Kentucky Journal of Equine, Agriculture, & Natural Resources Law

Volume 3 | Issue 1 Article 8

2010

Smooth Transition or Unfair Burden? Evaluating the Constitutionality of the Fair and Equitable Tobacco Reform Act in Swisher International, Inc. v. Schafer

Cara C. Houlehan
University of Kentucky

SMOOTH TRANSITION OR UNFAIR BURDEN? EVALUATING THE CONSTITUTIONALITY OF THE FAIR AND EQUITABLE TOBACCO REFORM ACT IN *SWISHER INTERNATIONAL, INC. V. SCHAFER*

CARA C. HOULEHAN*

I. INTRODUCTION

Between 1938 and 2004, the Agricultural Adjustment Act federally regulated the U.S. tobacco industry.[1] In 2004, however, Congress enacted the Fair and Equitable Tobacco Reform Act (hereinafter "FETRA").[2] This tobacco reform act dismantled the Agricultural Adjustment Act's system of quotas and price supports that significantly affected tobacco growers and manufacturers.[3] In *Swisher International, Inc. v. Schafer* (hereinafter "*Swisher International*")[4], the United States Court of Appeals for the Eleventh Circuit analyzed the consequences of FETRA on tobacco manufacturers. In particular, it addressed the magnitude of the burden imposed on the manufacturers to effectuate a smooth transition into the free market.[5]

This Comment will discuss the impact of the *Swisher International* decision. Section II provides a background discussion of *Swisher International*, including the requirements of FETRA, the history of the case, and the particular constitutional claims upon which Swisher relies. Section III describes the court's analysis of each claim, revealing the process it uses to evaluate the arguments and the authority it relied upon. Finally, Section IV explains the implications of the *Swisher International* decision for aggrieved tobacco manufacturers, for participants in the Kentucky tobacco market, and for the entire tobacco industry.

---

* Staff Member, Kentucky Journal of Equine, Agriculture, and Natural Resources Law, 2010-2011. B.A. 2007, Emory University, J.D. expected 2011, University of Kentucky, College of Law.

[1] Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1407 (2010).

[2] Fair and Equitable Tobacco Reform Act, 7 U.S.C. § 518-519a (2010).

[3] Swisher Int'l., Inc. v. Schafer, 550 F.3d 1046, 1049 (11th Cir. 2008).

[4] *Swisher Int'l*, 550 F.3d 1046 (11th Cir. 2008).

[5] See id.

II. LEGAL CASE AND BACKGROUND

A. Fair and Equitable Tobacco Reform Act

The Agricultural Adjustment Act of 1938 instituted a program of quotas and price supports to federally regulate the tobacco industry.[6] In 2004, however, Congress decided that a conversion to the free market would best serve the industry.[7] As a result, it passed FETRA in 2004 to disassemble the previous system and effectuate a smooth transition to the new structure.[8]

FETRA requires tobacco manufacturers and importers to fund a buyout of tobacco farmers over a ten-year period.[9] To determine the amounts owed, the Department of Agriculture employs a two-part procedure.[10] In "Step A," the volume of tobacco manufactured is multiplied by excise tax rates to determine the market share owed by each class of tobacco manufacturer.[11] In "Step B," the Secretary of Agriculture considers the number of cigars/cigarettes sold by the individual manufacturer to decide the percentage of the class assessment for which it is responsible.[12] In *Swisher International*, manufacturer Swisher objected to this assessment calculus and the steep financial burden imposed upon it by FETRA.[13]

B. History of Swisher International *and the Responsibility Imposed on Swisher*

In 2004, the Department of Agriculture ordered Swisher, a cigar manufacturer, to pay $11 million in buyout payments.[14] With this kind of yearly assessment, Swisher expected to make payments totaling over $100 million over the course of a ten-year period.[15] In response to this steep responsibility, Swisher sued the Department of Agriculture in 2005, disputing the constitutionality of FETRA.[16] The district court granted summary judgment for the Department, stating, "[h]owever unpalatable,

---

[6] *Id.* at 1049; *See* 7 U.S.C. §§ 1281-1407.

[7] *Swisher Int'l*, 550 F.3d at 1049.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1049-50. (Cigars represent one of six classes. The others are cigarettes, snuff, roll-your-own, chewing tobacco, and pipe tobacco).

[12] *Id.* at 1050 (the individual assessment rate of cigar and cigarette manufacturers are based upon the amount of those products sold; however, for the remaining four classes of tobacco products, the assessment is based upon the number of pounds of tobacco sold).

[13] *See Swisher Int'l*, 550 F.3d at 1050.

[14] *Id.*

[15] *Id.*

[16] *Id.*

seemingly unjust and onerous FETRA is to Swisher, and regardless of the fact that it may have been crafted by lobbyists to relieve cigarette manufacturers of their financial burdens under the MSA, it is not unconstitutional."[17] Swisher appealed to the United States Court of Appeals for the Eleventh Circuit, leading to the opinion in *Swisher International*.[18] The Eleventh Circuit rejected Swisher's arguments and affirmed the judgment of the lower court in favor of the Department of Agriculture.[19] In reaching this decision, the court evaluated Swisher's two constitutional claims: 1) a Fifth Amendment claim[20]; and 2) an Equal Protection claim.[21]

C. Fifth Amendment Claims

First, Swisher contended that FETRA violated the Fifth Amendment's Takings and Due Process Clauses.[22] The Takings Clause states "private property" shall not "be taken for public use, without just compensation."[23] Relying on this language, Swisher originally asserted to the district court that FETRA "effects [sic] a direct transfer of money from manufacturers to private individuals, in this case, producers," while the Secretary contended that the payments instead constituted a tax, which is outside the scope of the Clause.[24]

Additionally, the Due Process Clause states that "[n]o person shall...be deprived of life, liberty, or property, without Due Process of law."[25] Swisher claimed to the lower court that the requirements imposed by FETRA amounted to deprivation of its property without Due Process of law.[26] Essentially, the manufacturer argued that the assessments were unfair because they were made without regard to actual involvement with the quota system.[27] The Department of Agriculture countered that FETRA "is rationally related to a legitimate public purpose" and thus cannot violate the Due Process Clause.[28]

D. Equal Protection Claim

---

[17] Swisher Int'l., Inc. v. Johanns, No. 3:05-cv-871-J16-TEM, 2007 U.S. Dist. WESTLAW 4200816, at *16 (Fla. Dist. Nov. 27, 2007).

[18] *Swisher Int'l*, 550 F.3d at 1049.

[19] *Id.* at 1049, 1060.

[20] *Id.* at 1049.

[21] *Id.*

[22] *Id.*

[23] U.S. CONST. amend. V.

[24] Swisher Int'l., Inc. v. Johanns, No. 3:05-cv-871-J16-TEM, 2007 U.S. Dist. WESTLAW 4200816, at *3 (Fla. Dist. Nov. 27, 2007).

[25] U.S. CONST. amend. V.

[26] Swisher Int'l., Inc. v. Johanns, No. 3:05-cv-871-J16-TEM, 2007 U.S. Dist. WESTLAW 4200816, at *5 (Fla. Dist. Nov. 27, 2007).

[27] *Id.* (further claiming that over the past 10 years, Swisher purchased 99% of its tobacco from sources outside the U.S.).

[28] *Id.*

Swisher based its next challenge to the constitutionality of FETRA on the Equal Protection Clause.[29] Its argument stemmed from its perception of "adverse and differential treatment based on completely irrational rules and regulations which in no way are calculated to further the ends of FETRA."[30] Particularly, Swisher claimed that FETRA discriminated against it because the cigar class is subject to a different calculation for determining payment amounts than other classes of manufacturers.[31] The Secretary responded, however, that, "to the extent that [FETRA] treats cigars differently than other forms of tobacco at Steps A and B, such distinctions are supported by rational bases."[32] The Eleventh Circuit agreed with the district court's outcome after the following analysis.[33]

III. ANALYSIS OF MANUFACTURER'S CLAIMS IN *SWISHER INTERNATIONAL*

A. Fifth Amendment Claims

Both Swisher and the Secretary relied on the plurality decision of the Supreme Court in *Eastern Enterprises v. Apfel* (hereinafter "*Eastern Enterprises*"), which challenged the Coal Industry Retiree Health Benefit Act of 1992 under the Takings Clause and Due Process clauses.[34] The *Swisher International* court noted that although *Eastern Enterprises* "provide[s] significant guidance for this case," the decision is not binding authority and analyzed the issues independently.[35] Analogizing *Swisher International* to *Eastern Enterprises* and citing Justice Kennedy's concurrence, however, the Eleventh Circuit stated that Congress has imposed FETRA assessments "as a contribution toward the funding of the buyout of tobacco growers and the transition to the free market system...a mere obligation to pay money."[36] This obligation does not represent a property interest, thus taking it outside the scope of the Takings Clause.[37] In essence, the court finds that there cannot be a taking without an identifiable property interest being affected.[38] In *Eastern Enterprises*, Justice Kennedy noted that a property interest might include situations in

---

[29] *Swisher Int'l*, 550 F.3d at 1049.

[30] *Johanns*, 2007 U.S.Dist. WESTLAW 4200816, at *6 (quoting Dkt.1.¶ 103).

[31] *Johanns*, 2007 U.S.Dist. WESTLAW 4200816, at *6; Swisher *Int'l*, 550 F.3d at 1050.

[32] *Johanns*, 2007 U.S. Dist. WESTLAW 4200816, at *6.

[33] *Swisher Int'l*, 550 F.3d at 1049.

[34] *Id.* at 1050 (citing Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)).

[35] *Swisher Int'l*, 550 F.3d at 1050, 1054.

[36] *Id.* at 1054-55.

[37] *Id.* at 1055 (quoting *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part)).

[38] *Swisher Int'l*, 550 F.3d at 1057.

which Congress seeks to "appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest."[39] FETRA appears to not fall within any of these listed examples.

Swisher's Takings Clause claim amounted to an assertion that Congress lacks the power to impose the assessments it demands in FETRA.[40] However, the Takings Clause "does not operate as a substantive or absolute limit on the government's power." [41] Instead, it only requires that if a taking occurs, the government must compensate the owner.[42] In the present case, Swisher challenged the constitutionality of FETRA without mentioning seeking compensation from the government, suggesting that a Takings Clause claim was misplaced.[43] In addition, five Justices in *Eastern Enterprises* suggested that "where the challenge seeks to invalidate the statute rather than merely seeking compensation for an otherwise proper taking," the Takings Clause is inapplicable.[44] Therefore, the *Swisher International* court concluded that the Takings Clause was not a proper basis for evaluating Swisher's challenge to FETRA, and, even if it were, the requirements imposed by FETRA would not amount to a taking.[45]

Examining Swisher's Fifth Amendment claim, the court found that FETRA also failed to violate Swisher's Due Process rights.[46] In making this determination, the court noted several U.S. Supreme Court cases that provide the structure for evaluating Due Process claims concerning a statute. First, in *Usery v. Turner Elkhorn Mining Co.* (hereinafter "*Usery*") the Court established a rule that economic legislation is presumed constitutional.[47] Therefore, a plaintiff must show that Congress acted "arbitrarily" and "irrationally" to prove the statute violated Due Process.[48] Second, according to *General Motors Corp. v. Romein* (hereinafter "*General Motors*"), no Due Process violation exists where the government demonstrates that the statute has a "legitimate legislative purpose furthered by rational means."[49] Finally, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.* (hereinafter "*Pension Benefit*") requires a legitimate legislative purpose

---

[39] *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J. concurring in the judgment and dissenting in part) (explaining that the Coal Act failed to meet any of these exceptions).

[40] *Swisher Int'l*, 550 F.3d at 1055.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1049, 1057.

[44] *Swisher Int'l., Inc. v. Schafer*, 550 F.3d at 1057 (citing *Eastern Enterprises*, 524 U.S. at 539-47) (Kennedy, J., concurring in the judgment and dissenting in part)).

[45] *Swisher Int'l*, 550 F.3d at 1057.

[46] *Id.* at 1059.

[47] *Id.* at 1057 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

[48] *Id.* at 1057.

[49] *Swisher Int'l*, 550 F.3d at 1057 (citing Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)).

for applying a statute retroactively.[50] The *Swisher International* court assessed each of these considerations individually.

Swisher's Due Process claim relied upon its assertion that FETRA "imposes retroactive liability that is disproportionate to Swisher's participation in the price support program."[51] In response to Swisher's contention, the court held that FETRA is not retroactive, and also found a legitimate legislative purpose based on *Pension Benefit*.[52] In coming to its retroactivity decision the court relied on the plain language of FETRA, which stated that the Secretary of Agriculture "shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year."[53] Underlying this section of FETRA is the clear requirement that a manufacturer new to the tobacco industry would also be subject to the assessments, which are based on "current participation in the market...as well as those who participated in the past."[54] FETRA's lack of retroactivity defeated this prong of Swisher's argument.

However, the court continued to consider Swisher's Due Process argument in light of other authority. According to the Court in *Eastern Enterprises*, "[s]tatutes may be invalidated on Due Process grounds only under the most egregious of circumstances."[55] Keeping in mind this requirement and the *Usery* Court's presumption of constitutionality in economic legislation, the *Swisher International* court held that FETRA withstood Swisher's Due Process claim.[56] The court analyzed Congress' intent and basis for passing FETRA as well as the background of the tobacco market in order to determine that FETRA served a legitimate legislative purpose that is neither arbitrary nor irrational.[57]

Due to problems in the industry and the interests of the parties involved, Congress's plan to deregulate the tobacco industry through FETRA represented an exercise of power that had a legitimate purpose and a rational means of achieving that purpose.[58] In explaining this conclusion, the court notes that the passage of FETRA serves as evidence that Congress

---

[50] *Swisher Int'l*, 550 F.3d at 1057 (citing Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984)).

[51] *Swisher Int'l*, 550 F.3d at 1057.

[52] *Id.* at 1058.

[53] *Id.* at 1058 (citing 7 U.S.C. § 518d(b)(1) (2010)).

[54] *Swisher Int'l*, 550 F.3d at 1058.

[55] *Id.* (quoting *Eastern Enterprises*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

[56] *Swisher Int'l.*, 550 F.3d at 1059.

[57] *Id.* at 1059.

[58] *Id.* at 1058-59.

recognized problems in the tobacco industry.[59] These problems meant that the old system of subsidies needed to be altered and the legislature chose to change it by transitioning to the free market.[60] Congress then determined that "tobacco farmers and quota holders should be provided some cushion for the transition," and established the system of assessments.[61] An obligation was then imposed on tobacco manufacturers and importers to fund the assessments, "all of whom would benefit from the transition to the free market system."[62] In addition to these benefits, Congress believed manufacturers and importers were "best suited to pass such increased costs along to the ultimate consumers."[63] Ultimately, Swisher's claims were "without merit" because it failed to offer evidence sufficient to rebut the presumption of constitutionality of FETRA.[64] In other words, Swisher could not show any "egregious" circumstances that would permit the court to invalidate an act that the legislature rationally deemed an appropriate remedy for the problems in the tobacco industry.[65] While the court would not speculate on what alternative circumstances might constitute a Due Process violation, it concluded that if an act is rational, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches" and courts will be reluctant to disturb those decisions.[66]

B. Equal Protection Claim

In evaluating Swisher's Equal Protection claim, the court relied on *FCC v. Beach Communications, Inc.* (hereinafter "*Beach Communications*").[67] In that case, the Supreme Court utilized the same rational basis test for analyzing Equal Protection claims, finding that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against Equal Protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification."[68] The *Beach Communications* court

---

[59] *Id.* at 1058.
[60] *Id.*
[61] *Id.*
[62] *Swisher Int'l*, 550 F.3d at 1059.
[63] *Id.*
[64] *Id.* at 1058.
[65] *Id.* (citing *Eastern Enters.*, 534 U.S. at 550) (Kennedy, J., concurring in the judgment and dissenting in part).
[66] *Swisher Int'l*, 550 F.3d at 1058 (citing *R.A. Gray*, 467 U.S. at 729).
[67] *Swisher Int'l., Inc. v. Schafer*, 550 F.3d at 1059-60.
[68] *Id.* at 1060 (citing *FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993)).

also noted that "equal protection is not a license for the courts to judge the wisdom, fairness, or logic of legislative choices."[69]

Considering this framework, the *Swisher International* court determined that Swisher's Equal Protection rights were not violated by FETRA because "there was a rational basis for the Act's methodology."[70] In particular, the Step A calculation of cigar manufacturers' market share[71] was reasonable because cigars are the only type of tobacco with a variable excise tax rate; therefore, requiring a singular tax rate for the class is "administratively convenient."[72] Again relying on administrative convenience, the court concluded that Step B also contained a rational basis, even though the calculus considered the number of cigars sold rather than size, and Swisher mostly produced small cigars.[73] While the court's analysis failed to elaborate on the rationality of the assessment calculus, it also noted that "'the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one,' and perfection is not required in making the necessary classifications."[74] Consistent with its analysis of Swisher's due process claims, the court seemed to recognize that it is ill-suited to disparage a complex legislative duty.[75]

IV. IMPLICATIONS

The decision in *Swisher International* illustrates that courts show a substantial amount of deference to the legislature when evaluating claims of unconstitutionality concerning economic legislation. Indeed, the requirement that a statute must be egregious in nature in order to be struck down is a difficult standard to meet. Further, the test employed by the *Swisher International* court in evaluating Due Process arguments requires only a cursory evaluation of Congressional intent and the factual basis of the claim to find a legitimate purpose with a rational basis. As a result, any party seeking to demonstrate a Fifth Amendment violation has an almost insurmountable burden of showing that an act has no reasonable foundation. Additionally, the *Swisher International* court's analysis persuasively evaluated the Takings Clause, relying upon the Supreme Court for guidance, and suggested that FETRA assessments will rarely be invalidated under a Takings Clause framework as they are mere obligations to pay money. Finally, the rational basis test utilized in considering Equal

---

[69] *Id.* at 1060 (*FCC v. Beach Commc'ns, Inc.*, 508 U.S. at 313).

[70] *Swisher Int'l*, 550 F.3d at 1060.

[71] *See generally Id.* at 1050. (Cigar manufacturers assessment based on maximum excise tax rate, not actual excise rate that applies to other types of tobacco).

[72] *Id.*at 1060.

[73] *Id.*

[74] *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976)).

[75] *Swisher Int'l.*, 550 F.3d at 1060.

Protection claims also affords significant deference to the legislature. Swisher's claim was struck down on the simple finding that FETRA's assessment calculus was administratively convenient, despite the fact that Swisher's position as a small cigar manufacturer was somewhat different from others affected by the assessments.

This decision indicates that potential future challenges to FETRA will also likely fail. As FETRA is in place until 2014, even those tobacco manufacturers, like Swisher, with seemingly disproportionate responsibilities will continue to shoulder the high financial burden of funding the transition to the free market economy. While the court in *Swisher International* found that FETRA represented only a taxing burden to manufacturers, the act itself represents the evolving future of the industry. Because *Swisher International* suggests that FETRA will remain intact and survive constitutional challenges, the repercussions of the holding speak to not only the legal questions presented by FETRA, but to its consequences on the tobacco industry.

In Kentucky, FETRA carries particularly far-reaching implications. Before the implementation of FETRA, more than half of the tobacco farms in the U.S. made their home in Kentucky and the state ranked second in the nation in tobacco production.[76] Following FETRA, about 72% of tobacco farmers in Kentucky left the industry, while the businesses of those currently active in the market have grown.[77] Chief among concerns with FETRA is that "in 2009, the accelerated decline in domestic consumption, the high value of the U.S. dollar compared to other currencies, and an increase in foreign tobacco production have caused concern about how growers will fare without the safety net of a price support program and a guaranteed buyer."[78] Since it necessarily follows that manufacturers who rely upon those farmers will be impacted by changes in the system as well, a high level of uncertainty exists about the future of the U.S. tobacco market. Regardless of those concerns, FETRA is not only currently at work in the tobacco industry, but *Swisher International* suggests that FETRA is here to stay for its ten-year duration.

According to *Swisher International*, FETRA stemmed from Congress' rational decision to achieve the legitimate purpose of restructuring the tobacco market in response to the perceived needs of the industry. As such, challenges to the Act's validity seem to be fruitless efforts. Consequently, tobacco manufacturers faced with the liability of paying assessments to growers would be best served by accepting their

---

[76] Will Snell, *The Buyout: Short-Run Observations and Implications for Kentucky's Tobacco Industry* (2005) http://www.ca.uky.edu/cmspubsclass/files/lpowers/buyout/buyout_shortrun.pdf.

[77] Katie Pratt, *5 Years After the Tobacco Buyout*, THE MAGAZINE, 2009, http://www.ca.uky.edu/agcomm/magazine/2009/FALL-2009/Articles/FiveYearsAftertheTobaccoBuyout.html.

[78] *Id.*

plight and focusing on the long-term results of the free market system. After all, Congress considered the perspectives of both growers and manufacturers in enacting FETRA. Perhaps patient compliance with assessments for the remainder of the ten-year period will result in a radically divergent outlook on FETRA should the anticipated results of the free market system come to fruition.

V. CONCLUSION

While FETRA represents a major transition in the tobacco industry, *Swisher International* demonstrates a fixed reluctance by courts to disturb congressional acts. Deciding in favor of the Secretary of Agriculture, the court imposes a steep burden on manufacturers like Swisher to demonstrate violations of its constitutional rights that it is unlikely to be able to meet. In evaluating Swisher's claims, the court found the Takings Clause inapplicable, an absence of egregious circumstances that would violate Due Process, and a rational basis for FETRA that dismisses Equal Protection violations. As a result of this decision, FETRA will likely remain intact through 2014 and despite the steep economic responsibility imposed on tobacco manufacturers, the industry will complete its transition to the free market.

ENVIRONMENTAL GROUPS CHALLENGING OFFSHORE DRILLING AS EXPLAINED IN *CENTER FOR BIOLOGICAL DIVERSITY V. UNITED STATES DEPARTMENT OF THE INTERIOR*

KATHERINE L. HUDDLESTON*

I. INTRODUCTION

The now infamous chant "Drill, baby, drill" that filled town halls and auditoriums across the country during the 2008 United States presidential election has come to represent the deep political divide in the United States over the prospect of drilling for oil. After the BP oil spill in the summer of 2010, this divide has grown even larger, particularly concerning offshore drilling. However, offshore drilling is hardly a new phenomenon.

The United States Congress originally passed the Outer Continental Shelf Leasing Act (hereinafter "OCSLA") in 1953.[1] This legislation provided a framework for leasing outer continental shelf areas to private organizations for the purpose of searching for oil.[2] However, two major developments in the late 1960s and early 1970s led to large overhauls of the '53 Act and the OCSLA guidelines.[3] These two events were: 1) the massive oil spill caused by an outer continental shelf "drilling project in the Santa Barbara Channel on January 28, 1969;"[4] and 2) the 1973 Arab oil embargo, which clearly demonstrated the U.S.'s dependence on foreign oil.[5] The combination of these two incidents highlighted both the serious environmental dangers of offshore drilling and the pressing need for U.S. energy independence. Consequentially, Congress passed the 1978 Amendments to OCSLA, which are still in effect today.[6]

Balancing this delicate dichotomy has been both a goal and a challenge for the Department of the Interior (hereinafter "Interior"), environmental protection groups and U.S. courts over the past 35 years. Traditionally, this balance tilted towards energy independence and away from environmental protection. However, the April 17, 2009 decision of

---

* Staff member, KENTUCKY JOURNAL OF EQUINE, AGRICULTURE, AND NATURAL RESOURCES LAW, 2010-2011. B.A., *cum laude*, 2008 Georgetown University. J.D. expected 2011, University of Kentucky, College of Law.

[1] State of Cal. v. Watt (*Watt I*), 668 F.2d 1290, 1295 (D.C. Cir. 1981) (citing Outer Content Self Lands Act, 43 U.S.C. §§ 1331-1356 (2010)).

[2] *Id.*

[3] *Watt I*, 668 F.2d at 1295.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 1296.

the District of Columbia Circuit Court of Appeals in *Center for Biological Diversity v. United States Department of the Interior* (hereinafter "*Center for Biological Diversity*")[7] gives renewed hope to environmental groups seeking to challenge offshore drilling programs.

This Comment will discuss the *Center for Biological Diversity* opinion, its analysis and holding. Section II specifically relates to the legal and factual background surrounding the case. Section III provides an overview of the analysis of the D.C. Circuit Court while Section IV identifies certain implications that are likely to result from this important decision.

II. BACKGROUND

A. Legal Background

The plaintiffs in *Center for Biological Diversity* brought several claims under OCSLA, the National Environmental Policy Act of 1973 (hereinafter "NEPA") and the Endangered Species Act of 1973 (hereinafter "ESA").[8] Of these, the court only reached the merits of the claims under OCSLA.[9]

OCSLA sets up a four-tiered system by which the Secretary of the Interior is required to evaluate and process outer continental shelf leasing agreements.[10] The tiers are as follows: 1) the "preparation stage;" 2) the "lease-sale stage;" 3) the "exploration stage;" and 4) the "development and production stage."[11] Each tier is subject to a different level of review.[12]

The requirements under OCSLA are binding on leasing agreements evaluated by the Department of the Interior. However, even if the Interior satisfies the above-mentioned requirements of OSCLA, other federal statutes may bear on the agency's action. For example, NEPA requires that any governmental agency "assess the environmental consequences of 'major [f]ederal actions' by following certain procedures during the decision-making process."[13] To demonstrate compliance with this NEPA requirement, an agency must prepare and submit an Environmental Impact Statement (hereinafter "EIS"), detailing "the environmental impact of the proposed [agency] action."[14]

---

[7] Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466 (D.C. Cir. 2009).

[8] *Id.* at 471-72.

[9] *Id.* at 472.

[10] *Id.* at 473.

[11] *Id.*

[12] Sec'y of the Interior v. Cal., 464 U.S. 312, 337 (1984).

[13] Nev. v. U.S. Dep't of Energy, 457 F.3d 78, 87 (D.C.Cir. 2006) (quoting 42 U.S.C. § 4332(2)(C) (2010)).

[14] *Ctr. for Biological* Diversity, 565 F.3d at 474 (quoting 42 U.S.C. § 4332(2)(C)(i)-(iii) (2010)).

Additionally, the ESA requires an agency to consider any threat that a proposed action may pose to an endangered species before proceeding with that action.[15] If the agency determines that an endangered species may be affected, the agency must then "pursue either formal or informal consultation with the [National Marine Fisheries Service] or Fish and Wildlife" before proceeding.[16]

As *Center for Biological Diversity* and other relevant cases demonstrate, these environmental acts may work separately or in tandem to affect a proposal for outer continental shelf leasing.

A. Case Background

Center for Biological Diversity arose as a result of an order by the Interior approving an expansion of leasing areas under OCSLA off the coast of Alaska.[17] Three environmental groups, the Center for Biological Diversity, the Pacific Environment, and the Alaska Wilderness League, filed separate petitions opposing this action.[18] The cases of those Petitioners were combined and joined by the Native Village of Point Hope, Alaska, a tribal government.[19]

The groups filed four claims against the Interior.[20] First, the petitioners claimed that the Interior's actions violated OCSLA and NEPA because the "Interior failed to take into consideration both the effects of climate change on OCS [outer continental shelf] areas and the Leasing Program's effects on climate change."[21] Second, the Petitioners argued that the Interior violated OCSLA and NEPA by failing to conduct "sufficient biological baseline research" for the affected areas.[22] Third, Petitioners alleged the Interior violated ESA because the Interior failed to consult with either the National Marine Fisheries Service or the U.S. Fish and Wildlife Service regarding the possible effect of the program on endangered species.[23] Finally, Petitioners asserted the Interior violated OCSLA because it "irrationally relied on an insufficient study" conducted by the National Oceanographic and Atmospheric Administration (hereinafter "NOAA") as its sole authority in evaluating the "environmental sensitivity" of the OCS areas included in the program.[24]

---

[15] *Ctr. for Biological Diversity*, 563 F.3d at 474 (quoting 16 U.S.C. § 1536 (a)(2)).

[16] *Ctr. for Biological Diversity*, 563 F.3d at 474-75; (citing 50 C.F.R. § 402.13, 402.14 (2009)).

[17] *Center for Biological Diversity*, 563 F.3d at 471-72.

[18] *Id.* at 472.

[19] *Id.*

[20] *Id.* at 471.

[21] *Id.* at 471.

[22] *Id.* at 471-72.

[23] *Center for Biological Diversity*, 563 F.3d at 472.

[24] *Id.*

As previously discussed, approval of OCS leasing occurs in four stages. At which stage the action is brought will determine the level of review given by the courts. In this case, the Interior had only completed stage one, the preparation stage, when this action commenced.[25] The preparation stage is governed by Section 18 of OSCLA and requires the Secretary of the Interior to "prepare, periodically revise, and maintain" a program that is "conducted in a manner which considers economic, social, and environmental values" of the OCS resources and "the potential impact of ... exploration on ... the marine, coastal, and human environments."[26] During this stage, the Secretary is also required to "consider additional factors with respect to the timing and location of exploration, development, and production of oil and gas in particular OCS areas."[27] These additional factors include:

> a region's "existing information concerning the geographical, geological, and ecological characteristics; an equitable sharing of developmental benefits and environmental risks among the various regions"; [sic] "the interest of potential oil and gas producers in the development of oil and gas resources"; [sic] "the relative environmental sensitivity and marine productivity of different areas of the [OCS]"; [sic] and "relevant environmental and predictive information for different areas of the OCS."[28]

The final requirement during the preparation stage holds the Interior responsible for striking a delicate balance between the benefits of searching for oil and gas and the negative effects the search may have on the surrounding environment.[29]

Therefore, the court examined the Petitioners' claims in relation to these first tier requirements.

---

[25] *Id.* at 473.
[26] *Ctr. for Biological Diversity*, 563 F.3d at 473 (quoting 43 U.S.C. § 1344(a)(1)).
[27] *Id.* at 473.
[28] *Id.* (quoting 43 U.S.C. § 1344(a)(2)(A), (B), (E), (G), (H) (1978)).
[29] *Id.* at 474 (quoting 43 U.S.C. § 1344 (a)(3)).

III. ANALYSIS

A. Standing

The first major hurdle for the Petitioners in *Center for Biological Diversity* was to establish standing for their claims against the Interior. What may seem like a small obstacle can actually be extremely difficult for plaintiffs alleging an ideological opposition to governmental action. This difficulty results from Article III, Section 2 of the United States Constitution, which mandates that the role of the federal judiciary must be limited to handling actual "cases" and "controversies."[30] The Supreme Court has interpreted this limitation to mean that courts must "protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[31] The second part of this interpretation, requiring that plaintiffs feel the effects of an administrative decision "in a concrete way" before bringing an action, is the basis for the standing doctrine.[32]

The court then discussed two types of standing, substantive and procedural, in its analysis of this case. For substantive standing, the court used the standard and analysis set forth in *Lujan v. Defenders of Wildlife*: "a petitioner must demonstrate that it has suffered a concrete and particularized injury that is caused by, or fairly traceable to, the act challenged in the litigation and redressable by the court."[33] Applying this standard to the facts of this case, the court found that the Petitioners lacked substantive standing because they had yet to suffer "an injury that affects [them] in a 'personal and individual' way."[34] Furthermore, the Petitioners could not establish a causal link between such an injury and the actions of the Interior.[35]

Under the injury requirement of the substantive theory of standing, the court declared that "standing analysis does not examine whether the environment in general has suffered an injury."[36] Therefore, Petitioners' standing claim of "climate change ...shared by humanity at large," failed to establish substantive standing because the alleged injury was too "conjectural or hypothetical."[37] However, the court went on to say that even if the injury were sufficient to establish substantive standing, the Petitioners could not demonstrate a causal link between such injury and the

---

[30] U.S. CONST. art. III, § 2, cl. 1.

[31] Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

[32] *Ctr. for Biological Diversity*, 563 F.3d at 477.

[33] *Ctr. for Biological Diversity*, 563 F.3d at 477. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996)).

[34] *Ctr. for Biological Diversity*, 563 F.3d at 478 (quoting *Lujan*, 504 U.S. at 560 n.1).

[35] *Ctr. for Biological Diversity*, 563 F.3d at 478.

[36] *Id.* (citing Florida Audubon Soc'y v. Bentsen, 94 F.3d 658 at 665).

[37] *Ctr. for Biological Diversity*, 563 F.3d at 478; *See Defenders of Wildlife*, 504 U.S. at 560.

actions of the Interior, especially this early in the leasing process when no actual exploration had yet taken place.[38]

Under this analysis, it seems that an environmental protection group might never be able to establish standing to make a claim against the Interior regarding an outer continental shelf leasing program. However, the court continued to evaluate Petitioners' claims under a theory of procedural standing.

Procedural standing was defined by an earlier decision of the District of Columbia Court of Appeals in *Florida Audubon Society v. Bentsen*.[39] That case declared that, "a plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that there is a substantial probability that the procedural breach will cause the essential injury to the plaintiff's own interest"[40] In *Center for Biological Diversity*, the "threatened concrete interest" asserted by the Petitioners is the desire to "observe an animal species."[41] This interest has been recognized by the Supreme Court as a valid basis for standing if plaintiffs show proof of "concrete plans"[42] to visit and observe the species in the near future, providing "definitive dates" not just hopes or desires.[43] The Petitioners provided this information, and, therefore, the court found that they established grounds for standing under the procedural theory.

B. Ripeness for Review

After establishing standing for their claims, Petitioners had to prove that the issues they raised were ripe for review.[44] Ripeness of an issue for review is also mandated by the "case or controversy" requirement of the Constitution for federal court jurisdiction to exist.[45] Ripeness considerations go to the first half of the Supreme Court standard for "case or controversy" cited earlier, stating that agencies could not be subject to "judicial interference until an administrative decision has been formalized."[46] This requirement presented serious problems for the Petitioners' ESA and NEPA-based claims.

The ESA requires that an agency examine any impact a proposed action may have on an endangered species.[47] If the agency determines that

---

[38] *Id.* at 479.
[39] *Fla. Audubon Soc'y*, 94 F.3d 658.
[40] *Ctr. for Biological Diversity*, 563 F.3d at 479 (quoting *Fla. Audubon Soc'y*, 94 F.3d at 664).
[41] *Id.*
[42] *Id.* (quoting *Lujan*, 504 U.S. at 564).
[43] *Center for Biological Diversity*, 563 F.3d at 479.
[44] *Id.* at 480-84.
[45] *Id.* at 475.
[46] *Id.* (quoting *Abbott Labs*, 387 U.S. at 148-49).
[47] *Ctr. for Biological Diversity*, 563 F.3d at 474.

a species may be at risk, the agency is then required to consult with either the National Marine Fisheries Service (hereinafter "NMFS") or Fish and Wildlife.[48] Based on this requirement, Petitioners brought their third claim alleging that the lease approval was invalid because of Interior's failure to consult with these agencies.[49] However, the court found that this claim ignored the negative implication of the ESA, namely that consultation with the NMFS or Fish and Wildlife was *not* required if an agency determined that no endangered species would be impacted by the proposed action.[50]

Although Petitioners claimed that the Interior's determination was incorrect, the court held that the tiered structure of the leasing system must be taken into consideration. Upholding and citing a previous ruling, *North Slope Borough v. Andrus*,[51] the court stated "we must consider any environmental effects of a leasing program on a stage-by-stage basis, and correspondingly evaluate ESA's obligations with respect to each particular stage of the program."[52] Therefore, as the program under review had only completed the first tier of the leasing process and "by design"... "the welfare of animals" had yet to be implicated, the court found the claim made by Petitioners based on an alleged violation of ESA requirements to be premature.[53]

The NEPA claim faced similar challenges. The court cited its previous decision in *Wyoming Outdoor Council v. United States Forest Service* for the proposition that the obligations placed on an agency by NEPA only mature when the agency reaches a "critical stage of decision which will result in 'irreversible and irretrievable commitments of resources' to an action that will affect the environment."[54] Therefore, in the NEPA analysis, the tiered system of OSCLA was, once again, a determinative factor. The court concluded that under that tiered system, the "critical stage of decision" was not reached until the leases were actually issued.[55] Thus, any claim before that time would be considered premature and not ripe for review.

Despite petitioners' success in establishing procedural standing, their claims under NEPA and ESA ultimately failed because the issues presented were not ripe for review. Therefore, the only claims left for the court to address were the OCSLA-based claims.

---

[48] *Id.* at 474-75.

[49] *Id.* at 472.

[50] *Id.* at 475 (citing Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996)).

[51] *North Slope Borough*, 642 F.2d 589 (D.C. Cir. 1980).

[52] *Ctr. for Biological Diversity*, 563 F.3d at 483.

[53] *Id.*

[54] *Id.* at 480 (quoting Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 42, 49 (D.C. Cir. 1999)).

[55] *Ctr. for Biological Diversity*, 563 F.3d at 480.

C. Justiciable OCSLA Claims

When reviewing the approval of a leasing program under OCSLA, courts use a two-tier system of review.[56] The first tier involves "findings of ascertainable fact," which courts evaluate based on a "substantial evidence test" where the basis for such findings must be "more than a scintilla," but "may be less than a preponderance of the evidence."[57] The second tier looks at the policy judgments of an agency, which are reviewed to determine if the decision was "based on a consideration of the relevant factors and whether there [was] a clear error of judgment."[58] Petitioners' first claim under OCSLA alleged the failure of the Secretary of the Interior to properly take into account the environmental costs associated with consumption of oil and gas derived from the lease and the climate change that would be caused by the consumption of these fuels.[59] While OCSLA requires the Interior to evaluate any adverse environmental effect that could be caused by the lease, the court found Petitioners' extension of this duty to include a duty to examine any potential adverse effects of the *consumption* of the oil and gas, rather than just the recovery of such oil and gas, as much too tenuous, stating that "the Secretary ... need only consider the 'potential for environmental damage' on a localized basis."[60] Therefore, the court found that the Interior has no duty to consider potential future effects of consumption when evaluating leasing programs.[61]

Instead, the court held that the Interior's decision to focus its environmental effect analysis on the effects of the actual production activities that would occur under the lease was proper.[62] In making this analysis, the Interior evaluated the potential "greenhouse gas emissions that would result from leasing, exploration, and development in the OCS, and examined the cumulative impact of these emissions on the global environment."[63] The court found that these efforts satisfied the requirements of OCSLA.[64]

The court then turned to Petitioners' final claim that the Interior's sole reliance on a study conducted by the NOAA for its compliance with OCSLA's requirement to consider "the relative environmental sensitivity of

---

[56] *Id.* at 484.

[57] *Id.* at 484 (quoting FPL Energy Me. Hydro LLC. V. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

[58] *Ctr. for Biological Diversity*, 563 F.3d at 484 (quoting *Watt I*, 668 F.2d at 1302).

[59] *Ctr. for Biological Diversity* at 485.

[60] *Id.*

[61] *See Id.* (the "Interior simply lacks the discretion to consider any global effects that oil and gas consumption may bring about").

[62] *Id.* at 485.

[63] *Id.* at 486.

[64] *Id.* at 485.

... different areas of the outer Continental Shelf"[65] was insufficient.[66] Previous cases had held that "all that is required for compliance with Section 18(a)(2)(G) is 'that the Secretary make a good faith determination of the relative environmental sensitivity'" and that the Secretary was "free to use any methodology 'so long as it is not irrational.'"[67] While the court upheld this loose standard, it also went on to declare that Interior's actions in this case violated it.

The NOAA study relied on by the Interior examined environmental sensitivity of the Alaskan coastline but did not evaluate any offshore areas.[68] Therefore, by relying on this study, the Interior failed the OCSLA requirement that it consider the sensitivity of "different areas of the outer Continental Shelf."[69] The court went on to explain that Interior's duties under OCSLA for the first stage of the leasing process require a balancing of the "potential for environmental damage, potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone."[70] Such a balance is impossible when the Interior fails to properly consider one of these factors, as it did in this case.

Based on this analysis, the court in *Center for Biological Diversity* found in the Petitioners' favor and vacated the Interior's approval or the leasing program, remanding it to the Interior for further consideration consistent with the court's opinion.[71] According to the court, such further consideration must begin with a "more complete comparative analysis" of the outer continental shelf areas potentially affected by the program.[72]

IV. IMPLICATIONS

With constant worries looming over the ever increasing prices of oil worldwide and the amount of greenhouse gases trapped in the atmosphere, future battles between environmental groups and the government over OCSLA will likely be more common and more contentious than ever before. Courts will be asked to decide what should come first, garnering the fossil fuels our country needs or guarding an already fragile environment that protects life on this planet? There is no perfect answer, and as this debate continues the delicate balance mandated by OCSLA and upheld by the court in this case will be challenged from both sides.

---

[65] 43 U.S.C. § 1344 (a)(2)(G) (1978).

[66] *Ctr. for Biological Diversity*, 563 F.3d at 487.

[67] *Id.* at 488 (quoting California v. Watt (*Watt II*), 712 F.2d 584, 596 (D.C. Cir. 1983) (affirming the holding in *Watt I*, 668 F.2d at 1313)).

[68] *Ctr. for Biological Diversity*, 563 F.3d at 488.

[69] 43 U.S.C. § 1344(a)(2)(G) (1978).

[70] *Ctr. for Biological Diversity*, 563 F.3d at 488 (quoting 43 U.S.C. § 1344(a)(3)).

[71] *Ctr. for Biological Diversity*, 563 F.3d. at 489.

[72] *Id.* at 488.

The ruling in *Center for Biological Diversity* has important implications for both sides of this debate. For environmental groups, the court clearly states the standards for establishing standing for these claims. Establishing standing can be a serious challenge for groups opposing government action on ideological grounds, as the Supreme Court has consistently held that injuries must be particularized.[73] Therefore, claims of injury to the global environment affecting all residents are generally insufficient.[74] Establishing standing requires not only a showing of a particularized injury, but also the establishment of a causal link between the governmental action and the injury.[75] Proving this element becomes even more difficult when dealing with the kind of tiered system present under OCSLA wherein actual damage to the environment does not occur until leases have been obtained and drilling begins. Therefore, preemptive environmental protective action appears almost impossible under the standing rules.

However, the court in this case outlined very specific parameters by which environmental groups can establish standing for these challenges. Plaintiffs may establish a particularized injury in these cases by showing that, by omitting some procedural requirements under OCSLA, the governmental agency has *threatened* some concrete interest.[76] Since an actual injury need not have occurred to permit a claim, preemptive action may be taken. However, groups must demonstrate a "concrete interest," and, in these cases, the simplest way to establish such an interest is to provide affidavits from members of the plaintiff groups confirming both an interest in and desire to "observe an animal species," for any purpose, and "concrete plans" for making such observations including "definitive" travel dates.[77] While these are highly specific requirements and might be difficultly to meet, because of this opinion and *Lujan* before it, groups have the court's explicit approval of such a course of action to satisfy the standing requirements.[78]

However, once groups establish standing, they must still defend their claims on the merits. These groups typically assert claims that the governmental action fails on review because the agency did not "abide by a procedural requirement" that was designed to protect an established interest of a plaintiff.[79] However, the *Center for Biological Diversity* court

---

[73] *Id.* at 477-89 (citing *Lujan,* 504 U.S. at 560 and *Fla. Audubon Soc'y,* 94 F.3d at 665 to generally discuss the law of standing).

[74] *Id.* at 478.

[75] *Id.* at 477-78 (citing *Lujan,* 504 U.S. at 560-61 and holding that Petitioners' could not establish either element of standing for their substantive climate change claims).

[76] *Ctr. for Biological Diversity,* 563 F.3d at 479 (citing *Lujan,* 504 U.S. at 573 n.8).

[77] *Ctr. for Biological Diversity,* 563 F.3d at 479.

[78] *Lujan,* 504 U.S. at 562-63.

[79] *Ctr. for Biological Diversity,* 563 F.3d at 479 (citing *Lujan,* 504 U.S. at 573).

provided some encouragement for groups making these claims through its evaluation of the Interior's duties under OCSLA. When evaluating the Petitioners' OCSLA environmental sensitivity claim, the court upheld the previously stated standard requiring that the Interior act in "good faith" and refrain from "irrational" methodology in making sensitivity determinations,[80] but seemed to move away from that extreme deference stating that previous precedent "did not give Interior carte blanche to wholly disregard a statutory requirement out of convenience."[81] Instead, the court implied that Interior's discretion in making the necessary environmental determinations under OCSLA is not absolute and its actions must accord with the strict requirements of the text.

Therefore, the court's opinion in this case should give a great deal of hope to environmental groups seeking to oppose programs authorized under OCSLA and provides an excellent guide for how they can effectively do so. However, the court also provides protection for the Interior in exercising its rights and duties under OCSLA. Despite the court's order to vacate the Interior's approval of the leasing program in this case, the court made it clear that outer continental shelf leasing programs will be upheld as long as the Interior takes care to strictly comply with the requirements of OCSLA.

V. CONCLUSION

While this case provides a useful guide to environmental groups seeking to challenge leasing programs under OCSLA, it also dictates how the Interior can successfully stave off such challenges. When the Interior fails to meet the requirements of OCSLA, environmental groups can establish standing and oppose the program at issue. However, by strict compliance with the requirements of OCSLA, the Interior can protect itself from such challenges and go forward with approvals of leasing programs.

Thus, "to drill or not to drill" has a definitive answer, at least for the time being. When done in strict compliance with the law, off-shore drilling is permissible under existing statutes and any prohibition of such drilling would require further legislative action. However, while outer continental shelf drilling is a part of American life, this case demonstrates that the courts can be a useful tool in ensuring that such programs only occur with proper consideration and protection of the surrounding environment.

---

[80] *Id.* at 487-88. *See Watt I*, 668 F.2d 1290; *Watt II*, 712 F.2d 584.
[81] *Id.* at 488.

DEPAUL V. COMMONWEALTH: A LOOK AT POLITICAL CONTRIBUTIONS ASSOCIATED WITH THE HORSE-RACING INDUSTRY

STEPHANIE M. WURDOCK*

I. INTRODUCTION

In July of 2004, Pennsylvania enacted the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act" or "Act").[1] The Act functioned as a vessel through which the state legislature could introduce legalized slot machine gaming in Pennsylvania and brought with it hopes of increased state revenue and additional forms of tax relief.[2] The Act was designed to maintain the integrity of the gaming industry and protect the public through strict regulation and policing of gaming activities.[3] Included within the Gaming Act are various tools for accomplishing the legislature's goals, one of which is Section 1513, entitled "Political Influence."[4] Section 1513 identifies a class of individuals within the gaming industry and prohibits its members from making certain political contributions.[5] Specifically, this section bans certain individuals from contributing financially to local political party committees, groups organized in support of local candidates, or the campaigns of candidates running for local public office.[6]

In 2008, the Supreme Court of Pennsylvania reviewed and decided *DePaul v. Commonwealth*, in which the Petitioner challenged the constitutionality of this political ban as being an "overly broad and unlawfully discriminatory infringement of the rights to free expression and association."[7] These rights are guaranteed by Article I, Sections 7, 20, and 26 of the Pennsylvania Constitution.[8]

---

* Articles Editor, KENTUCKY JOURNAL OF EQUINE, AGRICULTURAL, AND NATURAL RESOURCES LAW, 2010-2011; B.A. in Marketing 2008, *summa cum laude*, University of Kentucky; J.D. expected May 2011, University of Kentucky College of Law.

[1] Pennsylvania Race Horse Development and Gaming Act, 4 PA. CONS. STAT. §§ 1101-1904 (2006) (amended 2010).

[2] Pennsylvania Gaming Control Board, http://www.pgcb.state.pa.us (follow "Gaming" hyperlink; then follow "Benefits for Pennsylvanians" hyperlink) (last visited Oct. 5, 2010).

[3] 4 PA. CONS. STAT. § 1102 (2004).

[4] *Id.* at § 1513, *declared unconstitutional by* DePaul v. Commonwealth, 969 A.2d 536 (Pa. 2009).

[5] *Id.* at § 1513(a).

[6] *Id.*

[7] *DePaul*, 969 A.2d at 538.

[8] *Id.*

The Petitioner in *DePaul* was a local businessman who held a 9.54% controlling interest in Philadelphia Entertainment and Development Partners ("PEDP"), a company which owned a local casino.[9] According to definitions provided in the Gaming Act, that ownership interest qualified Petitioner as a "principal" and subjected him to the political ban.[10] Wholly unaware of Section 1513's prohibitions, he made twenty-one political contributions in 2006, a number of which fell within the Section 1513 restrictions.[11] Upon realizing his error, Petitioner requested a total refund of his contributions and entered into a consent decree with the Pennsylvania Gaming Control Board ("Control Board").[12]

The resulting court opinion in *DePaul* addressed the conflict between the Gaming Act's primary objective, the protection of public confidence, and that of the judiciary, the protection of constitutional rights. By examining the decision in *DePaul*, this Comment analyzes how courts might strike a balance between the competing interests of the public at-large and those of individuals affiliated with racing and gaming facilities.

In Section II, this Comment discusses the legal background of *DePaul*. Next, Section III presents Petitioner's constitutional claims. Section IV examines the court's survey of similar judicial decisions, while Section V discusses and interprets the Supreme Court of Pennsylvania's holding. Finally, Section VI considers the implications of that decision for the gaming industry.

II. BACKGROUND

A. Statutory Background

DePaul evaluated the constitutionality of the Gaming Act's Section 1513 political ban on two grounds. First, the court assessed the ban's restriction of the right of free speech and association which are guaranteed by Article I, Section 7 of the Pennsylvania Constitution.[13] Second, it considered whether the ban violated Article I, Section 26 of the state constitution which restricts unlawful or baseless discrimination against any person's civil rights.[14]

---

[9] *Id.*
[10] *See* 4 PA. CONS. STAT. § 1103 (2006) (amended 2010).
[11] *DePaul*, 969 A.2d at 539.
[12] *Id.* at 539-40.
[13] *Id.* at 540.
[14] *Id.* at 541.

1. Gaming Act Provisions

The Gaming Act had a number of goals which included furthering the tourism market, promoting and assisting the horse racing industry, and generating new revenue for the state of Pennsylvania.[15] One additional, relevant purpose was to maintain and enhance public trust in local elected officials in the advent of slot machine gambling.[16] Section 1102 specifically articulated the Pennsylvania legislature's desire to maintain the integrity of gaming regulations in order to prevent actual corruption or the appearance of corruption that may result from campaign contributions, as well as "ensure bipartisan administration of [the Act]; and avoid actions that may erode public confidence in the system of representative government."[17]

The state legislature set out to achieve this goal by writing a number of regulatory provisions into the Act. Section 1103 sets the groundwork by defining pertinent terminology, including the term "principal." [18] The Act defines a "principal" as a person having an ownership interest in restricted gaming activity.[19] This definition includes officers, directors, and any other person who owns a beneficial interest or has a controlling interest in a gaming applicant or licensee.[20] For the purposes of the Act, an "applicant" is defined as a person who requests permission to engage in a gaming activity that is restricted therein, for example, installing slot machines.[21]

Section 1513 then imposed upon those individuals a restriction on political contributions. Specifically, the Act prohibited principals of slot machine licensees, licensed manufacturers, licensed suppliers, and licensed racing entities from making political contributions to local candidates for public office or to local political parties.[22] Section 1513 also went so far as to ban attendance at political functions such as dinners, meetings, and fundraising events that required the purchase of a ticket.[23]

To enforce the political ban and other regulations, the Gaming Act required that a Pennsylvania Gaming Control Board ("Control Board") be established and, within that board, a Bureau of Investigations and Enforcement ("Bureau") be created.[24] The Control Board's website, which

---

[15] 4 PA. CONS. STAT. § 1102 (3), (4), (6) (2004) (amended 2010).
[16] *Id.* at § 1102 (11).
[17] *Id.* at § 1102 (11).
[18] *Id.* at § 1103.
[19] *Id.*
[20] *Id.*
[21] 4 Pa. Cons. Stat. § 1103 (2006) (amended 2010).
[22] *Id.* at § 1513(a).
[23] *Id.* at § 1513(d).
[24] *Id.* at §§ 1201(a), 1517(a).

it is required to create and maintain by statute,[25] states that its mission is to "protect the interest of the public by ensuring the integrity of legalized gaming through the strict enforcement of the law and regulations...."[26] The Bureau, although existing entirely within the Control Board, acts independently in matters relating to the political ban.[27] As the independent body for enforcing those ban provisions, it is empowered investigate and review all permit or license applicants and generally monitor all gaming operations.[28]

2. Pennsylvania Constitutional Provisions

The constitutional challenge in *DePaul* derived from freedoms guaranteed by the Pennsylvania Constitution. Article I, Section 7 of the state constitution provides that "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print out on the subject...."[29] This, in conjunction with the right of petition granted by Article I, Section 20, provides generous protection for freedom of speech and association.[30] Additionally, Article I, Section 26 establishes that neither the state nor its agencies may discriminate against an individual's exercise of his civil rights in an unlawful or baseless manner.[31] These constitutional guarantees, although slightly broader in reality, are considered equal to the U.S. Constitution's First Amendment Right of Free Speech for the purposes of this Comment.

B. Political Corruption

Many of the Gaming Act provisions, Section 1513 in particular, are premised upon the belief that racing and gaming industry leaders use wealth and influence to sway local politicians to act in the industry's best interests. Society fears that this enables casinos and other gaming facilities to unfairly influence the entire political process.[32] This is evidenced by a "long-standing and strong sensitivity to the evils traditionally associated with ... gambling when it is unregulated" in America.[33] Gambling regulations do little to quiet these fears; for even when regulatory processes are put into

---

[25] *Id.* at §1513 (a.2) (1).

[26] Pennsylvania Gaming Control Board, *Mission Statement*, http://www.pgcb.state.pa.us (follow "About PCGB" hyperlink; then follow "Vision Statement / Mission Statement" hyperlink) (last visited Oct. 5, 2010).

[27] 4 PA. CONS. STAT. § 1517 (a) (2006) (amended 2010).

[28] *Id.* at § 1517 (a)-(a.1).

[29] PA. CONST. art. I, § 7.

[30] *See* PA. CONST. art. I, §§ 7, 20.

[31] *DePaul*, 969 A.2d at 541; PA. CONST. art. I, § 26.

[32] *DePaul*, 969 A.2d at 545 (citing Petition of Soto, 565 A.2d 1088, 1093-1094 (N.J. Super. Ct. App. Div. 1989)).

[33] *DePaul*, 969 A.2d at 545.

place, their integrity is often called into question.[34] Arguably, a regulation process that is laxly monitored and enforced, while created with noble intentions, leads to erosion of confidence in the integrity of a state's representative government.

Furthermore, a significant percentage of Americans consider gambling to be an activity that is "rife with evil" and mischievous in terms of the public welfare and morality.[35] These some people do not even believe that gambling should be legal, much less loosely regulated. Therefore, it would be irresponsible to ignore the possibility that popular public disapproval of gambling may in fact outweigh the activity's economic benefits for the state, whatever its regulations or restrictions.

III. DEPAULS'S CLAIMS

Petitioner's main claim in *DePaul* was that the Gaming Act's political ban was "overly broad and unlawfully discriminatory" so as to violate Petitioner's constitutional rights of political expression and association.[36] Petitioner asserted that the Act affected his constitutional rights and therefore required strict scrutiny review, the highest level of judicial scrutiny.[37] Strict scrutiny requires a showing that the contested statute serves a compelling government interest and is "narrowly tailored" to achieve that interest.[38] Petitioner argued that the ban in Section 1513 could not survive such review because it was not narrowly-tailored and served a purpose other than that articulated by the legislature.[39]

The legislature articulated the apparent purpose of the Act in Section 1102, entitled "Legislative Intent," stating that the political ban was enacted to prevent corruption of the type that normally results when members of any major industry makes large campaign contributions.[40] In light of that provision, however, a ban of all political contributions, regardless of size, would appear to be overly-inclusive. Another questionable characteristic of the ban is that it failed to require a connection between the licensed gaming industry and the "recipient political candidate."[41] Finally, the legislature also failed to indicate any "scintilla of evidence" that would connect licensed gaming and political contributions to political corruption within the state of Pennsylvania.[42]

---

[34] *See Id.;* 4 PA. CONS. STAT. § 1102(11) (2004) (amended 2010).

[35] *DePaul*, 969 A.2d at 551 (quoting *Soto*, 565 A.2d at 1093-94 (N.J. Super. Ct. App. Div. 1989)).

[36] *DePaul*, 969 A.2d at 538.

[37] *Id.* at 552.

[38] *Id.* at 540.

[39] *Id.* at 543.

[40] 4 PA. CONS. STAT. § 1102 (11) (2004) (amended 2010).

[41] *DePaul*, 969 A.2d at 543.

[42] *Id.* at 540-41.

IV. THE COURT'S ANALYSIS

To begin its analysis, the *DePaul* court imposed a heavy burden for overturning the Section 1513 ban, adopting the view that all doubts as to the constitutionality of the statute were to be resolved in favor of the legislative enactment.[43] Thus, it required that the ban be construed, when possible, to preserve its constitutionality.[44]

A. Application of Strict Scrutiny

The *DePaul* court first determined the applicable standard of review. Using its previous decisions as guidance, the court found the constitutional freedoms of speech and association were implicated by the freedom of political expression limited by Section 1513.[45] The court then declared strict scrutiny the appropriate level of review where freedom of expression is at issue.[46] Although Section 1513 implicated this freedom, the court also stated that the quantity of expression does not increase substantially in correlation with the quantity of contribution.[47] It follows that political contribution bans, irrespective of size, restrict political expression and are therefore subject to strict scrutiny review. As a result, the constitutional question for the court became whether the Section 1513 ban was narrowly tailored to accomplish the compelling state interest of preventing the "actual or appearance of corruption" resulting from campaign contributions by principles in a large and influential industries.[48]

B. The Court's Survey of Other Jurisdictions

With strict scrutiny established as the appropriate measure of review, the court next looked to jurisdictions that had decided similar constitutional questions.[49] At the time of that survey, nineteen states had legalized either "racinos"[50] or some other form of gambling.[51]

Among those nineteen states, the legislative approaches to political bans in the gaming industry were anything but uniform.[52] Five states had enacted statutes imposing blanket bans to political contributions;[53] however,

---

[43] *Id.* at 545-46 (citing Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 393 (Pa. 2005)).

[44] *DePaul*, 969 A.2d at 546 (quoting *In re* William L., 383 A.2d 1228, 1231 (Pa. 1978)).

[45] *DePaul*, 969 A.2d at 548.

[46] *Id.*

[47] *Id.* at 547 (quoting Buckley v. Valeo, 424 U.S.1, 20-21 (1976)).

[48] *DePaul*, 969 A.2d at 552.

[49] *Id.* at 544.

[50] *Id.* at 548 (defining a "racino" as a combined racetrack and casino).

[51] *Id.*

[52] *Id.* at 551.

[53] *Id.* at 543.

only two states' courts, New Jersey and Louisiana, upheld these blanket bans in the face of a First Amendment challenge.[54] Notably, only one of those bans would apply to an individual in Petitioner's particular ownership position.[55] The remaining fourteen states imposed either very specific restrictions or no restrictions at all.[56]

The courts upholding political bans required their respective legislatures to demonstrate both a sufficiently important state interest and a closely tailored means of protecting that interest. Specifically, the political ban could not be an "unnecessary abridgment of associational freedoms."[57] For example, bans survived judicial review when they applied solely to casino "key employees," defined as "persons in a supervisory capacity or empowered to make discretionary decisions which regulate casino operations."[58] This select prohibition was found to be narrowly tailored to protect governmental processes from unlawful influence.[59] Therefore, these types of limited bans stand a better chance of withstanding constitutional review.

Courts ruling in favor of blanket bans also held that the size of a political contribution does not determine or reflect its potential to cause corruption.[60] For example, a ban on large political contributions could be easily circumvented by a large number of smaller contributions.[61] Also, these courts refuted the necessity of an obvious or specified relationship between the politician who receives the contribution and the gaming industry providing it because public officers often "wield power or influence beyond that which is inherent in [their] official duties."[62]

Blanket ban proponents argue that the "evils traditionally associated with casino gambling" are too difficult to prevent with narrow legislation.[63] Jurisdictions adopting this view perceive concentration of wealth in the gaming industry as an inevitable precursor to political corruption.[64] However, this assertion sometimes lacks the evidence needed to support it.

---

[54] *DePaul*, 969 A.2d at 549.

[55] *Id.* (stating that the New Jersey ban would not apply to an individual who merely owns an interest in a business concern that owns an interest in the ownership of a gaming facility).

[56] *Id.* at 549.

[57] *Id.* at 549.

[58] *Id.* at 550 (quoting *Soto*, 565 A.2d at 1100).

[59] *DePaul*, 969 A.2d at 550.

[60] *DePaul*, 969 A.2d at 545 (citing Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61, 66 (Ill. 1976)) (noting that in *Berz*, 349 N.E.2d at 66, the Illinois Supreme Court rejected an overbreadth argument similar to the one the Petition level in *DePaul*).

[61] *Id.* (noting that the *Berz* Court rejected the effectiveness of corruption prevention laws that prohibited contributions above a certain dollar amount).

[62] *Id.* (citing Berz, 349 N.E.2d 61, 67 (Ill. 1976).

[63] *DePaul*, 969 A.2d at 551 (quoting *Soto*, 565 A.2d at 1093-1094).

[64] *See DePaul*, 969 A.2d at 551.

V. HOLDING

Ultimately, the *DePaul* court held that the appropriate test for determining the constitutionality of blanket political bans is to assess the relationship between the statute's legislative intent and the regulation used to achieve it.[65] Section 1102 of the Gaming Act recognizes that the Act's primary objective of "protect[ing] the public."[66] One other objective listed in Section 1102, in direct reference to the Section 1513 political ban, stated that a political ban is necessary to prevent "the actual or appearance of corruption that may result from large campaign contributions...."[67]

The *DePaul* court found that the legislative intent articulated a fairly narrow governmental interest and that banning all political contributions was not a narrowly drawn means of furthering that interest.[68] Consequently, the court held that the Section 1513 political ban violated Article I, Section 7 of the Pennsylvania Constitution and enjoined its enforcement.[69] The Pennsylvania legislature has not enacted any law nor otherwise amended the Section 1513 political ban to address the articulated concerns at the date of this Comment's publication.[70]

VI. IMPLICATIONS AND CONSEQUENCES

The recent economic recession caused a dramatic decrease in betting and earnings at equine industry racetracks.[71] In hopes of raising revenues, many racetracks have considered adding on-site gambling, most commonly in the form of slot machines.[72] States such as Pennsylvania have seen increases in new tax revenue, the creation of thousands of jobs, and reinvigoration of its horse industry, making on-site gambling an attractive

---

[65] *See DePaul*, 969 A.2d at 552.

[66] 4 PA. CONS. STAT. § 1102 (1) (2004) (amended 2010).

[67] 4 PA. CONS. STAT. § 1102 (11) (2004) (amended 2010).

[68] *DePaul*, 969 A.2d at 552-53.

[69] *Id.* at 554. Despite the court's ruling, in the 194th regular Session of the General Assembly, the Pennsylvania Legislature voted to leave Section 1513 intact, making only minor grammatical and structural changes. To address the court's rejection of the political ban in *DePaul*, the legislature instead added two new provisions to Section 1102, "Legislative intent." New Section 10.1 states: "The General Assembly has a compelling interest in protecting the integrity of both the electoral process and the legislative process by preventing corruption and the appearance of corruption which may arise through permitting any type of political contributions by certain persons involved in the gaming industry and regulated under this part." New Section 10.2 states: "Banning all types of political campaign contributions by certain persons subject to this part is necessary to prevent corruption and the appearance of corruption that may arise when political campaign contributions and gambling regulated under this part are intermingled." 4 PA. CONS. STAT. § 1102 (10.1),(10.2) (2010).

[70] *See* Pennsylvania Gaming Control Board, http://www.pgcb.state.pa.us (follow "Licensure" hyperlink; then follow "Political Influence Statement" hyperlink) (last visited Oct. 5, 2010).

[71] Janet Patton, *Drop in wagering eats into Ky. Coffers*, LEXINGTON HERALD LEADER, Sep. 22, 2009, *available at* http://www.kentucky.com/2009/09/22/944935/ohio-high-court-ruling-puts-racetrack.html.

[72] *Id.*

option for the racing and gaming industry and the states in which they are located.[73] This trend is particularly relevant for Kentucky, home to multiple racetracks, including Churchill Downs, the site of the world's most renowned thoroughbred horse race, the Kentucky Derby. In Kentucky, the addition of slot machines would transform the state's pre-existing racetracks into "racinos." A proposal to allow slot machines in Kentucky's racetracks has in recent years been both contemplated and rejected by the Kentucky General Assembly and has been the topic of heated debate in neighboring Ohio.[74]

While on-site gambling promises to benefit Kentucky and other horse-racing states, the decision in *DePaul* reveals that it also has the potential for negative consequences. States that do not already allow slot machine gambling would need to enact statutes that include strict regulatory provisions and establish some form of a gaming control board. *DePaul's* exploration of the Pennsylvania Gaming Act reveals that regulations are necessary to ensure governmental credibility and prevention of corruption within industries of considerable wealth. This is particularly true in regards to states such as Kentucky, where the horse racing industry is incredibly influential and important to the local economy.

Furthermore, *DePaul* exposes the possibility that such regulatory gaming laws can jeopardize constitutional rights. Although the *DePaul* court declared the blanket ban unconstitutional, the court's analysis included a survey of many jurisdictions that have upheld and continue to impose political bans on certain categories of individuals. This is a serious issue for states such as Kentucky and Ohio to consider when weighing the costs and benefits of adding slot machine gambling to their racetracks. Specifically, legislatures should consider whether the new revenue would justify potentially sacrificing an individual's First Amendment rights.

It must also be noted that the *DePaul* court ordered strict scrutiny review of political bans under racing and gaming statutes. Because such a heightened level of will likely be imposed in other jurisdictions as well, states implementing political bans must be prepared to demonstrate both a sufficiently compelling interest and a closely tailored means of protecting that interest. Specifically, state legislatures should ensure that their bans do not cause any "unnecessary abridgment of associational freedoms."[75] When reviewing these bans, courts should consistently apply the strictest

---

[73] Pennsylvania Gaming Control Board, http://www.pgcb.state.pa.us (follow "Gaming" hyperlink; then follow "Benefits for Pennsylvanians" hyperlink) (last visited Oct. 18, 2009).

[74] Julie Carr Smyth, *Ohio High Court Ruling Puts Racetrack Slots on Hold*, LEXINGTON HERALD LEADER, Sept. 22, 2009, *available at* http://www.kentucky.com/2009/09/22/944935/ohio-high-court-ruling-puts-racetrack.html.

[75] *DePaul*, 969 A.2d at 549 (citing Casino Ass'n of La v. La. *ex rel.* Foster, 820 So.2d 494, 509 (La. 2002)).

standard of review to ensure great stability and confidence in the protection of First Amendment rights.

VI. CONCLUSION

The *DePaul* court struck down the Pennsylvania Gaming Act's Section 1513 political ban even though it served two legitimate public purposes: protecting public confidence and preventing government corruption. Most similar blanket bans have met the same fate in other courtrooms nationwide. While state governments have an understandably strong interest in the regulation and integrity of the racing and gaming industry, *DePaul* shows that such an interest, unless it can satisfy the strict scrutiny standard of review, will not outweigh an individual's First Amendment rights to freedom of speech and expression. States have extreme difficulty proving their political bans to be constitutional, as evidenced by the fact that only two United States jurisdictions have upheld complete blanket bans.[76]

State governments must be applauded for any steps made towards regulating and controlling the racing and gaming industry. Those efforts surely bolster public confidence in the honesty and integrity of the state's governmental functions. Such attempts must, however, be coupled with an acute awareness of personal rights, for before the state is a protector of its economy and government, it is a protector of its people and their constitutional rights.

[76] *DePaul*, 969 A.2d at 549.