At Sidebar

by Philip W. Savrin

What "Are" the United States of America?

The recent ruling by the Supreme Court on the legitimacy of state laws recognizing same-sex marriage caused me to reflect on an experience I had more than a decade ago when my daughter's social studies teacher invited me to present a lesson on any topic of my choosing. Being an involved parent, I of course agreed to do so, without realizing the daunting task of finding a suitable topic that would not only be relevant but also interesting to a group of teenagers who were probably not thrilled by social studies in the first place, let alone by a "guest" teacher. Looking back, perhaps I accepted the invitation as yet another opportunity to embarrass my teenage daughter – but I digress.

As the fateful day approached, I considered, and then rejected, what I thought to be some of the more predictable topics, such as the system of checks and balances; how a bill becomes a law; and the significance of the Bill of Rights. While educational, these topics would have simply been too straightforward (relatively) for an obsessive overachiever like me. I instead opted to explain federalism, as in, how the state governments regulate certain activities within the umbrella concepts set forth in the Constitution. Nothing challenging in explaining that to adolescents consumed by their raging hormones, right?

After giving the idea some thought, I began the lesson by writing on the blackboard, "What are the United States of America?" I phrased the question in that manner principally to elicit responses that my grammar was wrong, which I did receive. As I expected, no one could possibly come up with the answer I was looking for, and, thankfully, this tactic seemed to grab the attention of the students (except, of course, those staring blankly out the window or doodling on their pads).

I then asked questions about where the students had lived, where they had traveled, and what customs they had observed that might have been different from their own. I asked them whether their parents ever disagreed on things that affected them and whether they were able to see both sides as being reasonable.

I decided to approach the concept of federalism in this manner because where one grows up has a dramatic influence on how one views the world. A large metropolitan area, for example, can offer a rich diversity of life in a concentrated physical space. As such, many city denizens may see no need to venture to other states or regions of the country. In contrast, smaller communities can foster greater intimacy with a slower, more relaxing pace of life but with fewer economic opportunities. Numerous other variables can influence the norms of the society that underscore the need for governance.

On a considerably more micro scale, teenagers often struggle with establishing their independence from their parents, which is itself a form of governance. I had little difficulty explaining that people can have differences of opinion, perhaps because I was addressing teenagers who spend much of their waking hours being disagreeable. Helping them to see that people with differing viewpoints can both be "right" was very close to explaining the challenges of creating laws in a civilized society.

Once I had established these principles with the class, I then proceeded to discuss how the 13 colonies were formed and eventually became united under one government. Although the country was much smaller in 1776, the founders knew very well that the colonies varied greatly and rejected the notion that "one size fits all." Instead of creating a single government, I explained, the Constitution preserves the sovereignty of the states to regulate all matters not expressly reserved for federal jurisdiction, albeit within the bounds of the Constitution.

Harkening back to the example of their struggles with their

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Pseudonymity

It is this second, very important consideration that caught my eye since I am on the verge of filing an action in the U.S. District Court for the Northern District of California allowing my client to file his civil lawsuit under a pseudonymous name, like "John Doe," to protect him from ridicule and the loss of his business reputation in a rather different context. It was only when I began to look into the legal requirements for filing pseudonymously that I begin to appreciate the daunting obstacles that exist.

In federal court, a plaintiff who wants to proceed pseudonymously must first file a special motion. Few district courts have local rules that address the procedure for seeking such protection. Though the U.S. Supreme Court has implicitly endorsed the use of pseudonyms, as for example in the famous abortion case, *Roe v. Wade*,[4] the Fifth Circuit may have been the first appellate court to directly confront the question of how one might acquire a cloak of anonymity when it introduced a three-factor test in 1979 in *Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe.*[5]

Though the law has evolved somewhat since that Fifth Circuit decision, in general, in the context of a motion, an anxious plaintiff must convince the court that his or her privacy interests outweigh the public's interest in knowing his or her identity. Achieving this might be likened to skiing uphill, since (1) a strong public policy favors the openness of court proceedings and eschews private trials; (2) there may be implications to be drawn from the fact that the practice of filing under pseudonyms is not specifically sanctioned by the Federal Rules of Civil Procedure (FRCP); and, (3) FRCP 10(a) provides that "[i]n the complaint the title of the action shall include the names of all the parties."

However, hope springs eternal, for a seminal case here in the Ninth Circuit, *Does I thru XXIII v. Advanced Textile Corporation*,[6] holds that the threat of deportation of foreign national garment-worker plaintiffs sufficiently outweighed any prejudice to the defendant companies and any right of the public to know the names of the potential deportees. (The Without My Consent website referenced above confronts the difficult issue of pseudonymity directly and provides valuable resources to Cyberian litigators who must wrestle with rather opaque standards for motions to establish anonymity for aggrieved clients.)

Conclusion

While my visceral reaction to the notion of a statute to protect

victims from the online publication of images they themselves created or acquiesced to is negative, my confrontation with the case law that deals with petitions for the right to proceed pseudonymously has given me pause. Perhaps the Judicial Conference, Congress, and our state legislatures would do better for Cyberian victims, and other victims as well, if they focused on providing advocates with clearer and more uniform standards for granting motions for pseudonymous status. ⊙

Endnotes

[1]*See* 18 U.S.C. §1801.

[2]S. B. No. 255, 2013–2014 Reg. Sess. (Cal. 2013).

[3]*Without My Consent,* www.withoutmyconsent.com (last visited Sept. 8, 2013).

[4]*Roe v. Wade,* 410 U.S. 113 (1973).

[5]*Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979).

[6]*Does I thru XXIII v. Advanced Textile Corporation*, 214 F.3d 1058 (9th Cir. 2000).

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own parents, it was a relatively small step from that point to explaining *why* the different states can have different laws yet all be "correct," provided they do not violate the terms of the federal Constitution.

I had not thought much about that event until recently, when the U.S. Supreme Court ruled that Congress had overstepped its bounds in enacting a statute (Defense of Marriage Act (DOMA)). This act would have prevented federal law from recognizing the legitimacy of same-sex marriages allowed by some of the states. Only a handful of states have laws allowing citizens of the same sex to marry each other, such that DOMA's nullification does not impact large swaths of the country. Understandably, however, the Court's decision that the states have the exclusive ability to define marriage evoked strong reactions from both sides of the political spectrum. Whatever one's position on the DOMA case, the decision reflects the federalism concept that lies at the heart of our system of governance. ⊙