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THE JOURNAL OF THE JAMES MADISON INSTITUTE

Celebrating 25 Years as Florida's Premier Free-Market Think Tank

THE JAMES MADISON INSTITUTE

Trusted Solutions for a Better Florida

Founded in 1987 by Dr. J. Stanley Marshall, The James Madison Institute is a non-partisan policy center dedicated to advancing the free-market principles of limited government, individual liberty, and personal responsibility.

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THE JOURNAL OF THE JAMES MADISON INSTITUTE

The Journal is published three times a year. It is provided to members of The James Madison Institute, to members of the Legislature, and to others who affect public policy in Florida. *The Journal* is intended to keep Floridians informed about their government, to advance practical policy solutions, to stimulate civil discussion of major issues, and to recognize individuals who exemplify civic responsibility, character, and service to others. Opinions expressed in *The Journal* are those of the authors and do not necessarily reflect the views of The James Madison Institute, its staff, or its Board of Directors.

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The James Madison Institute is a Florida-based, nonpartisan, nonprofit research and educational organization dedicated to advancing such timeless ideals as economic freedom, limited government, federalism, traditional values, the rule of law, and individual liberty coupled with individual responsibility.

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MESSAGE FROM THE PUBLISHER

WHY DID WE NAME IT THE JAMES MADISON INSTITUTE?

BY J. STANLEY MARSHALL

It could have been given another name and almost was. The Southeastern Center for Public Policy was considered—and there were others—but when Florida State University Professor Tom Dye suggested The James Madison Institute, there was no more discussion; it just felt right. While the decision might have been largely intuitive, it is now abundantly clear that the right name was chosen.

MARSHALL

James Madison was born in 1751 and died in 1836 at the age of 85. He served as the fourth President of the United States and was responsible for the U.S. Constitution's series of ten amendments collectively known as the Bill of Rights.

James Madison's forebears settled in Virginia in the latter part of the 17th Century, having come to America from England. Madison told friends that his ancestors were planters on both sides of the family and that they were among the most respectable if not the most opulent class.

Madison's Roots in Virginia

In 1653, John Madison, the first of the Virginia Madisons and the grandfather of the future President, acquired 600 acres of land in the Piedmont County of Orange in the Colony of Virginia. By the early 1740s the family had a large plantation in Orange County. John fathered six children, one of whom became the father of James.

The size and significance of the large group of Madison relatives probably meant little to 10-year-old James Madison as he watched them gather for his grandmother's funeral in 1761. When Madison took a seat in the Virginia legislature in 1776, he was surrounded by friends and relatives from the section of Virginia where he had grown up.

James Madison's parents and grandparents saw their estate grow from a virgin wilderness into a plantation where they were able to cultivate beauty, grace, and learning. The marriage of James Madison,

Sr. and Nelly Conway took place on September 15, 1749.

Nelly Conway Madison gave birth to her first child, a boy, James, at her stepfather's plantation on the Rappahannock River in King George County, Virginia, on March 16th, 1751. One of Madison's biographers has written that there were few blessings more important than Madison's good fortune of being born and living all his life amid the fertile beauty of the Piedmont country, presided over so majestically by the Blue Ridge Mountains. In Madison's boyhood, the family farm bustled, grew and prospered. His mother and father produced five children in the first 11 years of their marriage.

While the Madison family owned slaves, there's no reason to believe that their slaves were subjected to anything like the cruel treatment that was common in the rural South. There are numerous references in the local newspapers to the Madison family including the slaves, and at Montpelier they likely received care in the best traditions of the Colonial south.

Before grandfather John Madison died, about 1683, he had secured 1,300 more acres to add to the 600 acres he had acquired in 1653. By the early 1740s the future President's father was managing most of the family plantation.

One of his cousins became president of the College of William and Mary in 1785. Another cousin married Suzanna, sister of Patrick Henry. James Madison had a strong feeling of family concern and solidarity, and his aversion to travel and his own childlessness left him closer to his family connections than he otherwise might have been.

After serving in the Continental Congress in his 30s, Madison seems to have been away from Orange County for a full year only once, and when he returned, those family gatherings were large, happy occasions. During his Presidency, Dolley Madison once wrote that the house was often filled with more than 100 relatives and friends.

The big event of the week for the Madison family at Montpelier was the trip of six or seven miles, taking perhaps two or three hours each way, to the brick Anglican Church on the lands of his great-uncle, James Taylor.

The Sunday gatherings at church included a large collection of aunts, uncles, cousins, in-laws, friends, and neighbors. Political gossip and exchange of family news competed for attention with the words of the priest.

James Madison, Sr. took part in the various legal functions of the church, including management of church affairs and collections to support the established Anglican Church. Social codes of the day were enforced: No one but physicians could ride horseback on Sunday except to go to church, profane language was forbidden, and drunkards were subject to arrest.

Along with the excitement of watching a new home going up and the fright of Indian war, the young James Madison lived through what

may have been the severest trauma of his boyhood—an epidemic of the dreaded smallpox. There is no way of knowing how many friends and family members had the disease or died from it, but there's a notable concentration of deaths in the family from 1760 to 1762. Enough was known about the disease that the young James Madison and his brothers may have been sent away from home or otherwise isolated. In any case, from this experience he learned at an early age how dreadful the smallpox scourge could be.

Education Was Important

Though James Madison, Sr., the President's father, may have had to curtail his "book learning" because of his own father's early death, he had a distinct awareness of the culture of the English-speaking world, and he seemed determined to pass that on to his children, including James.

We do not know the details of James Madison's education in the fundamentals. He was probably instructed for a time by the local Anglican clergymen. At school, the schedule sometimes gave way to such special instructors as dancing masters. After the lessons in formal dancing, the young people were dismissed to play parlor games, such as "button," a guessing and kissing game. As James Madison grew, he probably took part in such activities, and it seems likely that life was not all drudgery for the young James Madison.

Though Madison's early schooling probably amounted to little more than instruction in reading, writing, and arithmetic, he showed interest in devouring almost every paper or book on the family farm. His earliest writing was dated December 24, 1759, in a 24-page notebook containing some of his favorite poems.

The young James Madison surely had every opportunity his family could provide to develop his mind. In 1767 when Madison was 16 years of age, he began studying at home for two years under the direction of the brick church's newly appointed rector, the Reverend Thomas Martin, who lived with the Madison family. James was fortunate to have been blessed with good teachers at almost every step and that contributed to the characteristic discipline, keenness and polish of his intellect.

If James Madison had followed the most common path to higher education in Virginia, he would have gone to the College of William and Mary in Williamsburg. But he did not do that. In June or early July 1769, he headed to the College of New Jersey—that was Princeton, of course.

He traveled with Thomas Martin, the family tutor, his brother Alexander, and one servant, a Negro slave. They traveled on horseback carrying clothes for college and several important books. They probably traveled 30 or 40 miles a day, taking about 10 days to make the 300-mile journey from Orange, Virginia, to Princeton, New Jersey.

When they reached Princeton, the travelers glimpsed Nassau Hall,

the spacious three-story stone building that was to be the home of the new college student for the next three years. James began at once to prepare for the exams that would permit him to enter the sophomore class in the fall, when classes resumed.

Madison compressed the work of the next three years into two so that he graduated in September 1771. The daily schedule at Princeton did much to develop the discipline that James and his family earnestly sought. At five o'clock the morning bell awoke the students, and at six another bell summoned them to morning prayers. There, the college president read a passage of Scripture. Students then studied for an hour (by candlelight in the winter) before breakfast.

At nine o'clock they had recitation followed by study until lunch at one o'clock. They were free until three o'clock, followed by recitation until five when they were called to evening prayers. They had supper at seven and at nine o'clock a room check. By then they were all expected to be either studying or asleep. The marks of a Princeton education were an increase in knowledge and growth in self-discipline, and the young James Madison seemed to acquire both.

When Madison graduated from the College of New Jersey (Princeton) in 1771, he was a well-educated scholar, and he had acquired a great thirst for knowledge—so great that he injured his health by studying long hours and neglecting sleep.

Throughout the rest of his life, Madison's reputation as scholar meant that learned friends turned to him for help in research and in compiling bibliographies. President Thomas Jefferson turned to Madison for help on numerous occasions.

Princeton University conferred an honorary doctorate on Madison at commencement in 1787, recognizing the high place he now occupied in the nation's life and especially the key role he had played in the Constitutional Convention.

Madison participated in that convention in Philadelphia during the long hot summer of 1787. The document was signed in the magnificent room where the Continental Congress had appointed George Washington Commander in Chief of the Continental Army in 1775 and where the Declaration of Independence was adopted on July 4, 1776.

Madison wanted future generations of Americans to know why the framers had written the Constitution the way they had, so he took careful notes and recorded all the votes. Washington was the first so sign the new Constitution, on September 17, 1787. Then Madison Signed.

But there were some problems with the new Constitution. Critics said it did not protect individual rights and that it had dramatically reduced the power and autonomy of the states. Patrick Henry became a staunch opponent of ratification. He charged that the Constitution would endanger public liberty. He continued to believe that states' rights were being trampled, and he viewed with alarm the provision that the three-

quarters of the states must approve the amendments, asking what had happened to majority rule.

But Madison was able to defeat Henry's enveloping rhetoric. What was needed, opponents had said, was a "bill of rights," and Madison was ready. He prepared a new preamble to the Constitution, along with the nineteen amendments divided into nine articles. The amendments included enlarging the size of the House and protecting freedom of religion, speech, assembly, and the press.

Madison recommended that the list of rights that he presented to the members be incorporated into the body of the Constitution rather than added at the end. Getting the Bill of Rights ratified was another matter. In Virginia, a contentious debate occurred between Patrick Henry and Madison's supporters. Opposition was also found in Massachusetts and some other states. But on March 1, 1792, Secretary of State Thomas Jefferson informed the governors of all states that the Bill of Rights had been approved.

In 1797 Madison completed his congressional service after eight years in the House of Representatives, but he would not leave Philadelphia and return to Montpelier alone for he had fallen in love with Dolley Payne Todd, to whom he would be married for the next 42 years.

James became a happier and more fulfilled person after he married Dolley. By then 46, he had been vying with other suitors for the attention of the 25-year-old widow, but he was too shy to tell her how he felt, so he asked Dolley's friend, Catherine Coles, to let Dolley know what he was thinking, and that he was worried that another man might win her.

The Bill of Rights, War and the Presidency

In 1801 James and Dolley Madison moved to Washington, D.C., where he served for eight years as President Jefferson's Secretary of State while she served as the unofficial first lady because Jefferson's wife had died some years before.

This was a difficult time for the United States because the British were creating serious problems. They frequently raided American ships and forced the captured sailors to serve in the British Navy. Jefferson convinced Congress to impose an embargo on all American ships departing for foreign ports so they would not become targets for British ships. He hoped this action would postpone war with England until the United States could be better prepared.

Unfortunately, however, the embargo seemed to hurt U.S. commerce more than it hurt the British Navy, and it was not well accepted by the American people. It seriously curtailed shipping and created a difficult problem for James Madison as Secretary of State.

In 1808, when Madison was elected to the first of two terms as President, he had to deal with the continuing hostilities in Europe. When the British attacked the United States in the

War of 1812, he had to flee the White House as the British moved in to burn it.

President Madison rode by horseback to nearby Maryland, where he watched as the militia fight the better organized British troops. Dolley won the gratitude of the nation by arranging for papers, furnishings and artworks, including Gilbert Stuart's portrait of George Washington, to be removed from the White House before the British troops burned it and the Capitol building.

Some historians claim that Madison could have avoided the war with Britain—and that once in the war, he could have managed it better. But it's unlikely that anyone else could have done much better in defending the United States against powerful British forces. The War of 1812 was essentially a draw, and historians agree that it could have turned out much worse for the U.S.

Midway through Madison's second term, with the War of 1812 over, the country entered an era of good feeling that lasted through the eight years in office of his successor James Monroe. Monroe had allowed his name to be entered as a candidate for President in 1808, but when it became clear that the Republican Caucus in Congress preferred Madison, Monroe did not pursue the Presidency.

James Madison, for good reason, has been called the Father of Constitution. He was a key mover in the Constitutional Convention of 1787, attending to every point of the Constitution's structure and being sensitive to the need to blend the various parts together. The discussions and debates among the delegates were vigorous and often angry. Slavery received careful but limited protection. Madison strongly supported property rights. In particular, he defended the right to acquire property, which he regarded to be essential to nation building.

At the Constitutional Convention, Madison met Benjamin Franklin. The 81-year-old Franklin became an authentic sage and a heroic figure. Franklin told stories of colonial life to emphasize the need for a plan that would secure the blessings and benefits of union. He and Madison became kindred spirits and deeply respected one another.

After Madison's second term as President, he and Dolley retired to Montpelier in 1817. For most of the next 20 years, he read extensively and entertained the many visitors who wanted to talk to the man who had done so much to shape the nation's future.

By June 1836, Madison was feeble and tired and could no longer write. The reliable hand that had penned so many words over the years could no longer function. It had become increasingly difficult for him to care for himself, and he depended on Dolley to help him through the day.

During the last week of June 1836, when it was obvious that Madison was dying, his doctor offered him medicine that might have prolonged his life until July 4. Why July 4? Well, Thomas Jefferson and John

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FROM THE EDITOR'S DESK

BREAKING THE INK-ON-PAPER HABIT

BY ROBERT F. SANCHEZ

Thank goodness I never picked up the tobacco habit, but longtime smokers tell me it isn't just the nicotine that makes the habit so addictive; there's also the muscle memory from a repetitive routine—opening the pack, tapping the cigarette, striking a match or flipping open a lighter—all leading up to whatever gratification smokers get when they inhale.

Maybe muscle memory accounts for my addiction to reading ink on paper. I still subscribe to my local newspaper's print edition, for instance. And my morning routine—walking out to the end of the driveway to retrieve it, unsheathing it from its plastic wrapper, discarding most of the ad inserts, and spreading it out on my breakfast table next to my cup of coffee—is as ingrained as the smokers' routine.

Indeed, my deeply ingrained newspaper habit may have contributed to my abrupt change of vocation when, in my early 30s, I abandoned my intended career in teaching and instead tried my hand at journalism—back when newspapers were still newspapers.

Anyway, reading ink-on-paper is probably a behavior I picked up during my childhood in Sarasota, where my family at one point subscribed to four daily newspapers—two in the morning, two in the afternoon—and at our high point received 26 magazines.

(I remember the number of magazines because my ninth grade social studies teacher at Sarasota High

School once asked her students how many publications their families received. When she expressed doubt that my family actually received 26, I listed them for her—everything from mass publications such as *Time*, *Life*, *Newsweek*, *Look*, *Collier's*, *Readers' Digest*, and the *Saturday Evening Post* to more specialized publications such *Nursing*, *Progressive Farmer*, and *Boys Life*. She was a bit amazed.)

Thirteen years ago, when I was preparing to move back to Tallahassee from Miami, I finally unburdened myself of one lingering legacy of my family's fondness for magazines: I donated roughly 50 years of National Geographic to the MAST Academy, an innovative magnet school located on Key Biscayne and devoted to marine science.

I mention all of the above in wistful recognition that ink-on-paper publications are losing out to other formats. For instance, some of America's bigger metro areas—New Orleans, Birmingham, Syracuse—no longer have daily printed newspapers.

Even in locales where daily newspapers still survive in print, they're frantically trying to develop a new business model, experimenting with gimmicks such as pop-up ads and "pay walls," which they hope will enable them to make money.

They are doing so because they know a day of reckoning inevitably will arrive—perhaps soon—when their product is distributed only via the internet, a place where readers have become accustomed to getting their news and information for free.

More worrisome than whether newspaper owners turn a profit is whether citizens will somehow be able to receive the news and information they need to make informed decisions. Newspapers already have cut back, while radio and TV have all but abandoned serious reporting, especially on state and local matters. Meanwhile, the internet has yet to become a consistent provider of reliable information. Who will fill the void?

Moreover, newspapers aren't the only traditional ink-on-paper enterprises having trouble adapting to the trend toward the internet. It's also occurring in the magazine business, where the *Readers' Digest* just filed for bankruptcy, *Newsweek* quit printing, and the conglomerate that published *Time* has put most of its stable of magazines up for sale.

Then there's the book business. My best friend reads constantly—mostly spy novels—but he doesn't have a library card, and the only ink-on-paper version he has bought recently is the one he acquired when Col. Oliver North was autographing copies of his latest book. Instead of reading ink-on-paper books, my friend subscribes to a service that lets him download them to his Apple I-Pad.

He's not alone. Indeed, the trend from ink-on-paper books to on-line books is evident in the travails of the two largest chains of retail bookstores. Borders went broke, and Barnes & Noble is closing some stores while pinning its survival hopes on its e-reader, the Nook.

Non-profit organizations such as

The James Madison Institute are not immune from the effects of this trend. Indeed, one of the nation's most prominent conservative think tanks, the Hoover Institution, just announced that the current edition of its venerable *Policy Review* will be the last. Here's the sad announcement, as posted on Hoover's website:

> *Policy Review* was the preeminent publication for new and serious thinking and writing about the issues of the day. Established in 1977, the bimonthly journal became a publication of the Hoover Institution, Stanford University, in 2001.
>
> Hoover Institution director John Raisian and *Policy Review* editor Tod Lindberg announced that the February–March 2013 edition of *Policy Review* would be its last. The journal's online archive will remain available on the Hoover Institution website.

JMI is fully aware of this trend. Already, for example, we have begun sending out pre-publication announcements concerning some of our studies and policy briefs, asking our members whether they want to have a printed copy mailed to them.

Often their degree of interest will depend on the topic. Many members are content to read our material on-line, where all of it is posted. If, after reading it, they decide they want to share a printed copy, they may still request one from us or they may do as many of our members do: print one out at home.

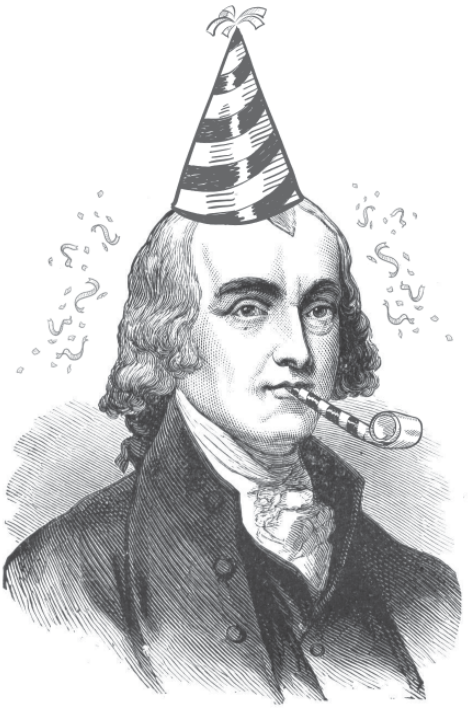
Our pre-publication notifications are intended to spare our members from having unwanted publications jamming their mailbox. For JMI, there is also a benefit. Reducing the number of printed copies saves a bit on our printing costs—and a lot on our mailing costs, which have risen steadily in concert with the chronic financial crises at the U.S. Postal Service.

That said, we'd like to hear from you concerning the future of this very publication, *The Journal of The James Madison Institute*. Should it go the way of the Hoover Institution's Policy Review? Should it survive as an on-line only publication? Would you miss it if it weren't around?

I confess that I'm still a card-carrying member of the Dead Tree Society and that I share its fondness for ink-on-paper reading material. Even so, like a tough-on-crime ex-liberal who got mugged by reality, I think the time will come when most, if not all, of our reading will be done on computers, tablets, and phones. Has that day arrived? You tell us.

Editor's Note:

The Journal welcomes readers' letters via e-mail or "snail mail." Complete contact informationis listed inside the front cover of each issue.



JMI AT 25:
ACHIEVEMENTS GALORE, CHALLENGES AHEAD

BY DR. J. ROBERT McCLURE

A lot has changed—in Florida and elsewhere—since Dr. Stan Marshall and several other brave souls gathered in Tallahassee in the spring of 1987 and decided to pursue a then-new idea: forming what was to become known as "a state-based think tank."

Thus was The James Madison Institute formed with the mission of advocating the free-market principles of limited government, individual liberty, personal responsibility, and federalism.

To be sure, the winds of change were stirring even then. The conflict known as the Cold War was drawing to a close—though nobody knew how the final chapter would be written.

All anyone knew was that the Soviet Union's "evil empire" was finally teetering on the brink of collapse as its long-suffering captives began demanding their freedom

after decades of tyranny.

Nowhere were the contrasts between the free and the enslaved more evident than along two national frontiers. Alas, one of them persists even today—on the Korean peninsula, across the highly militarized frontier known as the 38th parallel.

Back in 1987, however, this stark contrast was also a fact of life in a divided Germany, where the infamous Berlin Wall still stood as an imposing barrier and a symbolic line of demarcation between two radically different systems of government.

"Nowhere were the contrasts between the free and the enslaved more evident than along two national frontiers."

On one side of that hated wall, East Germans experienced life under a centralized government-run economy that produced only grinding poverty and a drab conformity enforced by ruthless secret police.

At the same time, on the other side of the wall, West Germans were enjoying freedom and prosperity—a situation that desperate East Germans could scarcely ignore despite their own government's propaganda and censorship.

As a result, dozens of East Germans died while trying to cross over, under, or around the wall. This made all the more memorable the words that President Ronald Reagan uttered just two months after JMI's founding.

Ignoring the advice of his all-too-cautious State Department minders, Mr. Reagan stood at Berlin's Brandenburg Gate and, in bold words that still echo, voiced mankind's universal longing for liberty: "Mr. Gorbachev, tear down this wall!"

In that same year, the winds of change were also stirring in Florida, though far less dramatically than in the former Soviet Union.

In January of 1987, just three months prior to the founding of The James Madison Institute, Florida had inaugurated a new Governor. Former Tampa Mayor Bob Martinez was only the second Republican to hold that office in the 20th Century—and the only member of the GOP to hold statewide office at that time. And pundits said his election more a reflection of a schism in the Democratic Party than a trend toward the GOP.

Indeed, the "progressive" climate of Florida politics at that time was reflected in the party alignment in the state government. All six members of the Cabinet, both U.S. Senators, and 12 of Florida's 19 members of the U.S. House of Representatives were Democrats.

Moreover, in the Legislature, Democrats dominated House 76-44 and the Senate 30-10, with unabashed liberals such as Miami Beach's Sen. Jack Gordon and Jacksonville's Rep. Corrine Brown putting their stamp on legislation and state budgets alike.

In the year JMI was founded,

the predominant thinking around Florida's Capitol reflected the mindset inherited from the previous 16 years: that Florida's growth needed to be "managed" and that the cure for the state's chronically underperforming schools was to throw more money at them until Florida reached the exalted "top quartile"—in money spent per pupil—on the theory that spending would improve pupil achievement.

So, from its inception, The James Madison Institute had its work cut out for it. Job one: Educate Floridians and their elected officials concerning free-market principles, especially the value of accountability—a goal better achieved through free and fair competition than through the stifling red tape of ham-handed government regulation.

It took awhile, but progress has been made. For example, despite a setback in the liberal-leaning Florida Supreme Court, which quashed one of the nation's most promising school voucher programs, Florida remains a national leader in providing parents with opportunities to choose from among varied menu of educational options in order to find the one that best suits their children. JMI led Florida's school choice movement.

Indeed, throughout its first 25 years, JMI has been in the forefront of providing what one former House Speaker aptly described as the "intellectual ammunition" needed to counter the misinformation prevalent in the liberal news media and to persuade legislators and other key policy makers of the advantages of school choice and accountability.

On many other issues of importance to Florida – from health care and property insurance to public employee pensions and eminent domain abuse—JMI has been a key player in the evolution of Florida from government-centric policies toward free-market solutions to the great questions of the day.

"JMI has been in the forefront of providing what one former House Speaker aptly described as 'intellectual ammunition.'"

That's a reflection of one of the key advantages of state-based think tanks: As the name implies, they can focus their resources on state issues while counting on great national organizations such as the Heritage Foundation to cover matters related to foreign policy, homeland security, defense, the national debt, entitlement growth, and other federal issues.

While JMI can be proud of its role in Florida's progress toward relying on free-market solutions based on the principles of limited government, individual liberty, and personal responsibility, the gains are never secure.

As a cautionary example, consider Ohio. Not so long ago, it was a low-tax state in which industry and agriculture had prospered because the state embodied the limited government philosophy of its long-time political dynasty, the Taft family.

Now Ohio—unlike Michigan and Wisconsin, which are currently in recovery—still exemplifies many of the problems that have plagued America's Rust Belt. Across that state and, indeed, through much of that entire region, many once-great cities are smaller in population now than they were 50 years ago or, in some case, 100 years ago.

That's because residents who could do so fled the intolerable conditions typical of urban decay: rampant crime, bad schools, high taxes, political corruption, and a feckless local government dominated by militant labor unions representing public employees.

If this could happen in a state that sent Robert A. Taft to the U.S. Senate and was once a bastion of Midwestern conservatism, then it could happen elsewhere—even in the Sun Belt, which has prospered from the influx of people fleeing the Rust Belt but is also seeing an influx of left-leaning political activists establishing strategic beachheads in some of the region's major metropolitan areas.

The point is that the job of defending liberty is never finished. At The James Madison Institute, our hope is that for the next 25 years and beyond, we will be able to continue championing the kinds of free-market solutions that will help Florida thrive and prevent it from meeting the fate of failed states such as Illinois and California. With your help, we will.

Dr. J. Robert McClure is President/CEO of The James Madison Institute.

PUBLISHER *(Continued from page 8)*

Adams both died on that date in 1826, this date in 1836 was the 50th anniversary of the Declaration of Independence, and James Monroe had died on July 4 in 1831.

But Madison rejected the offer. After having given so much to the nation, he did not want to keep his frail body going just so he could last until that anniversary. On the morning of June 28, 1836 he was so weak that he could not eat, and with his family at his side, he quietly passed away at age 85.

Madison did much for the new nation. He had to overcome one obstacle after another to help give the nation a Constitution and to ensure that included the amendments that became the Bill of Rights. There is no way to know if we would have a Bill of Rights today if Madison had lost the Congressional election in which he defeated James Monroe in February of 1789.

However, there's no doubt that this was a crucial moment in our nation's history, and a person of extraordinary ability was there to see that those amendments on which so much of our freedom depends became part of the Constitution.

This extraordinary little man from the hills of Virginia became known and respected in Virginia as Jemmy Madison. At the James Madison Institute, too, we have great love and respect for Madison and the principles he championed. That's why our organization proudly bears his name.

25 MOMENTS, 25 YEARS

WHAT I LEARNED WHILE STUDYING THE HISTORY OF JMI

BY FRANCISCO GONZALEZ

As The James Madison Institute (JMI) approached its 25th Anniversary, I led an effort to research key moments in the organization's history. As the leading development director at the Institute, I felt it was important for JMI's supporters to be able to read about the Institute's impact in Florida over the last 25 years. Supporters of JMI would first view this report at The James Madison Institute's 25th Anniversary Gala on March 13, 2013.

In this endeavor, many JMI staff members and interns helped along the way as we set out to answer two questions: Has The James Madison Institute made a difference in Florida? And if so, how?

I have now been with the Institute for more than five years. My official duties allow me to build relationships with donors all over the state and to garner financial support to sustain JMI's activities.

Throughout my time at JMI, I have met with many individuals and have enjoyed learning about each of their connections with the Institute. Each supporter has an anecdote that answers my two questions, and it seems like my interaction with these individuals over the years has amply prepared me for this particular period of research into JMI's history.

In my position at JMI, one of the first questions I ask of almost every supporter is this: "How did you first

become involved with JMI?" The next question is usually: "Why do you continue to support us?" While asking these questions, sometimes I get all sorts of stories—especially from donors who have been with us for many years, and in some cases more than two decades.

One story is from long-time supporter, Dr. Robert Helmholdt, a dentist in Fort Lauderdale. It was probably about two years ago now that I was sitting on a couch in his office as he told me that his good friend, Dr. Stanley Marshall, founder of The James Madison Institute, called him and told him he would like to visit and that he would be bringing along former Florida Governor Wayne Mixson.

Dr. Helmholdt told Dr. Marshall he didn't know what he could possibly do for him, but he wouldn't pass up a chance to have a former Governor visit his office. He then told me, "Dr. Marshall and Governor Mixson came to visit to tell me about this new organization they were starting, and they were sitting right there on that same couch you're sitting on now."

Dr. Helmholdt was very well connected, and he offered Dr. Marshall and Governor Mixson opportunities to introduce the newly formed James Madison Institute to groups of prospective supporters in Fort Lauderdale.

This simple act of hospitality would have a great effect on JMI for years to come. Many stories I've heard over the past five years, including this one, didn't quite make it into the 25 Moments, 25 Years report. There simply just wasn't enough space to add every story, but there were many small moments that made for a big impact.

In addition to heading up fundraising efforts for JMI, I am also a trained historian—with degrees from Florida Atlantic University and the University of Maryland. So, while this was a big project, it was an enjoyable one—and one that, at times, even made me miss those research-intensive days in graduate school. But this project also forced me to have to be a good editor and make tough decisions about what were the most important "moments" in our history that would be kept in a short enough format to keep readers' attention.

My research involved going through the JMI archives (we have tons of files kept from staff over the years). These files include old annual reports, newsletters, event information, donor records, pictures, and videos.

What was interesting here was seeing old typewritten notes—and even newsletters—from the 1980s and early 1990s. It's amazing how digital records, the internet, new software programs, and email correspondence have changed the way we communicate. In fact, technology has significantly accelerated the pace at which we are able to reach larger numbers of people. I could see this transition happening throughout our 25 years of records. And it made me wonder where we will be 25 years from now.

Other parts of my research

involved interviews. I was truly impressed at how willing noted scholars such as Dr. James Gwartney and Dr. Randall Holcombe were to sit down and chat with me—they were there at the very beginning of JMI and remain on our Research Advisory Council today.

It was also fascinating to connect with former JMI Presidents such as John Cooper (1989-1994) and Dr. Ed Moore (2000-2002). All of these men really lit up talking about the various policy accomplishments that took place during their time at JMI and how truly impressed they are by what our current President, Bob McClure, has been able to do to improve upon their own successes.

I also sat down on a few occasions with the esteemed founder of JMI, Dr. J. Stanley Marshall, who just turned 90 years old this year. It is always inspiring and rewarding to hear of his experiences first hand. It reminds me how important my specific job, and all those at the Institute, truly are in keeping his vision alive by growing support for the Institute. He started with nothing but a few ideas and a network of contacts that he had built during his time as President of The Florida State University and during an unsuccessful run for Commissioner of Education.

But that's really where our story begins. Many men and women have run for elected office and been unsuccessful. Running for office is a difficult, time-consuming thing. You—and your family—must put many things on hold, and you must put your own reputation on the line, as everything is up for public scrutiny. After losing a race, many feel dejected and never follow up on the vision that got them involved in the first place.

Dr. Marshall didn't let losing a race discourage him from achieving his dream to better the education system in Florida for future generations. Thanks to the suggestion by one of his former graduate students, Philip Halstead, he decided on another route to further his goals: to start a policy organization that would work to promote ideas that would launch Florida into new heights in education and beyond.

Dr. Marshall still has a passion for school choice. He believes every family—regardless of their income level—should have the opportunity to send its children to the highest quality school available. Over time, he has also come to realize the obstacle teachers unions have become to attempts to improve educational opportunities for our youth. Many of the dues theses unions take from teachers simply go to fund political lobbying efforts to retain the status quo.

Dr. Marshall wanted The James Madison Institute to provide the intellectual ammunition to create a groundswell of support for school choice efforts, despite the efforts of the well-paid lobbyists representing the unions. As he began JMI in 1987, school choice was a radical, almost foreign, idea. More than 25 years later, there are more than 583 charter schools in Florida; more than

50,000 low-income families receive a voucher each year to attend the school of their choice; and the public has become more aware of the politicization of the teachers unions.

In addition—perhaps unforeseen by Dr. Marshall—technology has helped revolutionize education, with the proliferation of digital education and virtual school options now available to nearly all Florida schoolchildren. But perhaps Florida would not be the leader in virtual schooling—as it is in overall school choice options—had it not been for someone like Dr. Marshall and an organization like The James Madison Institute promoting new ideas that allow lawmakers to be bold in offering innovative solutions to improve the quality of education available to all Floridians.

One of the biggest things I learned in my research of JMI's 25-year history is that none of what happened at JMI—or because of JMI—would be possible without people willing to devote their time, treasure, and passionate drive to achieve greatness and continue to move forward. This includes scholars, elected officials, donors, and JMI staff and board members. But more than anything, the donors have been the most important part of this equation. As Morton Blackwell, founder of the Leadership Institute, once said, "You can't save the world if you can't pay the rent."

And what I discovered is that it takes a lot of donors—but it also takes the special efforts of a few key donors to make it happen. The Institute would not have been able to open its doors had Dr. Marshall not received the support of some close friends. He organized a meeting on April 29, 1987 at the old Ramada Inn North in Tallahassee with 16 business leaders in town. They got behind his idea.

"The Institute would not have been able to open its doors had Dr. Marshall not received the support of some close friends."

But what he needed next was funding—and some actual doors to open, and that was met very generously by the late Jerry Lundquist, who offered office space and a $10,000 donation. Throughout the course of my interviews, various people brought up Jerry Lundquist's name and that alone helped me recognize the importance of this man's generous heart—and his significance in making JMI a reality.

Later, other individuals would step up at key moments in JMI's history—especially Preston "Dick" Wells, Jr. and Charlie Hilton. It seems clear to me that without a few key donors such as Jerry Lundquist, Dick Wells, and Charlie Hilton, The James Madison Institute wouldn't be here today, despite the need.

Those early and consistent donors may not have made some large and vital contributions to the Institute had they not seen hundreds of other supporters get behind the work

of JMI. And it is likely that none of these donors would have stood behind the work of JMI if not for the organization's credible reputation and its integrity.

A constant in JMI's history has been the organization's ability to remain an honest broker. And that is demonstrated most significantly in the fact that JMI has remained non-partisan. In fact, JMI can claim board members who have been prominent Republicans, Democrats, Libertarians, and Independents. While JMI certainly has a limited-government, free-market perspective—one traced back to our nation's founders—its research is compelling. And it has challenged assumptions by players in all parties.

"A constant in JMI's history has been the organization's ability to remain an honest broker."

For example, former JMI President John Cooper explained to me that one of those fights was about creating term limits for members of the Florida Legislature. Just as Republicans were beginning to make gains in the longtime Democrat-controlled state Legislature, JMI was probably the loudest voice in Tallahassee pushing for term limits. Some prominent Republicans took issue with Cooper and the Institute on this issue, but JMI remained persistent.

Cooper shared his thoughts on the role of JMI: "I always described our view on term limits as what a think tank strategy should look like: We should be neutralizing elite opinion and mobilizing mass public opinion." That statement is as true today as when Cooper developed it more than two decades ago.

And later, when I sat down with Dr. Ed Moore, he told me that those term limits were first fully felt in the year 2000, when he took over as JMI President. And the timing could not have been better for JMI. Former JMI board member Tom Feeney had just become Speaker of the House, and he conveyed to Moore that, because of the new term limits, he was going to have 64 freshman members of the Florida House—and they were going to need some training and orientation.

Under Moore's leadership, JMI put together an impressive legislative orientation program and literally took over the entire new member training and did so in a very balanced way. Although this all happened in the wake of the historic Florida recount, JMI was able to rise above this moment of high partisanship.

Many of those new members remain political leaders today, in one capacity or another. One can say with confidence that in the decade that would follow, the Florida Legislature has mostly done right by JMI's standards in areas such as taxes, regulations, property rights, education, and health care. Perhaps a few of the members were paying attention to the issues presented to them by JMI staff, scholars, and prominent guest speakers

such as Bill Bennett, Ed Meese, and Richard DeVos.

During our JMI research, we were focused on searching for all the good policy achievements JMI helped to advance, but one of the surprising things that jumped out at me during this research was a subject that was brought up by Professor Randall Holcombe when he mentioned all the bad things that JMI stopped.

His observation made me pause and wonder: What if JMI had not existed? Would there be more taxes? Maybe even a state income tax? Would there be more regulations? Would growth management laws be more pervasive? Would there be more wasteful spending on public education and government-run health care? Would there be more government-subsidized projects such as high-speed rail? Would certain public officials even have had the opportunity to get elected in such an environment? Would we be more like California?

I had to stop myself from letting these nightmarish thoughts fill my head and, instead, just be grateful that Dr. Marshall and other great men and women stepped up and provided a space for the kind of research and perspectives JMI has been able to offer over the past 25 years. But it is also interesting how some of the bad things we have stopped have sprouted up yet again many times over the years, sometimes under different names ("global warming" turned into "climate change," while "growth management" turned into "hometown democracy," etc.).

Even with all of its policy accomplishments, JMI certainly has had some challenges along the way. As mentioned previously, during a few key fundraising challenges, prominent donors stepped up to keep Dr. Marshall's legacy thriving.

But no one has given JMI a sense of permanence more than our current President, Dr. Bob McClure. Over and over, in interview after interview, I heard many of the scholars, board members, and former JMI Presidents sing Bob's praises. Some of them have been with JMI since the beginning and have seen no greater leadership than that which Bob has provided for this organization—and for this state.

I think Dr. Randall Holcombe said it best when he told me: "I have to give him a lot of credit for everything, really. Everything from fundraising, to talks at conferences, and legislative contacts."

Bob put together a plan to make sure JMI's policy ideas were relevant and had a winning message, but he also has been obsessive about making sure the Institute sustains itself financially. And, he has ensured that we are not just a Tallahassee-centered organization.

Yet, JMI is headquartered in Tallahassee for a reason: to be the state capital's voice for limited-government and free-market principles, representing our supporters from all around the state who count on us to convey our message to our state's leaders.

One of the biggest accomplish-

ments in giving JMI a lasting presence in Florida's public policy arena was to raise the funds necessary to find a permanent office in the vicinity of the Capitol.

After several years of persistence, JMI finally achieved this goal in 2012, when it moved into The Columns, a historic building just a few blocks from the State Capitol. This move is paying off daily as JMI is able to entertain policymakers, coalition partners, donors, activists, and even students in a wide array of programs, policy briefings, and strategy sessions.

During my research process, I was able to interview Susan Christian, the longest-serving JMI staff member in our history (other than Dr. Marshall). She came on board in 1988 as a temporary assistant for one project. Then, Dr. Marshall asked her to stay. Seventeen years later, she finally retired after having served under every JMI President, including during the first year of Bob McClure's tenure.

My interview of Susan Christian took place in my office at JMI's new headquarters, and I really felt that, for someone like her, this 25-year experiment had come full circle—as it has for me.

The hard work she and other staff members put in over the years has paid dividends. What we are doing today would not be possible without them. After five years at JMI, I am just part of a bigger idea that has taken the effort of many before us. And my goal in my time here—like the effort of so many of our supporters around the state—is to make sure that JMI is present in an even stronger capacity for those who will follow us in the future. ❧

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❧

Worthy Words

"If Congress can do whatever in their discretion can be done by money,
the Government is no longer a limited one,
possessing enumerated powers,
but an indefinite one, subject to particular exceptions."

–JAMES MADISON

CREATIVE DESTRUCTION VISITS HIGHER EDUCATION

BY WILLIAM C. JOHNSON, PH.D.

Capitalism is by nature a form or method of economic change, and not only never is—but never can be—stationary.[1] Those words of Austrian economist Joseph Schumpeter famously introduced the world to the idea of creative destruction, which occurs when traditional practices are endogenously destroyed and replaced by revolutionary new ones.

This process frequently makes entire industries and/or companies either less relevant or totally obsolete. Witness, for instance, how digital imaging disrupted sales of Kodachrome and other films, changed the kinds of cameras people used, and all but destroyed corporate icon Kodak in the process.

Clayton Christiansen, an expert on disruptive technologies, wrote about the technology mudslide hypothesis. That is, when companies are attempting to cope with a relentless onslaught of technological changes, their situation is somewhat analogous to trying to climb a mudslide raging down a hill—you have to scramble with everything you've got to stay on top of it, and if you ever once stop to catch your breath, you get buried.[2]

Now the forces of change are rapidly descending on the field of higher education as disruptive new technologies are causing a paradigm shift. Like any other knowledge and information-based enterprises, academia is vulnerable to disruptive innovation that offers a new experience that is cheaper, faster, simpler, and often better. College and univer-

sities are now running into the same problems as journalists, the music industry, and movie studios have faced: how to make any money when courses and even degrees are offered for free or at an extremely low cost and globally delivered .

Cisco CEO John Chambers predicted that education over the Internet is going to be so big, it is going to make email usage look like a rounding error. Chambers seems to have been right, as the popularity of online courses is growing rapidly.

For example, in this past year, three in 10 college students report taking at least one online course, up from one in 10 in 2003. An emerging technology-powered delivery model that meets the needs of tech-savvy and geographically dispersed student populations with minimal investment in infrastructure is now here.

This ought to be music to any academic dean's ears, as online delivery programs can scale quickly with little additional expense. Such courses are often taught by adjunct instructors who are paid a minimum stipend, on average between $2,300 and $4,000 per course, depending on the university, the grade level and the subject matter.

This new digital and online delivery paradigm has attracted much more attention lately because of several factors. First, non-classroom costs continue to skyrocket, especially their administrative costs. For example, the U.S. Department of Education reports that number of employees hired by colleges and universities to manage or administer people, programs, and regulations increased 50 percent faster than the number of instructors between 2001 and 2011.

As the College Board has reported, these costs have been a major reason that the average annual tuition at public and private universities in 2012 rose to $8,655 and $29,305 respectively. In fact, according to the Bureau of Labor Statistics, it has risen even faster than healthcare costs during the past decade.

Moreover, demographics suggest another factor driving higher education to rethink its existing business model. As applications tail off from children of baby boomers, fewer potential students are entering the pipeline. In the 2013-14 school year, for example, 3.2 million high-school students are projected to graduate. That's a 4.5-percent drop from the peak in 2007-08, according to the Western Interstate Commission for Higher Education.

Economics are increasingly coming into play as an additional factor as to whether students attend college. Since the late 1970s, annual costs at four-year colleges have risen three times as fast as inflation. U.S. student-loan debt continues to rise, increasing by $42 billion, or 4.6 percent, to $956 billion in the third quarter of 2012.

In fact, student loan debt now exceeds total credit card debt, according to the Federal Reserve Bank of New York A Pew research report, which used Federal Reserve data, found that among all student borrowers, the average student-

debt balance rose by 14 percent, to $26,682 between 2007 and 2010, after adjusting for inflation.

Thus far higher education has largely avoided the classic Schumpeter-like disruption, but that is now changing. The power of the Web and availability of powerful online delivery platforms are shaking up the educational field. Universities around the world are already incorporating online learning courses at different levels, from diploma and certificate courses to bachelors, master's and even to doctoral degrees.

Online courses have never been more accessible, offering students the freedom to learn at their own pace and their own schedule simply by being connected to a desktop computer, laptop, iPad, or iPhone. Thanks to these developments it's now possible to stream video classes with sophisticated interactive elements, i.e. full-video and audio chat sessions.

Many administrators like the online model in particular because they can more easily assess the outcomes and use the data to make teaching more effective. *(See "What I Learned Teaching Online Graduate MBA Courses" at right.)*

A legitimate question is whether online learning is comparable to traditional face-to-face instruction. The 2010 U.S. Department of Education's Review of Online Learning Studies found that students who took all or part of a course online perform better, on average, than those taking the same course through traditional face-to-face instruction.

LESSONS LEARNED FROM TEACHING ONLINE GRADUATE MBA COURSES

- Students benefit from and learn more from specific, immediate, and personalized feedback, one of the key advantages of online teaching.
- Students love a lot of options. This is more possible online versus traditional delivery, i.e., where to find assignments, where and how they are uploaded, offering trade-offs on scheduled assignments.
- Repetition, repetition, repetition. Unlike traditional instruction, placing the information in multiple locations is helpful for students (featuring an FAQs section also minimizes the number of responses to the same question). The focus of teaching online moves more toward competency completion and mastery, so letting students practice via repetition builds such subject-matter mastery.
- Teaching online is more akin to being the "guide on the side" as opposed to the "sage on the stage." Online instruction is more about facilitating and coaching rather than lecturing.
- The burden for learning shifts more to the student in online courses—a standard caveat which I include in my course greeting is that "you will get out of this course what you put into it." This is more true in an online environment than in a traditional setting.

Similarly, a study conducted in the same year by the internationally known scholars Mickey Shachar and Yoram Neumann that analyzed 20 years of research on the topic and showed that in 70 percent of the cases, students who took distance-learning courses outperformed their counterparts who took courses in a traditional environment.[3]

Online delivery seems well-suited for today's non-traditional student population, i.e., according to a 2008 U.S. Department of Education study, nontraditional students make up 70 percent of the undergraduate population, where nearly half of them are financially independent, more than one-third work full-time, and a quarter of them have dependents of their own. Online degree programs would allow these students to take classes on their own schedule and budget and at their own pace.

Setting up the technology needed to deliver high-quality instruction is getting easier as cloud computing and broadband technologies allow for greater access and downloading capabilities. The disruptive innovation referred to earlier is now already on the horizon with start-ups such as Udacity and EdX, a joint-venture of Harvard and MIT, which now also includes University of California-Berkley, Georgetown University. Meanwhile, Coursera includes sponsoring universities Stanford, Princeton, Duke, Emory, Penn, and University of Virginia.

With elite-university branding, these start-ups have put 219 college-level courses online, free of charge. These massive open online courses—or MOOCs—are exerting tremendous pressure on all but the top tier schools as they continue to partner with more schools and/or instructors to offer their courses, at least for time being, for free. It is probably just a matter of time before the MOOCs partner with the major textbook publishers such as Pearson or McGraw-Hill.

"…students who took distance-learning courses outperformed their counterparts who took courses in a traditional environment."

Udacity co-founders Sebastian Thrun and David Stavens concluded that conventional university teaching was way too costly, inefficient, and ineffective to survive for long, so they are seeking to introduce a teaching revolution in which the world's best instructors conduct highly interactive online classes that let them reach 100,000 students simultaneously and globally and cost effectively, where an entire degree would cost say $100!

I think the top 50 schools are probably safe, Stavens says. There's a magic that goes on inside a university campus that, if you can afford to live inside that bubble, is wonderful.

So, where is all this headed? Here is my assessment of higher education and the implications of these disruptive new technologies. First, we will begin to see a shift from credit hours and seat time to one that focuses on

competency and mastery.

One of the attractive features of online courses is that they can easily integrate actionable assessments and allow students to accelerate past the concepts and skills they already understand and have mastered and instead focus their time where they most need help at the level most appropriate for them.

This eliminates the one size fits all mold that characterizes much of higher education today. Today, we hear a great deal about the need for greater accountability. Outcome-based learning is well-suited to online course delivery, where courses in essence become outcome-constant and offer more appropriate measures for judging students and institutions.

Most creative destruction occurs where users of a service either are forced to make significant compromises (e.g., live on campus or commute there, pay for expensive buildings, glitzy dormitories, sports teams, faculty salaries) and/or pay a premium for the service.

The day is close at hand where low-cost online education that requires limited or no student borrowing may displace a huge swath of today's deep-rooted establishment. The value quotient of a college degree keeps getting smaller and smaller, where credentialism is trumping learning, and where even this is being realized at continuing higher costs.

So the proverbial disruptive elephant in the room is online learning, which offers a natural medium and platform for many of these changes to take place. Traditionalists in higher education had better take note lest the endure the ultimate Kodak moment.

William C. Johnson (Bill) is Professor Emeritus of Nova Southeastern University (NSU), where he served as a full-time professor, teaching master's and doctoral courses in marketing. He has taught online graduate and undergraduate courses in marketing for the past 14 years. Dr. Johnson received his Ph. D. in Business from Arizona State University. He currently serves as President of Marketing Know-how and teaches online marketing courses for NSU as an adjunct professor.

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Worthy Words

"If the highest aim of a captain were to preserve his ship, he would keep it in port forever."

–ST. THOMAS AQUINAS

NEXT STEPS FOR STRENGTHENING FLORIDA'S CIVIL JUSTICE SYSTEM

BY VICTOR E. SCHWARTZ AND CARY SILVERMAN

Florida's civil justice system is viewed as especially friendly to plaintiffs because its courts often interpret state law in a manner that expands liability. South Florida's aggressive personal injury bar makes businesses particularly weary of being hauled into court there. As a result, the American Tort Reform Association (ATRA) has repeatedly named South Florida as a Judicial Hellhole"! in its annual report.[1]

Because Florida's courts have shown an unwillingness to shift state law into the national mainstream, the Legislature has stepped in. In 2010, for instance, lawmakers addressed the excessive liability exposure imposed on Florida businesses for slip-and-fall claims, and they also enacted safeguards when the government contracts out its law enforcement authority to lawyers paid based on the amount of damages they impose.

The following year, with the support of Gov. Rick Scott, the Legislature enacted automobile crashworthiness reform, which allows a jury to consider a driver's fault when he or she claims a car should have provided more protection in an accident. Prior law had kept jurors from knowing that a driver was drunk, texting,or otherwise distracted when the crash occurred.

Most recently, Florida passed a law aimed at reducing automobile insurance fraud, and the Legislature repudiated the use of a fee multiplier for Personal Injury Protection cases.

As a result of these and earlier

reforms, the Sunshine State's reputation for civil justice is improving. In December, ATRA moved South Florida to its Watch List. This meant that, depending on the direction its judges and legislature take, the jurisdiction is on the cusp of either moving off the list completely or reclaiming its Judicial Hellhole status.

Florida should continue building on this foundation. Here are four critical steps that Florida policymakers should consider: 1) eliminate junk science; 2) address inflated damage awards; 3) stop gotcha lawsuits against insurers; and 4) protect the right of counsel for treating physicians.

Reliable Expert Evidence

Unreliable expert testimony presents one of the most difficult and dangerous challenges to the fair administration of justice. As the U.S. Supreme Court recognized, Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.[2]

Imposing liability on a defendant who did not cause harm violates a fundamental tenet of our system of justice. It also has led to the removal of beneficial products from the market and discouraged innovation.[3]

All federal courts, and the vast majority of state courts, evaluate the admissibility of expert testimony under a standard known as *Daubert,* named for a 1993 Supreme Court case.[4] Before admitting expert testimony, judges applying the *Daubert* standard consider whether the theory or technique 1) has been tested; 2) has been subjected to peer review and publication; 3) has a high rate of error; and 4) is generally accepted within the relevant scientific community.

"Imposing liability on a defendant who did not cause harm violates a fundamental tenet of our system of justice."

Florida, however, is among a few states that follow a more lenient standard. Its judges look only to whether the expert's view has general acceptance, just one of the four elements of the Daubert test. Making matters worse, in 2008 the Florida Supreme Court found that even this relaxed test is inapplicable in the vast majority of cases.[5]

Florida courts are not required to review the reliability of proposed expert testimony at all unless it involves a new or novel scientific technique.[6] This loophole allows courts to admit a hired expert's testimony on whether a defendant's conduct or product caused the plaintiff's injury when the opinion is solely based on paper credentials and intuition.

As a result, plaintiffs' lawyers have a green light to bring cases relying on junk science in Florida court, cases that they would not file elsewhere. The Florida Legislature should bring this state's standards for admission of expert testimony into the mainstream by adopting the key elements of the *Daubert* approach.

Accuracy in Damages

Jurors in Florida may also be misled into awarding inflated amounts for medical expenses due to Florida law. These awards serve no compensatory purpose for those who are injured, but drive up the costs of products and services for consumers.

Florida allows juries to learn only the amount a plaintiff was billed for medical expenses. Given the widespread application of negotiated rates between managed care plans and providers, fee schedules set by Medicare and Medicaid, and other discounts and write offs, it is not uncommon for list prices for medical services reflected on the original invoice to be three or four times the actual price paid.

After a verdict, Florida courts set off (subtract) the amount of the past medical expenses that no one actually paid, known as phantom damages, from the jury's award.[7] This step is helpful, but does not fully cure the excess because the jury may have based its award for future medical expenses, as well as pain and suffering, on the inflated amounts.

Creative Florida plaintiffs' lawyers can also avoid a set off by entering a Letter of Protection (LOP). Through an LOP, a doctor, at the request of the plaintiffs' lawyer, agrees to defer collection of a plaintiff's bills until the lawsuit concludes. By using this approach, the court can only consider the pending bill, not what the plaintiff would actually pay.

Defendants are placed in a difficult position if they challenge medical treatment attributed to the plaintiff's injury as unnecessary. In Florida, such allegations are considered tantamount to claiming that the treating physician engaged in medical malpractice. This entitles a plaintiff to ask that the court instruct the jury that the defendant is liable for all of the plaintiff's medical expenses, including those resulting from the negligent, unskillful, or unsuccessful medical care.[8]

"Defendants are placed in a difficult position if they challenge medical treatment attributed to the plaintiff's injury as unnecessary."

As a result, plaintiffs may receive damages in amounts that substantially exceed their actual and anticipated future medical expenses.

The Florida Legislature can address inflated awards for medical expenses by 1) providing that amounts actually paid for medical expenses are admissible at trial, 2) precluding admission of amounts billed for medical care that do not reflect amounts accepted in full satisfaction of the account, 3) allowing juries to consider amounts customarily accepted in payment for outstanding and future medical expenses, and 4) permitting juries to consider whether the treatment provided was necessary.

Fair Settlement Reform

Excessive awards also occur in Florida in lawsuits challenging insur-

ance payment practices. The purpose of Florida's bad faith insurance law is to deter insurers from unreasonably delaying or denying payment of valid claims. But this law is prone to significant and widespread abuse by plaintiffs' attorneys, who employ a variety of tactics to prevent insurers from promptly settling claims even where an insurer is willing to pay the full policy limits. This tactic can generate a bad faith lawsuit to recover damages far in excess of the insurance agreement.[9]

Florida law is particularly problematic with regard to so-called third party claims. This is when someone who is not the insurer's customer, and hence not a party to the insurance contract, sues the insurer for failing to settle a claim in a timely manner.

Plaintiffs' attorneys, eager to pursue greater recoveries by turning an ordinary insurance claim into a bad faith lawsuit, often purposefully delay the insurer's efforts to adequately investigate a claim's validity and to guard against fraud.

For instance, plaintiffs' lawyers often ignore repeated calls and letters from an insurer attempting to settle a claim, return checks sent for policy limits, or deliberately provide few, if any, specifics on the claim or remedy sought to cause delays and trigger a bad faith lawsuit.[10] The law also allows plaintiffs' attorneys to include any conditions for settlement with third party payment demands, which, if not met, can similarly be used to claim bad faith.[11] This gives attorneys incentives to devise conditions that are effectively impossible to meet.[12]

Such gotcha tactics lead to multimillion dollar verdicts against insurers who act responsibly, and this drives up insurance rates for all Floridians. As Florida Supreme Court Justice Charles T. Wells recognized, When an insured purchases and pays premiums on $20,000 of insurance but the insurer pays $2.5 million in claims, someone has to fill the pool. Initially, this amount may come out of an insurer's profits, but eventually the someones are the other insureds, whose premiums are increased.[13]

Moderate, commonsense changes to Florida's bad faith law can eliminate the gamesmanship. Such reforms should include: 1) setting a reasonable timetable to investigate and pay claims; 2) more clearly defining bad faith under the law; and 3) extending the obligation to negotiate in good faith to claimants and their counsel.

Right to Counsel

Florida's healthcare privacy law, as interpreted by the Florida Supreme Court, severely limits the ability of treating physicians, who are brought in to testify in a case but who are not parties, to communicate with their own attorneys.[14] A nonparty treating physician who receives a notice of deposition cannot consult with an attorney even to discuss non-patient information such as the mechanics of the deposition itself.[15] The doctor must enter the deposition blind, even if he or she is unfamiliar with the process.

The inability to obtain guidance from an attorney opens the door for doctors to unwittingly place themselves in unnecessary legal trouble. Nonparty treating physicians are prevented from discussing the case unless or until they reasonably expect to be named as a defendant. By that time, the doctor may have inadvertently made statements that caused this result. If the doctor does consult with an attorney after receiving a deposition notice, he or she may be accused of admitting culpability or violating patient confidentiality.

Florida should amend its patient-healthcare confidentiality statute to address this issue. While sensitive medical information most certainly should be protected, this protection cannot override a physician's fundamental right to an attorney.

The Path Forward

Over the past several years, Florida policymakers have identified and corrected areas where Florida liability law has fallen out of balance. Through building on this solid foundation, Florida may finally shed the perception among some in the business community that it is a Judicial Hellhole. Instead, Florida can be a point of light for civil justice.

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Cary Silverman is Of Counsel in the Group. They serve as counsel to the American Tort Reform Association.

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[3] See Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (1990).

[4] See Committee on Judiciary, Florida Senate, Analysis of Law Relating to Admissibility of Expert Testimony & Scientific Evidence, Issue Brief 2009-331 (Oct. 2008).

[5] *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2008).

[6] *Id.* at 547.

[7] *Goble v. Frohman*, 901 So.2d 830 (Fla. 2005).

[8] See, e.g., *Pedro v. Baber*, 83 So.2d 912, 916-18 (Fla. 2d DCA 2012) (providing a Stuart instruction, per *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977)).

[9] See Victor E. Schwartz, Restoring the Good Faith in Florida's Bad Faith Insurance Litigation, Fla. Justice Reform Inst. (2011).

[10] See, e.g., *United. Auto Ins. Co. v. Estate of Levine ex rel. Howard*, 87 So.3d 782 (Fla. 3d DCA. 2011).

[11] See John J. Pappas, A State in Crisis, Mealey's Litig. Rep.: Insurance Bad Faith, vol. 20, no. 20, at 33 (Feb. 20, 2007).

[12] See *Schwartz*, supra, at 18-23.

[13] *Berges v. Infinity Ins. Co.*, 896 So.2d 655, 685 (Fla. 2005) (Wells, J., dissenting).

[14] See *Dannemann v. Shands Teaching Hosp. & Clinics, Inc.*, 14 So.3d 246, 247 (Fla. 1st DCA 2009); *Hannon v. Roper*, 945 So.2d 534, 536 (Fla. 1st DCA 2006).

[15] *Hasan v. Garvar*, ___ So.3d ___, No. SC10 1361, 2012 WL 6619334, at *8 (Fla. Dec. 20, 2012).

Worthy Words

"Under this republic the rewards of industry belong to those who earn them. The only constitutional tax is the tax which ministers to public necessity."

–CALVIN COOLIDGE

FLORIDA'S UNFINISHED BUSINESS: REFORMING PUBLIC PENSIONS

BY KRAIG CONN

The 2013 Legislature has a chance to build on its previous efforts to ensure that all of Florida's public employees will have a degree of financial security when they retire. To secure that worthy goal, lawmakers still need to address several major concerns of Florida's cities.

Many of those cities have chosen to operate their own pension plans apart from the Florida Retirement System, which covers state, county, and school district employees. These cities now should be given the full right to bargain collectively the pensions for police and firefighters, without state interference.

To achieve this, the Legislature needs to rescind a1999 requirement that forces these cities to use any increases in revenue from the insurance premium tax to fund extra benefits for police and firefighters. That amounts to a $500 million state mandate to those cities.

Consequently, the top priorities for Florida's cities during the 2013 legislative session are enacting a comprehensive reform of city police and firefighter pensions to end this burdensome mandate and reforming the rules governing a presumption of disability.[1]

Legislation is needed in these areas in order to address problems created by numerous actions taken by the Legislature over the past 40 years relating to the defined benefit pensions of city police and firefighters. These actions have had significant fiscal impacts on cities and their taxpayers.

The reforms the cities are advocating do not provide them with a handout from, or a bailout by, the Legislature relative to city police and firefighter pensions. Nor are cities asking the Legislature to reduce or eliminate any police or firefighter pension benefit.

Rather, Florida's cities are merely seeking reasonable changes to a few state laws in order to allow them to determine and implement city police and firefighter pension reform at the local level, through the local collective bargaining process.

The goal is to keep police and firefighter pensions sustainable, sound, and secure for current and future generations of police officers and firefighters, while also safeguarding city taxpayer dollars.

Background

Just like private employers in Florida, the state's 410 cities are not required by law to provide a retirement plan to their employees. However, most cities do so, either voluntarily or through collective bargaining.

The Florida Supreme Court has ruled that city employees have the right to bargain collectively for retirement benefits. Further, the Florida Constitution requires that pension plans and pension benefit increases provided by a government entity, including a city, must be funded on a sound actuarial basis a concept associated with defined benefit type pensions.

Against this backdrop, Florida's cities provide a wide array of retirement plans including the following:

- ***Defined Benefit Plans***
  More than 200 cities provide a total of approximately 460 different defined benefit pension plans, and most of these cities have separate plans for general employees, police, and firefighters.
- ***Chapter 175 (firefighter) or Chapter 185 (police), Florida Statutes, Defined Benefit Plans***
  More than 200 cities operate a police or firefighter defined benefit pension plan under Chapters 175 or 185, Florida Statutes. Of the 460 city defined benefit pension plans noted above, 330 operate under either Chapters 175 or 185, Florida Statutes. Therefore, police and firefighter defined benefit pension plans make up 70 percent of all city defined benefit pension plans.
- ***Defined Contribution Plans***
  More than 100 cities provide a 401k-style defined contribution pension plan for a specified class of employees, typically general employees.
- ***Membership in the Florida Retirement System (FRS)***
  Most cities do not participate in the FRS. In fact, city employees make up less than 5 percent of the total FRS membership.
- ***Deferred Compensation Plans***
  Numerous cities offer deferred compensation plans as an additional opportunity for their employees to save for retirement.

Status of Government Pension Plans

Over the past several years, numerous reports and articles have been

written regarding the fiscal health or solvency-sustainability of government defined benefit pension plans. This information has been generated against the backdrop of substantial decreases in property tax and other revenues to all Florida governments, including cities. Moreover, the recession had significant negative impacts on the value of the assets held by pension plans.

However, it must be noted that government pension plans are operated based on long-term outlooks, typically with rolling 30-year horizons and long-term investment expectations. To obtain a meaningful assessment of any particular government pension plan, various performance measurements using reasonable and acceptable time frames and plan specifics should be considered.

Terms such as fiscal casualty or imminent bankruptcy to describe a particular Florida governmental entity or pension plan should be rarely used. Current state law provides a comprehensive process for the Governor to intervene on behalf of a city (or other local governmental entity) facing a financial emergency.

Financial emergency is broadly defined and includes consideration of a local government's ability to make pension plan contributions or pay pension benefits. Once that process is triggered, the Governor is authorized to take control of the city government's finances.

Fortunately, this power has been invoked only rarely and was last exercised for a Florida city by then Gov. Jeb Bush. As for bankruptcy, state laws prohibit cities and counties in Florida from seeking bankruptcy protection without specific authorization from the Governor. (See Section 218.503, Florida Statutes, 2012).

Accessing Government Pension Plans

The Florida Department of Management Services (DMS) recently compiled detailed financial information on the approximately 460 city defined benefit pension plans in Florida. Although the data are reliable, it must be noted it is at least one year old.

This information is in addition to a comprehensive annual report by DMS on the status of these same pension plans. The most recent report at the time this was written reflects information from 2011; however, the DMS was expected to release the report for 2012 sometime in January 2013.

Morningstar recently released a report, The State of State Pension Plans, which rated pension plans using an assets-to-liabilities funded ratio. Plans funded at 80 percent or higher were determined to be in Good fiscal health, plans funded between 70 and 79 percent were in Fair fiscal health, and plans funded at 69 percent or lower were in Poor fiscal health.

Using the Morningstar ranking levels and DMS data, out of 462 city defined benefit pension plans, 278 have funding ratios of 80 percent or higher; 80 are between 70 and 79.9 percent; and 104 are less than

70 percent. Of the 80 plans funded between 70 and 79.9 percent, 43 are police or firefighter plans and 37 are general employee plans. Of the 104 plans funded less than 70 percent, 69 are police or firefighter plans and 35 are general employee plans. For all 184 plans funded below 80 percent, 112 are police or firefighter plans and 72 are general employee plans.

Another measure of a pension plan's fiscal health involves a review of the plan's required employer (city) annual contribution, typically measured as a percentage of payroll. A percentage of payroll contribution is a combination of two main contribution requirements a contribution requirement to fund normal pension costs and a contribution requirement to fund any unfunded actuarial liabilities.

"Of the 162 city defined benefit pension plans with employer contribution rates above 30 percent of payroll, 118 are police or firefighter plans."

For instance, under this measurement, if a city's annual police payroll is $1 million, a 40 percent of payroll pension contribution means the city must contribute an additional $400,000 to the police pension plan. For reference purposes, the current required contribution for employers (the state and counties) with employees in the FRS Special Risk Class (police and firefighters) is approximately 15 percent of payroll. (See Section 121.71, Florida Statutes, 2012).

Using the DMS data, out of 467 city defined benefit pension plans, 98 have a percentage of payroll contribution requirement for employers of 40 percent or higher, and of those 98 plans, 74 are police or firefighter pension plans.

If the percentage of payroll measurement drops to 30 percent of payroll (which is about double the FRS Special Risk Class contribution rate), 162 plans have an employer contribution of 30 percent or higher, and of those 162 plans, 118 are police or firefighter pension plans.

Several broad conclusions can be drawn from the DMS information summarized above. Out of 462 city defined benefit pension plans, only 184 have a funding ratio less than 80 percent. More telling is that of the 184 plans, 112 are police or firefighter pension plans, showing that funding issues are typically more associated with police or firefighter plans.

The same finding is shown when the percentage of payroll contribution information is reviewed. Of the 162 city defined benefit pension plans with employer contribution rates above 30 percent of payroll, 118 are police or firefighter plans.

The Need to Reform Past Legislative Actions

In 2011, the Legislature passed a law taking the first steps in reforming local governments' defined benefit pensions, focusing primarily on city police and firefighter pension plans. The legislation addressed several

issues, including the following:

- prohibiting spiking of (or rapid increases to) pension benefits by restricting the use of overtime and unused sick or annual leave payments for pension determination purposes; and
- creating a task force to study issues with various state law disability presumptions for firefighters, law enforcement officers and corrections officers.

Importantly, however, the 2011 law did not address a requirement or mandate passed by the Legislature in 1999 for cities to perpetually provide extra pension benefits to police and firefighters with city insurance premium tax revenues.

Insurance Premium Tax Revenues

Prior to 1999, cities were largely free to bargain with local police and firefighter unions, or to provide for non-unionized police and firefighters, the pension benefits that best fit the priorities and needs of the city and its police and firefighters.

In 1999, however, the Legislature amended Chapter 175 (relating to city firefighter pensions) and Chapter 185 (relating to city police pensions), Florida Statutes, to require that specified city insurance premium tax revenues (taxes on property and casualty insurance premiums) be used to provide only extra or additional pension benefits to police and firefighters.

An extra pension benefit is defined in state law to mean that the benefit must have been given to police and firefighters after 1999, and the benefit must be greater than a pension benefit provided to general city employees. In aggregate numbers, this mandate from the Legislature has required cities and city taxpayers to provide more than $500 million in new, extra pension benefits to police and firefighters since 1999.

This state mandate for cities to perpetually provide extra pension benefits is not sustainable. Cities need the flexibility under state law to use insurance premium tax revenues for either the current level or a reduced level of police and firefighter pension benefits.

Because of severe budget constraints and rapidly increasing personnel costs, cities have attempted to reduce retirement costs for general employees, police, and firefighters. Numerous cities have successfully reduced retirement costs for general employees, but current state laws restrict their ability to reduce pension benefit levels for police and firefighters.

Additionally, city efforts to reform police and firefighter pensions have been hindered because of union accusations of breach of contract or unfair labor practice, or by unions using the state's labor laws to significantly delay implementation of pension reform decisions.

Until very recently, the DMS required city police and firefighter pension benefit levels to remain at or above the pension benefit levels in place in 1999 (many cities provided a high level of police and firefighter

pension benefits in 1999).

Add to this requirement the mandate for cities to provide extra pension benefits to police and firefighters, and the unsustainability of this scheme becomes evident. If a city either reduced a police or firefighter pension benefit to a level below the 1999 level or failed to provide extra pension benefits, the pension plan would be deemed to violate state law and the city would forfeit all insurance premium tax revenues—a fiscal consequence few cities could withstand. Thus, when cities attempted to bring police and firefighter pension costs under control, their actions have been effectively blocked by the DMS.

Finally, in 2012, the DMS, in a series of letters to cities, has rectified a 12-year-old inaccurate interpretation of that 1999 state law. The 2012 DMS interpretation follows the precise language in the city police and firefighter pension statutes regarding the use of insurance premium tax revenues, and the new interpretation provides significant relief to funding city police and firefighter pensions.

However, even with this accurate or correct interpretation, the current statutes continue to mandate the provision of extra pension benefits to police and firefighters with a portion of city insurance premium tax revenues. Only the Legislature can remove this unsustainable mandate for cities to perpetually provide new, extra pension benefits to police and firefighters.

"Only the Legislature can remove this unsustainable mandate for cities to perpetually provide new extra pension benefits to police and firefighters…"

Disability Presumptions

The Legislature has provided that health conditions relating to heart disease, hypertension or tuberculosis suffered by a firefighter, law enforcement officer, or correctional officer are presumed to be job-related. These disability presumptions cover state, county, and city employees and are applicable to both workers' compensation and disability pension claims.

For instance, under the disability presumption, if a police officer suffers a heart attack, it is automatically presumed to be work-related. The police officer receives the disability presumption regardless of when the heart attack occurred it could have occurred immediately after responding to a crime or during a two-week skiing vacation in Colorado.

Also, the police officer receives the disability presumption regardless of engaging in lifestyle activities that could increase the risk of heart attack such as smoking cigarettes or being overweight or having a genetic/hereditary predisposition to heart disease.

Disability presumption laws have been drafted by the Legislature and interpreted by the courts so favor-

ably toward these employees that cities and other government employers basically cannot overcome the presumption and show the health condition was not work-related. This means that the state, counties, and cities may be inappropriately incurring workers' compensation and disability pension expenses.

In 2012, a state Task Force on Public Employee Disability Presumptions issued findings and recommendations to the Legislature. Changes to presumption laws supported by a majority of task force members include providing that the presumption may be overcome by a preponderance of evidence and restricting application of the presumption to anyone who has used tobacco products within a specified timeframe.

These recommendations are designed to bring a fairer balance to the application of disability presumption laws. It is important to remember that just because an individual does not have a disability presumption does not mean he or she cannot make a workers' compensation or disability pension claim. Rather, it just means the individual must show that the health condition is work-related, just as every other employee who makes a workers' compensation or pension claim must do.

Conclusion

Florida's cities deeply honor and respect the services that police officers and firefighters provide and sacrifices they make. Therefore, the cities desire to provide current and future police officers and firefighters with a pension system that is sound, sustainable, and reliable. Florida's cities also desire to protect local taxpayers from unsustainable and unsound pension levels.

Reasonable and responsible reforms to state laws on city police and firefighter pensions and disability presumptions will ensure that pensions are available for current and future generations of police officers and firefighters, and will safeguard city taxpayer dollars.

Kraig Conn is legislative counsel for the Florida League of Cities.

Endnote

[1] In Florida, a city, town, or village is a municipality. There is no legal difference between them. To avoid confusion, this article refers to all municipalities as cities.

Worthy Words

"If you serve a child a rotten hamburger in America, federal, state and local agencies will investigate you, summon you, close you down, whatever. But if you provide a child with a rotten education, nothing happens, except that you're likely to be given more money to do it with. Well, we've discovered that money alone isn't the answer."

–RONALD REAGAN

IS THE PPACA'S 'TAX' CONSTITUTIONAL?

BY TIMOTHY SANDEFUR

Few expected the Supreme Court to declare the "Individual Mandate" provision of the Patient Protection and Affordable Care Act (PPACA) a "tax" on people who do not choose to buy "minimum acceptable" health insurance. The primary focus of the legal arguments was on whether the mandate was a legitimate use of Congress' power to "regulate commerce...among the several states." The tax theory was addressed in only a few pages of the government's extensive briefing, and occupied practically no time during the unusual, three-day oral arguments.

To this day, the Obama Administration, which claims to have won the case, has refused to accept the "Tax Power" theory; in a recent interview in *Rolling Stone*, President Obama reiterated his view that the mandate is not a tax, but a regulation of commerce. Nevertheless, Americans must live with the Court's decision, and, what is harder, try to make sense of it.

This is not easy. Not only did *NFIB v. Sebelius* result in several overlapping opinions—so that lawyers and judges are still arguing about which parts of the decision are binding law and which are not—but the Tax Power theory the Court adopted creates new puzzles, given that the Constitution imposes serious limits on the taxing power, which the mandate disregards.

First, the Constitution requires that all "direct taxes" be apportioned—meaning that each state's average tax liability must be the same. The Supreme Court has had difficulty defining "direct tax," however. In a

1792 case, *Hylton v. United States*, it ruled that a tax on carriages was not direct, because only taxes that can be easily apportioned can be direct, and since the tax on carriages could not be easily apportioned, it therefore must not be direct.

But the Constitution does not say "direct" and "apportionability" are synonymous. It says that an unapportionable direct tax is unconstitutional. Yet the *NFIB* Court relied on Hylton to declare that the PPACA tax is not direct because it "does not fall within any recognized category of direct tax." But that is just another way of saying what everybody already knew: that this law is unprecedented.

The Constitution allows only two categories of taxes: indirect taxes—including duties, imposts, and excises—and direct taxes, including income taxes. The PPACA is not an indirect tax, because the Court has held that those are "laid upon the happening of an event, as distinguished from its tangible fruits," which obviously does not apply to a tax on a person not doing something.

The Obama Administration, in its admittedly scanty briefing on the subject, tried to characterize the PPACA tax as an indirect "excise," because its "imposition is contingent upon numerous factors, including income and the way an individual finances health care, i.e., 'a particular use of property.'" But "earning a certain amount of income but not obtaining health insurance" is not a transaction or an event; it is simply another way of describing the ownership of property, and a tax on the owner simply because he is an owner is a direct, not indirect, tax.

By regarding the state of "not obtaining health insurance" as a "use" of property, this portion of the NFIB decision contradicts the earlier portion in which the justices refused to regard the absence of an activity as a kind of activity: not buying insurance is not a use of property, which could be indirectly taxed.

"…taxes need not be the same for everyone, but Congress may not tax the same thing differently based on geography."

Second, if the PPACA tax is not a direct tax, the Constitution still requires that it be "uniform" throughout the country. The PPACA tax appears to violate this requirement, too.

In the Head Money Cases, the Supreme Court explained that the Uniformity Clause requires that taxes "operate with the same force and effect in every place where the subject of [the tax] is found." And in *Knowlton v. Moore*, the Court clarified that the Uniformity Clause requires geographic, not "intrinsic" uniformity. That is, taxes need not be the same for everyone, but Congress may not tax the same thing differently based on geography.

By these standards, PPACA is not uniform. It provides a formula for determining whether a person

is exempt, and that formula that is based on "the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides."

Because this amount differs from state to state, low-income people with identical financial circumstances would be subject to different taxes based solely on the their state of residence. It is therefore inaccurate to say that the PPACA taxes persons who do not buy health insurance; rather, it imposes a tax on persons who do not buy affordable insurance, and affordability is judged by reference to state boundaries.

Moreover, the amount of the tax also incorporates geographical references, because people are taxed for each month in which they fail to maintain insurance. If John lives in a state where insurance is expensive, only to find the cost of insurance fall in the middle of the year, he will be taxed for the six months in which insurance in his state became affordable while Bob, whose income is otherwise identical to John's, will be taxed for the full year because, in his state, insurance premiums were always low. Meanwhile, Richard, whose income is also identical, will be entirely exempt because the same insurance policy remained high in his state. John, Bob, and Richard face different tax liabilities based solely on their states of residence.

True, the Court has said that uniformity is not violated where "the ultimate incidence" of a tax "is governed by state law," and it has held that Congress can treat states differently in order to target geographically isolated problems. But the incidence of the PPACA tax is governed wholly by federal law. It's just that the federal law employs a formula that discriminates based on geography. And health insurance is not a geographically isolated problem.

Of course, as is typical of Obamacare, there are no applicable legal precedents. In 1895, Chief Justice Melville Fuller observed that "there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,'" but that "such a tax for more than one hundred years of national existence has as yet remained undiscovered."

Could the PPACA tax be this long-sought-after "unicorn tax"? It seems more reasonable to conclude that it is either an unapportioned direct tax or a non-uniform excise.

Another Constitutional Hurdle

Whether the tax is direct or indirect, there is another constitutional hurdle the Act fails to leap. The Constitution requires that all "Bills for raising Revenue" must originate in the House of Representatives. The founders viewed the Origination Clause as a critical protection. Mindful of the profound danger of federal abuse, they chose to keep the taxing power close to voters by giving it to congressmen elected every two years directly by people in local districts.

But the PPACA originated in the Senate. On November 19, 2009,

Sen. Harry Reid submitted an "amendment" to a bill that the House had passed the previous month, H.B. 3590 a bill called the "Service Members Home Ownership Act," which provided incentives for veterans to buy houses. Reid's amendment struck out the bill's entire text, and replaced it with what became the PPACA, including the Individual Mandate and 17 other revenue-raising provisions. Although this "gut and amend" procedure is not uncommon, the Court has never determined whether Congress can use it to get around the Origination Clause.

Of course, the Senate may amend House-initiated revenue bills, but it may not rewrite House-passed bills to make them into revenue-raising bills. Instead, Senate amendments must be "germane" to the subject of the original House bill, to ensure that the Senate does not evade the Origination Clause. Courts have consistently said that "all legislation relating to taxes (and not just bills raising taxes) must be initiated in the House," and that Senate amendments cannot transform a bill that is not for raising revenue into one that is. Unlike any previous case, the Senate's gut-and-amend procedure is what first made H.R. 3590 into a bill for raising revenue.

In response to these arguments, the government has argued that while the PPACA is a tax, it is not a "Bill for raising Revenue." True, the Court has distinguished between assessments that are bills for raising revenue, subject to the Origination Clause and those that are "bills for other purposes which may incidentally create revenue," exempt from the Origination Clause.

But the latter situation arises when Congress imposes an exaction to enforce a statute passed under the Commerce Clause or other enumerated power. These are not really "taxes" at all; courts have called them "monetary 'special assessment[s],'" "sanctions," or "penalty assessments," which "are analogous to fines."

"There is a marked distinction between taxation for revenue," said the Fourth Circuit in a 1943 case, "and the imposition of sanctions by the Congress under the commerce clause." While Congress' power to regulate commerce "is the power to prescribe the rules by which commerce is to be governed, and the Congress is at liberty to adopt any method which it deems effective to accomplish the permitted end," including financial enforcement penalties, the power to tax "is a congressional power specifically mentioned and described in the Constitution, but always in connection with the subject of the revenue for the support of the government generally."

The Constitution's limits on the taxing power, including the prohibition on direct taxes, and, one would add, the Origination Clause, "relate solely to taxation generally for the purpose of revenue only, and not impositions made incidentally under the commerce clause."

The tax at issue in that case "ha[d] for its object the fostering, protecting and conserving of interstate commerce.... Revenue may inciden-

tally arise therefrom, but that fact [did] not divest the regulation of its commerce character and render it an exercise of the taxing power." For that reason, the constitutional limits on the taxing power did not apply.

But according to the *NIFB* Court's "saving construction," the PPACA must be a tax, not a penalty exempt from the Origination Clause. The Court declared that the PPACA rests solely on Congress' power to lay and collect taxes. And it specifically declared that the assessment is "a tax, not a penalty."

The justices emphasized this by contrasting the PPACA tax with the penalty invalidated in Bailey v. Drexel Furniture (1922). There, Congress used its taxing power as a pretext for regulating commerce that was beyond its reach; that tax was really a "penalty with the characteristics of regulation and punishment." While in Drexel Furniture, the Court found that Congress had passed a law "in the name of a tax which on the face of the act is a penalty," the *NFIB* decision found that "what is called a 'penalty' here may be viewed as a tax."

The Court has never expanded the Origination Clause exemption beyond this to cover something like PPACA, which rests solely on Congress' taxing power. Doing so would be disturbing, given the Court's pledge to enforce constitutional checks on this power.

The Origination Clause provides an important democratic preventative against Congress's abuse of its taxing authority power, a check that is all the more important if, as the *NFIB* decision said, the Court will not "protect the people from the consequences of their political choices."

The *NFIB* decision satisfied practically nobody. If, as some have suggested, Chief Justice Roberts was emulating John Marshall's *Marbury v. Madison* decision, that effort failed, because it resulted in an unworkable refashioning of the statute, one for which neither side contended, and which neither side now fully accepts.

In fact, *NFIB* may be the anti-*Marbury*. Chief Justice Marshall's opinion is a masterpiece because it asserted the Court's rightful constitutional power while tactfully withdrawing from a political dispute in which the judges were ill-suited to defend themselves. He accomplished this with a masterfully logical unanimous opinion.

NFIB, by contrast, resulted in an illogical opinion that withdraws the Court from its proper constitutional role, and does so solely as a function of political considerations. It also resulted in multiple, overlapping opinions, such that it is unclear now which parts of the opinion are even binding precedents. It imposed an implausible reading on the statute, which raises more constitutional problems than it resolves. Whether the Court can clean up the mess it has created can only be determined by future litigation.

Timothy Sandefur is a principal attorney at the Pacific Legal Foundation and heads the Foundation's Economic Liberty Project, which protects entrepreneurs against intrusive government regulation.

A PROPERTY RIGHTS ISSUE:

WHO OWNS THE TICKET THAT YOU JUST BOUGHT?

BY ANDREW LANGER

When you buy a ticket to a Bruce Springsteen concert or Miami Heat game, you can do with it what you choose. You can attend the event, give away your ticket, or resell it when an unforeseen event occurs, such as a business trip or an illness. The bottom line is that your ticket has been purchased and issued, and now the ticket is your property. Right?

Not according to Ticketmaster and others in the ticketing industry. Ticket issuers, as well as certain venues, artists, producers and sports teams, have introduced restricted ticketing to prohibit or limit a purchaser's ability to give away, resell, or even donate tickets. This practice intentionally strips ticket buyers of one of their most fundamental ownership rights.

Restricted tickets, also known as paperless, require a consumer to show a purchasing credit card and a matching photo ID in order to enter a concert or sports game. Unlike transferable electronic tickets that can be printed or e-mailed, these tickets can't be given away to friends or family or sold on the secondary market.

This restriction of property rights is even more troubling when it is imposed at taxpayer-subsidized venues—and in Florida, those include stadiums and arenas used by the state's nine franchises in the four major professional sports—football, baseball, basketball, and hockey.

Ticket issuers may allow restricted tickets to be transferred on the issuer's preferred (and typically owned) resale website. In addition to essentially eliminating competition in the secondary ticket market, these affiliated resale websites often impose price floors and price ceilings, threatening consumer choice and the free market.

As any economist could tell you, noncompetitive markets inevitably lead to higher prices, higher processing fees, lower-quality service, and fewer choices for consumers. Far worse is the damage these ticketing schemes inflict on the free market. These practices pave the way for monopoly in the ticket industry.

The American Antitrust Institute, an independent Washington-based non-profit organization that advocates for free market competition, issued a 2012 white paper on the threat of restricted ticket practices to consumer choice and competition in the ticket industry.

American Antitrust Institute Research Fellow James Hurwitz's 71-page paper found that restraints on the ability to transfer event tickets "unjustifiably limit consumer choice and depart from bedrock competitive market principles."

The white paper, which called on the Federal Trade Commission and other government officials to investigate this emerging practice, concluded:

> "With the loss of secondary market competition, prices can increase, output decrease, and incentives for innovation diminish. Legislative remedies may offer quicker and more focused benefits (than litigation), and, based on the available evidence, appear to be warranted."[1]

Outside of industries with national security implications such as airlines, no other goods or services in the marketplace are burdened with such restrictions. The onerous restrictions that go along with restricted paperless tickets are just a way to limit choice, corner the market, and undermine free-market principles.

Two Florida legislators, Rep. Jimmie T. Smith, R-Inverness, and Senator Alan Hays, R-Umatilla, have recognized the need to protect property rights and competition in Florida's substantial ticket sales industry. They have introduced legislation to uphold the following principles:

Ownership rights. Their legislation ensures that tickets are a consumer's property and can be given away or resold by that individual, without restrictions imposed by ticket sellers on these transactions.

Free market. This legislation protects the free market by prohibiting event producers and ticket sellers from restricting ticket transfers to designated resale marketplaces that impose arbitrary price restraints and threaten to create monopolies in the ticket industry.

It is critical that individual rights, including the right to do what we please with our own property, are

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PUBLIC-PRIVATE PARTNERSHIPS KEEP FLORIDA ON THE MOVE

BY DR. LAWRENCE L. MARTIN AND DR. JOE SAVIAK

Our nation's roads are deteriorating, and many of our bridges and tunnels are considered unsafe. Many state and local governments are broke, and the federal government has run up some $16 trillion in debt. How are we going to rebuild our transportation infrastructure and pay for it? Public-private partnerships (P3s) might be part of the answer.

The American Society of Civil Engineers (ASCE) rates the condition of the majority of America's infrastructure as "mediocre" or "poor" and estimates that it will cost $2.2 trillion to bring the nation's infrastructure up to "good" condition.[1]

One way that state and local governments have dealt with this crisis is by deferring maintenance on existing infrastructure and delaying the construction of new infrastructure. While successful in the short run, this continued approach is a prescription for disaster in the long term. Government revenues ultimately depend on the strength of the economy. An aged and failing infrastructure injures our economy and adversely affects revenue to the government.[2]

P3s involve an alliance between government and the private sector where decisions, risks, and rewards are shared. It is a true partnership where trust is paramount.[3,4,5]

P3s are primarily employed by our state and local governments for infrastructure maintenance and construction.[6] The most common involve airports, bridge, highways, hospitals, parking facilities, prisons,

rail systems, roads, tunnels, and waste/wastewater.

To date, 377 P3s have been initiated in 24 states with 104 of these P3s being for transportation infrastructure.[7] Florida (16), California (12), and Texas (9) have initiated the greatest number of P3s.[8]

The specific benefits of P3s can be: 1) accelerating infrastructure maintenance and construction, 2) substantial risk transfer from government to the private sector, 3) on-time and within budget delivery of infrastructure projects, 4) a source of new or increased infrastructure funding, 5) cost savings, and 6) equal or better quality.[9]

P3s differ from traditional government contracting in that 1) it represents a change in government/private sector roles and responsibilities; 2) it involves longer contract time periods, on average 30-40 years although it can last as long as 99 years; 3) the private sector partner sometimes provides all or some of the funding for the project and may assume significant risks for the government partner; and 4) it involves a potentially higher degree of risk for the partners.[10]

The P3 procurement process can operate as a request for proposal process, as a request for qualifications to identify interested firms with the requisite capacity to perform followed by a request for proposal process involving identified firms, or as a follow-up to an unsolicited proposal.[11]

In considering a P3, elected officials and public managers should use a checklist of policy and planning issues.This checklist would include determining if state P3 enabling legislation exists, identifying infrastructure needs and the gap between those needs and available resources, setting infrastructure priorities, deciding how available revenues will be apportioned between competing infrastructure needs, creating a policy to deal with unsolicited proposals, and confirming the availability of P3 expertise (in house or outside consultants).[12]

The first checklist issue involves current statutory authority for P3s. Enabling legislation is important because it sends a strong message to private sector firms that a state and its local governments are "open for business" when it comes to P3s. An enabling statute also removes uncertainty and risk for both the public and the private sector partners.

The key statutory elements to identify and understand are coverage (what types of projects are statutorily authorized), whether unsolicited proposals are allowed, whether the tools of availability payments or shadow tolls can be utilized to ensure financial viability depending on levels of project revenue, whether local governments are specifically authorized to engage in P3s, whether prior legislative approval of a proposed P3 is required, and whether non-compete clauses are allowed to prevent the government from adding a new infrastructure project to the same area if it would potentially affect the P3 project's revenue.[13]

Where does the law stand in

Florida? Section 334.30 of Florida Statutes currently authorizes the Florida Department of Transportation to engage in P3s, which it has done successfully and continues to do. Under this statute, P3s are limited to transportation projects, unsolicited proposals may be received but the opportunity must be advertised so others may submit proposals, availability payments and shadow tolls are permissible, prior legislative approval is required, and non-compete clauses are prohibited. Other state statutes authorize single purpose governments to engage in P3s, and there is a statute making state grant funding available to qualifying local governments in rural communities to participate in infrastructure P3s.

Partner selection is critical to the success of a P3. Qualifications and experience, financial capability, risk transference, and avoidance of firms mired in litigation or controversy should govern partner selection decisions by state and local governments.[14]

Multiple forms of risk can arise in a P3. These must be identified and effectively managed.[15] For both ordinary contracting and in P3s, risk factors are frequently interrelated. How well one type of risk is managed has implications for other types of risk. For example, service interruption risk, and how well it is managed, can affect political risk.

In managing risk, the governing principle is that the partner (government or private sector) best positioned to deal with the specific type of risk should assume that risk.[16] Demand risk is usually assumed by the private sector P3 partner. It can become a problem when project revenue is the financing mechanism of the P3 through tolls or fees. Demand forecasts and revenue projections can be highly unreliable, especially for P3s of long duration (10, 20, 30, 99 years).

"In managing risk … the partner (government or private sector) best positioned to deal with the specific type of risk should assume that risk."

Everyone loses if the private sector partner defaults on the P3 project or has to declare bankruptcy because of insufficient revenues. State and local governments should structure the P3 so that if demand declines to a point where revenues are insufficient to fund operations, then tolls or fees can be increased or some other remedy invoked in order to maintain desired service levels (availability payments, shadow tolls).

To avoid service interruption risk, government should prescreen and select capable private sector P3 partners. Managing and mitigating political risk is largely related to how well government explains the value and benefits of P3 projects to stakeholders and citizens to obtain their support. Financial risk varies depending upon the type of project. Force majeure risk is generally

shared equally by both the government partner and the private sector partner. Finally, P3 projects create additional risks including site risk (e. g., suitability) and design and construction risks. P3s are usually structured so that these additional P3 risks are assumed by the private sector partner.[17]

Public-Private Partnerships in Florida

The following two examples illustrate how P3s are helping to improve Florida's transportation infrastructure.

The I-595 Corridor P3 Project

This project in Broward County involves the construction of 10 miles of additional freeway lanes and the inclusion of three reversible toll lanes. Because of a lack of funding, the Florida Department of Transportation (FDOT) decided to make the I-595 corridor a P3 project. Without private financing, the FDOT estimated that the I-595 Corridor project would have had to stay on the shelf for another 15 years.

The FDOT held a competitive process to select a private sector firm to design-build-finance-operate-maintain (DBFOM) the project. The contract will run for a period of 35 years. The winning contractor, I-595 Express, LLC, is a consortium headed by ACS Infrastructure Development. The total cost of the project is estimated at $1.8 billion. The consortium arranged funding for the project and also invested $280 million of its own money.

In addition, the I-595 Express, LLC agreed to assume complete responsibility for any cost overages over the life of the project. The contract began in March 2009 and construction is to be completed in 2014. Tolls will be used to finance the operations and maintenance of the P3 project. FDOT will establish and collect the tolls and pay the contractor. At the end of the 30-year contract, operations and maintenance of the I-595 corridor will revert to the Florida DOT. By utilizing a P3 approach, Florida taxpayers may save as much as $244 million over the life of the contract.[18]

The Miami Port Tunnel P3 Project

The Port of Miami actually sits on an island in Biscayne Bay. Vehicles use downtown Miami surface streets to enter and exit the port. This causes traffic congestion. Following a competitive process, the FDOT entered into a P3 contract with MAT Concessionaire, LLC to DBFOM a tunnel to connect the port with interstates I-395 and I-95.

When this project is completed, the tunnel will reduce traffic congestion in the downtown Miami area. The total cost of the project over its 30 year life is approximately $1 billon. The Miami Tunnel P3 project was funded with loans from a consortium of banks and the federal government and by an $80 million investment on the part of the contractor.

The FDOT will establish and collect container and passenger fees to pay the contractor for operations and maintenance of the tunnel. At

the end of the contract, the Miami Tunnel will revert to the Florida DOT. By utilizing a P3 approach, Florida taxpayers will save an estimated $400 million over the life of the contract.[19]

Public Support for P3s

A February 2012 statewide survey of Florida voters commissioned by the Government Services Partnership Institute and conducted by Mason-Dixon Polling and Research, Inc. found significant support among Floridians for this policy option. Almost 75 percent of Florida voters supported the use of P3s for the building and maintenance of public facilities.[20]

Lessons Learned in Managing the Implementation of P3s

P3 experiences both here and abroad have yielded a valuable body of best practices and lessons learned.[21] First, in contracting, we manage the contract; in P3s, however, we manage the relationship. Second, state and local governments must access and develop the institutional expertise to successfully design and oversee P3 projects. Third, private sector partners should be involved earlier, not later, in decision making about the scope of the P3 project. Fourth, specific P3 contractual provisions should 1) focus on outputs and outcomes rather than inputs and methods used; 2) identify the number of asset upgrades, if any, and when they are to occur; 3) identify if, when and how much tolls or user fees may be increased; and 4) specify what happens to the asset at the end of the P3 project.

Finally, full documentation of issues and decisions is crucial because P3s terms can run for 20, 30, 50 even 99 years. Staff of both the government and the private sector partners at the end of a P3 will most likely not be the same ones from the start.

Conclusion

A bill before the Legislature in the 2012 regular session sponsored by State Rep. Trudi Williams, R-Fort Myers, would have expanded the opportunity for local governments to employ P3s for a wide range of capital projects. It passed the Florida House of Representatives but did not achieve final passage into law. To date, three bills dealing with P3s have been filed for the 2013 legislative session, so lawmakers this year will have a chance to revisit the issue.

When state and local governments adhere to best practices, public-private partnerships are a sound strategy that can produce positive outcomes. Citizens are looking for solutions, and the public has indicated strong support for this policy option. The State of Florida is potentially positioned to become a national leader in the use of public-private partnerships.

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TICKETS *(Continued from page 46)*

protected. This commonsense legislation would help to protect property rights, individual liberty, and the free market in the State of Florida.

A property rights advocate for two decades, Andrew Langer is president of the Institute for Liberty. Founded in 2005, the Institute for Liberty attempts to keep government focused on the primary mission of making sure our nation is safe, while keeping it from unnecessarily interfering in the daily lives of America's entrepreneurs.

Endnote

[1] "Restrictive Paperless Tickets," American Antitrust Institute. www.antitrustinstitute.org/~antitrust/sites/default/files/Tickets_paperless_Final.1.17.11.pdf.

Worthy Words

"Socialism, like the ancient ideas from which it springs, confuses the distinction between government and society. As a result of this, every time we object to a thing being done by government, the socialists conclude that we object to its being done at all."

— FREDERIC BASTIAT

"[T]he more public provisions were made for the poor, the less they provided for themselves, and of course became poorer ... [taking] away from before their eyes the greatest of all inducements to industry, frugality, and sobriety, by giving them a dependence of somewhat else than a careful accumulation during youth and health for support in age and sickness."

— BENJAMIN FRANKLIN

"Although the big word on the left is 'compassion,' the big agenda on the left is dependency. The more people who are dependent on government handouts, the more votes the left can depend on for an ever-expanding welfare state."

— THOMAS SOWELL

WHEN THE STATES RULED ...AND AFTERWARDS

BY THOMAS V. DiBACCO

One of the biggest fibs liberal historians tell their students these days—and most academic historians are liberal—is that the period preceding the adoption of the United States Constitution was downright awful.

The nation's first form of national government was outlined in the Articles of Confederation, adopted during the American Revolution in 1781. Liberal historians emphasize that this form was conspicuous for its lack of a central government, and that the largely state-controlled governments put the nation at risk of not surviving.

All this nonsense grew from an 1888 book written by a historian-philosopher (more philosopher than historian) named John Fiske in 1888. Titled *The Critical Period of American History*, it was a doomsday account of government during the years under the Articles of Confederation.

Fiske's interpretation was sucked up by gullible historians as readily as the public bought into Parson Weems's tale about young George Washington 'fessing up to his dad that he had indeed chopped down a cherry tree. "I cannot tell a lie, I did it with my little hatchet," Weems quoted young George as saying—without any substantial evidence to prove it.

As for the myths about the period prior to the adoption of the U.S. Constitution, not until 1950 did a conservative-minded historian, Merrill Jensen, attempt to write a more balanced history of that period.

The author's objectivity was evident in the book's non-damning title, *The New Nation: A History of the United States During the Confederation–*

1781-1789. Jensen pointed out that much was accomplished by a state-centered form of government that reflected American opposition to the strong executive and legislative system of Great Britain.

In fact, under the Articles of Confederation, there was no executive power of significance. Executive power was vested in a three-person committee elected by the Confederation Congress that was, itself, short on powers.

For instance, the Confederation Congress could make war and peace, but it could not tax or enforce laws; it could merely requisition states for monies or taxes. In that Congress, each state had one vote, with nine votes required to pass any measure and unanimity required to change the Articles.

States could issue their own paper money, which was not necessarily accepted by other states. And instead of the federal government having powers that were not specifically enumerated, the opposite was true. States retained whatever wasn't specifically delegated to the feds. There was no federal judiciary.

The accomplishments under the Articles of Confederation were notable. First, the war was successfully prosecuted by the military, and an excellent peace was forged with Great Britain. Second, the new nation stayed out of any major international squabble that would threaten its independence. Then the land policy and entry of new states into the union was established, permitting the rapid settlement of the West. Diplomacy was conducted, finances were attended to, even with the large amounts of borrowing and the issuance of paper money by the Confederation Congress and the states; demobilization was effected; and the economy, as concluded by Jensen, grew in leaps.

"There can be no question but that freedom from the British Empire resulted in a surge of activity in all phases of American life."

"Merchants owned more ships at the end of the 1780s than they had at the beginning of the Revolution, and they carried a greater share of American produce. By 1790 the export of agricultural produce was double what it had been before the war. American cities grew rapidly, with the result that housing was scarce and building booms produced a labor shortage. Tens of thousands of farmers spread outwards to the frontiers. There can be no question but that freedom from the British Empire resulted in a surge of activity in all phases of American life." (pp.423-424). To be sure, it was not a perfect union. And the attempt by the Confederation Congress to remedy the defects was sincere. The only problem was this: The Constitutional Convention, which was called by Confederation Congress, was supposed to be "for the sole and express purpose of revising the Articles of Confederation."

That pledge was not honored, and the result of that convention was the

Constitution of the United States, scarcely a revision of the Articles. Still, the Constitution was a more perfect document, and, thanks to James Madison.

Moreover, the Bill of Rights, particularly the 10th Amendment, provided for a limited federal government. Except for the Civil War period, the limitations on federal power worked pretty well until the 1930s, when the Great Depression began the movement from a federal government of limited powers to one of ever-expanding ones.

A major reason that states exerted substantial power for most of American history is that the Presidents and Congresses chose a low-key posture. In fact, the average American was affected little by the federal government until the Great Depression. The federal government derived virtually all of its revenue from tariffs, excise taxes, and the sale of land, and, not infrequently, it had to deal with revenue surpluses, not shortfalls. The federal income tax did not touch GI Joe or Rosie the Riveter until World War II.

When Franklin D. Roosevelt became President during the Great Depression, the handwriting was on the wall for the demise of state power, for FDR found a Congress eager to accept strong leadership and unfettered social experimentation.

Not surprisingly, Americans were a different breed than they are now. With more than 25 percent unemployed by 1933, the federal government offered families an outright dole under the Federal Emergency Relief Administration to sustain themselves. But Americans felt guilty about receiving that big green U. S. Treasury check without doing work. So FERA was replaced with work relief, which sustained Americans until World War II brought about full employment.

"When Franklin D. Roosevelt became President during the Great Depression, the handwriting was on the wall for the demise of state power…"

World War II never came to an end in terms of the federal government's expanding powers. Instead, it was succeeded by the Cold War, which led to U.S. involvement in the Korean War, the Vietnam War, and other foreign adventures.

Then the "Great Society" programs of President Lyndon B. Johnson added to the financial tether that drew more and more Americans into reliance on some sort of federal backing. And once initiated, the programs, unlike General Douglas MacArthur's description of old soldiers ("They never die, they just fade away"), the social programs never died or faded away. They grew.

Although Republican presidents after LBJ expanded federal powers, it was the aftermath of the election of Barack Obama in 2008 that saw limited government a fable and not reality. For the massive spending and debt accumulation under his charge have resulted in a phenomenon unlikely to become unraveled easily,

namely, that virtually a majority of Americans now want the government to do for them, not what they can do for their government.

Rush Limbaugh described it best in the wake of GOP presidential candidate Mitt Romney's stunning defeat in 2012. "You [the Republicans] can't compete with Santa Claus," he said.

The states have not only lost many of their powers to Uncle Sam, but their attractiveness to new residents. In the old days, the safety valve for discontent and disillusionment was for Americans to move from one state to another rather than take to the streets to protest.

Indeed, states competed for people as the nation rounded out its continental borders, often with economic and political incentives. Illinois offered more of these incentives than Indiana as it emerged first as a territory petitioning for statehood; to the west, Iowa outdid Illinois.

By the time the last contiguous U.S. territory, Arizona, requested statehood in 1912, its constitution was so democratic—providing for the recall of judges, for instance—that President William Howard Taft stopped the process until changes were made.

Ironically, even today, Arizona's quest to establish its own immigration enforcement policy—given the failure of the federal government to do the job—was met with the Obama Administration's objection and judicial disapproval, in spite of its sensible foundation.

Because Obama's legacy has been to regulate areas traditionally within the purview of states—from student loans to health insurance to voter identification requirements to even school lunch menus—the ability of Americans to move from one state to another to escape burdensome government has been sorely strained.

Today, only about one of every 10 Americans picks up stakes each year, half the usual movement and the lowest percentage since statistics have been kept in the post-World War period. Lack of jobs for young people, in particular, has kept them close to their parental home, and Obamacare has tightened the economic umbilical cord even tighter, what with the requirement that offspring under the age of 26 can be included under their parents' health insurance policy.

James Madison, who aligned himself with the forces supporting a strong central government, knew that the quality that was most needed to balance power and interests was elusive: "...the great desideratum which has not yet been found for Republican governments seems to be some disinterested and dispassionate umpire in disputes between different passions and interests in the state."

Woefully, the Supreme Court, which was rarely used in Madison's time, was a poor umpire because, first and foremost, its judges were federal, not state, judges.

Historian Dr. Thomas V. DiBacco is a resident of Palm Beach and is professor emeritus at American University in Washington, D.C. He is a member of The James Madison Institute's Research Advisory Council.

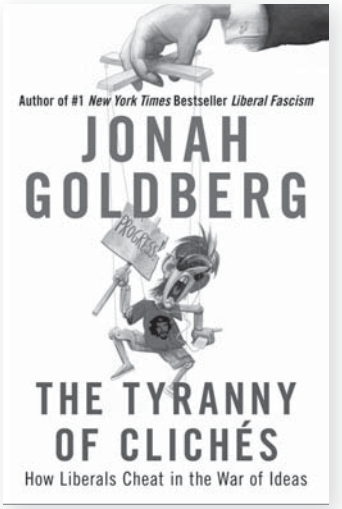
BOOK REVIEW

THE TYRANNY OF CLICHÉS:
HOW LIBERALS CHEAT IN THE WAR OF IDEAS

By Jonah Goldberg

© 2012 Sentinel HC, New York, NY, 320 pages

REVIEWED BY EVAN MARCUS



In the follow-up to his much-lauded bestseller *Liberal Fascism*, Jonah Goldberg attempts to unravel the thread of hypocrisy stitched into a patchwork of clichés that define American liberalism. *The Tyranny of Clichés* is essentially 24 vignettes that together span nearly 300 pages.

Each chapter centers on a particular catch phrase or idea ingrained within the liberal ideological mindset. Consequently, Goldberg's first chapter hones in on 'ideology' itself, describing the anti-ideology war against the right as an ideology in itself, one of hypocrisy.

From the phrase "social justice" to the long worn sound bite "dissent is the highest form of patriotism," Goldberg covers the range of excuses, justifications, and fallacies that litter the talking points on MSNBC's teleprompters.

To a reader unfamiliar with Goldberg's syndicated columns, the nature and depth of his commentary is striking. The book's brash subtitle, "How Liberals Cheat in The War of Ideas," belies a work more akin to a historical analysis than partisan hackery.

Each vignette contains the evolution of the particular cliché, as the original intended meaning morphs into political "truisms" we see brandished today by the Left. The chapter on "Social Darwinism" is especially interesting in this respect. The term was apparently never espoused by Herbert Spencer

himself. Moreover, "there is only one academic publication or article that clearly...advocates something called 'Social Darwinism'"—and even that work fails to mention Spencer as a reference."

Goldberg goes on to cite instances of noted liberals, both historical and contemporary, who use "Social Darwinism" as a label meant to demonize conservative opponents who support free market reforms. Later in this chapter Goldberg lists a variety of 20th century progressives who are widely known for having promoted eugenics as a statist project. Oh, the irony!

This is when *Tyranny* is at its best—when as a reader you have to stop and laugh, but not the kind of laugh that comes from his easy quips or an obscure reference to a science fiction flick. It is the type that is a melancholy, thought provoking, and shock-induced chuckle.

Perhaps the best way to describe these passages would be to use the time-honored cliché "it's funny because it's true." When Goldberg can reach for a quote from Caddyshack and connect it conceptually to a technical term coined by the 19th Century Italian theologian Luigi Taparelli d'Azeglio to depict the travesty of "Social Justice" as imagined by the Left, you begin to appreciate the essence of the argument.

The strength of *Tyranny* lies in using a clear prose to distill common liberal jargon into the true, often complex realities that underlie (and almost always discredit) the intended meaning. As when Barbra Streisand unsubscribed to the *L.A. Times* because Jonah Goldberg had taken the place of her favorite left-wing columnist.

A hilarious account of the story becomes less trivial when Goldberg questions the underlying meaning of her protest. Streisand complains Goldberg saps the diversity of opinion that the former columnist, Robert Scheer, had provided; "The gamut of voices has undeniably been diluted," she laments to the editor.

Goldberg questions what she means by diversity. Replacing one middle-class 2nd generation Jewish American of European descent with another certainly does not dilute diversity in the usual sense that the Left defines diversity, nor does it replace an outwardly liberal voice with a conservative one in a region ultimately controlled by Democrats. If anything, Goldberg argues, the choice to add a conservative voice is a progressive move by *The Times*.

Yet the ability to turn simple words and phrases into loaded conceptual frameworks for policy making is the dangerous side of Clichés. And according to Goldberg's book, it is a liberal specialty.

Beyond the clarity of his writing, there needs to be something said for Goldberg's distinctive voice. For readers familiar with his syndicated columns, the informal and at times crude prose of Goldberg's writing should come as no surprise.

For as many times as the book makes reference to the eloquent William Buckley, Jr., Goldberg is not

a writer in the vein of Buckley, nor does he try to be. The arguments are made with an attitude that at first strikes the reader as witty but, after 250 pages, feels unnecessary.

In the forum of a short newspaper opinion column, one can understand how his style comes off as frank and hard hitting, but the fact is that this book is not a weekly column. *Tyranny* is an attempt to deconstruct the underlying fallacies that serve as the foundation for modern liberalism. It is an important task, one which requires an objectivity and intent that Goldberg ultimately does not convey. Simply stated, the form does not fit the content.

"You can't judge a book by its cover" is one cliché that *Tyranny* seemingly contradicts. The illustration that adorns the front cover of the book features a "typical" college liberal, wearing trendy shoes, the perennial Che Guevara tee-shirt, an iPod in his ear, and a picket sign in his hand. He's being held aloft by a puppeteer—in this image, the much larger hand of big government).

It is intended as a visual representation of how clichés are being manipulated factiously by the left to peddle its own ideological agenda. Goldberg argues that the machine of American liberalism manipulates its own supporters into believing that they are taking the most pragmatic course to bring progress to the world.

It's a point well supported and clearly conveyed in the book. However, the clever image may also unwittingly reveal an inherent flaw in his critique. For conservatives to see a college kid wearing a Che Guavara shirt as the embodiment of liberal ideology is a cliché unto itself.

"…the dismissive tone and shallow structure render the book an ultimately irrelevant addition to the canon of American political commentary."

Moreover, this shallow attempt at symbolism is symptomatic of a failure to recognize the deeper complexities that have led to a proliferation of hollow misnomers during the last two decades. In fact, Goldberg himself seems to be using "worn-out and useless metaphors" that George Orwell, whom he often quotes, tried to dispel from the English language.

Historical novelties, interesting anecdotes, and humor make Tyranny of Clichés an enjoyable and informative read. Yet, the dismissive tone and shallow structure render the book an ultimately irrelevant addition to the canon of American political commentary.

College student Evan Marcus is a Spring 2013 intern for The James Madison Institute. A senior at Florida State University, he is pursuing a degree in finance and history.

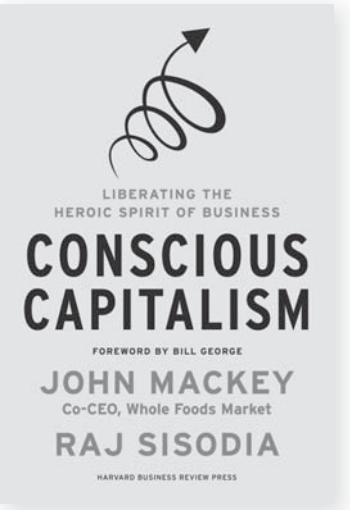
BOOK REVIEW

CONSCIOUS CAPITALISM:
LIBERATING THE HEROIC SPIRIT OF BUSINESS

By John Mackey and Raj Sisodia

© 2013 Harvard Business School Publishing, Boston, Mass., 344 pages

REVIEWED BY TOM MORGAN



John Mackey, the cofounder and CEO of Whole Foods, is an unabashed and unapologetic free-market capitalist, but this was not always the case. Mackey used to be a liberal, displaying some of campus liberalism's stereotypical trappings—long hair and a full beard. And rather than study business in college, he focused on Eastern philosophy. He even worked at a co-op because he saw business as evil and greedy.

Mackey is now one of America's best-known CEOs, in part because of his outspoken views on the dangers of big government. Yet it wasn't until he started his own business that he realized that his impressions of business and capitalism were deeply flawed.

At first Mackey struggled in business and barely made a profit, yet he was simultaneously being criticized by his friends at the co-op, who saw him as a "sellout" for even trying to earn a profit.

He knew in his heart that he wasn't greedy or evil; he just wanted to do something he loved as a career. However, his former mindset was not accurately explaining how the world worked. That led him to seek out new explanations, and he found more exact descriptions of the world in works of Friedrich von Hayek and Milton Friedman.

In his new book, *Conscious Capitalism*, Mackey and his co-author, Raj Sisodia, seek to explain why so many

people have negative views of capitalism, despite all the amazing things it has been able to accomplish for humanity. For example, about half of college-age Americans hold negative views of free-market capitalism.

The authors see this as happening for four reasons. First, the narrative of capitalism has been hijacked. It is being described by its enemies instead of its proponents, and its proponents have accepted its depiction. An obvious example is the belief that wealth is a zero sum game; that is, the larger the share of a pie held by one, the less there is for everyone else. That just isn't true; we can make the pie larger so that everyone has a larger share.

The second reason they cite is that some businesses operate with an eye for short-term profits rather than long-term. If a company is interested in maximizing profits for the next financial quarter without looking into the future, how much interest is it going to have in protecting consumers or the environment? The overwhelming majority of businesses don't think in these terms, but the few that do harm the reputation of business as a whole.

Profit maximization as the only goal of capitalism is the third reason for negative views. This is a long held belief of economists and business scholars alike. Mackey challenges this for its lack of nuance. He sees another important goal: advancing the higher purpose we set out for when we start a business. For example, Bill Gates didn't start Microsoft for maximum profits, but for transforming our world through computers. The profits, of course, flowed.

Finally, there is the problem of crony capitalism, which is what Mackey calls a mutant variation of capitalism. It occurs when those unable to compete in the market resort to using the power of the government to elevate themselves over others through the unfair rules.

The majority of the book is the authors' prescription on what we can do to fix these problems and change the public's negative view. He is challenging the status quo in the hopes of redefining the narrative. As with any challenge of the status quo, some things will be accepted as an improvement of the system while others will remain controversial.

Clearly the Mackey and Sisodia are on to something. There is more to capitalism than just an obligation to shareholders or profit margins. Regardless of whether one can accept the entire prescription, every true capitalist wants to see free markets around the world for reasons that go beyond money: It helps to diminish the age-old scourges of war, poverty, hunger, sickness, and tyranny. Mackey gives us a guidebook for his movement on how to make this the narrative.

Thomas Morgan holds a BA degree in political science from the University of South Florida and served as one of The James Madison Institute's college interns during the Spring 2013 semester.

Worthy Words

"We are at a turning point: Are we going to move in the direction of more freedom—or less? ... Today, property rights are widely viewed as selfish, the profit motive as immoral, and free markets as dangerous and even depraved. Unless we stop viewing free markets with suspicion and instead come to see them as moral, government's grip on the economy will keep tightening."

—YARON BROOK

"Economic liberty and creative entrepreneurship are the basis of any solution to today's social and economic difficulties. Blaming business, setting wages, and attempting to run the economy by decree from Washington only exacerbates the problems. Consider the minimum wage. It seems so simple: Tell business to pay its workers more. But a hike in the minimum wage is essentially a tax, punishing precisely those companies that hire workers with the least skills."

—DOUG BANDOW

"If the provisions of the Constitution can be set aside by an Act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war growing in intensity and bitterness."

—JUSTICE STEPHEN J. FIELD

"Government has an important role in helping develop a country's economic foundation. But the critical test is whether government is genuinely working to liberate individuals by creating incentives to work, save, invest and succeed."

—RONALD REAGAN

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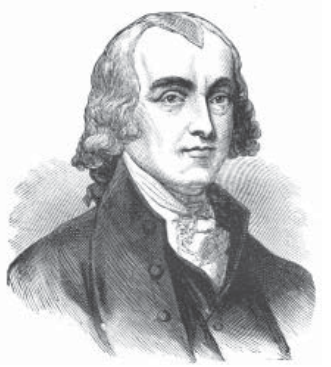

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