We all revere the Constitution, perhaps because we don’t have to agree about what it means. One among many interpretive fault lines lies between those who emphasize the Articles as against those who stress the Amendments. The Amendment-based conception has mostly prevailed since the FDR administration. This view emphasizes the Bill of Rights as the more essential part, in particular freedom of speech, separation of church and state, and the Due Process Clauses of the Fifth and Fourteenth Amendments, reaching beyond the guarantee of fair judicial proceedings to encompass strict supervision of state courts. In addition, Equal Protection is interpreted to reach far beyond the equal right of citizens to call upon the government to exercise the police power on their behalf, to something much closer to equality full stop.

In his e-book Fedzilla vs. the Constitution, John Krill, a man well known to members of the Statutory Law Section for his insightful summaries of U.S. and Pennsylvania Supreme Court cases at the PBI’s annual Statutory Law seminars, offers a vigorous, scholarly and provocative argument to read the Constitution in a way that considers the governmental structure provided by the Articles as the genuine bulwark of liberty. (While more than footnotes, the Bill of Rights and the other Amendments are less important than the checks and balances inherent in the structure of three branches and two levels.) This structural view predominated before the New Deal, and since its dispossession, it has sometimes been labeled the “Constitution in exile.” Under this conception, the federal government’s powers are limited to those enumerated in the Constitution’s text and are not made virtually plenary, as they are now, by such means as implausibly expansive interpretations of the Commerce Clause, the Necessary and Proper Clause, the General Welfare Clause of the Preamble, along with the reduction of the Tenth Amendment to an empty truism.

Each of the three branches of the federal government must stay within its separate and assigned role. In domestic affairs, the powers of the states are “numerous and indefinite,” as promised in Federalist No. 45. Economic freedoms are protected as jealously as civil rights. Fedzilla argues that the nation made a huge mistake when it acquiesced to the transmogrification of the Constitution from a federation of states ceding enumerated powers to a genuinely federal government into the current centralized government of enumerated limitations (i.e., the Bill of Rights).

The book argues, for instance, that the General Welfare Clause, as originally understood, prohibits Congress from spending on local improvements or bundling local projects into national “pork barrel” legislation; the Clause authorizes only measures that equally benefit the entire nation. More broadly, Congress may legitimately spend federal tax dollars

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Repatriating the Constitution

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only on legislation within the 18 enumerated powers set forth in Article I, § 8. The Commerce Clause should prohibit the federal government from regulating intrastate commerce and prohibit federal regulation of manufacturing and agriculture, which were understood to be distinct from commerce when the Constitution was adopted. When modern Supreme Court rulings and expansions of executive powers banished the structural Constitution, the enumerated powers ceased to impose any meaningful limits on the federal government. Congress is now free to spend on whatever it wishes, and may regulate virtually any activity it chooses to label interstate commerce.

Krill argues that if the nation were to restore the original understanding of the Constitution, the federal government could concentrate on its core functions, primarily defense and public safety, and it would therefore be much less expensive. The host of federal programs that fall outside the enumerated powers as narrowly interpreted, and are therefore unconstitutional, would either cease to exist, or continue through the states (either alone or cooperatively through interstate compacts) or the private sector. The nation pays for its abandonment of the Constitutional scheme of government by suffering a bloated federal government, less accountable to the people than it would be if local matters like crime and education were left to states and localities without federal control and interference.

A skeptical reader is likely to observe that restoration of the Constitution in exile faces many obstacles, which the book mentions but may underemphasize.

Krill argues that if the nation were to restore the original understanding of the Constitution, the federal government could concentrate on its core functions, primarily defense and public safety, and it would therefore be much less expensive.

Given the relentlessly progressive cast of American thought, a reversion to the structural Constitution seems as unlikely as a change in taste demanding popular music that sounds like Ellington and Gershwin, if not Haydn and Mozart. The original Constitution arguably created an unworkable government where nearly every major act became bogged down in endless legal wrangling among the federal branches and between the federal government and the states. The failure of the Constitution to address the fundamental issue of the states’ right to secede set the stage for a catastrophic Civil War. The nearly insuperable obstacles to amendment under Article V virtually necessitated expansion of the president's and the Supreme Court's powers, without which the nation's government would be unable to adapt to a dynamic world.

Despite President Kennedy's idealism, many Americans are unashamed to ask what their government can do for them. They expect the federal government to address many needs, real and imagined, and would be frustrated if their leaders were to repeatedly block their wishes by invoking the doctrine of enumerated powers. A candidate for president who seriously proposed implementing the Constitution's structure would likely be unelectable. Except for Justice Thomas and the late Justice Scalia, no contemporary justice subscribes to anything resembling the book's view, and a nominee who did would probably not be confirmed. Since the Constitution as conceived in Fedzilla has not been applied to contemporary conditions, doing so would constitute a radical change that might even cause the Republic to founder.

Fedzilla ably and thoroughly describes the many ways in which our current political practice has strayed far afield from the Constitution as written and originally intended. The public’s realization that the fundamental law our leaders swear to follow is largely a dead letter has contributed to the bitter tone of contemporary debate. The Constitution was framed to provide for a vigorous, but limited and accountable, government, with a suitable balance between national and local powers and responsibilities. Perhaps a constitutional convention as provided by Article V would provide an appropriate forum to rewrite the Constitution so that it can achieve its essential purposes in such a manner that the government can actually observe it. Despite the arguments ably advanced in Fedzilla, I don’t think we can rely on our magnificent founders to do our heavy lifting forever.

Lawrence G. Feinberg is a senior attorney with the Joint State Government Commission. The views expressed in this article are his own and should not be attributed to the Commission.

Committee Mission

The PBA Statutory Law Committee shall assist any entity of state government and of the PBA regarding bill draftsmanship and codification. The committee shall review legislation or other proposals to improve Pennsylvania’s legislative process and the public’s participation therein.

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The **Statutory Construction Digest: A Useful Legal Research Tool**

*By John K. Lavelle, Esq.*

The *Statutory Construction Digest* is a practical research tool. Among other things, it is a compilation of judicial decisions impacting a variety of legal practice areas. The decisions date as far back as the 19th century and have been gathered from more than 57 years of work in the Legislative Reference Bureau (LRB). This undertaking was started by a former LRB director, S. Edward Hannestad, as a pamphlet to aid in drafting legislation at the statehouse. Hannestad’s efforts laid the foundation for the present rendering of the publication prepared by the current LRB director, Vincent C. DeLiberato, and an editorial staff.

As a research tool, this book is useful in a number of ways. For instance, it contains cases deciding constitutional questions that crop up in the course of bill and amendment drafting. This material is presented in digest form or through a direct quote from the court opinion. These constitutional questions include topics like germaneness and original purpose concerns, along with issues relating to the uniformity of taxation and delegation of legislative power, to name a few. These topics often arise when a statute is being defended or challenged in civil or criminal litigation. As a result, the digest material for cases involving these types of issues may be valuable to litigators in matters before a court.

The digest also addresses specific areas of law that may be of interest for attorneys practicing in those areas. For example, the digest includes an entire chapter on statutory construction issues involving taxation. There are also several different aspects of criminal law mentioned throughout the paperback, as well as case law relating to administrative and commercial law.

The volume can be a good place to begin researching questions on statutory interpretation. The cases cited within it are useful for dozens of different statutory construction issues that have sprung up in the three branches of government over the years. Readers can expect future editions to them keep abreast of new matters presented in this commonwealth on the statutory interpretation front.

Another way this digest is beneficial to practitioners is in helping explain how courts in this commonwealth have viewed standard legislative subjects like discerning legislative intent, the enrolled bill doctrine, and the Speech and Debate Clause. The digest can also help demystify linguistic canons like *in pari materia*, the rule against surplusage, and *ejusdem generis*, that are sometimes used by courts to interpret statutes. Using the digest, researchers can gain an understanding of how courts in Pennsylvania have used the principles in analyzing statutes.

A feature of the digest that legal researchers will likely find useful is the easy-to-use index, which can be helpful in accomplishing research quickly. The index sets out a fairly extensive list of statutory construction and legislative drafting issues. Included within the index are topics such as repeals, retroactive effect, local and special legislation, severability and political subdivisions. It is also complimented by a table of the cases that catalogs all cases referred to throughout the work.

Updates of the digest are published after the conclusion of each two-year legislative session, and individual copies may be ordered online at www.shoppaheritage.com or by calling 717-787-5526.

John K. Lavelle is deputy general counsel in the Governor’s Office of General Counsel.

**Endnotes**

2. The first publication was *Court Decisions Affecting Legislative Drafting* by S. Edward Hannestad (Harrisburg, Pennsylvania: Pennsylvania Legislative Reference Bureau, 1957).
In the fall of 2014, the Joint State Government Commission (JSGC), pursuant to House Resolution 1032, Printer’s No. 4283, assembled an Advisory Committee that was directed to complete a study on truancy and school dropout prevention that included the following:

- A thorough and comprehensive study of current truancy law and policies;
- Barriers and best practices regarding education success and stability;
- Court competencies;
- Data collection;
- Measurement of educational outcomes for children in foster care;
- Statutes, best practices and legislative initiatives in other states;
- Studies or initiatives promoted by national educational advocacy organizations relating to truancy; and
- The manner in which charter and cyber charter schools enforce Pennsylvania’s truancy laws and impediments to enforcement.

The Advisory Committee was composed of experts, including representatives from those groups most likely to make useful and insightful contributions, such as representatives of the Pennsylvania Department of Education (PDE), educational organizations, the judiciary, district attorneys, law enforcement, public organizations involved in truancy issues, representatives of county children and youth agencies and juvenile justice agencies, and other appropriate organizations involved in school attendance issues.

After multiple meetings and telephone conferences, the Advisory Committee proposed a set of recommendations for both statutory and policy changes. The recommendations address several areas in particular: creating more uniformity in the definitions and procedures schools must use to implement compulsory school attendance, improving flexibility in the disposition of truant children by both schools and courts, taking into consideration their individual needs and the appropriateness of particular sanctions, and improving data collection to help identify at-risk students and provide schools, courts, and children and youth agencies with early intervention and prevention opportunities to promote educational success. Part of the impetus for the study was the tragic case of a mother imprisoned for her children’s truancy violations who became ill and died in jail, and thus enforcement of compulsory education requirements was a particular area of focus for the advisory committee. In this regard, the Advisory Committee recommended legislation that would organize and clarify the compulsory attendance enforcement procedures to ensure that all potential penalties are optional, allowing magisterial district judges discretion in enforcing compliance. Other areas addressed in the proposed legislation are aimed at clarifying truancy definitions and procedures, so that parents and schools have clear, definitive information with which to address attendance problems with students. They include: provide a standardized definition of “truant” and “habitually truant” that is applicable to all Pennsylvania schools; standardize truancy policies for charter and cyber charter schools and allow them to develop those policies independent of the local school district and to report truancies directly to the Department of Education; clarify truancy procedures, from notice requirements to determining when a case should be referred to the local children and youth agency or the magisterial district judge; and require schools to offer families a student attendance improvement conference before beginning legal proceedings against the student or the parent.

Additionally, the advisory committee found that Pennsylvania is virtually unique in its compulsory school starting age of eight years of age and believed this...
Truancy and School Dropout Prevention

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situations put Pennsylvania’s beginning students at a disadvantage. They recommended that the Public School Code of 1949 be amended to change the beginning compulsory attendance age from eight years of age to six years of age to bring Pennsylvania in line with the rest of the country and provide younger students with the advantage of beginning their formal education at the same time as the rest of their peers.

The advisory committee also suggested some public policy actions that would assist PDE and the magisterial district judges in improving truancy services. These include: PDE should serve as a resource for guidance and training to deal with truancy issues; good data collection systems should be in place to help identify areas of need and ensure that appropriate resources and support are available; consistent with state and federal privacy laws, data should be shared among and between schools, children and youth agencies, courts, probation, and other relevant entities to help identify children at risk and coordinate services to them; PDE, in conjunction with the Department of Human Services (DHS), should develop detailed data regarding educational outcomes for children in foster care; PDE, individual schools, and DHS should ensure that training is available to school personnel and children and youth caseworkers in truancy prevention and attendance improvement; and school-based services, especially evidence-based programs, should be available to assist children with compliance issues. This includes allowing truancy hearings to occur in schools, at the discretion of the magisterial district judge and the school superintendent.

The JSGC report for this study was presented to the General Assembly on Oct. 27, 2015, and is available on the Commission’s website at: http://jsg legis.state.pa.us/publications.cfm?JSPU PUBLN_ID=439.

On March 17, 2016, Rep. Kerry A. Benninghoff, the prime sponsor of the truancy study, introduced House Bill 1907. HB 1907 varies somewhat from the advisory committee’s original proposal in that it does not include any proposed amendments affecting charter schools and does not change the minimum age for compulsory school attendance. It adds a provision that establishes venue for truancy proceedings in the jurisdiction where the school that the child in enrolled in is located. Additionally, in the provisions regarding procedures for habitually truant students, the law currently provides different procedures for children 13 years of age or younger. HB 1907 changes that age to 15. The bill passed the House of Representatives by a vote of 197 to 3 on May 2, 2016 and was referred to the Senate Education Committee a week later.

Yvonne Llewellyn Hursh is counsel to the Joint State Government Commission, the central research agency of the Pennsylvania General Assembly.

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Commonwealth Court Rules Governor May Line-Item Veto Amendments to the Fiscal Code

by Andrew Butash, Esq.

In a recent ruling in Scarnati v. Wolf, the Commonwealth Court held that the governor may line-item veto amendments to the fiscal code, pursuant to Article IV, Section 16 of the Pennsylvania Constitution. This constitutional provision authorizes the governor “to disapprove of any item or items of any bill, making appropriations of money, embracing distinct items...” One of the key issues in the case is whether the fiscal code amendments that Gov. Tom Corbett vetoed are appropriations for the purposes of the section or substantive provisions that direct the use of appropriations in the operating budget, but are not subject to Article IV, Section 16.

The court held that the governor may line-item veto certain amendments to the fiscal code for three reasons. First, the court held that the governor may exercise the authority because the operating budget could not be implemented without the fiscal code, which directs how the appropriations in the operating budget are allocated throughout state government and different programs. The court stated that the amendments to the fiscal code that the governor vetoed were appropriations under Article IV, Section 16 because of the interdependent relationship between the fiscal code and operating budget. The court posited that the fiscal code and operating budget were interdependent because the fiscal code states that its intent is to implement a balanced operating budget as mandated under Article VIII, Section 13 of the Pennsylvania Constitution. The court also asserted that the fiscal code and operating budget are interdependent because a correlation exists between the vetoes of the fiscal code amendments and operating budget.

Second, the court held that the governor may line-item veto amendments to the fiscal code since how the amendments specify the way prior appropriations are to be allocated does not mean that the amendments are not appropriations for the purposes of Article IV, Section 16. In reaching this conclusion, the court adopted the definition of “appropriation” as the word stems from Black's Law Dictionary (8th ed. 2004), which mirrored the court’s interpretation in Common Cause and County of Mercer and the Supreme Court’s interpretation in Jubelirer. Black defines “appropriation” as a “sum of money the legislature designates for a particular purpose.” Furthermore, the court adopted the definition of “appropriation bill” from Black’s, which defines it as “a measure before a legislative body authorizing the expenditure of public moneys and stipulating the amount manner, and purpose of the various items of expenditure...” The court stated that the definitions were also consistent with the manner in which “appropriation” is used in other parts of the Pennsylvania Constitution. Based on Black’s definitions of “appropriation” and “appropriation bill,” the court concluded that there was no substantive distinction between the amendments in the fiscal code and the appropriations in the operating budget because both “authorize the use of money for a particular purpose.”

Third, the court held that the governor may line-item veto amendments to the fiscal code because determining that the fiscal code is a “bill making appropriations of money” is necessary to effectuate the governor’s line-item veto power under Article IV, Section 16. The court asserted that amendments to the fiscal code must be interpreted as appropriations as a matter of policy, because to interpret it otherwise would prevent the governor from line-item vetoing provisions relating to the operating budget in the fiscal code. Moreover, the court stated that if the governor is prohibited from line-item vetoing the fiscal code, the result would force governor to veto the entire fiscal code hindering the implementation of the operating budget.

Andrew Butash is assistant counsel with the Legislative Reference Bureau, the legislative drafting agency for the Pennsylvania General Assembly.

Endnotes
2 The act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code; 72 P.S. §§ 1-1805.
3 Scarnati, 135 A.3d at 218-25.
4 Id. at 222-24.
5 Id. at 222.
6 Id.
7 Id. at 223.
8 Id. at 223-24.
12 Scarnati, 135 A.3d at 224.
13 Id.
14 Id.
15 Id.
16 Id.; Common Cause., 668 A.2d 190 at 205.
17 Id.
18 Id.
19 Id.
Supreme Court Rules State Action Immunity Not Automatically Applicable

by John K. Lavelle, Esq.

Background

The United States Supreme Court handed down a decision with a significant impact on state administrative law throughout the country last year.1 The case came before the court because of actions by the dental board in North Carolina that effectively eliminated teeth whitening services by non-dentists in the state. This purging began when the state board designated teeth whitening as the practice of dentistry. The dental board, whose majority is statutorily required to be dentists, then issued dozens of cease-and-desist letters warning businesses that providing teeth whitening services constituted a criminal law violation. The board also urged shopping mall operators to remove businesses selling teeth whitening services from their premises.

Because of these actions, the non-dentist teeth whitening services disappeared in North Carolina. Afterwards, the Federal Trade Commission (FTC) filed an antitrust action against the dental board alleging that the board’s behavior regarding the non-dentist teeth whiteners violated the Sherman Act.2 The FTC argued that the actions of the board resembled a cartel more so than a state agency in light of its anticompetitive behavior. The Fourth Circuit ruled in favor of the FTC, and the dental board appealed the decision to the high court.

Ruling

Certain forms of activity performed by a state are immune from antitrust laws. For non-state actors, a state’s anticompetitive policy is generally given antitrust immunity only if the state clearly articulates the policy and actively supervises it.3 This court decision addressed the supervision component for antitrust immunity.

In a 6-to-3 ruling, the court affirmed the Fourth Circuit that the dental board is not immune from federal antitrust laws. In particular, the court was concerned about active market participants determining who may participate in its marketplace. Writing for the majority, Justice Kennedy noted: “[w]hen a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.”4

Practical effects

According to guidance issued by the staff of the Bureau of Competition within the FTC, federal antitrust law does not mandate that state legislatures provide for active supervision of state regulatory boards.5 A legislature may decide that a regulatory board be subject to the requirements of the federal antitrust laws. If a state legislature determines that a regulatory board should be subject to antitrust oversight, it need not provide for active supervision of the board. When a controlling number of decision makers on a state board are active market participants in the occupation regulated by the board, however, the active supervision requirement must be met for the board to invoke antitrust immunity. In addition, the supervision must include the authority to review the substance of the agency’s actions and the power to override or modify the actions.6 Therefore, if a state legislature sought to exempt a state administrative board federal antitrust law, the active supervision requirement can be met only if the supervision allows the board’s action to be reviewed as well as overruled or altered in some respect.

In sum, the state action immunity doctrine is not automatically applicable in state administrative law, although states may avail themselves of the defense after clearly articulating the policy and actively supervising it under the North Carolina State Board of Dental Examiners decision.

John K. Lavelle is deputy general counsel in the Governor’s Office of General Counsel.

Endnotes


2 15 U.S.C.A. § 1 et seq.

3 This is known as Parker immunity, which is a common law doctrine first articulated by the Court under Parker v. Brown, 317 U.S. 341 (1943).

4 North Carolina State Board of Dental Examiners, 135 S. Ct. at 1114; 191 L. Ed. 2d at 53; 2015 U.S. LEXIS at 28.

5 Bureau of Competition of Federal Trade Commission, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants, 2 (October 2015).

6 North Carolina State Board of Dental Examiners, 135 S. Ct. at 1116; 191 L. Ed. 2d at 55; 2015 U.S. LEXIS at 34.