ABA Section of State and Local Government Law Vol. 35, No. 1, Fall 2011

STATE & LOCAL LAW NEWS

The Section serves as a collegial forum for its members, the profession, and the public to provide leadership and educational resources in urban, state, and local government law and policy.

Local Government and the First Amendment at the Supreme Court:

Legislative Voting as "Speech" and Union Grievances as "Petitions"

By Robert H. Thomas

I. Introduction

The U.S. Supreme Court decided two First Amendment cases this Term of special interest to attorneys practicing state and local government law. In *Nevada Comm'n on Ethics v. Carrigan,*[1] the Court concluded Nevada's Ethics in Government Law, which requires elected and appointed government officials to recuse themselves from voting when they might have a conflict of interest, does not violate an official's right to vote. By upholding Nevada's ethics laws, the Court allowed state and local governments to continue to regulate the conflicts of interests of elected and appointed government officials and other government employees. In *Borough of Duryea v. Guarnieri,*[2] the Court applied the long-standing balancing test applicable to government employee speech to government employee union grievances and held that a public employee—in that case, a police chief—was protected by the Petition Clause against retaliation for filing a union grievance only if it addressed a "matter of public concern." In both cases, the Court allowed state and local governments to exercise broad discretion in how they manage their elected officials and employees.

II. *Carrigan*: Legislators' Voting Is an Exercise of "Power," Not "Speech"

The technical legal question before the Court in *Carrigan* was whether legislative voting by an elected official was "speech" and if so, whether it was protected by the First Amendment. The Court's opinion reaffirmed the core principle of representative government: when casting votes, elected and appointed officials are not speaking for themselves, but are exercising power "that belongs to the people."

Robert H. Thomas (www.inversecondemnation.com) is a Director with Damon Key Leong Kupchak Hastert in Honolulu, Hawaii, and Berkeley, California. He is the CLE Director for the Section and chair of the Section's Condemnation Law Committee.

A. *Nevada's Ethics Statute Requires Recusal for Close Relationships*

The case began when Michael Carrigan, a city councilman in Sparks, Nevada, did not recuse himself from considering an application for development filed by a hotel/casino project known as the Lazy 8. The developer's consultant was Carrigan's "longtime friend and campaign manager," during each of his two election campaigns.[3] The Nevada Ethics in Government Law prohibits public officers, including local elected officials, from voting or advocating on matters in which their independent judgment could be reasonably questioned because of a "commitment in a private capacity." Nev. Rev. Stat § 281A groups those private commitments into five categories, including those to family and household members, employers, and certain business contacts, as well as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection."[4]

(continued on page 13)

In This Issue

- *Chair's Message*, page 3
- *Section News*
  —**2011 Fall Meeting in Tucson, pages 4-5**
  —2010–11 Student Excellence Awards, page 7
- Is Zoning Coming to an Ocean Near You?, page 6
- *Supreme Court Watch*, page 9

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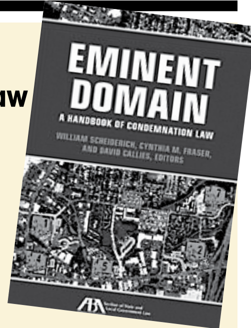
SECTION NEWS

Eminent Domain

A Handbook of Condemnation Law



Edited by William Scheiderich, Cynthia M. Fraser, and David Callies

Eminent domain has a long and distinguished legal history, dating from the first limits on sovereign power in the Magna Carta. Just compensation is a newer concept, and court decisions such as Kelo v. New London make the exercise of eminent domain controversial. Can government condemn property to increase its tax base? Can the state transfer property from one private owner to another for incidental public benefit, and does this constitute "public use"? While eminent domain traditionally was used to acquire property for roads, waterways, defense installations, government and public buildings, and the interstate highway system, it has recently been a favored tool in developing urban areas, creating shopping malls, and building big-box retail stores. *Eminent Domain: A Handbook of Condemnation Law* is written by leaders in the field and will introduce general practitioners working for condemnors and property owners alike to the many intricacies of condemnation practice.

August, 2011 6x9 paperback
$89.95—regular price
$69.95—SLGL member price

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Our Very Special Thanks

The Section of State and Local Government Law gratefully acknowledges the support of the following firms in making the Section's 2011 Annual Meeting in Toronto, Ontario, a success:

Brown & Hofmeister
Richardson, Texas

Stikeman Elliott
Toronto, Ontario

The Section of State and Local Government Law gratefully acknowledges

Edward J. Sullivan
Garvey Schubert Barer
Portland, Oregon

for his support of the Section Spring Meeting in Portland, Oregon.

Upcoming Event:

Kratovil Conference on Real Estate Law & Practice

September 20, 2011, Chicago, Illinois

On Tuesday, September 20, 2011, the Center for Real Estate Law at John Marshall Law School in Chicago will host an all-day conference: the *12th Kratovil Conference on Real Estate Law & Practice: 40th Anniversary Quiet Revolution in Zoning and Land Use Regulation*.

In 1971, the President's Council on Environmental Quality published *The Quiet Revolution in Land Use Control* (*The Quiet Revolution*). The book described in detail the innovative land use laws in nine states around the nation that returned the control of land use to a state or regional level, largely at the expense of local zoning. This constituted the "quiet revolution." The Kratovil *Quiet Revolution* Conference will bring together national scholars and experts in land use to analyze the lasting land use impact of *The Quiet Revolution* in several jurisdictions around the country. In the afternoon, experts will analyze the future of land use policy and how this national issue will play out around the country and in the Chicago region.

For a full list of speakers and to register, visit *www.jmls.edu/kratovil* online.

STATE & LOCAL LAW NEWS

Public Law Produces Public Benefit

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State & Local Law News provides information concerning current developments in the law of interest to state and local government lawyers, news about the activities of the Section, and other information of professional interest to Section members.

Any member of the ABA may join the Section by paying its annual dues of $45. Subscriptions to *State & Local Law News* are available to nonlawyers for $44.95 a year ($49.95 for foreign subscribers).

The views expressed herein are not necessarily those of the American Bar Association or its Section of State and Local Government Law.

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Address corrections should be sent to the American Bar Association Service Center.

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CHAIR'S MESSAGE

Edwin P. Voss, Jr., is a partner in the Richardson, Texas, law firm of Brown & Hofmeister and is the Chair of the Section.

Gratitude

"If a man is to be obsessed by something, I suppose a boat is as good as anything, perhaps a bit better than most." —E.B. White.

As we end this year and begin a new one in our Section, I arrive as Chair with much gratitude for our (very!) outgoing Chair, Dwight H. Merriam. Our Captain has maintained the helm this past year with aplomb and good humor. Most of you know of Dwight's love of the wind, sail, and sea. Indeed, our year with Dwight in command began with his reception in San Francisco aboard the SS Jeremiah O'Brien, a World War II Liberty Ship, rich with history that remains fully operational today.

From there, our adventurous Captain hoisted the Section's Fall Meeting flag in his own backyard (sort of): Providence, Rhode Island. Notably, we were treated to a very special reception at the U.S. Naval War College. Finally, Dwight chose Portland, Oregon, as the site for our Section's Spring Meeting. Besides being the home town of several of our Section's leaders, Portland's natural beauty, surrounded by water, was marvelous. At these meetings, the Section's programming and presentations were top knot.

To our Old Salt, we extend our thanks, and always wish you "fair winds and following seas."

I inherit from Dwight a section that is in ship shape. Our finances are operating in the black, we have increased our membership, and our fine ABA staff (shipmates Tamara and Marsha) keep us on an even keel.

Now, on to the desert.

The name "Tucson" is derived from a Pima Indian word, "Stjukshon" or "Chuk-son," meaning "spring at the foot of a black mountain." The Pimas, the Native Americans who occupied the site of present-day Tucson when the first white settlers arrived, were referring to the Santa Cruz River, which used to flow near the base of the Tucson Mountains (it is mostly a dry river bed now). Tucson was officially founded in 1775 as a Spanish colony, and the Presidio San Augustin del Tucson was built as protection from the Apache. Part of the old walled presidio still exists today, and its nickname, "Old Pueblo," is now extended to the city as a whole.

Founded under Spain, Tucson became a Mexican town when Mexico won independence from Spain in 1821. In 1853, the United States acquired land from Mexico (including Tucson) known as the Gadsden Purchase. Before 1863, when Arizona gained territorial status, Tucson briefly belonged to the Confederacy. Tucson became the capital of the Arizona Territory in 1867.

Tucson has played an integral role in the romance of the Old West. The Old Pueblo was the scene of gunfights, brawls, and other skirmishes. Nearby Tombstone was the site of the legendary gunfight at the O.K. Corral. Afterwards, U.S. Marshall Wyatt Earp and friends traveled to California and, while at the Tucson trail station, avenged the shooting of Morgan Earp. The great gold rush also brought prospectors to Southern Arizona, and mining (e.g., copper, silver, zinc) has been part of the Arizona economy ever since.

By the time it became the 48th state in 1912, Arizona was famous for sunny climates and dry air, making it ideal as a healthful spot to visit and settle. And our Section's Fall Meeting is planned to take advantage of those same benefits. Tucson aggressively preserves its multicultural heritage and pioneer spirit, yet it has grown considerably in the last half century. We will learn about the challenges that result from that growth during our meeting, September 22–25, 2011. Our programs will feature land use, water, environmental, election, and immigration topics.

Our accommodations in Tucson, the Loews Ventana Canyon Resort, nestled in the foothills of the Santa Catalina Mountains, will be fabulous. Go to *www.loewshotels.com/en/Ventana-Canyon-Resort* and you will see what I mean.

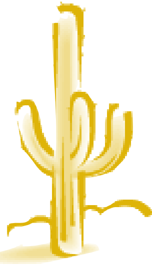
We are thankful for those who have gone before us, both in the Section and in Tucson. Come join us at the Old Pueblo!

In your service,
Ed Voss

Calling All Friends of the Section!

Connect with the Section on Facebook.

www.facebook.com/pages/Chicago-IL/ABA-Section-of-State-and-Local-Government-Law/151505107412



ABA Section of State and Local Government Law

2011 Fall Council Meeting

September 22-25, 2011 ◆ Loews Ventana Canyon ◆ Tucson, Arizona

Thursday, September 22, 2011

4:00 p.m. to 5:00 p.m.—Executive Boardroom
Executive Committee Meeting

5:00 p.m. to 6:00 p.m.
Conflict of Interest Restriction After *Carrigan*: Legislative Voting and the First Amendment
Committee: Ethics
This program will include a panel discussion of the recent U.S. Supreme Court opinion in *Nevada Commission on Ethics v. Carrigan*. At the heart of this case is how far a state can go to police public officials who face a potential conflict of interest when conducting government business. The panel will discuss the case, the ruling, its ethical implications, and questions still to be answered.

6:00 p.m. to 7:00 p.m.—Ventana Room
Networking Reception

Friday, September 23, 2011

7:00 a.m. to 6:00 p.m.
Section Registration & Hospitality

7:00 a.m. to 8:00 a.m.—Ventana Room
Continental Breakfast

8:00 a.m. to 9:30 a.m.
Committee: Public Finance
Selling Assets to Balance Budgets
This program includes technical and legal issues of asset sales, revising state laws to facilitate sales, infrastructure financing, federal funding and tax incentives.

9:45 a.m. to 11:15 a.m.
Committee: Environmental Law
A Presentation on Arizona Water Use Law—With an overview of the history and case law impacting the rights to use the available water and ownership of the river-beds and streams
Speakers: Michael J. Pearce, Phoenix, AZ
Rhett A. Billingsley, Phoenix, AZ
Nicole D. Klobas, Phoenix, AZ

Active Arizona water law practitioners, some with experience in the Arizona Department of Water Resources, will provide an insightful discussion of the unique issues facing Arizona regarding the utilization of water, rights to water, and the rights to the river and stream beds. The discussion also will focus on the famous Colorado River basin and other river basins within Arizona.

11:30 a.m. to 12:45 p.m.
Committee: Government Operations
Immigration CLE

1:00 p.m. to 2:00 p.m.
Luncheon Keynote Speaker: Grady Gammage, Jr., Gammage & Burnham, Phoenix, Arizona

2:15 p.m. to 3:15 p.m.
Committee: Government Operations and Liability/ABA Standing Committee on Election Law
Trends in State and Local Election Law: Planning for the Future

This program will consist of a look at evolving trends in state and local election law as they will affect election officials, state and local lawyers, and election advocates for the next decade, including:

- *Citizenship Voting and Registration*: Renewed questions on voter qualification, proof of citizenship, and disqualification for felons and others;
- *Voter ID Laws*: The trend towards requirements that all voters possess a "real" ID;
- *Absentee Balloting*: Increased use will change elections, election administration, and raise questions as to how absentee ballots should be counted;
- *Vote Counting*: The next trend in voting machines;
- *Recounts & Contests*: Challenges will involve sophisticated analysis of absentee and other votes; and,
- *Redistricting*: Is it now all politics with little to challenge in the courts?

5:00 p.m. to 8:00 p.m.
Dinner—Arizona Sonora Desert Museum Ocotillo Café
2021 North Kinney
3:30 p.m. Board bus for Museum
This is a ticketed event, not included in the general registration fee. The cost is $75 per person.

Saturday, September 24, 2011

7:00 a.m. to 5:00 p.m.
Section Registration & Hospitality

7:00 a.m. to 8:00 a.m.—Ventana Room
Continental Breakfast

8:00 a.m. to 9:00 a.m.
***Urban Lawyer* Advisory Board**

8:00 a.m. to 9:00 a.m.
Revenue Enhancement Committee

9:00 a.m. to 12:00 p.m. (concurrent meetings)
ABA Standing Committee on Election Law Meetings

9:00 a.m. to 10:00 a.m.
Electronic Communications Committee

9:00 a.m. to 10:00 a.m.
Diversity Committee

10:00 a.m. to 12:00 p.m.
Publications Oversight Board

11:00 a.m. to 12:00 p.m.
Land Use Committee Business Meeting

11:00 a.m. to 12:00 p.m.
Content Advisory Board

12:00 p.m. to 1:00 p.m.
Substantive Committee Business Meetings: Condemnation, Public Finance, Government Operations, Environmental, Ethics, Public Education, Emergency Management, Diversity Law, Model Procurement Code

1:00 p.m. to 2:00 p.m.
Membership Committee

Sunday, September 25, 2011

8:30 a.m. to 11:00 a.m.
Council Breakfast Meeting

SPECIAL EVENTS

Thursday, September 22, 2011

Join us and enjoy a delicious meal in the middle of the desert. We will have dinner at the Desert Museum Ocotillo Café. The Museum is a cultural center, zoo, natural history museum, and botanical garden in one, with almost two miles of paths traversing 21 acres of beautiful desert. The museum's Ocotillo Café is a seasonal casual fine dining restaurant, which has a menu that consists of Southwestern gourmet cuisine.

REGISTRATION APPLICATION

The registration fee includes the CLEs and Hot Topics materials. Payment must accompany registration. Confirmations will be sent to all registrants.

Register online through the Section website at **www.americanbar.org/groups/state_local_government/events_cle.html** (credit card only).

Or Send Via Fax 312-988-121 (credit card only) Or Mail to: Marsha Boone, ABA Section of State & Local Government Law, 321 North Clark St. Chicago, IL 60654-7598

CLE CREDIT

Accreditation has been requested for this program from every state (including CA and PA) with mandatory continuing legal education (MCLE) requirements for lawyers. Please be aware that each state has its own rules and regulations, including its own definition of "CLE." Certificates of attendance will be available at the program for both attendees and speakers. If you have questions about the number of CLE credit hours granted by each state, you may call 800-285-221 starting two weeks before the program.

AMERICANS WITH DISABILITIES ACT

For those individuals with disabilities who need special arrangements while attending the program, please contact Marsha Boone, at the American Bar Association, 312-988-5649.

HOTEL INFORMATION

Loews Ventana Canyon offers guests a premier luxury hotel designed to provide both comfort and value. Stroll the resort's own half-mile paved nature trail and learn the wonders of the Sonoran Desert. Just minutes from the resort is an intricate trail system with adventures for all skill levels. While visiting this Tucson attraction, take a trip up to Seven Falls and enjoy the waterfalls or hike the Phoneline trail with breathtaking views of the city below. Join the hotel for stargazing on Wednesday and Saturday nights. The sky is the limit with the resort's own telescope and a University of Arizona astronomy professional, who will guide you through stars, planets and galaxies.

A block of rooms has been reserved on a **priority basis for program registrants**. Room rates at the Loews Ventana Canyon are $149, single/double. This rate is available three days prior and three days following the Section's *listed meeting dates*.

You may reserve your accommodations by calling the hotel directly at 520-299-2020, or online at www.loewshotels.com/en/Ventana-Canyon-Resort. Be sure to refer to the **ABA Section of State & Local Government Law's 2011 Fall Meeting**, and guarantee your reservation by credit card or deposit check. Rooms will be available for check-in no later than 3:00 p.m. with check-out time of 12:00 p.m. **Individuals with guaranteed reservations must cancel their reservations 24 hours prior to the scheduled day of arrival to avoid a one-night cancellation charge.**

Please, make your reservations NOW. The hotel will release our room block on Wednesday August 31, 2011 at 5:00 p.m. (CST).

SPECIAL AIRLINE DISCOUNTS

Airfare discounts to ABA meetings are available through ABA Online Travel, Orbitz for Business, the ABA's travel agency, or directly from the airlines. To access ABA Online Travel, go to **http://www.abanet.org/travel/**

American: Call 800-433-1790 code 20348
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Continental: Call 800-468-7022
Z code ZEPB—Agreement code BQGH95.
Continental discounts are also available at www.continental.com > enter ZEPBBQGH95 in the "offer code box"

CANCELLATION POLICY

Refund requests must be made in writing (via email or U.S. mail) and received in the Section of State & Local Government Law's office on or before September 2. All refunds will be reduced by a $25 administrative fee. Substitutions may be made at any time.

NO refunds will be made after September 2.
Early Bird Registration ends on August 31.

To register for the State and Local Government Law Fall Meeting in Tucson, Arizona, visit

www.americanbar.org/groups/state_local_government/events_cle.html

Is Zoning Coming to an Ocean Near You?

By John M. Boehnert and Adena Leibman

The answer is that zoning certainly could be coming to an ocean, or one of the Great Lakes, near you, given the national, and even international, interest generated by the State of Rhode Island's first-in-the-nation ocean zoning regulatory program.

And the impetus for such ocean zoning could be as diverse as the interests of the regions impacted. It may be initiated to foster alternative energy development, as resulted from the intense interest in wind energy in Rhode Island and certain other Atlantic Coast states, or it may be initiated to protect the marine ecosystem from disasters such as oil spills, which have recently impacted the Gulf Coast.

What Is Ocean Zoning?

Ocean zoning may be thought of as an effort to establish specific use zones for ocean waters, based on detailed research and categorization of the ecology of the region in question, including oceanography (geological, physical, chemical, and biological) and meteorology, as well as the study of other areas of the marine environment and its uses. These additional studies can include global climate change and its potential impact on the region, cultural and historical resources, fisheries, recreation and tourism, shipping and navigation, and other factors or uses specific to the region. These use zones, once delineated, can allow, limit, or deny particular types or intensities of uses.

Such zoning would effectively implement the results of "marine spatial planning," which is defined by the Interagency Ocean Policy Task Force (a federal multiagency task force formed by Executive Memorandum in June 2009 by President Obama and charged with developing a national ocean policy) as follows:

> a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas. Coastal and marine spatial planning identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security and social objectives.

Mr. Boehnert practices real estate and environmental law, including coastal permitting, in Providence, Rhode Island. He is currently writing a book on ocean zoning.

Ms. Leibman is a second year student at Lewis & Clark Law School, has undergraduate and graduate degrees in marine science, and worked on coastal regulatory issues while serving as a NOAA Sea Grant Fellow in the office of U.S. Senator Sheldon Whitehouse (D-R.I.).

In other words, the end result helps identify zones and areas where development activities should be limited because of sensitive resources or areas needing special protection, as well as to identify areas suitable for more intensive uses, such as shipping and marine transportation, mineral extraction, or offshore energy development.

What Is Rhode Island's Ocean SAMP?

The Rhode Island plan, known as the Ocean Special Area Management Plan, or Ocean SAMP in shorthand, is an ecosystem-based management plan for a defined area that requires detailed regulation because of special or unique characteristics. It has been referred to as the nation's first zoning of offshore waters to regulate uses and control development, including the fostering of preferred uses such as alternative energy production, principally wind power.

Rhode Island's Ocean SAMP was formally adopted by Rhode Island's Coastal Resources Management Council (CRMC) on October 19, 2010, for Rhode Island waters and became effective for state regulatory purposes on December 26, 2010.

While Rhode Island is familiarly known as "Little Rhody," there is nothing little about this ambitious plan. In fact, it covers 1,467 square miles of offshore waters comprised of both the state waters of Rhode Island and federal waters off the coasts of Rhode Island, Massachusetts, Connecticut, and New York. The Ocean SAMP covers an area approximately 50% larger than the land area of Rhode Island (1,045 square miles) and about equal to Rhode Island's total land and water area of 1,545 square miles.

The Ocean SAMP required, and recently received, approval from the National Oceanic and Atmospheric Administration (NOAA) as a programmatic change to Rhode Island's Coastal Resources Management Program, confirming it as part of the federally approved state program

Because the Ocean SAMP covers more than state waters, a separate and distinct federal approval is also required to confirm the Ocean SAMP as part of the enforceable policies of Rhode Island's coastal resources management program, which would extend the influence of the state over federal waters under the federal consistency program, as discussed below.

The Ocean SAMP is available for review on CRMC's website at *www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf*.

Why a Rhode Island Ocean SAMP?

The stated rationale for CRMC undertaking the Ocean SAMP process was to meet ambitious requirements for alternative energy production imposed by state statute and executive order to reduce Rhode Island's reliance on fossil fuels. The siting of offshore renewable energy facilities was seen as critical to accomplishing these goals, and coastal regulators concluded this necessitated a detailed planning and regulatory tool to site such facilities.

In fact, two of the stated objectives CRMC advanced in proposing the Ocean SAMP were the streamlining of federal and state permitting processes for such offshore facilities and establishing a cost-effective permitting environment for potential investors.

How Was the Rhode Island Ocean SAMP Developed?

Costing over $8 million and taking over two years to study and draft, Rhode Island's Ocean SAMP was developed in a collaborative process led by CRMC, which relied on university and educational resources, including scientists, policymakers, educators, and university staff. A large and active stakeholder group that included representatives of environmental organizations, fishermen, acquaculturists, government officials, alternative energy authorities, and other interested parties also was involved throughout the entire process.

Rhode Island officials also collaborated with neighboring states, given the extensive waters covered, and entered into a Memorandum of Understanding with Massachusetts, pledging cooperation in the development of wind energy projects in a 400-square-mile "Area of Mutual Interest" within the Ocean SAMP region. Moreover, CRMC worked closely with federal regulators throughout the entire process, given that the program would ultimately be subject to federal review and approval.

The process involved the collection and analysis of existing data about the region, gathering new information through studies and research, and assembling and working with advisory groups and a large stakeholder group.

Technical advisory groups were formed for each of the chapter topics addressed in the Ocean SAMP, and a science advisory task force was used to address the scientific aspects of the plan.

The result was a regulatory document of nearly 1,000 pages, and an even longer Appendix, addressing 1,467 square miles, beginning 500 feet off of Rhode Island's coast and extending 30 miles offshore.

The Ocean SAMP area encompasses Rhode Island state waters (which extend to three nautical miles) and federal waters, and abuts (but does not include) state waters of Massachusetts, Connecticut, and New York.

What Does the Ocean SAMP Do?

The Ocean SAMP sets forth the results of extensive studies and investigations that formed the basis of policies and standards pertaining to uses and development within the Ocean SAMP region.

Given the extensive nature of the report, only a brief outline of the key chapters can be provided here.

Chapter 2: Ecology of the Ocean SAMP Region

The SAMP summarizes extensive findings regarding the ecology of the region, including detailed information concerning wind, storm, wave, and tide patterns, seafloor geology, and the biological composition of the complex benthic and pelagic ecosystems present in the region, which support a variety of life from zooplankton to megafauna. Enforceable policies include the preservation and restoration of ecosystems as the primary guiding principle for measurement of environmental alteration of coastal resources; activities must be designed to avoid adverse impacts to such ecosystems and if such impacts are unavoidable they must be minimized and mitigated.

Chapter 3: Global Climate Change

This chapter addresses the implications of global climate change for the region, including sea level rise, more intense storms, accelerated rates of erosion, and the consequences these implications may have for coastal

2010–11 Student Excellence Awards

Each year the Section of State and Local Government Law recognizes outstanding students working in the areas of land use law and local government law at the nation's law schools. Each honoree is nominated by the dean of his or her law school for this recognition. The student honored receives a special award that includes a current Section publication and a certificate of recognition. The 2010–11 award recipients and their law schools are:

Sebastian M. Lombardi and **DeVaughn L. Ward**, University of Connecticut School of Law;

Kristen Kay Erickson, **Justin Dean Young**, and **Jason M. Marino**, Washington University School of Law;

Betty Burley, Cleveland-Marshall College of Law;

Brendan Bylee, Brigham Young University–J. Reuben Clark Law School;

Katharine Casaubon, Quinnipac University School of Law;

Sarah Smith, The College of William & Mary Law School;

Daniel F. McGraw and **Kevin A. Gardner**, The Dickinson School of Law;

Thomas J. Major, Rutgers, The State University of New Jersey Law School;

Michael Frascarelli and **Eric Garofano**, Albany Law School; and

James Byron Hicks and **Emily B. Pickering**, Cornell Law School.

infrastructure and recreation, marine navigation, and transportation. This is an important chapter, as it is an area CRMC takes seriously. Enforceable policies include prohibiting land-based and offshore development projects that will threaten safety or have adverse environmental impacts based on anticipated sea-level rise.

Chapter 4: Cultural and Historic Resources

This chapter catalogues numerous resources, such as submerged pre-contact tribal landscapes, and historic shipwrecks. (Rhode Island coastal waters have perhaps the largest number of known Revolutionary War shipwreck sites in the country.) Enforceable policies include prohibiting activities that will adversely impact the state's cultural, historic, or tribal resources, and requiring archeological surveys as part of the permitting process for projects that may pose a threat to such resources.

Chapter 5: Commercial and Recreational Fisheries

This is the second longest chapter and provides detailed information about fisheries resources as well as a detailed discussion of commercial and recreational fisheries in the region. Enforceable policies include protecting commercial and recreational fisheries within the region from the adverse impacts of other uses.

Chapter 6: Recreation and Tourism

This chapter addresses marine recreation as well as shore-based recreational activities adjacent to the Ocean SAMP region, with enforceable policies including promoting uses of the region that do not significantly interfere with recreation and tourism.

Chapter 7: Marine Transportation, Navigation, and Infrastructure

This section of the Ocean SAMP details navigational considerations, shipping lanes, vessel routes, anchorages, Navy restricted areas, right whale management areas, and other transportation activities and issues. Enforceable policies include an acknowledgement that the SAMP region is heavily used for designated navigation areas and the impacts of any change in spatial use patterns on marine transportation must be carefully evaluated.

Chapter 8: Renewable Energy and Other Offshore Development

This is the largest chapter of the Ocean SAMP, discussing various forms of renewable energy, including wind, wave, solar, biomass, and geothermal. Its focus is on wind energy, which is seen as the most feasible of the available technologies that can generate electricity on a utility-scale in Rhode Island. Enforceable policies include support for increased renewable energy production with a focus on the potentials of wind energy, designating a renewable energy zone, more specifically discussed below, and a commitment by CRMC to work with federal regulators to develop a "seamless" review and design approval process for offshore wind energy facilities consistent across federal and state waters.

Chapter 11: Regulatory Standards

The Ocean SAMP promulgates regulatory standards for large- and small-scale offshore development projects that include requirements for detailed documentation to be submitted to the state at various stages throughout the project and detailed standards for development activities themselves.

The regulatory standards also designate and regulate certain sensitive areas for increased protection.

"Areas of Particular Concern" are areas of unique or fragile features, having important habitats, harboring significant historical or cultural features, or being important for navigation, transportation, or military or other uses. These areas can include offshore dive sites or historical shipwrecks.

"Areas Designated for Preservation" are areas to be preserved because of their ecology, and large-scale offshore development, mining and mineral extraction, and other incompatible development are prohibited. These areas include certain sea duck foraging habitat and areas identified as critical habitat under the Endangered Species Act.

What Are the Benefits of the Ocean SAMP?

This, of course, depends on whom you ask. Whether one supports or opposes the concept of ocean zoning, it appears there are several benefits arising from the Ocean SAMP.

Blueprint for Plans in Other Jurisdictions

Perhaps its greatest benefit is that it has been enacted by a state. It therefore presents a substantive model for ocean zoning regulation. Other states and jurisdictions are free to study it and revise it as they see fit.

Not only does it present a substantive role model for study, it also presents a procedural role model. Rhode Island did enact a final Ocean SAMP, despite the contentious issues and competing interests involved. The process employed is therefore worth studying and perhaps emulating.

Establishes Renewable Energy Zones

Supporters of renewable energy, and that appears to be a rapidly expanding group, would find one of the significant benefits of the Ocean SAMP to be that it designates a renewable energy zone, Type 4E, south of Block Island in Rhode Island state waters.

Renewable energy facilities can be sited here in order to have minimum interference and minimum adverse impacts to fisheries, navigation and shipping, recreation and tourism, and other marine uses. Although this designated zone is the preferred site for the development of large scale renewable energy facilities, it is not the only area where such facilities may be located. The Ocean SAMP specifically provides that offshore renewable energy development

(continued on page 12)

By Sophia M. Stadnyk

An End-of-Term Roundup: From Clean Elections to Clean Air to Mortal Kombat

Here's a look at the Supreme Court's recent decisions of interest to local government lawyers.[1]

Subsidies of Political Speech and the First Amendment

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 79 U.S.L.W. 4640, 2011 WL 2518813 (U.S. June 27, 2011). A state law, the Arizona Citizens Clean Elections Act, created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. The candidates who opted in agreed, among other things, to limit their expenditure of personal funds for the campaign to $500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public moneys to the state. In exchange, the candidate was entitled to receive public funding for his or her campaign in the form of matching or "equalizing" funds. In essence, once a defined threshold was met (based on the amount of money a privately financed candidate received in contributions, combined with the expenditures of independent groups made in support of that candidate), the publicly financed candidate was eligible to receive a dollar in additional state funding for each additional dollar over the threshold that a privately financed candidate received in contributions or spent on his campaign. (Under state law, a privately financed candidate could raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements.) Once the public financing cap was exceeded, additional expenditures by independent groups could result in dollar-for-dollar matching funds as well.

John McComish was a member of the State House of Representatives. McComish, other candidates, and two independent expenditure groups (political action committees), challenged the constitutionality of the matching funding law, claiming that it unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights. At first instance, the district court entered a permanent injunction against the enforcement of the matching funds provision[2]; on appeal, the U.S. Court of Appeals for the Ninth Circuit reversed concluding that the provision imposed only a minimal burden and that the burden was justified by the state's interest in reducing quid pro quo political corruption.[3]

In a 5–4 ruling, the Supreme Court reversed, in a majority opinion authored by Chief Justice Roberts. "We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment."[4] Referring to *Davis v. Federal Election Comm'n*[5] (invalidating an election finance law that unconstitutionally forced a candidate "to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations"), the Court held that if "the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well."[6] Specifically, once a privately financed candidate had raised or spent more than the state's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate resulted in an award of almost one additional dollar to his opponent. This "penalty" "plainly force[d] the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."[7]

Moreover, unlike the law in *Davis,* this statutory scheme was, to some extent, beyond the control of the privately financed candidate: even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election—regardless of whether the candidate sought such support or it helped him—could trigger matching funds. This was "a substantial advantage for the publicly funded candidate," who could allocate the matching funds as the candidate saw fit, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds.[8] The burden the Arizona law imposed on independent expenditure groups was significant as well. Once the spending cap was reached, an independent expenditure group that wanted to support a particular candidate could only avoid triggering matching funds in one of two ways: opt either to change its message from one addressing the merits of the candidates to one addressing the merits of an issue or to refrain from speaking altogether.[9]

Arizona's matching funds provision was not justified by a compelling state interest. Although the purpose of the matching funds provision was to "level the play-

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ing field" in terms of candidate resources, the Supreme Court had previously rejected the argument that the government had a compelling state interest in such "leveling" that would justify undue burdens on political speech.[10] Similarly, if the interest was one of combating corruption (the quid pro quo of election contributions), the Court found that burdening a candidate's expenditure of his own funds on his own campaign did not further the state's anti-corruption interest, nor did the burden on independent expenditures.[11] In fact, much of the speech burdened by the matching funds provision did not pose a danger of corruption, and any increase in speech resulting from the law was "of one kind and one kind only—that of publicly financed candidates."[12]

Restricting Access to Violent Video Games

Brown v. Entertainment Merchants Ass'n, 79 U.S.L.W. 4658, 2011 WL 2518809 (U.S. June 27, 2011). In 2005, California passed a law that restricted the sale or rental of violent video games to minors. The law prohibited the sale or rental of "violent video games" to minors and required their packaging to be labeled "18." The act covered games in which the options available to a player included killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts were depicted in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that was "patently offensive to prevailing standards in the community as to what [was] suitable for minors," and that caused "the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[13] By requiring that the purchase of violent video games could be made only by adults, the act aimed to ensure that parents could decide what games were appropriate for their children.

In a 7–2 ruling, the Supreme Court affirmed the decision of the Ninth Circuit, finding that the law violated the First Amendment, "reject[ing] a State's attempt to shoehorn speech about violence into obscenity."[14] California had acknowledged that video games qualified for First Amendment protection, and the fact that such games were "interactive" (the player participated and determined the outcome) was constitutionally irrelevant. The law, the Court ruled, wished "to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken."[15] As in its prior ruling in *United States v. Stevens*,[16] the state tried to make violent-speech regulation look like obscenity regulation by "appending a saving clause" required for the latter. "That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'"[17]

Because the act imposed a restriction on the content of protected speech, it was invalid unless the state could demonstrate that it passed strict scrutiny—that the restriction was justified by a compelling government interest and was narrowly drawn to serve that interest. California failed to meet that standard. "At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors."[18] Further, the law was "seriously underinclusive" in a respect that rendered "irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence" by not including other media (e.g., movies) and leaving open the possibility of access by children so long as a parent or relative purchased the game, without "any requirements as to how this parental or avuncular relationship is to be verified."[19] In addition, as a means of assisting concerned parents, it was seriously overinclusive because it abridged the First Amendment rights of minors whose parents (and aunts and uncles) thought violent video games were a harmless pastime. "[T]he overbreadth in achieving one goal is not cured by the underbreadth in achieving the other."[20]

The majority rather gleefully pointed out that violent entertainment for youth had been around for a long time. "Reading Dante [in the *Inferno,* corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface] is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones."[21]

Change in the Law and Searches Incident to Arrest

Davis v. United States, 131 S. Ct. 2419 (2011). The question presented in *Davis* was this: whether evidence was admissible under the good-faith exception to the exclusionary rule, when the evidence was obtained during a search that was conducted in objectively reasonable reliance on a precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by the Supreme Court.

In 2007, police officers stopped the car in which Davis was a passenger. The driver was arrested after failing sobriety tests, and Davis was arrested for giving a fake name. Because he continued to "fidget" after being told not to do so, the officers decided to do a pat-down search, asking him to step out of the car and handcuffing him. They also searched his jacket, which he left on the seat, and found a gun in the pocket. Before the vehicle was towed from the scene, the officers inventoried its contents, as required by police department policy, and prepared a written inventory report. Davis's motion to suppress was denied on the basis that the gun had been found during a valid search incident to arrest under *New York v. Belton*,[22] with the court noting that the parties agreed that the current law squarely covered these facts. Davis sought to preserve his rights given the then-pending decision of the Supreme Court in *Arizona v. Gant*,[23] which could affect the legality of the search.

Gant explained that lower courts across the nation had "widely understood" that the Supreme Court's decision in *Belton* established a bright-line rule that permitted

vehicle searches incident to the lawful arrest of a vehicle's recent occupant, even when there was no possibility the arrestee could gain access to the vehicle at the time of the search. *Gant,* however, ultimately read *Belton* more narrowly, restricting a search of a vehicle incident to a lawful arrest as including the vehicle's passenger compartment only if the arrestee was "unsecured and within reaching distance of the passenger compartment at the time of the search," or if it was "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[24] Davis relied on *Gant,* arguing that the search after his arrest violated the Fourth Amendment and, therefore, that the gun recovered from his jacket should have been suppressed.

Dealing with Davis's appeal, the Eleventh Circuit held that, while the search was unlawful under *Gant,* the exclusionary rule did not apply "when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned."[25] In 2007, when the search was done, it was a permissible search, but a Supreme Court decision like *Gant* that "constru[es] the Fourth Amendment [must] be applied retroactively to all convictions that [are] not yet final at the time the decision was rendered."[26] A good-faith exception to the exclusionary rule applied when the police had reasonably relied on clear and well-settled precedent.

On appeal, in a 7–2 vote, the Supreme Court affirmed: searches conducted in objectively reasonable reliance on binding appellate precedent were not subject to the exclusionary rule. The rule's "sole purpose, [the Court had] repeatedly held, is to deter future Fourth Amendment violations," and these deterrence benefits of exclusion varied based on the culpability of the law enforcement conduct at issue.[27] Here, the search incident to Davis's arrest followed the Eleventh Circuit's precedent exactly. Under the existing exclusionary-rule precedents, "this acknowledged absence of police culpability dooms Davis's claim."[28]

Custodial Detention, Miranda Warnings, and Juveniles

J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011). A child's age, the Court held, was a relevant factor to consider in determining whether the child was "in custody" for the purposes of a *Miranda v. Arizona* analysis. The appeal concerned a ruling by the Supreme Court of North Carolina in which the court held that a 13-year-old student, being questioned by police at his middle school about a burglary and theft, was not in custody and was not entitled to Miranda protections as applied to juveniles. J.D.B., the juvenile, had been seen close to a residence that had been broken into and had been seen at school with a camera (one that turned out to be stolen from the home). When police came to speak to him the same day, he was taken into a room with a police officer, a school official, a school resource officer, and an intern. He was not given Miranda warnings or given the chance to speak with his parent or guardian. J.D.B. confessed to the break-in. The police officer then told him that he did not have to talk to the officer and that he was free to leave. J.D.B. continued to provide more details on where certain items could be located. When officers visited J.D.B.'s home later, he spoke with the officers, brought out some of the stolen items, and volunteered the location where others could be found. None of his family members were home at the time.

The state court affirmed the denial of the juvenile's motion to suppress, wherein he claimed that the failure to Mirandize him meant his confession and statements could not be used, and held that J.D.B.'s age was not relevant to the determination whether he was in police custody.

In a 5–4 opinion authored by Justice Sotomayor, the Supreme Court reversed, finding that a minor's age could be relevant in determining whether he was "in custody" for Miranda purposes, as custodial police interrogation entailed "inherently compelling pressures," and minors tended to be more vulnerable or susceptible to outside pressures than adults.[29] In some circumstances, a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. So long as the child's age was known to the officer, or would have been objectively apparent to a reasonable officer, including age in the custody analysis was consistent with the Miranda test's objective nature. This did not mean that a child's age would be a determinative, or even a significant, factor in every case, but it was a reality that courts could not ignore.

Greenhouse Gas Emissions Public Nuisance

American Electric Power Co., Inc. v. Connecticut, 79 U.S.L.W. 4547, 2011 WL 2437011 (U.S. June 20, 2011). In a 8–0 ruling, the Court decided that the federal Clean Air Act displaced a federal common-law cause of action that might have existed for a "public nuisance" of contributing to global warming by emitting carbon dioxide. The plaintiffs in the case were eight states, New York City, and several nonprofit land trusts, which sued five major electric power companies for being, they alleged, the largest emitters of carbon dioxide in the nation and, as such, contributors to global warming. The plaintiffs further claimed that the defendants' emissions substantially and unreasonably interfered with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. They sought a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. The lawsuits here began "well before" the Environmental Protection Agency (EPA) initiated efforts to regulate greenhouse gases.[30]

The district court dismissed the suits as presenting nonjusticiable political questions, but the Second Circuit reversed, finding the suits were not barred by the political question doctrine, that the plaintiffs had adequately alleged Article III standing, and, on the merits, that the plaintiffs had stated a claim under the "federal common

law of nuisance," which claim was not displaced by the Clean Air Act.[31]

The Supreme Court reversed, concluding that the Clean Air Act and the EPA action authorized by the act displaced any federal common-law right that private citizens (the land trusts), the states, or political subdivisions may have previously had to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants.[32] The Court, however, left open the possibility of state-law claims.[33] The Court rejected the plaintiffs' argument, and the Second Circuit's holding, that the federal common law was not displaced until the EPA actually exercised its regulatory authority by setting emissions standards for the defendants' plants. The "critical point" was that Congress had delegated to the EPA the authority on whether and how to regulate carbon-dioxide emissions from power plants, and it was the delegation, not the exercise of that power, which displaced federal common law.[34] Because none of the parties had briefed preemption or otherwise addressed the availability of a claim under state nuisance law, the matter was left for consideration on remand.

Endnotes

1. The rulings in *Nevada Comm'n on Ethics v. Carrigan* and *Borough of Duryea v. Guarnieri* are reviewed in Robert H. Thomas, *Local Government and the First Amendment at the Supreme Court: Legislative Voting as "Speech" and Union Grievances as "Petitions,"* at 1, in this issue.
2. McComish v. Brewer, No. CV-08-1550-PHX-ROS, 2010 WL 2292213 (D. Ariz. Jan. 20, 2010).
3. McComish v. Brennett, 611 F.3d 510, 513 (9th Cir. 2010).
4. 2011 WL 2518813, *6 (U.S. June 27, 2011).
5. 554 U.S. 724 (2008).
6. 2011 WL 2518813 at *11.
7. *Id.*
8. *Id.*
9. *Id.* at *12.
10. *Id.* at *17 (citing Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 904–05 (2010)).
11. *Id.* at *18, *19.
12. *Id.* at *13.
13. Cal. Civ. Code Ann. §§ 1746–1746.5 (West 2009).
14. 2011 WL 2518809, *4 (U.S. June 27, 2011).
15. *Id.* at *5.
16. 130 S. Ct. 1577 (2010).
17. 2011 WL 2518809 at *4.
18. *Id.* at *7.
19. *Id.* at *8.
20. *Id.* at *10.
21. *Id.* at *6 n.4.
22. 453 U.S. 454 (1981).
23. 129 S. Ct. 1710 (2009).
24. *Id.* at 1719.
25. 598 F.3d 1259, 1264 (11th Cir. 2010).
26. *Id.* at 1263.
27. 131 S. Ct. 2419, 2426 (2011).
28. *Id.* at 2428.
29. 131 S. Ct. 2394, 2410, 2413 (2011).
30. 2011 WL 2437011 at *5.
31. 582 F.3d 309 (2d Cir. 2009).
32. 2011 WL 2437011 at *9.
33. *Id.* at *12.
34. *Id.* at *10.

Is Zoning Coming to an Ocean Near You?

(continued from page 8)

may be located elsewhere in Rhode Island state waters in the region if it would not have a significant adverse impact on natural resources or human use of the region.[1]

Shortened Permitting Time

The extensive studies and investigations leading to implementation of the Ocean SAMP resulted in the collection of a great deal of data about the region, data that for the most part has been accepted by CRMC and can provide substantial help in defining alternatives and evaluating sites in the permitting process. Interestingly, approximately $3 million of the cost of the work behind the Ocean SAMP was paid for by a prospective offshore alternative energy developer, which may have concluded that a regulatory process based on detailed scientific and environmental studies could actually save it and other developers considerable time and money in the permitting process.

The state believes that the time for procuring a lease from the primary federal regulator for activities in the Ocean SAMP region will fall from 10 years to two years.

What Is Ocean SAMP's Role in Coastal Zone Management?

As approved by the CRMC and by NOAA, the Ocean SAMP constitutes a programmatic change to Rhode Island's Coastal Resources Management Program, governing activities in Rhode Island waters.

That being said, much of the SAMP region is in federal waters. Accordingly, CRMC will formally request "a geographic boundary expansion to its federal consistency boundary by documenting in advance that certain licenses, permits, leases, and so on, will have a foreseeable effect on the state's coastal zone."[2]

As of this writing, the matter is before federal agencies for comment before formal application to NOAA, and the state anticipates it could have approval by autumn of this year, given that CRMC staff have been working on this program and consulting with federal regulators over the past several years.

The importance of federal approval is that it would make the Ocean SAMP policies enforceable components of Rhode Island's coastal management program for purposes of the federal consistency program under the federal Coastal Zone Management Act.[3] This would effectively give Rhode Island significant approval rights over specified activities in the Ocean SAMP region requiring federal permits. (The rights of a state vary depending on whether the federal permit is awarded to a federal entity itself or to a nonfederal actor, with states effectively having a type of veto over actions of the nonfederal actor that are inconsistent with a state's enforceable coastal zone management policies.)

Rhode Island municipalities also can be heard in this process as to matters of importance to their localities by making their views known to CRMC during the federal consistency review process.

In essence, Rhode Island would be extending its enforceable policies into federal waters over the Ocean SAMP region. This will provide a significant extra measure of protection to Rhode Island in guarding its coastal

resources and may well be a blueprint other states wish to study.

Endnotes

1. Section 1160.1.1.
2. CRMC Press Release, October 19, 2010.
3. 16 U.S.C. 1451 *et seq*.

Local Government and the First Amendment

(continued from page 1)

After consultation with the city attorney, Carrigan did not seek an advisory opinion from the Nevada Commission on Ethics, but instead disclosed his relationship with the Lazy 8's consultant and voted on the development proposal. The council denied the casino's application by a 5–4 vote, with Carrigan casting one of the four minority votes for approval.

In response to complaints received about Carrigan's failure to recuse, the Commission on Ethics investigated and concluded that he should not have voted on the Lazy 8 matter. The Commission determined that Carrigan considered his campaign manager's assistance "instrumental" to his electoral victories, and that his relationship with the consultant was a close one because he confided to him "on matters where he would not confide in his own sibling."[5] Although his relationship with the campaign manager did not fall under any of the relationships detailed in subsections (a) through (d) of the ethics statute, the Commission concluded the relationship was such that a reasonable person would view it as "substantially similar" to those relationships and that recusal was required under subsection (e).[6] "In other words, the Commission found that Carrigan should have known that his relationship with [the consultant] fell within the catch-all definition and prevented him from voting on . . . the Lazy 8 project."[7] The Commission censured Carrigan, but imposed no penalty because it concluded that the violation was not willful.[8]

The Nevada trial court affirmed the Commission's conclusion, but the Nevada Supreme Court reversed, concluding that an official's legislative vote is "speech" and therefore reviewed using strict scrutiny. Applying this standard, the Nevada Supreme Court found that the catchall provision in the Ethics in Government statute was not narrowly tailored and was facially unconstitutional. The majority held that "voting by an elected public officer on public issues is protected speech under the First Amendment."[9] The court relied on a Fifth Circuit case, *Colson v. Grohman,*[10] which held that "[t]here is no question that political expression such as a [city council member's] positions and votes on City matters is protected speech under the First Amendment."[11] The Nevada Supreme Court majority adopted *Colson*'s rationale without detailed analysis, following a two-step logic. Because voting on legislative matters is a "core legislative function,"[12] the court concluded that "it follows that voting serves an important role in political speech."[13] The court distinguished *Pickering v. Board of Education*,[14] because that case involved balancing the First Amendment rights of a government employee—a public school teacher—against the state's interest in good government, and Carrigan, as an elected councilman, was not in the same position as a run-of-the-mill government employee.[15] The court held that, although employed by the state, elected officials are directly responsible to the voters and thus their rights are more protected by the First Amendment from state regulation than other government employees.[16] The court rejected the *Pickering* balancing test, reasoning that because Carrigan's vote was speech—and more importantly was highly protected political speech—the ethics statute must be reviewed with strict scrutiny, the most exacting judicial test. "Strict scrutiny" most often means "fatal scrutiny" since it shifts the burden to the state to show that regulation of speech both supports a compelling governmental interest and is narrowly drawn to further that interest while restricting First Amendment rights as little as possible.[17] There was no dispute that the state's interest in protecting the integrity of the legislative process was compelling.[18] Thus, the sole issue was whether the catchall provision was narrowly tailored. The court concluded the definition of a "commitment in a private capacity" was overbroad, because there was no limitation on what relationships it could encompass, and thus "has a chilling effect on the exercise of protected speech,"[19] because it "does not inform or guide public officers as to what relationships require recusal."[20]

B. *Supreme Court: A Legislative Vote Isn't "Saying" Anything*

The U.S. Supreme Court concluded that legislative voting is an act of governance and is not a legislator's "speech." Justice Scalia, writing for Chief Justice Roberts, and Justices Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan, concluded that a legislator's vote is not speech because a city council member is not "saying" anything by voting, and because a vote is not speech, it may be regulated, or in this case prohibited. Thus, in accordance with the Nevada statute, Carrigan should have recused himself from voting on the casino's development proposal.

1. What Would the Founders Do? The opinion began with the tautology that the First Amendment prohibits laws abridging the freedom of speech, "[b]ut the Amendment has no application when what is restricted is not speech."[21] The Court agreed with the Nevada Supreme Court's conclusion that voting by elected officials is a "core legislative function," but reached the opposite conclusion about what that means. Justice Scalia's opinion characterizes voting as only action with little or no expressive content, at least not one that a legislator is entitled to claim, because when voting, government officials are acting as trustees for constituents, not exercising personal speech rights:

> But how can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his

> apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.[22]

The Court held it was "dispositive" that legislative recusal rules have been around since the birth of the republic, "and such rules have been commonplace for over 200 years."[23] The opinion supported that assertion by noting the U.S. Senate and House of Representatives adopted recusal rules "within 15 years of the founding."[24]

The Court also seemed swayed by the fact that "virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest."[25] Reviewing the Nevada ethics law under the strict scrutiny standard would also subject those laws to serious challenge, and the Court appears to have been convinced that there is no need to do so.

2. Restrictions on Legislative Advocacy. The Court also concluded that recusal laws prohibiting an official from "advocating the passage or failure" of legislation in addition to requiring recusal from voting do not violate free speech rights, even though they expressly prohibit speech:

> If Carrigan was constitutionally excluded from voting, his exclusion from advocat[ing] at the legislative session was a reasonable time, place and manner limitation.[26]

Justice Kennedy concurred to note that ethics laws might impose burdens on speech rights if they restrict actions other than voting.[27] This indicates that there may be other First Amendment problems with ethics laws restricting conduct other than an official's vote.

The Court's opinion left open two questions. First, whether the catchall provision impermissibly burdened Carrigan's right to political association by penalizing him for his relationship with his campaign manager. Second, whether as a matter of due process, the catchall provision was too vague to provide notice of what relationships will result in recusal. The Court addressed neither, concluding that Carrigan waived them.

Justice Alito concurred in part. He concluded that legislative voting is, in fact, speech. He concurred in the judgment, however, because ethics rules are reasonable "time, place, and manner" speech regulations because "the Court demonstrates that legislative recusal rules were not regarded during the founding era as impermissible restrictions on freedom of speech."[28]

C. *Carrigan Talking Points*

Having concluded that Carrigan's vote was not speech, the Court, of course, did not consider whether it would be subject to the same limited First Amendment protections as speech by other government employees as in *Pickering, Garcetti v. Ceballos*,[29] and *Connick v. Meyers*,[30] which together subject restrictions on government employee speech to varying levels of judicial scrutiny depending on the content of the speech. Even though the Court took the Scarlett O'Hara approach ("I'll think about that tomorrow"), a recusal requirement might implicate speech concerns if it is not content-neutral like Nevada's, and it might implicate associational concerns if it penalizes an official's relationships, and it might be unconstitutional if it is so vague that no reasonable official could understand what it requires. But despite the absence of a sweeping ruling, government officials should read the Court's message clearly: political power derives from the people and when a "legislator casts his vote, [he is acting] 'as trustee for his constituents, not as a prerogative of personal power.'"[31]

III. *Guarnieri*: Government Employee Speech Test Applied to Petitions

In *Carrigan,* the Court found it unnecessary to delve into the levels of First Amendment protection available when a legislator is voting, or whether the balancing test that governs government employee speech applies to that situation. One week later, however, in *Borough of Duryea v. Guarnieri*,[32] the Court applied the *Pickering-Connick-Garcetti* test to a government employee's union grievance, concluding that it would be protected by the First Amendment's Petition Clause if it involved a matter of public concern.

A. *Union Grievances and a Circuit Split*

That case began when Charles Guarnieri, the police chief of the borough, filed a union grievance challenging his firing. The arbitrator concluded that he "engaged in misconduct, including 'attempting to intimidate Council members,'" but that the borough council wrongly terminated him because it "committed procedural errors in connection with the termination."[33] He was reinstated, and when he returned to work, the council issued written "directives" explaining "what was going to be expected of him upon his return."[34] For example, he was told he could not work overtime without permission, could only use the police car for official business, and was told that the municipal building is a no smoking area. Because he did not have "a warm welcome feeling," he filed a second grievance, which was sustained, Guarnieri instituted a federal civil rights action asserting that his right to petition the government for redress of grievances had been infringed on by the council's directives. After the council turned down his request for $338 in overtime, he amended his complaint to allege that his lawsuit was a petition, "and that the denial of overtime constituted retaliation for his having filed the lawsuit."[35]

The jury awarded Guarnieri $45,000 in compensatory damages and $24,000 in punitive damages for the directives, and $358 in compensatory damages and $28,000 in punitive damages for the overtime claim. The Third Circuit affirmed the compensatory damage awards, and concluded that Guarnieri's union grievance was protected activity even if it "concerns a matter of solely private concern."[36]

B. *Supreme Court: Petitions Are Like Speech*

In an opinion authored by Justice Kennedy and joined by the Chief Justice and Justices Ginsburg, Breyer, Alito,

Sotomayor, and Kagan, the Court held that the *Pickering-Connick-Garcetti* standard applicable to restrictions on government employee speech developed in three earlier cases also govern government employee petitions. In those cases, the Court fashioned a balancing test for restrictions on government employee speech.

In *Pickering v. Board of Education*,[37] the Court held that when evaluating the validity of regulation of a public employee's expression, a court must strike a balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[38] The Court concluded that a public schoolteacher's right to speak on a matter of public concern did not impede the performance of his teaching duties, so the state's interest in regulating his speech was low when compared to his expressive rights.[39] In *Connick v. Meyers*,[40] the Court held that when a public employee's speech "touched upon matters of public concern in only a most limited sense,"[41] and her employer had a strong interest in controlling "action which he reasonably believed would disrupt the office, and undermine his authority, and destroy close working relationships,"[42] the employee's discharge did not offend the First Amendment. In *Garcetti v. Ceballos*,[43] the Court acknowledged that public employees "do not surrender all their First Amendment rights by reason of their employment," but held that public employees are not insulated from employer discipline by the First Amendment when making statements pursuant to their official duties. The Court held that determination of whether a public employee may be disciplined for speech is a two-part analysis: first, "whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech[;]"[44] second, if that question is answered in the affirmative, then the court undertakes the *Pickering* balancing.[45]

C. *Petitions Are as Potentially Disruptive to Government Employers as Speech*

Unlike *Carrigan,* the *Guarnieri* opinion assumed the government employee's union grievance and lawsuit were "petitions" so focused on the applicable standard of review. The Court recognized "[t]his case arises under the Petition Clause, not the Speech Clause,"[46] but applied the same rationale to cases involving government employee petitions, noting that "[a]lthough this case proceeds under the Petition Clause, Guarnieri just as easily could have alleged that his employer retaliated against him for the speech contained within his grievances and lawsuit," and "[t]hat claim would have been subject to the public concern test already described."[47] The Court found it incongruous that the borough was entitled to restrict its employees' speech if it satisfied the *Pickering* balancing test, but that under the Third Circuit's Petition Clause test, it would be liable for the same action as long as the employee's grievance was not a "sham."[48] Although acknowledging that the rights of petition and speech are not identical, the Court held that in cases of alleged retaliation for government employee petitions, the concerns are the same as in cases of alleged retaliation for government employee speech.[49] Petitions and lawsuits can interfere with the operation of government offices as much as disruptive speech, and lawsuits can be "particularly disruptive."[50] The Court concluded that to have a separate, more intense judicial inquiry for Petition Clause cases would "compound the costs of compliance with the Constitution."[51] It rejected Guarnieri's argument that petitions are inherently about private matters, while acknowledging that historically, petitions involved matters of both private and public concern. The Court limited its holding to cases of government employment, however, concluding that outside the employment context, it is of little distinction whether a petition's subject is public or private.[52] The Court remanded the case for application of its new standard.

> Justice Scalia concurred in the judgment in part and dissented in part. Applying the same rationale as his majority opinion in *Carrigan,* he asserted that lawsuits are not "petitions," because "[t]here is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of government, not to the courts."[53]

Justice Scalia also disagreed with carrying over the "public concern" test from speech cases to petition cases. He saw no problem with having separate judicial tests to analyze speech and petition rights, since the First Amendment includes "*both* provisions as *separate* constitutional rights,"[54] and objected to applying the rationale supporting the public concern test for speech to petitions because they protect different interests. Justice Scalia would apply a much simpler test based on capacity: if employees' petitions are "addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign," he would conclude that the government employer is not prohibited by the Petition Clause from retaliation.[55] His test is a simpler one but seems not to have swayed the other Justices because it would seem to more sharply limit the rights of employees, especially when filing union grievances.

D. *Guarnieri Talking Points*

The Court's "public concern" test and transportation of the *Pickering-Connick-Garcetti* standard from Speech Clause analysis to the Petition Clause allow state and local government to take a unitary approach to their employees' speech and petition activities. While it is not as simple as Justice Scalia's "capacity" test, it has the advantage of not requiring the wholesale creation of a new body of law by which to analyze petition cases. Like the regulation of government employee speech, there is now little doubt that state and local governments have a fair degree of leeway when it comes to reacting to union grievances. Once it is determined that a petition does not involve a matter of public concern, a government employee has little First Amendment protection against retaliation.

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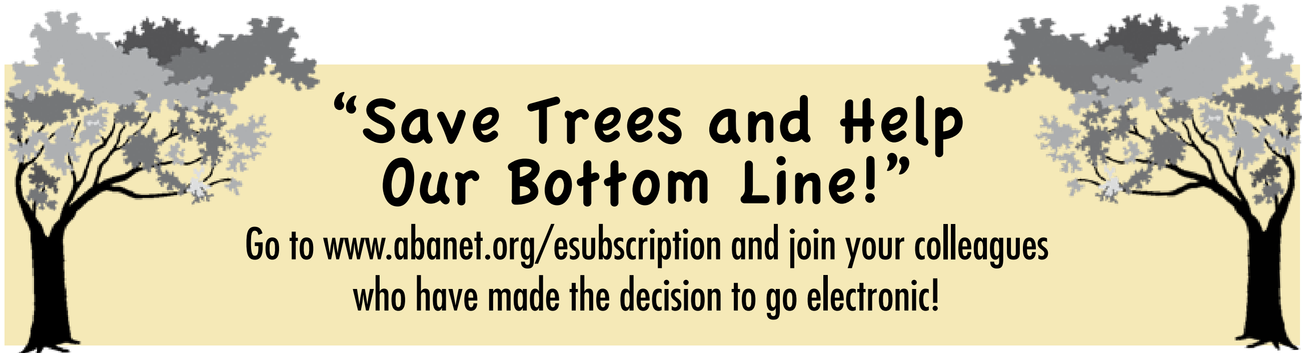

IV. Conclusion

Under *Carrigan* and *Guarnieri,* legislative voting is not speech and is subject to out-and-out prohibition via conflict-of-interest regulations, and union grievances by government employees must be of public concern before First Amendment protections apply. These two opinions, when read together, recognize that state and local governments have fairly wide latitude in regulating the activities of elected officials and employees.

Endnotes

1. Nevada Comm'n on Ethics v. Carrigan, No. 10-568 (U.S. June 13, 2011).
2. Borough of Duryea v. Guarnieri, No. 09-1476 (U.S. June 20, 2011).
3. *Carrigan,* slip op. at 2.
4. Nev. Rev. Stat. § 281A.420(2), (8)(a) (2007).
5. Carrigan v. Comm'n of Ethics, 236 P.3d 616 (Nev. 2010).
6. *Carrigan,* 236 P.3d at 619.
7. *Id.*
8. *Id.* at 619 n.3.
9. *Id.* at 621.
10. Colson v. Grohman, 174 F.3d 498, 506 (5th Cir. 1999).
11. *Carrigan,* 236 P.3d at 621 (quoting *Colson,* 174 F.3d at 506 (brackets supplied)).
12. *Id.* at 621 (citing Commission on Ethics v. Hardy, 212 P.3d 1098, 1106 (Nev. 2009)).
13. *Carrigan,* 236 P.3d at 621.
14. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
15. *Carrigan,* 236 P.3d at 622.
16. *Id.*
17. *Id.* at 622 (citing Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 898 (2010) (laws that burden political speech are subject to strict scrutiny, which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieved that interest.")).
18. *Carrigan*, 236 P.3d at 622–23.
19. *Id.*
20. *Id.* at 623.
21. *Carrigan,* slip op. at 3.
22. *Id.,* slip op. at 8.
23. *Id.*, slip op. at 4.
24. *Id.*
25. *Id.,* slip op. at 7.
26. *Carrigan,* slip op. at 3–4.
27. *Id.*, slip op. at 1 (Kennedy, J., concurring).
28. *Id.,* slip op. at 3 (Alito, J., concurring in part and concurring in the judgment).
29. Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).
30. Connick v. Meyers, 461 U.S. 138 (1983).
31. *Carrigan*, slip op. at 10 (quoting Coleman v. Miller, 307 U.S. 433, 469–70 (1939)).
32. Borough of Duryea v. Guarnieri, No. 09-1476 (U.S., June 20, 2011).
33. *Id.*, slip op. at 2.
34. *Id.*
35. *Id.* at 3.
36. *Id.* at 4 (quoting Guarnieri v. Borough of Duryea, 364 F. App'x 749, 753 (3d Cir. 2010)).
37. *Pickering,* 391 U.S. 563.
38. *Id.* at 568.
39. *Id.* at 574.
40. Connick v. Meyers, 461 U.S. 138 (1983).
41. *Id.* at 154.
42. *Id.*
43. Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).
44. *Id.*
45. *Id.*
46. *Guarnieri,* slip op. at 6.
47. *Id.*
48. *Id.,* slip op. at 6 (citing San Filippo v. Bongiovanni, 30 F.3d 424, 442 (3d Cir. 1994)).
49. *Id.,* slip op. at 8.
50. *Id.,* slip op. at 9.
51. *Guarnieri,* slip op. at 12.
52. *Id.*, slip op. at 13. The Court traced the history of petitioning government, starting with the Magna Carta and ending with petitions by women seeking the vote in the early part of the 20th century.
53. *Id.,* slip op. at 2 (Scalia, J., concurring and dissenting).
54. *Id.,* slip op. at 4 (Scalia, J., concurring and dissenting)(emphasis in original).
55. *Id.,* slip op. at 7 (Scalia, J., concurring and dissenting).

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