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Whether a State may ban all advertising of an activity that it permits but could prohibit . . . is an elegant question of constitutional law.³

Five years ago, Thomas Jeffries, the owner and publisher of The Charlottesville Observer, decided to add a new weekly feature in the Metro news section, in which local motorcycle dealers were identified by trade name, location, and business hours, listing new cycles and any special sales. Jeffries added the feature and captioned it "Motorcycle News," thinking it might eventually establish a certain cachet with some readers, if merely in the same manner of the five-day weather forecast feature that other readers had come regularly to look for in the paper.

Jeffries also thought this feature might catch on especially well in Charlottesville. It was a college town, located in a beautiful part of Virginia, benefitting from a mild climate, and a fine, inviting road system with connecting links to Richmond, the nearby capital city, with additional scenic roads wending eastward toward Colonial Williamsburg. Jeffries noted, too, that campus parking for cars at the University of Virginia was already quite crowded and increasingly expensive. The sprawl and congestion of asphalt lots seemed to have no end in sight, yet few students and townsmen people were willing to settle for getting around by bicycles or public trans-

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1. "Dicit ei Simon Petrus Domine quo vadis?" (Vulgate) ("Simon Peter said unto him, Lord, whither goest thou?") (The Bible, King James Version, John 3:36.) Also fitting this essay, perhaps, is the enigmatic answer: "Respondit Jesus quo ego vado non potes me modo sequi sequeris autem postea" ("Jesus answered him, Whither I go, thou canst not follow me now; but thou shalt follow me afterwards.")

2. William & Thomas Perkins Professor of Law, Duke University. This article is derived from the Siebenthaler Lecture delivered at Salmon P. Chase College of Law in the Spring of 1997. I am most grateful for the hospitality extended by Dean David Short, Professor David Elder, and the faculty and students.

portation. The proposed "Motorcycle News" feature might suggest an alternative. If not, still little would be lost, or so Jeffries thought.

The weekly feature ran as Jeffries had planned. He proved to be quite right. Indeed there had been an interest in his innovative news feature as he was pleased to learn from an informal reader survey just this year, on the strength of which he decided to continue the feature indefinitely. Jeffries was also pleased that it seemed to have encouraged more students and others to rely on motorcycles than on cars, reducing parking congestion in the campus area, contributing to easier traffic flow in the Charlottesville area, and lessening the need for more city asphalt parking lots; developments which, earlier, in Jeffries' view, had threatened the great charm of Charlottesville.

An incidental benefit, which also pleased Jeffries, was that the several local motorcycle dealers realized they were benefiting from favorable reader response to the weekly Metro "Motorcycle News" feature of the Observer. Accordingly, they now much more regularly sought out the newspaper and tended to place more advertising with the Observer than they had previously been inclined to do.

Of course, not everyone was quite as well pleased (no one ever is, it seems), including a number of car dealers for whom sales had been quite flat in the Charlottesville area, and some of whom were inclined to blame Jeffries, as well as the motorcycle dealers, for their plight.

Consequently, through their trade association, the Virginia Car Dealers Association ("V.C.D.A.") they sought help through the Virginia General Assembly where, in comparison with the very much smaller Virginia Motorcycle Dealers Association ("V.M.D.A."), they had always had much more influence than the motorcycle dealers possessed. They counted, too, on attracting strong support from several public interest groups, such as Mothers Against Motorcycle Drivers ("M.A.M.D."), the highly influential Virginia Medical Association ("V.M.A."), and Citizens for a Drug-Free America ("C.D.F.A."), a citizens' group who associated motorcyclists with the drug culture.

The Automobile Dealers' and their highly supportive public-interest allies' strong first preference was to have the Virginia General Assembly adopt a statute simply prohibiting motorcycles. Toward that end, their preferred strategy was to launch a general campaign well calculated to educate the public on the dangerousness of motorcycles, playing to the negative stereotypes of motorcyclists: of recklessness, drug culture, and the public burden of excessive medical costs borne by the public from cyclist injuries, injuries that would have been avoided with the greater shielding of
automobiles. In mounting this campaign, and in thinking it might well have its desired effect, they took their cue from an earlier era in which a trade association of American railroads had sought measures of a similar restrictive nature against motor freight carriers. Moreover, in moving in just this fashion, insofar as it would prove effective, they were much encouraged by their attorney's advice.

Their attorney assured them that were the General Assembly to outlaw motorcycles, to forbid any further retail motorcycle trade, as a public safety, health, and general welfare measure, they could be confident that the measure would easily hold up against any mere Fourteenth Amendment "substantive due process" or "equal protection" constitutional complaint any motorcycle dealers might press in any state or federal court. There was likewise nothing in the state constitution that would stand in the way.

The attorney's confidence seems to have been well warranted. The few pertinent clauses of the state constitution, such as they were, had been uniformly construed by the state supreme court merely to mimic what the federal courts had done in applying the restrictions of the Fourteenth Amendment to the states. And the futility of a challenge under the due process clause of the Fourteenth Amendment was all but guaranteed in view of the Supreme Court's own long-standing, virtual abdication of judicial review of legislation of this sort, leaving the outcome on such matters as this pretty much to legislative will. Similarly, the motorcycle dealers could expect to do no better by pursuing a claim based on an alleged denial of

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4. For an instructive description of the episode, see Eastern R.R. Presidents Conf. v. Noerr Freight, 365 U.S. 127 (1961) (coordinated industry campaign to discredit motor freight carriers to induce public opinion to bring about restrictive congressional legislation of motor carriers exempt from the reach of federal anti-trust laws, the Court holding that, even assuming the campaign was a "conspiracy" in "restraint of trade," insofar as the means of seeking such a restraint was to bring it about through legislation, the First Amendment protected the right of the railroads to seek measures concedingly within the power of Congress to adopt).

5. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 728 (1963) (commenting on such legislation insofar as it is impugned on due process grounds, and rejecting such a complaint, declaring: "[I]t is up to the legislatures, not the courts, to decide on the wisdom and utility of [such] legislation"); Olsen v. Nebraska, 313 U.S. 236, 246 (1941) (Douglas, J., for a unanimous Court) ("We are not concerned . . . with the wisdom, need, or appropriateness of the legislation"); United States v. Carolene Products Co., 304 U.S. 144 (1938) (same position by the Court in respect to similar acts of Congress when challenged under Fifth Amendment due process clause); Nebbia v. New York, 291 U.S. 502, 537 (1934) ("With the wisdom of the policy, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"). For a still classic and useful critical review of this standard, see Robert G. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34. For an extended and compelling argument that the Court's virtual abdication of due process review of legislation stifling product competition is wholly unwarranted by any mere repudiation of Lochner v. New York, 198 U.S. 45 (1905), see Frank R. Strong, Substantive Due Process--A Dichotomy of Sense and Nonsense (1986).
equal protection. For just as in respect to an attempt to bring a due process challenge, the current review standard for ordinary economic equal protection rights is an enfeebled inquiry of "imaginable rationality" and little, if anything, more. If there is some imaginable basis that would make the difference in treatment reasonable, the statute must be sustained, so the Court has declared, even if the legislature did not act on that basis (but, rather, acted little better than as mere rent seekers, virtually selling their votes to those offering the greater political support).  

Even absent total legislative success of this kind (i.e., total success in having motorcycles banned as simply "too dangerous at any speed"), the automobile dealers and the influential public interest groups allied with them would press other measures suitably designed to the same end, so to reduce the sales and uses of motorcycles, and so to divert consumer purchases to a different choice (cars, bicycles, or public transportation) deemed to be "better" and "safer" by the legislature of the state. Among the proposed measures were these: a state law severely limiting the number and location of authorized cycle dealers; a new measure levying a heavy thirty percent sales surtax on motorcycles; an additional measure requiring completion of an "approved motorcycle training program," for licensing eligibility for a motorcycle driving permit; 7 and fourth, increasing the minimum age for licensed owners to twenty-one. Here, too, they had no doubt that whatever of these approaches (or several others) the Virginia General Assembly might adopt "to reduce effective demand" for this "dangerous" product, the

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6. For the most recent reiteration of this (non)standard, see FCC v. Beach Communications, 508 U.S. 307, 313-14 (1993) (Thomas, J., for a unanimous Court) (emphasis added) ("This standard of review is a paradigm of judicial restraint. *** On rational-basis review ... those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." ) See also William Cohen & Jonathan Varat, CONSTITUTIONAL LAW 690, 691 (10th ed. 1997) ("Despite occasional dissenting expressions of discomfort with the "toothlessness" of rational basis review as applied in the realm of purely economic regulation ..... the Court consistently has refused to invalidate any such measure, with one notable exception, for more than fifty years") (and noting, that the one exception was itself subsequently overruled). (The exception was Morey v. Doud, 354 U.S. 457 (1957). It was overruled in New Orleans v. Dukes, 427 U.S. 297 (1976)). (For a critical review of this toothless standard, see Gerald Gunther, [A] Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (nonetheless also noting, that the prevailing standard is "minimal scrutiny in theory and virtually none in fact.")

7. Under this part of the proposed plan, moreover, it was agreed that the state itself would not provide such programs, leaving it entirely to the dealers, or to someone else, to make their own provision for any such programs, wholly at their own expense. To qualify, it was agreed, such programs would need to have "state certification and approval," a process itself involving substantial fees.

8. Cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) ("[W]e can ... agree with the State's contention that it is reasonable to assume that demand ... is somewhat lower whenever a higher, noncompetitive price level prevails."); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 339, 341 (1986) ("The interest at stake in this case, as determined by the Supe-
motorcycle dealers and anyone else who might side with them would readily fail in any effort to have them set aside on some conjured constitutional ground. Once again, that is, they were reliably assured that nothing in any of three principal clauses of the Fourteenth Amendment would stand in the way. 9

As it happened, however, despite their best efforts to secure the necessary votes on their preferred first choice, nothing approaching a majority of members in the Virginia General Assembly were ready to vote simply to outlaw motorcycles, either outright, or even as merely unlawful to use on public roads. For the moment, moreover, neither was there a sufficient consensus to pass any of the other proposals, although, to be sure it appeared very likely that several of them, perhaps even all of them, would command an easy majority in the legislature if a strongly preferred first option a member of the legislature suggested were to prove ineffective in diminishing motorcycle sales and use to "tolerable" levels, a matter to be determined after seeing how well this preferred first option tended to produce the desired effect during a trial period of five years. 10

The "preferred first option" suggested by a member of the Virginia legislature was simply to enact a statute forbidding motorcycle dealers to advertise. 12 The intended effect would be twice beneficial, conducive to the prior Court, is the reduction of demand . . . ") (So, here, a "reduction in demand" is sought quite directly, e.g., in the measure imposing the thirty percent sales surtax, putting the price of the product out of reach for buyers at the margin of affordability. In Posadas and in 44 Liquormart, the "reduction in demand" is sought somewhat more indirectly, by prohibiting advertising (thus to diminish public awareness of product availability, price, features, comparison with other products, etc., imposing increased search costs on potential consumers, and relying also on a simple psychological truth ("out of sight, out of mind"). See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) (same technique). 9. As to the futility of seeking relief from any of these measures on a due process or equal protection complaint, see supra notes 4, 5. That a complaint seeking relief on the strength of the privileges and immunities clause of the Fourteenth Amendment would likewise fail, see, e.g., The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) (state regulation of lawful ways of making a living, in this instance conferring an exclusive monopoly on a named company, putting several hundred competitors out of business pursuant to bribery of state legislators to do so, held, wholly unaffected by privileges and immunities clause of the Fourteenth Amendment). (For a detailed, critical review, see Charles Fairman, VI HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION 1864-88, PART ONE, pp. 1320-74 (1971).)

10. That is, whatever that "tolerable level" might be deemed to be (for this, again, would merely be a matter presumably within the discretion of the legislature to decide, consistent with its own view of how "the public interest" is best served).

11. See also Posadas, 478 U.S. at 346 (Rehnquist, C.J.) ("It would surely be a pyrrhic victory for . . . appellant to gain recognition of a First Amendment right to advertise . . . only to force the legislature into [more substantial measures].").

12. "Advertise," meaning "advertising in any manner whatsoever" (as in 44 Liquormart, the ban would be total, all media, all audiences, all times). Cf. Posadas (casino advertisements directed to
prosperity of car dealers who individually (by dealership) and collectively (by common trade association ads touting cars) would continue to promote the merits of their products (even as the major auto manufacturers would doubtless continue to do), even while the statute would at once strike off any individual motorcycle dealer ads, or any institutional (motorcycle trade association) ads or manufacturer advertising of motorcycles. The act would at once remove these commercial voices altogether and ought, predictably, lead to much lower motorcycle sales.

The legislative proposal also aimed at Jeffries' kind of "Motorcycle News" feature, moreover, to exactly the same end. Thus it took care to forbid any 'advertising' of retail motorcycle dealers, their business locations, services, or prices, whether provided for consideration, or provided gratuitously", (the italicized language was meant to cover Jeffries' "Motorcycle News" feature and other things of a like sort). This final part of the proposed bill was set off in a separate section, and accompanied by an express severability clause.

Shortly following enactment of the described statute, however, a civil suit challenging the announced intention of the Virginia Attorney General to enforce it, was filed in federal district court in nearby Richmond. The

tourists exempted, but otherwise forbidden by any media or means); Central Hudson ("informational," but not "promotional," regulated utility advertising permitted); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (ban of alcohol content information from being provided on beer bottle labels, but not otherwise).

13. Trade association advertisements of a commercial product or service offered by the association's members are of course "commercial speech" (that they may not mention particular brands or dealers in no respect makes them "noncommercial" speech). See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66 at n. 13 (1983).

14. The wording ("gratuitously") was selected in order to exempt from the statute's coverage anything reasonably within any bona fide news coverage (thus Jeffries' feature might be reached insofar as it appeared regularly, but "gratuitously," because generated by no news events). For a suitable analogy, encouraging the legislature to believe such a measure might be sustained, see Briscoe v. Reader's Digest Ass'n, 93 Cal. Rptr. 866 (Ca. 1971) (invasion of privacy claim against Reader's Digest for story identifying plaintiff as having been convicted of highjacking eleven years earlier, no recent event involving plaintiff making this report newsworthy, defendant could be held liable despite New York Times v. Sullivan, 376 U.S. 254 (1964)). See also state statute reviewed in Near v. Minnesota, 283 U.S. 697, 702 (1931) (newspaper publication of defamatory statements deemed privileged only if both truthful and "published with good motives and for justifiable ends").

15. The reason for this treatment was obvious, as all agreed: the legislature (as well as the automobile dealers and their "public interest" allies) was not at all certain that this provision could be sustained under the First Amendment, as applied to the Jeffries' sort of feature (that is, provided by him in his own newspaper as owner-publisher of a standard newspaper). It might be seen as an impermissible form of editorial censorship violating "the freedom of the press." See, e.g., Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 257 (1974) ("The choice of material to go into a newspaper ... constitutes the exercise of editorial control and judgment"). Assuming it might not be sustained, however, the severability clause would still operate; it would leave the balance of the act unimpaired.

16. Indeed, on the same day it was to take effect.
plaintiffs included several named individuals, each identified as a resident over eighteen years of age, each possessing a valid Virginia motor vehicle operator's permit, and eligible to own and to operate a motorcycle in Virginia. Each sought a declaratory judgment and an injunction to forbid enforcement of the new statute by the state.

In filing this action, these first-listed, citizen consumer plaintiffs (none of whom was a motorcycle dealer and none of whom had any direct economic stake derived from how well or how poorly motorcycle sales may fare) proceeded exactly as other Virginia residents had done in seeking injunctive relief from an earlier advertising ban, a ban on drug price advertising in Virginia, just twenty years before. These plaintiffs appeared not on behalf of, or in substitution of, any motorcycle dealer, manufacturer, or trade association, rather, they appeared on their own behalf, as "individuals adversely affected by the state law, denied information respecting the availability of a lawful product, foreclosed by state law from receiving it in a useful form and from an otherwise responsible, willing and able source." Other plaintiffs of course included several named retail motorcycle dealers.
dealers, now forbidden by Virginia law from providing any off premises business notice of their locations, hours, inventory, services, or any other information of a like sort, suing to lift the ban. Attached to their complaint was an example of such a forbidden advertisement. The Attorney General has straightforwardly advised a dealer it could not be used, whether, as previously, for publication in the Charlottesville Observer or in any direct mailing to local residents, or in another medium in the state; so as to call attention to the dealership as such. This is the "business notice" (i.e., the advertisement) in its entirety, as previously carried in the Observer, and now disallowed pursuant to the new Virginia act:

Charlottesville Honda is a full service, authorized dealer of Honda motorcycles. We are located at 2134 Alta Vista Rd., in Charlottesville, just off Exit 34 Jefferson Boulevard. Our business hours are 9:30 a.m. to 9:30 p.m. weekdays and Saturdays from 10:00 a.m. to 5 p.m. Our inventory includes all current Honda street cycles from 250 cc (average 60 mpg in fuel economy) to 1500 cc touring cycles, including the new 1997 450 cc Silver Arrow (recently reviewed in Cycle Magazine as "overall best in its class"). Charlottesville Honda also carries a full line of Honda, U.S.D.O.T. safety-approved helmets, protective gloves, and all-weather clothing. All inquiries are welcome. Charlottesville Honda will sell only to purchasers who present a current license confirming their age and certifying their competence lawfully to operate a cycle in Virginia. Charlottesville Honda has been in business in Charlottesville for thirty years.

The Virginia Motorcycle Dealers Association ("V.M.D.A.") likewise appeared as a named plaintiff, suing on its own behalf and on behalf of its members. Of course, Thomas Jeffries is also a plaintiff, as owner and publisher of the Charlottesville Observer, restricted as he is, as a newspaper publisher, by the new Virginia law.

Lastly, three other individual residents are also named plaintiffs in this case. Like the first named individual plaintiffs, each asserts a claim of right to uncensored information "as it would otherwise be forthcoming to them but for the ban imposed by the new state law." And each asserts a claim as a person who resides in Charlottesville, who seeks uncensored information respecting certain lawful goods and services available in Charlottesville.

20. The V.M.D.A.'s standing to sue in its own right is uncontested, given that its organizational purpose is the promotion of motorcycle information and use, and also that it occasionally sponsors generic advertising of motorcycles as well as of motorcycling, as both a regular and recreational alternative to other means of commuting, travel, and sport.
"the better to form an informed opinion in respect to their worth relative to other (i.e., alternative) services and goods." These plaintiffs also assert standing of their own. They seek to attack the ban "as a constitutionally prohibited attempt to influence public and private choice by disallowing the free circulation of truthful information the state does not wish them to have equal access to see lest they compare it with information they receive from others and reach conclusions different from those the state prefers them to entertain."

All of the plaintiffs' causes of action have been filed pursuant to 42 U.S.C.S. section 1983, and federal court jurisdiction has been plainly stated pursuant to 28 U.S.C.S. sections 1331 and 1343(a)(3). The plaintiffs have named the Virginia Attorney General as defendant. It is conceded that all have standing to proceed in this way and that the Attorney General is a

21. In short, they say, the purpose of the law is obviously partly one of "thought control" and not merely "marketplace control" (the phrase, "thought control," is taken from a part of the court's opinion in American Booksellers v. Hudnut, cited infra this footnote). The power of the state in respect to the latter (marketplace control, i.e., what can be bought and sold, by whom, on what terms, etc.), these and the other plaintiffs say, is not in dispute. The power of the state in respect to the former (thought control), these plaintiffs say, assuredly is. Car dealers and motorcycle dealers (among others) in contemplation of the law at hand, are speech rivals, fully as much as railway carriers and motor freight carriers have been in the past and continue to be even now. The state, wishing the views solely promoted by the car dealers to prevail, has muffled one side in order to assure that the other side will have a clear field. The object is not to assure success by setting terms of trade, rather, the object is to assure success by biasing what the public may see, so to bias what the public shall know. Car dealers (and car manufacturers, car trade associations, etc.) may freely advertise, inclusive of ad copy offering positive "facts" regarding why their products are desirable and negative "facts" regarding why motorcycles are undesirable, while motorcycle dealers (and motorcycle manufacturers, motorcycle trade associations, etc.) are forbidden to use merely the same medium even to dispute their claims, or to offer countervailing observations or information, or offer any response, i.e., to "answer". See Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("[The state] has no... authority to license one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensbury Rules."); American Booksellers v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), summarily aff'd, 475 U.S. 1001 (1986) ("The state may not ordain preferred viewpoints in this way."); Thomas v. Collins, 323 U.S. 516, 545 (1943) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.").


Every person who, under color of any statute...of any State...subjects...any...person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution...shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

23. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C.S. § 1331 (1998).
proper party, to have to answer to the complaint. The case is admitted to be timely, serious, and ripe. So, what shall be its disposition (and what would Posadas fairly suggest)?

I. THE POSADAS QUESTION

The "Posadas question" (as we shall call it) seems to be the real question, for the Virginia statute is not designed, nor is there any pretense that it is tailored, merely to forbid, forestall or to provide redress for the circulation of commercially deceptive, or false or misleading information, such as such information might happen to be. The Attorney General concedes that this is so but merely demurs and points out that, under the Virginia law, "the accuracy or 'truth' of such information as an advertisement respecting motorcycles may contain will not save it, truth is irrelevant so far as this statute is concerned." Its object is not to assure that only truthful information is supplied, rather, in large measure, its object is to see that such information is not provided, insofar as within the power of the state so to do.

Neither is the statute concerned (or "tailored") merely to avoid coercive or stressful forms of high pressure marketing practices or tactics. It is subject to no such saving rationale. This, too, the Attorney General also admits. Its object is not to blunt or forestall varieties of commercial "overreaching," for in no respect is it reasonably limited to conditions presenting such a risk.

Nor is it of a common piece of a more general measure, regulating

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24 See the framing of that question, supra, note 1.

25 See, e.g., the sample advertisement submitted by Charlottesville Honda. There is nothing false or misleading in any of its statements or representations, nor does the Attorney General claim otherwise. (Cf. Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985) (advertisement placed by attorney promising that "[i]f there is no recovery, [there will be] no legal fees", while literally true, may nonetheless mislead by omitting mention of court costs, thus state may require such additional information to be provided but not otherwise ban such advertisements).

26 Indeed, from the state's point of view, "truth" is the greater part of the problem (that is, it is the accuracy, rather than any inaccuracy, of representations of product availability, price, features, fuel economy, colors, options, zero-to-sixty acceleration rates, or top running speeds, etc., of different makes and models (of motorcycles), the state seeks to suppress from concern of how just such information may influence those to whose attention it may come).

27 See discussion supra note 26.

28 Cf., e.g., Ohralk v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state bar restriction on "bedside" personal injury solicitation of clients by lawyers, sustained). See also Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (extending Ohralk to sustain a state law restriction forbidding direct mail professional inquiries within thirty days of personal injury). (But see Edenfield v. Fane, 507 U.S. 761 (1993) (invalidating state law forbidding uninvited in-person solicitations by certified public accountants)).
commercial speech as even a broad, community-wide restriction on billboards might represent. Neither is it an enactment meant merely to provide some fair sanctuary in one's home or place of business from intrusive marketing practices, such as they might otherwise be, were it the case (as it is not the case) that the law could provide no common relief from the incessant "calls of commerce" wherever one might turn.

Nor, again, is it merely akin to still older kinds of "time, place, and manner" municipal ordinances of a sort forbidding commercial handbill hawkers from adding to the general congestion of the public streets. Rather, serving no similar end or ends, this statute bans the mere placement of plaintiffs' sample advertising copy in an ordinary newspaper of general circulation, as it bans it equally, even as a simple mailed brochure. Accordingly, and as the Virginia Attorney General concedes, it has no qualified, or limited, commercial speech "time, place, or manner" rationale.

29. See, e.g., Song of the Open Road (O. Nash, I WOULDN'T HAVE MISSED IT: SELECTED POEMS OF OGDEN NASH 31 (1975) (usefully quoted in Metromedia, Inc. v. City of San Diego, 164 Cal. Rptr. 510, 532 (1980)):

I think I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall,
I'll never see a tree at all.

See also Walter Lippmann, DRIFT AND MASTERY 52-53 (1914) (describing modern advertising as a "deceptive clamor that disfigures the scenery, covers fences, plasters the city, and blinks and winks at you through the night").

30. See, e.g., Moser v.FCC, 46 F.3d 970 (9th Cir. 1995), cert. denied, 515 U.S. 1161 (1995) (sustaining congressional ban on mass telemarketing use of "automatic-dialing-and-announcing-devices" (devices programming prerecorded commercial messages, automatically dialing and playing when one answers one's telephone, with no live operator on the line); Board of Trustees v. Fox, 491 U.S. 469 (1989) (university restriction on salesmen soliciting in university dormitories, sustained); Beard v. Alexandria, 341 U.S. 622 (1951) (sustaining a local ordinance disallowing uninvited door-to-door commercial solicitations, Black and Douglas, JJ., dissenting as applied to magazine sales solicitations, though agreeing that the ordinance would survive as a time and place restriction on soliciting sales for "pots and pans" or other products not covered by the first amendment). Cf. Martin v. City of Struthers, 319 U.S. 141 (1943).

31. See, e.g., Valentine v. Christensen, 316 U.S. 52 (1942) (sustaining ordinance ban on ordinary commercial handbill distribution on public streets). Cf. Schneider v. State, 308 U.S. 147 (1939). Because commercial speech is indeed "hardy", it may well be that restrictions limiting certain forums to noncommercial speech are sustainable, when indeed ample outlets (and the commercial incentive to use them) remain fully available for the usual advertisement of ordinary lawful goods and services. See Virginia State Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, n. 24 (1976). Indeed, it is arguable that the Court may have erred in not adequately acknowledging the extent to which this may be so. See, e.g., City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) and compare William Van Alstyne, Some Cautionary Notes on Commercial Speech, 43 U.C.L.A. L. REV. 1635 (1996).

32. See Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (emphasis added) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, pro-
Is it the case that the statute is nevertheless not objectionable on First Amendment grounds? If so, on what reasoning might one presume so to declare? Wherein does the explanation lie?

II. DOES THE GREATER POWER INCLUDE THE LESSER?

Is it because, as suggested by Chief Justice Rehnquist in Posadas, "[T]he greater power to completely ban [an activity or product] necessarily includes the lesser power to ban advertising of [such an activity or product]" without otherwise presuming to interfere with it so far as the legislature is currently disinclined to do? That is, is this the answer to the "elegant question" as framed by Justice Stevens, because as Chief Justice Rehnquist went on to elaborate in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, "[I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."

That this is so, though there may be nothing in the content of such advertising (and also nothing in the manner of its presentation, its format, its means of distribution, or the age or competence of those to whom it may generally directed, etc.) distinguishing it in any respect from advertisements others are free to use in respect to such goods or services it is lawful for them to provide? But why should that be so?

The straightforward idea here (and in the preceding quotation from Posadas) might be thought to be so obvious, as hardly to be worth spelling out, indeed, simply this: that no one is forced to get into the casino trade (or, here, into the business of marketing motorcycles), and insofar as one understands that the legislature closely regulates this particular (prohibitable) trade in a certain way (including, as here, by providing that no advertising thereof is permitted by or on behalf of one who engages in that trade), one may conclude that, in light of the restriction, it is not worthwhile,
that is, that one would be better off pursuing some other line of business (namely, one not subject to this particular restraint). And so one is perfectly free to do. What one may not do, however, is to suppose that one may take up the business of the casino trade, and then simply disregard one of the clearest restrictions of all: namely, that while engaged in this trade, one will abstain from all advertising related thereto. Given that this is a business the legislature could forbid outright, if one nevertheless wants to pursue what one thinks may well be a lucrative business notwithstanding the restrictions, one is welcome to do so. But when, as here, it is a business the legislature could altogether forbid, to quote Justice Rehnquist (from still a different case), "a litigant in the position of the appellee must take the bitter with the sweet."

If this is the explanation, such as it is (and there seems little reason to think that it is not), the position taken by Justice Rehnquist in Posadas seems to be constructed from an analysis not much different from that advanced by Justice Holmes' many decades earlier, in the quite famous case of McAuliffe v. Mayor of New Bedford, dismissing a policeman's complaint on observations of a strikingly similar sort neither more nor less. The policeman had been discharged for violating a rule of which he was well aware when he became a policeman (in this instance, a rule disallowing public statements reflecting on the police). "The petitioner," Holmes observed in McAuliffe, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." If one wants nonetheless to be a policeman, he may, Holmes observed, but in doing so, of course "he takes the employment on the terms which are offered him," neither more nor less. And having done so, Holmes declared, "he cannot complain." Thus the suggestion, pursued by Justice Rehnquist in Arnett (and equivalently in Posadas?), that "a litigant in the position of the appellee must take the bitter with the sweet." Or so it might be thought, if there were no more to be said.

Yet, in the particular case in which Justice Rehnquist first offered this view, the Supreme Court had disagreed with Justice Rehnquist's analysis, such as it was, declined to follow it at all. Rather, in Arnett (and later also,

39 29 N.E. 517 (Mass. 1897).
40 See Id. at 518.
41 Id.
42 Id. at 518.
43 Id.
44 See Id. at 166-67 (Powell, J., concurring). See also Cleveland Bd. of Educ. v. Loudermilk, 470
in *Loudermill*), the Court held that it is *the state* (not the employee) that may sometimes accept "the bitter with the sweet". Specifically, in *Arnett*, that the state must accept something *it* may not want (providing tenured employees with pretermination procedural due process required by the Fourteenth Amendment, rather than some lesser, legislatively-preferred procedure), in order to get something it desires to have (presumably the better quality of service it may receive by providing some kind of job tenure for its employees rather than by compelling all to serve solely for fixed terms or to be terminable simply at will). The point was plainly put by Justice Powell, in the following way, in *Arnett*: "While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."\(^45\)

In fact, quite early on, and long prior to cases such as *Arnett*, the Supreme Court had heavily qualified the "greater-and-lesser" (or "right-privilege") syllogism, in respect to the First Amendment as well. It had done so via the doctrine of "unconstitutional conditions."\(^46\) Indeed, had the Court not done so, the power of the government effectively to crush constitutional rights under the powers of the "right-privilege" (and "greater-and-lesser") doctrines would have left very little not within government reach to command pretty much as it might wish, even as the Court


\(^45\) *Arnett*, 416 U.S. at 167 (emphasis added). So, here, too, one might suggest, the legislature may be free not to permit any lawful trade of a certain sort, but nonetheless conclude that "such an interest, once conferred, while conferred, and within the boundaries it has been conferred, brings with it commensurate rights of free speech" (that is, merely the same rights at one's own expense to furnish public information respecting that trade, even as others are free to do in respect to such trade as is likewise lawful for them).

\(^46\) "[T]he doctrine of unconstitutional conditions limits the government's ability to make someone surrender constitutional rights . . . to obtain an advantage that could otherwise be withheld." Clifton v. Federal Elections Commission, 114 F.3d 1309, 1315 (1st Cir. 1997) (construing an act of Congress as not forbidding the spending-for-speech at issue in the case, and so construing the act in order to avoid the likelihood that the act would otherwise be vulnerable as invalid for imposing an unconstitutional condition). See generally, William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 83 Harv. L. Rev. 1429 (1968); Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Brooks Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 U.C.L.A. L. Rev. 371, 458-62 (1995) (with additional references at p. 373, n. 1). See also Philip Kurland, *Posadas De Puerto Rico v. Tourism Company: "Twas Strange, Twas Passing Strange: 'Twas Pitiful, Twas Wondrous Pitiful."* 1986 Sup. Ct. Rev. 1, 13 (noting specifically how the argument offered by Justice Rehnquist in *Posadas* "bears a great similarity to that long since rejected under the rubric of unconstitutional conditions"). Indeed, it does. For being obliged to forbear from any advertising whatever (merely of the same utterly conventional sort all others are free to provide), as a condition of being allowed to compete at all, is arguably a condition of just this, "unconstitutional" kind.
acknowledged in the course of its own critical review.47

To face up to the issue more directly, however, and this time without recourse to mere legal epigrams (whether of the "greater-lesser" sort on the one hand, or of the "unconstitutional conditions" sort on the other hand), in returning still again to Posadas, perhaps one may more correctly say this, with appropriate detachment: "If it is true that the power to forbid an activity implies a power to forbid any advertisement of such an activity, and to do so even when the activity has not been forbidden (just as Justice Rehnquist suggests in Posadas), it is true only because the Supreme Court is so inclined to read the Constitution so to provide. Otherwise it is not true."

Putting the point this way, moreover, merely helps clear the air.

So, the question remains to be answered: why should the Supreme Court read the Constitution so to provide,7 when nothing in the Constitution suggests that this is necessarily a correct reading or understanding of its various provisions that may bear on the question? Certainly nothing in its text compels such a reading. Nor is it simply some sort of obvious Euclidean self-evident truth. Indeed, perhaps it would be at least equally plausible to read the Constitution quite differently, for example, to say the following, instead:

Whether or not a legislature may forbid an activity (a question it will be time enough to consider if and when the legislature presumes to do so), when it has not done so (i.e., when it has not exercised that power, such as it may be), there is no reason to suppose its power to restrict or forbid speech providing information pertinent to that activity is at all the same as though it had exercised that power. Indeed, it is surprising that anyone should think that it is, for there is no equivalency in the circumstances at all. Perhaps it, the legislature, may altogether forbid the activity in question; and perhaps, also, a legislature may do so for virtually

47. See, e.g., Frost & Frost Trucking Co. v. Railroad Comm'n of California, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). Arnett, 416 U.S. 134 (1974). See also United States ex rel. Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437 (1920) (Holmes, J., dissenting), (describing the mail as something that could be abolished whenever the government might choose to do so, but which, in the meantime, so long as the government chooses to maintain it (that is, so long as the government finds it useful to provide a postal system), it must be prepared to accept some of the "bitter" (certain mail it would strongly prefer not to carry because of its content) as long as it wants whatever advantage it finds in the "sweet" (the mail it does desire to carry for such value as it may be thought to have)). Holmes' position in Burleson thus reflects a considerable change in his thinking since his dismissive opinion in the McAuliffe case. (And, indeed, the McAuliffe syllogism itself was abandoned in subsequent decisions by the Court. See, e.g. Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967).)
any reason satisfactory to itself (i.e., that this is so if just because the Constitution may scarcely place any restraint on its power to do so, insofar as we have concluded, for better or for worse, that when it does so, such decisions as it shall make, when of this sort, are hardly subject to judicial review at all). But, however that may be, when it has not exercised that power in respect to a particular activity, and insofar as the activity is permitted, the First Amendment applies to prohibit the legislature from presuming to forbid those lawfully engaged in it to provide public information in respect to that activity, so to furnish at their own expense a fair description of what it is (i.e., what the ‘activity’ consists of, to whom it is lawfully available, when, and on what terms), always answerable for the truth of their representations, such as those representations may be, neither more nor less than others who likewise offer other lawful goods or services may likewise be made to do. For so much as this, we think, the First Amendment secures of its own force. Nor do we readily understand what would so mislead a legislature to suppose otherwise, that the First Amendment, despite the manner in which it is written, somehow implies it is largely just up to legislative bodies to decide the extent to which people shall be permitted to learn or not of services and products lawfully available to them. We know of no such doctrine permitting legislative bodies thus to try to control what people may learn or from whom they may learn it. And we find no basis to accept it merely because requested so to do. 48

This view of the matter merely acknowledges how the First Amendment may operate as an independent restraint on Congress and on the states. 49

48. Indeed, why isn’t this as logical or even a more logical "reading" of the Constitution than that suggested by Justice Rehnquist for the Court in Posadas, so to say something quite different about the Constitution, merely of the following sort?

49. The proposition is also much more of a piece with what the Court elsewhere reports as its own view, for example, in Edenfield v. Fane, 507 U.S. 761, 767 (1993). The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Id

This position is also merely the same as the Court has taken, equivalently, in respect to due process in cases such as Loudennill and Arnett. And for fuller elaboration, see also Brooks Fundenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 U.C.L.A. L. Rev 458-62, 76-78 (reviewing Posadas and usefully diagramming greater-and-lesser powers); Martin Redish, Tobacco Advertising and the First Amendment, 81 Iowa L. Rev. 589 (1966).
But may we say instead that any restriction on advertising, whether by motorcycle dealers or others whose commercial activity the state could altogether shut down, while not necessarily exempt from First Amendment scrutiny, need meet only the minimal requirements of ordinary economic substantive due process review (rather than First Amendment standards as such)?

Judged by that "mere rationality" standard (i.e., the "(non)standard" of minimal scrutiny, bordering on virtual nonjusticiability); the standard applicable, however, where no one's speech as such is the object of any restrictive law, the Virginia statute clearly meets the appropriate test?


51. See supra notes 4, 5 and 9.

52. Indeed, but this is merely a virtual reiteration of the "greater-and-lesser" proposition explicit in Justice Rehnquist's Posadas position, rather than a different approach (even as his reference to the Jackson-Jeffries' article, supra n. 45, further suggests). It once again elides any distinction between presuming to regulate the product and presuming to suppress accurate commercial information about the regulated product, treating them as equally within the discretion of the legislature to dispose of as it may please itself to do. For with no significant difference in rephrasing, what the Chief Justice necessarily suggested (in the "greater-and-lesser intrusion" view of the law involved in Posadas), was that (constitutionally speaking) whatever reasons, no matter how utterly uncompelling or even petty, would be deemed constitutionally adequate by the Court insofar as the government enacted a "wholesale prohibition" on a given kind of commerce, the very same reasons must perforce also be constitutionally adequate when the government takes "the less intrusive" step of tolerating the trade and merely forbids any advertising by those permitted to engage in it. This is so "precisely because" the government could have taken the more restrictive step of outlawing the trade (the greater, the power to ban the trade, includes the lesser, the power to ban advertising of such trade as the government permits in any line of trade the government could ban).

Again, however, as we have seen, since there is almost no line of commerce government cannot prohibit, even merely for the purpose of favoring those in competing goods and services (see, discussion supra notes 3, 4 and 7), this would leave only a thin (and highly uncertain) category of goods and services not subject to nearly unbridled legislative power to declare "who may advertise and who may not," and giving the First Amendment no separate work to do. Indeed, to escape the rationale, such few goods as government could not reach on this basis (namely, such privately offered commercial goods or commercial services of a kind government could not ban), would have to find some special "anchor" in the Constitution itself and thus, in finding some substantively protected "marketing entitlement" secured against government in the Constitution, not be goods or services of a kind the government could ban (e.g., possibly "commerce" in certain printed matter, such as newspapers as implicit in "the freedom of the press"); or "commerce" in at least some kinds of legal services (as implicitly protected in the due process clause of the Fifth Amendment and in one part of the Sixth Amendment the part that refers to the "right to counsel"); or possibly some even "commerce" in condoms or other contraceptive items and abortion services (as necessary to certain constitutionally-anchored "privacy" rights pursuant to Roe v. Wade, 410 U.S. 113 (1973), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Griswold v. Connecticut, 381 U.S. 479 (1965). All of this, incidentally, Philip Kurland presciently recognized in the critique he offered of Posadas more than a decade ago. See supra note 41. See also Martin
Or is it because while this may not be true either\(^5\) (rather, what \textit{is} true is that the "advertising restrictions" at issue here are obviously specific, content-directed prohibitions of \textit{truthful} statements of \textit{lawful} consumer information in contemplation of utterly lawful transactions and, as such, are speech restrictions unexceptionally subject to conventional First Amendment review), the restrictions nevertheless can fairly be said to "directly advance the government's substantial interest in the health, safety, and welfare of its citizens," \textit{and} that in doing so, they "are no more extensive than necessary to serve the government's interest," and thus meet the Court's \textit{own} First Amendment, \textit{Central Hudson} "commercial speech" test, \(^6\) just as a

\(^{53}\) See discussion supra, note 52.


\textit{In commercial speech} cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For \textit{commercial} speech to come \textit{within} that provision, it . . . must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is \textit{substantial}. If both inquiries yield positive answers, we must determine whether the regulation \textit{directly} advances the governmental interest asserted, \textit{and} whether it is \textit{not more extensive than is necessary to serve that interest}.” If the restriction meets these requirements, it is to be upheld.

\textit{Id.}

So, here, specifically in respect to our motorcycle advertising ban, applying the specific word formula of \textit{Central Hudson}, may it be said that the state has a "substantial" interest in the good health of its citizens, and likewise, therefore, a "substantial interest" also in reducing the number of hazardous, unshielded, crash-prone, powered motorcycles in private use and at large on the public roads? (Why not? For surely it \textit{may} be so "said," just as the Virginia legislature, alert to the test, can be expected to take due care so to declare.) As to whether this measure is "no more extensive than is necessary to serve that interest," is there any obvious ground for saying that it is "more extensive" than is "necessary" to serve that interest? If so, in what way, and who are the courts so to declare? If the legislature declares that it is merely as extensive as it needs to be to do its task efficiently, on what basis could a court presume to say otherwise, \textit{e.g.}, to declare that "something more compromising," or "something permitting at least \textit{some} advertising" would be enough? Enough \textit{for what}? Surely a \textit{total} ban on motorcycle advertising would have much greater effect than some half-way measure, would it not?

So, thus applying the "test," if, indeed, this, the \textit{Central Hudson} formula, \textit{is} to supply the formula, though it is (superficially) quite different from, and more demanding than, the mere economic substantive due process "test," what does it come to, in the end? That even the larger part, if not the whole part, of the legislative purpose was in fact to secure the greater prosperity of the automobile dealers, rather than any particular "public safety" concern, may well be true. Still, if securing their greater prosperity (either \textit{per se} or because it is felt, by the legislature, that their products are more in the public interest than the products of competitors) is not likely to be regarded as a "substantial" interest, then the legislature is simply unlikely so to admit the point, indeed, least of all will it be inclined to do so, given its awareness of the requirements of the \textit{Central Hudson} test. Rather, one may expect it will say nothing about wanting to protect automobile dealers and will cite a concern for "public safety," so to meet the "substantial" interest part of the \textit{Central Hudson}
majority of the Court likewise also found in *Posadas*,\(^5\) in keeping with what has since been quite rightly described as an *alternative* basis for the holding in that case?\(^6\)

Or is it the case, rather, that *this ought to fail as well*,\(^7\) so that whether or not motorcycles (or some other goods or services, whether margarine, muslin, or mopeds) could be outlawed, heavily taxed,\(^8\) or otherwise restricted, whether for private use or in commerce (for, indeed, there may be scarcely any meaningful constitutional restraint limiting either Congress or even the states in this regard), "the state may not suppress truthful speech in order to discourage its residents from engaging in a lawful activity,"\(^9\)

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55. "[T]he statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the *Central Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim." *Posadas*, 478 U.S. at 344. The argument in this branch of *Posadas* does not rely on the "greater-and-lesser" reasoning, rather, it is independent, i.e., it stands on its own. It is much the same as that which might sustain a state-law based tort action for invasion of privacy in respect to a newspaper presuming to publish private facts of a private person, unassociated with any newsworthy event (e.g., the kind of case discussed at *supra* note 14). "The state," obviously, "has a substantial interest in protecting each person's 'right to be left alone,'" such a court might declare, in applying a *Central Hudson* standard of First Amendment review, to meet its first requirement. And "the restriction placed on the newspaper," it might then proceed to say, is "no more extensive than necessary" to secure that particular right, which it does, and "directly" so. (Query, however, even accepting the argument here, whether the analogy fits: truthful information on the availability of a lawful product, one might note, prejudices no one's "rights," and wherein does the government presume to assert it has a substantial interest in keeping consumers uninformed in respect to the relative cost, relative advantages, availability, etc., of one kind of lawful product or lawful service vis-a-vis others they may in fact not prefer?)


57. See discussion *supra* notes 52, 53 respecting the manner in which a literal *Posadas*-style of applying *Central Hudson* standards would appear to work out.

58. *See*, e.g., *McCray v. United States*, 195 U.S. 27, 30 (1904) (ten cent per pound tax imposed on colored margarine, none on butter (whether artificially colored or not), sustained on basis that colored margarine could be outlawed (thus, even assuming the tax "discriminated against oleomargarine in favor of butter, to the extent of destroying the oleomargarine industry for the benefit of the butter industry," as was alleged), it would not matter; the result was no different than might have been done directly, albeit ostensibly for "consumer protection" as the alleged purpose.

59. *See Posadas*, 478 U.S. at 349 (Brennan, J., dissenting) ("I do not believe Puerto Rico constitutionally may suppress truthful commercial information in order to discourage its
however else it may presume to regulate that activity, or determine the conditions or terms of its lawful pursuit (down to and including its outright prohibition), or otherwise restrict its own residents' access to that activity, so far as a legislature may decide so to do? In brief, that both Posadas and Central Hudson (to the extent Posadas relied on Central Hudson in its alternative holding) simply in error in suggesting the contrary?

For, to offer the obvious first-level distinction once again, so far as the latter kind of power is concerned (i.e., so far as the power to determine what commercial services may or may not be permitted), to be sure, the First Amendment may indeed have very little to say, if just because the First Amendment (unlike the Fifth Amendment, such as it is)\(^6\) is not addressed to government power generally to determine what goods and services may or may not be lawfully provided or whether, if provided, to whom they may be provided, under what circumstances, or on what particular terms. But, (and need we be reminded still again?) the First Amendment does speak to restrictions on speech, the immediate, indeed the sole, target of the Virginia law put into challenge in this case.\(^6\)

And, at the next step, moreover, the First Amendment provides no general exception the Court would recognize as such just because the speech in question supplies information on particular lawful goods and services, whether motorcycles or milk, (or milk substitutes) rather than information about something else (e.g., information about today's weather, or information about tomorrow's election, or information about yesterday's smashup of cars on some local road).\(^6\)

residents from engaging in lawful activity.

\(^6\) See cases and discussion at supra note 5. See also Carolene Products Co. v. United States, 323 U.S. 18 (1944) (Carolene Products II). Despite clear labeling sufficient to dispel any consumer confusion or possible product misidentification, and despite uncontested proffer of proof that lower cost, vitamin-fortified vegetable oil in defendant's product met all the nutritional standards of whole milk such that there was no basis to describe defendant's product as either "adulterated" or as misbranded, an Act of Congress successfully lobbied by the dairy industry to totally forbid defendant's lower cost product was sustained. Furthermore, the Fifth Amendment Due Process Clause would provide no ground for relief.) For an effective critique of Carolene Products II, see Frank R. Strong, SUBSTANTIVE DUE PROCESS OF LAW--A DICHOTOMY OF SENSE AND NONSENSE 226-31 (1986).

\(^6\) See Martin Redish, Tobacco Advertising and The First Amendment, 81 IOWA L. REV. 589, 599 (1996) ("If it is beyond dispute that the First Amendment provides greater protection to speech than the Fifth Amendment's Due Process clauses provides to the sale of a product.")

\(^6\) See also 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1510-12 (1996)(Stevens, J., joined in this part of the Opinion (Part VI), by Kennedy, Thomas, and Ginsburg, JJ.)"The reasoning in Posadas does support the State's argument, but, on reflection, we are now persuaded that Posadas erroneously performed the First Amendment analysis.**Because the 5-to-4 decision in Posadas marked such a sharp break from our prior precedent... we decline to give force to its highly deferential
critical juncture in this essentially tendentious essay) does the First Amendment provide an exception that the Court should be willing to recognize, permitting the suppression of such information, to keep it from reaching the public, just on account of its commercially interested source.63

That accurate information respecting the availability of a lawful product or service is forthcoming principally, or even solely, by the exertions of one from whom it may be purchased (and who on that account may expect to recover the cost of providing the information from lawful transactions in the particular product or service), does not suggest why it should be any more subject to suppression on that account, under the First Amendment, than were it provided instead in the most ordinary reportage of a general newspaper, or in an ordinary subscription copy, or public library copy, of Consumer Reports (where we can be quite sure it would be fully protected by the First Amendment). That the speech in question the government here seeks to suppress appears in a flyer distributed by a motorcycle shop, rather than in an identical flyer distributed to all the same persons by an individual or an association who differ solely in that they may personally have less economically at stake in doing so, would appear to provide very little by way of distinction between them, moreover, in respect to the proper measure of protection each may be due, so far as the First Amendment is concerned.64

To press the point, not inappropriately, merely consider variations on the unprepossessing case immediately at hand, even as modeled on Posadas itself. A legislature may not regard it as a contribution to the public welfare that a newspaper would run a regular local feature on casinos the state sees fit to license (though it need license none), and yet have no power to suppress that feature, chock full of unexceptionably accurate casino information as it may be, dislike it for such reasons as they may. Nor will it

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63. Of course, one can invent (or "read in") such an ultimate exception, if one is so inclined, but assuredly the burden is appropriately placed on those so inclined to do and the question at once presents itself as to why one would wish to follow that particular idea (and also, perhaps at least as importantly, what makes one thinks the First Amendment adopts that idea).

matter whether the feature is carried partly, or even principally, or even wholly, because the newspaper thinks it conducive to the newspaper's own commercial success so to provide that feature, rather than for some reason more sublime.\textsuperscript{65}

So, too, the legislature may see no value, but only a public disservice, to a news story bringing to public attention the datum that the state's official lottery (which state lottery, moreover, the state allows itself to advertise, as indeed most state lotteries do)\textsuperscript{66} offers a payout much inferior by far to any of the commercial casinos in the state.\textsuperscript{67} That the "public interest" might well be deemed by the legislature to be disserved by the publication of that datum of information may be true.\textsuperscript{68} But it is also quite beside the point. For though it may be true, one may with full confidence predict that the legislature may not on that account seek\textsuperscript{69} to prevent a newspaper from publishing just such information insofar as it is true. Nor may it seek to subject the newspaper to some penalty (e.g., some fine) for what it has presumed to do.\textsuperscript{70}

\textsuperscript{65} See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973) (emphasis added).

If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. \textit{Such a basis for regulation clearly would be incompatible with the First Amendment.} See also Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Cammarano v. United States, 358 U.S. 498, 514 (1959) ("The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise.").


\textsuperscript{67} Cf. Posadas, 478 U.S. at 353-54 (noting how the Puerto Rico ban on casino advertising at issue likewise did not apply to advertising by the state lottery, and further suggesting that "it is surely not far-fetched to suppose that the legislature chose to restrict casino advertising not because of the 'evils' of casino gambling, but because it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery.").

\textsuperscript{68} For, to be sure, it may at once result in a switch of consumer interest more toward casinos and away from the state lottery, the entire net proceeds of which, unlike the casino's proceeds are earmarked for public schools (the adequate financial support of which, from state lottery net proceeds, is of course of "compelling" legislative concern).

\textsuperscript{69} Or, rather, may not successfully seek, for who knows what the legislature may try to do.

\textsuperscript{70} To be sure, the legislature, one may readily concede, could prohibit casinos from offering any gaming odds more favorable than those offered by the state lottery, or heavily tax their proceeds, restrict their ownership, or indeed simply "remove them from the field." Yet, though all this is true, it could have no hope, consistent with the First Amendment, in any effort to forbid newspapers, or mere radio talk show hosts (or anyone else, for that matter), from informing the public of such differences as there may still be (whatever they still are as between the casinos, such as they are, and the state lottery, such as it is). \textit{But see} New York Times Co. v. United States, 403 U.S. 713 (1971), the famous "Pentagon Papers" case. In respect to the newspaper, in brief, nothing in the nature of the mere \textit{Central Hudson} test would be used.
Nor is it obvious on what basis it should feel entitled to hope for any better result just because it "merely" forbids any casino (though not "any newspaper") to publish those differences such as they are or, indeed, to forbid it to publish any information whatever respecting its location, lawful services, and its ordinary business hours, such as they may be. For it would, now to quote Justice Rehnquist against himself, be "a strange constitutional doctrine" (a strange First Amendment doctrine) which would hold that it is up to the newspapers (governed by such interests as may varyingly motivate their publishers) to determine what information (if any) is to be available, on the range of goods and services lawful for citizens to consider for themselves. Nor, indeed, is there anything offered in either Posadas or in Central Hudson to suggest that this is somehow the manner in which the First Amendment guarantee of freedom of speech, that "Congress shall make no law abridging the freedom of speech," is meant to work.

To be sure, as we now turn toward some closure on this essay, insofar as a commercial enterprise offers a lawful service which, however, it also

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72. Cf. Posadas, 478 U.S. at 346

It would . . . be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

73. Consider merely the description of the case at hand regarding the "motives" of Thomas Jeffries as publisher: one part "altruistic" and public-spirited (i.e., he believes that more motorcycles and fewer cars will, all things considered, provide a better community than the one that was troubling him, with its ever-crowding, pre-existing "pro-automobile" trend), but also one part "businessman" (i.e., he believes adding this feature will add (or help retain) readers and paying subscribers (which in turn helps attract advertisers) and so add profit or at least help avoid loss; and perhaps one part "free speech altruist" (i.e., subject to only certain minimum standards, he believes it to be part of a newspaper's function to provide information readers find of meaningful interest, whether it would necessarily be of similar interest to him). But the case would not differ, however, if the newspaper publisher were utterly a "pure profit-maximizer" (even as some so regard the international publishing magnate, Rupert Murdoch, and others still would identify, for example, Larry Flynt).

So, too, in respect to those simply selling motorcycles or other lawful goods, no doubt the range of motives is both wide and equally mixed (i.e., there is no reason to assume that they see no benefits, or positive social value to their products, much less that they attach no positive informational value to what they put in their advertisements (but seek merely to eurche the credulous, i.e., "merely to make money" by "stimulating" a wholly "artificial" demand). "Altruism" (in the larger sense of the word) need not be some missing component from varieties of business, nor, oppositely, is the motive of pure "profiteering" unknown within the weedy fields of the fourth estate (i.e., "the press"). Cf C. Edwin Baker, Commercial Speech: A Problem in The Theory of Freedom, 62 IOWA L. REV. 1 (1976); Randall Bezanson, Institutional Speech, 80 IOWA L. REV. 735, 781-816 (1995).
does no more than to describe to others in no less truthful terms (but merely the *same* terms), and by no more intrusive means (but merely the *same* means) as other lawful enterprises are equally free to do in respect to such goods or services as may likewise be lawful for them to provide, and to do so, moreover, at its own expense\(^{74}\), it is no doubt quite true that neither we or any legislature can have some sought-after assurance that people will make "good" choices ("good choices," of course, as we, or as some legislature, regard such "good" choices to be). *While* it, the activity, *remains* lawful\(^{75}\), however, and within the boundaries that it is lawful, however, perhaps it is a fairer reading of the First Amendment to suggest that that is a matter ultimately left for *them* to determine, according to their *own* lights, and not for the legislature to presume to do by deflecting, suppressing, or outlawing information that would otherwise reach them from a competent and willing source. For the First Amendment, may not require the government to support any kind of commerce,\(^{76}\) or for that matter, even to support any particular kind of speech, but it firmly sets its countenance against regimes of government censorship to deny, or steer or deflect information out of public view lest those to whose attention it might otherwise come might presume to find something in it the government would prefer they not so freely be allowed to know. So, at least, one may believe the First Amendment is better understood, indeed, so much as this in keeping with but the most ordinary understanding of freedom of speech, rather than anything peculiar, arcane or strained.\(^{77}\)

\(^{74}\) Merely in the same manner as any other producer or retailer may likewise do

\(^{75}\) A matter the First Amendment does not presume to decide and, indeed, a matter with respect to which the Constitution as a whole may have only a little to say, leaving decisions of this sort largely to political determination such as it may be.


\(^{77}\) See also Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment*, YALE LAW SCHOOL OCCASIONAL PAPERS, Second Series, No. 1 (1995). Indeed, the Canadian Supreme Court has accepted this view of the matter, as well, in some reasonably strong degree, despite the considerably *weaker* protection generally provided in the Canadian Charter of Rights for freedom of speech in Canada than our First Amendment provides, and even in respect to commercial products of no notable distinction as such. See RJR-MacDonald Inc. v. Canada (Attorney General) [1995] 127 D.L.R. 4th 1 (aff'g judgment declaring void large portions of the Tobacco Products Control Act of 1988, forbidding commercial advertisements of tobacco products in Canada). The Canadian Tobacco Products Control Act of 1988 prohibited advertising of tobacco products in Canada (excepting only advertisements of foreign tobacco products appearing in imported publications). The Act also required unattributed health warnings on all tobacco products and forbade manufacturers from putting any other material on tobacco packages, prohibited the marketing of derivative products displaying the trade marks of tobacco companies (exempting principally only use of such trade marks in identifying financial benefactors of various public interest programs, *e.g.*, acknowledgments of sponsorship of "a cultural or sporting activity or
Moreover, even as others have suggested, including several from within the Court itself, neither Posadas or Central Hudson (so far as Central Hudson figured as an alternative ground in Posadas) yields any convincing reason for some other conclusion for one to reach.\textsuperscript{78}

(event\textsuperscript{3}), and forbid any free, or rebate or gift-tied distribution of tobacco products. With three judges dissenting, however, the Canadian Supreme Court sustained plaintiffs' request for a declaratory judgment that the restrictions violated section 2(b) of the Canadian Charter of Rights (the Charter section generally protecting freedom of speech and of the press) and were not saved by section 1 (the "savings" section permitting such infringements as are "reasonable and demonstrably justified in a free and democratic society"). Accordingly, in keeping with the Court's Opinion, the section imposing the advertising ban (including mere informational advertising) of tobacco products was declared unconstitutional under section 2(b) of the Canadian Charter. And separately, the requirement mandating unattributed health warnings was also held invalid under section 2(b), as was likewise the prohibition of the use of trade marks on any other articles (i.e., articles other than tobacco products). Much of the balance of the act was declared invalid (but largely because of non-severability). The provision forbidding free distributions, and some few other regulations were upheld. Id. at pp. 74-88 (McLachlin, J.).

It may be additionally noteworthy that the Canadian Court reached its decision in this, a purely "commercial speech" case, despite its earlier decisions sustaining quite sweeping bans on "hate" speech and "discriminatory" speech (such as they are deemed to be in Canada) in Regina v. Butler, [1992] 1 S.C.R. 697, and Regina v. Keegstra, [1990] 3 S.C.R. 697, neither of which forms of restriction on speech have survived court tests here. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), summarily aff'd., 475 U.S. 1001 (1986); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).


[I]ntermediate scrutiny [i.e., Central Hudson scrutiny] is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly;

See also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 523 (1996) (Thomas, J., concurring)

I do not join the principal opinion's application of the Central Hudson balancing test because I do not believe that such a test should be applied to a restriction of 'commercial' speech, at least when . . . . the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark;

Id. See also Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 318, 349 (1986) (Brennan, J., dissenting) ("I do not believe [a state] constitutionally may suppress truthful commercial information in order to discourage its residents from engaging in [a] lawful activity."); Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (Stevens, J., concurring) ("[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Douglas, J.) ("[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."); Thomas v. Collins, 323 U.S. 516, 545 (1943)(Jackson, J., concurring)("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . ").
THE DISABILITY-BASED PEREMPTORY CHALLENGE: 
DOES IT VALIDATE DISCRIMINATION AGAINST BLIND 
PROSPECTIVE JURORS?

By Matthew J. Crehan

I. INTRODUCTION

This article deals with the current and future use of the peremptory challenge against disabled prospective jurors and the effect that the Americans with Disabilities Act ("ADA") has on such a challenge. Although this paper concentrates on the blind prospective juror, it is equally applicable to other disabilities, including deaf and non-ambulatory jurors. The sightless juror perspective was chosen since persons with this disability have historically been viewed as having a disability for which accommodation in the trial setting is most difficult.

Hearing enhancement technologies and contemporaneous visual transcriptions are readily available to accommodate the hearing impaired. Alterations of the courtroom and other temporary measures can be used to accommodate the physically impaired individual. However, the perception is somewhat pervasive that little can be done to accommodate lack of sight when the participants in a trial expect jurors to observe witnesses as well as view exhibits and demonstrative evidence.

The most common reasons for challenging blind persons from a

1. Matthew J. Crehan is a Judge on the Court of Common Pleas of Butler County, Ohio. This article is adapted from "Seating the Blind Juror: 'Is it a Judicial Dilemma?'", a thesis submitted in partial fulfillment of the requirements for the degree of Master of Judicial Studies at the University of Nevada-Reno, December, 1996.
3. The author does not agree with the perception that the blind are not competent to serve as jurors; neither do blind persons who have served as jurors. This paper does not deal with the ability of blind persons to serve on juries. It only addresses the continued viability of the peremptory challenge when the underlying basis is a prospective juror's disability and the effect of the ADA on the disability based peremptory challenge.


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jury panel are:
-A blind juror will not be able to view the witness, which is a disadvantage in judging the credibility of witnesses.
-A blind juror will not be able to appreciate the layout of the scene of an incident.
-A blind juror does not have the personal experience necessary to apply certain standards of care (driving a car; operating machines) which requires one to visualize spatial relationships or sight-distance measurements.
-A blind juror is unable to view and appreciate photographic evidence and video presentations.
-A blind juror will not be able to view physical evidence.
-A blind juror will not be able to read documentary evidence.
-A blind juror will not be able to view sketches, graphs, charts, and computer graphics which are designed to clarify confusing evidence.
-A blind juror's disability will impede his or her ability to decide issues of identification.
-A blind juror must depend on other jurors during deliberations and will not use individual faculties to make independent determinations of issues. 4

Blind persons have historically been discriminated against and denied access to jury service solely because of their disability. State statutes confirmed this assumption by excluding blind persons from serving on juries. Arkansas, for example, specifically excluded the blind from jury service until it amended its statute in 1994.5 The Superior Court of the District of Columbia had a public policy disqualifying blind persons from jury service until 1993, when the United States District Court enjoined the practice.6 Court decisions, the passage of the ADA,7 and public opinion have converged today to eliminate laws and procedures which have previously disqualified the blind from jury service. Many states, however, still permit the exclusion of blind persons from serving as jurors if they are not "capable by reason of physical and mental ability to render satisfactory

4. For an analysis of the validity of the most common reasons for exercising a causal challenge of blind perspective jurors, see Crehan Thesis, supra, note 2.
5. ARK. STAT. ANN. § 16-31-102 (C), (Michie 1997) (civil cases); ARK. STAT. ANN. § 16-33-304 (1997) (criminal cases).
jury service," if they are "of unsound mind or [have] a bodily defect that renders . . . [a person] incapable of performing the duties of a juror," if they have a "loss of hearing or . . . [another] incapacity . . . [that renders the person] incapable of performing the duties of a juror . . . [to the] prejudice . . . [of] the substantial rights of the challenging party," or if they have a "physical impairment" that limits their "ability to perceive and appreciate the evidence."11

This paper does not argue whether the jury system is broken and in need of fixing or criticize or defend the jury selection system and the peremptory challenge as they exist. Instead, it examines the continued use of the peremptory challenge to remove persons with disabilities from a jury panel solely because of their disability. A judge confronted with a blind prospective juror should anticipate challenges from either or both sides. Therefore, this paper is written from a judge's perspective since it is the judge who must make the "call."

II. THE BLIND AS JURORS

A. An Historical Perspective

Prior to 1986, the role of the judge in the jury selection process was as an overseer to ensure that only qualified persons were selected to be jurors in accordance with applicable statutes and due process requirements of federal and state constitutions. The primary consideration was the right of litigants to present their respective cases to a fair and impartial jury of their peers. Historically, peers did not include blind persons.12 They, like many persons with some form of disability, were presumed to be unfit for jury service.13 Indeed, the language of many state statutes concerning juror eligibility was couched in terms that disqualified such persons outright.14

9. FLA. STAT. ANN. § 913.03(2) (West 1997).
11. 725 ILL. COMP. STAT. 5/115-4(d) (West 1998); 735 ILL. COMP. STAT. 5/2-1105.1. (West 1998).
12. D. Nolan Kaiser, Juries, Blindness, and the Juror Function, 60 CHI-KENT L. REV. 191 (1984). Professor Kaiser was a professor of philosophy at Central Michigan University and was blind. He wrote this article after being excluded from a jury because of his blindness.
14. See Goldbas, supra, note 13, at 119-20 n.3. In addition to twenty states which specifically disqualified the physically or mentally disabled, as of 1981, "[t]he federal government and six states require[d] that jurors be in possession of their natural facul-
Those individuals who managed to become members of a venire were removed by “challenges for cause” on the theory that a blind person could not effectively receive physical evidence and testimony, could not form accurate impressions of witnesses, and could not interact with sighted jurors during deliberation. In addition, it was often thought that accommodating the disabled juror placed an undue burden on the court and state, which outweighed any claimed right to jury service on the part of the individual.

Statutes were created and customs and policies were developed which automatically disqualified disabled persons, including the blind, from jury service. Procedural rules were codified which allowed litigants to challenge prospective jurors solely because of their disability. State statutes excluded persons from serving on juries who did not possess their “natural faculties” and disqualified persons “afflicted with bodily infirmity amounting to a disability.”

As persons with disabilities became more vocal, the national consciousness began to recognize the abilities of blind persons to function in society. Legislators recognized this trend and passed laws precluding per se exclusion of persons with disabilities from jury service. Today, most courts will not automatically sustain challenges for cause to sightless jurors. Judges generally conduct or require the carrying out of a more personalized voir dire examination of the prospective juror to determine if the person can adequately perform the functions of a juror with or without reasonable accommodation. As of September 1994, no state had a statute or rule of procedure on the books that per se disqualified a blind person from serving as a juror. Ironically the last holdout of jurisdictions which

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had a *per se* disqualification for the blind was the District of Columbia. This legislative act followed on the heels of a decision by the United States District Court for the District of Columbia which found in favor of a blind person excluded from jury service by practices and procedures in effect in that court. The plaintiff in the case was, among his other accomplishments, the former director of the Peace Corps in Jamaica.

Federal mandates, court decisions holding discriminatory provisions in juror-eligibility statutes unconstitutional, and the public perception of unfairness have forced many states to amend their laws to remove *per se* exclusions of the disabled. Twenty-nine states now have statutes or rules that specifically qualify eligible jurors as "persons who are capable by reason of physical and mental ability to render satisfactory jury service."  

Wood, 1994). Arkansas was the last state that excluded the blind from jury service. In 1994, the legislature passed laws prohibiting exclusion of the blind and deaf from jury service in both criminal and civil litigation.

23. District of Columbia Pub. L. No. 103-269 [H.R.4205] (June 28, 1994) amended D.C. Code § 11-1906(b) (1981) by adding paragraph (4): An individual who is blind may not be disqualified from serving as a juror solely on the basis of a blindness, but may be disqualified from serving as a juror in a particular case if the individual's blindness makes the individual incapable of rendering satisfactory jury service in that case. D.C. CODE ANN. § 11-1906(b)(4) (1997).

24. Galloway v. Superior Court of the District of Columbia, 816 F.Supp. 12 (D.D.C. 1993). The court specifically found, "after careful consideration of the statutes invoked and the pleadings submitted, it is clear that defendants have violated the Rehabilitation Act, the ADA, and the Civil Rights Act of 1871 by implementing a policy that categorically excludes blind individuals from jury service." Id. at 15.

25. Id. at 14. The court stated:

Plaintiff Galloway is a United States citizen, who lives in and is registered to vote in the District of Columbia. He is also blind and has been blind since the age of sixteen. Presently, he is employed as a Special Assistant and Manager by the District of Columbia Department of Housing and Community Development. Prior to attaining his current position, Galloway received both a Bachelors of Arts degree in sociology and a Master of Arts in social work. After completing his education, he held a variety of research and supervisory positions in both the private and public sectors. For instance, early in his career, Galloway worked for the University of California, assisting the establishment of a prepaid health care program and health care centers. Later, Galloway served for three years as the director of the Peace Corps for Jamaica, and then became assistant to the Deputy Director of the Peace Corps. In his current position with the District of Columbia government, as well as in his past positions, Galloway has had "to evaluate facts and people and to weigh evidence and make judgments based on this information." Id.

26. Bleyer, supra n.22, at Appendix A-1 (Alabama, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa (have added language that the juror must be able to receive and evaluate information), Kentucky, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio ("Challenge for cause: . . . or other cause that might render him at the time an unsuitable juror"), Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, Wisconsin (judge cannot consider structural, physical, or architectural barriers of a building, courtroom, jury box, or other facility in determining a pro-
Fifteen states specifically prohibit the exclusion or disqualification of prospective jurors on the basis of defective sight, hearing, or other disability. Some of those same states, however, have statutes or rules which contain language which allows for challenge or disqualification if the person has a "physical or mental disability which would impair the rendering of satisfactory jury service." Florida disqualifies a person of unsound mind or bodily defect that renders one incapable of performing the duties of a juror. Louisiana allows challenges for cause of prospective jurors who have a loss of hearing or other incapacity which renders the person incapable of performing the duties of a juror "to the prejudice of the substantial rights of the challenging party." In Illinois, a prospective juror can be challenged for a physical impairment after considering the person’s ability to perceive and appreciate the evidence. There are five states whose only juror disqualifier is mental incompetence.

Today, even though many states have adopted rules and statutes providing for the individual evaluation of persons with a disability to protect against per se exclusion, blind persons seldom appear on juries. Most states use voter registration, drivers license or combination lists as the source for the jury pool. Blind people do not drive and many blind persons do not vote because voting booths do not accommodate them. Others simply answer "yes" to a disability question on the jury questionnaire, mail it and "forget it." This situation may change as the enforcement of access to public services provisions of the ADA increases, and as public perception of the possibility of the blind serving on juries changes.

27. Id. (Alaska, Arkansas, California, Massachusetts, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin, Florida. Connecticut and Louisiana specifically prohibit the use of a hearing disability to disqualify jurors but the statutes are silent on any other disabilities).

28. Id. (Massachusetts, Florida, Oregon, Rhode Island, South Dakota, Texas, West Virginia).

29. Id. (citing Fla. Stat. Ann. § 913.03(2) (1994)). This statute also allows that in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror.

30. Id. (citing LA. CODE CRIM. PRO. ANN. art. 401(B) (1994). Same in civil cases as for criminal cases. LA. REV. STAT. ANN. § 13.3041 (1994)).

31. Id. (citing 725 ILCS § 5/115-4(d) (1994); 735 ILCS § 2-1105.1 (1994); ILL. SUP. CT. R. 434(c)).

32. Id. (Arizona, Georgia, Minnesota, Mississippi and Montana).

33. See supra notes 26 - 32.

34. John Grisham’s Bestseller, The Runaway Jury, contains a main character, Herman Grimes, who is blind and is elected foreman of the jury. JOHN GRISHAM, THE RUNAWAY JURY (1996). As books such as this become more accessible through audio books, the blind may be more willing to at least attempt to be seated.
Despite overcoming, for the most part, the "automatic challenge," there still remains the "reasoned challenge or challenge for cause" and the "peremptory challenge" which can be used, arbitrarily, to exclude the blind juror from jury service. This paper will not be concerned with the challenge for cause of a blind prospective juror. It assumes that the causal challenge to a juror's ability to receive and evaluate evidence in a trial setting has been denied. It concentrates on an analysis of the viability of the disability-based peremptory challenge and the effect of the ADA on the exercise of that challenge by litigants.

III. THE DISABILITY-BASED PEREMPTORY CHALLENGE

A. Fair Trial vs. Juror Rights

Advocates for the disabled argue that a peremptory challenge based on a disability alone is a violation of the disabled person's constitutional rights and should be treated the same as race- and gender-based challenges. Other commentators champion the complete abolition of the peremptory challenge. These proposals are massive subjects in and of themselves and are beyond the scope of this paper. I will touch on them only to point out the status of the law regarding disability-based peremptory challenges as it exists now and in the foreseeable future. In 1986, the United States Supreme Court in *Batson v. Kentucky* restricted the use of peremptory challenges on the basis of race. *Batson* set off a flurry of activity among law professors, academics, social scientists, and syndicated writers, who predicted the eventual demise of the peremptory challenge. The United States Supreme Court fueled this blaze further with various decisions which applied and expanded the use of the racial restriction to various categories of cases.

35. See Lynch, *supra* note 17, at 301.
39. See *Georgia v. McCollum*, 505 U.S. 42 (1992) (white defendants challenging black jurors must give racially neutral reason for exercising the challenge. A criminal defendant is deemed to be a state agent in the exercise of peremptory challenge, and strikes are subject to equal protection analysis); *Powers v. Ohio*, 499 U.S. 400 (1991) (prosecution challenge to white jurors with a black defendant was held to be violative of equal protection); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (civil case in which the corporate defendant challenged black jurors in a black plaintiff's civil case. The court held that a private litigant is deemed to be a government actor in the use of peremptory
rel T.B., expanded the racial restriction to another cognizable group: women. Observers of the Court then asked, "Who is next? What about the disabled?"

The law regarding the unrestricted peremptory challenge of persons with a disability has not been clear. Both the bench and bar have been concerned by and confused over whether the Fourteenth Amendment's "equal protection" restriction, which has been applied to race and gender, also applies to the disabled. Litigants argue that the juror challenging process is the only method available to assure a fair trial as guaranteed under the "due process" clause of the Constitution. Due process includes a trial which, to the extent possible, recreates past events. Litigants tell their story verbally through witness testimony which may then be amplified and clarified visually through the use of physical, documentary and demonstrative evidence. The presentation might involve visual aids such as charts, diagrams, photographs, and computer graphics. A view of the scene might assist the jurors to understand the evidence and documents and tangible evidence might be introduced to prove material facts.

Litigants ideally want a panel of jurors who will understand their cases, who will believe their version of events, and who will award some variation of available remedies. In short, litigants contend they have a constitutionally based "due process" right to a fair trial which equates to a jury composed of people who can fully and fairly receive and evaluate the evidence through their senses. Up until 1986, this right was sacrosanct.

challenges and that the use of race-based strike violates equal protection in a private civil case.

41. U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law."). Id.
42. E. X. Martin III, Using Computer Generated Demonstrative Evidence, TRIAL, September 1994, at 84 ("Computer-generated demonstrative evidence is helping both criminal defense and civil attorneys win cases for their clients."). Id.
43. This due process or fair trial argument is epitomized in a paragraph excerpted from the pre-Batson case of Lewinson v. Crews, 282 N.Y.S.2d 83, 86 (N.Y. App. Div. 1967):

A litigant who comes before the Bar of Justice, whether in a criminal case or in civil litigation, wishes to have the impact of his evidence fall with its full weight upon the jury, if there be a jury trial. If his evidence or exhibits are not understood or the force of his interrogation of witnesses is lost, he will not have been afforded his full rights. It is not an adequate protection to say that he may challenge the blind juror on the voir dire for if we hold blindness not to be a disqualification under the statute, a challenge for cause will not be available thereafter on that account. A peremptory challenge would still be available but these are limited in number and they are an important right possessed by a litigant; he should not be made to resort to such challenges in order to preserve his right to fair trial.

Id.
The present "tempest in the legal teapot" being generated by legal scholars and sociologists concerns the continuing viability of the peremptory challenge and whether the racial and gender restrictions placed on the peremptory challenge will be extended to other cognizable groups such as persons with disabilities. The continued existence of the peremptory challenge has developed a dichotomy between advocates for the disabled, who see jury service not only as a civic duty but as a fundamental right, and advocates for litigants, who view it as the means to preserve their right to a fair trial.

The peremptory challenge has been around as long as juries have been used. Historically, "peremptory challenges . . . [could] be exercised against potential jurors for any or no reason without being subject to the control of the court." No matter how qualified the person might be to sit on a particular jury, he or she could be excluded. The decision to excuse a juror lay solely in the hands of the litigants, with little or no control by the court. With certain exceptions concerning racial exclusions, the judge presiding over the case was powerless to question the underlying motive of the litigant.

The peremptory challenge is now under attack by many, including the disabled, as a mechanism for discrimination. Whether it will usher in the next era of civil rights is a discussion for another day. Legislative victories, such as the ADA and United States Supreme Court decisions restricting the use of peremptory challenges, has encouraged the disabled community to become increasingly vocal with demands for equal rights, equal access, and equal accommodation. In order to hazard a prediction

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44. See Ward, supra note 37; Marder, supra note 37; Christopher E. Smith and Roxanne Ochoa, The Peremptory Challenge in the Eyes of the Trial Judge, 79 JUDICATURE 185 (1996).
47. See Strauder v. West Virginia, 100 U.S. 303 (1880) (a state denied a black defendant equal protection of the law when it put him on trial before a jury from which members of his race had been purposely excluded). See also Swain v. Alabama, 380 U.S. 202 (1965) (a defendant must show a systematic exclusion of a group of jurors by the prosecution, beyond his own case, in order to claim a denial of equal protection of the law). The reasoning of Swain was expressly rejected in Batson, 476 U.S. 79, 80.
48. Andrew Phillip McGuire, Blind Justice, Should the Courts Ban Blind and Deaf Citizens from Serving as Jurors?, THE WASHINGTON LAWYER, Mar.-Apr. 1996, at 32. The author cites several instances of advocacy for the disabled: in Los Angeles, the city government installed a 911 telephone system accessible to the deaf after threat of suit; a bar examination review course agreed to provide Braille copies of course material, sign-language interpreters, and other costly aids to students with disabilities in the face of a
on this issue, we must look to the historical rationale upon which the race
and sex based prohibitions were based and determine whether those same
bases apply to the peremptory challenge of disabled persons.

The United States Supreme Court decided \textit{Batson} in 1986. In 1994,
the Court decided \textit{J.E.B.} Each of these cases changed the legal status of the
unbridled peremptory challenge and altered the traditional role of the judge
in the jury selection process. Both cases restricted the use of peremptory
challenges in jury selection to prohibit discrimination against a cognizable
group. In \textit{Batson}, the Court found that the State's privilege to strike indi-
vidual jurors through a peremptory challenge, based on race, is subject to
the commands of the equal protection clause.\textsuperscript{49} In \textit{J.E.B.}, the court ex-
tended the "equal protection clause" to gender-based challenges and ap-
plicated a "heightened scrutiny"\textsuperscript{50} constitutional analysis to any jury strikes

\textsuperscript{49} \textit{Batson}, 476 U.S. at 79. A black man charged with burglary and receiving stolen
goods was convicted on both counts by an all-white jury. The prosecution used its per-
emptory challenges to strike all four black persons on the venire, resulting in a jury
panel composed only of white persons. Defense counsel moved to discharge the jury
before it was sworn, claiming a violation of defendant's right to a jury drawn from a
cross-section of the community under the Sixth and Fourteenth Amendments and to
equal protection of the law guaranteed by the Fourteenth Amendment. The trial court
denied defendant's motion, noting that the parties were entitled to use their peremptory
challenges to "strike anybody they want to." \textit{Id.} at 83. Defendant's post-conviction ap-
peal to the Kentucky Supreme Court resulted in the affirmation of the convictions.

Looking back to its decision in \textit{Swain} v. Alabama, 380 U.S. 202 (1965), the Court
noted its first attempt to balance the prosecutor's historical privilege of peremptory
challenges free of judicial control with the constitutional prohibition against exclusion of
persons from jury service based on race. The \textit{Batson} Court rejected the analysis of the
\textit{Swain} Court that a black defendant must make out a prima facie case of purposeful
discrimination by showing that the peremptory challenge system was being perverted to
deny blacks the same right and opportunity to participate in the administration of justice
enjoyed by the white population. Under \textit{Batson}, it is no longer necessary for a defendant
to prove a history of systematic exclusion of blacks from jury service in order to show a
violation of equal protection. The \textit{Batson} Court expressly overruled this requirement.
The court, noting its many equal protection decisions since \textit{Swain}, held that a defendant
could establish a prima facie case of a violation of the equal protection clause solely on the
discriminatory use of the peremptory challenges in his own trial and gave the methodol-
ogy for doing it.

\textsuperscript{50} The Equal Protection Clause of the Fourteenth Amendment commands that no
state shall "deny to any person within its jurisdiction the equal protection of the laws,"
which is essentially a direction that all persons similarly situated should be treated
alike. \textit{U. S. Const.} amend. XIV, \textit{§} 1. The courts have themselves devised standards for
determining the validity of state legislation or other official action that is challenged for
denying equal protection. The general rule is that legislation is presumed to be valid and
will be sustained if the classification drawn by the statute is rationally related to a le-
gitimate state interest. When social or economic legislation is at issue, the equal protec-
tion clause allows the states wide latitude, and the Constitution presumes that even
improvident decisions will eventually be rectified by the democratic processes. This
based on a juror's sex as well as race. The majority opinion states, "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." The court held that a claim of gender discrimination in the jury selection process will require the proponent of the challenge to give a gender-neutral basis for the strike. In other interim cases, the United States Supreme Court had recognized and amplified this "equal protection" principle.

Advocates for the blind and other disabled persons take comfort in these decisions. The disabled contend they are a cognizable group which, because of juror exclusions and challenges, has historically been denied the opportunity to serve on juries due solely to their disabilities. Some are optimistic that the successful "equal protection" attack against the peremptory challenge in race and sex discrimination cases will be ex-

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51. J.E.B. v. Alabama ex rel. T.B., 511 U. S. 127. (1994). At defendant's paternity and child support trial, the state used nine of its ten peremptory challenges to remove male jurors. The court empaneled an all-female jury after rejecting petitioner's claim that the logic and reasoning of Batson, in which the court held that the equal protection clause of the Fourteenth Amendment prohibits peremptory strikes based solely on race, extends to forbid gender-based peremptory challenges. The jury found defendant to be the father of the child in question.

52. Id.

53. Id. As with race-based Batson claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. Batson, 476 U.S. at 97. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. See Hernandez v. New York, 500 U.S. 352, (1991).

54. See supra, note 39. See also Hernandez, 500 U.S. at 352 (the Court upheld the prosecution's peremptory challenges of Latinos, thus indicating that the prosecutor's explanation as to the jurors' ability to speak and understand Spanish was plausible, but the Court warned that language ability would not be an acceptable reason for exercising peremptory challenges in all cases).

55. Lynch, supra note 17, "The evolving equal protection principles described above, properly interpreted, would support extending Batson protection to jurors with disabili-
panded to reach the disabled. An analysis of the cases, however, leads one to conclude that this interpretation does not reflect reality. The death knell has not been sounded for peremptory challenges at least in relation to the disabled. The reason is contained in the United States Supreme Court's decisions. The majority opinion in *J.E.B.* stated:

> Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review. Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext.⁵⁶

If the disabled had been given hope and comfort by *Batson*, those feelings were dashed by Justice Blackmun's reference to the *Cleburne* decision, a pre-*Batson* case in which the Court had examined a claimed violation of the equal protection clause in the denial of a special-use permit for a group home for mentally retarded individuals. There, the Supreme Court found that a test of heightened scrutiny was inappropriate for testing social and economic legislation, and that the rational-basis test should apply.⁵⁷ Further, it held that the court of appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than that normally accorded to economic and social

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⁵⁶. *J.E.B.*, 511 U.S. at 143 (citations omitted).
⁵⁷. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 466-50 (1985). The Court held that the mentally retarded were not a suspect class entitled to a heightened scrutiny test, yet still found that requiring a special-use permit for the proposed group home deprived respondents of the equal protection of the law under the rational-basis test. The syllabus of the case summarizes the Court's finding as follows: Although the mentally retarded, as a group, are different from those who occupy other facilities -- such as boarding houses and hospitals -- that are permitted in the zoning area in question without a special permit, such difference is irrelevant unless the proposed group home would threaten the city's legitimate interests in a way that the permitted uses would not. The record does not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests. Requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded, including those who would occupy the proposed group home and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

*Id.*
In 1993, the Supreme Court affirmed this same approach to the classification of the mentally ill when it found a rational basis between Kentucky legislation involving the involuntary commitment of mentally ill persons and the classification of persons affected by the legislation. In May 1994, the United States Supreme Court sidestepped an opportunity to expand the Batson racial restriction and the J.E.B. gender restriction to matters of religion in the jury selection process and denied certiorari from the Supreme Court of Minnesota. In their dissents, Justices Scalia and...
Thomas (who also dissented in *J.E.B.*) indicated that they could see no difference between the heightened scrutiny applied in matters of race and gender and the scrutiny usually applied to government involvement in religion, because they are all fundamental rights.\(^1\)

The questions raised by these decisions greatly affect the prospects of disabled persons who seek to expand the racial and gender restrictions to peremptory challenges based on disabilities. If a prospective juror can be challenged because of his or her religion, and if the mentally ill and the mentally retarded are not “suspect classes” (as is the case with minorities and women), where does that leave the disabled prospective juror who is peremptorily challenged because of his or her disability? I submit, very low in the pecking order of classifications under equal protection of the law.

Equal protection principles require that legislation involve a legitimate governmental interest and that the classification of those affected by the law bear a rational basis to that interest.\(^2\) There can be little doubt that the government has a legitimate interest in the jury selection system and can make rules to control the practices and procedures used in that process, including the peremptory challenge. The question is whether disabled citizens should be regarded as a “suspect class” and given special consideration because of discrimination, as have black and female citizens. Given the decisions rendered by the United States Supreme Court,\(^3\) it is highly unlikely that the court will find that the disabled compose a suspect class entitling them to the same heightened-scrutiny analysis applied to minorities and women. Based on recent decisions, if the rational-basis

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\(^1\) *Davis*, 114 S. Ct. at 2120-21 (Thomas, J., dissenting).

Justice O’Conner stated:

[I]n deed, given the Court’s rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. The Court’s decision in *J.E.B.* was explicitly grounded on a conclusion that peremptory strikes based on sex cannot survive ‘heightened scrutiny’ under the Clause, because such strikes “are not substantially related to an important government objective.” In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed ‘heightened’ or ‘intermediate’ scrutiny, *J.E.B.* would seem to have extended *Batson*’s equal protection analysis to all strikes based on the latter category of classifications — a category which presumably would include classifications based on religion. (citations omitted).

\(^2\) *Lynch*, supra note 17 at 305.

\(^3\) *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Heller*, 509 U.S. at 312.
were to be applied to the rules and statutes governing juror selection and their impact on the disabled, the statutes would be found to have a rational basis and thus be constitutional. Justice O'Connor, in her concurring opinion in *J.E.B.* wrote as follows: "But today's important blow against gender discrimination is not costless. I write separately to discuss some of these costs, and to express my belief that today's holding should be limited to the government's use of gender-based peremptory strikes." She then went on to write:

For this same reason, today's decision further erodes the role of the peremptory challenge. The peremptory challenge is "a practice of ancient origin" and is "part of our common law heritage." The principal value of the peremptory is that it helps produce fair and impartial juries. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury. The peremptory's importance is confirmed by its persistence: it was well established at the time of Blackstone, and continues to endure in all the States. Moreover, the essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.

Justices Stevens, Souter and Ginsberg joined Justice Blackmun in the lead opinion, stating the decision "does not imply the elimination of all peremptory challenges... Parties still may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." Furthermore, Chief Justice Rehnquist and Justices Scalia and Thomas praise the peremptory challenge in their dissents. With this lineup of sitting justices in favor of preserving

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64. See Lynch, supra note 17 at 305.
66. Id. at 147-48 (O'Connor J., concurring) (internal brackets, quotation marks and citations omitted).
67. Id. at 143.
68. Id. at 154 (Rehnquist, C.J., dissenting). Justice Rehnquist stated, "I think the State has shown that jury strikes on the basis of gender 'substantially further' the State's legitimate interest in achieving a fair and impartial trial through the venerable practice of peremptory challenges." Id. at 156.

Justice Scalia, with whom Justices Thomas and Rehnquist joined, stated, "And make no mistake about it: there really is no substitute for the peremptory. Voir dire (though it can be expected to expand as a consequence of today's decision) cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them." Id. at 162 (Scalia, J., dissent-
the peremptory challenge, it appears that the unrestricted peremptory challenge is alive and well in all but racial and gender strikes and will stay that way for the foreseeable future.

Any doubt as to the continuing viability of the peremptory challenge was put to rest when the court decided the case of Purkett v. Elem, a per curiam habeas corpus case from Missouri. The prosecutor had struck two black men from the jury panel and the defendant, on trial for robbery, objected based on Batson. The prosecutor gave the following "race neutral" explanation:

I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. The prosecutor further explained that he feared that juror number twenty-four, who had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that 'to have a robbery you have to have a gun, and there is no gun in this case.'

The trial court overruled the defendant's objection. The Missouri Court of Appeals affirmed, and Purkett filed for habeas corpus in the United States District Court which, in turn, denied the claim giving due deference to the factual findings of the state court. The Eighth Circuit Court of Appeals reversed and remanded. When the Supreme Court reviewed the case it reversed the court of appeals holding that: "(1) [the] race-neutral explanation tendered by the proponent of [a] peremptory challenge need not be persuasive, or even plausible, and (2) [the] prosecutor's proffered explanation for [the] peremptory challenge of a black male, that the juror had long, unkempt hair, a moustache and a beard, was race-neutral and satisfied the prosecution's burden . . . [to] articulat[e] a

70. Id. at 766.
71. Id.
73. Id.; Purkett, 514 U.S. at 766-67.
non discriminatory reason for the strike.\textsuperscript{75}

In Batson, the Supreme Court had required a legitimate race-neutral reason for the strike of a black prospective juror in order to rebut a prima facie case of racial discrimination. In Purkett, the Court explained what it meant by the term "legitimate reason." The Court stated, "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."\textsuperscript{76}

Even if the Supreme Court expanded Batson and J.E.B. to apply the same restrictive challenges to the disabled, it is clear that litigants would have little difficulty articulating a disability-neutral reason for exercising a peremptory challenge. Analogizing to Purkett, the reason would not have to be plausible, nor one that made sense. It just has to be "disability neutral."\textsuperscript{77} The end result would be the same as under the existing procedure for exercising the peremptory challenge. Initially the blind juror will be challenged for cause. If the judge denies the strike the litigant will peremptorily strike the blind person for any disability-neutral reason. Nothing will have changed and the blind juror will be excused.

IV. THE AMERICANS WITH DISABILITIES ACT

Even if the courts do not expand the race and gender restrictions of Batson and J.E.B. to require a "disability-neutral" reason for peremptorily challenging a person who is disabled, some may argue that the ADA mandates such action because access by the disabled to such governmental programs is required under Title II of the Act.\textsuperscript{78}

In 1990 the ADA was signed into law.\textsuperscript{79} It protects qualified individuals from discrimination, on the basis of disability, by providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and by providing clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.\textsuperscript{80}

Title II of the Act, effective January 26, 1992, deals with the services and practices of state and local governments, including the operations of the court system.\textsuperscript{81} The act provides, subject to certain exceptions, that no

\textsuperscript{75} Purkett, 514 U.S. at 765.

\textsuperscript{76} Id. at 769.

\textsuperscript{77} See id.


\textsuperscript{80} Id. § 12101(b).

\textsuperscript{81} Id. §§ 12131-65.
"qualified individual with a disability" shall, by reason of such disability, be "excluded from participation in" or "denied the benefits of the services, programs, or activities" of a "public entity" or be subject to discrimination by "such entity." To understand the impact of ADA Title II in relation to jury service and the visually impaired a definitional foundation is needed.

"Discrimination" is defined as the exclusion of a qualified individual with a disability "from participation in or . . . . denial of] the benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity." Blind persons are disabled persons as defined by the ADA and thus come within the provisions of the legislation. Courts are a "public entity" and as such, are subject to the ADA. Under the Act, jury service is a program or service of a public entity and must be made accessible to the blind as a matter of law. "As the symbols of justice and equality, courts should take the lead in implementing the ADA so that all citizens, regardless of disability, have equal access to the judicial system."

A. Program Accessibility

The Code of Federal Regulations pertaining to the Department of Justice, and in particular the section effectuating Title II of the ADA, best summarizes the impact of the ADA when it states: "[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."

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82. The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Id. § 12131.
85. "Disability" for purposes of the ADA means "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Id. § 12102(2).
86. "Public entity" means "(A) any state or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." Id. § 12131(1).
entity." Litigation is an activity that must be accessible to the disabled.

Public entities are not necessarily required to make each existing element accessible, as long as the program as a whole is accessible. The focus is on the availability of the program, rather than on barrier removal. Public entities need not take action that would cause a 'fundamental alteration' of the program or service or an 'undue financial or administrative burden,' as determined by the head of the public entity. Instead, the entity [court] must take any other action that would enable individuals with disabilities to participate.

Traditionally, judges are given wide latitude in deciding whether a juror can render satisfactory jury service. The United States Supreme Court has held, "the trial court is invested with a wide discretion in determining the competency of the jurors, the court's judgment in this respect will not be interfered with except for an abuse of discretion." Traditionally, courts faced with a blind prospective juror, have used stereotypical assumptions, have lacked understanding of the true limitations resulting from a disability, and have not actively sought to accommodate the disabled person in the juror selection process. For example, the Indiana Supreme Court stated in one old opinion "no one who cannot see the expression of faces nor observe deportment and demeanor can justly weigh testimony." Federal courts also were not immune from such misconceptions concerning disabilities, finding that deaf jurors possessed limited ability to assess witness credibility because they were unable to "follow the intonation pattern."

A public entity is forbidden from imposing or applying "eligibility criteria that screen out or tend to screen out an individual with a disability

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88. 28 C.F.R. § 35.130(a) (1997).
or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.\textsuperscript{94} The ABA recommends that the source list for jurors be expanded to include non-drivers and persons who are not registered to vote because such source limitations can be discriminatory against the blind.\textsuperscript{95} Providing exemptions for handicapped persons in many cases limits the number who appear in answer to a summons. The ABA suggests that any question of impairment be eliminated from juror questionnaires and that the person who seeks such an exemption be required to show a functional impairment rather than a generic diagnostic label.\textsuperscript{96}

At least one commentator has written that the ADA creates a special concern for courts in connection with the jury selection process, in particular the continued use of the peremptory challenge with disabled jurors.\textsuperscript{97} This was discussed in Part Three of this paper. It was concluded that the peremptory challenge lives now and will in the foreseeable future. The racial and gender classifications which have restricted peremptory challenges for those classes of persons are not available to the disabled.

The passage of the ADA does not change this conclusion. For one thing, the ADA was effective when the Supreme Court rendered its decision in \textit{J.E.B. v. Alabama ex rel T.B.} in which it referred to the \textit{Cleburne} decision in justifying the continued use of the peremptory challenge in trials.\textsuperscript{98} Another reason is contained in the language of the act itself. Title 42 of the United States Code states as follows:

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications

\textsuperscript{94} 28 C.F.R. § 35.130(b)(8) (1997).
\textsuperscript{95} Blyer, \textit{supra} note 87, at 249-50.
\textsuperscript{96} Id. at 250.
\textsuperscript{97} Mullen, \textit{supra} note 78 at 205.
\textsuperscript{98} See \textit{supra} notes 56, 57.
are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations.\(^9\)

Requiring a disability neutral reason to be articulated to justify a litigant’s exercising a peremptory challenge would fundamentally alter the nature of the jury selection process. The ADA does not require such action. No doubt when this matter is further considered by the courts, both the disabled and the judiciary will have a definitive resolution. Until then, the trial judge can rely on the decisions of the United States Supreme Court and the “fundamental alteration” language in the act.\(^10\)

**V. CONCLUSION**

To illustrate the status of the law relating to challenges based on a juror’s disability, consider this scenario: The judge is on the bench. A blind prospective juror has been questioned. He responded that he can be a fair and impartial juror; that his blindness will not affect his ability to ascertain the facts; and that he will follow the law. After having been denied a challenge for cause, one of the attorneys challenges the juror peremptorily. The judge thinks that this is a discriminatory challenge, one based solely on the person’s disability. Should the judge deny the challenge? More than likely, no. The current common law interpretation of “equal protection” allows the peremptory challenge regardless of the underlying reason, with the exception of race and gender. Furthermore, the court is under no obligation to inquire as to the motive of the challenger unless there is an objection based on race or gender discrimination.\(^11\) A peremptory

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100. There are no cases dealing with reasonable accommodation versus fundamental alteration in the jury selection process. However, other institutional rules have been the subject of litigation under the ADA. See *Pottgen v. Missouri State High School Activities Assoc.*, 40 F.3d 926 (8th Cir. 1994) (order requiring school to waive age requirement so a student could engage in school athletics is a fundamental alteration of an essential rule and not mandated by ADA); *Johnson v. Florida High School Activities Assoc.*, 899 F. Supp. 579 (M.D. Fla. 1995) (a waiver would be a reasonable accommodation and not a fundamental alteration if the athlete is no bigger or better than those meeting the age requirement). See also *Doe v. Attorney Discipline Bd.*, No. 94-74048, 1991 WL 78312 (6th Cir. Feb. 22, 1996) (extending deadlines and relaxing ethical rules for an attorney afflicted with adult attention-deficit disorder would constitute a fundamental alteration of existing rules and not be required by the ADA).

101. For a contrary view, see *People v. Green*, 561 N.Y.S.2d 130 (N.Y. Co. Ct. 1990). The court concluded that *Batson*-like protection should be afforded to a hearing impaired
challenge based solely on a person's disability is constitutionally permissible and is not prohibited by the ADA. Discrimination against the blind in the jury selection process continues despite advances made by disabled persons in other activities of life.

prospective juror and disallowed a peremptory challenge by a prosecutor who intended to eliminate the juror solely because of the juror's deafness. Note that this case was decided prior to Davis v. Minnesota, 511 U.S. 1115 (1994).
A DEFENSE OF KENTUCKY'S APPROACH TO CHOICE OF LAW

By John T. Cross

Choice of law theory has been in continual flux for the better part of the twentieth century. At the start of the century, the "traditional" rules were firmly entrenched throughout the nation. These rules were codified in the highly-influential First Restatement. Beginning around the end of the second World War, however, commentators, and then the courts, began to question the strictly "territorial" basis of the First Restatement. Those critics offered various substitutes for the traditional rules, including the various forms of "interest analysis", the hybrid approach of the Second Restatement, application of various "functional considerations", and

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1. Professor of Law, University of Louisville School of Law.
2. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).
3. The first widely-published criticism was that of Professor Walter Wheeler Cook. Walter Wheeler Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942). Professor Cook's work has been highly praised by other twentieth century scholars. See, e.g., Brainerd Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." Id. at 6. An excellent discussion of the growing academic and scholarly discontent with the First Restatement is set forth in Lea Brilmayer, CONFLICT OF LAWS, 25-46 (2d. ed. 1995).
4. Professor Brainerd Currie, the "father" of interest analysis, set forth his ideas in a number of different publications. A collection of his most influential works is contained in CURRIE, supra note 3. As the essays demonstrate, Currie himself modified his views over the years. Other scholars have themselves suggested modifications to the basic interest analysis approach. For a sampling, see Joseph Singer, Facing Real Conflicts, 24 CORNELL INT'L L.J. 233 (1991); Larry Kramer, Interest Analysis and the Presumption of Forum Law, 56 U. CHI. L. REV. 1301 (1989).
5. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Because the Restatement (Second) has largely supplanted the original, all references in the remainder of this article to the "Restatement" refer to the Restatement (Second).
selection of the "better rule of law".\(^7\)

Like many states, Kentucky has experimented with the modern approaches to choice of law. Unfortunately, a review of the Kentucky precedent on the topic can leave the reader somewhat confused. During a ten-year period commencing in the late 1960's, Kentucky's highest court (the Court of Appeals until 1976, thereafter the Kentucky Supreme Court) tried at least three fundamentally different choice of law methodologies, including interest analysis,\(^8\) use of Kentucky law,\(^9\) and the Restatement.\(^10\)

To complicate matters further, the high court has sometimes adopted a new approach without discarding prior approaches. The result is considerable confusion as to what choice of law method applies in the Kentucky courts.

This article will both explain and defend Kentucky's approach to choice of law. Although the cases are admittedly confusing, a careful reading reveals that Kentucky actually does have clear and relatively straightforward rules. In contract cases, and probably in conveyancing cases, Kentucky applies the Restatement. In tort cases, Kentucky has adopted a unique lex fori rule, under which a court should apply Kentucky law unless there is a compelling reason not to. This two-tiered approach, properly applied, provides a workable way to deal with choice-of-law problems.

Nevertheless, Kentucky's choice of law regime is likely to prove unsettling to advocates of the various "modern" theories of choice of law. First, it requires courts to characterize a case as, for example, a "tort" dispute. Most modern choice of law approaches reject characterization under the theory that the same basic considerations should apply in all types of

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\(^7\) Robert A. Leflar, *Conflicts of Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966). As the title to his article indicates, Professor Leflar actually proposed that courts consider several factors in making a choice of law, only one of which is the application of the better rule. As the theory has played out in practice, however, the better rule factor more often than not proves decisive. See, e.g., Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973), where the court ignores Leflar's fourth factor ("advancement of the forum's governmental interests") and decides the case solely on the basis of its evaluation of which competing rule was better.

Professor Louise Weinberg once proposed a different set of considerations for courts to consider in choice of law cases. Louise Weinberg, *COMMENTARY ON THE CONFLICT OF LAWS*, 284 & 362 (3d ed. 1986). Although she does not explicitly recommend using the better rule, her analysis clearly favored some laws. For example, she proposed a "presumption" in favor of rules allowing recovery.

\(^8\) Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967). *Wessling* is discussed *infra* at text accompanying notes 25 to 32.

\(^9\) Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968). *Arnett* is discussed *infra* at text accompanying notes 33 to 40.

\(^10\) Lewis v. American Family Insurance Group, 555 S.W.2d 579 (Ky. 1977). *Lewis* is discussed *infra* at text accompanying notes 50 to 54.
CHOICE OF LAW cases. Second, Kentucky's strong preference for its own law in tort cases is even further removed from mainstream conflicts thinking. By selecting Kentucky law regardless of Kentucky's interest in or connection with the case, the tort rule does appear extremely parochial.

A closer inspection of the issue shows that these criticisms are unfounded. Although the Kentucky approach does differ depending on whether the case is categorized as tort or contract, it does not necessarily follow that the courts are applying two sets of basic principles. Instead, Kentucky's two tests can be viewed as corollaries of a single basic principle. This "displaceable lex fori" approach involves characterization only because the courts have recognized that application of the basic principle will often result in a different outcome in a tort case than in contract and conveyancing disputes.

The same analysis helps to justify the strong preference for forum law in tort cases. In fact, this particular rule may well put Kentucky on the cutting edge in choice of law theory. Compared to the traditional rules, modern choice of law approaches tend to minimize the significance of state lines. In the modern theories, the content of the competing substantive rules plays a much greater role than the sovereign source of those rules. Kentucky's unabashed preference for its own substantive law actually represents this theory taken to its logical end.

I. KENTUCKY'S CHOICE OF LAW METHODOLOGY

A. The Early Years

Kentucky's choice of law rules during the first half of this century were quite catholic. Like all of its sister states, Kentucky courts discussed choice of law whenever faced with a dispute having connections with other states or nations. In these multistate cases, the courts applied a set of fixed rules to determine which state had the power to govern the issue in question.11 The heart of these rules was the principle that only one state had sovereignty over a given legal claim. Thus, the traditional rules were highly territorial, attempting to ascertain the one jurisdiction in which the claim could be said to have arisen. Depending on the type of case, different operative facts determined the locus of the cause of action.

The Kentucky Court of Appeals1 (at that time, the State's highest

11. See, e.g. Kitchen v. New York Trust Co., 168 S.W.2d 5 (Ky. 1943) (validity of trust); Arciero v. Hager, 397 S.W.2d 50 (Ky. 1965) (validity and incidents of adoption); Beddow v. Beddow, 257 S.W.2d 45 (Ky. 1952) (validity of marriage); Big Four Mills v. Commercial Credit Co., Inc., 307 S.W.2d 612 (Ky. 1948) (allowable interest rate under contract); Martin v. Harris, 203 S.W.2d 78 (Ky. 1947) (will).
court) 1952 decision in Ansback v. Greenberg\(^{12}\) is an excellent example of how the traditional rules operated. In Ansback, the plaintiffs, a husband and wife, traveled to Florida in a car driven by defendant. On the return trip, the defendant lost control of the car in Georgia, injuring the plaintiffs.\(^{13}\) Georgia had a common law rule that allowed passengers to recover from their hosts only upon a showing of gross negligence.\(^{14}\) Kentucky had no such limitation.\(^{15}\) Although all parties were apparently from Kentucky,\(^{16}\) the court applied the Georgia guest statute to the case, stating, "The general rule, of course, is that an action for personal injuries must be tried under the law of the state where the injury occurred.... The question here is whether the Ansbacks have a cause of action under the Georgia law where the injury occurred."\(^{17}\) The only fact relevant in this analysis was the site of the accident.

Cases like Ansback fueled the discontent with the traditional choice of law rules in the middle decades of this century. The problem with an unblinking application of \textit{lex loci delecti} in a case like Ansback, of course, is that the place of the accident is largely fortuitous. Assuming that the parties were from Kentucky, Kentucky had significantly more of a connection with the case than Georgia. But the traditional approach ignored all of these other contacts, and focused solely on answering the metaphysical question of where the tort "arose."

One of the most influential critics of the traditional rules was Brainerd Currie. He advocated an alternate approach, commonly referred to as "interest analysis." That basic theory, in its various forms, has had a profound impact on choice of law thinking in the United States.\(^{18}\) Interest

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12. 256 S.W.2d 1 (Ky. 1952).
14. \textit{Id.} The Georgia rule was set out in \textit{Harris v. Reid}, 117 S.E. 256 (Ga. App. 1923).
15. Although Kentucky had a guest statute early in the twentieth century, the Court of Appeals declared it unconstitutional in \textit{Ludwig v. Johnson}, 49 S.W.2d 347 (Ky. 1932).
16. The opinion specifies neither the place where the trip originated nor the residence of the parties. However, as the case was litigated in the Kentucky courts, it seems likely that the parties were from Kentucky.
17. \textit{Ansback}, 256 S.W.2d at 2.
18. Interest analysis revolutionized the way that United States courts and scholars viewed choice of law. One author stated that "Currie brought...choice of law...kicking and screaming, into the twentieth century." Bruce Posnak, \textit{Choice of Law: Interest Analysis and Its "New Critics"} 36 AM. JUR. COMP. L. 681, 701 (1988). Although this may be an exaggeration, it is clear that considerations of state interest underlie many of the more widely-accepted modern choice of law methodologies, including the Restatement and those approaches cited \textit{supra} in notes 4, 5, and 7. The United States Supreme Court itself has recognized the dominance of interest analysis. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, n.11 (1981). Even today, over forty years after the initial development of the theory, much of the scholarly discussion in the field merely debates various aspects of
analysis abandons the notion that only a single state can create a particular claim. Instead, it recognizes that several states may validly assert legislative jurisdiction over a dispute that has connections with several states. Interest analysis attempts to ascertain whether application of a candidate state's law to a particular case would further the policy behind that law. Interest analysis attempts to ascertain whether application of a candidate state's law to a particular case would further the policy behind that law. Advocates of interest analysis contend that many cases present "false" conflicts, where only one state has an interest. If only one state has an interest, Currie and his followers argue, that state's law should automatically apply.

The New York courts adopted interest analysis in the often cited 1963 case of Babcock v. Jackson. The facts of Babcock are strikingly similar to Ansback. The case involved a New York passenger and driver who were injured while on a trip to Ontario. Ontario law (like Georgia's in Ansback) restricted a guest's ability to recover from a host, while New York law (like Kentucky's in Ansback) did not. The Babcock court determined that only New York had an interest in having its law applied. New York law allowed passengers to recover, and accordingly would benefit the New York plaintiff. Ontario, by contrast, had no interest in having its guest statute applied. Assuming that Ontario statute was enacted to protect drivers and their insurers, the court found that Ontario had no interest in protecting a New York driver who had obtained insurance from a company outside Ontario. Babcock was accordingly an easy case; a "false conflict" in which applying New York law was the only rational solution.

B. Kentucky Experiments with Modern Choice of Law Theories

Babcock opened the floodgates for interest analysis across the nation.

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This is not to suggest that interest analysis does not have its critics. One of the most persuasive critics is Professor Lea Brilmayer, who has lodged an attack on several fronts. See, e.g., Lea Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 MICH. L. REV. 392 (1980).

19. Currie, supra note 3, at 183-84.
20. Id. at 107-110.
22. Id. at 280. Unlike Ansback, the Ontario law was set out in a statute. Id.
23. Id. at 284.
24. Id. The court did not indicate the home of the insurance company.
The tide reached Kentucky in 1967, as evidenced by Wessling v. Paris.\(^{25}\) This case involved basically the same scenario as Ansback and Babcock: a Kentucky passenger was injured by the alleged negligence of a Kentucky driver while the two were traveling together in Indiana.\(^{26}\) Indiana, unlike Kentucky, had a guest statute.\(^{27}\) After considering the logic underlying both the traditional rules and interest analysis, the court opted for the latter. The court noted that other than the place of the accident, which it considered "fortuitous", all of the contacts involved in the case were with Kentucky. Therefore, the court concluded, only Kentucky had an interest in whether the Kentucky plaintiff could recover.\(^{28}\)

The main problem with the Wessling decision is that the court couched its reasoning in somewhat ambiguous terms. The court borrowed terminology from three separate choice of law theories, the "pure" interest analysis advocated by Professor Currie and applied in Babcock,\(^{29}\) the hybrid analysis of the Restatement,\(^{30}\) and the older "grouping of contacts" theory.\(^{31}\) Moreover, the court refused to commit itself completely to the modern approach, expressly limiting application of the newly adopted methodology to "a very clear case."\(^{32}\) As a result, Wessling did not send a clear signal to the lower courts about how they should deal with choice of law problems.

The court backed off from Wessling only one year later. In Arnett v. Thompson,\(^{33}\) the court faced a case that was the factual converse of Wessling. The passenger and driver were from Ohio, a state with a guest statute. The accident occurred in Kentucky. A literal application of interest analysis would have led to application of Ohio law, as only Ohio had an interest in whether one of its residents could recover against another

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25. 417 S.W.2d 259 (Ky. 1967).
26. Id.
27. Id. See IND. CODE ANN. § 34-4-40-4 (Michie 1997) (the current version of Indiana's guest statute).
28. Wessling, 417 S.W.2d at 260. The court bolstered its argument by noting that guest statutes as a rule violate Kentucky policy, based on the fact that an earlier decision had found the Kentucky guest statute to violate the Kentucky constitution in Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932). Id. at 261. This argument is difficult to reconcile with the court's earlier Ansback decision, however, where the court explicitly rejected the plaintiff's argument that Kentucky's policy against guest statutes was a reason to ignore the lex loci delecti rule. Ansback v. Greenberg, 256 S.W.2d 1 (Ky. 1952).
29. Id. (discussion of Indiana policy and Babcock v. Jackson).
30. Id. (discussion of Tentative draft of the Restatement).
31. Id. (immediately prior to discussion of the Restatement).
32. Id. at 261.
33. 433 S.W.2d 109 (Ky. 1968).
resident. Nevertheless, the Arnett court selected Kentucky law. The opinion set out a fundamentally different approach to choice of law questions than the court used in Wessling. Rather than determining and weighing the interest of all the candidate states, the Arnett court concluded that Kentucky law should apply whenever "Kentucky has enough contacts to justify applying Kentucky law." The court found that the fact the accident in question had happened in Kentucky was itself a sufficient reason to apply Kentucky law.

The only explanation that the Arnett court gave for this fundamental shift in direction was that it had engaged in "further study and reflection" on the problem of choice of law. But the opinion does not share that study and reflection with the reader. The court articulated only two reasons why Kentucky law concerning whether passengers could recover should apply to a dispute between two residents of Ohio. First, it noted that traditional territorial-based rules would have selected Kentucky law because the accident occurred in that state. This happy coincidence, however, is hardly a justification, especially given the court's denunciation of the logic underlying those traditional rules only a year earlier in Wessling. Second, the court noted that guest statutes violate Kentucky's public policy. However, although this may have been a reason to refuse to apply the particular Ohio law at issue in the case, it does not support a general choice of law rule requiring courts to apply Kentucky law in every case with a Kentucky connection.

Notwithstanding the gaps in the court's reasoning, the court confirmed Arnett's general lex fori approach only four years later. As in Arnett, the issue in Foster v. Leggett was whether to apply the Ohio guest statute. This time, however, the accident had occurred in Ohio. In addition, although the plaintiff resided in Kentucky, the defendant driver's status was less clear. Although the defendant lived in Kentucky for many years, he

34. Id. at 113.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 114.
40. Other courts have refused to apply a different state's guest statute on the theory that such a statute violates the forum state's public policy. See, e.g., Paul v. National Life, 342 S.E.2d 550 (W. Va. 1986) (applying traditional rules).
41. 484 S.W.2d 827 (Ky. 1972).
42. One wonders if the field of Conflicts of Law might have developed along vastly different lines had states not chosen to adopt guest statutes.
43. Foster, 484 S.W.2d at 827.
had moved to a town in Ohio situated just across the Ohio River from Kentucky a few years before the accident. However, the defendant continued to work in Kentucky, commuting on a regular basis. The journey that gave rise to the Ohio accident originated in Kentucky.

In an opinion that strongly reaffirms Arnett, the Foster court concluded that Kentucky law should apply. The majority specifically rejected approaches based on an evaluation of the different states’ “contacts” or “interests”, including the Restatement. Instead, it expressed a clear preference for the application of Kentucky law stating “[W]hen a court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons.” Given the substantial Kentucky connection with the plaintiff in Foster, the court found no reason to displace Kentucky’s rule.

After Arnett and Foster, it seemed that Kentucky had settled on a definite approach to choice of law. Unlike most states, Kentucky’s highest court did not adopt wholesale the interest-based methods that courts and scholars had offered as substitutes for the traditional rules. The court’s novel approach called for the application of Kentucky law on all issues in a case unless there was a valid reason not to apply that law. Although unusual, the approach proved very easy for the lower courts to apply.

C. Confusion Develops

The state of relative stability was to last for only five years. In 1977, the newly-established Kentucky Supreme Court again faced a choice of

44. Id. at 828.
45. Id. at 827.
46. Curiously, the majority opinion closes with the statement, “We are now reaffirming our position taken in Wessling v. Paris, supra, that if there are significant contacts — not necessarily the most significant contacts — with Kentucky, the Kentucky law should be applied.” Id. at 829. This reference to Wessling appears to be an unintended error, for the “significant contacts” approach described in the passage is clearly that set forth in Arnett.
47. Foster, 484 S.W.2d at 829.
48. Id. The quote appears to borrow from an article written by Professor Robert Sedler (who was then teaching at the University of Kentucky) dealing with Kentucky choice of law. Robert A. Sedler, Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws, 56 Ky. L.J. 27, 87 (1967) (“The first proposition is that the basic law is the law of the forum, and that law will not be displaced absent valid reasons for such displacement.”) Professor Sedler’s suggested approach actually differed from the court’s in certain ways.
49. See, e.g., Layne v. Layne, 433 S.W.2d 116 (Ky. 1968) (facts directly parallel to Arnett; court refuses to apply Indiana guest statute to case between two residents of Indiana because accident happened in Kentucky).
law question in *Lewis v. American Family Insurance Group*. Lewis, like the earlier cases, involved an automobile accident. The accident occurred in Kentucky, and involved residents of Indiana and an uninsured motorist from Kentucky. Instead of a guest statute, however, the issue was whether the uninsured motorist provisions of two insurance policies covered this particular accident.

Notwithstanding the Kentucky connection, the court applied Indiana law. Without citing or otherwise acknowledging *Wessling*, *Arnett*, or *Foster*, the court applied the Restatement to resolve the issue. Under section 193 of the Restatement, a court uses the law of the place of the insured risk unless some other state has a more significant interest. The insured risk in *Lewis* was the automobile. Concluding that Indiana, the state where the automobile was kept, had an ample connection with the dispute, the court refused to displace Indiana law.

The Kentucky Supreme Court again applied the Restatement only five years later in *Breeding v. Massachusetts Indemnity and Life Insurance Co.* Like *Lewis*, *Breeding* involved the construction of an insurance policy. The decedent had purchased an accident insurance policy when he rented a car. The rental company provided this insurance under a nationwide “master” insurance policy to the rental company in Delaware. Decedent purchased an individual policy from the rental company under this master policy. However, neither the rental company nor the defendant provided the decedent with a copy of the policy or a certificate of

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50. 555 S.W.2d 579 (Ky. 1977).
51. The defendant insurance company alleged that the policy did not cover the case for two reasons. First, it claimed that the policy had lapsed because the premium had not been paid. Id. at 581. In the alternative, it alleged that even if the policy was in force, the accident fell into an exception written in the policy. Id.
52. Id. at 582.
53. Section 193 of the Restatement provides:
   The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship to the principles stated in section 6 to the transaction and the parties, in which event the local law of the other state will be applied.
54. The owner lived in Indiana and kept the automobile (the “insured risk”) garaged there. Accordingly, there was no other state with a more significant interest.
55. 633 S.W.2d 717 (Ky. 1982).
56. Id. at 718. Although the policy was labeled one of accident insurance, the court throughout the case refers to it as “health insurance.” As a result, the court applied various state statutes that on their face apply only to “blanket health insurance.”
57. Id.
58. Id.
When called upon to pay under the policy after decedent’s death, defendant invoked an exclusion in the policy. Delaware law would enforce the exclusion. The *Breeding* court, however, applied Kentucky law, under which the exception was unenforceable because the decedent had not received a certificate of coverage setting out the exclusion. The court chose Kentucky law by applying section 188 of the Restatement, which calls for application of the law of the state with the most significant interest. The court found it “patently obvious” that Kentucky had the most significant interest because the individual policy had been purchased by a Kentucky decedent from a Kentucky rental agency, and the death had occurred in Kentucky. As in *Lewis*, the court never acknowledged its earlier decisions in *Wessling*, *Arnett* and *Foster*.

*Breeding* was the last case in which Kentucky’s highest court directly faced the question of choice of law rules. Because the court’s two most recent pronouncements appear to conflict directly with its earlier precedent, the current state of the law in this area is somewhat unclear. It is not even clear which choice of law methodology the state uses.

The federal courts have certainly had some difficulty divining Kentucky’s choice of law rules. Recent opinions from both the Western and Eastern Districts of Kentucky conclude that Kentucky follows either “interest analysis” or the similar “most significant relationship” test of the Restatement. The Sixth Circuit, by contrast, recently declared that Ken-

59. Id.
60. Decedent died by drowning while he was intoxicated. A clause in the insurance policy excluded loss caused by “intoxicants or narcotics, unless administered on the advice of a physician . . . .” Id.
61. Id.
62. Id. at 719.

The court arguably erred by applying section 198 instead of section 193, the provision that governed in *Lewis*. Section 193 covers all issues relating to “casualty” insurance contracts, including those that insure people. See *supra* note 53, cmt. a. However, that mistake probably did not affect the result in the case. Although section 193 uses the primary location of the risk as a “default” rule, the primary location in *Breeding* was Kentucky. If Kentucky had the most significant interest under section 188, there would certainly be no reason to displace the default choice of Kentucky law under section 193.

65. See *Blount v. Bartholomew*, 714 F. Supp. 252 (E.D. Ky. 1988) (Judge Reed). An earlier case from the Eastern District, however, applied the *lex fori* rule of *Arnett* and
tucky follows a form of *lex fori*, applying its own law whenever it can be justified. 66 Certainly, there is support for both of these views in the Kentucky case law.

**D. Reconciling the Kentucky Cases**

The apparent dilemma is actually quite easy to resolve. The two most recent cases, in which the Kentucky Supreme Court applied the Restatement, can easily be distinguished from the earlier *lex fori* cases. Even though all of the cases arose out of automobile accidents, the nature of the claim differed significantly. The crucial issue is *Arnett* and *Foster* was whether one of the parties was liable in tort to a victim. *Lewis* and *Breeding*, by contrast, both involved interpretation of the insurance contract to one of the drivers. Therefore, the easiest way to resolve the cases is to conclude that Kentucky has different choice of law approaches for contract and tort cases. In fact, this appears to be the way in which the Kentucky Court of Appeals reconciles the cases. 67

1. **Contract**

The rule for contract cases appears to be the modified interest analysis of the Restatement. 68 The Restatement’s general rule is that a court should apply the rule of the state with the “most significant relationship” to the case. 69 On a number of specific questions, however, the Restatement also provides a “default” choice. In these cases, a court looks first to the law of the place where one particular aspect of the claim occurred. 70 The court will displace that default choice only if it finds that some other state has a more significant relationship to the transaction.

Section 6 of the Restatement also lists factors that a court is to con-

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The Eastern District of Kentucky may have recognized this distinction without voicing it in its opinions. The *Blount* case cited in note 65 was a contract case, in which the court applied the Restatement, while *Kennedy*, where the court applied *lex fori*, involved a tort claim.
68. The court’s use of the “default” rule of section 193 in *Lewis*, see supra note 55, indicates that Kentucky does not use the “pure” form of interest analysis advocated by Professor Currie and his followers. In pure interest analysis, no state has any initial advantage merely because it has a certain contact with the underlying transaction or event.
69. The general rule in contract cases is section 188, the provision applied in *Breeding*.
70. Section 193, the provision applied in *Lewis*, contains such a default rule. Another example of a default rule is section 189, which applies the law of the state where land is situated to determine the validity of a contract to convey the land.
sider in determining the significance of a state's relation to the
transaction.\textsuperscript{71} Factors (b) and (c) incorporate the modern "interest" based
thinking insofar as they direct the state to determine and compare the pol-
icy underlying each candidate state's law.\textsuperscript{72} Notwithstanding these section
six factors, however, many courts, including Kentucky's, typically add up
the contacts without evaluating their importance.\textsuperscript{73}

\textit{Lewis} and \textit{Breeding} both represent fairly orthodox application of the
Restatement analysis. \textit{Lewis} involved section 193 of the Restatement (va-
lidity of a contract for risk insurance), which establishes as a default the
law of the place where the insured risk is situated.\textsuperscript{74} The insured auto-
mobile involved in \textit{Lewis} was located in Indiana.\textsuperscript{75} Similarly, the automobile
owner and insurer were from Indiana.\textsuperscript{76} These Indiana connections gave
the court sufficient reason to stay with the default choice of Indiana law,
notwithstanding that the accident had occurred in Kentucky.\textsuperscript{77}

\textit{Breeding}, by contrast, applied the "general" contractual choice of law
provisions of section 188.\textsuperscript{78} Instead of a default choice, this provision
simply calls for application of the law of the state with the most significant
relationship.\textsuperscript{79} As noted above, the court found that Kentucky had the

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\textsuperscript{71.} \textsc{Restatement (Second) of Conflict of Laws} § 6 (1971)
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\textsuperscript{72.} Section 6(2) reads in its entirety:
When there is no such directive \textit{[i.e., a statutory command]} the factors relevant to
the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states
in the determination of the particular issue,
(d) the protection of justified expectations,
(c) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.
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\textit{Id.} at § 6(2).\textsuperscript{73}
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\textsuperscript{73.} In \textit{Breeding}, for example, the court "counted" the car rental company's Kentucky
residence as a Kentucky contact. 633 S.W.2d at 719. Given that Kentucky law would
hold that party liable, however, it would not further Kentucky's policy to apply its law to
that party. Similarly, the court never discussed the residence of the respondent, the
insurance company that issued the policy. If that company was from Delaware, the court
largely ignored Delaware's interest in having its defendant-protecting law applied to the
Delaware insurance carrier. \textit{Id.} If that company was from a state other than Delaware
or Kentucky, the court completely failed to consider that state's law on the crucial issue.
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\textsuperscript{74.} \textsc{Restatement (Second) of Conflict of Laws} § 193 (1971).
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\textsuperscript{75.} \textit{Lewis} v. American Family Ins. Group, 555 S.W.2d 579 (Ky. 1977).
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\textsuperscript{76.} \textit{Id.}
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\textsuperscript{77.} \textit{Id.} at 582.
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\textsuperscript{78.} 633 S.W.2d at 719.
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\textsuperscript{79.} \textsc{Restatement (Second) of Conflict of Laws} § 188 (1971).
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most significant contacts with the individual insurance contract. The fact that the master insurance contract between defendant Massachusetts Indemnity and the rental company had been delivered in Delaware was relatively insignificant.

One aspect of the Breeding decision, however, has caused some confusion. The insurance contract in that case contained a choice of law clause selecting Delaware law to govern the transaction. The Kentucky Supreme Court nevertheless applied Kentucky law, concluding that Delaware had "no significant relationship" to the insurance contract. The court gave no weight to the fact that the parties had attempted to choose what law was to govern their respective rights and obligations.

Both the Sixth Circuit and the Kentucky Court of Appeals have interpreted Breeding as establishing a per se rule that Kentucky law does not honor choice of law clauses whenever the underlying contract has a significant connection to Kentucky. However, these courts may have read Breeding too broadly. First, because the insured in that case had received neither a copy of the insurance contract nor a certificate of coverage, he had no knowledge of the choice of law clause. It would have been grossly unfair to bind the insured to a "choice" of law that he did not even realize he had made.

Second, even if it is fair to apply the unknown choice of law clause to the insured, a refusal to honor that clause would still be entirely consistent with the Restatement. Section 187 of the Restatement, which governs most contractual choice of law clauses, is generally quite accommodating

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80. See supra note 60 and accompanying text.
81. 633 S.W.2d at 719. This clause did not specifically mention Delaware; rather, it provided that the contract would be governed by the law of the state in which the master policy was delivered, which happened to be Delaware. Id.
82. Id.
83. See Harris Corp. v. Comair, Inc., 712 F.2d 1069, 1071 (6th Cir. 1983); Paine v. La Quinta Motor Inns, Inc., 736 S.W.2d 355, 357 (Ky. Ct. App. 1987). The discussion in both cases is admittedly dictum. Harris did not involve a choice of law clause. Although the court in Paine did ignore the choice of law clause based on Breeding, it acknowledged that the substantive law on the crucial issue was identical in Kentucky and the state selected by the parties. Id. at 357-58. The outcome of the case would accordingly have been the same even if the court honored the clause.
84. Of course, it could be unfair to bind contracting parties to choice of law clauses when they realize that the clause was in the contract. Many lay people may not realize the significance of a clause selecting some other state's law to govern a transaction.
85. Admittedly, the court in Breeding never mentions the Restatement provision governing choice of law clauses. This author does not mean to assert that the court actually considered the Restatement; rather, he merely intends to demonstrate that the court's analysis is not inconsistent with the Restatement.
of such provisions. It allows the contracting parties to select any law, even that of a state that has no connection with the contract, if the issue is one that the parties could have negotiated. However, if the issue is one that cannot be negotiated, section 187 is more restrictive. For non-negotiable issues, the parties may select a state only if it has a significant relationship to the contract, or if there is some other reasonable basis to select that state’s law.

Because Breeding actually involved a non-negotiable contract term, the latter, more restrictive part of section 187 would apply. The crucial issue was whether the insurance company could invoke an exception in the policy if it had not delivered a certificate listing that exception to the insured. The duty to deliver the certificate was imposed by Kentucky law, and apparently could not be waived by contract. Therefore, assuming that the court was correct in its conclusion that Delaware had no significant relationship to the individual policy procured by the decedent, the Restatement would allow the parties to select Delaware law only if that choice was otherwise reasonable. In fact, applying the Delaware rule making delivery of a certificate merely optional would have been patently unreasonable on the facts of Breeding, given that the group insurance contract itself explicitly required delivery of a certificate to the insured.

Breeding, then, is actually consistent with the Restatement. Given that the Kentucky Supreme Court has never stated that choice of law clauses are not per se unenforceable, it may well be that the state uses the Restatement for all contractual choice of law problems. This accords with a literal reading of Lewis and Breeding.

2. Tort

There is also some ambiguity concerning the “displaceable lex fori” rule in tort cases. Although Arnett and Foster make it clear that Kentucky law will apply to most cases, they also indicate that Kentucky law may sometimes be displaced. The court’s opinions provide little guidance,
however, on the crucial question of when using another state’s law would be justified. No Kentucky tort decision in the modern era has used another state’s substantive law. Nor has the Kentucky Supreme Court even indicated what factors the lower courts should consider.

Nevertheless, a few cases in which Kentucky law would be displaced readily come to mind. For example, if neither the parties nor the cause of action have Kentucky connections, it would violate both the Due Process Clause of the Fourteenth Amendment\(^\text{92}\) and the Full Faith and Credit Clause of Article Four\(^\text{93}\) to apply Kentucky law.\(^\text{94}\) This exception, however, in unlikely to prove of much practical import. Cases that have no connection to Kentucky are rarely filed in the Kentucky courts, because of the difficulties both in obtaining personal jurisdiction and of enforcing a judgment against a defendant who has no assets in Kentucky.

Beyond that obvious case, the factors that might justify displacing Kentucky law in a tort case are less clear. Nevertheless, there are at least two other types of tort cases in which a Kentucky court, in accordance with the Kentucky Supreme Court’s precedent, might elect to apply some other state’s law. These two situations can be illustrated by the following scenarios:

**Scenario One.** Two residents of Kentucky, each driving her own car, collide in Illinois. A light rain is falling at the time of the accident, and both drivers are operating their windshield wipers. However, as the skies are not particularly dark, defendant has not turned on her headlights. In Kentucky, assume that a failure to use headlights in this situation would not be negligent. The Illinois rules of the road, however, require a driver to operate her headlights whenever she uses her windshield wipers. Plaintiff alleges that defendant is negligent per se for failing to use headlights.

**Scenario Two.** Two residents of Illinois, each driving her own vehicle, are involved in a collision in Kentucky. The defendant is married, but her husband is not in the car at the time. Unlike Kentucky, Illinois law makes spouses vicariously liable for the

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92. U.S. Const. amend. XIV, § 1.
93. U.S. Const. art. IV, § 1.
94. See Phillips Petroleum Co. v. Shutta, 472 U.S. 797, 818-23 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981). The analysis under each provision is similar. Language in *Arnett* suggests that a Kentucky court might indeed choose to displace forum law in a case with no contacts with the state. The court in that case stated that Kentucky law would apply whenever the state “has enough contacts to justify applying Kentucky law.” 433 S.W.2d 109 at 113. The court may have recognized that Kentucky law cannot apply in the absence of any constitutionally recognized contacts.
torts of their spouses. Plaintiff accordingly sues both the other driver and her husband in a Kentucky court.

In both of these scenarios, Kentucky has enough of a connection with the lawsuit to allow it to apply its own law, even given the strictures of due process and full faith and credit. Yet, a Kentucky court would probably apply Illinois law in the first case, and might well apply Illinois law in the second.

The first scenario is *Wessling* with an important twist. The guest statute at issue in *Wessling* is the classic example of what courts and commentators call a "loss allocating" rule. The main purpose of such a law is not to regulate the activity leading to the accident itself, but simply to distribute the burden of the loss caused by that accident. Most of the modern developments in choice of law have focused on loss allocating rules. One of the main contributions of interest analysis is to demonstrate that in a case where the plaintiff and defendant have the same domicile, that state, rather than the state where the accident occurred, has a genuine interest in having its law applied.

Many tort rules, however, deal not with allocating loss, but with regulating the primary activity giving rise to the tort itself. Laws governing the standard of care are obvious examples. The Illinois headlight law in Scenario One qualifies as a "conduct-regulating" rule, as it requires drivers to act in a certain way in an attempt to lessen the risk of an accident.

Choice of law discussions have devoted comparatively little attention to conduct-regulating rules. There is nevertheless remarkable uniformity in the treatment of these rules in the case law. Regardless of which choice of law methodology is in vogue, courts uniformly apply the conduct-

95. See Carroll v. Lanza 349 U.S. 408 (1955) (holding that in selecting the law of the place where a tort occurred will always comport with the constitutional requirements, even if the injury is that state's only connection with the case; nothing more in the court's recent cases indicates the contrary).


regulating rules of the state where the conduct occurred. The Restatement is in accord.

Actually, this consistent treatment is not terribly surprising. There are two main justifications for applying the law of the state where the conduct occurred. First, courts recognize that the conduct state has the primary


Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

Id. at 284. The Court of Appeals treated this dicta as controlling in a case where a New York plaintiff sued a New York owner of a construction site for injuries that occurred on the site. Padula v. Lilarn Props. Corp., 644 N.E.2d 1001 (N.Y. 1994). Although both parties were from New York, the court applied the law of Massachusetts, the state where the construction site was situated, to determine whether defendant's conduct rendered it liable. Id. at 1003. The New York trial courts have also proved consistent in applying the conduct regulating rules of the place of conduct. See, e.g., Salsman v. Barden & Roberson Corp., 564 N.Y.S.2d 546, 548 (1990); Sadkin v. Avis Rent-a-Car System, Inc., 638 N.Y.S.2d 435, 436 (1996); Angello v. 20166 Tenants Corp., 648 N.Y.S.2d 101, 103-04 (1996); Hutson v. Hayden Building Maintenance Corp., 657 N.Y.S.2d 945, 946 (1997); Brewster v. B&O R. Co., 562 N.Y.S.2d 277, 278 (1990).

The notion of the conduct regulating the rule can, however, be taken to extremes. The decision of the California Court of Appeals in Hernandez v. Burger, 162 Cal. Rptr. 564 (Cal. Dist. Ct. App. 1980), stretches the concept to its breaking point. In that case, the court considered Mexico's damages cap in tort cases to be conduct regulating, treating it as an attempt to encourage the "conduct" of tourism. Id. at 568.

99. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt. d (1971) (stating "[t]hus, subject only to rare exceptions, the local law of the place of the state where the conduct occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct . . . .") See also id. at § 146 cmt. d (stating "[w]ith respect to issues relating to standards of conduct, the local law of the state of conduct and injury has been invariably applied.")
concern with regulating conduct that occurs within the borders of that state, regardless of the citizenship of the actor. Second, the parties themselves expect that the propriety of their behavior will be judged by the rules of the state where that behavior occurred. Thus, even though none of the reported Kentucky tort cases deal with conduct-regulating rules, it is fair to assume that Kentucky courts would recognize these considerations and apply Illinois' conduct-regulating law in Scenario One.

The Second Scenario is *Arnett* with an important twist. Both the Scenario and *Arnett* involve loss-allocating rules. The difference is that Kentucky law allowed recovery in *Arnett*, while in the Scenario it does not.

Does this difference justify a different result in the choice of law calculus? The answer depends on whether the Kentucky courts have completely abandoned the “interest analysis” approach adopted in *Wessling*. Although *Arnett* certainly denounced unadorned interest analysis as a general choice of law methodology, neither that case nor any other entirely rejected interest analysis. Moreover, the *Arnett* court did indicate that the state’s policy concerning the law in questions was a factor to be considered in the choice of law analysis. As consideration of state policy is one of the cornerstones of interest analysis, it is altogether possible that state interest remains a relevant factor in Kentucky’s approach.

It is not difficult to incorporate interest based consideration into the displaceable *lex fori* rule established in *Arnett* and *Foster*. When the court said that Kentucky law will be displaced whenever there is a “strong reason”, it might have been envisioning a case in which Kentucky has no “interest” in applying its law. If applying Kentucky law would not further the policy underlying the law, but applying the law of some other state

100. *See supra* note 98.
101. This analysis admittedly fails to consider the more complex situation where the conduct occurs in one state but causes injury in another.
102. *Arnett* involved a guest statute, a classic example of a loss allocating rule. The hypothetical spousal liability rule in Scenario Two would also be entirely loss allocating.
103. *Arnett v. Thompson*, 433 S.W.2d 109, 113 (Ky. 1968).
104. The *Arnett* court merely emphasized the statement in *Wessling* itself that the approach was limited to “very clear cases.” *Id.*
105. *Id.*
106. Under both interest analysis and the Restatement, a court should analyze the state’s policy underlying a given law. A state has an interest in having its law applied only if application of the law to the actual fact situation at hand would further the underlying policy.
107. The court’s analysis of interest in *Foster* is less clear in this regard. The court may simply be “counting” the contacts, without attempting to determine the significance of each contact.
would further that state’s policy, a straightforward application of interest analysis would require Kentucky courts to defer to the other state’s law.

Admittedly, there is nothing in the Kentucky Supreme Court opinions explicitly stating that Kentucky’s *lex fori* approach includes considerations of interest analysis. The cases nevertheless provide clues that state interest remains a relevant concern. First, as noted just above, the Kentucky Supreme Court has never completely rejected the interest analysis approach set out in *Wessling*, but has instead merely limited its application to clear cases. Second, the court’s use of the interest based Restatement approach in contract cases suggests that it does recognize the importance of state interests in the choice of law calculus.

The recent decision of the Western District Court of Kentucky in *Rutherford v. Goodyear Tire & Rubber Co.*108 lends considerable support to the argument that a lack of any Kentucky interest is a reason to displace Kentucky law in a tort case.109 *Rutherford* has the singular distinction of being the only post- *Arnett* tort case in which a court, albeit a federal court, has elected to displace Kentucky law. The court based its holding on its determination that the state had no interest in having its rule applied to the case.110

*Rutherford* involved an accident between two Indiana drivers on a road in Indiana.111 Alleging that the accident was caused by a defective tire on the other driver’s car, plaintiff sued Goodyear, which had manufactured the tire, and Ford, which had mounted the tire on the car.112 Ford had mounted the tire at a Kentucky assembly plant.113 The court, although recognizing Kentucky’s *lex fori* rule, also reasoned that interest analysis played a role in determining whether displacing Kentucky law was justified.114 To the court, the sole purpose of Kentucky’s product liability laws and statutes of limitations was to protect Kentucky citizens and other people who happen to be injured in the state.115 Finding that none of the parties was a Kentucky resident, the court concluded that applying Kentucky law would not further Kentucky policy in any way.116 It therefore applied

109. Id.
110. Id. at 792.
111. Id. at 790.
112. Id. at 791. Plaintiff had also sued the other driver, but settled that claim at an early stage of the suit. Id. at note 3.
113. Id.
114. Id. at 792.
115. Id.
116. Id. The court arguably oversimplified matters when it concluded that none of the
Indiana law to decide the case. The use of interest analysis to displace Kentucky law helps to reconcile Wessling with the more recent lex fori cases.

Based on Rutherford and the reasoning set forth above, a Kentucky court might well displace Kentucky law in Scenario Two. Even though Kentucky is clearly connected with the case by virtue of it being the situs of the accident, that connection gives Kentucky no interest in having its law apply. The Kentucky rule does not attempt to regulate the accident itself, but merely controls how the losses from that accident will be allocated. Nor is Kentucky concerned with any of the parties. The Kentucky rule protects spouses. Because the defendant husband in Scenario Two is from Illinois, Kentucky is not concerned with protecting him.117

None of the Kentucky Supreme Court's tort cases require a different outcome. Wessling, Arnett and Foster all involved a clash between some other state's guest statute and Kentucky's rule allowing a guest to obtain full recovery against a host upon showing of ordinary negligence. In the jargon of interest analysis, the "policy" behind Kentucky's law is to ensure that victims receive full compensation for their injuries.118 Viewed in this light, Wessling and Foster are easy cases. In both, the plaintiff was a resident of Kentucky. Kentucky undoubtedly had an interest in applying its law, which allowed its citizen to recover, in lieu of the guest statute of...
the place of injury, which did not.

Arnett is more difficult. Like Scenario Two, Kentucky's only connection was that the accident occurred there. Therefore, Kentucky had no interest in whether the Ohio plaintiff had to bear the loss, or whether he could ask the Ohio defendant for compensation. At first glance, Arnett seems to indicate that Kentucky law will apply even in the absence of a state interest.

But Arnett and Scenario Two are distinguishable. The problem lies in the use of labels. A guest statute is admittedly a loss-allocating rule. However, in Arnett Kentucky was not the state with the guest statute. Kentucky's "rule" was that passengers can recover against their host. A rule allowing full recovery does more than simply allocate loss. By requiring tortfeasors to pay for all damages occasioned by their negligence, Kentucky law may also encourage drivers to act more carefully. Kentucky would accordingly have an interest in applying its law in Arnett because the conduct causing the accident occurred in the state. Accordingly, even Arnett does not preclude a court from displacing Kentucky law in a case like Scenario Two, where Kentucky truly has no interest.

Again, the above discussion represents only reasoned conjecture. Because the court has not yet faced a case in which the state had no interest in having its law applied, it is not entirely clear that the Kentucky Supreme Court would agree with this suggested approach. The myth that has emerged since the Kentucky Supreme Court last dealt with choice of law in tort cases, that Kentucky courts apply Kentucky law whenever there is any contact, may now represent reality. If so, then Wessling has truly been overturned.

119. The California Supreme Court applied a similar argument in a case where it found that California's lack of a limitation on damages was meant to encourage people acting in the state to exercise greater care. Hurtado v. Superior Court, 522 P.2d 666 (Cal. 1974).

120. Rutherford contains facts somewhat more difficult to resolve under this approach. The court in Rutherford never discusses the content of Kentucky products liability law. If that law had been more favorable to plaintiffs, it might, under the analysis set forth in the text, been deemed conduct regulating. However, it is not entirely clear that the "conduct" that was being regulated in Rutherford occurred in Kentucky. Although the tire was mounted on the car in Kentucky, it did not cause injury until it blew out in Indiana. Products liability laws attempt to regulate conduct only because they are concerned with minimizing the injury that flows from that conduct. There is therefore some debate about whether such laws reach injuries that occur in other states. For this reason, the issue of conduct in one state that causes injury in another is beyond the scope of this article.
3. Other Areas

Because Kentucky’s highest court has dealt only with contracts and torts, the choice of law rules in other areas is less clear. The only reported decision in the past thirty years dealing with an issue other than torts or contracts is a 1977 decision of the Court of Appeals involving construction of a will. In that case, the court applied the law of the state where the testator was domiciled at death instead of Kentucky law. Even though a will, as a written instrument, is more analogous to a contract, the Court of Appeals cited neither the Restatement nor Lewis and Breeding, the contract cases. It instead relied on a 1947 case applying the traditional rules. However, given that the Restatement would also apply the law of the testator’s domicile at death in this situation, this case is not necessarily inconsistent with Lewis and Breeding.

The Kentucky courts likewise have not dealt during the modern era with choice of law issues involving title to property. One can nevertheless predict that they will use the Restatement in this area too. Unlike the traditional rules pertaining to torts and contracts, the Restatement effects very few changes to the traditional rules governing title to tangible property. In almost every case it selects the law of the place that the property is situated. The courts can therefore apply the Restatement approach without disturbing the earlier precedent.

III. DEFENDING THE KENTUCKY APPROACH

The prior discussion demonstrates that Kentucky has adopted an essentially two-tiered approach to choice of law. In contract cases, and possibly also in other cases based on voluntary transactions like deeds and wills, Kentucky uses the interest based approach of the Restatement. In tort cases, by contrast, Kentucky will automatically apply Kentucky law, except in the rare case where use of some other state’s law is justified.

121. With respect to statutes of limitation, Kentucky has a borrowing statute that requires it to use the limitations periods of other states in certain cases. Ky. Rev. Stat. Ann. § 413.120(7) (Banks-Baldwin 1996). For an application of this statute, see Haeberle v. St. Paul Fire & Marine Ins. Co., 769 S.W.2d 64 (Ky. 1989).
123. Id.
124. Id. (citing Martin v. Harris, 203 S.W.2d 78 (Ky. 1947).
126. Id. at §§ 223-43 (immovable property), 244-66 (movable property). The main exceptions concern the effects of marriage (see id. at §§ 257-59) and death (see id. at §§ 260-66) on the title to movable property.
127. See discussion accompanying notes 68-91.
This approach is certainly unusual.\textsuperscript{128} As such, it is bound to undergo a critical review. Two main lines of criticism are likely to emerge from any such review. First, the use of different choice of law methods in contract and tort cases runs counter to the "modern" approaches to choice of law, which typically reject characterization. Modern theorists strive to discover a universal methodology that can be applied to all possible situations. Second, the strong preference for Kentucky law in tort cases is also problematic. The preference at the very least appears unprincipled; a cynic might even dub it parochial.

However, neither of these criticisms is valid. Properly understood, Kentucky's choice of law system is actually a well-reasoned and internally consistent approach to the problem of how a court goes about determining what rules of substantive law should govern a multi-state case. Although the approach may not fit neatly into any of the currently popular paradigms, it is nevertheless built upon many of the same premises. In fact, it can be argued that of all the choice of law theories in use today, only Kentucky's succeeds in throwing off the last vestiges of the discredited "vested rights" theory that underlay the traditional rules.

\textbf{A. The Search for Universal Principles}

Kentucky's use of the Restatement in contract cases puts the state in the mainstream. Although the Restatement's hybrid approach has been the subject of considerable scholarly criticism, sometimes scathing, it has gained widespread acceptance among the courts.\textsuperscript{129} Therefore, Kentucky need not defend its use of the Restatement. The only issue that arises with respect to the Restatement is why Kentucky has adopted only the contract provisions, using an entirely different approach in tort cases.

This two tiered approach runs counter to today's choice of law norms. Modern choice of law theory is essentially an attempt to discern universal principles to guide courts in selecting a law for cases with multi-state connections. Although the application of those principles may well differ in tort and contract cases, the principles themselves should remain constant.

\begin{footnotesize}
\textsuperscript{128}. The approach has even garnered Kentucky some attention in the national literature. See \textsc{Lea Brilmayer}, \textit{Conflict of Laws, Cases and Materials} 365 (4th ed. 1995) (author asks, "What's going on in Kentucky?").

\textsuperscript{129}. In 1983, one author determined that thirteen states had adopted the Restatement. \textsc{Herman Kay Hill}, \textit{Theory Into Practice, Choice of Law in the Courts}, 34 \textsc{Mercer L. Rev.} 521, 552-62 (1983). However, that number is somewhat misleading. Although only a few states have adopted the Restatement \textit{in toto} as their sole choice of law methodology, many cite the Restatement as support for their decisions. And as Professor Kay acknowledged, some courts try to apply both the Restatement and interest analysis. \textit{Id.} at 577-78.
\end{footnotesize}
The modern approaches therefore reject characterization as an ultimately fruitless endeavor.

Again, however, this criticism is based on a misperception of Kentucky law. It is not entirely clear that the state actually uses two separate and distinct approaches. In fact, all of the leading Kentucky cases are consistent with the general principle established in Arnett and Foster; i.e., that Kentucky courts should apply Kentucky law unless there are strong reasons to displace it. Tort cases rarely call for displacement of forum law. However, because contract and conveyancing cases may involve different considerations, a court hearing such a case may be more likely to displace Kentucky law. Use of the Restatement in contract cases may simply be a way for a court to identify the considerations that call for use of another state's law.

At the most fundamental level, courts in both contract and tort cases face the same basic question: whether one party has met its legal duty to another. Yet there is a crucial difference between the two kinds of cases. Tort involves a duty that is created by a court or legislature, and imposed on the parties after the fact. In a contract case, by contrast, the parties have attempted to define their respective legal obligations by agreement. Instead of creating the duty, the court's main task in a contract case is to determine whether and how to apply the duty agreed upon by the parties.

Because the parties to a contract attempted to allocate the duties at the outset, contract cases involve considerations of party expectations that are not present in the typical tort case. These expectations should affect the question of choice of law. Contracts are a useful social and economic tool. Their utility, however, depends on predictability of result. If courts regularly adjudicate contractual disputes using legal rules that were not anticipated by the contracting parties, the use of contracts would likely diminish. Accordingly, a rational choice of law regime should take account of the legitimate expectations of contracting parties.\(^\text{130}\)

130. Of course, parties to a tort case may also have expectations as to which law will govern. Here, however, it is important to distinguish between two categories of expectations. First, in the case of a conduct regulating rule such as the headlight law discussed previously in the main text, the actor has a legitimate expectation that the law of the place where the conduct occurred will be used to determine whether that conduct was legally acceptable. For a choice of law system to select a different law would introduce an intolerable level of uncertainty in the way people conduct their lives. The courts' consistent use of the conduct regulating rules of the place of conduct is probably due to a respect for this type of expectation.

Second, parties to a tort lawsuit may expect the court to evaluate their conduct under a particular state's rule. This second category of expectation, however, is not necessarily relevant to the choice of law process. Unlike conduct regulating rules, expectations as to
Kentucky's use of the Restatement as the choice of law methodology in contract cases may be an attempt to acknowledge party expectations. Section 188 of the Restatement lists several factors for the court to consider when choosing a law in a contract case, including the place of negotiation, contracting, and performance of the contract, the location of the subject matter, and the domicile of the parties. These are roughly the factors that parties contemplating a contract are likely to consider in determining which law will govern. Although the law selected under the Restatement approach may not always comport with party expectations, the Restatement nevertheless recognizes the importance of those expectations in determining contract rights.

Similar considerations may apply in other areas of the law. In 1977, the Kentucky Court of Appeals applied the law of the state of the testator’s domicile (Michigan) in lieu of Kentucky law in construing a will. Although the court cited a “traditional” rule case as controlling, its reasoning focused on the testator’s expectations. The court stated:

A testator is presumed to know the law of his domicile at the time which law will apply in litigation do not influence the parties’ pre-litigation behavior. For example, a driver transporting a passenger is unlikely to drive more carelessly merely because she enters a state with a guest statute. In fact, a conscious decision to drive more carelessly might well transform the case from a negligence case into one of recklessness, possibly making the guest statute inapplicable. Thus, to let expectations as to governing law control the choice of law process would be to put the cart in before the horse. For a similar discussion of the concept of expectations and foreseeability, see Sedler, supra note 18, at 611-13.

Of course, a legal system can survive only if it has the respect of the people. If people perceive that courts make choice of law decisions on a purely arbitrary basis, they may lose faith in the legal system. However, this consideration merely calls for a consistent and understandable approach, not necessarily any existing method. Over time, if people understand the system, they will form new and different expectations as to what law will govern once they go to court.

132. The vast majority of the Restatement’s contract rules are likely to correspond to the law that the parties anticipated at the time they entered into the transaction. However, one possible exception is section 206 of the Restatement, which specifies that the law of the place of performance will usually govern the details of the performance. Id. at § 206. As an illustration of the basic principle, Illustration 2 hypothesizes a contract that calls for payment in State X on a given day. Id. at illus. 2. That date happens to be a Sunday. Id. Under the default rule of section 206, whether payment could be delayed until Monday is governed by the law of State X. Id. However, if both parties are from a state that has a contrary rule, they might well expect that contrary rule to govern, perhaps because they did not give the matter any real consideration.
133. Santoli v. Louisville Trust Co., 550 S.W.2d 182, (Ky. Ct. App. 1977). The issue in Santoli was whether the adopted children of a beneficiary who died before the testator would take the beneficiary’s share. Id.
134. Id. at 183 (citing Martin v. Harris, 203 S.W.2d 78, (Ky. 1947)).
of his death, and it is presumed that he wishes his will to be executed pursuant to that law if language or circumstances do not indicate otherwise. Courts are reluctant to amplify facts and imply from coincidence to frustrate what must be the presumed intent of the testator.\(^{135}\)

In this type of case, the traditional rule comported with party expectations. Thus, the court’s decision not to apply Kentucky law was based at least in part on a desire to preserve the intent of the testator.

In short, Kentucky’s approach to choice of law may not be the uncoordinated melange that a cursory review of the cases might suggest. Instead, all of the cases are consistent with the basic principle that Kentucky courts will apply Kentucky law to all disputes unless there are strong reasons to apply a different rule. Contract and conveyance cases may well present a strong reason, namely, the importance of choosing a law that comports with the expectations of the affected parties. For similar reasons, courts hearing tort cases should apply the conduct regulating rules of the place where the conduct occurred.\(^{136}\) Other than conduct regulating rules, however, Kentucky courts will rarely displace Kentucky law in tort cases.\(^{137}\)

That preference for Kentucky law is certainly the most controversial aspect of the state’s approach to choice of law. As this section has demonstrated, that preference may underlie Kentucky’s entire system, not merely the test used in tort cases. Understanding that basic principle is accordingly necessary if one is to comprehend and appreciate the Kentucky choice of law methodology.

**B. The Preference for Lex Fori**

The entire choice of law system in Kentucky may turn on the basic principle that Kentucky courts should apply Kentucky law in the absence of strong reasons to choose some other law. If so, the Kentucky approach is all the more controversial. Use of lex fori, especially in cases where the interests of another state predominate, seems out of step with the basic principles, both historical and modern, of choice of law.

But properly understood, Kentucky’s lex fori rule is actually not that radical. Other modern choice of law theories also contain a preference, hidden or expressed, for forum law. For example, one of the leading con-

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\(^{135}\) Santoli, 203 S.W.2d at 183-84.

\(^{136}\) See supra text accompanying notes 96-101.

\(^{137}\) Of course, a court might displace Kentucky law in tort cases for reasons other than expectations of the parties. For example, the Constitution prohibits a court from applying the law of a state that has no connection with either the case or the parties. See supra note 94.
Conflicts scholars of this century, Albert Ehrenzweig, long advocated the use of *lex fori* as a default choice of law rule in all conflicts cases.\(^{138}\) Professor Ehrenzweig’s approach admittedly differed from Kentucky’s model. He felt that many cases involved what he called “true rules”, situations in which all states would agree that some other law should apply.\(^{139}\) Professor Ehrenzweig argued that a court should apply such a true rule in lieu of forum law. In all cases not involving a true rule, however, Professor Ehrenzweig argued that states should apply their own rules of law, regardless of whether they could demonstrate any sort of “interest” in the case.\(^ {140}\)

Professor Ehrenzweig’s unabashed preference for forum law never gained widespread acceptance. However, a more subtle preference for *lex fori* also exists in other, more accepted, approaches to choice of law. In fact, the original formulation of interest analysis was actually a version of *lex fori*. Professor Brainerd Currie, who first developed the theory, originally approached the problem of choice of law from a perspective remarkably similar to that of the Kentucky Supreme Court. Currie challenged the fundamental assumption of the traditional rules that a forum could be obligated to apply the law of a particular state merely because the dispute involved that state in one way or another. He argued instead that a forum should generally apply its own law to decide the case.\(^ {141}\) The only exception that Currie recognized was a case in which the forum had no interest, but some other state had an interest.\(^ {142}\) In all other cases, including those “true” conflicts where both the forum and another state had an interest, and the “unprovided for case” in which no state had an interest,

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\(^{139}\) See Ehrenzweig, supra note 135, at 89-90; Lex Fori, supra note 135, at 340-44. As examples of true rules, he cited the use of situs law to govern title to land and the law of domicile to deal with questions of succession. Id. at 343. He also suggested that courts followed certain principles, often unarticulated, in making choice of law decisions. For example, he argued that the “rule of validation” under which courts pick the law that upheld the validity of a contract, was another true rule. Id. at 344. A person could find these true rules, he asserted, by focusing on what courts actually held, instead of the language in which they couched their opinions. Ehrenzweig, supra note 138, at 90.

\(^{140}\) Id. at 91, 93; Basic Rule, supra note 138, at 643-44; Lex Fori, supra note 138, at 345.

\(^{141}\) Currie, supra note 3, at 183-84.

\(^{142}\) Id.
the forum would apply its own law.\textsuperscript{143} As discussed above, depending upon how one reads \textit{Arnett} and \textit{Foster}, this may actually be the Kentucky view.\textsuperscript{144}

Other modern choice of law theories are also biased in favor of forum law. Consider Professor Leflar's approach. Although his analysis includes five discrete factors, the actual resolution typically turns on the fifth, under which the forum selects the "better" rule of law to decide the case.\textsuperscript{145} As others have recognized, most courts will consider their own state's rule superior to the other candidates.\textsuperscript{146} The strong preference for Kentucky law in the Kentucky choice of law regime may similarly be a reflection of local pride; i.e., that the state's judges consider Kentucky substantive law to be the optimal way to resolve the myriad of legal disputes that may arise.

The notion that courts making a choice of law decision ought to compare the relative merits of the competing rules is deeply disturbing to some courts and commentators. Yet, it is a core tenet of the "new" way of thinking about choice of law that has dominated the last half of this century. Modern thinking rejects the jurisprudential foundations of the traditional choice of law rules. That traditional approach was built upon the vested rights theory. The crux of that theory is that the plaintiff's claim comes into being at a certain point in time and space. The state with sovereignty over the particular place at that time, and only that state, could determine the extent to which that claim was cognizable.\textsuperscript{147} According to

\begin{itemize}
  \item \textsuperscript{143} Id. at 184, ex. 5.
  \item \textsuperscript{144} See supra text accompanying notes 119, 120. Again, one can only theorize as to the Kentucky view, as Kentucky's highest court has never faced a case in which the state had no interest, at least if the concept of interest is defined to include the conduct regulating effect of laws allowing full recovery.
  \item \textsuperscript{145} Leflar, supra note 7, (displaying the classic articulation of Professor Leflar's theory). In addition to the "better rule" factor, the approach lists four other "choice influencing considerations" including (i) predictability of result, (ii) maintenance of interstate and international order, (iii) simplification of the judicial task, and (iv) advancement of the forum's government interests. That last factor incorporates a form of interest analysis. Id.
  \item \textsuperscript{146} As indicated in the text, however, courts applying Professor Leflar's approach often ignore these four other factors, and decide the case on the basis of which rule they consider better. See, e.g., Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973).
  \item \textsuperscript{147} One study found only three cases applying Professor Leflar's approach that found that the law of a different state was better. William A. Reppy, Jr., \textit{Eclecticism in Choice of Law: Hybrid Method of Mishmash?}, 34 MERCER L. REV. 645, 691 n.216 (1983). Accord Brilmayer, supra note 3, at 71. Professor Leflar himself recognized that courts might tend to favor their own rules. Robert Leflar, \textit{Choice-Influencing Considerations in Conflicts Law}, 41 N.Y.U. L. REV. 267, 298-99 (1966).
  \item \textsuperscript{147} See Joseph H. Beale, A TREATISE ON THE CONFLICT OF LAWS 515 (1935) (setting
this paradigm, the court’s task was to choose a forum, not a law. Once the
court ascertained the forum in which the alleged right vested, it would then
determine the substantive law of the forum on that issue.

Modern theorists reject the vested rights approach, arguing that it is
based on a faulty premise.\textsuperscript{148} Today, there are very few situations in which
only one state has the exclusive power to regulate a particular tort or trans-
action. As long as the incident bears some meaningful connection with
two or more states, each of the concerned states may regulate it.\textsuperscript{149} There-
fore, modern choice of law thinkers focus on choosing a law rather than a
forum. In order to make a reasoned choice between competing laws, a
court must consider the content of each law.

Yet even with this shift in focus, many of the modern theories are still
burdened by residual vestiges of the old vested rights thinking. Consider
how interest analysis and the Restatement operate. They assume that be-
cause State X has some connection with a dispute, the forum ought at least
to consider what State X thinks about how the dispute should be resolved.

But that begs the question. Reduced to its essentials, a lawsuit in-
volves a dispute between plaintiff and defendant. As plaintiff and defen-
dant cannot agree on what principle should be used to gauge their behav-
ior, they ask the court to intercede. To resolve the dispute, the court will
apply the legal rule that it deems to be the fairest way to settle the matter.
Of course, the court is not free to create new rules for every case. If the
legislature has spoken to the question, the court must apply the rule set out
in the statute. It must also follow the binding precedent of any higher
courts. But the court need only defer to the legislature and higher courts of
that state, not to other states.\textsuperscript{150} For example, nothing requires Kentucky to
agree with Ohio on the general question of whether a passenger in an
automobile should be able to recover against her host driver.

At least in this post-\textit{Erie} world, no one in the United States questions

\textsuperscript{148} See, e.g., Cook, supra note 3, at 9-19; David Cavers, \textit{A Critique of the Choice of
Law Problem}, 47 HARV. L. REV. 173, 178 (1933); Currie, supra note 2, at 52-53.


\textsuperscript{150} The analysis in the text assumes that there has been no prior litigation between
the same parties involving the matter. If there had been, the separate requirement of
full faith and credit to judgments would require the second forum to follow the judgment
of the other state’s court.
that reasoning in a case with connections with only one state. It is only when more than one state is involved that we turn to different analysis, an analysis we call choice of law. But why do we automatically assume that the analysis must change in the multi-state case? To continue with the prior example, why does the fact that a case has some connections with Ohio lead a Kentucky court to consider abandoning its substantive rule, which it considers the best, and substituting an Ohio rule which it feels is inferior? If the court’s task is merely to choose a law, there is no a priori reason why a court should pay any attention to Ohio’s views as to how the dispute should be resolved.

The perception that Ohio law “matters” persists even to this day because we have not entirely succeeded in rejecting the notion of vested rights. We cling to the notion that a certain connection between the case and Ohio gives Ohio some legal stake in the outcome. Once we identify the problem as choosing a law instead of a forum, the need to defer to Ohio’s opinion disappears.

Of course, the above argument does not necessarily mean that a state should always apply its own law to resolve a dispute. If the state has no connection with the dispute, the national Constitution forbids use of that state’s law.151 Similarly, as discussed above,152 the justified expectations of the parties may be a reason to apply a rule other than that of the forum. A court may accordingly want to defer to the conduct regulating rules of the place of conduct, or to the contract rules that the parties thought would govern their mutual agreement. However, this deference is not an exception to the general principle outlined above. In cases where expectations are a factor, the forum applies the other law not out of deference to the sovereign powers of the other state, but because of the importance of meeting party expectations.

Viewed in this light, Kentucky’s preference for lex fori is by no means a throwback to an earlier, more parochial time. It may actually represent the next logical step in the evolution of choice of law thinking. Unlike other approaches, the lex fori rule discards the last remnants of sovereignty and vested rights, and focuses exclusively on selecting that law that provides the fairest resolution of the dispute. Kentucky’s rule will be the fair-

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151. Of course, the due process-full faith and credit analysis, as currently formulated, also turns on formalistic jurisdictional factors. However, that does not mean that a state’s choice of law methodology must necessarily include those same factors. As long as a state complies with the Constitution, it may select whatever choice of law method it deems best. Allstate, 449 U.S. at 307.

152. See supra note 130.
III. CONCLUSION

At present, Kentucky choice of law is clouded in considerable confusion. Much of the blame admittedly belongs to the Kentucky Court of Appeals and Supreme Court, which both have done a relatively poor job of explaining their reasoning and reconciling their own precedent. The ambiguity in the reported cases has made it difficult for the lower state and federal courts to deal with choice of law questions.

However, it is possible to distill a clear set of rules from the case law. A close reading of the cases reveals certain basic themes. One can infer that Kentucky uses two rules for choice of law questions. In cases involving contracts, Kentucky uses the Restatement. In tort cases, by contrast, the courts automatically apply Kentucky law, unless strong reasons exist to use some other law.

Compared to other states, this approach is quite unusual. But that does not mean it is irrational. In fact, Kentucky’s approach to choice of law is a coherent, internally consistent system that builds upon the modern theories about the aims of choice of law. It may well be that Kentucky is on the cutting edge in the field of choice of law.
LIMITED LIABILITY COMPANIES BEFORE AND AFTER THE JANUARY 1997 IRS "CHECK-THE-BOX" REGULATIONS: CHOICE OF ENTITY AND TAXATION CONSIDERATIONS

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I. INTRODUCTION

During the last decade new forms of business organizations have become popular alternatives to traditional partnerships and corporations. These new entities facilitate greater flexibility in management structure while fostering both limited liability and perceived tax advantages for investors. One of the more popular of these alternative business organizations is the Limited Liability Company (LLC), which blends traditional corporate and partnership characteristics into a distinct entity. While Wyoming was the first state to permit the creation of domestic LLCs in 1977, the concept did not immediately sweep across the country as evidenced by the five year period until Florida became the second state to follow suit. At present, all states and the District of Columbia have LLC statutes in place. There is no question that attracting foreign investment was a key motive for adoption of these early statutes, however, states delayed their legislation until the Internal Revenue Service (IRS) ruled in 1988 that a domestic Wyoming LLC

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5. See infra Table 1.
qualified for federal partnership flow-through tax treatment. This article compares Limited Liability Companies to other traditional and emerging forms of business structures and assesses salient tax considerations attendant to the choice of entity question, taking into consideration the effect of the January 1997 IRS check-the-box rules.

The Uniform Limited Liability Company Act of 1995 (ULLCA) serves as a model for the LLC entity. It is based on a combination of provisions which borrow many characteristics from other uniform acts, such as the general partnership models, the limited partnership model, and the corporate models. In addition, it combines features of the original Wyoming "bullet proof" statute, which is aimed at guaranteeing partnership-like taxation treatment, the Delaware "flexible model" and the "Prototype" LLC Act developed in 1992 by a working group of the American Bar

6. The Study Committee of the National Conference of Commissioners on Uniform State Laws commenced its work early in 1992, culminating in the draft which was adopted at the annual meeting in August 1994. Since that time the Executive Committee has approved amendments to section 801 (3) of the ULLCA.
7. The Uniform Partnership Act (UPA) and the 1994 Revised Uniform Partnership Act (RUPA).
8. The Revised Uniform Limited Partnership Act (RULPA).
9. The Model Business Corporation Act (MBCA) and the Revised Model Business Corporation Act (RMBCA). From the legislative perspective, some states have amended their partnership laws to add LLCs, while others have attached LLC legislation to corporate chapters. Still other states have created a separate LLC chapter within their state statutory codes.
10. A "bullet proof" statute is designed to guarantee characteristics that qualify for partnership-like taxation treatment. The early versions of the Wyoming statute contained several mandatory provisions that required an LLC to have decentralized management and unanimous consent of the members for transfer of ownership interests or continuation of the business after a dissolving event. WYO. STAT. ANN. §§ 17-15-101 to -144 (Michie 1977). In a "pure bullet proof" statute, such conditions cannot be altered by an LLC operating agreement. After Rev. Rul. 88-76, 1988-2 C.B. 360, compliance with these statutory provisions assured LLCs of partnership-like tax treatment. See also, COLO. REV. STAT. §§ 7-80-101 to -1101 (1990); and Robert B. Keatinge, New Gang in Town, 4 BUS. LAW TODAY 5, 6 (March/April 1995), recognizing the Nevada, Virginia and West Virginia statutes.
11. The "flexible approach" statute permits each LLC to structure its association in a manner most suitable for its operation. Such LLCs are cautioned, however, to include sufficient limitations on two corporate-like characteristics in their operating agreements or run the risk of forfeiting partnership-like taxation. Delaware has served as the primary model for this type of statute. DEL. CODE ANN. tit. 6, §§ 18-101 to -1109 (1992). See also, MO. ANN. STAT. §§ 47.010-.187 (West 1994). The Alabama, Arizona, Florida, Illinois, Kansas, Louisiana, Oklahoma, Rhode Island and Utah statutes are recognized and discussed in the Keatinge article. Robert B. Keatinge, New Gang in Town, 4 BUS. LAW TODAY 5, at 6 (March/April 1995). The Texas and Maryland statutes are similarly recognized in Brian L. Schorr, Limited Liability Companies: Features and Uses, CPA J. 26 (Dec. 1992).
Association. The 1995 ULLCA most resembles the "Prototype" model, containing default characteristics, most of which apply only when LLC governing documents do not contain contrary provisions. The few "nonwaivable provisions" are aimed primarily at preserving certain fiduciary duties and third party rights. This model act, along with the January 1997 rules, will likely influence future revisions to many state LLC statutes.

Prior to January 1997, for purposes of federal income taxation an LLC could be taxed either as a partnership or a corporation, depending on its structure. To qualify for partnership-like taxation status, an LLC had to have more than two of the following four characteristics: 1) limited liability of investors, 2) centralized management, 3) free transferability of beneficial ownership interests, and 4) continuity of life or unlimited duration of the business. These four corporate characteristics were part of a test established by Treasury Regulation section 301.7701-2(1) and recognized in the 1935 Morrissey case. As a practical matter, limitations had to be imposed on the transferability and continuity characteristics, since limited liability was a desired characteristic for virtually all LLCs. Pre-January 1997 IRS interpretations facilitated more flexibility in designing the limitations on these characteristics than was originally envisioned by early statutory drafters.

A number of IRS Private Letter Rulings examined a combination of default provisions in statutes, as well as individual structures of LLCs. Some states with "bullet proof" provisions received IRS rulings assuring LLCs organized under those statutory constraints would be awarded partnership-like tax treatment. In other states, LLCs were individually evaluated, based on the structure and constraints contained in the Articles of Organization and

12. A hybrid approach is adopted in the Report of November 19, 1992, of the Working Group on the Prototype Limited Liability Company Act of the Subcommittee on Limited Liability Companies of the Committee on Partnership and Unincorporated Business Organizations, Section of Business Law of the American Bar Association, hereinafter referred to as "PROTOTYPE." The Prototype contains default rules requiring unanimous consent of members for the admission of a new member and for continuation of the business after a dissolving event, as well as direct management by members. Such requirements may be waived, however, in the operating agreement. See PROTOTYPE at iii.

16. Morrissey v. Commissioner, 296 U.S. 344 (1935). Under this test, the business was classified as an "association unless there were more corporate characteristics than non-corporate characteristics. Treas. Reg. § 301.7701-2 (a)(3) (Kintner regulations).
Operating Agreements, and not too surprisingly, most states elected to tax LLCs according to federal income tax classifications. There is no guarantee, however, that each state will grant an LLC partnership-like taxation status, just because the IRS permits pass-through taxation. In addition, states have found LLCs a convenient entity for the imposition of additional tax burdens. For instance, a business entity tax or corporate income tax is assessed on LLCs in Alabama, Florida, Michigan and Pennsylvania, while Texas and New York impose special "filing taxes." Finally, although filing fees vary greatly, other fees such as those required to accompany annual reports may be revenue enhancing when compared with those required of corporations.

II. CHOICE OF ENTITY ISSUES: HISTORICAL PERSPECTIVE

A. Creation and Management Structure

An LLC is created by filing the "Articles of Organization" with the Secretary of State. According to the Prototype Act, the LLC is officially formed at the time that the signed articles are delivered to the Secretary of State for filing. The person(s) signing the document need not be "members," or owner-investors, at the time of the signing. The filing documents should disclose the name, office, registered agent and whether or not it is operated by an outside manager, a member-manager or members collectively. To distinguish an LLC from a corporation or limited partnership, the name of the business must include the designation "L.L.C." or "L.C." or "Limited Liability Company" or "Limited Company."

17. In North Carolina the LLC Certificate of Authority fee is $250, the fee for filing the Articles of Organization is $125 and the annual report fee is $20. N.C. GEN. STAT. § 57C-1-22 (Michie 1997). In Illinois the fee for filing the Articles of Organization was $500, but was reduced to $400 effective January 1, 1998. Similarly, in Illinois the Annual Report fee was $300, but was reduced to $200 effective January 1, 1998. 805 ILL. COMP. STAT. 180/50-10 (West 1998) as amended by P.A. 90-424 § 10.

18. The ULLCA broadens the concept to a "record" which could include electronic filings or filings by a medium permitted by the Secretary of State. See ULLCA § 206 and comment (1995).

19. PROTOTYPE § 206.


22. The Articles must be accompanied by a filing fee. Ongoing regulatory requirements include an annual report and a renewal fee. Some states, such as Florida, Texas, and New York, impose specific filing "taxes" on LLCs. See PROTOTYPE § 104 and comment (noting that the section is modeled after limited partnership law, RULPA § 103); Mo. ANN. STAT. § 359.704 (1,2) (West 1994). Generally, the Articles must be accompanied by a filing fee with the amount varying significantly depending upon the state. For
The document which governs the internal structure, rights and functions of the LLC is called the "Operating Agreement," and is comparable to corporate by-laws. This agreement is a contract between the members which details the management structure, limitations on continuation of the business and transferability of membership interests, and can alter certain fiduciary duties only by unanimous consent. The Operating Agreement may be a private, unfilled document. Although some states permit oral operating agreements, the Statute of Frauds and other evidentiary issues notwithstanding, an oral agreement is not advisable.

Most statutes require an LLC to have at least two "members" when it is formed as this parallels traditional partnership law requiring at least two partners for taxation purposes. Prior to the check-the-box rule, a single member LLC risked loss of pass-through taxation treatment, or worse, tax status ambiguity. Even "flexible model" statutes did not necessarily have a uniform approach to the single member issue. Some states allowed single member LLCs to be formed, while others permitted or did not expressly preclude the continuation of an LLC after its multi-member LLC had been reduced to one member. A few states expressly prohibited either the formation or continuation of a single member LLC with some state legislatures still failing to react to the January 1997 change in federal tax classification. Finally, based on partnership rulings, an LLC with over 500 members, Missouri requires a filing fee of $105 while imposing no annual fee. An annual report must also be filed, and in some states, requires a renewal fee, while LLCs operating in several states usually must pay multiple renewal fees. See ULLCA § 211 (1995). Some states, such as Texas and Florida have imposed specific filing taxes on LLCs. See Jeffrey A. Tannenbaum, Partnership, Corporations Aren't Only Ways to Start Out, WALL ST. J. May 15, 1991 at B2 (noting that Florida's 5.5% tax is applied to LLCs, but not to partnerships). See infra Part III.

Although it is somewhat parallel to corporate by-laws, the designation of management structure, transferability of interest and dissolving events had added importance with LLCs because of tax considerations. This distinction has been ameliorated by the Check-the-Box rules.

"Bullet proof" statutes generally required at least two members, although some statutes permit a single person to organize the LLC. See PROTOTYPE § 201 comment (noting COLO. REV. STAT. § 7-80-203 (2) (1997), KAN. STAT. ANN. § 17-7605 (1990), VA. CODE ANN. §§ 13.1-1002 to -1010 (Michie 1992)).

27. See Rev. Proc. 95-10, 1995-3, I.R.B. 1 (refusing to rule on whether or not a single member LLC could receive pass-through taxation treatment). See also, Reg. § 301.7701-2 (providing that a traditional partnership must have at least two partners to qualify for partnership taxation).

28. MO. ANN. STAT. tit. 23 chap. 359 (West 1994). Texas and New York have "flexible approach" statutes permitting one member LLCs. See N.Y. LIMITED LIABILITY LAW § 203.
members may expose itself to corporate tax status. 29

An LLC has the option of being either member-managed or manager-managed in most states and under the ULLCA. 30 The Prototype and most "flexible model" LLC statutes specify that the LLC is to be managed by its members, 31 unless the Articles of Organization 32 or Operating Agreement 33 specify otherwise. In a true "bullet proof" statute, a member-managed LLC would be mandatory, rather than being a default position. This assures that all important decisions are subject to approval by members and that this decentralized management structure is treated as a partnership-like characteristic for tax purposes. 34

The owners who have "all rights incident to ownership, not merely economic rights" are called "members." 35 Members of an LLC have inherent rights to a voice in management unless those rights are specifically restricted. 36 The Prototype and many state statutes provide that members will each have one vote regardless of capital contribution 37 unless the Operating Agreement provides otherwise. Default rules vary from state to state,

(McKinney 1998); TEX. REV. CIV. STAT. ANN. art. 1528n (West 1997). The 1994 revisions to the Colorado statute eliminated the two or more member requirement, COLO. REV. STAT. § 7-80-201(2) (1990). For an historical perspective on this issue, see generally, Sandra K. Miller, Increased Flexibility of Limited Liability Company Operating Agreements Raises Questions About Tax Treatment, TAXES, October 1994, at 634-35.

29. I.R.S. Notice 88-75, 1988-2 C.B. 386 indicated that the IRS would treat partnerships with more than 500 members as corporations for tax purposes.


31. "The management authority and duties of a member (in a members managed LLC) are analogous to those of a general partner in a limited partnership." PROTOTYPE § 401 comment.


33. The PROTOTYPE statute vests management in the members, unless the Operating Agreement specifies otherwise. PROTOTYPE § 401.

34. Treas. Reg. § 301.7701-2 c (1) classified an organization as having "centralized management" if the management decisions for the conduct of business were vested in persons or a group other than the entire membership. For an historical look at this issue. See generally, K.L. Harris and F.J. Wirtz, Corporate Governance, Limited Liability Companies and the IRS's View of Centralized Management, TAXES, April 1993, at 225; Special Report, Changes in the Tax Law, LEGAL TIMES, March 20, 1995, at 834.

35. PROTOTYPE § 102 comment.

36. Unlike a closely held corporation, which must file a declaration to be managed by its shareholders, an LLC is presumed to be member-managed unless the Articles or Operating Agreement provide otherwise. See supra notes 31-34 and accompanying text.

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however, with some state statutes providing for a capital ratio default rule.\textsuperscript{38}

Most ordinary decisions are determined by a vote of a "majority in interest,"\textsuperscript{39} unless a manager form of LLC is designated. Decisions related to admission of new members and continuation of the business after a dissolving event\textsuperscript{40} should be subject to unanimous approval by the members to be "bullet proof" for partnership taxation purposes.\textsuperscript{41} Voting power can be delegated by proxy for up to eleven months while proxies can be used by both members and managers.\textsuperscript{42}

Certain types of delegation of management authority to a subgroup of members may be possible without losing the partnership-like characteristic. As long as the group of members has at least twenty percent beneficial interest in the LLC, management authority can be delegated to that group and the "member-managed" requirement will still be satisfied.\textsuperscript{43} This is contrary to earlier IRS Revenue Rulings which indicated that any delegation of essential decisions to less than full membership would be treated as a corporate characteristic, whether or not outside managers were chosen.\textsuperscript{44} It is because of that earlier reasoning that the "default provision" in most states provides for decentralized decision-making by the full membership.\textsuperscript{45}

\textsuperscript{38} PROTOTYPE § 403 comment. This comment adopted a per capita default rule, but recognized that some states have a capital ration default rule. \textit{Id.}

\textsuperscript{39} Id. The IRS and the ULLCA both used the term "majority in interest" without an accompanying definition. Comment to ULLCA § 801 indicates that the Uniform Act intends to be consistent with federal tax language, but as a default rule considers a "majority in number would also be a majority in interest" where "the members' economic interests in the company [are] measured by the members' respective capital accounts, share of profits or distributions [which are presumed to be per capita]." ULLCA § 801 comment (1995).

\textsuperscript{40} ULLCA § 404(a)(2) specifies that most business matters are to be decided by a majority vote of the members of a member-managed LLC, except decisions related to the continuation of the business after a dissolving event. ULLCA § 404(a)(2) (1995).

\textsuperscript{41} Partnership-like characteristics may be preserved for tax purposes with less than unanimous consent given certain precautions and circumstances.

\textsuperscript{42} In a traditional corporation, directors must be present at meeting, RMBCA § 8.02(b), and cannot vote by proxy in their role as directors. The ULLCA does not impose that restriction on LLC managers, but allows proxy voting in the role of managers, as well as in the role as a member. ULLCA § 404(e) (1995). A corporate shareholder's proxy is limited to eleven months. RMBCA § 7.22(c) (1984).

\textsuperscript{43} Rev. Proc. 95-10, 1995-1 C.B. 501.


\textsuperscript{45} The original 1990 Colorado statute was unique in that it actually mandated management by managers. It required transfer of ownership interest and continuation of the business to be subject to unanimous consent of the members, however, to assure two partnership-like characteristics. COLO. REV. STAT. § 7-90-401 (1994). The 1994 revision to the Colorado law eliminated this requirement, but instead adopted a flexible approach to all
If the Operating Agreement designates the LLC as a manager-managed LLC, then "managers shall have exclusive power to manage the business... except to the extent otherwise provided in the Operating Agreement." Managers may be elected and removed with or without cause by majority vote of the members, unless the Operating Agreement provides for other requirements. In such LLCs managers, not members, are agents of the LLC. Filing as a manager-run LLC may serve to cut off apparent authority for some acts of individual members, whereas, in a member-run LLC, all members are agents and retain at least apparent authority to bind the LLC "in the usual way of business."

Where a CPA firm retained agency authority for its members, even though it was run primarily by the Managing Member and Managing Committee, the IRS ruled that the LLC lacked a corporate characteristic. The LLC members had also retained the right to approve personnel decisions. The key factor was that management authority of the managers was not "exclusive." In contrast, an LLC which appointed three or twenty-five members as a management team in its Articles of Organization was found to possess a corporate characteristic. While the Articles must specify whether or not the LLC is manager-run, care should be taken to delegate particular authority to managers in the Operating Agreement, rather than appointing the managers in the Articles. Delegation of "exclusive" management to nonmembers is even more likely to trigger IRS treatment as a corporate characteristic.

The distribution of management decisions specified in the Operating Agreement should be designed to avoid giving a manager "exclusive"

areas, consistent with the national trend. COLO. REV. STAT. § 7-80-101 to - 1101. (1994); See, Risa Lynn Wolf-Smith, Colorado LLC: New and Improved, 23 COLO. LAW. 1473, at 1474 (July 1994).

46. PROTOTYPE § 401(B).
47. Top executives in an LLC are referred to as "managers," rather than as officers.
48. PROTOTYPE § 401(B)(1).
49. Id. at § 301.
50. Id. at § 401, Commentary.
51. Id. at § 301(A).
52. Priv. Ltr. Rul.. 94-12-030 (Dec 12, 1994). This letter ruling indicated that personnel and major business decisions were subject to an eighty percent approval of members. Id.
53. Id.
54. Id.
55. Rev. Rul. 94-5, 1994-1 I.R.B. 122. This ruling indicated that appointment of managers in the Articles could result in centralized corporate-like management structure. Id.
authority. A hybrid form that delegates day-to-day management to a subgroup of members or to an outside manager, but which reserves certain decisions to the members as a whole may be most appropriate. Administrative rights and powers can be delegated to managers, while preserving policy-making decisions to the membership as a whole. The membership as a whole should be required to vote on amendments to the Articles or Operating Agreement, ratification of acts that would violate the duty of loyalty and any decisions regarding the merger or sale of substantially all firm assets. Prudence dictates this similarity to the rights vested in general partners or traditional corporate shareholders. Policy-making decisions could also be delegated to managers, but decisions on admission of new members, personnel matters and continuation of the business after dissolution should be retained by the membership. Where key decision-making power is delegated to managers, veto power should be vested in all members so that the authority of the managers is not exclusive, and therefore, corporate in nature.

B. Limited Liability Issues

The ULLCA provides that a "member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." The Prototype only exempts members from personal liability, but permits each LLC to eliminate or limit such liability for managers or provide for indemnification in its Operating Agreement. State statutes typically shield members and managers from liability, except for willful misconduct or knowing criminal violations. In states that do not provide for the statutory shield, members and managers can be indemnified unless they are found liable for negligence or misconduct.

57. Under the old rules, such a delegation to an outside manager would have been deemed to be a corporate characteristic.
58. ULLCA § 404(c) (1995). Although the MBCA § 2.06 permits directors of a corporation to adopt the by-laws without shareholder consent unless the Articles require otherwise, the Model LLC acts require membership approval of such amendments to the Operating Agreement, because of the added significance that the agreement plays in an LLC. Compare MODEL BUS. CORP. ACT § 2.06 (1984) with ULCA § 103 and comment(1995).
59. ULLCA § 303(a) (1995). Section 304 of the PROTOTYPE statute has similar language protecting members from personal liability for LLC torts and contracts with some limitations.
60. PROTOTYPE § 404. This section permits the Operating Agreement to specify the conditions under which a manager may be excused from liability for breach of a duty or be indemnified for fines, penalties or legal expenses.
62. PROTOTYPE § 404, comment (citing FLA. STAT. § 608-404 (1992) and WYO. STAT. ANN.
A central goal of emerging business organizations and revisions to existing ones is to shield investors from personal liability. Historically, general partners have had joint and several liability for torts or breach of trust committed in the scope of partnership business by either partners or authorized agents. For other debts, such as those arising out of contractual commitments, their liability has been either joint or joint and several under some state revisions. While the 1994 revisions to the Uniform Partnership Act (RUPA) expand joint and several liability to all partnership debts, RUPA also more firmly adopts the concept of marshalling assets to require creditors to exhaust partnership assets before enforcing a judgment against partners individually. To provide greater protection of professionals against the malpractice of their partners, Limited Liability Partnerships (LLPs) excuse a general partner from personal liability beyond investment for torts committed by other partners or by agents not under that partner's supervision. Joint and several liability is still retained for LLP contracts and debts in many states, but an increasing number are adopting broad liability shields for the LLP entity.

In a limited partnership, general partners are still personally liable, but limited partners are shielded from liability beyond their investment, as long as they do not exercise "control" similar to that of a general partner. Under the 1985 Revised Uniform Limited Partnership Act (RULPA), a limited partner can now exercise a number of "safe harbor" rights without being subjected to personal liability. A limited partner is no longer automatically exposed to personal liability on all partnership debts as a result of one act of "control." Due to the addition of an estoppel concept, creditors can hold a limited partner personally liable only if those creditors "transact business . . . reasonably believing . . . that the limited partner is [acting as] a general partner." The emergence of a Limited Liability Limited Partnership (LLLP) may diminish the liability disadvantages of the limited partnership form of business for general partners. In fact, some states are providing

§ 17-15-104(a)(ix) (Michie 1977)).
63. UPA § 15(b) (1914).
64. Id.
67. Id. § 307(d).
68. See ULPA § 303 (1985).
70. RULPA § 303(b).
71. Id. § 303(a).
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statutory limited liability for limited partners even when they exercise managerial control.\textsuperscript{72}

LLC statutes go farther than any of the partnership models in permitting members to limit their personal liability. An LLC is treated as a legal entity and is liable for its own debts.\textsuperscript{73} Members and managers may be shielded from personal liability for torts and contracts entered into in the usual course of business. As with other forms of business, however, an LLC member can be held liable for any debts she personally guarantees and may be sued for her own negligence or wrongdoing. An LLC is an improvement over traditional partnership alternatives because a member can participate in management without automatically subjecting herself to personal liability for business contracts or torts. Because of the management participation and tax features, such as greater ability to use losses to off-set income, a number of commentators have speculated that LLCs will replace most limited partnerships.\textsuperscript{74}

Principles of comity require one state to recognize and enforce the laws of another state, but only if doing so does not violate its own laws or impede its own public policy. An LLC does not fit cleanly in pre-LLC models for conflicts of law purposes. While the Restatement (Second) of Conflicts of Law provides that the laws of the state under which a corporation is organized govern shareholders' liability to third parties,\textsuperscript{75} partners' liability is governed by the state having the most significant contacts.\textsuperscript{76} Hence, the liability and tax treatment of LLCs which are neither corporations nor partnerships, may vary from state to state.

The equitable doctrine of "piercing the corporate/entity veil" permits the courts to protect creditors' interests by imposing personal liability on corporate directors, officers or controlling shareholders where fairness dictates.\textsuperscript{77} If commingling of entity and personal assets of investors is coupled with inadequate capitalization of the business, the corporate veil may be pierced under the alter ego doctrine.\textsuperscript{78} Traditionally, the corporate veil

\textsuperscript{73} ULLCA § 201 (1995).
\textsuperscript{75} RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 307 (1971).
\textsuperscript{76} Id. §§ 292, 294 and 295.
\textsuperscript{78} Id.
also can be pierced to hold officers or directors personally liable for fraud or if entity formalities are not followed.  

Some state statutes specifically provide that the doctrine of "piercing of the corporate veil" applies to LLCs. The ULLCA, however, includes a statutory shield which provides that "failure of a limited liability company to observe usual company formalities . . . is not a ground for imposing personal liability on the members or managers for liabilities of the company." Such a provision confers managers with greater protection than they are afforded under many corporate statutes, where officers or directors can be subject to personal liability for corporate debts during the time that the corporation is not in "good standing." Although a technical violation of record keeping requirements will not cause loss of limited liability status for LLC managers or members, other acts of wrong doing and environmental violations may result in personal liability.

C. Ownership Transfer, Duration and Continuation

To qualify as a partnership-like tax characteristic, transfer of ownership interest and admission of new members had to be restricted. The Operating Agreement was required to specify the nature and percentage required for approval of transfer of ownership interests and admission of new members, however, private letter rulings held that unanimous approval by existing members satisfied the requirement. Unanimous consent is still required in "bullet proof" statutes and is envisioned by the ULLCA, but the trend is toward "flexible models." In states such as Delaware, Missouri and Texas, an LLC may "opt out" of the unanimity requirement by specifying the required method and percentage of approval in the Operating Agreement.

Based on a 1993 Internal Revenue Service Ruling, transfer of ownership interest may be approved by a simple majority vote of the members and still qualify as a partnership-like characteristic. Similarly, if a simple majority of the members approve the admission of a new member, that is a sufficient restriction for tax purposes. Revenue Procedure 95-10 went a step further in promoting flexibility by allowing for approval by a majority of the managers in a manager-managed LLC, or by a group of

79. Id.
81. ULLCA § 303(b) (1995).
83. ULLCA § 404(c)(7) (1995).
84. Rev. Rul. 93-98.
85. Id.
members owning more than twenty percent interest in the LLC.\textsuperscript{86} Perhaps more importantly, this Revenue Procedure was an important evolutionary step as a precursor to the check-the-box rule.

Transfer of ownership interests in an LLC may be facilitated more easily than in a traditional UPA general partnership, where unanimous consent is required.\textsuperscript{87} However under the 1994 RUPA model, there is no longer a mandatory list for unanimous approval of certain matters, such as admission of a new partner, so the advantage an LLC has over a partnership on transferability of interest may be diminished over time.\textsuperscript{88}

A member's right to receive profits is assignable or transferable at the discretion of an individual member, but his participation rights in management are not.\textsuperscript{89} The transfer of the right to receive profits is typically permitted under partnership law and does not create a corporate characteristic. A member's other rights and voice in management, however, can be transferred only with the consent of the other members.\textsuperscript{90}

Generally only one class of LLC members is envisioned. However, some states may permit transfer of interests to either full members or "limited members" (nonmembers). The latter would have a status parallel to limited partners and would not be permitted to help direct the management of the business. While this second class would have the economic right to share in the profits, it would not be subject to self-employment tax. Such a classification might make these members less able to participate in pass-through losses because of their limited basis, and would likely obviate any risk for environmental liability due to the business "control" issue.\textsuperscript{91}

Limitations on the duration of an LLC were once necessary if this feature of the LLC was to qualify as a partnership-like characteristic for federal income tax purposes.\textsuperscript{92} Obviously, the IRS January 1997 check-the-box rule has the potential to create some interesting contradictions in states that choose not to follow the Internal Revenue Service's lead relative to the implementation of state tax policy. An LLC is similar to a traditional term partnership which dissolves at the end of a specified period\textsuperscript{93} or can be dissolved earlier by triggering events listed in the Articles or Operating

\textsuperscript{87} See UPA §§ 18(g), 21 (1914).
\textsuperscript{88} See RUPA § 103 (1994).
\textsuperscript{89} See ULLCA §§ 501-503 (1995).
\textsuperscript{90} ULLCA § 503(a) (1995).
\textsuperscript{91} See LIMITED LIABILITY Co. REPORTER 94-112 (Jan/Feb. 1994).
\textsuperscript{92} Treas. Reg. § 301.7701-2(b).
\textsuperscript{93} This default period is usually thirty years. For alternative treatment, see DEL. CODE ANN. tit. 18, § 18-801 (1992).
Agreement. Events triggering dissolution typically include death, expulsion, retirement, resignation, or bankruptcy of a member. Where the member is another business or trust, the dissolution, termination or distribution of the entire trust or estate will be a dissolving event. An LLC can also be dissolved by court order for fraud or abuse of legal authority. Likewise, it may be administratively dissolved for failure to file an annual report, failure to pay any franchise taxes or not filing articles of termination at the expiration of a specified term. To qualify for partnership-like taxation treatment, the LLC does not necessarily have to require all of the above mentioned items as dissolving events.

The Articles and Operating Agreement should not contain language providing for the automatic continuation of the LLC after a dissolving event. Despite an original Minnesota statute which contained such a business continuation provision, the IRS held that a Minnesota LLC could qualify for partnership-like treatment because its Articles and Operating Agreement contained language negating the statute. It is important to note, though, that this type of restriction is less significant in terms of federal tax classification since adoption of the check-the-box rule.

Members can vote to continue the business only after the dissolution triggering event has occurred. The ULLCA provides that after dissolution, the members "may unanimously waive the right to have the company's business wound up and the company terminated." A number of states have retained the unanimity requirement in their statutes, either as a mandatory "bullet proof" provision or a default option. Several IRS Revenue Rulings have interpreted such a restriction to be satisfactory to preserve the partnership-like characteristic of limited duration.

95. Treas. Reg. § 301.7701. This section specifies that it is a corporate characteristic if these factors (plus insanity of a member) do not cause the business to dissolve. The types of characteristics which trigger dissolution of an LLC parallel those which have traditionally caused dissolution of a general partnership. See UPA §§ 31 and 32 (1914).
98. ULLCA § 809.
102. ULLCA § 802(b) (1995).
103. The Wyoming statute provides that "(i)f a member [of an LLC] ceases to be a member for any reason, the continuity [of the LLC] is not assured, because all remaining members must agree to continue the business." WYO. STAT. ANN. § 17-15-123 (Michie 1977).
Revenue Procedure 95-10 guidelines indicate a willingness on the part of the IRS to permit continuation of the LLC entity upon the affirmative vote of a "majority in interest" of the members, even though the IRS has not yet issued a Revenue Ruling accepting the majority vote. "Flexible models" allow an LLC the option of continuing with a majority vote of the remaining members. This treatment would be consistent with IRS handling of partnerships, as well as conforming with trends in the revision of general partnership law under the RUPA. Partnerships which have continued the business with the consent of a majority of the partners have not been denied partnership taxation by the IRS.

If the LLC is manager-run, the entire membership may not be required to vote on continuation of the business every time a member "dissociates" from the LLC. However, a vote by the membership would be required, however, any time a manager-member dissociates from the LLC as a result of a dissolving event. This brings LLCs into congruity with limited partnership law by paralleling the role of managers to that of general partners and by paralleling the capacity of the other members to that of limited partners. Only the dissociation of a general partner would cause the traditional partnership to dissolve, at which time the remaining members would have to vote on whether or not to continue the business.

The ULLCA borrows this concept of "dissociation" from the 1994 revisions to RUPA. RUPA's development of the concept of "dissociation," which permits the business to continue after the death, withdrawal or expulsion of a partner, minimizes another traditional disadvantage of a partnership. Under RUPA, partnership will be viewed as an entity which can survive the demise of a partner. Fewer events automatically trigger its dissolution. The majority of partners in a term partnership can even vote to continue the business within ninety days of the expiration of the term. Under this model the dissociated member has the right to have its distributional interest purchased. The timing of the buy-out will be dependent on the reason for the dissociation, any existing restrictions on premature dissociation and a determination of whether or not it triggers dissolution. Although these provisions of the RUPA have not been

107. ULLPA §§ 601-603.
110. Id. § 801(2).
111. See ULLCA, Articles 7 and 8 (1995).
interpreted for tax implications in Revenue Rulings, presumably partnerships and LLCs designed in conformance with ULLCA language would receive similar treatment. Presently most states still follow the traditional UPA model and have not amended state statutes to reflect RUPA provisions.

III. IRS "CHECK THE BOX" RULE

The finalization of the check-the-box rule has made it easier for a domestic LLC to automatically qualify for partnership taxation treatment. As discussed previously, an LLC desiring pass-through taxation treatment historically had to satisfy the case set forth in the *Morrisey* case by structuring the business so that no more than two of the following corporate characteristics were present: 1) limited liability of member investors, 2) continuity of life (perpetual duration), 3) unrestricted transferability of a member's interest, and 4) centralization of management. Businesses in existence on or before May 8, 1996, were grandfathered relative to the classifications they claimed under the old rules, unless they elect to change that classification by filing a Form 8832. In adopting the check-the-box rules, the IRS, in effect admitted that traditional arbitrary criteria used to distinguish partnership from corporations is less relevant in an era when LLP registrations allow general partnerships to offer limited liability to general partners. Likewise, the IRS action is also acknowledgement that closely-held corporations are capable of effectively disregarding the board of directors and to function more like a partnership. LLCs, which arguably allow the greatest flexibility in choice of business entity, are now free to individually determine whether partnership or corporate taxation is preferable.

Under the check-the-box rule which was effective January 1, 1997, new domestic unincorporated business entities, including LLCs, will be treated as partnerships for federal income tax purposes. Any business not desiring this default tax classification must file a Form 8832 election to change the tax status, obtaining the signatures of everyone who is a member.

113. Previous Reg. § 301.7701-2(a) and I.R.S. Proc. and Admin. Reg. § 301.7701-(2)(1), both of which were based on the *Morrisey* case. Originally, there were six factors, but the characteristics of "associates" and "objective to carry on a business and divide its gain" are typical of corporations and partnerships. See also *supra* Part II.
115. *Id.*
at the time the election becomes effective.\textsuperscript{117} Such a change in tax status is permitted once every sixty months pursuant to an election rule similar to that rule applied to S corporations.\textsuperscript{118} If fifty percent or more of its total interest in capital and profits is transferred, or a merger occurs, a new business entity is deemed to have been formed and the freedom exists to elect a new tax status.\textsuperscript{119} This is true even if it is less than the aforementioned sixty months since an election had been made by the predecessor business.\textsuperscript{120} The federal tax classification is not binding on states, which are still free to use their own criteria for classifying the taxing LLCs. However, the reality is that most states follow the federal lead with regard to tax classification choices.\textsuperscript{121}

Foreign businesses are subject to other default rules. If all investors have limited liability, foreign business entities will be classified as corporations for United States federal income tax purposes.\textsuperscript{122} At least one investor must have unlimited liability on business debts for the entity to elect partnership taxation status, regardless of how that business is classified in its country of origin.\textsuperscript{123} This differs from the treatment of domestic entities, which can qualify for default partnership classification even if all investors have limited liability.

Some restrictions exist on the acquisition of partnership tax status for domestic business entities. A one member LLC is not treated as a partnership, but the LLC can elect to have the entity "disregarded" for tax purposes, thereby permitting sole proprietorship taxation.\textsuperscript{124} A list of types of

\textsuperscript{117} ANN. 97-5, 1997-3 I.R.B. 15. See also instructions for Form 8832, revised December 1996.
\textsuperscript{118} See I.R.C §§ 1361-1380 (1996).
\textsuperscript{119} Treas. Reg. § 301.7701-3(c)(i)(iv).
\textsuperscript{120} Id.
\textsuperscript{121} In a few states, such as Florida and Pennsylvania, LLCs historically did not receive pass-through tax treatment for state income tax purposes. Since implementation of the IRS check-the-box rule, Pennsylvania recently changed its statute to make it easier for LLCs to be treated as partnerships under state law. 15 PA. CONST. STAT. § 8707 (1997). The check-the-box rule will not be automatically applicable in states without appropriate statutory changes. For example, the California Franchise Tax Board announced in Notice 96-5 that the federal change will not be recognized until regulatory changes or statutory changes are adopted. See 28 TAX ADVISE 217 (April 1997). Many states are struggling with the implementation of both the check-the-box rule and liberalization of S corporation rules under the Small Business Job Protection Act (1996), see Joint Committee on Taxation, Review of Selected Entity Classification and Partnership Tax Issues (JCS-6-97), April 8, 1997. Finally, especially problematic are issues associated with LLCs that have corporate members, see NEW JERSEY LAWYER, THE MAGAZINE, April 1997.
\textsuperscript{122} See Treas. Reg. § 301.7701-2(b).
\textsuperscript{123} Treas. Reg. § 301.7701-3(b)(2)(i)(A).
\textsuperscript{124} Treas. Reg. § 301.7701-3(c)(2,3). See also, One Member LLCs Can Be Created Now, 96 LWUSA 545 (June 17, 1996).
domestic businesses for which corporate tax status is required is also contained in the new rule. Among the businesses included in that list are banks, insurance companies, taxable mortgage pools, wholly owned state organizations and publicly traded partnerships. The new rule does not alter prior distinctions between trusts and business entities. Other factors determining whether or not any joint venture or undertaking qualifies as a business "entity" are determined under pre-1997 tax rules.

With the implementation of the check-the-box rule, LLCs are freer to structure their business organization to satisfy the internal objectives of their investors and still take advantage of default tax classification as a partnership. In making decisions concerning those objectives, however, the drafter still must address what restrictions are to be placed on transferability of ownership interests and what events will trigger dissolution of the LLC. Many questions persist. For example, are the remaining members able to continue the business after a dissolving event, and if so, what vote is required? Also, should issues of majority or super-majority consent for certain transfers or decisions be address in the operating agreement, even if the LLC is to be manager-managed?

The operating agreement also needs to address a number of employment related issues, ranging from allocation of management decision-making to the scope of managerial and agency authority to service responsibilities regarding such matters as vacation, sick leave and disability accommodation. Whether or nor an LLC is member managed can have implications on whether or not members are considered "employees" for purposes of complying with federal civil rights legislation that typically requires compliance if there are fifteen or more employees. A member's status as an "employee" also has other implications, including self employment tax, Social Security and Medicare withholdings. Closely held and family businesses also have additional control and estate tax issues that may impact the choice of entity question. Further, the check-the-box rule does not control

126. See Entity Treatment: A Matter of Choice, NEW YORK LAW J. (June 3, 1996). Partnerships with over 100 members may incur corporate tax unless at least 90% of the income is "qualifying income." See also, Partnerships, Check-the-Box Prompts Need for Clarifying Qualifying Income, Partnerships Tell IRS, Daily Report for Executives, BNA (June 14, 1996).
128. Devine v. Stone, Leyton & Gershman, 100 F.3d 786 (6th Cir. 1996).
issues related to estate planning, bankruptcy or security regulation, nor does it address certain accounting requirements. Some of the foregoing, issues will be discussed in more detail below.

IV. TAX CONSIDERATIONS POST-JANUARY 1997

A. Basis, Loss Deductions and Entity Formation

Although the question of whether an LLC would be subject to federal taxation as a partnership or corporation once revolved around an exhaustive review of the traditional corporate characteristics, approval of the proposed Treasury Regulations made this analysis obsolete. As mentioned previously, effective January 1, 1997, the presence or absence of these factors is irrelevant in determining federal tax classification status of the LLC. Should an LLC want to be taxed as a partnership at the federal level, it merely will make that election. This decision is now comparable to that made by qualified C corporations relative to whether to file Form 2253 for the S election.

If a business anticipates significant tax losses during its early years of operation, the S corporation may not be the best vehicle for allowing owners to obtain an immediate tax benefit from these losses. A shareholder's basis in S corporation stock does not include the shareholder's proportionate share of the corporation's debt financing. This rule seriously restricts the amount of loss an S corporation shareholder can deduct on a personal tax return because loss deductions cannot exceed the shareholder's stock basis. In contrast, the LLC member's basis will include the member's proportionate share of LLC debt. S corporation shareholders do, however, receive an increase in basis for loans they make to the corporation. For tax planning purposes, the generally accepted technique is for the S corporation shareholder to borrow funds personally and then lend the funds to the corporation. Since the IRS has not challenged this technique by arguing the step transaction doctrine or by claiming that the transaction is a sham, it

130. See supra Part II.
131. Treas. Reg. § 301.7701 et. seq. (commonly referred to as the "check-the-box" election). Actually, if no election is taken, the default presumption is partnership taxation treatment. Id.
continues to be a useful solution if loss deductions are an issue.

A problem that is not so easily solved occurs when assets that are subject to liabilities are transferred to the entity. If such an asset is transferred to an S corporation, the transferor will recognize gain to the extent that the liability assumed by the corporation exceeds the shareholder's basis in the asset.\(^{135}\) For example, if an asset with a fair market value of $800,000.00, a basis of $400,000.00 and subject to a $500,000.00 liability is transferred to an S corporation, the transferor will recognize a $100,000.00 gain on the difference between the $500,000.00 liability assumed by the corporation and the $400,000.00 basis. If a LLC were used, this gain would not be recognized. Assume that an LLC member receives a fifty percent ownership interest in return for his asset contribution, the member's basis will include fifty percent of the $500,000.00 debt assumed by the LLC. Although the assumption of the $500,000.00 debt is deemed a distribution of money to the member, it causes recognition of income only if it exceeds the member's LLC basis. That basis is $650,000.00 and is comprised of the $400,000.00 basis of the asset contributed plus fifty percent of the liability assumed. Because the $500,000.00 assumed debt is less than the member's basis of $650,000.00, no gain is recognized.\(^{136}\) This allocation of debt to a transferor's basis for gain recognition is not available in the context of a transfer to S corporations and represents one circumstance where only the LLC provides a solution.

Generally, all LLC debts are allocated to each member's basis "in accordance with their respective interests in the entity." Since the member's basis in the LLC is increased as the LLC acquires more debt, LLC losses can be offset against member's income, especially in a member-run LLC. Because of the limited liability feature of LLCs, all debt is essentially nonrecourse. This distinguishes an LLC from a partnership interest, in which the general partner may be at risk for personal liability beyond capital investment in the business.

In contrast, a partner can only offset losses to the extent he is economically at risk for those losses. In a partnership, a partner is

\(^{135}\) I.R.C. § 357(c). 
\(^{136}\) The member's outside basis is $150,000 after deducting the $500,000.00 liability from which the member was relieved from the $650,000. If it is necessary to further increase the transferor's basis, the remedial method of allocation can be used according to I.R.C. Section 704(c). Using that method, $400,000.00, representing the built-in-gain portion of the debt ($800,000.00 fair market value less $400,000.00 assumed liabilities) is first allocated to the transferor. The transferor's outside basis then equals $350,000.00, which is comprised of the $400,000.00 basis of the asset contributed, the $400,000.00 built-in-gain portion of the debt, $50,000.00 representing fifty percent of the remaining $100,000.00 of assumed debt, less the $500,000 debt from which the member was relieved.
"economically at risk" on "recourse debts" of the partnership. An LLC member would not have that risk unless the member personally guaranteed a particular LLC debt. In doing so, the LLC member would increase its basis to reflect the entire amount of that guaranteed debt. Members in an LLC are in a better position to offset losses against income for federal taxation purposes than shareholders in an S corporation or limited partners in a limited partnership. The issue of whether or not a member of an LLC could be treated as a limited partner for tax purposes in a manager-run LLC remains unresolved.

B. Owner Allocations and Passive Activity Losses

In S corporations, shareholders who contribute cash will be taxed on their proportionate share of gain from the sale of corporate assets. Those assets include property transferred to the corporation by other shareholders which may have had a fair market value in excess of basis. This distortion is corrected when the cash contributing shareholder sells shares. Using the example above, assume that the asset contributed was a building with a fair market value of $800,000.00 that had been depreciated to $400,000.00 and that the other fifty percent owner contributed $300,000.00 in cash. In a S corporation each shareholder would have a $300,000.00 book capital account. However, the cash contributing shareholder would have a capital account for tax purposes of $300,000.00 compared to the property contributing shareholder's tax capital account of $100,000.00, the latter calculated by subtracting the $400,000.00 basis from the $500,000.00 assumed liability.

If the building is depreciated under alternative MACRS over 40 years, the $10,000.00 annual depreciation deduction would be allocated equally between the shareholders. By allowing the property contributing shareholder an equal share of the depreciation, a portion of the pre-contribution gains is, in effect, shifted to the cash contributing shareholder. This disparity is adjusted in an LLC because depreciation deductions must be allocated to eliminate book versus tax disparities. In this example, the entire $10,000.00 annual depreciation deduction would be allocated to the cash contributing member. Each member's tax capital account would equal $100,000.00 at the end of the forty year depreciation period. To the extent that investors might otherwise be reluctant to contribute cash when other investors are using appreciated property to obtain their ownership interest, the manner in which these deductions are allocated should ameliorate their

137. Treas. Reg. 1.704-3(b)(1).
concerns. When this is a major concern of cash investors, the LLC is the favored entity choice.

If pass-through tax treatment is desired for purposes of using business losses to offset other income, the LLC and S corporation shareholder will be subject to the passive loss provision of the Internal Revenue Code. \[\text{138}\] This provision generally allows passive losses only to be used as an offset against passive income. If the loss is not passive, it can only be offset against other income, such as salary, interest and dividends. Whether a LLC member's or S corporation shareholder's loss is passive depends on the extent of the equity owner's participation in the business.

If an owner "materially participates" in the business, the passive loss limitations do not apply. For purposes of a limited partner in a limited partnership, there is a presumption that a limited partner does not materially participate. \[\text{139}\] However, this presumption is overcome if the limited partner satisfies one of three requirements, such as participating in the business for more than five hundred hours during a year. The IRS seems to have taken the position that LLC members will be viewed as limited partners relative to the material participation test. \[\text{140}\] In contrast, no such presumption against material participation exists for S corporation shareholders. Material participation may be shown by meeting one of seven tests. One of these tests is satisfied if the shareholder, based on all the facts and circumstances, participates in the business on a regular, continuous and substantial basis. \[\text{141}\] The broader criteria available to the S corporation shareholder for purposes of satisfying the material participation requirement is a factor which clearly favors that entity if an equity owner expects to use tax losses to offset other income.

C. Property Distributions and Employment Taxes

The LLC offers a significant advantage if a distribution of business property to a member is contemplated. No income or loss is recognized by the LLC if it distributes appreciated property to a member. \[\text{142}\] A member who receives such appreciated property will recognize no gain or loss unless cash, marketable securities, receivables or inventory are distributed. \[\text{143}\] Unlike the LLC member, an S corporation shareholder is required to recognize gain

\[\begin{align*}
\text{138. I.R.C. § 469.} \\
\text{139. I.R.C. § 469(h)(2).} \\
\text{140. Treas. Reg. 1.469-4(d)(3)(ii).} \\
\text{141. Temp. Reg. 1.469-5T(a)(7).} \\
\text{142. I.R.C. § 731(b) (West Supp. 1997).} \\
\text{143. I.R.C. § 731(a)(2), (c) (West Supp. 1997).}
\end{align*}\]
when receiving a distribution of appreciated property.\textsuperscript{144} Although the difference in tax treatment is significant, its impact is usually mitigated in the initial planning phase. Assets which may appreciate in value can frequently be leased to the business rather than contributed for an equity interest. Where a leasing arrangement is possible, this factor would not weigh against using the S corporation.

Employment tax is a factor with an impact that can be easily quantified. FICA taxes total 13.75 percent for social security applicable to a 1998 maximum of $68,400.00 of salary income, and 1.45 percent for Medicare applicable to all salary income.\textsuperscript{145} S corporation shareholders are not subject to social security and Medicare taxes on their share of corporate income. Although shareholder employees must pay these taxes on salary income, they are typically in a position to set salaries to minimize the amount that is subject to tax. Although it is possible for the Internal Revenue Service to argue that a salary is unreasonably low,\textsuperscript{146} there is often a significant amount of income that can be shielded from FICA taxes. Since the reasonableness of a salary involves a subjective judgment, the taxpayer can use the absence of an objective standard to establish compensation levels which minimize these taxes.

In contrast, LLC members who either have authority to contract on behalf of the entity or who participate in the business for more than five hundred hours during the tax year will be subject to self employment tax.\textsuperscript{147} Under most state LLC statutes, members of member managed LLCs have authority to contract on behalf of the LLC and many members of LLCs devote more than five hundred hours per year to the business. Because S corporation shareholders are not subject to these tests, this entity offers a significant advantage.

\textbf{D. C Corporation Alternatives and Entity Conversion}

Although the comparison of LLCs to S corporations is appropriate if business owners are seeking partnership income tax treatment, there are many circumstances where pass through tax treatment is either irrelevant or not desirable. In a business which is interested in accumulating capital to finance expansion, the C corporation is the best alternative because it produces the lowest current income tax on retained earnings. This allows the business to retain a higher percentage of its earnings on an after tax basis to

\textsuperscript{144} I.R.C. § 331 and 336.
\textsuperscript{145} I.R.C. § 1301(a), (b).
\textsuperscript{146} Rev. Rul. 74-44, 1974-1 C.B. 287.
\textsuperscript{147} Prop. Reg. 1.1402(a)-2(h)(2).
fund anticipated growth. In other situations, businesses anticipate distributing virtually all of their profits. Professionals and many service oriented businesses pay out all earnings as compensation. In these cases, pass through tax treatment is simply not a relevant consideration.

Another significant advantage enjoyed by the C corporation is preferential treatment of fringe benefits. LLCs cannot deduct expenses incurred in providing fringe benefits to its members. Similarly, S corporations cannot deduct these same expenses where benefits are provided to shareholders except where the shareholder owns two percent or less of the corporate stock. These benefits include group term life insurance up to $50,000.00, meals and lodging furnished for the convenience of the employer, and health insurance and medical reimbursement. In entity formation, questions about health insurance and medical coverage are often key factors in making the choice between business forms, and usually result in the conclusion that the C corporation is preferred. Needless to say, the savings which result from being able to finance these benefits with pre-tax dollars is considerable.

Entity conversion is yet another issue for the firm which is already in existence and contemplating whether the LLC form of business would be preferred. The majority of states address issues concerning foreign LLCs, as well as mergers or consolidations of LLCs with other business organizations. General partnerships and limited partnerships are permitted to merge with or convert to LLCs and these statutes often allow the partnership to circumvent provisions in its partnership agreement which may not have allowed such a conversion at the time the agreement was drafted. While partners will obtain limited liability for new business debts upon conversion to an LLC, they remain personally liable on pre-existing partnership debts even after conversion.

Previous IRS rulings have permitted a general partnership to convert to a limited partnership through an amendment to its partnership agreement, and appropriate public filings, without termination of the partnership. Since partners contributed capital and basis equivalent to what they had in the general partnership, no tax gain is realized. This ruling has been extended to partnership to LLC conversions.

Businesses that already exist as partnerships may want to consider converting to either an LLP or an LLC. Conversion to an LLP is the simplest and is achieved by filing as an LLP with the Secretary of State. The primary

revision to the partnership agreement would be to add provisions related to limited liability of members and managers. A partnership can convert to an LLC without dissolving and without significant negative tax consequences under the Internal Revenue Code.\textsuperscript{151} This assumes that 50% or the capital and interest in the partnership is retained by the LLC and not sold or traded within a twelve month period, and further, that former partners acquire at least 50% ownership interest in the new LLC.

For a corporation that may consider converting to an LLC, the decision is more complex. Conversion of an existing C or S corporation is a liquidating event, thereby creating tax consequences upon dissolution. It will trigger a capital gain taxation liability upon the transfer of appreciated property to the LLC. The investor's basis may also be increased in value, as an increase in adjusted basis is realized triggering tax liability upon conversion to an LLC. "Safe Harbor" versus POP methods of allocating income will have to be addressed, especially in LLCs which have liquid assets which are traded frequently.

V. OTHER RELEVANT CONSIDERATIONS

The trend in the evolution of various forms of business organizations is to facilitate greater flexibility of management structure and decision-making, while providing limited liability for investor-owners and managers. This trend is apparent with the development of close corporations, which permit a small corporation to file to abolish the board of directors, thereby permitting shareholders to run the corporation. New forms of business are emerging that avoid the more cumbersome corporate formalities, notably limited liability companies (LLC), limited liability partnerships (LLP), family limited partnerships (FLP) and limited liability limited partnerships (LLLP). Even traditional general partnership law is undergoing a face lift with the development of the Revised Uniform Partnership Act of 1994 (RUPA).

LLP statutes are being developed to recognize a new type of general partnership. LLP amendments to partnership law are fostered by accounting professionals who seek to limit their liability for the malpractice of co-partners. Forty nine states and the District of Columbia have passed LLP statutes, and although the legislation varies from state to state, the most common feature protects general partners from tort liability for the wrongdoing of other partners and agents not under their direct control. Approximately one-half of the statutes shield partners from joint and several liability of the partners for contractual obligations and debts of the

\textsuperscript{151} I.R.C. §§ 702, 708.
partnership. In states which permit these new forms of business for professionals, LLCs or LLPs may be an attractive alternative for a new business.

Professional personal service firms have several structural options emerging in the 1990s. Historically, professionals were restricted to the general partnership form of business, which meant broad liability exposure of partners for torts of agents and other partners. Today alternatives such as professional corporations, LLCs and LLPs, minimize professional liability for the wrongdoings of others.

Professional corporations are recognized in all states, and a growing number permit professionals to organize as LLCs. Some expressly permit this as part of the state’s general LLC statute; others have separate Professional LLC legislation or leave the decision to professional licensing associations. In contrast, California and Rhode Island expressly prohibit professionals from operating under an LLC form of business. 152

An LLC also affords more options for joint ventures, especially if foreign investors are involved. An LLC can be a shareholder in a corporation or, unlike the S corporation, may have a corporation as an equity holder. The LLC, however, can avoid the 80% control requirement needed for consolidated corporate returns. Foreign tax implication should be also considered for any firm doing business in more than one country. A number of other countries have recognized forms of business similar to LLCs long before they became popular in the United States, such as the German GmbH, French SARL, U.K. Holding Company, and South American limitada. 153 Businesses organizing abroad, however, may need to customize documents to facilitate appropriate tax status in the U.S.

A final consideration is the manner in which LLCs will be treated for security regulation and bankruptcy purposes. Whether an LLC will be covered by the securities statutes may depend on the type of management structure selected. Since LLCs are not specifically addressed in the Bankruptcy Code as a form of business, an LLC filing for bankruptcy would need to qualify as either a corporation or a partnership. Under section 101 of the Bankruptcy Code, an LLC might meet the definition of a corporation:

(A)(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; or

(A)(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such an

152. See 1996 Cal. Legis. Serv. 57 (West); R.I. GEN LAWS § 7-16-3 (1997).

153. See P.L.R. 80-03-072 (Oct. 25, 1979), which treated a Brazilian limitada as a partnership for United States federal tax purposes.
association; or (A)(iii) unincorporated company or association.154

A limited partnership is excluded from the above definition. Some
business trusts are ineligible for bankruptcy relief based on the foregoing
definition.

Additionally, different issues emerge under the various Bankruptcy Code
chapters. For instance, should a member's personal bankruptcy trigger
"dissociation" from the LLC? Under normal conditions, an assignment of a
member's interest will not automatically trigger "dissociation." Should
bankruptcy be treated differently? Bankruptcy is listed in the PROTOTYPE
Act, the ULLCA and the RULE as an event causing "dissociation" and
potentially dissolution of an LLC.155 Operating Agreements and state
statutes sometimes attempt to shield the LLC from negative consequences
when a member goes bankrupt by trying to limit the bankruptcy trustee's
access to LLC assets. The agreements may specify that dissolution may not
be forced. It cannot be overlooked, however, that federal pre-emption issues
lurk with respect to the effectiveness of these state statutory attempts to
control domestic LLCs.

VI. CONCLUSION

It appears that the LLC is clearly the preferred entity in circumstances
where the S Corporation is either not available, or, if available and chosen,
would create adverse tax consequences that would be avoided with the LLC.
If a business will have more than seventy five owners or have partnership,
corporation or nonresident alien owners, the S corporation is simply not
available. Where financing the business requires the use of debt with
conversion or participation features or the granting of preferred returns to
certain owners, the S corporation could not be used. When appreciated
property subject to debt in excess of the property's basis will be transferred to
the entity, the LLC will avoid recognition of the gain that otherwise would be
taxed with a S corporation. Similarly, when depreciable property with a fair
market value in excess of its basis in contributed, the LLC allows
depreciation deduction to be allocated to the cash contributing owners.

There are also circumstances, however, which would clearly favor the S
corporation. If owners wish to use business losses to offset other income,
they will be more likely to satisfy the material participation tests applicable to
S corporations. In addition, the opportunity to minimize employment tax
liability for owners who are involved in the operation of the business is an

155. See also PROTOTYPE § 802 comment.
advantage that favors the S corporation owners who have control over their salaries. Business entities planning to accumulate capital for expansion, distribute all corporate earnings as compensation, or wish to provide fringe benefits with pre-tax dollars, the traditional C corporation is clearly the entity of choice.

Remaining factors which are discussed in this article are either neutral or can be navigated with proper planning. Leasing arrangements and shareholder loans, for example solve the potential problems associated with distributions of appreciated property and the basis limitations on the deductibility of losses. Beyond those factors discussed, the lack of a uniform LLC statute, the paucity of interpretative case law, the relative complexity of the partnership IRC sections compared to the S corporation provisions and the consequent additional professional fees involved in working with that complexity, are additional reasons that militate toward careful consideration before deciding on the LLC as the entity of choice.

TABLE I
STATE LLC STATUTES

(Organized according to year enacted)

1982: FLA. STAT. Ch. 608.401-.471 (1982)
      KAN. REV. STAT. ANN. §§ 17-7601 to -7651 (1990)
1991: NEV. REV. STAT. ANN. §§ 86.010-.571 (Michie 1991)
      TEX. REV. CIV. STAT ANN. Art. 1528n (West 1992)
      VA. CODE ANN. §§ 13.1-1000 to -1123 (Michie 1992)
      DEL. CODE ANN. tit. 6 §§ 18-101 to -1107 (1992)
      ILL. COMP. STAT. 180/1-1 to 55-10 (West 1994)
      IOWA CODE §§ 409A.100 to -.1601 (1992)
      LA. REV. STAT. ANN. §§ 12:1301 to :7651 (West 1992)
1998] TAX CONSIDERATIONS FOR LLC’S 613

Minn. Stat §§ 322B.01-.955 and §§ 319A.01-.22 (1993)
R.I. Gen. Laws §§ 7-16-1 to -75 (1992)

1993:
Idaho Code §§ 53-601 to -672 (1994)
N. D. Cent. Code §§ 63.001-.990 (1994)
Or. Rev. Stat. §§ 63.001-.990 (1994)
S. D. Codified Laws §§ 47-34-1 to -59 (Michie 1994)
Wis. Stat. §§ 183.0102-.1305 (1994)

1994:
Alaska Stat. §§ 10.50.010 to .995 (Michie 1994)
Ohio Rev. Code Ann. §§ 1705.01-.58 (Anderson 1995)

I. INTRODUCTION

American medical science is world renowned for the innovative adaptation of technology to create devices¹ that improve, prolong and sometimes save lives. The application of technology to medicine, however, has not been problem free, as evidenced by the numerous injuries suffered by women who used the Dalkon shield intrauterine contraceptive device during the 1970’s.² In response to the revolution in bio-medical technology,³

¹. Devices are distinguished from drugs under the federal regulation of medical products. Drugs were first regulated under the 1906 Food and Drugs Act, but medical devices as a distinct category came into being in 1938 “as a weaker system of controls generally parallel to drug regulation.” J. O’REILLY, FOOD AND DRUG ADMINISTRATION § 18.01 at 18-2 (2d. ed. 1995). Today, however, “medical device products [are] among the most closely regulated of American consumer products.” Id. On November 21, 1997, President Clinton signed into law the FDA Modernization Act of 1997 (§ 830), which was designed, in part, to improve the FDA’s regulation of medical devices. See generally CENTER FOR DEVICES AND RADIOLOGICAL HEALTH, U.S. FOOD & DRUG ADMIN., THE FOOD AND DRUG ADMINISTRATION MODERNIZATION ACT OF 1997, DESCRIPTION OF SELECT MEDICAL DEVICE PROVISIONS, (last modified Dec. 2, 1997) <http://www.fda.gov/cdrh/modact/lawsum.html>.

The statutory definition of “device” under the federal food and drug laws is contained in 21 U.S.C. § 321(h) and is quite broad. “Essentially, any item promoted for a medical purpose that does not rely on chemical action to achieve its intended effect is considered to be a medical device . . . [a]ltogether there are more than 1700 different types of medical devices, 50,000 separate products, and 7,000 manufacturers of such devices.” David A. Kessler et al., The Federal Regulation of Medical Devices, 317 NEW ENG. J. MED. 357, 357-58 (1987).

². According to the Congressional committee report on the Medical Device Amendments, the Dalkon Shield IUD was placed on the market in 1970 as a “safe and effective contraceptive device” and just five years later “the device had been linked to sixteen deaths and twenty five miscarriages.” When the report was written, 500 lawsuits were pending against the device’s manufacturer. Committee On Interstate And Foreign Commerce, Medical Device Amendments Of 1976, H.R. Rep. No. 94-853 at 8 (1976) reprinted in AN ANALYTICAL LEGISLATIVE HISTORY OF THE MEDICAL DEVICE AMENDMENTS OF 1976, app. III (Daniel F. O’Keefe & Robert Spiegel eds., The Food and Drug Law Institute, Inc., 1976) [hereinafter HOUSE REPORT].

³. Modern developments in the plastic, electronics, metallurgy and ceramics industries, along with progress in design engineering led to the invention of the heart pacemaker, the kidney dialysis
and to the concurrent increase in personal injuries resulting from improperly designed and tested devices, Congress enacted the Medical Devices Amendments ("MDA") to the Federal Food, Drug and Cosmetic Act ("FDCA") in 1976. Under the MDA, Congress gave the Food and Drug Administration (FDA) broad authority to issue regulations that govern the safety and effectiveness of medical devices before they enter the marketplace. Furthermore, Congress did not want state imposed requirements for medical devices to burden interstate commerce by conflicting with the FDA's device regulations. Thus, a provision was added to the MDA declaring that federal regulations would preempt, or override, any state "requirement . . . which is different from, or in addition to . . ." any federal requirement governing medical devices.

In 1994, Ms. Helen Niehoff brought a product liability action based on Kentucky tort law against Surgidev Corporation, alleging that Surgidev's defective design of an intraocular lens implant caused an infection which led to the loss of her eye. Since the FDA had already issued regulations governing intraocular lenses, would a potential judgment in favor of Ms. Niehoff establish "requirements" in the form of standards or duties with which lens manufacturers would need to comply under Kentucky common law? If so, would these Kentucky common law requirements be "different from, or in addition to" federal requirements, thus precluding Ms. Niehoff from having her day in court? In the recent case of Niehoff v. Surgidev Corp., the Kentucky Supreme Court allowed Ms. Niehoff to bring her case to court, holding that the Medical Device Amendments did not preempt her state law tort claims against Surgidev. Relying on the United States Supreme Court's 1996 decision, Medtronic, Inc. v. Lohr, Justice Wintersheimer and a slim majority reasoned that strict liability claims


9. 950 S.W.2d 816 (Ky. 1997).

were "laws of general applicability to all products" and were thus beyond the scope of the MDA's express preemption provision.\textsuperscript{11}

As with many cases deciding the preemption issue, there was no dispute in \textit{Niehoff} over the fact that federal law can preempt state law. The disagreement was over the "scope" of preemption under a particular federal statute.\textsuperscript{12} With \textit{Lohr}, it was hoped that the Supreme Court would clarify the scope of the MDA's express preemption clause.\textsuperscript{13} Instead, the Court "squandered a valuable opportunity"\textsuperscript{14} to provide effective guidance for lower courts on how to decide whether the federal MDA overrides state law.

At the heart of the MDA preemption controversy is basic principles of federalism. Historically, states have had "great latitude under their police powers to legislate as to the protection of lives, limbs, health, comfort and quiet of all persons."\textsuperscript{15} Therefore, the Supreme Court recognizes a fundamental "presumption against preemption"\textsuperscript{16} when interpreting expansive federal regulatory schemes that might encroach on traditional state law doctrines. Additionally, since judges must decide whether a potential damages award in a tort claim against a medical device manufacturer would interfere with Congress' purpose behind the MDA, the preemption issue highlights differing judicial assumptions about the role of tort law as both a form of regulation and as a compensation mechanism.\textsuperscript{17}

\begin{enumerate}
\item 11. \textit{Niehoff}, 950 S.W.2d at 822.
\item 12. \textit{Id.} at 818. See also \textit{Cipollone v. Liggett Group, Inc.}, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, dissenting in part) (noting that when Congress is ambiguous about preemption, the issue is the extent of preemption, not its existence).
\item 13. See, e.g., Richard C. Reuben, \textit{The Heart of the Matter: Product Liability Case Will Test Court's Commitment to Federalist Principles}, ABA J., May 96 at 44 (briefly discussing the importance of \textit{Lohr}).
\item 14. Lars Noah, \textit{The Preemption Morass: Medtronic Leaves Muddled the Question of Whether or When Federal Law Pre-empts State Tort Claims Against Defective Medical Devices}, LEGAL TIMES, July 29, 1996 S-37, at S-38 (also suggesting that \textit{Lohr} will not destroy the preemption immunity for medical device manufacturers).
\item 16. \textit{Id.} at 2230.
\item 17. Compare \textit{Cipollone v. Liggett Group, Inc.}, 505 U.S. 504, 521-22 (1992) (Stevens, J., arguing that common law actions have a direct effect on the behavior of manufacturers) \textit{with id.} at 536-37 (Blackmun, J., concurring in part, concurring in the judgment in part, dissenting in part; asserting that damages awards have an indirect effect, and that tort law has a separate function as a system of compensation). See also Richard C. Ausness, \textit{Federal Preemption of State Products Liability Doctrines}, 44 S.C. L. REV. 187, 231-34 (1993) (critiquing preemption analysis generally)(hereinafter Ausness, Federal Preemption); Susan Rose-Ackerman, \textit{Tort Law in the Regulatory State, in Tort Law and the Public Interest} 80 (Peter H. Schuck, ed., 1991) (examining and comparing the regulatory effect of tort law and statutory regulation).\end{enumerate}
Part II of this note will provide a brief background of the Medical Device Amendments, the doctrine of federal preemption, and the scope of federal preemption under the MDA as defined by *Cipollone v. Liggett Group, Inc.* and *Medtronic, Inc. v. Lohr.* This information is helpful for a better understanding of the court’s reasoning in *Niehoff.* In part III, this note will discuss the facts and the court’s holding in *Niehoff,* and in Part IV this note will analyze the decision in comparison with current post-*Lohr* case law. Part V will conclude with the observation that the Kentucky Supreme Court’s strict reading of *Lohr* eliminates the preemption defense for most medical device manufacturers.

II. BACKGROUND

A. The Regulatory Scheme of the Medical Device Amendments

1. The Device Classification System

Congress had a dual purpose in enacting the MDA: (1) to regulate the safety and effectiveness of medical devices; and (2) to encourage innovation of new medical devices beneficial to the “health and longevity of the American people.” 18 Thus, before a manufacturer can market a new medical device, the FDA must first assign a device to one of three statutorily defined classifications based on the device’s degree of safety and effectiveness. 19 The classification which a device receives will determine the standard of FDA approval required before it can be sold.

Devices that present no unreasonable risk of illness or injury are designated Class I and are subject only to minimal regulation by “general controls.” 20 Devices that are potentially more harmful are designated as Class II. 21 Manufacturers of Class II devices may market their products without advance approval from the FDA, but they must comply with fed-
eral performance regulations known as “special controls.” Finally, Class III medical devices have the greatest potential to cause illness or injury, but may also be important for sustaining life. Because of the health risks that Class III medical devices pose to the public, they are generally subject to a rigorous FDA “premarket approval” ("PMA") process before they can be sold and used in the treatment of a patient. Thus, under the PMA process, a manufacturer of a Class III device must submit: all of its information on any investigations concerning the device’s safety and effectiveness; a statement of the intended use of the product; a description of the expected manufacturing process; and any other relevant information the FDA may require. The process is extensive and time consuming, with the FDA spending an average of 1200 hours on each PMA submission. But, a manufacturer can avoid the lengthy PMA process under three important exceptions: (1) the “grandfathering” provision; (2) the “substantially equivalent” provision; and (3) the “investigational device exemption.”

First, under a “grandfathering” provision in the MDA, pre-amendment (before 1976) medical devices were permitted to remain on the market pending later review by the FDA. Second, because of the “grandfathering” provision, Congress included a “substantial equivalence” provision allowing new post-amendment devices that were substantially equivalent to pre-amendment devices to be subject only to a limited “premarket notification” review. Under the premarket notification process (also called the “section 510(k) process” after the number of the section in the original act), a manufacturer of a substantially equivalent device must notify the FDA of its intentions to market the device, and if there is no objection by the FDA within 90 days of receipt of this premar-

22. Id. Special controls include performance standards, postmarket surveillance, and development and dissemination of guidelines. Id. Examples of Class II devices include items such as condoms, 21 C.F.R. 884.5300, and hearing aids, 21 C.F.R. § 874.3300.
28. See id. § 360(e)(b)(1)(B).
29. See id. § 360(k); Class I & II devices are also subject to the requirements of this provision; see also Lohr, 116 S. Ct. at 2247.
30. Lohr, 116 S. Ct. at 2247.
ket notice, the device may be sold. An example of a device approved under the section 510(k) "substantial equivalence" process is the pacemaker component at issue in Lohr.

The purpose behind the "substantially equivalent" provision was to prevent pre-amendment devices from monopolizing the market while new post-amendment devices were undergoing the lengthy PMA process. Also, the section 510(k) process applied to modifications of pre-amendment devices, thus encouraging improvements. Currently, the "substantially equivalent" process is the preferred way for a manufacturer to bring a Class III device to market. As the Lohr court noted, 80 percent of new Class III devices were brought to market in 1990 through the substantially equivalent process.

Third, under the "investigational device exemption" ("IDE"), a device under development may be sold on an experimental, pre-approval basis. Usually, a manufacturer will obtain an IDE for a device in order to perform clinical studies and collect data to submit to the FDA for premarket approval. The FDA has issued specific regulations governing investigational devices generally, and up until 1997, the FDA had specific regulations just for intraocular lenses, such as the lens at issue in Niehoff. The general IDE regulations require a detailed application describing the device under investigation and setting forth a plan for studying its use in human subjects, which is reviewed both by the FDA and an institutional review committee. Since the clinical studies are performed on human

31. See Kessler et al., supra note 1, at 359.
32. The component is a pacemaker lead, the portion of a pacemaker that transmits the heartbeat-steadying electrical signal from the 'pulse generator' to the heart itself. Lohr, 116 S. Ct. at 2247.
33. Lohr, 116 S. Ct. at 2247.
34. Id.
35. Robert Adler & Richard Mann, Preemption and Medical Devices: The Courts Run Amok, 59 Mo. L. Rev. 895, 914 (noting also that Congress made the 510(k) process stricter under the Safe Medical Devices Act of 1990).
36. Lohr, 116 S. Ct. at 2247.
38. Kessler et al., supra note 1, at 360.
40. Id. § 813. This section was removed and reserved in 1997 because the FDA believed that it was no longer necessary to maintain particularized regulations on IOL investigation because approved IOL's are now widely available and investigations of IOL's can be conducted under the investigational device regulations applicable to medical devices generally 62 Fed. Reg. 19, 4164 (1997). Moreover, IOL's were experimental in the 1970's, but today are a standard treatment for cataract patients. Slater v. Optical Radiation Corp., 961 F.2d 1330, 1332 (7th Cir. 1992).
subjects, the FDA has strict requirements for informed consent and the monitoring of the investigations. Moreover, an IDE evaluation differs from the PMA process in that the FDA does not formally "approve" IDE devices, nor does the FDA impose design requirements on IDE devices. Finally, the policy behind the IDE exception is to give doctors and engineers the freedom to develop new medical devices, but not at the expense of public health.

In sum, the federal statutory structure governing medical devices imposes various levels of design, manufacturing and labeling requirements tied to a three-part classification system. A device is classified based on the FDA's determination of possible risk to the public. The classification system is important to understand in the preemption context, because a device's classification will often determine whether a federal requirement preempts a state-tort law claim.

2. The Express Preemption Provision

When Congress enacted the MDA, it recognized that conflicting state and federal requirements would unduly burden the interstate trade of medical devices. Therefore, the MDA contains an express preemption provision which states that:

No state or political subdivision of a state may establish or continue in effect with respect to a device intended for human use any requirement-

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the de-

42. Id.


44. See 21 U.S.C. § 360j(g)(1)(994). This section states:
The purpose of this subsection to encourage, to the extent consistent with the protection of public health and safety and with ethical standards, the discovery and development of useful devices intended for human use and to maintain optimum freedom for scientific investigators in their pursuit of that purpose.

Id.

45. Compare Niehoff v. Surgidev Corp., 950 S.W.2d 816, 818-19 (majority's discussion of IDE and a finding no preemption of state claims) with id. at 823-24 (dissent's discussion, finding preemption). See also Lohr, 116 S. Ct. at 2253-57 (scrutinizing FDA classification system in order to determine preemption); Carrier, supra note 19, at 550 (discussing importance of FDA classification for preemption analysis).

vice or to any other matter included in a requirement applicable to the device under this chapter.47

To implement the MDA's preemption provision, the FDA promulgated corresponding regulations.48 In these regulations, the FDA interpreted the scope of the MDA's preemption provision by stating that: "no state . . . may establish . . . any requirements . . . having the force and effect of law (whether established by statute, ordinance, regulation, or court decision),"49 which is different from, or in addition to, any requirement . . . applicable to a medical device covered by the MDA.50

Furthermore, the implementing regulations limit the scope of the preemption provision in declaring that state claims are preempted only when the FDA has "established specific counterpart regulations . . . applicable to a particular device."51 Significantly, the regulations also provide that state requirements are not preempted if they are of "general applicability where the purpose of the requirement relates . . . to other products in addition to devices."52 The regulations further state that no state requirement is preempted if it is "equal to, or substantially identical to" FDA requirements.53 In addition, the regulations allow a state to apply to the FDA to have certain state medical device requirements exempted from federal preemption.54

Given the ambiguity in the MDA's language over what a "requirement" entails,55 and the lack of clarity in the FDA regulations interpreting the scope of preemption under the MDA, there has been much debate among the courts and commentators over what Congress intended.56 Sig-

47. 21 U.S.C. 360k(a) (1994) (emphasis added); see also 21 C.F.R. § 801.1(b)(1996).
48. 21 C.F.R. §§ 808.1 - 808.5.
49. Id. at § 808.1(b)(emphasis added). The use of court decision here is not clear, as one commentator suggests it may mean "nothing more than judicial applications of state positive law . . . [but] courts have interpreted the regulation as extending to common law judgments as well . . . ." Lars Noah, Amplification of Federal Preemption in Medical Device Cases, 49 FOOD & DRUG L.J. 183, 187, n. 20 (1994) (citing sections of the Fed. Reg.); but see Adler & Mann, supra note 35, at 938-94 (arguing that the FDA never interpreted the MDA to extend to tort claims).
50. 21 C.F.R § 808.1(b).
51. Id. at § 801.1(d).
52. Id. at § 801.1(d)(1) (emphasis added) (citing state electrical codes and the UCC warranty of fitness as examples of requirements of general applicability).
53. Id. at § 801(d)(2).
54. 21 U.S.C. § 360k(b), see also 21 C.F.R. § 808.1.
56. See discussion infra part II.B.1.
nificantly, four Justices in *Lohr* \(^{57}\) and commentators \(^{58}\) have noted the absence of any mention of the preemption of state law tort claims in the language or legislative history of the MDA. Also, until *Lohr*, \(^{59}\) there was much debate among courts and commentators over the effect of the FDA’s regulations interpreting the scope of federal preemption. \(^{60}\) While it now seems settled that the "requirements" language in the express preemption provision may include state law tort actions within its scope, \(^{61}\) the core issue is: What state-tort law action would create specific "requirements . . . different from, or in addition to" FDA requirements for a specific device thus triggering preemption? \(^{62}\) Most courts begin their analysis of this issue by turning to the United States Supreme Court’s federal preemption jurisprudence.

**B. Federal Preemption under the MDA**

1. *The Doctrine of Federal Preemption*

   The principle of federal preemption of state law derives from the Supremacy clause contained within Article VI of the Constitution. Article VI establishes the law of the United States as "the supreme Law of the Land. . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." \(^{63}\) Simply put, if state law collides with federal law, state

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57. 116 S. Ct. 2240 at 2252-53 (Justices Stevens, Kennedy, Souter and Ginsburg) (noting absence of material in legislative history to show that Congress wanted broad preemption of state common law claims under the MDA).

58. See Adler and Mann, *supra* note 35, at 923-24 (noting that nowhere in the MDA or its legislative history is preemption of state law tort claims mentioned); Ausness, Federal Preemption, *supra* note 17, at 231 (noting that none of the preemption provisions in federal product safety statutes specifically mentions damages claims under state law).

59. A majority of justices in *Lohr* showed deference to the FDA’s interpretation of the scope of the MDA and concluded that generally applicable state requirements, such as tort claims, are not preempted except where they have 'the effect of establishing a substantive requirement for a specific device.' *Lohr*, 116 S. Ct. at 2257. See discussion *infra* pp. 20-24.

60. See e.g., Adler & Mann, *supra* note 35, at 938-94 (arguing that the FDA never interpreted the MDA to extend to tort claims); but see Mark Herman and Geoffrey J. Ritts, *Preemption and Medical Devices: A Response to Adler and Mann*, 51 FOOD & DRUG L.J. 1, 16-19 (1996).

61. Note that five justices agreed in *Lohr* that the requirement language includes state law tort actions, and four justices recognized that state law tort claims may be included within the requirement language. Mary Beth Neraas, *Medical Device Preemption After Medtronic, Inc. v. Lohr*, 51 FOOD & DRUG L.J. 619, 624 (1996).

62. Judge Posner succinctly expressed the issue: "If the FDA in a valid regulation under the Medical Device Amendments requires X, and X relates to safety and effectiveness, a state cannot, whether through statute, regulation, or common law decision, require non-X, or X [+,-] Y." *Slater v. Optical Radiation Corp.*, 961 F.2d. 1330, 1333 (7th Cir. 1992).

63. U.S. CONST. art VI, cl. 2.
law must yield to federal law. 64 In practice, however, the doctrine is often difficult to apply, as the closely divided decisions in Niehoff and Lohr demonstrate. Moreover, preemption is not limited to federal statutes, but may also include administrative regulations. 65

A court’s analysis of preemption begins with the language of the statute since “the purpose of Congress is the ultimate touchstone.” 66 However, Congress is not always clear in expressing its intent in statutory language, therefore preemption analysis is often a matter of statutory interpretation. 67 So, a court will first look to the language of the statute at issue to see if Congress expressly declared its intentions to preempt state law (“express preemption”). 68 Second, in the absence of clear preemptive language, a court will consider whether Congress implied its intent to preempt through the structure and purpose of a statute (“implied preemption”). 69 The Supreme Court has recognized two types of implied preemption: “field preemption,” where Congress occupies a field with a statutory scheme so pervasive that state law cannot supplement it; 70 and “conflict preemption,” where Congress enacts a federal law which makes compliance with a state law impossible 71 or where state law frustrates a purpose of Congress. 72 Additionally, inclusion of an express preemption provision in a federal statute does not preclude the existence of implied preemption. 73

For many years, the Supreme Court was reluctant to find that federal public safety statutes preempted state law tort actions to recover damages. 74 Furthermore, the Court has stated that the regulation of health

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64. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).
69. Id.
71. Id. (quoting Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963)).
72. Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
74. See e.g., Silkwood v. Kerr-Mcgee Corp., 484 U.S. 238 (1984) (holding that a state court punitive damages award for injuries suffered as a result of escaped plutonium from a federally licensed nuclear power plant was not preempted, even though Congress has occupied the field of nuclear energy safety); see also Adler & Mann, supra note 35, at 902 (noting courts’ traditional caution in finding preemption of tort claims).
and safety is historically an aspect of state police powers and thus a local concern.\textsuperscript{75}

2. \textit{The Cipollone v. Liggett Group, Inc. Preemption Analysis.}

In 1992 the Court decided the landmark preemption case of \textit{Cipollone v. Ligget Group, Inc.},\textsuperscript{76} which subsequently opened the door for courts to find that the Medical Device Amendments broadly preempted most state law tort claims.\textsuperscript{77} In \textit{Cipollone}, the Supreme Court held that amendments to the Federal Cigarette Labeling and Advertising Act preempted certain state common law actions brought by a victim of lung cancer against a tobacco company, but did not preempt others.\textsuperscript{78} The Act’s preemption provision barred “requirement[s] or prohibitions . . . imposed under state law” which could interfere with federal cigarette advertising and labeling requirements.\textsuperscript{79} Justice Stevens, writing for the plurality, reasoned that the “requirement or prohibition” language “sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary these words easily encompass obligations that take the form of common law rules.”\textsuperscript{80} Justice Stevens further noted that a state court’s award of damages can exert a regulatory effect on business analogous to positive enactments and that state common law damages claims are “premised on the existence of a legal duty” which can impose “requirements” beyond those mandated by the federal act.\textsuperscript{81}

In \textit{Cipollone}, the Court adopted a claim-by-claim preemption analysis that relied on a close textual reading of the federal statute to determine whether a state common law damages claim would potentially create a “requirement” expressly preempted by the statute.\textsuperscript{82} First, the Court narrowly construed the language of the preemption provision “in light of the

\begin{thebibliography}{99}
\bibitem{Hillsborough} Hillsborough County v. Automated Medical Laboratories, Inc. 471 U.S. 707, 719 (1985); see also Medtronic, Inc. v. Lohr 116 S. Ct. 2240, 2245 (1996) (citing Hillsborough and discussing historical state control over health and safety matters).
\bibitem{Cipollone} 505 U.S. 504 (1992).
\bibitem{See infra} See infra note 99-1-3 and accompanying text.
\bibitem{A plurality} A plurality (Justices Stevens, O’Connor, White and Chief Justice Rehnquist) reasoned that the preemption provision did preempt failure-to-warn and fraudulent misrepresentation claims, but did not preempt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy. \textit{Cipollone}, 505 U.S. at 530-31.
\bibitem{Cipollone,} \textit{Cipollone}, 505 U.S. at 520.
\bibitem{Id.} Id. at 521.
\bibitem{Id. at} Id. at 521-22; see also Kennedy v. Collagen Corp., 67 F.3d. 1453, 1459 (9th Cir. 1995).
\end{thebibliography}
presumption against the preemption of state police power regulations."\textsuperscript{83} Second, the court then looked to each state common law claim and inquired whether the legal duty on which each common law claim was premised would constitute a "requirement" within the language of the statute.\textsuperscript{84} Moreover, the Court relied on express preemption analysis in \textit{Cipollone}, finding that Congress' desired "preemptive reach" was indicated by the language of the statute and refused to consider implied preemption.\textsuperscript{85}

Justice Blackmun, joined by Justices Kennedy and Souter,\textsuperscript{86} criticized the \textit{Cipollone} plurality's analysis as a "crazy quilt of preemption"\textsuperscript{87} and asserted disbelief "that Congress intended to create such a hodgepodge of allowed and disallowed claims" under the federal cigarette act's preemption provision.\textsuperscript{88} Additionally, Justice Blackmun disagreed with the plurality's flat statement that the "no requirement or prohibition" language included state common law claims, arguing that Congress' intent was not clear.\textsuperscript{89} He relied on dictionary definitions to argue that the language suggests "specific actions mandated or disallowed by a formal governing authority."\textsuperscript{90} Furthermore, Justice Blackmun criticized the plurality's view that common law damages awards can have a direct regulatory effect, arguing instead that the effect is indirect, because a manufacturer retains a "level of choice" in deciding whether to change its behavior in response to a state court damages award.\textsuperscript{91} He reasoned that a manufacturer "may decide to accept damages awards as a cost of doing business and not alter its behavior in any way," whereas under statutes and administrative regulations there is no similar level of choice.\textsuperscript{92} Justice Blackmun concluded that none of the petitioner's state common law claims were preempted by the federal act and he also predicted that lower courts would have trouble

\textsuperscript{83} \textit{Cipollone}, 505 U.S. at 518, 523.
\textsuperscript{84} \textit{Id.} at 523-24. For example, the Court found that the petitioner's failure to warn claims based on a state common law duty requiring a manufacturer to warn that a product is reasonably safe, suitable and fit for its intended use were preempted to the extent that they would require the respondent tobacco company to include in their advertisements, additional, or more clearly stated, warnings beyond those required by federal law. \textit{Id.} at 524.
\textsuperscript{85} \textit{Id.} at 517.
\textsuperscript{86} \textit{Id.} at 531 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\textsuperscript{87} \textit{Id.} at 542-43.
\textsuperscript{88} \textit{Id.} at 543.
\textsuperscript{89} \textit{Id.} at 535.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.} at 536.
\textsuperscript{92} \textit{Id.}
applying the *Cipollone* plurality's claim-by-claim analysis.\textsuperscript{93} Justices Scalia and Thomas agreed with that prediction in a separate opinion, although they argued that all of the petitioner's claims should have been preempted under the express language of the statute.\textsuperscript{94}

In the aftermath of *Cipollone*, several commentators criticized cases considering federal preemption of state tort law as problematic and conflicting.\textsuperscript{95} One leading commentator suggests that since Congress has not clearly expressed its intent to preempt state tort law damages claims in any federal product safety statute, courts generally rely on implied preemption analysis, usually on "frustration-of-purpose grounds."\textsuperscript{96} Because adequate evidence is often not available on the effect of potential tort liability on the conduct of manufacturers, courts can only speculate, as the plurality did in *Cipollone*, as to whether state tort law claims will obstruct Congress' purpose.\textsuperscript{97} Hence, different assumptions about the effect of state law tort damages claims, such as those exhibited by Justices Stevens and Blackmun in *Cipollone*, will often result in courts deciding differently on factually similar cases.\textsuperscript{98}

After *Cipollone*, state and federal courts wasted no time in finding that most state-tort law claims brought by plaintiffs allegedly injured by medical devices were preempted by the express preemption provision of the

\textsuperscript{93} Id.

\textsuperscript{94} Id. at 544, 555 (concurring in the judgment in part and dissenting in part).

\textsuperscript{95} See, e.g., Adler & Mann, supra note 35, at 899 (attributing difficulty of applying preemption analysis to ambiguity in statutory language and congressional fuzziness on preemption); Richard C. Ausness, The Case for a Strong Regulatory Compliance Defense, 55 MD. L. REV. 1210, 1234 (1996) (claiming that court decisions on preemption are inconsistent and appear to have little predictive value) [hereinafter Ausness, Regulatory Compliance]; Jonathan S. Massey, Federal Preemption of Medical Device Tort Claims: Not What Congress (or the Doctor) Ordered, TRIAL, June 1994, at 58; Noah, supra note 14, at 5-37 (characterizing current preemption jurisprudence as a morass); NOWAK & ROTUNDA, supra note 66, § 9.1 at 320 (discussing preemption generally: [t]he nature of the problem of discovering congressional intent has resulted in judicial ad hoc balancing); but see Susan M. Messner, Medical Device Technology: Does Federal Regulation of this New Frontier Preempt the Consumers State Common Law Claims Arising From Injuries Related to Defective Medical Devices? 7 J.L. & HEALTH 253, 256 (1993) (arguing that the *Cipollone* analysis is useful for determining the scope of preemption under the MDA).

\textsuperscript{96} See Ausness, Federal Preemption, supra note 17, at 231-32 (criticizing frustration-of-purpose analysis because: "First, its primary analytical concept 'statutory purpose', is inherently indeterminate; second, it requires a court to make factual determinations without adequate information; and third, it excludes meaningful consideration of critical policy issues"); see also Ausness, Regulatory Compliance, supra note 95, at 1235 (claiming that courts focus on "regulatory purpose" in preemption cases).

\textsuperscript{97} Ausness, Federal Preemption, supra note 17, at 233; Ausness, Regulatory Compliance, supra note 95, at 1235.

\textsuperscript{98} Ausness, Federal Preemption, supra note 17, at 233; Ausness, Regulatory Compliance, supra note 95, at 1235.
Most of these courts reasoned that since the MDA preemption provision contains "requirements" language similar to that of the federal statute at issue in Cipollone, then state law tort claims that create requirements "different from, or in addition to" federal requirements for medical devices are thus preempted by the MDA. Also, most of the courts finding preemption of state law claims by the MDA employed the Cipollone claim-by-claim analysis.

A minority of courts, however, refused to construe the MDA's preemption provision so broadly and found that only some state law claims were preempted, or even that no claims were preempted at all. Most notably, the Ninth Circuit held in Kennedy v. Collagen Corp. that a plaintiff's state law tort damages claims were laws of "general applicability" and were thus not preempted by the MDA. The Kennedy court relied on the FDA's narrow reading of the scope of the MDA's preemptions provision, and asserted that the MDA's premarket approval process "is supposed to benefit consumers, not create a rose garden, free from liability for manufacturers." Moreover, several commentators noted that applying Cipollone in the MDA context and finding broad preemption detracted from Congress' original purpose for the MDA — to protect consumers

99. See Connelly v. Iolab Corp., 927 S.W.2d 848, 852 (Mo. 1996) (citing eleven post-Cipollone federal appellate court cases that found preemption under the MDA); see also Beverly J. Jacklin, Annotation, Federal Pre-Emption of State Common- Law Products Liability Claims Pertaining to Drugs, Medical Devices, and Other Health Related Items, 98 A.L.R. FED. 124, §§19-28 (1990)(Cataloging numerous cases in October 1996 supplement where state law claims were preempted by the MDA); Adler & Mann, supra note 35, at 917, n.108 (noting the unanimous post-Cipollone finding of preemption among the courts , and citing numerous cases); but see Noah, supra note 49, at 186 (noting that several lower courts had found preemption under the MDA prior to Cipollone and citing several cases).

100. 21 U.S.C. § 360k(a) (1994).

101. Id.

102. See Connelly, 927 S.W.2d at 851-52 (discussing Cipollone analysis and noting federal appellate court cases which followed the Cipollone definition of requirements and thus holding that the MDA preempted most state common law claims); see also Adler & Mann, supra note 35, at 917.

103. See generally, King v. Collagen Corp., 983 F.2d 1130 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); Mendes v. Medtronic, 18 F.3d 13 (1st Cir. 1994); Stamps v. Collagen Corp, 984 F.2d 1416 (5th Cir), cert. denied, 114 S. Ct. 86 (1993).

104. See, e.g., Feldt v. Mentor Corp., 61 F.3d 431, 436 (permitting defective design claim, but holding other claims preempted); see also Anne-Marie Dega, Comment, The Battle over Medical Device Regulation: Do the Federal Medical Device Amendments Preempt State Tort Law Claims?, 27 LOY. U. CHI. L. J. 615, 639-47 (1996)(discussing minority partial-preemption and no preemption court decisions and citing several cases).

105. 67 F.3d 1453 (1995).

106. See 21 C.F.R. § 808.1.

107. Kennedy, 67 F.3d at 1460.
from potentially harmful medical devices.\textsuperscript{108} Because of the conflict between circuits on the preemptive scope of the MDA, the Supreme Court granted certiorari in 1996 to review a case from the Eleventh Circuit, \textit{Medtronic, Inc. v. Lohr}.\textsuperscript{109}

3. \textit{The Medtronic, Inc. v. Lohr Device-specific Preemption Analysis}

The lengthy \textit{Lohr} decision contains three separate opinions: (1) Justice Stevens' seven-part opinion of the court,\textsuperscript{110} (2) Justice Breyer's concurring opinion,\textsuperscript{111} and (3) Justice O'Connor's opinion, concurring in part, and dissenting in part.\textsuperscript{112}

In the main opinion of the Court, Justice Stevens, along with Justices Ginsburg, Kennedy, Souter and Breyer, concluded that Lora Lohr's negligence and strict liability claims based on Florida law against a heart pacemaker manufacturer were not preempted by the MDA.\textsuperscript{113} Justice Stevens repeated that there is "presumption against the pre-emption of state police power regulations"\textsuperscript{114} which compelled a narrow interpretation of the MDA's preemption provision, 21 U.S.C. section 360k(a).\textsuperscript{115} He reiterated that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.\textsuperscript{116}

Justice Stevens then proceeded with the \textit{Cipollone} claim-by-claim preemption analysis of Ms. Lohr's state law claims. First, Justice Stevens reasoned that Lohr's defective design claims were not preempted by the MDA because Medtronic's pacemaker was put on the market through the "substantially equivalent" section 510(k) process.\textsuperscript{117} As a result, the FDA did not "require" the pacemaker "to take any particular form for any par-

\textsuperscript{108} See e.g., Adler & Mann, \textit{supra} note 35 (arguing that neither Congress or the FDA intended for the MDA to preempt state tort claims); Massey, \textit{supra} note 95, at 58 (arguing that Congress never stated in the MDA that it intended to insulate manufacturers from state law liability); Gary L. Wilson, \textit{Listen to the FDA: The Medical Device Amendments Do Not Preempt Tort Law}, 19 HAMLIN\textsc{e} L. REV. 409 (1996). \textit{But see} Noah, \textit{supra} note 49, at 185 (arguing that Congress intended the MDA to have a broad preemptive effect); Herrman & Ritts, \textit{supra} note 60 (arguing legislative history supports finding of broad preemption under MDA).
\textsuperscript{110} Id. at 2259-62 (concurring in part and concurring in the judgment).
\textsuperscript{111} Id. at 2262-64 (joined by Justices Scalia, Thomas and Chief Justice Rehnquist).
\textsuperscript{112} Id. at 2253-58. Lohr's claims included: defective design, identity of requirements, negligent labeling and manufacturing.
\textsuperscript{113} Id. at 2250 (quoting \textit{Cipollone} v. Liggett Group, 505 U.S. 504, 518, 523, (1992)).
\textsuperscript{114} See discussion \textit{supra} part II.A.2.
\textsuperscript{115} Lohr, 116 S. Ct. at 2250 (citing \textit{Cipollone}, 505 U.S. at 516).
\textsuperscript{116} See discussion \textit{supra} pp. 6-7.
ticular reason; the agency simply allowed the pacemaker, as a device substantially equivalent to one that existed before 1976 to be marketed without running the gauntlet of the PMA process." Moreover, Justice Stevens reasoned that the section 510(k) process was only intended to "maintain the status quo" for selling pre-MDA devices, a status quo which included potential tort liability for the defective design of a device. Also, Justice Stevens concluded that the MDA does not preempt a state law claim based on allegations that a device manufacturer has violated FDA regulations.

Turning to Lohr's manufacturing and labeling claims, the five Justice majority showed deference to the FDA's interpretive regulations in 21 C.F.R. section 808.1120 which narrows the scope of section 360(k). The majority concluded that preemption occurs "only where a particular state requirement threatens to interfere with a specific federal interest." 121 The majority then set out a device-specific inquiry based on the language of section 360(k) and section 808.1 to determine if a state requirement is preempted.122 The inquiry has three steps:123 1) Is the federal requirement "applicable" or "specific" to the "particular device" in question? (2) Is the state requirement "with respect to" a medical device and is it "different from, or in addition to" a federal requirement? (3) Or does the state requirement have "the effect of establishing a substantive requirement for a specific device"?124 Under this analysis, the majority stated that a "careful comparison [is required] between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute."125

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118. Lohr, 116 S. Ct. at 2254.
119. Id. at 2255. The majority noted that "[t]he presence of a damages remedy does not amount to the additional or different requirement that is necessary under the statute; rather it merely provides another reason for manufacturers to comply with identical existing requirements under federal law." Id.
120. See discussion supra part II.A.2.
121. Lohr, 116 S. Ct. at 2257.
122. Id.
124. Oja, 111 F.3d at 788 (quoting Lohr, 116 S. Ct. at 2257; 21 U.S.C. § 360(k) and 21 C.F.R. § 808.1(d)).
125. Lohr, 116 S. Ct. at 2257-58. This comparative analysis of state and federal device requirements is based on Cipollone, as noted in footnote 19 at 2258.
Under the device-specific analysis, the majority reasoned that the federal labeling and manufacturing requirements in question were "entirely generic concerns about device regulation generally" and so did not preempt Lohr's common law claims. Likewise, Lohr's state common law negligent manufacturing and failure to warn claims were premised on duties that are "general obligations" for all manufacturers, and thus would not interfere with Congress' specific purpose to regulate the safety and effectiveness of medical devices under the MDA.

Justice Breyer did not join in the part of the opinion that distinguished the MDA from the statute at issue in Cipollone. Thus, only a plurality concluded that nothing in the legislative history of the MDA showed Congressional intent to provide "a sweeping pre-emption of traditional common law remedies against manufacturers and distributors of defective devices." Nor did Justice Breyer join with Justices Stevens, Ginsburg, Kennedy and Souter in refusing to answer Lohr's contention that "state common law duties are never 'requirements' within the meaning of §360(k)" and therefore the MDA could never preempt a state common law claim. Instead, the plurality reasoned that under the device-specific analysis employed here "it will be rare indeed for a court hearing a common law cause of action to issue a decree that has 'the effect of establishing a substantive requirement for a specific device.'" The plurality then concluded that it would consider such a case when it arises.

Justice Breyer's concurring opinion reiterated the majority's view that courts should be guided by the FDA's narrow interpretation of Section 360k. Justice Breyer agreed with the other Justices in finding no pre-emption of Lohr's state law tort actions, but he asserted that the MDA "will sometimes pre-empt a state law tort suit." Also, he agreed with

126. The majority relied on the U.S. Court of Appeals finding that the federal labeling requirements in Lohr were contained in 21 C.F.R. §§ 801(b) and (c); and the manufacturing requirements were Good Manufacturing Practices (GMP’s) contained in 21 C.F.R. § 820. Id. at 2256.
127. Lohr, 116 S. Ct. at 2258.
128. Id. The majority observed that these general obligations are no more a threat to federal requirements than would be a state law duty to comply with local fire prevention regulations and zoning codes, or to use due care in training and supervision of a workforce. Id.
129. Lohr, 116 S. Ct. at 2251-52.
130. Id. at 2253.
131. Id. at 2259.
132. Id.
133. Id. at 2259-62 (Breyer, J., concurring in part).
134. Id. at 2260-61.
135. Id. at 2259.
Justice O'Connor and the three other dissenters who concluded that the "requirements" language of section 360k includes state common law claims. Moreover, he relied on the proposition from Cipollone that state common law damages actions can have a direct regulatory effect and asserted that the MDA could preempt a state requirement "that takes the form of a standard of care or behavior imposed by a state law tort action." In conclusion, he disagreed with the plurality that future cases of MDA preemption of state common law claims will be "few" or "rare."  

Justice O'Connor's opinion, concurring in part and dissenting in part, was joined by Justices Scalia and Thomas, and Chief Justice Rehnquist. Justice O'Connor applied the reasoning of Cipollone and concluded that the term "requirement" in the express language of the MDA's preemption clause encompassed state common law claims. While Justice O'Connor rejected the majority's device-specific analysis and deference to FDA interpretation, she did agree with the majority that Lohr's defective design claims were not preempted because the section 510k process "places no 'requirements' on a device." Also, Justice O'Connor agreed with the majority that Lohr's common law claim alleging violations of federal requirements were not be preempted.

In sum, what conclusions can be drawn from the divided Lohr opinion? Observers who had hoped that the Court would establish precise guidelines on MDA preemption were disappointed by the Court's splintered decision. Since Justice Breyer sided with the O'Connor dissenters

136. Id. at 2259-60. Justice Breyer used a hypothetical to make his point:

In respect to a particular hearing aid component, a federal MDA regulation requires a 2-inch wire, but a state agency regulation requires a 1-inch wire. If the federal law embodied in the 2-inch MDA regulation, preempts the state 1-inch agency regulation, why would it not similarly pre-empt a state law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of a more than one-inch wire is negligent)? The effects of the state agency regulation and the state tort suit are identical.

Id. at 2259.

137. Lohr, 116 S. Ct. at 2262 (Breyer, J., concurring in part).

138. Id. at 2262-64 (O'Connor, J., concurring in part and dissenting in part).

139. Id. at 2264.

140. Id. Justice O'Connor asserted that in a state action based on violations of federal requirements "the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ." Id.

141. See Noah, supra note 14, at S38 (accusing the Lohr court of failing to provide clearer guidelines for medical device preemption issues); see also, Alan J. Lazarus, et al., Recent Developments in Products, General Liability, and Consumer Law, 32 TORT & INS. L.J. 499, 511 (1997) (asserting that Lohr raised many more questions than it answered, and clouded the predictability of the preemption
in the finding that the "requirements" language of section 360k(a) includes state law damages actions, yet sided with the Stevens plurality in finding no preemption based on the facts of the case, two shifting 5-4 majorities were created. These shifting majorities can be distinguished and argued to support or reject preemption of state law claims under the MDA. Nevertheless, the basic Cipollone rule that a state common law damages action may impose a requirement within the meaning of the MDA preemption provision remains valid. Also, a five-justice majority in Lohr agreed that specific federal regulations may preempt conflicting state law "requirements" embodied in judge-made common law, but merely differed on the frequency of this conflict.

Moreover, Lohr adds a layer of medical device specificity to the Cipollone preemption analysis. Courts can no longer find the MDA blanket preemption of all state law tort claims as they did after Cipollone. Before ruling on preemption, courts must closely scrutinize FDA regulations issued for medical devices, examine how a device entered the market (e.g., "substantial equivalence," PMA or IDE), and then make a "careful comparison" to a possibly conflicting state requirement.

Furthermore, most commentators agree that Lohr has eliminated the preemption defense in state law tort cases concerning medical devices cleared by the FDA under the section 510(K) process. However, the
Supreme Court did not conclusively decide whether the FDA’s more rigorous PMA or IDE approval processes would create specific federal requirements that could preempt conflicting state requirements. Nevertheless, the Kentucky Supreme Court considered the issue of IDE devices in *Niehoff v. Surgidev Corp.*  

III. NIEHOFF V. SURGIDEV CORP  

**A. Facts and procedure below**

In September 1983, a Style 10 intraocular eye lens (IOL) manufactured by Surgidev was implanted into Helen Niehoff’s left eye to replace the diseased natural lens removed during cataract surgery. This IOL had been provided to Ms. Niehoff’s ophthalmologist, Dr. Hafer, pursuant to an investigational device exemption granted by the FDA in 1978. Dr. Hafer, as an FDA approved investigational ophthalmologist was required under FDA regulations for IOL’s to receive Ms. Niehoff’s written informed consent before he could surgically implant the experimental lens. However, Ms. Niehoff alleged that she was told only that some risk was involved in the procedure and that she never signed a consent form. In 1989, Ms. Niehoff developed a surgical infection which resulted in the loss of her eye.

In 1991, Ms. Niehoff filed a product liability action based on negli-
gence and strict liability theories against Surgidev in Jefferson Circuit Court. The trial court granted Surgidev’s summary judgment motion on the grounds that the product liability action based on Kentucky tort law was preempted by the federal MDA laws.

The Court of Appeals affirmed the lower court’s reasoning that a state court decision in a products liability suit would establish new state “requirements,” forcing a medical device manufacturer like Surgidev to alter the design of its product in ways “different from, or in addition to” FDA regulations for a specific IDE device. Therefore, Niehoff’s claims were preempted by the MDA because they would impose requirement’s of “limited or specific applicability,” rather than “general applicability.”

In light of the United States Supreme Court’s decision in Medtronic, Inc. v. Lohr, the Kentucky Supreme Court granted discretionary review.

B. Majority Opinion

Justice Wintersheimer, delivered the majority opinion of the court. He first noted that the Congressional purpose behind the investigational device exemption “did not imply any intention to insulate Surgidev from liability to a patient who had not assumed the risk.” Also, he observed that Surgidev had sold the Style 10 lens for ten years without FDA premarket approval even though the FDA had expressed concerns about an investigational exemptions being “unduly prolonged” and used as a “subterfuge for commercial distribution.”

Justice Wintersheimer then began analyzing Lohr, because he believed

158. Ms. Niehoff alleged negligence in the design, marketing, and monitoring of the device, as well as a failure to warn and to obtain her informed consent. Niehoff, 950 S.W.2d at 822.
159. Niehoff, 950 S.W.2d at 822. Ms. Niehoff alleged that the IOL was a defective and unreasonably dangerous product both because of its defective design and because of Surgidev’s failure to warn or to obtain her informed consent. Id. Her strict liability claims were based on the Product Liability Act of Kentucky, KY. REV. STAT. ANN. §§ 411.300-340 (Michie 1992) (based on § 402A Restatement [second] of Torts strict liability) and case law such as Dealers Transport Co. v. Battery Distributing Co., 402 S.W.2d 441 (Ky. 1965).
160. Niehoff also brought a medical malpractice action against Dr. Hafer in a separate suit. Id. at 817.
161. Id.
162. Id. at 818. The Court of Appeals of Kentucky opinion has been withdrawn and will not be published. See 1995 WL 680040 (Ky. App. Nov 17, 1995); 1995 WL 794203 (Ky. App. Nov. 17, 1995).
163. Niehoff, 950 S.W.2d at 818.
164. Id.
166. Niehoff, 950 S.W.2d at 818.
it was "highly influential" and "instructive" for the resolution of the case.\textsuperscript{168} Moreover, he reiterated \textit{Lohr}'s "presumption against preemption" maxim and noted the \textit{Lohr} court's deference to the FDA's narrow interpretation of preemption, two principles which would guide him in his decision.\textsuperscript{169} Justice Wintersheimer also recognized that the FDA regulations for IOLs were more specific than the "substantially equivalent" process at issue in \textit{Lohr}, but that still would not insulate Surgidev from liability.\textsuperscript{170}

Justice Wintersheimer then asserted that "\textit{Lohr} clearly cautioned that future decisions on the scope of preemption under the federal act must focus on a comparison between specific federal and state regulations."\textsuperscript{171} Furthermore, he distinguished the pre-\textit{Lohr}, Seventh Circuit \textit{Slater v. Optical Radiation Corp.} decision, on which the Kentucky Court of Appeals had relied to affirm the summary judgment in favor of Surgidev. Justice Wintersheimer reasoned that \textit{Slater} and other pre-\textit{Lohr} decisions had not considered the specificity of the federal regulations with regard to the design of a device, but had only relied on "general FDA safety regulations to preempt any state common law" claims.\textsuperscript{172} Next, Justice Wintersheimer briefly summarized the three views expressed in \textit{Lohr}, then focused on Justice Breyer's concurring opinion as "critical to the decision of the U.S. Supreme Court and helpful in disposing of this case" and noting that Justice Breyer agreed with the device-specific analysis of the Stevens plurality.\textsuperscript{173}

Justice Wintersheimer then abruptly concluded that Niehoff's tort claims under Kentucky common law were "not divergent from or in conflict with any specific FDA regulations."\textsuperscript{174} The court further held that "Kentucky's strict liability case law and statutes are laws of general applicability to all products and fall beyond the scope of federal preemption under [section] 360k."\textsuperscript{175} Moreover, the court held that there was no specific federal requirement or regulation that contradicted the opinion of Ms. Niehoff's expert witness,\textsuperscript{176} or that would preempt a Kentucky court's

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168. \textit{Id.} at 819-20. \\
169. \textit{Id.} at 820. \\
170. \textit{Id.} \\
171. \textit{Id.} at 821. \\
172. \textit{Id.} \\
173. \textit{Id.} at 821-22. \\
174. \textit{Id.} at 822. \\
175. \textit{Id.} (emphasis added). \\
176. \textit{Id.} Ms. Niehoff's expert witness was Dr. Robert Drews, Professor of Ophthalmology at Washington University and past president of the American Intraocular Implant Society. He submitted two affidavits to the court below which contained data from past studies conducted by Surgidev and in
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judgment or jury finding that the IOL’s design was defective. In addition, Justice Wintersheimer concluded that Niehoff’s negligence claims for failure to warn and for violations of federal regulations would not diverge from any specific Federal regulation, but rather, the court declared that:

a judgment by a Kentucky court or a potential jury verdict that Surgidev failed to use ordinary care in its design or in its failure to report its data to its investigators or any possible violation of federal regulations would not diverge from any specific federal regulation. Obviously, it would assist in enforcing them.

Justice Wintersheimer then ended the opinion by stating that he was unpersuaded by a post-Lohr preemption case relied on by Surgidev. Rather, he claimed to be more persuaded by a recent Missouri Supreme Court case, Connelly v. IOLab Corp., which held a plaintiff’s state tort law claims against the manufacturer of the IOL were not preempted. He also cited a pre-Lohr case, Montoya v. Mentor Corp.

C. Dissenting opinion

In a vigorous and lengthy dissenting opinion, Special Justice Ison concluded that all of Niehoff’s state claims were preempted because they would impose requirements that are different from or in addition to federal requirements. To reach this conclusion, Justice Ison provided a detailed examination of the MDA and FDA regulations for experimental devices, in addition to citing supporting authority from post-Lohr case law.

First, Justice Ison closely compared the “extensive” FDA regulations controlling the IDE process for IOL’s, with the elements of Niehoff’s claims. He stated that in order for Ms. Niehoff to prevail on her strict medical literature indicating a higher rate of complication with surgical procedures that involved the Surgidev Style 10. The affidavits also stated that the FDA became aware of the complications in 1982 and suggested that Surgidev warn physicians. However, according to Dr. Drews, Surgidev did not warn physicians of the higher rate of complication with the Style 10, but rather, kept selling the lens for six years until it was withdrawn from the market in 1988. Brief for Appellant Niehoff at 9-12, Niehoff v. Surgidev Corp., 950 S.W.2d 816 (Ky. 1997) (No. 96-SC-000127).

177. Niehoff, 950 S.W.2d at 822.
178. Id.
180. 927 S.W.2d 848 (Mo. 1996).
182. Niehoff, 950 S.W.2d at 823-32 (Ison, J., dissenting) (Justice Cooper and Chief Justice Stephens joined in the dissent).
183. Id. at 832.
185. Niehoff, 950 S.W.2d at 823-24 (Ison, J., dissenting).
liability claims, she would have to prove that Surgidev sold the lens in a “defective condition that was unreasonably dangerous for human beings.”\textsuperscript{186} Moreover, Niehoff asserted in her negligence claims that Surgidev violated “Kentucky’s requirements to exercise the reasonable care required of an ordinarily prudent manufacturer.”\textsuperscript{187} Thus, Justice Ison reasoned, Niehoff’s claims created an “actual conflict” with detailed FDA regulations that control the safety and effectiveness of Surgidev’s IOL.\textsuperscript{188} Justice Ison next accused the majority of giving too much weight to the fact that Ms. Niehoff allegedly failed to receive informed consent for the lens implant.\textsuperscript{189} That duty, Justice Ison concluded “lies with the physician and not the manufacturer.”\textsuperscript{190}

Turning to \textit{Lohr}, Justice Ison distinguished that case as being concerned with the “substantially equivalent” process, in contrast to the IDE approval process at issue here. That distinction is important, he reasoned, because the FDA does not make a determination of a device’s safety and effectiveness under the “substantially equivalent” process, whereas here “the FDA has clearly reviewed and approved the Surgidev IOL device marketed pursuant to the IDE as sufficiently safe and effective for investigative use.”\textsuperscript{191}

Additionally, Justice Ison asserted that Congress intended to insulate device manufacturers from state tort liability, because tort claims would interfere with federal interests in maintaining “optimum freedom for scientific investigators” under the IDE process.\textsuperscript{192} He further reasoned that since Surgidev’s IOL was statutorily exempted from federal design and manufacturing requirements as an IDE device, that was evidence of Congress’ intent to preempt state law claims premised on defective design and manufacturing tort theories.\textsuperscript{193} Moreover, Justice Ison declared that the pervasiveness of federal regulations governing IOL’s indicated Congress’ intent to occupy the legislative field, thus state law tort claims would be

\textsuperscript{186} Id. at 824. (citing Dealers Transport Co. v. Battery Distributing Co. 402 S.W. 2d. 441, 446-47 (Ky. 1965)).

\textsuperscript{187} Id. (citing C.D. Herme v. R.C. Tway Co., Inc., 294 S.W.2d 534, 537 (Ky. 1956)).

\textsuperscript{188} Id.

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 825.

\textsuperscript{191} Id. (citing Gile v. Optical Radiation Corp., 22 F.3d. 540, 543 (3d. Cir.) cert. denied, 513 U.S. 965 (1994)).

\textsuperscript{192} Id. at 826.

\textsuperscript{193} Id. at 827(quoting 21 U.S.C. § 360(j)(1)(1996)). See supra note 44 and accompanying text.
impliedly preempted.\textsuperscript{194}

Furthermore, Justice Ison narrowly characterized Justice Breyer’s preemption analysis in \textit{Lohr} as mainly focusing “on the requisite degree of specificity of federal requirements”\textsuperscript{195} and argued that Justice Winter- sheimer and the majority were incorrect in their reading of Justice Breyer’s opinion as implying that state requirements must be specific to be preempted by the MDA.\textsuperscript{196} To further support his view that Ms. Niehoff’s Kentucky tort law claims should be preempted, Justice Ison relied on three post-\textit{Lohr} cases that found preemption of state law tort claims against manufacturers of IDE devices: \textit{Berish v. Richards Medical Co.},\textsuperscript{197} \textit{Martin v. Teletronics Pacing Systems, Inc.},\textsuperscript{198} and \textit{Chambers v. Osteonics Corp.}\textsuperscript{199}

\textbf{IV. Analysis}

The Niehoff decision typifies the post-\textit{Lohr} confusion over the Medical Device Amendment’s scope of preemption.\textsuperscript{200} Both Justices Winter- sheimer and Ison laid claim to Justice Breyer’s concurring opinion to argue that a majority of the United States Supreme Court supported their opposing views on preemption \textit{vel non} of Kentucky tort law claims.

The analytical problem begins with the \textit{Lohr} majority’s device-specific analysis for determining whether a state law tort claim is preempted under the MDA by a federal requirement: (1) Is the federal requirement “applicable” or “specific” to the “particular device” in question? (2) Is the state requirement “with respect to” a medical device and is it “different from, or in addition to” a federal requirement? (3) Or does the state requirement have “the effect of establishing a substantive requirement for a specific device”?\textsuperscript{201} While this test provides some analytical framework for lower courts, it does not provide an answer for the question of how specific a state or federal requirement must be to fit

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\textsuperscript{194} Niehoff, 950 S.W.2d at 828.
\textsuperscript{195} Id. at 830 (citing Papike v. Tambrands, Inc., 107 F.3d. 737 (9th Cir. 1997)).
\textsuperscript{196} Id. at 829.
\textsuperscript{197} 937 F. Supp. 181 (N.D.N.Y. 1996).
\textsuperscript{198} 105 F.3d 1090 (6th Cir. 1997).
\textsuperscript{199} 109 F.3d 1243 (7th Cir. 1997).
\textsuperscript{200} See Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2262 (1996) (O’Connor, J., concurring in part and dissenting in part) (describing majority’s holding as bewildering and seemingly without guiding principle); See also Mitchell v. Collagen Corp., 126 F.3d 902, 910 (7th Cir. 1997) (asserting that “the holding in Medtronic contains several ambiguities that impair our ability to perceive with absolute clarity the path that the Court has chosen for us to follow.”)
\textsuperscript{201} Lohr, 116 S. Ct. at 2257 (quoting 21 U.S.C. § 360(k)(1996) and 21 C.F.R. § 808.1(d) (1994)).
\end{flushleft}
within the analysis. Moreover, as Justice Ison argued in his dissent, a number of lower courts have interpreted Lohr as requiring only a finding of federal device-specific requirements for preemption to occur, regardless of whether the supposedly conflicting state claims are "based on general duties applicable to other products." However, as the majority opinion in Niehoff exemplifies, several courts have read Lohr as requiring both device-specific state and federal "requirements" before preemption by the MDA can occur.

Nevertheless, if one reads between the lines, Lohr provides some answers about the specificity needed for the federal requirement. Since the Stevens plurality and Justice Breyer agreed that the "substantially equivalent" process did not impose device-specific requirements on Medtronic's pacemaker lead, it is reasonable to infer that the more detailed and rigorous requirements imposed by the IDE and PMA processes might make them "specific" to a "particular device." As such, a majority of cases since Lohr have concluded that both the IDE and PMA processes constitute federal requirements "specific" to a "particular device." Also, FDA device-specific regulations for labels have been held to be federal requirements within the meaning of the Lohr analysis.

In Niehoff, however, Justice Wintersheimer never held conclusively that the IDE process for IOL's is a specific requirement, but rather claimed

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204. See Neraas, supra note 61, at 626 (noting all three opinions in Lohr distinguished the PMA process as more rigorous than the section 510(k) process).


207. See, e.g., Papike v. Tambrands, Inc., 107 F.3d 737, 740-43 (9th Cir. 1997) (regulations requiring labels on tampon packages warning of the risks of toxic shock syndrome under 21 C.F.R. § 801.430(b)).
that the FDA has “more specific regulations regarding IOL’s.” He seemed to overlook this step of the Lohr analysis. On the other hand, Justice Ison provides an in-depth examination of the “extensive” FDA regulations that control IOL’s, which compels the conclusion that the regulations are indeed federal requirements specific to IOL’s. In sum, the specific federal requirement prong of the Lohr analysis is not difficult to apply, with most courts finding the IDE and PMA processes are specific to particular devices.

In contrast, the Lohr court did not provide any bright-line rules for when lower courts may find that a state law tort claim establishes requirements in conflict with a federal requirement. While it now seems settled that state common law damages may be “requirements” within the meaning of the preemption provision of the MDA and that these requirements may be preempted by conflicting federal requirements, the crux of the analytical problem is: When does that occur?

Indeed, the Stevens plurality in Lohr and Justice Breyer acknowledged that this could occur, they only differed on frequency. Perhaps viewing Justice Breyer’s “2-inch hearing-aid wire” hypothetical is instructive. Using the reasoning of his hypothetical along with the views expressed in his concurring opinion, one can conclude that he believes state law tort actions can create “requirements” that conflict with federal requirements far more often then the Stevens plurality suggests. Combining this reasoning with the fact that Justice Breyer agreed with Justice O’Connor’s Cipollone express preemption analysis, might lead to the conclusion that a majority of Justices still subscribe to the pre-Lohr view that a broad range of state law tort claims are preempted by federal MDA requirements. But given the equivocal posture of Justice Breyer’s concurring opinion, however, this conclusion is far from settled. While courts are deciding factually similar cases on point with Lohr, most post-Lohr courts are
still divided over what state law tort claims will create “requirements” that collide (or not) with the federal MDA “requirements.” Moreover, the Niehoff case exemplifies this split of authority.

In the majority opinion, Justice Wintersheimer broadly concluded that none of Niehoff’s state law tort claims are preempted by the MDA because they are not “divergent from or in conflict with any any specific FDA regulations” and that her strict liability claims are “laws of general applicability.” He reached this conclusion, however, without undergoing the “careful comparison” between state and federal requirements that the Lohr majority applied. In contrast, most other courts who reach the same conclusion of non-preemption employ the Lohr device-specific, claim-by-claim analysis.

Similarly, Justice Ison employed the Lohr device-specific analysis in his dissent, but conversely concluded that Niehoff’s strict liability and negligence claims were preempted. Like the Lohr court, Justice Ison examined the elements of the plaintiff’s claims and then compared them to the FDA requirements. From this “careful comparison,” he concluded that Niehoff’s claims conflicted with the FDA’s determination of safety and effectiveness for experimental intraocular lenses. Likewise, a number of other courts have employed the analysis of Lohr, and have concluded that all of a plaintiff’s state law tort claims do effectively impose “requirement[s] . . . different from, or in addition to” federal requirements for

Medical Systems, 116 F.3d 102 (4th Cir. 1997) (penile prosthesis marketed pursuant to § 510(k) notification; common law tort and warranty claims not preempted); Duvall v. Bristol-Myers-Squibb Co., 103 F.3d 324 (4th Cir. 1996) (penile prosthesis marketed pursuant to § 510(k) notification; strict liability, negligence, warranty claims not preempted).

217. Compare Connelly v. Iolab Corp., 927 S.W.2d 848, 853-54 (Mo. 1996) (state strict liability and negligence claims against IOL manufacturer not preempted- no conflict with federal requirements) with Fry v. Allergan Medical Optics, 695 A.2d 511, 517 (R.I. 1997) (strict liability and negligence claims against IOL manufacturer preempted, would impose different or additional burdens on manufacturer).


On a practical level, this reasoning is appealing, since state law tort claims do impose safety standards and duties which can be viewed as "requirements" with which a medical device manufacturer would need to comply. Thus, judge-made, common law requirements could be problematic in the area of experimental devices particularly, as one pre-Loehr case argued. Since the "point of the experiment is to find out whether [a device] is safe and effective," if federally controlled experimental evaluations are subject to state law tort actions, "there will be fewer experimental treatments, and patients will suffer." This view, however, overlooks a primary public policy goal of tort liability: to spread the loss from an individual victim to the larger public who benefits from a product. Moreover, allowing a plaintiff harmed by an experimental medical devices.

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221. Slater v. Optical Radiation Corp., 961 F.2d 1330 (7th Cir. 1991) (influential pre-Loehr IOL preemption case). Note that the Kentucky Court of Appeals relied on Slater in ruling in favor of Surgidev's summary judgment. Niehoff, 950 S.W.2d at 821.

222. Slater, 961 F.2d at 1333.

223. Id. at 1334. This argument hints at a larger issue that is beyond the scope of this note: does increased exposure to tort liability discourage medical device manufacturers from developing new, potentially lifesaving products? See generally, W. Kip Viscusi & Michael J. Moore, An Industrial Profile of the Links Between Product Liability and Innovation, in THE LIABILITY MAZE 81-119 (Peter W. Huber & Robert E. Litan, eds., 1991) (providing substantial statistical evidence from a number of industries that higher tort liability dampens new product development and innovation); Gregory A. Antoine, Lawsuits Restrict Medical Access, CINCINNATI ENQUIRER, Sept. 28, 1997, at D 7 (arguing that product liability lawsuits against medical device manufacturers ultimately affect the poor and minorities the most); but see Mary L. Lyndon, Tort Law and Technology, 12 YALE J. ON REG. 137 (1995) (asserting that tort law plays an important role in the management of new technologies).


[i]s extremely important in the experimental stage; since experimental devices are exempted from the usual requirements of establishing pre-market safety and effectiveness under FDA guidelines, manufacturers need incentives to make their products safe enough to be tested on people. Allowing state tort claims advances this goal... [s]ince future consumers benefit from the information generated from
medical device to bring a state tort action seems consistent with Congress' purpose of protecting the public from potentially harmful medical devices. Also, given that Congress did not provide for a private right of action under the MDA, there is no suggestion that a private right of action was implied.\textsuperscript{225}

Ultimately, \textit{Niehoff} highlights the differing judicial assumptions, at issue in \textit{Cipollone}, about the role of tort law as a form of regulation and as a compensation system.\textsuperscript{226} In his dissent, Justice Ison argued that a judicial award of damages in favor of Niehoff against Surgidev would conflict with Congress' and the FDA's purpose behind federal medical device regulation. Thus, he seems to follow Justice Stevens' view in \textit{Cipollone} that tort law has a direct effect on the behavior of manufacturers that is similar to enactments by legislatures. On the other hand, the Winter-sheimer majority asserted that Congress and the FDA did not intend to insulate Surgidev from potential tort liability. As such, Justice Wintersheimer seems to take the view that "tort law has an entirely separate function — compensating victims - that sets it apart from direct forms of regulation."\textsuperscript{227}

This view is further illustrated by Justice Wintersheimer's citing of \textit{Montoya v. Mentor Corp.}\textsuperscript{228} in his decision. \textit{Montoya} is a pre-\textit{Lohr} decision which found no MDA preemption of state common law claims against a manufacturer of a Class III, PMA medical device. In \textit{Montoya}, the Court of Appeals of New Mexico discussed the indirect effect of state tort law on manufacturers and reached the apposite conclusion that:

\begin{quote}
[t]he result of determining federal preemption of all state common law tort claims for Class III devices would be to leave an injured party with no remedy whatsoever, and ironically, with less protection than they enjoyed before passage of the MDA. Such could not have been the intent of Congress in an area where the legislative body has sought to protect the consumer. There simply must be some avenue for redress, and the MDA does not provide it.\textsuperscript{229}
\end{quote}

\textsuperscript{226} See discussion supra part II.B.3.
\textsuperscript{228} 919 P.2d 410 (N.M. Ct. App. 1996).
\textsuperscript{229} \textit{Id.} at 417-18. \textit{See also} Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those
V. CONCLUSION

While the post-\textit{Lohr} courts will continue to try to interpret the United States Supreme Court’s divided view on federal preemption and the MDA, a few cases point to the future. Since most post-\textit{Lohr} medical device cases have survived a court’s summary judgment\footnote{Under the Federal Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and \ldots the moving party is entitled to judgment as a matter of law. \textit{FED. R. CIV. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Under Kentucky law, summary judgment should not be granted unless the right to judgment is shown with such clarity that there is no room for controversy and it appears impossible for the nonmoving party to produce evidence at trial warranting judgment in his favor. \textit{Steelvest, Inc. v. Scansteel Service Ctr., Inc., 807 S.W.2d 476 (Ky. 1991).}} on federal preemption, a few courts have denied summary judgment with the suggestion that a defendant can argue for federal preemption at trial.\footnote{See, \emph{e.g.}, \textit{Comeau v. Heller, 945 F. Supp. 7, 12 (D. Mass. 1996); Shea v. Oscor Medical Corp., 950 F. Supp. 246, 250 (N.D. Ill. 1996); Hernandez v. CooperVision, 691 So.2d 639, 641 (Fla. Dist. Ct. App. 1997).}} Also, two other courts have taken a sensible, intermediate view on preemption, where strict liability claims were held to be preempted, but negligence claims were not.\footnote{See \textit{Chambers v. Osteonics Corp., 109 F.3d 1243 (7th Cir. 1997) (artificial hip - IDE); Green v. Dolsky, M.D., 685 A.2d 110 (Pa. 1996) (collagen-PMA, negligence claims not preempted which in essence, mirror FDA requirements).} For example, in \textit{Chambers v. Osteonics Corp.,} (a case cited by Justice Ison in his dissent) the court argued that strict liability claims would collide with federal policy, but that a negligent manufacturing claim premised on a standard of care defined by FDA requirements \textit{“...would impose no greater requirements on [the defendant] than the FDA itself imposed [\ldots] ... we think it will encourage manufacturers to conduct their experiments pursuant to FDA requirem}ents, taking care not to expose consumers to unnecessary risk.”\footnote{\textit{Chambers, 109 F.3d at 1248.}}

The holding in \textit{Chambers} is consistent with the view of all nine Justices in \textit{Lohr}, who agreed that state law tort claims which parallel federal requirements are not preempted by the MDA.\footnote{Note also that the \textit{Niehoff} majority suggested that violation of FDA regulations might now be considered negligence \textit{per se},\footnote{\textit{``Judgment by a Kentucky Court or a potential jury verdict [for] any violation of federal regulations would not diverge from any specific federal regulation. Obviously, it would assist in enforcing them.” \textit{Niehoff v. Surgidev Corp., 950 S.W.2d 816, 822 (Ky. 1997).}} whereas prior authority held that FDA approval is merely evidence that a jury may consider as a factor.\footnote{See \textit{Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 538 (6th Cir. 1993) (applying Kentucky}}
tionally, commentators have recently suggested that the federal preemption doctrine should be recast as a more vigorous government standards defense.\textsuperscript{237}

Finally, in \textit{Niehoff v. Surgidev Corp.}, the Kentucky Supreme Court expanded the limited holding of \textit{Lohr} to find that a broad range of state law tort claims were not preempted by the Medical Device Amendments. In spite of a national division among courts over what the basic rule of \textit{Lohr} really is, Kentucky follows a sizeable number of jurisdictions which have refused to find blanket preemption of all state law tort claims under the MDA. Also, the majority's conclusion in \textit{Niehoff} that "Kentucky's strict liability case law and statutes are laws of general applicability to all products and fall beyond the scope of federal preemption [by the MDA]"\textsuperscript{238} strongly suggests that most medical device products liability claims premised on Kentucky law theories of tort liability will not be preempted by federal regulations or statutes.

The \textit{Niehoff} majority interpreted \textit{Lohr} as requiring both device-specific state and federal requirements before preemption could occur.\textsuperscript{239} Moreover, the \textit{Niehoff} majority seems to follow the reasoning in \textit{Lohr} that general state common law claims were "not specifically developed 'with respect to' medical devices [and thus] are not the kinds of requirements that Congress and the FDA feared would impede the ability of federal regulators to implement and enforce specific federal requirements."\textsuperscript{240}

Therefore, under a strict reading of the \textit{Lohr} device-specific analysis, state common law damages claims will almost never be preempted by the MDA, because warranty and tort law theories apply to all products generally, and are not only "specific" or "with respect to" just medical devices.\textsuperscript{241}

\begin{footnotesize}
\begin{enumerate}
\item[238.] \textit{Niehoff}, 950 S.W.2d at 822.
\item[239.] \textit{Id.} at 819 (interpreting \textit{Lohr} as establishing that the MDA will not preempt state law unless a specific state requirement contravenes a specific regulation).
\item[241.] See \textit{Lohr}, 116 S. Ct. at 2259 (quoting 21 CFR § 808.1(d)(6)(ii)) ("It will be rare indeed for a court hearing a common law cause of action to issue a decree that has the 'effect of establishing a substantive requirement for a specific device.'") See also Chmielewski v. Stryker Sales Corp. 966 F. Supp. 839, 842 (D. Minn. 1997) (noting rarity of MDA preemption of state law claims under a strict application of the \textit{Lohr} analysis).
\end{enumerate}
\end{footnotesize}
The Kentucky Supreme Court's "no preemption" posture is good news for plaintiffs like Helen Niehoff who have allegedly been injured by medical devices, allowing them to seek compensation for injuries in Kentucky courts. However, *Niehoff* is disturbing for manufacturers of medical devices who wish to sell their devices to treat patients in Kentucky, because it suggests that a previously strong defense against product liability actions\(^{242}\) has been destroyed.

\(^{242}\) See *Burnett v. Pfizer, Inc.*, 846 F. Supp. 25 (E.D. Ky. 1994) (pre-*Lohr* and *Niehoff* case finding preemption of Kentucky tort law claims by the MDA).