constitution.

FACTS

On July 30, 1999, while driving his automobile, Crepage was pulled over by two undercover City police officers who suspected that he had marijuana. After obtaining Crepage's consent, the officers searched his automobile and found a bag containing 471.5 grams of marijuana. Crepage was arrested and his automobile towed to the City police department. Three days later, the City sent Crepage a notice of forfeiture of his automobile pursuant to the Florida Contraband Forfeiture Act (FCFA). The notice advised Crepage that he had a right to institute an adversarial preliminary hearing within fifteen days to determine whether probable cause existed to suspect that his automobile was used in violation of the FCFA. On August 17, Crepage's attorney requested an adversarial preliminary hearing. On August 25, the City filed a forfeiture complaint and supporting affidavits. Also on that day, at approximately 10:00 a.m., the City faxed a notice of hearing to determine probable cause to Crepage's attorney, advising him that the hearing was set for August 26, the next day, at 1:30 p.m. Crepage's attorney did not receive the faxed notice until 3:00 p.m. that day, and the faxed notice failed to include a copy of the forfeiture complaint and affidavits.

At the hearing, Crepage's attorney argued that he did not have reasonable notice and a fair and meaningful opportunity to present his case, because he had less than twenty-four hours' notice of the hearing. The hearing was held, however, twenty-four days after the City sent Crepage the notice of forfeiture and nine days after Crepage requested the adversarial preliminary hearing. The trial court rejected his argument and, after the hearing, found probable cause to seize and confiscate Crepage's automobile. The trial court denied Crepage's motion to dismiss the forfeiture action, finding that there were procedural-due-

process violations. The Fourth District Court of Appeal found that the City did not adhere to Crepage's procedural-due-process rights granted to him by the Florida Constitution and remanded the case to the trial court for a hearing with proper notice to Crepage.

ANALYSIS

The Florida Constitution, in providing procedural-due-process protections, mandates that one be given "fair notice[ ] and afforded a real opportunity to be heard and defend[ ] in an orderly procedure, before judgment is rendered against him." *Dept. of L. Enforcement v. Real Prop.*, 588 S.2d 957, 960 (Fla. 1991). The FCFA statute does not provide a specific notice period for the adversarial preliminary hearing when one is requested. Crepage was given one day's notice of his hearing, during which he would be given the opportunity to present evidence, witnesses, and a legal argument in an attempt to rebut the City's case against him. Crepage argued that this notice was inadequate because he was not provided a fair and meaningful opportunity to present his case.

Crepage had the right, under the FCFA, to litigate the issue of probable cause at an adversarial preliminary hearing. Once he requested his hearing, the City was required to set and provide notice of the hearing, which must be held within ten days after Crepage's request was received or *as soon as practicable thereafter*. Fla. Stat. § 932.703(2)(a). The City's argument, echoed by Judge Barry J. Stone in his dissent, was that it complied with the statutorily-imposed time requirements. In addition, Crepage was given notice of the hearing that met constitutional guarantees. The hearing was held on the ninth day; therefore, Crepage's attorney had the opportunity to gather evidence and prepare a challenge to the anticipated showing of probable cause. If the City created an unreasonable delay between Crepage's hearing request and the hearing itself, then the City would also be denying Crepage his due-process rights. *Crepage*, 774 S.2d at 63 (citing *Cochran v. Harris*, 654 S.2d 969, 970 (Fla. Dist. App. 4th 1995) (dismissing the forfeiture proceedings, because the three day delay "constituted a denial of due process"). The City argued that *Cochran* placed the burden on it to ensure that the hearing occur within the statutory time requirements. *Id.*

Because the forfeiture statute did not clearly establish time procedures, the court found that the Florida Rules of Civil

Procedure would control to satisfy due-process requirements. *Real Prop.*, 588 S.2d at 966; *Golon v. Jenne*, 739 S.2d 659, 662 (Fla. Dist. App. 4th 1999). Rule 1.090(d) requires that notice of a hearing "be served a reasonable time before the time specified for the hearing." Although "reasonable time" is not defined, Crepage must receive actual notice and time to prepare. *State Dept. of Transp. v. Plunske*, 267 S.2d 337, 339 (Fla. Dist. App. 4th 1972). In finding that the notice the City provided was inadequate, the court looked to a recent Florida Supreme Court decision finding that twenty-four hours' notice of an advisory hearing, in an action terminating the father's parental rights, was insufficient to satisfy constitutional-due-process requirements. *J.B. v. Fla. Dept. of Children & Fam. Servs.*, 768 S.2d 1060 (Fla. 2000); *see Harreld v. Harreld*, 682 S.2d 635, 636 (Fla. Dist. App. 2d 1996) (finding that two days' notice of hearing on motion to hold husband in contempt was insufficient); *Reynolds v. Reynolds*, 187 S.2d 372, 373 (Fla. Dist. App. 2d 1966) (finding that one day's notice of hearing on an order to show cause constitutes a due-process violation); *Henzel v. Golstein*, 349 S.2d 824, 825 (Fla. Dist. App. 3d 1977) (concluding that one working day notice of hearing to be on motion to dismiss was inadequate); *Anderson v. Suntrust Bank/North*, 679 S.2d 307, 308 (Fla. Dist. App. 5th 1996) (holding four days' notice of hearing insufficient for an award of guardianship fees and costs).

The court stopped short of creating a bright-line rule about what amount of notice is reasonable, but held that twenty-four hours' notice of a hearing at which suppression issues are likely to be litigated is insufficient. Crepage's hearing was not just a preliminary hearing, but rather an adversarial proceeding during which Crepage would present evidence, witnesses, and his legal argument. At the adversarial preliminary hearing, Crepage should have been afforded a fair and meaningful opportunity to challenge the legality of his police stop and raise other Fourth Amendment issues in determining whether probable cause existed. *See Golon v. Jenne*, 739 S.2d 659, 661 (Fla. Dist. App. 4th 1999) (holding that the validity of the police's stop and search is inextricably bound with the probable-cause determination required); *Indialantic Police Dept. v. Zimmerman*, 677 S.2d 1307, 1309 (Fla. Dist. App. 5th 1996) (providing that, in vehicle forfeiture proceeding, the owner was entitled to cross examine the officer on Fourth Amendment issues).

Twenty-four hours' notice of an adversarial preliminary

hearing is insufficient for one defending himself properly to gather evidence, secure witnesses, and compose a legal defense. The court, however, left no indication about what amount of time is needed to provide adequate notice to satisfy the procedural-due-process requirements of the Florida Constitution. Is thirty-six hours sufficient notice? Is forty-eight hours sufficient? The void left open by this case fosters uncertainty and speculation for government entities attempting to guarantee constitutional liberties.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 19.11.40 (Beth A. Buday & Victoria A. Braucher eds., 3d ed., Clark Boardman Callaghan 1996).
- 10 Fla. Jur. 2d *Constitutional Law* §§ 440, 442 (1996).

John W. Zajac

Constitutional Law: Due Process

Parisi v. Broward County,
769 S.2d 359 (Fla. 2000)

Can a court impose a "bonded fine" as a civil-contempt sanction without considering the financial resources of the contemnor? The Florida Supreme Court held that the "bonded fine" in this case had the same effect as any other civil-contempt sanction and, therefore, must satisfy certain requirements. One requirement that the court should consider when determining the amount of the bonded fine to be imposed is the contemnor's financial resources.

FACTS AND PROCEDURAL HISTORY

The respondent sought injunctive relief to prevent the petitioners from operating their environmentally-hazardous salvage yard. The trial court granted the injunction in favor of the respondent and enjoined the petitioners from operating the salvage yard. The petitioners failed to comply with the injunction, so the respondent moved to hold the petitioners in civil contempt. The trial court found the petitioners in contempt and "ordered [them] to post a 'bonded fine' as a contempt sanction to secure performance of certain remedial measures." *Parisi*, 769 S.2d at 362.

The petitioners appealed, arguing that the trial court erred in issuing the order because the court failed to consider the petitioners' financial resources before imposing the contempt sanction. The Fourth District Court of Appeal rejected the petitioners' argument and held "that the trial court [was required only to] make a finding 'that the contemnor had the ability to comply with the underlying order that required some type of action.'" *Id.* (quoting *Parisi v. Broward County*, 710 S.2d 981, 981 (Fla. Dist. App. 4th 1997)). The petitioners appealed to the Florida Supreme Court.

LEGAL ANALYSIS

Contempt sanctions are classified as either being criminal or civil. Civil-contempt sanctions are further classified as either being compensatory or coercive. The difference between civil and criminal sanctions depends largely on the character and purpose of the sanctions involved. *Intl. Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 827 (1994). This distinction is important because the determination of whether a sanction is criminal or civil will affect the procedures for adjudication and set the parameters for the sanctions. *Id.* at 830–831.

The Supreme Court recognizes the broad contempt powers granted to the courts and is concerned about the possible abuse of these powers. Therefore, the Court suggests striking a balance between the courts' contempt powers and the necessity of preventing their abuse. *Id.* Because criminal contempt is essentially a "crime," the courts must afford the contemnors the same due-process protections afforded to criminal defendants. *Id.* at 826. Civil-contempt sanctions are different. They are viewed as non-punitive, and therefore, require fewer procedural protections than criminal sanctions.

In *Bagwell*, the Supreme Court recognized that a key safeguard in civil-contempt cases is the requirement that the contemnor have the ability to purge or cease the contempt. *Id.* at 829. Furthermore, in a civil-contempt proceeding with a fine imposed as a coercive sanction, the trial court's discretion in determining the amount of the fine is limited. In *U.S. v. United Mine Workers,* 330 U.S. 258, 304 (1947), the Court held that a court must consider the amount of the defendant's financial resources when it determines the amount of the fine to be imposed as a contempt sanction.

The respondent argued that the bonded fine was valid

because it was not a regular fine and, therefore, it did not have to meet the requirements of other civil-contempt sanctions, including the inquiry into the petitioners' finances. The Florida Supreme Court disagreed and held that the trial court intended the bonded fine to have the same effect as any other contempt sanction. In both instances, the sanctions would effectively deny the petitioners the use of their money. Therefore, the bonded fine was a civil-contempt sanction, and the trial court erred when it failed to consider evidence of the petitioners' financial resources before it assessed the amount of the bonded fine.

Alternatively, the respondent argued that the bonded fine in this case was a valid compensatory sanction; however, the court rejected that argument. Although the courts have authority to order civil fines to compensate for losses, the fines must be based on evidence of the injured party's actual loss. *Id.* at 303. The respondent submitted no evidence establishing the relationship between the damages it suffered and the sanction imposed; therefore, this was not a compensatory contempt sanction.

COMMENTARY

"The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter." *Id.* The contempt powers granted to the courts exist to ensure that judicial orders are given proper respect and compliance. Without strict adherence to the courts' orders, the work of our judicial system would be futile.

This case outlines some important distinctions between the various types of contempt sanctions and the judicial procedures applicable to each. In subsequent cases, courts have cited *Parisi* as support for the imposition of certain procedural requirements in their own contempt proceedings. In *Kimball v. Yaratch,* 787 S.2d 97, 99 (Fla. Dist. App. 2d 2001), the court held that the suit, which had been initiated as a civil-contempt proceeding, was actually punitive and criminal in nature because the defendant had not been offered any opportunity to purge the contempt. After concluding that it was a criminal-contempt proceeding, the *Kimball* court found that the defendant had not been afforded the appropriate due-process protections. *Id.* This is another example of a court striking a balance between the need for contempt sanctions and the prevention of abuse.

RESEARCH REFERENCES

- *Johnson v. Bednar,* 573 S.2d 822 (Fla. 1991).
- Margit Livingston, *Disobedience and Contempt*, 75 Wash. L. Rev. 345 (2000).

Dustin Duell Deese

Constitutional Law: Education – School Vouchers

Bush v. Holmes,
767 S.2d 668 (Fla. App. Dist. 1st 2000),
rev. denied, 790 S.2d 1104 (Fla. 2001)

In this first round of challenges concerning the controversial school-voucher program established by the Florida Legislature in 1999, the First District Court of Appeal addressed only the narrow question of whether the constitutional requirement that education be established through "a system of free public education" found in Article IX, Section 1 made the Florida Opportunity Scholarship Program (OSP), which provides state money to private schools, unconstitutional on its face. The court held that the OSP was not unconstitutional on its face. However, the First District's decision is very likely just the first act of what may prove to be a very long play.

Although many private schools are also religious schools, the court deferred consideration of the larger constitutional question concerning establishment of religion. Appellate courts ordinarily will not rule on constitutional issues without the benefit of the opportunity to examine an established record from the court below. *Glendale Fed. Sav. & Loan Assn. v. State*, 485 S.2d 1321, 1324–1325 (Fla. Dist. App. 1st 1986). In *Bush*, the court limited its analysis to an interpretation of the OSP statute, because its examination of this statute on its face did not depend upon a review of the record from the trial court.

STATUTORY CHALLENGE

The day after the Florida Legislature approved Section 229.0537 establishing the OSP, a group of citizens, parents, and educators filed suit to have it declared unconstitutional, because it violated the Establishment Clause of the United States Constitution and also violated state constitutional provisions for school funding established in Article IX, Section 6. The lower court

found the OSP unconstitutional under Article IX, Section 1 of the Florida Constitution, but the First District Court of Appeal reversed and remanded.

ARGUMENTS

The trial court relied on the principle of *expressio unius est exclusio alterius*, the rule of statutory construction mandating that items that the legislature expressly *includes* in a statute imply the *exclusion* of all other items the legislature has not included. Because one phrase in the Florida Constitution requires the state to provide free *public* education, the lower court reasoned under *expressio unius*, the State was prevented from providing money for *private* education.

However, nothing in Article IX, Section 1 specifically prohibits the use of public-school funds to provide private-school education. Stripped of excess verbiage and broken into its elements, Section 1 provides the following:

(1) The education of children is a fundamental value of the people of the State.
(2) The State has a duty to provide for the education of all children.
(3) The provision for a system of free public schools shall be made by law.
(4) The provision for institutions of higher learning shall be made by law.

The language of Section 1 prescribes only the manner in which public schools will be funded, which is "by law." Nothing in the Section specifically precludes using public money to fund private schools. Further, the court reasoned that, because the Legislature's purpose in passing the OSP was to advance educational opportunities for all of Florida's children, regardless of whether those opportunities were funded by public or private means, the Act fell within the bounds of Article IX, Section 1.

Although frequently argued by appellants challenging statutes, most courts favor the principle of *expressio unius est exclusio alterius*. *Taylor v. Dorsey,* 19 S.2d 876, 881 (Fla. 1944) (explaining that the *expressio unius* canon should be used sparingly with respect to the constitution). Therefore, the court found that the trial court erred by employing the *expressio unius* principle to find the OSP unconstitutional.

Unless legislation clearly contradicts an express or implied prohibition in the Constitution, courts have no authority to strike

it. *Chapman v. Reddick,* 25 S. 673, 677 (Fla. 1899). The OSP did not clearly contradict any prohibition in the Florida Constitution. Furthermore, when a legislative act is challenged, the court will be liberal in interpreting the constitutionality of the challenged statute. *Taylor,* 19 S.2d at 882. In other words, the statute will be construed in favor of its constitutional legitimacy. To be held invalid, the legislation must be found unconstitutional beyond a reasonable doubt. Here, nothing in Article IX, Section 1 clearly prohibits the Legislature from allowing public funds to be used for private-school tuition. Section 1 does, however, mandate that Florida provide an adequate education for all children in the State. In reviewing the OSP, the court found that the Legislature's intent in passing the statute was to provide an enhanced opportunity for all students. Taking its cue from *State v. State Board of Administration,* 25 S.2d 880, 884 (Fla. 1946), the court noted that "[t]he Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good."

Although none of the cases relied upon above were school-funding cases, it was important to the court's analysis that there was binding precedent for using public funds to send children to private schools. In *Scavella v. School Board of Dade County,* 363 S.2d 1095, 1098 (Fla. 1978), the Florida Supreme Court held that "the state is responsible for providing adequate educational opportunities for all children," and approved public dollars to send special-education students to private schools. Based on those reasons, the court held that the OSP did not violate Article IX, Section 1 on its face, and that applying the *expressio unius* principle was erroneous.

COMMENTARY

This case was narrowly decided and is not over. The court stated that it would not rule on the larger constitutional question of the Establishment Clause until the trial court first rendered its opinion.

At the national level, the answer to whether it is constitutional to use public money to fund private schools may depend on the state in which the lawsuit is filed. In Alaska, Kansas, Missouri, New York, Ohio, Oklahoma, and Oregon, it is unconstitutional. In Connecticut, Indiana, Kentucky, Mississippi, and now Florida, neither the state nor federal constitutions have

proved to be an impediment.

RESEARCH REFERENCES

- *Weinberger v. Bd. of Pub. Instruction of St. Johns County*, 93 Fla. 470, 488–489 (Fla. 1927) (holding that when the Constitution expressly mandates the manner in which a thing must be done, by implication, it forbids doing the thing in a substantially different manner).
- Frank R. Kemerer & Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability,* 150 West's Educ. L. Rptr. 589 (Mar. 29, 2001).
- Eugene McQuillin, *The Law of Municipal Corporations*, vol. 16B, § 46.02.10 (3d ed., West 2001).

Carol Cole McCrory

Constitutional Law: Eleventh Amendment

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001)

Historical interpretations of the Eleventh Amendment were reinforced by this decision that advanced states' rights. By a five-member conservative majority, state instrumentalities were held to be immune from damages claims filed by state employees in federal court for violations of the Americans with Disabilities Act (ADA). The majority opinion limited Congress's use of its broad remedial powers where states are concerned and reaffirmed the presumption that state action is rationally based.

• Eleventh Amendment state immunity cannot be pierced by a Congressional enactment to enforce ADA violations of Equal Protection through Section 5 of the Fourteenth Amendment. No matter how desirable the money-damages remedy may be to achieve the intended public-policy objective of eliminating state discrimination, it cannot withstand judicial scrutiny demanding that a remedy be congruent and proportional to the violation. *Garrett*, 531 U.S. at 374.

• "[N]onconsenting States may not be sued by private individuals in federal court" unless Congress has acted pursuant to powers found in Section 5 of the Fourteenth Amendment to eliminate states' Eleventh Amendment immunity. *Id.* at 363 (citing *Kimel v. State Board of Regents*, 528 U.S. 62, 73 (2000)).

The power attempted to be exerted through the enactment of the ADA was found invalid by this majority opinion.

• "If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 368.

• Without bluntly stating it, the Court did not and may not in the future use its precedential-reasonableness standard when interpreting legislative intent from Congressional hearings under the Separation of Powers Doctrine.

• The Court did not and may not in the future defer to legislative-branch judgments where the liability of states is concerned. The majority sets a new standard, closer to strict scrutiny, when state financial liabilities are a focus of Congressional legislation.

• The majority makes it clear that the employee's burden of proof is to demonstrate that there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 367 (quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993)).

• Local governments, although state actors for purposes of the Fourteenth Amendment, do not enjoy the immunity extended by the Eleventh Amendment. Local governments remain subject to employee-damage claims pursuant to the reach of the ADA. *Id.* at 369 (citing *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)).

HISTORY OF CONFLICT

Patricia Garret, the Director of Nursing OB/Gyn/Neonatal Services for the University of Alabama in Birmingham Hospital, and Milton Ash, a security officer for the Alabama Department of Youth Services, separately sued the state of Alabama for money damages due to violations of the ADA. This consolidated appeal arose from federal district court Judge Acker's rulings in favor of the defendants' motions for summary judgment. The trial of the State employees' allegations of disability discrimination, a violation of two federal statutes, could not be heard because the defendants were immune from suit. The Eleventh Amendment was the State's shield and it was not to be penetrated by Congressional statements that the ADA and the Rehabilitation Act were designed to apply to state employers. *Id.* at 363; 29 U.S.C. § 701 (1994); 42 U.S.C. § 12101 (1994). "Congress cannot stretch Section 5 and the Equal Protection Clause of the

Fourteenth Amendment to force a state to provide allegedly *equal* treatment by guaranteeing *special* treatment or 'accommodation' for disabled persons." *Garrett v. Bd. of Trustees of U. of Ala.,* 989 F. Supp. 1409, 1410 (N.D. Ala. 1998) (hereinafter *Garrett I*).

Prior to this, conflict over whether the enactment of a national policy could pierce the states' immunity was addressed in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress was without the power to abrogate state sovereign immunity from suit regardless of a clear legislative intent), and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress was without the power to enact the Religious Freedom Restoration Act which would have prevented state and local governments from enforcing statutes and ordinances regarding historic building preservation).

When the aggrieved employees appealed to the Eleventh Circuit, the issue was framed as whether Congressional intent, as expressed in the ADA and Rehabilitation Act legislation, pierced state immunity granted by the Eleventh Amendment, or whether the state retained its immunity from suit for damages in federal court. The State employees made factual claims that each suffered from a physically-based medical problem for which no accommodation was made. Because the employees' medical problems were not accommodated, each suffered lowered performance evaluations and was penalized. However, these factual allegations were set aside for subsequent hearings.

The ADA and the Rehabilitation Act are clear about Congressional intent to abrogate state immunity. *See* 42 U.S.C. § 12202 (1994) (providing that a "[a] State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of [the ADA]"); 42 U.S.C. § 2000d-7(a)(1) (1994) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973"). With such statutory clarity, the contest between the philosophical poles of Congressional power and state sovereignty were clearly joined. Eleventh Circuit Senior Judge Paul Roney ended the contest when he relied upon a recent interpretation from the Eleventh Circuit to find that the ADA was a valid exercise of Congressional intent. Specifically, citing *Kimel* as authority, the Eleventh Circuit found that the ADA did breach state immunity. *Garrett v. Univ. of Ala. at Birmingham*

Bd. of Trustees, 193 F.3d 1214, 1218 (11th Cir. 1999) (hereinafter *Garrett II). Garrett II* found the Rehabilitation Act to be within the scope of Congressional powers by finding *Clark v. State of California*, 123 F.3d 1267, 1270 (9th Cir. 1997) (citing *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985)), to be persuasive. The summary judgments favoring the states' instrumentalities were reversed, setting the stage for this final appeal.

Supreme Court: Split 5-4 on Issue Analysis

Leaving the Rehabilitation Act to stand, only challenges under Title I of the ADA were presented by the State to the United States Supreme Court, where the philosophical debate was finally resolved through a series of questions and answers.

Are states shielded from Congressional legislation by the Eleventh Amendment? They are not where Congress finds Equal Protection violations amounting to invidious discrimination that can be remedied or deterred by federal legislative enactments. *Flores*, 521 U.S. at 519. Removing discrimination by enforcement through Section 5 of the Fourteenth Amendment is appropriate and lawfully within Congress's power if the statutory remedy is sufficiently based upon the legislative record. But it is the Court, not Congress, that "define[s] the substance of constitutional guarantees." *Garrett*, 531 U.S. at 365 (citing *Flores*, 521 U.S. at 519–524) [hereinafter *Garrett III*]. "Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett III*, 531 U.S. at 365 (quoting *Flores*, 521 U.S. at 520). The Rehnquist-led majority subsequently found inadequate evidence that the state caused any injury, and thus the remedy of ADA enforcement was not congruent or proportional.

Did Congress act within its authority by enacting the ADA wherein states were rendered subject to federal claims for money damages? To answer this, Chief Justice Rehnquist looked to *Cleburne v. Cleburne Living Center, Incorporated*, 473 U.S. 432 (1985), to determine whether fundamental rights could be infringed by state action. Under the minimal standard of rational basis, appropriate for social legislation, "the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Garrett III*, 531 U.S. at 367. This statement remains the law of this current case.

Did Congress find, during its hearings prior to the passage of the ADA, a historical pattern of unconstitutional employment discrimination by states against the disabled? The five Justices scrutinized the legislative evidence in the hearings for the ADA by subjecting it to a judicial standard of reliability and relevance. They found, from the over 300 instances of discrimination listed in the attached Appendix C, only "several" instances that evidenced a state's unwillingness to make a disability accommodation. *Id.* at 370. However, they could not determine whether such few instances were irrationally based, and thus unconstitutional. They found within many instances "unexamined, anecdotal accounts" compiled by a mere task force, albeit created by Congress. *Id.* But, when submitted to Congress, these accounts may not have been understood because no express findings of state discrimination were made for the record.

In the judgmental view expressed by Chief Justice Rehnquist, the ADA suffers "[c]onstitutional shortcomings" when compared to the Voting Rights Act of 1965, because Congress examined with great care the problem of racial discrimination in voting. *Id.* at 373 (referring to *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1996)). Justices Kennedy and O'Connor's concurrence best exemplified this stricter, judicially-created standard for scrutinizing Congressional fact finding: "If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist." *Id.* at 375–376 (Kennedy & O'Connor, JJ., concurring).

In strong opposition about the sufficiency of this evidence, the standard by which it should be reweighed by an appellate court, and which body was in the best position to make the final decision about its relevance for the drawing of national inferences, Justice Breyer, writing for Justices Stevens, Souter, and Ginsburg, made clear points contradicting his colleagues in the majority. In contrast to their "around 50" allegations "that could conceivably amount to constitutional violations," and to the half-dozen state violations in the hearings pointed out by the aggrieved employees, Justice Breyer identified 300 factually-specific instances of state-government burdens raised against the disabled, recounted in Appendix C. *Id.* at 369, 371 n. 7. Those

reports were from fifty states, involving 30,000 attendees, and were exclusive of the thirteen separate Congressional hearings held and listed in Appendix A. Hundreds of "instances in which a person with a disability found it impossible to obtain a state job, to retain state employment, to use the public transportation that was readily available to others in order to get to work, or to obtain a public education." *Id.* at 379. Justice Breyer gave other details of direct state discrimination on pages 378 and 382.

The majority claimed these were purely "unexamined, anecdotal accounts." *Id.* at 370. Obviously, these accounts were not sufficient for this Court as a retrier of the facts — facts that obviously were not fully examined in order to expose constitutional violations. *Id.* at 369–370. Congressional committees and their designees on task forces were viewed by the five Justices as unqualified to render a proper judgment about who and what they were seeing and hearing about discriminatory acts of governments.

Who then should be the final arbiter of Congress's analysis of evidence gathered through hearings? The majority thinks it should be because here the Court did not defer to the findings of the legislative officials who witnessed the testimony. The five conservative Justices substituted their own subjective assessment for the evidentiary record. Who was in the better position to weigh the reliability of the witnesses and their testimony? Who is structured to gather real experiences of constituents, experts, and the general public, and then assess their significance in pursuit of a remedy?

In prior years, whenever this Court reviewed and weighed the evidence from Congressional hearings to determine legislative intent, the practice was to determine whether the conclusions drawn to support the legislation were reasonable. *Katzenbach v. Morgan,* 384 U.S. 641, 654–656 (1966). "In reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate." *Garrett III*, 531 U.S. at 380. In fact, the Court deferred to Congress as recently as the year 2000 when it decided *Kimel.* This Court did not require that the Congressional record be broken down into evidentiary categories because Congress does not function like a court; therefore, judicial institutional standards are inappropriate if applied. "Congress, unlike courts, must, and does, routinely draw general conclusions — for example, of likely motive or of likely relationship to legitimate

need — from anecdotal and opinion-based evidence of this kind, particularly when the evidence lacks strong refutation." *Id.*

Acceptance of and reliance upon less-than-judicially-probative records was reinforced in this discrimination area by the *Cleburne* decision five years before passage of the ADA. This decision established the basis upon which negative attitudes, unjustified fears, stereotypical assumptions, and irrational prejudice about and against the disabled were definable as violations of the Fourteenth Amendment. *Cleburne*, 473 U.S. at 448, 450. Following this judicial guidance, the legislative record was developed upon which the ADA of 1990 was based. But in this current interpretation, the majority ignores this history in order to retreat from its own precedent and change the rules upon which legislation is predicated.

COMMENTARY

Although the factual dispute never received a trial, the allegations have particular relevance to this commentator, who has been disabled since childhood. If the state instrumentalities had made a reasonable effort to accommodate the plaintiffs, they would have discovered how little it would take to achieve. A lifetime of my experiences having to adapt to the existing world has proven that. Ms. Garrett, a nursing director of OB/Gyn services before cancer removal and treatment, was not given the chance to prove that she could perform her job as effectively as before. Mr. Ash, a guard at a juvenile-service agency, needed merely to be moved to an odor-free work area on the day shift to enable him to avoid asthmatic attack and perform his assigned tasks. Ironically, the state costs of reasonable accommodation would have been substantially less than its legal fees, no doubt.

Today, deep-seeded and subtle forms of discrimination require that a concerned Nation receive more than the minimum enforcement from Section 5 of the Fourteenth Amendment. It is in our judicial heritage, as far back as the time when states received more deference from the high court. In 1880, this "Court wrote that § 5 'brought within the domain of congressional power' whatever 'tends to enforce submission' to its 'prohibitions' and 'to secure to all persons . . . the equal protection of the laws." G*arrett III*, 531 U.S. at 386 (Breyer, Stevens, Souter, & Ginsburg, JJ., dissenting) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).

State employees certainly did not receive the minimum from this decision. It leaves them and other disabled people without

serious power to remove barriers in the public workplace, such as public services and transportation. *See id.* at 370–372 (referring to such discrimination in the House Committee on Education and Labor findings). For example, how does a potentially-employable motorbike-accident paraplegic get to work in a city when the state does not enforce the statute requiring public transportation to be wheelchair accessible? The practical realities of such a barrier should have been recognized by these learned jurists, who wrote that the remedies available to the disabled have not been abrogated by this decision because their rights may be enforced by the U.S. Attorney or in state court by way of injunction. *Id.* at 374 n. 9. Sadly, they could not or chose not to do so.

When faced with such a state-created barrier, the hypothetical wheelchair occupant must find the resources, stamina, and financial reserves to enter the administrative process, either federal or state, to build a record that might eventually be considered by a court. Common sense would tell us that the physical, financial, and time burdens would deter even the most hardy and dedicated "able bodied" person. Is it any wonder why Justice Kennedy could find no litigation branding such barriers as unconstitutional?

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 19.15 (Beth A. Buday & Victoria A. Braucher eds., 3d ed., Clark Boardman Callaghan 1996).
- Laurence H. Tribe, *American Constitutional Law* vol. 1, § 5-16 (3d ed., Found. Press 2000).
- Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 Yale L.J. 441 (2000).

James J. Brown, Professor

Constitutional Law:
First Amendment – Adult Business Use

***421 Northlake Boulevard Corp. v. Village of North Palm Beach*,**
753 S.2d 754 (Fla. Dist. App. 4th 2000)

- The judicial test for a First Amendment challenge of whether there were a sufficient number of alternative sites for the exercise of free-speech rights received another factual application in this decision. Rights are not denied even though available sites are too small, lack sufficient parking, are too expensive, are uneconomical for business purposes, or are currently unavailable.

- Adult business uses may be limited to a specific number of sites through a ratio, the denominator of which is based on the total population of the community. This is a useful test with precedent in Florida.

FACTS AND PROCEDURAL HISTORY

The Village of North Palm Beach (the Village) sued to stop an adult nightclub from operating its business. The Village claimed that the nightclub's location violated a Village zoning ordinance that prohibited the operation of any adult-entertainment establishment within 2,000 feet of an existing adult-entertainment establishment.

The trial court granted the injunction, and the nightclub challenged the constitutionality of the zoning ordinance. The nightclub contended that the 1998 amended zoning ordinance violated its First Amendment right to free expression. The nightclub alleged that, under the ordinance, there were no sites that both could comply with the 2,000-foot restriction and that were cheap enough for the nightclub to operate and to park its patrons' cars. Therefore, the nightclub argued that the ordinance, in violation of the First Amendment, did not allow for reasonable alternative avenues of communication.

Adult-entertainment zoning ordinances generally regulate the negative secondary effects of adult businesses on the community and not the content of the expression. Therefore, adult-entertainment zoning ordinances are scrutinized as content-neutral time, place, or manner restrictions. As a result, the First Amendment inquiry is whether the ordinance is

narrowly tailored to serve a substantial governmental interest and whether the ordinance allows for reasonable alternative avenues of communication. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986).

The court followed and reaffirmed the law announced in *Renton*, which provided that the First Amendment is not violated as long as cities abstain from effectively denying an adult business a reasonable opportunity to open and operate an adult theater within city limits. Additionally, the *Renton* court held, and this court agreed, that adult businesses must fend for themselves in the real estate market. As such, in assessing the alternative avenues of communication, no consideration is given to whether such avenues are costly, badly situated, or unavailable. *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995).

In this case, at least two sites satisfied the ordinance's requirements and were available for adult-entertainment businesses. The fact that the alternative avenues of communication were not currently for sale does not give rise to a First Amendment violation. *421 Northlake*, 753 S.2d at 757. In *Centerfold Club, Incorporated v. City of St. Petersburg*, 969 F. Supp. 1288, 1306 (M.D. Fla. 1977), the court noted that district courts had approved ratios between one site per 4,208 residents and one site per 6,761 residents. Therefore, the ratio of one site per 6,100 residents in this case was consistent with other courts' rulings. Given the small area and modest population of the Village of North Palm Beach, the two alternative sites satisfied Northlake's constitutional right to freedom of expression.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 6A, § 24.123.30 (Beth A. Buday & Victoria A. Braucher, 3d ed., Clark Boardman Callaghan 1997).
- Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law Substance and Procedure* vol. 2, § 14.6 (3d ed., West 1999).

Robin Lynn Petronella

Constitutional Law: First Amendment – Sound Ordinance

Cannabis Action Network, Incorporated v. City of Gainesville,
231 F.3d 761 (11th Cir. 2000)

Ordinances that give a city complete discretionary power to issue permits before allowing the use of public places for First Amendment activities are prior restraints on speech, and as such must meet certain procedural safeguards to be constitutional.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Cannabis Action Network (CAN), represented a group of political activists who believe that the possession and distribution of marijuana should be legal because of its medicinal, industrial, and food uses which should be brought to the public's attention. To promote their ideas, CAN conducts rallies around the country, including an annual rally that began in 1989 in the Gainesville Downtown Plaza. Pursuant to the City's Special Events Policy, CAN applied for three permits from the City, (an Event Permit, a Street Closing Permit, and a Sound Amplification Permit) all of which were denied. CAN filed suit seeking injunctive and declaratory relief alleging that the ordinances, which required that CAN obtain the permits before the rally could be held, violated its First-Amendment rights. CAN later added Kevin Alpin as a plaintiff to the suit via an amended complaint. By a supplemental order of the court, the permits were issued before determining whether the ordinances were constitutional. As a result, CAN later filed a motion for summary judgment seeking a declaratory judgment that the Special Events Policy and the ordinances were unconstitutional. The City conceded that the Special Events Policy and the original Street Closing Ordinance were unconstitutional, but argued that the Street Closing Ordinance had been amended since the original complaint.

The District Court's Omitted Findings and the Resulting Confusion

The district court held that the original Street Closing Ordinance was facially unconstitutional, and entered final judgment in favor of CAN. However, the court found the amended

Street Closing ordinance facially constitutional, but failed to include this finding in its final judgment. Finally, also neglecting to include it in its written judgment, the district court held that the Sound Ordinance was not a prior restraint on speech and therefore not susceptible to a facial challenge.

The City filed a motion to amend the final judgment to include all of the district court's rulings, and on the same day, unaware of the City's motion, CAN and Alpin filed their notices of appeal. Because of the City's pending motion, the notices of appeal were dismissed as untimely. The district court later reserved judgment to consider additional relief for the individual plaintiffs. Believing its judgment was also not final, CAN, which was not considered an individual plaintiff, failed to renew its notice of appeal.

Due to the convoluted nature of the proceedings and the ambiguous nature of the court orders, the district court found that CAN's untimely notice of appeal was "excusable neglect" and allowed CAN to join Alpin's timely appeal. *Cannabis*, 231 F.3d at 765. The City alleges that the district court could not extend CAN's time to file its notice of appeal, and CAN alleges that the Sound Ordinance and the Street Closing Ordinance are unconstitutional prior restraints on its free speech because they do not satisfy certain procedural safeguards developed by case law.

LEGAL ANALYSIS

CAN's Untimely Notice of Appeal

As a threshold issue, it must be determined whether the extension of time to allow CAN to file its notice of appeal was an abuse of discretion. If CAN's appeal is proper, then it must be decided whether the Sound Ordinance is a prior restraint on speech. Both parties and the district court properly agreed that the revised Street Closing Ordinance is a prior restraint on speech. Therefore, if the Sound Ordinance is found to be a prior restraint, both the Sound Ordinance and the Street Closing Ordinance must be examined to ensure that they have the appropriate procedural safeguards required of prior restraints on speech.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure "provides that a district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal." *Id.* at 766. CAN's notice of appeal was "filed after the

expiration of the original 30-day period," thus according to the rule's advisory committee notes, the appeal must be evaluated under the "excusable neglect" standard. *Id.* The "excusable neglect" standard was originally outlined in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993).

Under *Pioneer*, the court should consider the totality of the circumstances contributing to the omission, including "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Cannabis*, 231 F.3d at 767 (quoting *Pioneer*, 507 U.S. at 395). The City was not prejudiced by the extension because it was aware that CAN intended to appeal, and because it still had to defend the same issues in Alpin's timely notice of appeal regardless of CAN's participation. The effect of CAN's tardiness on the judicial process was *de minimus* in view of the many years the parties had been involved in the litigation. Additionally, the orders of the district court were unclear, CAN was diligent in its attempt to appeal, there was no indication that CAN's delay in its notice of appeal resulted from negligence or bad faith, and the correct law was applied. Therefore, the district court properly granted CAN an extension of time for its appeal.

Whether the Sound Ordinance Was a Prior Restraint on Speech

Because CAN's appeal was proper it must be determined whether the Sound Ordinance was a prior restraint on speech. Any ordinance that gives local officials the discretionary power to distribute a permit that is "a prerequisite to the use of public places for First Amendment activities is a prior restraint on speech." *Id.* at 768 (citing *Kunz v. N.Y.*, 340 U.S. 290, 293–294 (1951)). "A prior restraint is subject to a facial challenge." *Id.* (citing Ward *v. Rock Against Racism*, 491 U.S. 781, 793 (1989)). The Sound Ordinance gives city officials complete discretion in the granting of a permit to use sound amplification equipment and the complete power to forbid the use of the equipment. On the contrary, in *Ward*, the issue was not the outright denial of the use of sound amplification equipment, but the right to limit and control noise level and the mix of sound. Therefore, "Gainesville's ordinance appears to 'authorize . . . suppression of speech in

advance of its expression,' through a general ban on the use of sound amplification equipment unless a special permit is obtained." *Id.* at 770 (quoting *Ward*, 491 U.S. at 795 n. 5). Thus, the Gainesville Sound Ordinance constitutes a prior restraint on speech.

Procedural Safeguards for Ordinances That Impose Prior Restraints on Speech

Ordinances that impose prior restraints on speech "must meet the procedural safeguards set forth in the *Freedman* line of cases." *Id.* at 771 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 217 (1990); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

Specifically, *Freedman* provides that:

> (1) upon denial of the right to speak, the censor must bear the burden of initiating judicial proceedings, as well as the burden of proof once in court; (2) any restraint prior to judicial review can be imposed only for a specified and brief time period during which the status quo is maintained; and (3) there must be the assurance of prompt judicial review in the event that the speech is erroneously denied.

Cannabis, 231 F.3d at 772 (citing *Freedman*, 380 U.S. at 58–59). A majority in *FW/PBS* agreed that the last two requirements are essential, and a plurality concluded that the first requirement might not be necessary in certain situations. *Id.*

The Sound Ordinance does not meet the second requirement because "it does not specify any time within which the city manager must issue or deny a Sound Amplification permit. Furthermore, the ordinance does not obligate the city manager to make a decision at all, nor does it require the manager to notify the applicant of the decision." *Id.* Because the ordinance allows the "indefinite postponement of the issuance of a license," it is an unconstitutional prior restraint on speech. *Id.* (citing *FW/PBS*, 493 U.S. at 227).

The Street Closing Ordinance fails the first safeguard that the censor bear the burden of initiating judicial proceedings. Although, this requirement need not be met in certain limited circumstances, such as for business licenses, it is required here because of the difference in incentive between those trying to obtain a business license and a non-profit organization trying to obtain a one-time permit to engage in political speech. While business licensee's have the financial incentive to initiate

proceedings for themselves, CAN has no financial incentive to challenge the City's denial of a Street Closing Permit. Therefore, without this safeguard, the City's Street Closing Ordinance is also an unconstitutional prior restraint on speech.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 7A, §§ 24.593–24.595 (3d ed., West 1998).
- Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law Substance & Procedure* vol. 4, §§ 20.46–20.47 (3d ed., West 1999).

Robin Lynn Petronella

Constitutional Law: Fourth Amendment – Search & Seizure

Brinkley v. County of Flagler,
769 S.2d 468 (Fla. Dist. App. 5th 2000)

Under Florida Statutes Section 828.073, the seizure without a warrant of mistreated and abused animals falls within the urgent need for action exception to the Fourth Amendment warrant requirement. No pre-seizure hearing within the statutorily-prescribed period is required so long as the animal-owner is afforded a full hearing regarding the propriety of the confiscation of the animals.

FACTS AND PROCEDURE

A sheriff's deputy and an animal-cruelty investigator responded to a citizen's complaint that a large number of animals were being mistreated and confined under unhealthful conditions. As the officers stood by the front gate of the property, they were overcome by the putrid smell of animal feces. When they entered the unlocked front gate to the property, they approached a farmhouse where they saw animal cages on the porch, the decaying body of a dog, and a thick layer of animal feces covering the porch and the bottom of the cages. From the porch, they could see into the house, where they observed similar unsanitary conditions and inhumane treatment of animals. As a result of these observations, Flagler County immediately entered and seized approximately 358 dogs and one bird from the Brinkleys.

The County filed a petition against the Brinkleys pursuant to Florida Statutes Section 828.073, which prohibits the mistreatment of animals. The trial court found the Brinkleys to be unfit to care for the animals and ordered the animals turned over to the Flagler County Humane Society for placement. Additionally, the County sought, and was granted, an injunction against the Brinkleys, precluding them from further possessing animals. The Brinkleys claimed that the government officers violated their due-process rights under the Federal and Florida constitutions by conducting an illegal search and seizure. They also claimed that the statutory provision that enabled the court to enjoin the Brinkleys from possessing animals was unconstitutional.

COURT'S ANALYSIS

Section 828.073 of the Florida Statutes gives county officers the authority to care for animals in distress. In its opinion, the court concluded that the Fourth Amendment prohibition against unlawful searches and seizures applied to Section 828.073, because the seizure of the animals from the Brinkleys deprived them of their personal property. However, although the County seized the animals without a warrant, the court determined that the emergency exception to the Fourth Amendment warrant requirement applied in this case because the condition of the animals presented an immediate need for protective services. *See Tuck v. U.S.,* 477 A.2d 1115, 1119 (D.C. App. 1984) (defining the emergency exception to the warrant requirement). Furthermore, the deputy and investigator did not enter the Brinkleys' property with the intention to search or to make an arrest. Therefore, their entrance onto the property and seizure of the animals clearly fell within the emergency exception to the warrant requirement and did not violate the Fourth Amendment. *Brinkley*, 769 S.2d at 472 (citing *State v. Bauer*, 379 N.W.2d 895, 899–900 (Wis. App. 1985)).

The court also examined whether the failure to provide the Brinkleys with a preliminary hearing before their property was seized violated the due-process prohibition against the deprivation of property without an opportunity to be heard. The court recognized that the fundamental element of due process affords individuals the right to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). Additionally, this right assures a full hearing, the right to put forth evidence, and the right to a judicial determination based on that evidence. *E.g. Pine v.* State, 921 S.W.2d 866, 873

(Tex. App. 14th Dist. 1996). In this case, the Brinkleys were granted a post-seizure hearing within the statutorily-prescribed period, which the court determined was sufficient to satisfy due-process concerns. Fla. Stat. § 828.073(2) (1997). Accordingly, the court concluded that it did not matter whether the hearing was pre-seizure or post-seizure, so long as the Brinkleys were represented by counsel, had the opportunity to examine the witnesses, and were able to put forth evidence. *Cf. e.g. Humane Soc. of Marshall County v. Adams*, 439 S.2d 150, 153 (Ala. 1983) (holding that a statute permitting the Humane Society to seize animals that, in the Humane Society's employees' discretion, were neglected or abused was unconstitutional).

Finally, the court briefly addressed the Brinkleys' contention that the provision in Section 828.073 allowing an injunction against owners from further possessing animals rendered that Section "constitutionally infirm." However, the court dismissed this contention, reasoning that, because the injunction was subject to modification or termination in the future, this "legislative protection of animals from harassment and ill-treatment is a valid exercise of police power." *Brinkley*, 769 S.2d at 472.

RESEARCH REFERENCE

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 19.11.40 (3d ed., Clark Boardman Callaghan 1996).

Carol Cole McCrory
Jessica Paz Mahoney

Constitutional Law: Inverse Condemnation – Takings

Keshbro, Incorporated v. City of Miami,
801 S.2d 864 (Fla. 2001)

A regulatory action requires just compensation if it denies a property owner all economically beneficial or productive use of its land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The issue addressed in *Keshbro* is whether *Lucas's* categorical treatment applies to a regulation that only temporarily deprives an owner of the use of its property.

The Florida Supreme Court held that temporary regulations

are subject to *Lucas*'s categorical treatment. And the State must compensate the property owner if the State prevented all economically beneficial or productive use of the land, unless the State can prove that the regulation proscribes only those uses that were not part of the owner's title originally.

FACTS AND PROCEDURAL HISTORY

The Second District Court of Appeal issued its opinion in *City of St. Petersburg v. Kablinger*, 730 S.2d 409 (Fla. Dist. App. 2d 1999), and certified conflict with the Third District's decision in *City of Miami v. Keshbro, Incorporated,* 717 S.2d 601 (Fla. Dist. App. 3d 1998). The Florida Supreme Court consolidated these cases for review. Therefore, discussion of this issue will begin with an explanation of the two principal cases.

In *Keshbro*, the Plaintiff owned and operated a fifty-seven-room motel. The Miami Nuisance Abatement Board (NAB) conducted several hearings involving the motel and, each time determined that the motel was a drug- and prostitution-related public nuisance, in violation of both the City of Miami Code and the Florida Statutes. After each hearing, the NAB entered the appropriate sanction. Despite repeated sanctions, the motel continued to be the site of several drug- and prostitution-related arrests. Over the years, the NAB ordered the motel closed, either completely or partially, on four separate occasions. Finally, after receiving evidence of additional nuisance activity, the NAB ordered the complete shutdown of the motel for six months. The Plaintiff filed suit against the City and the NAB (Defendants) for injunctive relief and inverse condemnation, claiming that the NAB's complete closure of the motel constituted a taking and therefore required compensation. The circuit court granted Plaintiff's motion for summary judgment. On appeal, the Third District reversed, holding that no compensation was required because the NAB's order did not proscribe any uses that were inherent in the Plaintiff's property rights. The court of appeals found that the Plaintiff had no right to operate a "brothel and drug house."

In *Kablinger*, Residential Property Management (RPM) owned an apartment complex that the NAB ordered closed for one year. The NAB issued its order after it learned of two incidents at the complex involving the sale of cocaine, which violated the City's Code of Ordinances. Two years after the closure, RPM assigned its interest in the apartment complex to Kablinger

(Plaintiff), who thereafter brought an action against the City for inverse condemnation. The Plaintiff sought compensation for the year the complex was ordered closed. The trial court granted Plaintiff's motion for summary judgment. On appeal, the Second District affirmed the trial court's grant of summary judgment, and certified conflict with *Keshbro*.

Although both the Second and Third District Courts of Appeal reached opposite conclusions in *Keshbro* and *Kablinger*, each court relied on the categorical takings analysis established in *Lucas*. The Defendants' primary contention in each case was that the "temporary" closures ordered by the respective NABs were not subject to treatment under the *Lucas* analysis. The Florida Supreme Court consolidated the two cases for review and determination of the appropriate standard to be applied.

ISSUE ANALYSIS

In the present case, the court held that it is clear that a temporary deprivation can amount to a taking, but whether such a deprivation is subject to *Lucas*'s categorical treatment is a different issue. The *Lucas* standard states that a regulatory action requires compensation if it "denies all economically beneficial or productive use of land." *Keshbro*, 801 S.2d at 869 (quoting *Lucas*, 505 U.S. at 1015). If the court finds that a regulatory action has worked a complete deprivation of land use, then the State must pay the owner just compensation, unless it can identify any "background principles of nuisance and property law that prohibit the uses" proscribed by the order. *Id.* at 875 (quoting *Lucas*, 505 U.S. at 1031). Therefore, if the State can show that the proscribed uses were not part of the owner's original property title, then it may avoid any liability for compensation. This is referred to as the nuisance exception.

The Defendants argued that the "temporary" nature of the NABs' orders precludes any finding that the closures amounted to a complete deprivation of all economically beneficial or productive use of the properties. The Florida Supreme Court disagreed, and in making this determination, it cited *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). A landowner can recover damages for the "temporary" deprivation of land use based upon *Lucas's* categorical standard. *Id.* As referenced in *First English*, the "temporary" deprivation is that period of time from when the regulation was enacted, to when it was struck down by the courts. In *First English*, the actual

"taking" was to be found temporary, and not the regulation, as in the present case. However, the Florida Supreme Court held that such a fine distinction should not guide the takings analysis. "Retrospectively" temporary takings, like those in *First English*, and "prospectively" temporary takings, like those found in the present case, should be treated as being the same. Therefore, the temporary takings in *Keshbro* and *Kablinger* were subject to the categorical treatment under *Lucas*.

Defendants next argued that the NABs' orders did not deprive the owners of all economically beneficial or productive uses of the properties because there were other uses available to them. However, the court disagreed with the defendants and held that the orders "rendered the properties economically idle." *Keshbro*, 801 S.2d at 875. The temporary nature of the closings prevented the owners from transforming the properties into some other use. One of the structures was built as a motel, and it would have been impractical to transform it into something else for a six-month period.

After concluding that the NABs' orders denied the property owners all economically productive use of their land, the court conducted its final inquiry. The Defendants could avoid paying the owners compensation if they could show that the closure orders proscribed only those uses that were already prohibited by principles of nuisance and property law. The court noted that this would be a difficult task for the Defendants because of the breadth of the orders, which proscribed all uses of the respective properties, both legal and illegal. Specifically, the regulations must simply mirror the relief that could be obtained in the courts by adjacent landowners under the private nuisance law, or by the State under its powers to abate nuisances that affect the public generally.

In Florida, "injunctions issued to abate public nuisances must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise." *Keshbro*, 801 S.2d at 876. This means that, when the illegal and legal conduct of an enterprise are separable, only the illegal conduct may be enjoined as a nuisance. In this case, the court agreed with the Third District in *Keshbro*, and held that the unlawful activities, including drugs and prostitution, had become inextricably intertwined with the lawful activities of the motel. Therefore, it was necessary for the City to close down the motel completely to preclude the illegal activities that constituted a

public nuisance. The drugs and prostitution had become "part and parcel" with the motel's operations, and all previous attempts by the City to eradicate these activities had been futile. Consequently, the NAB's order was reasonable and was tailored as specifically as possible.

The court identified factual distinctions between the two cases. The Florida Supreme Court agreed with the Second District in *Kablinger* and held that the apartment's illegal and legal activities were not inextricably intertwined as they were in *Keshbro*. The NAB's record indicated only that the complex had been the site of cocaine sales on more than two occasions. The court found there was no evidence that the drug activity had become an inseparable part of the apartment complex's operations and concluded that the NAB's abatement order was not specifically tailored to abate the drug nuisance at the property. After distinguishing their respective factual scenarios, the court affirmed the decisions in both *Keshbro* and *Kablinger*.

COMMENTARY

This case answers an important question in the area of inverse condemnation. The application of *Lucas's* categorical treatment to "temporary" deprivations should have a substantial impact. As the present case explains, courts are not required to use the categorical analysis to find that a "temporary" deprivation of property amounts to a taking. However, the burden on an owner is much more difficult and troublesome without the *Lucas* analysis. Absent the *Lucas* analysis, an owner would have to demonstrate the economic impact of a regulation and the extent to which the regulation interfered with investment-backed expectations. Now, the property owner can avoid this burden by simply showing that a regulation resulted in a complete deprivation of economic use, even when it is merely a temporary deprivation.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 11, § 32.26 (3d ed., West 2000).
- David M. Layman, *Concurrency and Moratoria*, 71 Fla. B.J. 49 (Jan. 1997).

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