VOLUME 20, NUMBER 2, WHOLE NUMBER 231 JANUARY 2003

INSIDE

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IN FUTURE ISSUES

General description of collateral adequate under Revised Article 9

In an action brought by two debtors to determine the validity, priority, and extent of the liens held in certain farm equipment, the United States Bankruptcy Court for the Southern District of Illinois has ruled that a creditor's financing statement containing only a general description of the farm equipment was sufficient to protect that creditor's security interest. *In re Grabowski*, 277 B.R. 388, 392 (Bankr. S.D. Ill. 2002). The court further ruled that the financing statement's listing of the debtors' address as their business address, as opposed to their home address where the collateral was located, did not render the financing statement misleading or otherwise invalid. *See id.*

This action involved a dispute between two creditors, Bank of America ("BOA") and South Pointe Bank ("South Pointe"), over the priority of their security interests in three items of farm equipment owned by the debtors, Ronald and Trenna Grabowski. *See id.* at 389. Both banks had filed financing statements to perfect their interests. *See id.* BOA was the first to file and its financing statement described the collateral as "All Inventory, Chattel Paper, Accounts, Equipment and General Intangibles." *Id.* (italics in original removed). While BOA's financing statement described the identity of the debtors as "Ronald and Trenna Grabowski," it listed their former business address, rather than their home address, where the collateral was located. *See id.* By contrast, South Pointe's later filed financing statement described the collateral as "JD 925 FLEX PLATFORM, JD 4630 TRACTOR, JD 630 DISK 28' 1998," and listed the debtors' home address. *Id.* (italics in original removed).

South Pointe conceded that BOA's financing statement was first in time. *See id.* at 390. South Pointe argued, however, that BOA's financing statement was insufficient to vest priority because the statement "contained the address of the debtors' farm equipment business rather than that of the debtors' home where their farming operation is located and ... it failed to mention any specific items of equipment or even make reference to 'farm equipment' or 'farm machinery.'" *Id.* at 390. South Pointe argued that "a subsequent lender would reasonably conclude that Bank of America's intended security was the personal property of the debtors' business rather than equipment used in the debtors' farming operation." *Id.*

The plain language of revised Article 9 of the UCC provides that the revised article "applies to all transactions or liens within its scope, 'even if the transaction or lien was

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PACA reparation award affirmed

In an action brought under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a - 499t ("PACA"), the United States District Court for the Southern District of New York has affirmed a reparations award of $4,800.00 entered by the United States Department of Agriculture ("USDA") in favor of a tomato seller. *Koam Produce, Inc. v. Dimare Homestead, Inc.*, 213 F.Supp.2d 314 (S.D.N.Y. 2002). The court ruled that the seller was entitled to recover the expenses it incurred for price adjustments in the cost of its produce because those adjustments resulted from falsified USDA inspection certificates. *See id.* at 326.

This case arose out of a criminal investigation that involved acts of bribery at a wholesale produce market known as the Hunts Point Wholesale Produce Market ("Hunts Point"). *See id.* at 317. As a result of this investigation, several USDA inspectors were charged "'with accepting cash bribes in exchange for reducing the grade of the produce they inspected, which then allowed the Hunts Point companies to pay some amount less than the invoice price to their suppliers.'" *Id.* (citation omitted). A number of owners and employees of Hunts Point were charged with paying the bribes. *See id.* One of the charged employees, Marvin Friedman, worked for a Hunts Point produce

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buying company named Koam Produce, Inc. ("Koam"). *See id.* Friedman eventually pled guilty to the charges against him. *See id.* at 323.

As a result of the Hunts Point bribery scandal, the USDA sent letters to "members of the produce industry informing them of indictments in connection with the scandal, the department's plans to improve inspections, and a process by which injured parties could file PACA reparations claims for damages." *Id.* at 318. DiMare Homestead, Inc. ("DiMare"), which had sold tomatoes to Koam, filed such a claim with the USDA seeking recovery of $4,800.00 in "unjustified price reductions based on fraudulent certificates issued by bribed inspectors." *Id.*

The hearing officer ruled in Dimare's favor, holding that "as a matter of law ... Koam's negotiation of the adjustments, without disclosure of its involvement of the bribery of the federal inspectors, constituted a misrepresentation basic to the adjustment process, rendering the adjustments voidable because of misrepresentation and mistake." *Id.* The hearing officer further ruled that "because Koam could not rely on the tainted inspection certificates, or affidavits of its employees, it could not carry its burden of showing that the quality of the tomatoes DiMare had shipped to it was inferior." *Id.* The hearing officer determined that Koam was required to pay the full contract price. *See id.* The $4,800.00 price adjustments were set aside. *See id.*

Koam filed a request for reconsideration of the award with the Secretary of Agriculture. *See id.* That request was denied. *See id.* Koam then filed an appeal in the United States District Court for the Southern District of New York. *See id.* at 316. The court stated that under § 499g(c) of the PACA, "such an appeal is tried *de novo* in the federal district court, in the same manner as other civil damage suits, except that the factual findings in the reparation order are prima facie evidence of the facts found." *Id.* at 317 (italics in original).

As the starting point of its analysis, the court declared that "under the Uniform Commercial Code, . . . when a buyer accepts the goods but claims adjustments for defects, the buyer has the burden of establishing the defects." *Id.* at 322. In its first attempt to carry such burden, Koam pointed to seven earlier sales transactions between Koam and DiMare, none of which were at issue in this litigation, on which DiMare had granted discounts. *See id.* at 323. As a result of the previous discounts, "Koam argue[d] that one should infer that there were pervasive defects in DiMare's shipments of tomatoes." *Id.* Koam, however, offered no evidence to support the suggested inference, and thus the court rejected this argument. *See id.* at 326.

Koam also attempted to carry its burden by relying on affidavits from two of its employees that stated that the tomatoes in question actually were defective. *See id.* The affidavits stated that, "[a]t no time did I or any other employee of Koam pay any money or take an action for the purpose of creating a fraudulent inspection." *Id.* The court determined that the affidavits were unreliable because they directly contradicted the testimony offered by Friedman when he entered his guilty plea. *See id.*

> In his plea Friedman stated that
> [o]n approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at [Koam] .... I was an employee of [Koam] at the time. I acted knowingly and intentionally and I knew that the payments were unlawful.

Id.

The district court reasoned that the employees' statements were not deserving of credit in light of the employees' "willingness to make that broad statement under oath, when at the very least they were unaware whether it was true or false . . . [because it] bespeaks a willingness to testify to whatever they see as their employer's interest." *Id.* at 323-24.

Koam's next argument was that the "particular inspections [for the transactions in question] (although performed by bribed inspectors) [were] not shown to be corrupt." *Id.* at 324. Koam contended that "'there was no showing that the inspections in question were falsified' and point[ed] to the Judicial Officer's statement that '[t]here is no showing on this record that falsified inspections were issued as to the specific lots of tomatoes listed[.]'" *Id.* (citations omitted).

The court rejected this argument based on the evidence as a whole. *See id.* Among other things, the court pointed out that during the hearing on his guilty plea, Friedman had stated that the '"purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at [Koam] . . . .'" *Id.* The court also relied upon a letter to DiMare from the USDA which enclosed copies of inspection certificates which the Office of Inspector General had identified as "directly correspond[ing] to bribes that were offered and accepted." *Id.*

Koam's final argument was that "it was Friedman, not his employer Koam, who bribed the inspectors, and that [it was] without responsibility for his actions." *Id.* at 325. According to the court, "[a]cceptance of that proposition would fly in the face of the evidence, of statute and common law, and of common sense." *Id.* Among other things, the court cited PACA § 499p, which imposes liability on licensees for acts and omissions of agents. *See id.* The court also relied on the common law rule that a master is liable for tortious acts of his servant committed within the scope of the servant's employment. *See id.*

Having rejected all of Koam's arguments as to why it should be entitled to keep the adjustments, the court ruled that "DiMare can recover the adjustments it granted to Koam in reliance on official certificates, not knowing that Koam had bribed the inspectors to falsify them." *Id.* at 326. According to the court, "[a] mutual mistake of the parties, or (as here) a mistake on plaintiff's part and a fraud by defendant 'are the classic grounds for reformation of an instrument in equity.'" *Id.* (citation omitted).

> The court explained that
> [w]here a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

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VOL. 20, NO. 2, WHOLE NO. 231 January 2003

AALA Editor.....Linda Grim McCormick
2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail:
lgmccormick@academicplanet.com

Contributing Editors: Drew L. Kershen, University of Oklahoma School of Law; John C. Eastman, Chapman University School of Law; E. John Edward, III, University of Arkansas School of Law

For AALA membership information, contact Donna French Dunn, Executive Director, 4115 South Duff Avenue, Suite C, Ames, IA 50010-6600. Phone: (515) 956-4255.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

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—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Everything you need to know about the Constitution you can learn in agricultural law: federalism and Commerce from amber waves of grain to migrating bald eagles

By John C. Eastman[1]

Delivered January 5, 2002 at the Association of American Law Schools Annual Meeting Section on Agricultural Law Panel

It is a pleasure to be here this morning. I particularly want to thank Drew Kershen for organizing this panel and designing its very interesting theme. Indeed, although I am going to focus my remarks on how agricultural law cases have contributed to our understanding of the Commerce Clause, my reflections about the panel topic called to mind the much broader impact that agricultural law has had on Constitutional law generally. I was reminded, for instance, of the 1877 case of *Munn v. Illinois*,[2] in which Chief Justice Waite, writing for the Court, greatly expanded the definition of "affected with the public interest" to include privately-owned grain elevators, prompting a powerful dissent by Justice Stephen Field, who contended that the Court's opinion was "subversive of the rights of private property" that were protected by the "principles of republican government" and by the Fourteenth Amendment.[3] Justice Field argued that the Fourteenth Amendment's prohibition on state deprivations of life, liberty or property without due process of law contained a substantive component that limited what a state government could do, even if it followed all the correct "procedures." That proposition was to become the majority position nearly thirty years later, of course, in the landmark case of *Lochner v. New York*,[4] still one of the most widely discussed constitutional law cases ever decided by the Supreme Court.[5]

I was reminded, too, of three cases collectively decided four years before *Munn*, affectionately known as *The Slaughter-House Cases*.[6] While *The Slaughter-House Cases* did not involve agriculture *per se*, they did involve cattle, which is at least a close cousin to agriculture (the range wars of the old West notwithstanding!). By emasculating the Fourteenth Amendment's Privileges or Immunities Clause, the Court radically transformed the Fourteenth Amendment, centering the debate over the principal substantive protections of that Amendment instead in the Due Process and Equal Protection clauses, neither of which have the same kind of natural law/fundamental rights connotation that the framers of the Fourteenth Amendment arguably sought to codify in the Privileges or Immunities Clause. That is not to say that fundamental rights have not been protected under the latter two clauses; the fundamental rights idea was simply too strong to stay down merely because the clause best suited to its purpose was interpreted into near nothingness. But it is to say, or at least to suggest, that the development of fundamental rights analysis under clauses that, on their face, are of a more procedural and positive law character may well have distorted the analysis. A century and a quarter later, the brief glimmer in *Saenz v. Roe*[7] of a Privileges or Immunities Clause revival notwithstanding, we are still trying to fit the square peg of fundamental rights in the round holes of Due Process or Equal Protection, with predictable difficulty. I think this difficulty lay at the heart of Justice Thomas's call, in his *Saenz v. Roe* dissent, for a Privileges or Immunities clause that replaces rather than merely supplements existing Due Process and Equal Protection fundamental rights jurisprudence.[8]

The panel topic also called to mind some of my recent work on the Spending Clause.[9] The crucial turning points in the interpretation of the Spending Clause both involved agriculture. You might recall that one of the key disputes in the 1790s about the scope of the authority of the national government involved various proposals for "internal improvements." But for a brief interlude during the John Quincy Adams administration, spending for internal improvements was considered beyond the authority conferred on the national government to spend for the "general" (as opposed to local) welfare, up to and including President James Buchanan's veto of the first college land grant bill. In his veto message, President Buchanan cogently described the policy considerations that underlay the constitutional mandate:

> The representatives of the States and of the people, feeling a more immediate interest in obtaining money to lighten the burdens of their constituents than for the promotion of the more distant objects intrusted [sic] to the Federal Government, will naturally incline to obtain means from the Federal Government for State purposes. If a question shall arise between an appropriation of land or money to carry into effect the objects of the Federal Government and those of the States, their feelings will be enlisted in favor of the latter. This is human nature; and hence the necessity of keeping the two Governments entirely distinct.... Besides, it would operate with equal detriment to the best interests of the States. It would remove the most wholesome of all restraints on legislative bodies—that of being obliged to raise money by taxation from their constituents—and would lead to extravagance, if not to corruption. What is obtained easily and without responsibility will be lavishly expended.[10]

President Buchanan's veto message calls to mind the various mega-subsidies that for a good while now the federal government has provided to agriculture—small time farming operations, to be sure, such as Archer Daniels Midland in the Midwest, or even R.J. Reynolds down South in the tobacco belt.

Of course, shortly after Buchanan's veto of the first land grant bill (and perhaps to keep the West happy during the war), Abraham Lincoln signed the Morrill Act, providing federal grants to establish *agricultural* colleges throughout the West despite the fact that their principal benefit was a local rather than a national one.[11] And while it took seventy years before this expansive interpretation of the Spending Clause was finally tested in the Supreme Court, that 1936 case, *United States v. Butler*,[12] also involved agriculture – a challenge to the Agriculture Adjustment Act of the New Deal that, though successful, resulted in the virtually unlimited reading of the Spending Clause that we have had ever since.

I'll have more to say about the Spending Clause in a moment, but let me turn now to the Commerce Clause. The title of this paper is, after all, "*When Endangered Species Are Not Celebrated Jumping Frogs from Calaveras County: Exploring the Commerce Clause Limits on Federal Land Use Regulation*."

In many ways, agriculture embodies both sides of the Commerce Clause coin, so it is perhaps no surprise that the historical development of Commerce Clause jurisprudence can, at least in part, be traced via agriculture law cases.

Free trade in agricultural commodities was unquestionably at the core of what the Commerce Clause was designed to protect, or at least to bring under a single, uniform regulatory scheme that could only be provided by a national government. Indeed, as Justice Thomas noted in his 1997 dissenting opinion in *Camps Newfound/Owatonna, Inc. v. Harrison, Maine*, trade among the states in agricultural commodities was the focus not just of the Commerce Clause but of the Import-Export Clause as well, which barred States from taxing imports—primarily agricultural imports, at the time—from other states as well as foreign nations.[13] (As an aside, a wrong interpretive turn limiting the Import-Export Clause to foreign commerce, made shortly after the Civil War, is

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John C. Eastman is Professor of Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence.

what gave rise to the entire dormant commerce clause jurisprudence, which is the doctrine that underlies yet another agricultural law case, *Sporhase v. Nebraska*,[14] but that is another story altogether).

On the other hand, the articles of trade produced through agriculture are produced from the land, the quintessential thing that does not move in interstate commerce. (Manufacturing plants don't typically move in interstate commerce either, of course, but I suppose they could, like Sadam Hussein's mobile biological weapons plants, and the parts necessary to construct them were usually once articles of commerce in a way that land never was). Once the New Deal-era Court rejected the definition of commerce as trade and adopted in its stead, ultimately, a definition of commerce as business, it was, I think, no accident that the conflict with the local police power posed by this new expansive definition came into sharpest focus when the business activity generating articles of trade was agriculture, for agriculture is really the productive utilization of land, the regulation of which has long been an area of state rather than national concern.[15]

This transformation in the scope of the Commerce Clause had its roots in a single line of dictum in an early non-agricultural case, of course, but the "affect other states" language from *Gibbons v. Ogden*[16] carried about as much weight as a pack-rat until an agricultural law case added the pack mule of an aggregation principle to do some heavy lifting for the substantial effects test, a legerdemain in legal reasoning that was just too much for a simple country wheat farmer like Roscoe C. Filburn to understand. Farmer Filburn, you see, actually thought that he could avoid the regulatory burden of President Roosevelt's Agricultural Adjustment Act, enacted pursuant to Congress's power to regulate *commerce among the states*, if he simply avoided engaging in commerce with farmers or wheat merchants in other states, but just to be safe, he decided to forego trading wheat even with his neighbors. Such was not to be the case for Farmer Filburn, though, so agriculture's entry into the Commerce Clause field, in *Wickard v. Filburn*,[17] gave us fifty years of jurisprudence accepting a seemingly limitless Commerce Clause power.

That all changed in the past decade, of course, with a couple of non-agricultural law cases restoring some limits to the understanding of the Commerce Clause, but whether the restoration of limits revolution begun in *United States v. Lopez*[18] and *United States v. Morrison*[19] ultimately carries the day is, I believe, going to be decided in agricultural law.

We got a glimpse of this proposition two terms ago in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[20] a non-agricultural case, to be sure, but one addressing a statute that is the subject of frequent litigation in the agricultural law field. The Clean Water Act, at issue in the case, bans the "discharge" of "pollutants" into the "navigable waters" of the United States,[21] but those clever lawyers over at the Corps of Engineers (do they teach law in engineering school?) had managed to interpret that act to cover puddles at the bottom of a gravel pit in Northern Cook County, Illinois—puddles in which migratory birds happen on occasion to bathe. They have also managed to interpret the act to prohibit plowing of a vineyard and citrus orchard in the Central Valley of California—miles from any navigable water, as anyone who has tried to find so much as a cool glass of water on the drive from Los Angeles to Sacramento in the summer can confirm. (I exclude the California aqueduct, the cement plume that ribbons across the region, because I don't think it is navigable for anything much larger than a toy paddleboat!).

The Court in *S.W.A.N.C.C.* struck down the Corps' ingenious "migratory bird rule" as beyond the scope of the statutory authorization of the Clean Water Act, but in an important section of the opinion joined by the same five judges who formed the majority in both *Lopez* and *Morrison*, Chief Justice Rehnquist strongly suggested that any alternative reading of the statute would exceed the scope of the Commerce Clause.[22]

The farmer from the Central Valley of California I mentioned did not fare so well. In fact, given the size of his fine, I think he fared a might bit worse than even farmer Filburn. Two weeks ago, by an equally divided court, the Supreme Court in *Borden Ranch v. U.S. Army Corps of Engineers* affirmed a decision by the Ninth Circuit Court of Appeals upholding a $500,000 fine assessed by the U.S. Army Corps of Engineers and the Environmental Protection Agency against Angelo Tsakopoulos for turning some of his own Central Valley property into productive vineyards and orchards.[23] Mr. Tsakopoulos's "crime"? He plowed his land using a technique known as "deep-ripping"—essentially plowing with 4-foot metal prongs behind a tractor so as to make the land receptive to the deep root systems of grape vines and fruit tree orchards.

Because some of Mr. Tsakopoulos's land gets wet when it rains(!)—creating "vernal pools" on isolated flatland, "swales" on slopes, and "intermittent drainages" where the rain briefly gathers into run-off streams—the U.S. Army Corps of Engineers believes it has jurisdiction to decide whether or not Mr. Tsakopoulos can plow his own land. The supposed statutory authority for this extraordinary assertion of federal jurisdiction is, as I mentioned a moment ago, the Clean Water Act of 1972, enacted pursuant to Congress's power to regulate commerce among the states. Mr. Tsakopoulos's plowing activities were held to constitute a "discharge" because, under prevailing Ninth Circuit precedent, the plow's "moving around" of dirt was sufficient to qualify as a "discharge." The discharge was held to be of a "pollutant" because, again under prevailing Ninth Circuit precedent, material removed from a wetland qualifies as a "pollutant" if it is then returned to the wetland.[24] This, despite the fact that the Act explicitly exempts discharges "from normal farming … and ranching activities, such as plowing."[25]

Although, under the common use of the terms, Mr. Tsakopoulos's actions involved neither a "discharge" or a "pollutant," and although treating rain puddles as "navigable waters" would be laughable if anyone other than the U.S. Government itself was making the argument, the district court felt obligated to uphold the Corps' jurisdictional assertion under prevailing Ninth Circuit precedent, finding that Tsakopoulos committed 358 separate violations of the Clean Water Act (with each pass of the plow across the field amounting to a separate violation). With a statutory maximum penalty of $25,000 *per violation*, Mr. Tsakopoulos was actually liable for civil penalties totaling $8,950,000, so the district court's reduction of the fine to *only $1/2 million* is apparently a judicial exercise of "compassionate conservatism."

When the Supreme Court granted the writ of certiorari last June,[26] Mr. Tsakopoulos must have breathed a sigh of relief, thinking that some sanity was finally going to be brought to the Corps' overly-aggressive interpretation of the Clean Water Act. The *S.W.A.N.C.C.* decision was barely a year old, and the plowing-as-pollutant discharge arguments at issue in this case smacked of the same overreaching creativity that had manifested itself in the Corps' migratory birds rule.

The storm clouds that would ultimately rain on Mr. Tsakopoulos vineyards began to appear last August when the Court issued a preliminary procedural order in the case with the notation, "Justice Kennedy took no part in the consideration or decision of this motion."[27] Justice Kennedy, it turns out, was an acquaintance of Mr.

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Tsakopoulos, so had recused himself, leaving the Court evenly divided on the merits (presumably with the four *Solid Waste* dissenters holding to their expansive interpretation of the Clean Water Act and the Commerce Clause itself, concerns of *stare decisis* notwithstanding). That gave counsel of record Ted Olson, Solicitor General of the United States, an undeserved victory and the Ninth Circuit an undeserved affirmance.

Similar issues about the reach of the Commerce Clause arise under the Endangered Species Act. In the recent case of *Gibbs v. Babbitt*,[28] the Fourth Circuit upheld the listing of the North Carolina Red Wolf as an endangered species protected by the federal Endangered Species Act in part because the wild wolves would otherwise be shot by North Carolina farmers in order to protect their crops and livestock, agricultural products that would no longer find their way into the stream of commerce because of the appetite of the Red Wolf (much like the wheat grown by farmer Filburn never found its way to the stream of commerce because of the appetite of farmer Filburn and his family and livestock).[29]

My own case currently pending before the D.C. Circuit, *Rancho Viejo LLC v. Norton*,[30] involves the regulation of the arroyo toad, a particular subspecies of toad that is found only in California and Baja California, Mexico, and in which there never has been any commerce. As we noted in the briefs, these are not Mark Twain's celebrated jumping frogs of Calaveras County. Although my case is not an agricultural case, the habitat protection designations under the Endangered Species Act quite commonly interfere with agricultural operations, much as the Clean Water Act regulations at issue in *Borden Ranch* quite often are applied to agricultural lands far removed from any navigable waters. I think ultimately the Supreme Court is going to have to address these statutes, quite possible in the context of agricultural law, to decide whether *Lopez* and *Morrison* are mere anomalies or whether they actually do represent a revival of the enumerated powers doctrine.

Which brings me to the final point I want to make. If the Court does strike down any application of the Endangered Species Act or the Clean Water Act because, as seems apparent, the nexus with interstate commerce is merely a pretext to reach an object of local land use that is not within the powers delegated to the national government, I predict that we will soon see the very same regulations (together with the provisions of the Brady Act and the Violence Against Women Act struck down in *Lopez* and *Morrison*, respectively) get reenacted as conditions on federal spending. The Court will then have the opportunity to revisit whether the Spending Clause has any limits akin to the limits it has found in the Commerce Clause. Of course, current standing doctrine has made it very difficult for anyone to bring Spending Clause challenges,[31] but proposals made during debate over the latest agricultural appropriations bill may well provide an exception to the general rule if they are ultimately adopted. Apparently not content with the outright subsidies to agricultural interests and the ethanol tax incentives designed to funnel additional revenues to their corn farmers, Midwestern states appear near to having the federal government mandate certain levels of ethanol in gasoline products.[32] Armed with reputable scientific studies which demonstrate that ethanol actually causes greater harm to the environment by the energy use required for its production than the benefits it provides, and taking advantage of the fact that taxpayers in non-corn-producing states may actually have a particularized harm when compared with taxpayers in corn-producing states,[33] we could conceivable see plaintiffs challenging the new agricultural subsidies on Spending Clause as well as environmental grounds—proving once again that everything your really need to know about the Constitution you can learn in agricultural law.

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[1] Professor of Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence. Ph.D., The Claremont Graduate School; J.D., The University of Chicago Law School. Dr. Eastman is lead counsel in *Rancho Viejo LLC v. Norton*, No. 01-5373 (D.C. Cir.) (pending), and represented The Claremont Institute as *amicus curiae* in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

[2] 94 U.S. 113 (1877).

[3] *Id.* at 136 (Field, J., dissenting).

[4] 198 U.S. 45 (1905).

[5] For a more complete discussion of Justice Field's jurisprudence, see John C. Eastman and Timothy Sandefur, "Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier," 6 NEXUS: A Journal of Opinion 121 (Spring 2001).

[6] 83 U.S. (16 Wall.) 36 (1973).

[7] 526 U.S. 489 (1999).

[8] *Id*., 526 U.S. at 528 (Thomas, J., dissenting) ("We should … consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence").

[9] See John C. Eastman, "Restoring the 'General' to the General Welfare Clause," 4 Chap. L. Rev. 63 (Spring 2001) (part of Chapman Law Review's Symposium on "The Spending Clause: Enumerated Power or Blank Check").

[10] President James Buchanan to the House of Representatives, Feb. 24, 1859, *reprinted in* 7 A Compilation of the Messages and Papers of the Presidents 1789-1897, 3074, 3076-77(James D. Richardson ed., 1910).

[11] Act of July 2, 1862, ch. 130, 12 Stat. 503, 503-05 (donating public lands to several states and territories for the provision of colleges to benefit agriculture and the mechanic arts).

[12] 297 U.S. 1 (1936).

[13] 520 U.S. 564, 610 (1997).

[14] 458 U.S. 941 (1982).

[15] *Solid Waste Agency of Northern Cook Cty v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (noting the "States' traditional and primary power over land and water use"); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("regulation of land use [is] a function traditionally performed by local governments").

[16] 22 U.S. (9 Wheat.) 1, 194 (1824) ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, *and which does not extend to or affect other States*") (emphasis added); *compare id*. at 195 ("The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State").

[17] 317 U.S. 111 (1942).

[18] 514 U.S. 549 (1995). "Navigable waters" is defined as "the waters of the United States," 33 U.S.C. § 1362(7), but contrary to the broad interpretation of that phrase given by the Corps of Engineers in the *S.W.A.N.C.C.* case, "the waters of the United States" has long been a term of art, limited to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

[19] 529 U.S. 598 (2000).

[20] 531 U.S. 159 (2001).

[21] 33 U.S.C. § 1344(a).

[22] 531 U.S. at 173-174.

[23] 123 S. Ct. 599 (Dec. 16, 2002).

[24] *See Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

[25] 33 U.S.C. § 1344(f)(1)(A).

[26] 122 S. Ct 2355 (June 10, 2002).

[27] Order granting petitioners' motion to dispense with printing of joint appendix, *Borden Ranch, et al. v. U.S. Army Corps of Engrs.*, No. 01-1243 (Aug. 26, 2002), *available at* http://a257.g.akamaitech.net/7/257/2422/26aug20021030/www.supremecourtus.gov/orders/courtorders/082602pzor.pdf.

[28] 214 F.3d 483 (2000).

[29] The Fourth Circuit also found a sufficient nexus with interstate commerce in the portion of the interstate tourism industry devoted to attending Red Wolf "howling events," a rationale that cannot be squared with the dicta in *S.W.A.N.C.C.*

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(b) the other party had reason to know of the mistake or his fault caused the mistake.

Id. (quoting Restatement (Second) of Contracts § 153).

The court determined that all these requirements were satisfied. *See id.* The court stated that DiMare did not bear the risk of mistake under § 154 "because the risk was not allocated to it by agreement of the parties, there was no occasion to contemplate the risk of bribery, and it would be unreasonable to allocate that risk to DiMare[.]" *Id.* The court also stated that it was "obvious that Koam's fault caused the mistake, and enforcement of the discounts would be unconscionable." *Id.* The court therefore entered judgment in favor of DiMare for the $4800.00 in price adjustments, together with costs, interest and attorney's fees pursuant to PACA § 499g(c). *Id*.

—E. John Edwards III, Graduate Fellow

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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[30] No. 01-5373 (D.C. Cir., pending).

[31] *See*, *e.g.*, *Schaffer v. Clinton*, 240 F.3d 878 (10th Cir.), *cert. denied sub nom. Schaffer v. O'Neill*, 122 S. Ct. 458 (2001) (denying standing to taxpayers and member of Congress to challenge congressional pay raise as contrary to the 27th Amendment).

[32] *See*, *e.g.*, Dan Morgan and Peter Behr, "Negotiators Near Agreement on Energy Bill," *The Washington Post*, A6 (Sept. 29, 2002) (noting that House and Senate conferees were "expected to approve a major initiative that would require gasoline refiners to more than double the amount of ethanol—produced mainly from corn—included in fuel mixes in the next decade").

[33] For a good description of how the overrepresentation of small states in the Senate results in a disproportionate share of federal funds going to small states, see Lynn A. Baker, "The Spending Power and the Federalist Revival," 4 Chap. L. Rev. 195 (Spring 2001).

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entered into or created before [the statute's] effective date[.]'" *Id*. (quoting 810 Ill.Comp.Stat. 5/9-702 (2001)). The bankruptcy court stated that it would apply the provisions of the revised article even though the transactions at issue preceded the July 1, 2001, effective date of the revised article in Illinois. *See id.*

The court examined the language of several sections of Article 9 of the UCC to support its ruling. *See id.* The court explained that §9-203 "governs the attachment and enforcement of security interests through the parties' execution of the security agreement, while § 9-502 relates to the requisites of a financing statement filed to perfect the creditors' interest against the interests of third parties." *Id.* The court also explained that although both §9-203 and §9-502 call for a description of the debtor's property, "the degree of specificity required of such description depends on the nature of the document involved–whether it is a security agreement or financing statement–and the purpose to be fulfilled by such document." *Id.* at 390-91 (citing 9A Hawkland, *Uniform Commercial Code Series*, [Rev] § 9-108:2, at 291-92; [Rev] § 9-108:2, at 294-96 (2001)). The court explained that the reason for this difference lies in the differing purposes of the two documents, to-wit: "[w]hile a security agreement defines and limits the collateral subject to the creditor's security interest, a financing statement puts third parties on notice that the creditor may have a lien on the property described and that further inquiry into the extent of the security interest is prudent." *Id.* (citing *Signal Capital Corp. v. Lake Shore Nat'l Bank*, 652 N.E.2d 1364, 1371 (Ill. App.1995)).

The court also explained that §9-108 establishes the test for sufficiency of a description under the UCC. *See id.* Section 9-108 provides that "... a description of personal ... property is sufficient, whether or not it is specific, *if it reasonably identifies what is described*." *Id.* (citing 810 Ill. Comp. Stat. 5/9-108(a) (2001) (emphasis supplied)). The court stated that "[e]xamples of descriptions that meet this 'reasonable identification' test include identification by 'category' or by 'type of collateral defined in the UCC.'" *Id.* (citing § 9-108(b)(2), (3)). The court added that "[o]nly a super-generic [description] such as 'all the debtor's assets' or 'all the debtor's personal property' is insufficient under the 'reasonable identification' test of § 9-108." *Id.* (citing Ill. Comp. Stat. 5/9-108(c)).

The court stated that although "§9-108 provides a flexible standard for determining sufficiency of a description in a security agreement, §9-504 provides an even broader standard with regard to a financing statement." *Id.* Section 9-504 provides that a financing statement sufficiently describes the collateral if it provides: "(1) a description of the collateral pursuant to Section 9-108; or (2) *an indication that the financing statement covers all assets or all personal property*." *Id.* (citing 810 Ill. Comp. Stat. 5/9-504 (2001) (emphasis supplied)). The court stated that "[t]hus, in the case of a financing statement, a creditor may either describe its collateral by 'type' or 'category' as set forth in § 9-108 or may simply indicate its lien on 'all assets' of the debtor." *Id.*

The court reiterated that BOA's financing statement indicated that it had a lien "on the debtor's property consisting of 'all inventory, chattel paper, accounts, equipment, and general intangibles.'" *Id.* at 391-92. The court stated that, "[d]espite the generality of [BOA's] description, it was sufficient to notify subsequent creditors, including South Pointe, that a lien existed on the debtors' property and that further inquiry was necessary to determine the extent of [BOA's] lien." *Id.* The court concluded that it found "no merit in South Pointe's argument that the description of [BOA's] collateral was too general to fulfill the notice function of a financing statement under the UCC." *Id.*

The court also rejected South Pointe's argument that it had been "misled by the incorrect address contained in Bank of America's financing statement and 'reasonably concluded' that the only equipment subject to the Bank's lien was that located at the debtors' farm equipment dealership." *Id.* Noting that BOA's financing statement identified the debtors by their individual names and not the name of their business, the court ruled that the "debtors' business address was not part of the … description of its collateral and, thus, did not serve to limit the collateral subject to [its] lien." *Id.* According to the court, "[r]ather than serving to describe [BOA's] collateral, therefore, the debtors' address merely provided a means by which subsequent lenders could contact the debtors to inquire concerning [its] lien." *Id.*

—E. John Edwards III, Graduate Fellow
University of Arkansas Masters Program in Agricultural Law

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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