FEDERALISM & SEPARATION OF POWERS
2003 UPDATE: THIRD QUARTER

EXECUTIVE & LEGISLATIVE ACTIONS

The Judicial Nomination Fight Continues

Following the withdrawal of Miguel Estrada's nomination to the D.C. Circuit Court of Appeals, the Democrats immediately promised to filibuster more of the President's nominees. They kept their promise. Five nominees are now being filibustered: Justice Priscilla Owen, Attorney General William Pryor, Judge Carolyn Kuhl, Judge Charles Pickering, and Justice Janice Brown. In response to the filibusters, Republicans conducted a nearly 40-hour marathon on the Senate floor during November—yet the Democratic filibustering continued. Some conservatives are urging the President to make recess appointments to fill the vacancies, and Senators Lindsey Graham and Saxby Chambliss are reportedly planning to sue the Senate in early 2004 for denying them their constitutional right to cast an up-or-down vote on executive nominations.

- **Also of Interest:**
  - *Southern Discomfort: Judicial Filibusters Aren't Helping Democrats in Dixie*, WALL ST. J. ONLINE, Nov. 6, 2003, *at* http://opinionjournal.com/editorial/feature.html?id=110004266.
  - Brian C. Anderson, *Schumerism: Democrats Subvert the Constitution Through Judicial Filibusters*, WALL ST. J. ONLINE, Nov. 8, 2003, *at* http://www.opinionjournal.com/extra/?id=110004279.
  - Alexander Bolton, *How Ted Cemented Filibuster*, THE HILL, Nov. 19, 2003, *available at* http://www.thehill.com/news/111903/filibuster.aspx.
  - Katherine Mangu-Ward, *The Senate's All-Nighters: As Filibusters Go, It Was Something of a Letdown*, WKLY. STANDARD, Nov. 24, 2003, *available at* http://www.weeklystandard.com/Check.asp?idArticle=3384&r=vddee.

Anti-Spam Legislation

Congress recently passed anti-spam legislation, the Controlling the Assault of Non-Solicited Pornography and Marketing Act (referred to, ironically, as the "CAN-SPAM Act"). The CAN-SPAM Act goes into effect in January 2004, and it will preempt all state laws already on the books, even though some states had previously-existing legislation that would have been tougher on spammers. The problem with spam email raises many federalism issues. Is federal legislation really the answer to unwanted email? Could the problem instead be handled at the state level? Was a governmental solution really necessary or could this problem be better solved by the free market? Many private solutions to spam email are already being developed, including whitelist/challenge-and-response systems and other filtering devices. These systems are imperfect; however, many argue that free market solutions (rather than an "opt-out" legislative solution enforced by a government agency) will stand a better chance of combating the spam problem in the long run.

- **Also of Interest:**
  - Jacob Sullum, *Laws Targeting Unwanted Email Won't Accomplish Much*, TOWNHALL.COM, May 31, 2003, *at* http://www.townhall.com/columnists/jacobsullum/printjs20030531.shtml.
  - Clyde Wayne Crews Jr., *Wishful Anti-spam Thinking*, CATO INST., Dec. 15, 2003, *at* http://www.cato.org/dailys/12-15-03.html.
  - *Lovely Spam, Wonderful Spam*, LAS VEGAS REV.-J., Dec. 17, 2003, at 8B ("Once again, unleashing individual initiative and entrepreneurial creativity can alleviate a problem that a one-size-fits-all government approach will only exacerbate.").
  - Michael Botos, *Entrepreneurs Can Solve Spam Problem*, SAN DIEGO UNION-TRIB., Dec. 18, 2003, at B13.

- *Federal Anti-Spam Law Guts Tough State Remedies*, USA TODAY, Dec. 23, 2003, *available at* http://www.usatoday.com/usatonline/20031223/5781617s.htm.

Same-Sex Marriage

Earlier this year, the Supreme Court invalidated a state sodomy law in its *Lawrence v. Texas* decision. Some conservatives are concerned that the decision lays the foundation for courts to invalidate state laws prohibiting individuals of the same sex from getting married, thus putting the decision in the hands of judges, rather than voters and the legislators they elect. In Massachusetts, the State's highest court ruled in November that a ban on homosexual marriage violates the state constitution, and it gave the state legislature 180 days to remedy the problem. In 2000, the Vermont legislature enacted a civil-unions law in response to a similar state court decision. The series of court decisions has caused voters and legislators to propose a constitutional amendment defining marriage as an institution to be entered into only by one man and one woman. The courts' actions and the proposed constitutional amendment have raised several federalism and separation of powers concerns. Is it proper to nationalize this issue by enacting an amendment to the Constitution, rather than resolving the issue at the state level? On the other hand, if the issue is not nationalized through a constitutional amendment, will courts take it upon themselves to nationalize the issue in the name of upholding the Constitution? Last, have court decisions upholding gay rights, to date, been appropriate exercises of judicial power or are courts overstepping their bounds and treading on the toes of the state and federal legislatures?

- **Also of Interest:**
  - Jonathan Rauch, *Give Federalism a Chance: The Case for Same-Sex Marriage*, NAT'L REV. ONLINE, Aug. 2, 2001, *at* http://www.nationalreview.com/comment/comment-rauch080201.shtml.
  - *The Marriage Amendment*, FIRST THINGS, Oct. 2003, *available at* http://www.firstthings.com/ftissues/ft0310/editorial.html.
  - Gary Bauer, *When Courts Reinvent Marriage*, WASH. POST, Oct. 1, 2003, at A23, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A25654-2003Sep30&notFound=true.
  - Richard W. Garnett, *Conservatives, Federalism, & Consistency: Supporters of Federal Action on Marriage and Abortion are not Hypocrites*, NAT'L REV. ONLINE, Dec. 1, 2003, *at* http://www.nationalreview.com/comment/garnett200312010922.asp.

SUPREME COURT 2003-2004 TERM

AEI's Federalism Project also maintains a website that contains information on currently pending and recently decided federalism cases. Several of the cases discussed below are also discussed on AEI's website: http://www.federalismproject.org/masterpages/supremecourt.

Virginia v. Maryland, No. 129, Original, *available at* 2003 U.S. LEXIS 9192.
Leave to File Bill of Complaint Granted: May 30, 2000.
Oral Argument: Oct. 7, 2003. Decided: Dec. 9, 2003.

Maryland and Virginia have long argued over their respective rights to the Potomac River. Their disagreement stems from a boundary dispute that predated the birth of the country. This case is the latest in that series of disputes. In 1933, Maryland established a permitting system for water withdrawal and waterway construction taking place within Maryland territory. Over the years, several permits were issued to Virginia entities for activities occurring on the Potomac. In 1996, Virginia's Fairfax County Water Authority sought permits from Maryland for construction of a water intake structure extending from the Virginia shore into the Potomac. Its application was initially denied, and it sought leave to file a Bill of Complaint in the Supreme Court. The Court granted Virginia's motion and referred the matter to a Special Master.

The States agree that two agreements ratified by their legislatures and Congress, the 1785 Compact and the Black-Jenkins Award of 1877, govern the dispute. Each State further agrees that Virginia has a right to withdraw water and construct improvements, but Maryland asserts that it is entitled to regulate such actions by virtue of its sovereignty over the river. Maryland further argues that, even if Virginia once possessed unrestricted rights over waterway construction and water withdrawal in the Potomac, it lost those rights by acquiescing to Maryland's regulation over the years. The Supreme Court entered the Special Master's proposed decree, which was issued in favor of Virginia. The Chief Justice delivered the opinion of the Court, in which Justices O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer joined. Justice Stevens filed a dissenting opinion, in which Justice Kennedy joined. Justice Kennedy filed a dissenting opinion, in which Justice Stevens joined.

A "congressionally approved interstate compact," the Chief Justice held, is interpreted "'as if [we] were addressing a federal statute.'" *Id.* at *20 (citation omitted). The "plain language" of the Seventh Article of the 1785 Compact "grants to the 'citizens of each state' 'full property' rights in the 'shores of Potowmack river' and the 'privilege' of building 'improvements' from the shore." *Id.* at *21. Absent from this language is any "grant or recognition of sovereign authority to regulate the exercise of this 'privilege' of the 'citizens of each state.'" *Id.* This absence stands in contrast to other provisions in the Compact, which explicitly provide for regulation of certain activities. The inference to be drawn from the Seventh Article's silence is that "each State was left to regulate the activities of her own citizens." *Id.* at *22-23. Maryland argues that the silence must be read in her favor. Had her sovereignty been well settled by 1785, this would doubtless be correct; however, the Court must "read the 1785 Compact in light of the ongoing dispute over sovereignty." *Id.* at *26.

While the 1785 Compact delineated the States' rights to build improvements, the Black-Jenkins Award determined which State would be sovereign over the river. Maryland, the Award held, was sovereign over the River to the low-water mark on the Virginia shore. Virginia, however, would be entitled to "full dominion over the soil to [the] low-water mark on the south shore of the Potomac," and it would have a "right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership." *Id.* at *26. The plain language of the Award, as well as the reasoning contained in the opinion of the arbitrators, gives Virginia the right to use the river beyond the low-water mark. Maryland incorrectly contends that the Black-Jenkins award "simply confirmed her well-settled ownership of the Potomac, and thus the rights granted to Virginia in Article Fourth are subject to Maryland's regulatory authority." *Id.* at *27. The opinion issued by the arbitrators confirms that Maryland's sovereignty over the river was very much in dispute at the time of the Award.

Last, Virginia did not lose her sovereign rights by acquiescing in Maryland's regulation of her activities on the Potomac. To succeed in such a claim, Maryland must "'"show by a preponderance of the evidence . . . a long and continuous . . . assertion of sovereignty over"' Virginia's riparian activities, as well as Virginia's acquiescence in her prescriptive acts." *Id.* at *36 (citation omitted). The Court has "'never established a minimum period of prescription' necessary for one State to prevail over a coequal sovereign on a claim of prescription and acquiescence"; however, the "period must be 'substantial.'" *Id.* at *37 (citations omitted). Maryland asserts that Virginia has "acquiesced in her pervasive exercise of police power" on the Potomac in the 125 years since the Black-Jenkins Award. *Id.* The relevant question, however, is how long Virginia acquiesced to regulation of water withdrawal and construction improvements along the river. The period of regulation for these rights was much shorter: 43 years at the most. It is unclear whether such a short period of time is sufficient to "overcome a sovereign right granted in a federally approved interstate compact." *Id.* at *39. Regardless, Maryland's claim fails because it has not proved Virginia's acquiescence. To the contrary, Virginia "vigorously protested" Maryland's authority on at least one occasion: In 1976 during passage of § 181 of the Water Resources Development Act of 1976. *Id.*

Cases Yet to Be Decided This Term

Brief summaries of these cases can be found in the Third Quarter Update, 2003: http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/FedSep3Q2003.pdf.

- Frew v. Hawkins, No. 02-628.
  Cert. Granted: March 10, 2003. Argument scheduled: Oct. 7, 2003.
- Locke v. Davey, No. 02-1315.
  Cert. Granted: May 19, 2003. Argument scheduled: Dec. 2, 2003.
- Nixon v. Missouri Municipal League, 02-1238.
  Cert. Granted: June 23, 2003. Argument scheduled: Jan. 12, 2003.
- Tennessee v. Lane, No. 02-1667.
  Cert. Granted: June 23, 2003. Argument scheduled: Jan. 13, 2003.
- Engine Manufacturers Association v. South Coast Air Quality Management District, No. 02-1343.
  Cert. Granted: June 9, 2003. Argument scheduled: Jan. 14, 2003.
- Tenn. Student Assistance Corp. v. Hood, No. 02-1606.
  Cert. Granted: Sept. 30, 2003. Argument scheduled: Mar. 1, 2003.