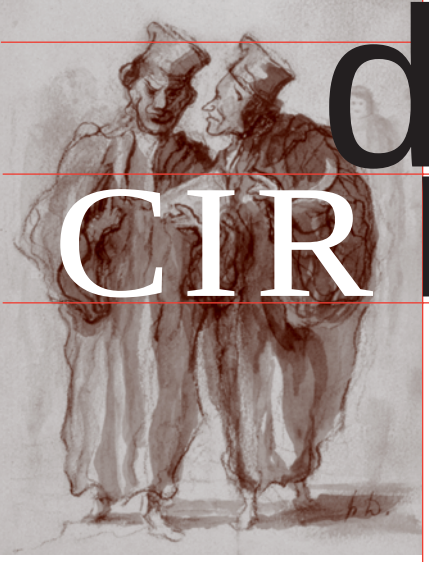

CIR docket report

Le Moyne's 'Disposition' – Unlawful

McConnell v. Le Moyne College

Cooperating Counsel: Daniel B. O'Sullivan and Neil Koslowe, Shearman & Sterling, LLP; Raymond J. Dague, The Law Office of Raymond J. Dague, PLLC.

Summer 2006

On January 19, the Supreme Court of the State of New York ordered Le Moyne College to reinstate Scott McConnell forthwith.

Hopefully this will be the end of one of the more outrageous recent fads in higher education—so-called dispositions theory. Incredibly, educators now evaluate, discipline, and even expel students based on their demonstrated commitment to social justice—or, in other words, their "disposition" toward a progressive political agenda.

You would think that the word "McCarthy" would be enough to remind school officials why this is wrong. Until recently, it was well settled that individuals could not be punished for thoughts, inclinations, even dispositions. But nothing is off limits to educators determined to remake students according to their progressive agenda. So much for the idea of creating an inclusive supportive learning environment. As our client Scott McConnell learned, students could be summarily expelled for expressing even slightly unorthodox views in the course of their academic work. Creating an inclusive environment definitely did not mean including diverse views, especially views that challenged progressive thinking.

Well, dispositions theory took a bad stumble in the McConnell case, thanks to a New York State law that requires no more than schools follow their own rules when they discipline or expel students. And thanks to your CIR, which was willing to bring the matter to the attention of the courts. Though others had yelled about dispositions theory, CIR was the first to bring a legal challenge in court.

Funny how filing a complaint gets the attention of educators. And our complaint against Le Moyne was a doozy. We challenged the fact that Le Moyne had ignored its own procedures for expelling students which, among other things, expressly precluded disciplining students merely for expressing unorthodox views. We challenged the fact that Le Moyne claimed to be acting as a teacher certification agent of the state yet claimed to be exempt from the First Amendment.

You'd think Le Moyne would have settled the case. Not so. Smug school officials asserted this was all a matter of academic judgment. They figured no judge would want to second guess their right to make important academic judgments about things like multiculturalism. After all, these people invented multiculturalism, so how *could* anyone criticize their expertise? And as far as corporal

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A Fool and His Money are Soon Parted

Affordable Housing Development Corp. v. City of Fresno
Cooperating Counsel: Bruce Berger; Stammer, McKnight, Barnum & Bailey

On January 11, 2006, Judge John T. Noonan put a decisive end to another of the seemingly interminable efforts by equal housing do-gooders to make speech into a crime. This time, it was a commercial housing developer that decided the best way to fight some noisy citizens was to haul them -- all of them -- into court and sue them for housing discrimination.

Noonan's ruling is a milestone in CIR's effort to restore the simple idea that the government can't suppress speech based on the speaker's point of view. Period. It matters not a whit whether the point of view in question undermines this or that pet government project or even, gasp, is racially intolerant.

Noonan is no conservative. But he is a serious judge. And he saw right through the latest ploy in political correctness: First, the government licenses private corporations to sue individuals for housing discrimination every time they speak out against a public housing project. Second, individuals spend years in court defending their good name against battalions of corporate lawyers all the while facing the threat of terrible damages, a multi-million dollar judgment.

CIR client Travis Compton and his family (l to r) William 11, James 4 and his wife Pamela.

In 1996, a developer called the "Affordable Housing Development Corporation" ("AHDC") sought Fresno city approval for a tax-exempt bond to finance a low-income housing project. Many neighbors objected to the project and, with the help of a city councilman, they succeeded in getting the city to reject the bond.

A Civil Rights Conspiracy...

AHDC sued everyone in sight, including the city, the city councilman, Compton, and 500 unnamed individuals called "Does 1 through 500." Among other things, AHDC accused Compton and others of conspiring to interfere with the federal fair housing rights of others based on race, disability, and family size.

AHDC produced some minutes and phone lists with Compton's name on them and, based solely on the lists, alleged that he was part of a group that tried to block the project for discriminatory reasons. In 2000, the District Court granted Compton's motion for summary judgment. The court held that even if Compton was a member of a citizens' group, there was no evidence that Compton knew about or participated in any action that was illegal.

We realized though, that merely winning summary judgment after four expensive and long years in court just wasn't going to cut it. If wealthy corporations could keep noisy individuals tied up in court for a few years for nothing more than speaking up at a public meeting, few individuals could afford to speak out. That kind of a win was no kind of win at all.

Because the lower court refused to promptly dismiss the suit, Compton (who was a first-time homeowner and father of young children) quickly faced $30,000 in legal expenses, of which he only was able to pay $2,000. Had CIR not agreed to become involved in the case, Compton would have had no counsel. Altogether, it has cost nearly $500,000 to defend Compton against claims that never should have been brought in the first place.

...“even if its exercise is not politically correct...”

And to our great delight, the Ninth Circuit agreed with us. Judge John T. Noonan, who wrote the opinion, re-affirmed that individuals have a constitutionally protected right to petition the government even if its exercise "is not politically correct and even if it is discriminatory against others."

Provided that a speaker does not incite imminent violence, he has a constitutional right to "advocate violation of law" (and, we would add, just about anything else).

Strong stuff. But of single importance to CIR's goal, the court held that Compton was entitled to recover his attorneys' fees. It ruled that Compton's free speech rights were so well settled as a matter of law that AHDC should have known the case was frivolous from the beginning. The court cited CIR's 2000 victory in *White v. Lee*, where the court imposed personal liability on HUD officials for conducting a burdensome discrimination investigation of several individuals in Berkeley, California. As Judge Noonan put it, "*White v. Lee* was not a bolt from the blue but the application of established law."

Well, we always thought *White v. Lee* was established law, but as Travis Compton's ordeal illustrates, injecting discrimination law into inherently political issues like zoning confuses people greatly. Hopefully, Judge Noonan's ringing decision in this case means that the next Travis Compton won't have to spend seven years and hundreds of thousands of dollars to re-settle the meaning of the First Amendment.

The ruling in *AHDC v. Fresno* is all the more important following the Supreme Court's decision last fall in *Kelo v. New London*, which eviscerated constitutional restrictions on the power of eminent domain. So long as the courts treat property rights as state-made creations, all the more crucial is it to stress that free expression is not subject to state control. *AHDC v. Fresno* shows that defending free speech in court is a central element of any serious effort to restore the idea of limited government based on individual rights.

What Constitutional Right?

Worth v. Jackson, et al.

On April 19, CIR General Counsel Michael Rosman appeared before a panel of the U.S. Court of Appeals for the D.C. Circuit to explain why it is unconstitutional to systematically prefer job applicants and employees of certain races.

At issue is the mindless employment preference scheme now used in many government agencies and defended in court by the Bush Administration. Its essence is simple—repair any slight disparity in racial representation in any job category by favoring minority applicants in hiring and promotion. Never mind whether minorities are overrepresented in the agency as a whole. And decline to remedy any underrepresentation of non-minority employees, no matter how egregious.

Over time, the relentless pursuit of parity for certain races but not others will produce an agency consisting predominantly of the preferred race. As of this writing, HUD's workforce is 50% minority and female, yet it continues to operate a system of preferences explicitly designed to further boost the percentage of minority employees.

More fundamentally, the issue is whether the courts are going to hold the federal government to the law. Up until this point, the law is 0 for 3. U.S. District Court Judge Reggie Walton first tried to make the case go away by ruling that the case was rendered moot by the Bush Administration's last-minute effort to jettison all mentions of numerical "goals" in the OPM guidance that governs minority hiring by agencies like HUD.

When we pointed out to Judge Walton that our case was about the actual practices at HUD (as well as the federal laws that all but required those practices, never mind the OPM guidance) he suddenly discovered another way to make the case go away. And so last August, he ruled that our client Dennis Worth lacked standing from the beginning. (He didn't explain why he had us spend two years arguing about the new OPM guidance if he thought we had failed to state a legal claim from the beginning.)

But that was okay with us, if only because we got to go right

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punishment went, they figured no self-respecting person would even try to defend someone who supported that outmoded view.

Le Moyne almost pulled it off. First one judge dismissed the case without even reading our papers. So we refiled in state court, only to be assigned a judge whose wife was a Le Moyne graduate. Then, after two trips to Syracuse by our fabulous co-counsel, Daniel B. O'Sullivan and Neil Koslowe of Shearman and Sterling, LLP, and Raymond J. Dague, Esq., to brief said judge on the law and the facts, we were rewarded with a two-page "letter decision" declaring this was all a matter of academic judgment and not fit for judicial review.

McConnell had one last shot in court before it would be too late for him to graduate. We took it. In January, we persuaded the New York Appellate Division to hear our expedited appeal. And that's when things started to unravel for the supremely confident educators of Le Moyne College. The Appellate Division panel simply couldn't believe that Le Moyne had kicked a student out over a seminar paper. It was not in the least impressed with the school's fraudulent argument that this really was an admissions decision.

And so, two weeks after the hearing, the court issued its short opinion that knocked the legs out of every one of Le Moyne's preposterous rationalizations. Scott showed up the next day to enroll for the spring term. Le Moyne said it was going to appeal the decision to the highest court in New York, but several weeks later, folded its tent for good.

So McConnell is back at Le Moyne. He plans to graduate next summer, only one semester late.

And Le Moyne's officials are left to contemplate how their efforts to create a supportive, diverse, and nurturing community ran afoul of laws designed to protect academic freedom and the right of individuals to express unorthodox views.

CIR supporters are left with the one piece of this whole matter that will have lasting significance for our country—a legal precedent that demolishes the lofty pretensions of so-called "dispositions theory." The Le Moyne decision exposes dispositions theory for what it is—an effort to enforce progressive thinking at the expense of traditional civil liberties like freedom of expression.

Despite the effort of *The New York Times* and others to paint this case as an effort by CIR to defend corporal punishment, the courts were not the least bit interested in that topic one way or another.

The truth of the matter is that these cases aren't about the right of individuals to be outrageous. They are about the right of individuals to express different points of view on the same terms as every other individual. It's not that the state has to accept every outrageous expression that the Left cares to put up—it's that the state can't enforce its speech rules selectively, allowing one side unlimited opportunity to control the terms of debate while simultaneously expelling anyone who dares to suggest an opposing point of view.

Le Moyne doesn't have to put up with outrageous speech. But if it's going to protect unorthodox speech, it has to protect the unorthodox speech of all its students.

CIR client Scott McConnell expelled from Le Moyne College for statements made in a course paper.

All's FAIR....

Rumsfeld v. Forum for Academic and Institutional Rights, et al.
Cooperating Counsel: Gerald Walpin, Katten Muchin Rosenman LLP

On March 6, the Supreme Court unanimously decided that Congress can require law schools to allow military recruiters access to their students. The Court rejected claims that forcing schools to accept recruiters violated law professors' rights of free speech and association.

The losing "party" was an association of 36 law schools and law professors that called itself the Forum for Academic and Institutional Rights, or "FAIR" for short. (Hilariously, only 24 of FAIR's members permitted themselves to be publicly identified as members of this important group.)

Your CIR filed one of its rare *amicus* briefs in the case and while we can't claim credit for the outcome, we take pride in the fact that the opinion was liberally sprinkled with citations to past CIR cases—the body of free speech precedent we've built up over the last 18 years.

The new Roberts Court seems to understand that a principled conception of free speech does not mean the government has to tolerate any and all speech. But it does mean the government cannot play favorites among competing points of view—it must treat all according to the same standard, whatever that standard might be.

And playing favorites was just what the law professors' claim was all about. According to them, the temporary presence of a competing voice on campus so compromised the professors' own ability to say mean things about the military that it amounted to unconstitutional suppression of speech. And so they claimed a First Amendment right to trim the First Amendment rights of others.

The reluctance of law professors to associate with a couple of military recruiters per year will strike readers of this Docket Report as deliciously ironic. After all, it was these same law professors who piously informed the Supreme Court a few years ago in our *Grutter* case that schools needed a special dispensation in order to engage in race discrimination so that they could help the military maintain a racially diverse officer corps. Now that the Supreme Court has granted them the right to discriminate in this way, we guess it's time to get back to the business of slapping the military around.

That's the problem with the law professors' view of the First Amendment—it's all based on what seems expedient to the law professors. When it suits the law professors, they like to maintain a close relationship with the military. Otherwise, they like to kick them off campus.

The Roberts Court would have none of this, of course. Its task in explaining the First Amendment to the law professors was made easier by the considerable body of free expression precedent your CIR has set. Justice Roberts cited no less than three Supreme Court and Courts of Appeals decisions in CIR cases. Most prominent among them was CIR's 1995 victory in *Rosenberger v. University of Virginia,* where the Court correctly observed that students are capable of distinguishing between "speech a school sponsors" and "speech a school permits because it is legally required to do so." In that regard, the students are way ahead of the law professors.

It took 18 years to move the law incrementally in our direction. But the results speak for themselves. Instead of a divided court wringing its hands over what to say to the law professors, it had plenty of CIR precedents at hand that helped insure the correct outcome.

Places to Go, People to See

This last fall CIR added three new members to its Board of Directors. They join **Dr. Jeremy Rabkin** (Chairman of the Board), Professor of Government at Cornell University; **Dr. Larry Arnn**, President of Hillsdale College; **James Mann**, Director of Derivative Products Group of Societé Generale; **Gerald Walpin**, former senior partner and currently Of Counsel for KMZ Rosenman; and **Terry Pell**, President of CIR.

Dr. Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. Dr. George has lectured and published extensively. In 2005, Dr. George won a Bradley Prize for Intellectual and Civic Achievement and the Philip Merrill Award for Outstanding Contributions to the Liberal Arts of the American Council of Trustees and Alumni. From 1993-98, Professor George served as a presidential appointee to the United States Commission on Civil Rights. Professor George is a member of the Council on Foreign Relations and the President's Council on Bioethics, and serves as Of Counsel to the law firm of Robinson & McElwee. He is a graduate of Swarth-

Not NOW, Not Again

Joseph Scheidler, et al. v. National Organization for Women, Inc., et al.

On February 28, the Supreme Court shut down another effort by the National Organization of Women to make violence against women a federal crime. This particular effort concerned the Hobbs Act, which designates interstate robbery or extortion as federal crimes. NOW wanted to expand the Hobbs act to include *any* violence that affects interstate commerce. The Court would have none of it.

Readers of this Docket Report will recall that your CIR was instrumental in stopping another of NOW's long-running efforts to elevate violence against women into a federal cause...er, crime. In *U.S. v. Morrison*, CIR took aim at a provision of the Violence Against Women Act, which purported to create a federal civil remedy, on top of existing state remedies, for violence motivated by gender-based animus.

Then, as now, the Court took a dim view of the expansion of federal authority over crimes that seemed to have little, if any, connection to interstate commerce. In *Morrison*, the Court struck down the offensive provision as exceeding Congress's authority under the commerce clause. In *Scheidler*, the Court merely observed that Congress never intended to make *all* violence that affects interstate commerce a federal crime, but only violence related to interstate robbery and extortion.

The decision warranted scant notice on the pages of *The New York Times*. That's because *The Times* has figured out that the less it talks about NOW's efforts to use the abortion issue to expand the scope and role of the federal government in every area of American life, the better.

more College and Harvard Law School and earned a doctorate in philosophy of law from Oxford University.

Arthur Stephen Penn, Esq., is President of Elmrock Capital, Inc. Prior to the founding of Elmrock, Mr. Penn was a practicing attorney in New York City. He was involved in diversified investment opportunities during the 1970s and 1980s as well as real estate management and conversion. He earned his J.D. degree from New York University School of Law in 1961 and his B.A. from Cornell in 1956.

Dr. James Piereson is President of the William E. Simon Foundation. He is the former executive director and trustee of the John M. Olin Foundation. Before joining the foundation in 1981, Mr. Piereson was a member of the political science faculty at the University of Pennsylvania. He also serves as a member of the board of The Philanthropy Roundtable and is a member of the board of overseers of the Hoover Institution.

Joseph Scheidler, president of Pro Life Action League, speaks to reporters after Supreme Court arguments in Scheidler v. NOW.

Through its work on cases like *Scheidler* and *Morrison*, CIR is trying to focus the Court's attention on the threats posed by interest groups like NOW to our structure of limited government.

Groups like NOW realize that it's always easier to blow some particular issue out of proportion if it can focus all its effort on Washington instead of hundreds of small towns and cities. NOW understands the utility in politicizing run-of-the-mill crimes against women, and it can best accomplish this if the feds are forced to investigate and prosecute each one under the careful scrutiny of *The New York Times* and any manner of other concerned busybodies.

Morrison was a major precedent that changed the constitutional landscape for decades. In *Scheidler* it was important to block another of NOW's many end runs around the idea of limited government. We are pleased that we succeeded in both objectives.

NOW sought to criminialize abortion clinic protests, such as this one by the Pro-Life Action League, under federal extortion laws.

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to the Court of Appeals for the D.C. Circuit on an issue of law that has troubled us for some time. It looks like *Worth v. Jackson, et al.* may be our opportunity to do something about it.

You see, according to Judge Walton's reading of the law, federal employees who think there is unconstitutional discrimination cannot just file a lawsuit challenging the program under the Constitution. (Never mind that this happens to be what any state employee can do, not to mention any student at a state college, any government contractor—come to think of it, *anyone,* but a federal employee.) According to Judge Walton, the sole remedy for federal employees is the comprehensive employment discrimination statute passed by Congress to make it easier for employees to get discrimination complaints resolved, usually referred to as "Title VII."

Well, easier for some. Because just as soon as Judge Walton finished writing that Title VII was the one and only remedy available for employment discrimination, he ruled that our client didn't have a case under Title VII. Why? Because under Title VII, he wrote, an employee must first successfully challenge a specific employment decision before he gets a crack at challenging the constitutionality of a hiring preference system as a whole. Even one as egregious as the one at HUD.

Judge Walton didn't explain why this little fact about Title VII might actually undermine his theory that Title VII could be the *sole* remedy for employment discrimination for federal employees. Of course, if Judge Walton is right, it means that Title VII restricts the remedies for employment discrimination. Including, we would note, the fundamental remedy of asking the courts to enjoin a program that is unconstitutional across the board and not just in the particular employment decisions it is taken to authorize.

Our goals in this case are clear, starting with a D.C. Circuit precedent that unequivocally allows federal employees the right to sue under the U.S. Constitution to enjoin the use of racial preference schemes that are clearly unconstitutional.

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