Washington and Lee Law Review

Volume 43 | Issue 2 Article 10

Spring 3-1-1986

Iv. Constitutional Law

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Recommended Citation

Iv. Constitutional Law, 43 Wash. & Lee L. Rev. 497 (1986).

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the arrearage properly balances the states' interest in protecting their dependent citizens with the federal interest in facilitating debtor rehabilitation and, accordingly, courts properly should allow debtors to include support arrearages in Chapter 13 plans.[108]

RODNEY L. MOORE

IV. CONSTITUTIONAL LAW

A. *The Constitutionality of State Regulation of Public Utility Holding Companies*

All public utility companies possess two defining features—a general public need for the services that the public utility company provides and technical characteristics that foster monopolistic practices.[1] Holding companies[2] fostered the initial expansion of public utility companies in the 1920's and 1930's by providing necessary capitalization and technology.[3] According to

108. *See supra* notes 46-67 and accompanying text (discussing Code sections protecting support claimants and facilitating debtor rehabilitation).

1. Note, *Jurisdiction of State Regulatory Commissions Over Public Utility Holding Company Diversification,* 15 LOY. U. CHI. L.J. 87, 89 n.12 (1983) (public utility companies include railroads, waterways, pipelines, cable television, telephone services, electric power, natural gas, and sewage) [hereinafter cited as *Jurisdiction].* A public utility company provides goods or services that consumers need on a continual basis. *Id.* at 89.

2. 6A W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2821 (1981). A holding company is a corporation organized to hold the stock of another corporation. *Id.* The primary characteristic of a holding company is the ownership of securities, which allows a holding company to control or influence the policies or management of one or more operating companies. *Id.; see also* North Am. Co. v. S.E.C., 327 U.S. 686, 701 (1945) (concentrated ownership of securities by holding company is primary means of achieving control over another company); D.W. HAWES, UTILITY HOLDING COMPANIES § 1.01 (1985) (describing types of holding companies). Three general types of holding companies exist. HAWES, *supra,* at § 1.01. One type of holding company controls numerous other companies through less than full ownership. *Id.* A second type of holding company aims at separating operating companies for legislative or administrative purposes. *Id.* A final type of holding company seeks to control regulated companies in the hope of avoiding some or all of the regulations. *Id.*

3. *See* S. Doc. No. 92, 70th Cong., 1st Sess. 832-33 (1927) (summary of report by Federal Trade Commission (FTC) to United States Senate on financial and corporate aspects of holding and operating companies of electric and gas utilities). The holding company structure facilitated rapid development of public utility companies by improving technical facilities, stimulating the entry of new capital into the industry and providing a ready means for bringing together unconnected operations in an efficient manner at a reasonably low cost. *Id.; see, e.g.,* RITCHIE, INTEGRATION OF PUBLIC UTILITY HOLDING COMPANIES at 12 (1954) (holding companies were beneficial in original development of public utilities); N. Buchanan, *The Public Utility*

federal law, a public utility holding company is any company that directly or indirectly owns or controls ten percent or more of the outstanding voting securities of a public utility company.[4] The public utility holding company structure ultimately fostered dangerous management practices, including fraudulent and misleading accounting practices that threatened public utility service to consumers and represented a risk to investors.[5] On the federal

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Holding Company Problem, 25 CALIF. L. REV. 517, 518 (1937) (holding companies possess power to determine financial and management policies of subsidiaries); Comment, *Federal Regulation of Holding Companies: The Public Utility Act of 1935,* 45 YALE L.J. 468-73 (1936) (holding companies, by providing means to centralize management, transformed public utility industry from local business operating within limited area to interstate industry) [hereinafter cited as *Federal Regulation]. See generally* HAWES, *supra* note 2, at §§ 2.02-2.03 (detailing rapid expansion of public utility companies using holding companies during years 1866-1932).

4. Public Utility Holding Company Act of 1935 (PUHCA), Pub. L. No. 74-333, 49 Stat. 803, 15 U.S.C. § 79b(b) (1982) (federal statute regulating public utility holding companies). Under PUHCA, Congress defined a public utility as a company that owns or operates the means for distribution of electric energy for sale or a company that owns or operates the means for distributing at retail natural or manufactured gas for power, heat or light. *Id.* at § 79b(a)(3)-(5); *see infra* note 6-9 and accompanying text (discussing scope of federal regulation of public utility holding companies). Under federal law, a company that owns or controls 10% or more of a public utility is a public utility holding company. 15 U.S.C. § 79(b)(6) (1982).

5. *See* American Power Co. v. S.E.C., 329 U.S. 90, 100-02 (1946) (dangers of public utility holding companies include financially irresponsible management and unsound capital structure); *North Am. Co.,* 327 U.S. at 701 (public utility holding companies facilitate gerrymandering in manner unrelated to economic or efficient control); S. Doc. No. 92, *supra* note 3, at 842-82 (summary of FTC report to United States Senate detailing dangerous practices inherent in public utility holding companies). The FTC found that public utility holding companies pose the following threats to consumers: charging excessive fees to the public utility, conducting misleading and fraudulent methods of accounting, retaining public utility revenue, and engaging in pyramiding practices creating a fragile corporate structure. S. Doc. No. 92, *supra* note 3, at 842-82. The FTC report linked a public utility holding company's use of unsound business practices with threats to consumers' receipt of adequate and economical public utility goods and services. *Id.* at 881-82. Public utility holding companies also threatened investors' investments in public utility stock. *Id.* at 881. Public utility holding companies facilitated a "pyramiding" of companies in which a holding company, though lacking complete ownership, controlled a number of operating companies. *Id.* The pyramiding structure threatened a shareholder's investment in a public utility company by permitting operating companies to issue securities of a speculative nature, the valuation of which might misrepresent the true value of the public utility company. *Id.* Furthermore, an investor might be unable to ascertain a public utility company's actual value because the intercorporate relationships of public utility holding companies facilitated misleading accounting practices. *Id.* at 884; *see also* M.E. PARRISH, SECURITIES REGULATIONS AND THE NEW DEAL 147 (1970). Public utility holding companies often have charged their subsidiary public utility companies significant management fees and higher interest rates than a public utility would pay absent the presence of a holding company. M.E. PARRISH, *supra,* at 147. The public utility passes those fees on to consumers in the form of increased rates. M.E. PARRISH, *supra,* at 147; 2 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 507 (1969) (summary of abuses of public utility holding companies documented by FTC); RITCHIE, *supra* note 3, at 11-14.

Beyond the dangers the FTC identified as inherent in public utility holding companies, other disadvantages of public utility holding companies that commentators have identified and discussed frequently include the following: diversity of risk, absentee ownership, shifting of talented managerial staff to non-utility activities, complex corporate structure, fees extracted

level, Congress enacted the Public Utility Holding Company Act of 1935 (PUHCA) to eliminate the dangerous management practices inherent in the public utility holding company structure.[6] The ultimate danger at which Congress aimed PUHCA was the distinct possibility that holding company ownership of public utilities would adversely affect service to ratepayers and represent a risk to persons investing in public utility companies.[7] Congress in PUHCA empowered the Securities and Exchange Commission (SEC) to enforce the Act's provisions[8] by disallowing a holding company's initial acquisition of the securities of a public utility or ordering simplification of a public utility holding company structure.[9]

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from the public utility and financial manipulation. RITCHIE, *supra* note 3, at 11-14. A public utility holding company permits diversification into areas beyond the public utility industry, creating an increased risk to investors. *Id.* at 11. Associated with diversification may be a rechanneling of managerial talent away from the public utility company to nonutility companies, which may not be in the best interests of the consumers of a public utility company's goods and services. *Id.;* N. Buchanan, *supra* note 3, at 520. If a public utility company involves itself in a debtor-creditor relationship with its holding company, the financial relationship often harms the public utility company, and ultimately the consumer, because a public utility company usually pays to its holding company a higher interest rate than if the public utility company did not participate in a holding company structure. N. Buchanan, *supra* note 3, at 520; *Federal Regulation, supra* note 3, at 478. Ultimately, a public utility company passes the higher interest payments to its consumers in the form of increased rates. N. Buchanan, *supra* at 520; *Federal Regulation, supra* note 3, at 478. Public utility holding companies often milk public utility companies of the operating company's finances by employing deceptive financial and accounting methods that harm consumers by increasing rates and that harm investors by not utilizing the public utility company's funds for the benefit of the public utility company. *Federal Regulation, supra* note 3, at 470; *see Jurisdiction, supra* note 1, at 95 n.41 (rechanneling of management talent away from public utility companies harms consumers).

6. Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803, 15 U.S.C. § 79-79z-6 (1982) (federal statute regulating public utility holding company formation and continuing business); *see supra* note 5 and accompanying text (detailing dangers to consumers and investors inherent in public utility holding companies).

7. S. Doc. No. 92, *supra* note 3, at 882. Congress recognized that a state might feel inhibited in regulating the corporate structure of public utilities because of the interstate character of public utility holding companies. *Id.* The effect would be to constrain a state's legitimate regulation of a public utility's rates. *Id.* Thus, higher utility rates would result over which no constraining element existed. *Id.* Congress, therefore, sought to limit increases in utility rates that arose pursuant to the holding company structure in PUHCA. *Id.*

8. 15 U.S.C. § 79b(b) (1982) (Securities and Exchange Commission (SEC) has sole authority to declare company holding company or subsidiary company). Any holding company, or company planning to become a holding company, must file a notification of registration as a holding company with the SEC. *Id.* at § 79e. The registration is effective once the SEC receives the notification of registration. *Id.* at § 79e(a). A registered holding company must file a registration statement containing the corporations articles of incorporation, financial statements, balance sheets, accountants' statements, and any other documentation the SEC determines to be necessary to protect investors and consumers. *Id.* at § 79e(b); 17 C.F.R. §§ 210.1-01 - 210.12-29 (1985) (detailing form and content of financial statements to accompany registration of public utility holding company); 17 C.F.R. §§ 259.01-259-501 (1985) (detailing forms required for registration with SEC of public utility holding company).

9. 15 U.S.C. § 79i (1982). A registered holding company must obtain SEC approval before the company acquires the securities of a public utility company. *Id.* Under PUHCA, a

While PUHCA provides for extensive federal regulation of public utility holding companies,[10] Congress did not intend to usurp completely the states' traditional power to regulate public utility companies.[11] In fact, PUHCA specifically acknowledges the significant role played by states in regulating public utilities.[12] In 1955, the Maryland legislature enacted the Public Service Commission Law to regulate public utility companies.[13] The Maryland statute created a Public Service Commission (PSC)[14] with the power to regulate the rates public utility companies charge customers,[15] the power to require a

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holding company's application for acquisition of the securities of a public utility must include all the documents that the SEC determines are necessary for the SEC to decide whether the transaction is in the public's best interest. *Id.* at § 79j(a). The SEC may prevent an acquisition upon determining that the dangers arising from the overlapping corporate departments would be detrimental to the public interest or to investors, that the fees paid by the holding company in the acquisition of a public utility company's assets or securities are unfair or unrelated to the true value of the assets or securities, or that the transaction would complicate unduly the corporate structure of the holding company to the detriment of the public or investors. *Id.* at § 79j(b). Once a holding company structure exists, Congress, pursuant to PUHCA, authorizes the SEC to order simplification of the holding company if unnecessary complexities exist that serve no economic or social purpose. *Id.* at § 79k. The SEC must ascertain certain facts before ordering the simplification of a public utility holding company. *Id.* at § 79k(b)(1). If the SEC finds that individual public utility companies located in one state or adjacent states would operate at a substantial economic loss absent the use of a holding company structure, and that one large holding company would not hamper the efficiency of local management or the effectiveness of local regulation, the SEC may find simplification to be unnecessary. *Id.*

10. *See supra* notes 6-9 and accompanying text (detailing extent of federal regulation of public utility holding companies).

11. *See Jurisdiction, supra* note 1, at 116 n.168. The SEC noted that a major purpose of PUHCA was to facilitate state regulation of state public utility companies. *Jurisdiction, supra* note 1, at 116 n.168. The exemption of intrastate holding companies from SEC review presumes that states regulate intrastate public utility holding companies. *Id.* at 116. The Supreme Court has recognized for many years that state regulation of local public utility companies is a legitimate exercise of state police powers. *See* J. NOWAK, R. ROTUNDA, H. YOUNG, CONSTITUTIONAL LAW 389 (2d ed. 1978). The police power concept recognizes the right of state and local government to pass legislation aimed at protecting the health, safety and welfare of the state's citizens. *Id.;* Munn v. Illinois, 94 U.S. 113, 126 (1876) (states may regulate property when property becomes clothed with public interest); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) (regulation of public utilities is one of state's most important functions); *see also* Bridgeport Hydraulic Co. v. Council on Water Co. Lands of Conn., 453 F. Supp. 942, 954-55 (D. Conn. 1978) (state may impose regulations on public utility companies that differ from regulations imposed on other private companies because public utility company is public purpose entity franchised by state).

12. *See* 15 U.S.C. §§ 79f(b), 79i(b), 79g(g), 79n(b) (1982). PUHCA acknowledges the role of states in regulating public utility companies. *Id.* For example, if a state public service commission approves a holding company's acquisition of the assets or securities of a public utility company and all the public utility companies are organized intrastate, the SEC cannot prohibit the transaction. *Id.* at § 79i(b).

13. *See* MD. ANN. CODE art. 78, §§ 1-107 (1980) (Maryland Public Service Commission Law).

14. *Id.* at §§ 3, 5. The Maryland Public Service Commission (PSC) consists of five Maryland citizens that the governor of Maryland appoints. *Id.*

15. *Id.* at §§ 68-72a. Maryland law authorizes the Maryland PSC to approve public utility company rates that are just and reasonable. *Id.* § 69(a). Under Maryland law just and reasonable

public utility to continue providing service, the power to order a public utility to discontinue service,[16] and the authority to inspect the records of a public utility.[17] Section 24 of the Maryland statute deals with the PSC's authority over the corporate structure of a Maryland public utility.[18] Under section 24, a public utility company in Maryland may not, without prior approval of the PSC, assign, lease, or transfer a public utility franchise,[19] acquire the capital stock of another public service company,[20] or issue securities.[21] Section 24 of the Maryland Public Service Commission Law also prohibits a holding company from acquiring a public utility company,[22] except in the case of an acquisition of a public utility by a holding company already controlling a public utility company of the same class as the public utility company subject to acquisition.[23] The effect of the exemption in section 24(e) is that only a holding company that presently controls a public utility company may acquire another public utility, subject to PSC approval.[24] In *Baltimore Gas and Electric Co. v. Hientz*[25] (*Baltimore Gas*), the United States Court of Appeals for the Fourth Circuit determined whether section 24(e) of the Maryland Public Service Commission Law was constitutional.[26]

In *Baltimore Gas,* Baltimore Gas and Electric Company (BG&E) and BGE Corporation (BGE CORP.) filed a joint petition with the Maryland Public Service Commission (PSC) requesting authorization for the acquisition by BGE CORP of all the stock of BG&E.[27] BG&E was a public utility organized under Maryland law with its principal office in Baltimore City, Maryland.[28] BG&E supplied gas and electricity to customers in Baltimore

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rates are rates that are consistent with the public good and yield reasonable operating income to the public utility company. *Id.* The Maryland PSC may alter a public utility company's rate structure after a hearing allowing concerned parties to voice views on proposed rate changes. *Id.* at § 69B.

16. *Id.* at § 75. The Maryland PSC may require a public utility company to continue or to discontinue providing services if that action is necessary for public convenience. *Id.*

17. *Id.* at § 63.

18. *Id.* at § 24; *see infra* notes 19-24 and accompanying text (discussing § 24 of Maryland Public Service Commission Law).

19. MD. ANN. CODE art. 78, § 24(b)(1) (1982).

20. *Id.* at § 24(b)(2).

21. *Id.* at § 24(b)(5).

22. *Id.* at § 24(e). No holding company may acquire more than 10% of the stock of a Maryland public utility company. *Id.* A holding company, however, may acquire more than 10% of a Maryland public utility company if the holding company takes the stock as collateral security and the PSC approves the transaction. *Id.*

23. *Id.* The Maryland Public Service Commission Law classifies public utility companies to be of the same class when the public utility companies are both common carrier companies, gas companies, electric companies, steam heating companies, telephone companies, telegraph companies, radio common carriers, water companies, or sewage disposal companies. *Id.* at § 2(o).

24. *Id.* at § 24(e).

25. 760 F.2d 1408 (4th Cir.), *cert. denied,* 106 S. Ct. 141 (1985).

26. *Id.* at 1413-27.

27. *In re* Baltimore Gas & Elec. Co., 74 Md. PSC 249, Case No. 7695 Order No. 66273 (July 1, 1983).

28. Baltimore Gas & Elec. Co. v. Heintz, 760 F.2d 1408, 1411 (4th Cir. 1985).

City.[29] Shareholders residing outside of Maryland owned 70% of BG&E's outstanding shares.[30] BGE CORP was a Maryland corporation formed specifically to be the parent company to BG&E.[31] The joint application filed with the PSC proposed a share-for-share exchange of all outstanding stock of BG&E for stock in BGE CORP.[32] The stated purpose for the reorganization was to separate the utility and nonutility divisions of BG&E, allowing the nonutility division to diversify into activities free of PSC supervision.[33] Pursuant to section 24(e) of article 78 of the Maryland Code, the PSC refused the reorganization plan, stating that the proposed plan violated section 24(e), because, under the plan, BGE CORP would acquire control of a Maryland public utility company, and BGE CORP was a stock corporation not already owning a public service company of the same class as BG&E.[34]

BG&E and BGE CORP brought an action against the Maryland PSC in the United States District Court for the District of Maryland seeking a declaratory judgment that section 24(e) of article 78 of the Maryland Code was unconstitutional.[35] BG&E and BGE CORP first claimed that pursuant to the supremacy clause of the United States Constitution,[36] the Public Utility Holding Company Act of 1935 preempted section 24(e) of the Maryland

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29. *Baltimore Gas,* 760 F.2d at 1411 (1985).

30. *Id.* at 1411-12; *see infra* notes 161-68 and accompanying text (that 70% of BG&E's shareholders were not residents of Maryland affects determination of whether Maryland statute violates commerce clause).

31. *Baltimore Gas,* 760 F.2d at 1412.

32. *Id.* The terms of the proposed acquisition by BGE CORP. of Baltimore Gas & Electric Co. (BG&E) provided that BGE CORP. would acquire the stock of Resource & Property Management (RPM), a wholly-owned subsidiary of BG&E. *Id.* As a result of the BGE CORP.'s acquisition of BG&E and RPM, BG&E and RPM would have become separate, wholly owned subsidiaries of BGE CORP., and holders of BG&E common stock would have become holders of BGE CORP. common stock. *Id.* In share-for-share exchange of stock, the acquiring corporation trades its shares for the shares of the acquired corporation. 13 FOX, BUSINESS ORGANIZATIONS—CORPORATE ACQUISITIONS AND MERGERS § 3.03[2] (1984). Pursuant to a share-for-share exchange of stock, a parent-subsidiary relationship exists in which the acquired company, although now a subsidiary of the acquiring company, retains its identity. *Id.*

33. Baltimore Gas & Elec. Co. v. Heintz, 582 F. Supp. 675, 677 (D. Md. 1984), *rev'd.,* 760 F.2d 1408 (4th Cir. 1985). The jurisdiction and powers of the Maryland PSC extend only to public utility companies operating a utility business in Maryland. MD. ANN. CODE art. 78, § 1 (1980). Thus, a public utility holding company can diversify into nonutility industries that are beyond PSC control. *Id.*

34. *Baltimore Gas,* 760 F.2d at 1412; MD. ANN. CODE art. 78, § 24(e) (1980).

35. Baltimore Gas & Elec. Co. v. Heintz, 582 F. Supp. 675 (D. Md. 1984). By seeking declaratory judgment in a federal court, BG&E bypassed the provisions of Maryland law for direct state court review of a state administrative agency's action. MD. ANN. CODE art. 78, §§ 89-98 (1980) (Maryland provisions for judicial review of PSC action); *see infra* note 71 and accompanying text (discussing Maryland provisions for direct state court review of state agency's action).

36. U.S. CONST. art. VI., cl. 2. The supremacy clause declares that congressional laws enacted pursuant to the United States Constitution are superior to all state laws. *Id.; see generally* J. NOWAK, *supra* note 11, at 267-70 (discussing supremacy clause).

Code.[37] The district court held that PUHCA did not preempt state law.[38] According to the district court, a federal law preempts state law to the extent that the state's law blocks the achievement of the objectives of Congress.[39] The district court found that Congress enacted PUHCA to control the expansion of public utility holding companies and not to foster holding companies.[40] The district court, therefore, found section 24(e)'s prohibition against a holding company acquisition of a public utility, unless the holding company already controlled a public utility, was not contrary to the objectives of PUHCA.[41] In addition to the claim that PUHCA preempted the Maryland statute, BG&E claimed that section 24(e) violated the commerce clause of the United States Constitution.[42] The district court found that Maryland had a legitimate interest in controlling the formation of public utility holding companies, but found that an outright prohibition on the formation of holding companies served no legitimate state interest, because the state had available less restrictive means to protect the public against the evils of public utility companies.[43] The district court found that the burden section 24(e) imposed on interstate commerce was excessive in light of the availability of

37. *Baltimore Gas,* 582 F. Supp. 680-81. The supremacy clause essentially is the same as the preemption doctrine. J. NOWAK, *supra* note 11, at 267. The supremacy clause declares federal law supersedes, i.e. preempts, state law. *Id.* at 267; Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1982); *see* Brief for Appellee at 41-47, Baltimore Gas & Elec. Co. v. Heintz, 760 F.2d 1408 (4th Cir. 1985) (BG&E's argument that section 24(e) violates supremacy clause). BG&E argued, in both the district court and the Court of Appeals, that Congress passed the Public Utility Holding Company Act of 1935 (PUHCA) to foster the good aspects of the public utility holding company system. *Brief,* at 45. BG&E argued that a state, therefore, cannot prohibit entirely the formation of public utility holding companies because to do so would violate the supremacy clause. *Id.* at 43-47; *see also Baltimore Gas,* 582 F. Supp. at 680-81 (district court refused to accept BG&E's supremacy clause argument).

38. *Baltimore Gas,* 582 F. Supp. at 680-81; *see infra* notes 39-41 and accompanying text (discussing Maryland district court's analysis in rejecting BG&E's argument that section 24(e) violated supremacy clause).

39. *Baltimore Gas,* 582 F. Supp. at 680-81; *see* Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1976) (setting forth test for supremacy clause analysis).

40. *Baltimore Gas,* 582 F. Supp. at 680-81.

41. *Baltimore Gas,* 582 F. Supp. at 680-81; Public Utility Holding Company Act of 1935, 15 U.S.C. § 79i(a)(2) (SEC has power to prohibit acquisition of public utility company by holding company). *But see supra* note 37 and accompanying text (explaining BG&E's contention that Congress intended to foster public utility holding companies by enacting PUHCA).

42. *See Baltimore Gas,* 582 F. Supp. at 681-82 (district court's determination that section 24(e) violated commerce clause); Brief for Appellee, *supra* note 37, at 11-32 (BG&E's arguments that 24(e) violated commerce clause); U.S. CONST. art. I, § 8, cl. 3 (commerce clause). Congress possesses the sole authority to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. Although Congress retains sole authority to regulate interstate commerce, a state may pass legislation that incidentally affects interstate commerce if the state's regulation conforms to the standards set by the Supreme Court. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). If a state statute regulates even-handedly in pursuit of legitimate local state interests, and only incidentally affects interstate commerce, a court should uphold the state statute unless the burden on interstate commerce clearly outweighs the local benefits. *Pike,* 397 U.S. at 142.

43. *Baltimore Gas,* 582 F. Supp. at 679-80. In *Baltimore Gas* the district court held that the Maryland legislature could have addressed adequately the fears of dangers posed by public

less restrictive alternatives.[44] Accordingly, the district court held that section 24(e) of the Maryland Public Service Commission Law violated the commerce clause.[45]

Following the adverse ruling of the district court, the Maryland PSC appealed to the Fourth Circuit.[46] The Fourth Circuit reversed the district court,[47] addressing four constitutional issues.[48] First, BG&E claimed that PUHCA preempted section 24(e) of the Maryland Public Service Commission Law.[49] Applying the same test that the district court applied, the Fourth Circuit concurred with the district court's holding that PUHCA did not preempt the Maryland statute.[50] The Fourth Circuit noted that PUHCA anticipated coordinated federal and state regulation of public utility holding companies.[51] The *Baltimore Gas* court stated that PUHCA would preempt section 24(e) only if section 24(e) stood as an obstacle to the achievement of the purposes of PUHCA.[52] The Fourth Circuit found that PUHCA evinced

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utility holding companies by merely requiring PSC approval of all proposed transfers of assets rather than an outright prohibition on certain transfers. *Id.* at 680.

44. *Id.* at 682. The district court in *Baltimore Gas* found that the Maryland Public Service Commission Law burdened interstate commerce because section 24(e) prevented BG&E and BGE CORP. from diversifying into areas beyond PSC control, adversely affected BG&E's ability to get financing, and prohibited BG&E stockholders from exchanging BG&E shares for BG&E CORP. stock. *Id.* The district court in *Baltimore Gas* found that the only state interests served by an outright ban on public utility holding companies was the avoidance of administrative costs, an interest that did not mitigate the burden imposed on interstate commerce. *Id.* The district court did not address the merits of BG&E's constitutional challenges based on the equal protection and due process clauses. *Id.*

45. *Id.*

46. *See* Baltimore Gas and Elec. Co. v. Heintz, 760 F.2d 1408-27 (4th Cir. 1985) (Fourth Circuit opinion upholding section 24(e) of Maryland Public Service Commission Law).

47. *Id.* at 1427. Initially the Fourth Circuit noted that no legislative history interpreting section 24(e) existed and that neither federal courts nor Maryland courts had construed the section. *Id.* at 1413. The Fourth Circuit, therefore, looked to the PSC's interpretation of section 24(e) since the Maryland legislature had charged the PSC with the enforcement of the provisions of article 73 of the Maryland Annotated Code. *Id.* at 1414. The Fourth Circuit found that the PSC's interpretation of section 24(e) was reasonable and consistent with the wording of the statute. *Id.* at 1414; *see* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 177 (1981) (court pays great deference to administrative agency enforcing statute); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1968) (court should follow construction of statute by agency charged with statute's execution unless compelling evidence shows that administrative agency's interpretation is wrong).

48. *Id.* at 1414-27; *see infra* notes 50-92 and accompanying text (discussing Fourth Circuit's constitutional analysis in *Baltimore Gas).*

49. *Id.* at 1414-16. The Supreme Court has recognized that the preemption doctrine stems from the supremacy clause. Fidelity Fed. Sav. & Loan v. De La Cuesta, 458 U.S. 141, 152 (1982) (preemption doctrine rooted in supremacy clause); *see supra* note 37 and accompanying text (supremacy clause provides that federal law overrides i.e. preempts, state law).

50. *Baltimore Gas,* 760 F.2d at 1414; *see supra* notes 38-45 and accompanying text (discussing district court's findings on issue of preemption).

51. *Baltimore Gas,* 760 F.2d at 1415; *see supra* note 12 and accompanying text (detailing examples in PUHCA acknowledging state role in regulating public utility companies).

52. *Baltimore Gas,* 760 F.2d at 1415; *see supra* note 39 and accompanying text (federal law preempts state law if state law stands as obstacle to achievement of congressional objectives).

congressional regulatory restraint in attacking the evils inherent in public utility holding companies.[53] PUHCA, according to the Fourth Circuit, does not preclude a state from enacting regulations more restrictive than the regulations of PUHCA.[54] Although the federal law does not prohibit unilaterally the formation of public utility holding companies,[55] the Fourth Circuit found that Congress did not intend to prevent states from forbidding the initial formation of public utility holding companies.[56] Since section 24(e)'s regulations of holding company acquisitions of public utility companies do not frustrate the aims of PUHCA, the Fourth Circuit held that PUHCA does not preempt section 24(e) of the Maryland Public Service Commission Law.[57]

In addition to the supremacy clause issue, the Fourth Circuit considered whether section 24(e) of the Maryland statute violated the equal protection clause.[58] BG&E claimed that the classification in the Maryland statute, distinguishing holding companies presently owning a public utility from holding companies not presently owning a public utility for purposes of determining eligibility for acquisition of a public utility, was a denial of equal protection.[59] The Fourth Circuit employed a two-tiered analysis to determine whether the Maryland statute violated the equal protection clause.[60]

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53. *Baltimore Gas,* 760 F.2d at 1415 In holding that PUHCA represented congressional regulatory restraint rather than acquiescence to the multiplication of public utility holding companies, the Fourth Circuit in *Baltimore Gas* relied on the amicus curiae brief that the SEC submitted. *Id.* at 1415-16. The SEC determined that PUHCA did not preempt section 24(e) because a congressional decision to forbid certain types of public utility holding companies did not indicate necessarily a congressional intent that public utility holding companies were beyond the reach of state statutes. *Id.* at 1416.

54. *Baltimore Gas,* 760 F.2d at 1416. According to the Fourth Circuit, Congress' requiring in PUHCA the meeting of certain conditions before a holding company may acquire a public utility company does not indicate a legislative intent that states cannot prohibit the initial formation of public utility holding companies. *Id.*

55. *See* 15 U.S.C. § 79k (1982). The SEC may order only the simplification of public utility holding companies that are unnecessarily complex. *Id.; see supra* note 9 and accompanying text (detailing factors SEC must consider in allowing public utility holding company to continue existence).

56. *Baltimore Gas,* 760 F.2d at 1416. The Fourth Circuit in *Baltimore Gas* found that Congress' decision to eliminate certain public utility holding companies embodied regulatory restraint and not an intent to foster the growth of public utility holding companies. *Id.* at 1415. Thus, the Fourth Circuit held that section 24(e) did not undermine congressional objectives and Maryland could forbid the initial formation of public utility holding companies. *Id.* at 1416; *see supra* notes 11-12 and accompanying text (Congress contemplated state regulation of public utility holding companies).

57. *Baltimore Gas,* 760 F.2d at 1416.

58. *Baltimore Gas,* 760 F.2d at 1416-18; *see* U.S. CONST. amend. XIV (no state can deny any person equal protection of the laws).

59. *See* Brief for Appellee, *supra* note 37, at 33-34. BG&E claimed that section 24(e) violated the equal protection clause because section 24(e) allowed a holding company already controlling a public utility to acquire more than 10% of another public utility with approval of the Maryland PSC, while a holding company not owning a public utility never could acquire more than 10% of the securities of a public utility. *Id.*

60. *Baltimore Gas,* 760 F.2d at 1417-18. The Fourth Circuit's two-tiered equal protection

The Fourth Circuit stated that a state statute must serve a legitimate state purpose and the state legislature reasonably must have thought that the classification would promote that purpose.[61] The Fourth Circuit in *Baltimore Gas* found that the state's interest in protecting the consumer public through regulation of public utility holding companies was a legitimate use of the state's police powers, and that the Maryland legislature rationally could have believed the classification would further the state's interests.[62] In limiting the eligible holding companies to holding companies already owning a public utility and subjecting holding companies to review by the PSC, the Fourth Circuit found that the statute ensures the availability of the public utility company's records so that the PSC can examine the records to determine whether the potential exists for abusive practices harmful to the consumer.[63] Additionally, the Fourth Circuit recognized that when a holding company already owns a public utility, "utilities of scale," such as economic benefits derived from consolidation of a number of public utility companies into one holding company system, might exist that outweigh the potential dangers of a holding company structure.[64] Since Maryland possessed a legitimate state

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analysis entailed two findings. *Id.* at 1417. First, the Fourth Circuit determined whether the challenged statute served a legitimate state interest. *Id.* Second, the Fourth Circuit determined whether the Maryland legislature reasonably could have believed that the classification between holding companies owning public utility companies and holding companies not controlling public utility companies would promote a legitimate state purpose. *Id.; see infra* notes 61-64 and accompanying text (discussing analysis for determining whether a statute violates equal protection clause).

61. *Baltimore Gas,* 760 F.2d at 1417; City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). When analyzing an equal protection challenge to a state statute the Supreme Court defers to local economic legislation if the legislative classification attempts to fulfill a legitimate state interest and the legislature rationally could have believed the classification would promote the state purpose. *Id.; see infra* notes 113-116 and accompanying text (discussing equal protection clause analysis).

62. *Baltimore Gas,* 760 F.2d at 1417-18. The Fourth Circuit in *Baltimore Gas* held that the state interest the Maryland legislature may have been seeking to effectuate through section 24(e) was the ensured continuation of utility services to consumers and maintaining the financial responsibility of public utility companies. *Id.* The Fourth Circuit found that the continuation of public utility services to local consumers was a legitimate objective and that Maryland had the constitutional power to pursue that objective under the state police power. *Id.; see supra* note 11 and accompanying text (defining state police power to regulate public utility companies).

63. *Baltimore Gas,* 760 F.2d at 1417-18.

64. *Id.* at 1418. When a holding company already owns a public utility, economies of scale might outweigh possible detriments to the consumer public that accompany a public utility holding company. *Id.* The concept of economies of scale refers to the fact that a holding company controlling a public utility company is familiar with the public utility industry and such knowledge would assist the holding company in controlling another public utility company and operating the public utility more efficiently. *Id.* PUHCA recognizes that economices of scale may outweigh the potential for abuse in the context of public utility holding companies. *See* 15 U.S.C. § 79k(b)(1) (1982). A holding company, in order to obtain SEC approval of an additional system to the holding company structure, must show that the additional system could not operate independent of the holding company without loss of economies, causing economic harm to the public utility and ultimately to consumers. 15 U.S.C. § 79k(b)(1). The Supreme

interest in controlling pubic utility holding companies and could have believed rationally that section 24(e) would further the state's interests, the Fourth Circuit found that section 24(e) of the Maryland Public Service Commission Law did not violate the equal protection clause of the United States Constitution.[65]

The Fourth Circuit next addressed BG&E's claim that section 24(e) violated constitutional due process.[66] BG&E claimed that the PSC did not apply section 24(e) consistently, thereby constituting selective enforcement in violation of the due process clause.[67] BG&E alleged that the PSC previously had permitted several public utility acquisitions that violated the terms of section 24(e).[68] The Fourth Circuit acknowledged that principles of administrative law require an administrative agency to explain deviations from established precedent.[69] The Fourth Circuit, however, held that the requirement that an administrative agency explain deviations from established precedent applies only in a direct review of agency action.[70] Although the Maryland Code provides for direct review in Maryland state courts, BG&E did not seek direct review through state channels but, instead, sought declaratory judgment in federal court.[71] The Fourth Circuit stated that a party

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Court has accepted the economies of scale rationale found in PUHCA. S.E.C. v. New Eng. Elec. Sys., 384 U.S. 176, 179, 185 (1965). In *New Eng. Elec.*, the Supreme Court held that the federal ban on public utility holding companies could be bypassed when the loss of economies would be substantial if the public utility companies operated independently. *Id.* at 179.

65. *Baltimore Gas*, 760 F.2d at 1418.

66. *Id.* at 1418-20; *see* U.S. CONST. amend. XIV (neither states nor the federal government can deprive a person of life, liberty, or property without due process of law). *See generally* J. NOWAK, *supra* note 11, at 385-16 (discussing due process requirements and history of due process clause).

67. *See* Brief for Appellee, *supra* note 37, at 35-39 (detailing BG&E's due process argument). BG&E argued that by allowing other similar public utility acquisitions and denying the proposed acquisition of BG&E, the PSC violated BG&E's due process rights because the PSC failed to justify the denial. *Id.*

68. Brief for Appellee, *supra* note 37, at 35-39; *Baltimore Gas*, 760 F.2d at 1418. BG&E named six instances in which the Maryland PSC allegedly allowed public utility acquisitions that violated section 24(e). Brief for Appellee, *supra* note 37, at 38-39. BG&E, however, admitted that the Maryland PSC never considered section 24(e) in connection with the alleged illegal transactions. Brief for Appellee, *supra* note 37, at 37. The Fourth Circuit held that BG&E's admission that the PSC never considered section 24(e) in connection with the alleged illegal acquisitions precluded BG&E from proving that the PSC acted with impermissible intent in denying BG&E's application. *Baltimore Gas*, 760 F.2d at 1419-20.

69. *Baltimore Gas*, 760 F.2d at 1418. The principle that an administrative agency must explain deviations from precedent is a logical requirement because, to hold otherwise, would mean an agency would not have to explain why the agency treated differently two similar fact situations. *Id.; see* Secretary of Agriculture v. United States, 347 U.S. 645, 653-54 (1954). In reviewing an administrative agency's disparate treatment of similar circumstances, a reviewing court needs a precise means, in the form of an agency explanation, by which to measure the agency's actions before the court can declare an agency's actions to be correct or incorrect. Secretary of Agriculture v. United States, 347 U.S. at 654.

70. *Baltimore Gas*, 760 F.2d at 1419.

71. MD. ANN. CODE art. 78, § 89-98 (1980). Under the Maryland Public Service Commission Law, a person may question the validity of a PSC ruling or regulation through a

seeking to invalidate an administrative act as violative of due process must prove that the administrative agency acted on some constitutionally impermissible criterion, such as race or sex, in denying the merger.[72] The Fourth Circuit indicated that impermissible intent or motive would be necessary to violate due process, and the Fourth Circuit held that BG&E could make no showing of impermissible motive since the BG&E case represented the first instance in which the PSC invoked section 24(e).[73] The Fourth Circuit, therefore, concluded that section 24(e) did not violate the due process clause.[74]

In addition to rejecting BG&E's claims that section 24(e) of the Maryland Public Service Commission Law violated the supremacy clause, the equal protection clause, and the due process clause, the Fourth Circuit rejected BG&E's contention that section 24(e) violated the commerce clause of the United States Constitution.[75] The Fourth Circuit noted that under the commerce clause Congress maintains exclusive authority to regulate interstate commerce and that a virtually per se rule of unconstitutionality exists regarding state statutes that directly regulate interstate commerce.[76] The Fourth Circuit indicated, however, that courts have developed a principle that recognizes a state's ability to regulate local concerns when the state legislation has an indirect effect on interstate commerce, unless the burden on interstate commerce is excessive.[77] The Fourth Circuit chose to apply the

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petition for declaratory judgment to the Superior court in Baltimore City or to the circuit court for the county in which the petitioner has his main office. *Id.* at § 89. The petitioner may request further review through an appeal to the Court of Special Appeals if he is unsatisfied with the result in the declaratory judgment proceeding. *Id.* at § 98.

72. *Baltimore Gas,* 760 F.2d at 1419; *see* United States v. Carolene Prods., 304 U.S. 144, 152 (1937). In *Carolene Prods.,* the Supreme Court declared that a presumption of constitutionality attaches to state economic regulatory schemes. *Carolene Prods.,* 304 U.S. at 152. A state economic statute violates the due process clause if there is absolutely no rational basis on which the legislature could have believed that the legislation would further valid state interests. *Carolene Prods.,* 304 U.S. at 152. In the realm of noneconomic regulations, a court will strike down a statute if the statute impinges on a fundamental right and the legislative means are not necessary to achieve a compelling state interest. *See* Roe v. Wade, 410 U.S. 113, 155 (1972) (individual possessed fundamental right to bodily privacy in deciding whether to have abortion, and legislature can violate fundamental right only in pursuit of compelling state interests using methods necessary to effectuation of states interests); *see infra* note 131 and accompanying text (Fourth Circuit applied equal protection analysis to due process clause issue).

73. *Baltimore Gas,* 760 F.2d at 1419-20. The absence of an explanation for an agency's decision to enforce a statutory provision in one case and not to enforce the provision in another similar case, absent an impermissible motive on the part of the administrative agency, does not amount to a deprivation of due process. *Id.* at 1419. The Fourth Circuit in *Baltimore Gas* stated that BG&E never could show an impermissible intent in the Maryland PSC's actions relating to BG&E CORP.'s application for acquisition of BG&E because in no comparable set of circumstances did the PSC invoke or discuss section 24(e). *Id.* at 1419-20.

74. *Baltimore Gas,* 760 F.2d at 1420.

75. *Id.* at 1420-27; U.S. CONST. art. I, § 8, cl. 3. The commerce clause grants to Congress the power to regulate commerce with foreign countries and to regulate commerce among the states. U.S. CONST. art. I, § 8, cl. 3; *see supra* notes 42-45 and accompanying text (discussing *Baltimore Gas* district court's commerce clause analysis).

76. *Baltimore Gas,* 760 F.2d at 1420; *see* Edgar v. MITE, 457 U.S. 624, 640 (1981) (commerce clause prohibits direct state regulation of interstate commerce); *see supra* note 42 (state cannot regulate directly interstate commerce but may affect indirectly interstate commerce).

test the United States Supreme Court established in *Pike v. Bruce Church*[78] to determine whether section 24(e) violated the commerce clause.[79] The *Pike* test requires an initial determination of whether a state statute regulates evenhandedly.[80] According to the Fourth Circuit, evenhandedness means the statute does not seek to protect local economic interests by discriminating against out-of-state businesses.[81] The Fourth Circuit stated that if the statute regulates evenhandedly, a court then must determine whether the statute seeks to effectuate legitimate local interests and whether the statute's effects on interstate commerce are incidental.[82] The Fourth Circuit concluded that if a state statute serves legitimate state interests and only incidentally affects interstate commerce, the court will uphold the state statute, unless the burden on interstate commerce clearly outweighs the local benefits.[83]

In applying the *Pike* test, the *Baltimore Gas* court found that section 24(e) of the Maryland Code regulated evenhandedly, because the regulation applied equally to all companies and did not favor local commerce over out-of-state commerce.[84] The Fourth Circuit next determined that section 24(e) advanced the legitimate state interest of protecting the local consumer of public utility services and products by regulating the rates and corporate structure of public utility companies.[85] Addressing the next hurdle of the

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77. *Baltimore Gas,* 760 F.2d at 1419-20; *see, e.g.,* Pike v. Bruce Church, 397 U.S. at 142 (state incidentally may affect interstate commerce in pursuit of legitimate local interests unless burden on interstate commerce clearly outweighs local benefits); Arkansas Elec. Corp. v. Arkansas Pub. Comm'n, 461 U.S. 375, 393-95 (1983) (applying *Pike* commerce clause test to uphold public service commission's jurisdiction over retail rates charged by public utility); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981) (commerce clause is explicit constitutional grant of authority to Congress to regulate interstate commerce but Congress may grant to states power to restrict flow of interstate commerce). The Fourth Circuit followed the *Pike* commerce clause test, finding that the Supreme Court had not formulated a new commerce clause analysis. *Baltimore Gas,* 760 F.2d at 1421-22; *see infra* note 134 and accompanying text (Baltimore *Gas* court correctly applied *Pike* commerce clause test and appropriately found that Supreme Court had not formulated different commerce clause test); *Pike v. Bruce Church,* 397 U.S. at 142-43.

78. *Pike v. Bruce Church,* 397 U.S. at 142 (courts will uphold state statutes that regulate evenhandedly in pursuit of legitimate state interest unless burden on interstate commerce clearly is greater than local benefits).

79. *Baltimore Gas,* 760 F.2d at 1422.

80. *Pike v. Bruce Church,* 397 U.S. at 142.

81. *Baltimore Gas,* 760 F.2d at 1422-23; *see* Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 36-42 (1980) (state statute is not regulating evenhandedly if statute prevents only out-of-state businesses from giving investment advice in state).

82. *Baltimore Gas,* 760 F.2d at 1423-24; *see Pike v. Bruce Church,* 397 U.S. at 142 (if statute regulates evenhandedly, court will uphold state statute if statute only incidentally affects interstate commerce and pursues legitimate state interests).

83. *Baltimore Gas,* 760 F.2d at 1423-24.

84. *Id.* at 1422-23; *see* MD. ANN. CODE art. 78, § 24(e) (1980) (both in-state and out-of-state holding companies are subject to section 24(e)).

85. *Baltimore Gas,* 760 F.2d at 1424-25. A state's power to regulate public utilities traditionally is associated with the state's police power. *See supra* note 11 and accompanying text (states legitimately may regulate public utilities pursuant to police power because of local character of public utility companies). The Fourth Circuit in *Baltimore Gas* determined that state power to regulate the corporate structure of public utilities is implicit in the police power

Pike test, the Fourth Circuit acknowledged that section 24(e) imposes burdens on interstate commerce,[86] but found the burden to be minimal and outweighed by Maryland's interest in protecting consumers of public utility company services.[87] Finally, the Fourth Circuit considered whether prohibiting the formation of public utility holding companies served the state interest in light of possibly less restrictive means to protect the public against the evils of public utility holding companies.[88] In the context of a commerce clause analysis, the Fourth Circuit stated that the court will analyze alternate means only if the challenged statute discriminates against interstate commerce.[89] The *Baltimore Gas* court found that when a state's method for achieving a legitimate state interest does not discriminate against out-of-state businesses, the court will not declare that choice unconstitutional merely because equally nondiscriminatory means exist.[90] The Fourth Circuit stated that the state legislature, rather than the court, should choose among the nondiscriminatory alternatives.[91] The Fourth Circuit ultimately determined that section 24(e) of article 78 of the Maryland Annotated Code was constitutional.[92]

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to regulate public utility companies. *Baltimore Gas,* 760 F.2d at 1424; *accord* Bridgewater Hydraulic Co. v. Council on Water Co. Lands, 453 F. Supp. 942, 951 (D. Conn. 1978) (logical for state to be concerned about management of public service companies because that management is related to public interest and welfare). The Fourth Circuit found that the congressional recognition of the evils inherent in public utility holding companies, coupled with the state's authority to regulate public utility companies, proved the legitimacy of the state's interest of protecting consumers by regulating public utility holding companies. *Baltimore Gas,* 760 F.2d at 1424-25; *see supra* note 5 and accompanying text (detailing dangers inherent in public utility holding company structure).

86. *Baltimore Gas,* 760 F.2d at 1425; *see supra* note 44 and accompanying text (burdens section 24(e) imposed on interstate commerce included prohibiting BG&E stockholders from exchanging BG&E shares for shares of BGE CORP. and preventing BG&E and BGE CORP. from diversifying into areas beyond PSC control).

87. *Baltimore Gas,* 760 F.2d at 1425-26. In *Baltimore Gas,* the Fourth Circuit held that Maryland had a strong state interest in regulating public utility holding companies. *Id.* at 1425. The Fourth Circuit found that section 24(e) fully complied with the state interest in protecting consumers because by preventing the formation of public utility holding companies, section 24(e) precluded the possibility of the evils accompanying public utility holding companies that harm consumers. *Id.* at 1426. The Fourth Circuit further found that the exception to the all-encompassing prohibition of holding company acquisition of public utility companies, which allowed holding companies already owning a utility to acquire another public utility, also supported the state interest in protecting the consumer because section 24(e) required PSC review of the holding company's application to assure protection of consumers. *Id.* at 1426-27.

88. *Baltimore Gas,* 760 F.2d at 1427.

89. *Id.*

90. *Id.; see infra* note 120 and accompanying text (court will not alter legislature's choice of method if two legitimate statutory means exist that do not discriminate against out-of-state businesses).

91. *Baltimore Gas,* 760 F.2d at 1427. In *Baltimore Gas* the Fourth Circuit refused to substitute the court's judgment for the state legislature's determination since the state legislature selected a nondiscriminatory means to address a legitimate state interest. *Id.*

92. *Baltimore Gas,* 760 F.2d at 1427; *see supra* notes 57, 63, 74 and accompanying text (Baltimore *Gas* court concluded that section 24(e) was not unconstitutional).

Baltimore Gas is a case of first impression because no other state has enacted a statute with a provision similar to section 24(e) of the Maryland Public Service Commission Law.[93] State legislatures have employed various methods of regulating the corporate structure of public utility companies.[94] Some state statutes require an individual or corporation to acquire the state public service commission's approval before acquiring more than a fixed percentage of a public utility company.[95] Other state statutes require that a public utility company seeking to acquire the stock of another public utility company obtain approval of the state public service commission.[96] Most states, however, regulate the reorganization of public utility companies through general antitakeover statutes.[97] General antitakeover statutes are not

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93. *See* Brief for Appellee, *supra* note 37, at 4 (section 24(e) of Maryland Public Service Commission Law is historical anomaly); *see infra* notes 95-96 and accompanying text (examples of state statutes regulating ownership of public utility companies).

94. *See generally* HAWES, *supra* note 2, at § 12.03 (detailing states specifically regulating ownership and control of public utility companies).

95. *See, e.g.*, N.J. STAT. ANN. § 48:3-10 (West Cum Supp. 1985) (sale or transfer of majority of stock of public utility company requires approval of New Jersey Public Service Commission); N.Y. PUBLIC SERV. LAW § 70 (West Cum. Supp. 1985) (no stock corporation shall acquire more than 10% of voting stock of gas or electric utility corporation without prior approval of New York Public Service Commission); CONN. GEN. STAT. ANN. § 16-47 (West 1985) (no holding company can gain majority control of Connecticut gas, electric, water or cable service corporation without obtaining public service Commission's approval). Section 24(e) differs from other state statutes in that section 24(e) absolutely disallows the acquisition of more than 10% of a public utility company by a holding company unless the holding company already owns a public utility company and the PSC approves of the acquisition. MD. ANN. CODE art. 78, § 24(e) (1980). Section 24(e), however, roughly parallels state statutes requiring commission approval before a holding company may acquire a certain percentage of a public utility company since section 24(e) requires PSC approval before a holding company can acquire more than 10% of a public utility company's stock acquired as collateral security. *Id.*

96. *See, e.g.*, VA. CODE § 65-89 (1981) (Virginia public utility corporation must obtain approval of state public utility commission before public utility divests or acquires utility assets); VT. STAT. ANN. tit. 30, § 107 (Cum. Supp. 1985) (public service corporation cannot acquire control of another public service corporation without approval of Vermont Public Service Commission that transaction will not harm public good); N.D. CENT. CODE § 49-04-06 (1978) (public utility company must have North Dakota Public Service Commission's approval before public utility can acquire stock of another public utility company). The Maryland Public Service Commission Law is similar to the Virginia, Vermont, and North Dakota statutes in that the Maryland Code does require the Maryland PSC's approval before one public utility company can acquire any stock in another public utility company. MD. ANN. CODE art. 78, § 24(b)(2) (1980).

97. *See* Note, *A Failed Experiment: State Takeover Regulation After* Edgar v. Mite Corp., 1983 U. OF ILL. L.F. 457-58, 457 fn. 4 (1983) (listing states with general antitakeover statutes); E. ARANOW, H. EINHORN, G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 205-07 (1977). State antitakeover statutes regulate tender offers through various means, including requiring disclosure of information, requiring hearings, regulating the length of time before a tender offer is effective, and regulating the possibilities of withdrawal of the tender offer. *Id.* The future of the general antitakeover statutes is in question following the Supreme Court's ruling in *Edgar v. MITE. See* Edgar v. MITE, Corp., 457 U.S. 624, 646 (1982) (invalidating Illinois antitakeover statute). The Illinois antitakeover statute required any company seeking to acquire a target company to register with the Illinois Secretary of State twenty days

designed specifically to regulate takeover attempts of public utility companies.[98] Instead, holding company acquisitions of public utility companies fall within state general antitakeover statutes as would a holding company takeover of any company.[99] Section 24(e) differs from other state statutes regulating public utility holding companies because the Maryland provision prohibits the acquisition of a public utility by a holding company not presently controlling a public utility.[100] Other state statutes that regulate public utility holding companies do not prohibit the acquisition of a public utility company by a holding company, but, instead, utilize a permissive procedure requiring state public service commission approval of a takeover acquisition.[101]

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before the registration became effective. *Edgar*, 457 U.S. at 626-27; ILL. REV. STAT., ch. 121 ½, ¶ 137.54.A,E (1979) (repealed 1983). Under the Illinois statute a target company was a corporation which had 10% or more shareholders located in Illinois, or which met any two of the following three conditions: the corporation had its executive offices in Chicago, was organized pursuant to Illinois law, or had 10% of its stated capital and paid-in surplus within Illinois. ILL. REV. STAT., ch. 121 ½, ¶ 137.52-10 (1979) (repealed 1983). During the twenty day waiting period, the secretary could deny registration if, after a hearing, the secretary found the tender offer failed to disclose adequate information or the takeover offer was inequitable. ILL. REV. STAT. ch. 121 ½, ¶ 137.57.E (repealed 1983). The federal government regulates tender offers, requiring registration with the SEC and disclosure of certain information. The Williams Act of 1968, 15 U.S.C. §§ 78m(d)(e), 78n(d)(f) (1982). The major aim of the federal act is to protect the investor by neither favoring the management nor the takeover bidder. *Edgar*, 457 U.S. at 633. The Supreme Court in *Edgar* held that the Illinois Act violated the supremacy clause because the Illinois secretary of state could reject a takeover bidder's registration if the secretary determined the offer to be unfair, which would violate the Williams Act's aim of allowing investors to be free in making investment decisions. *Edgar*, 475 U.S. at 639. The Supreme Court also held that the Illinois Act favored incumbent management in direct contravention of the Williams Act. *Edgar*, 457 U.S. at 635. The *Edgar* Court held that the Illinois Act violated the commerce clause because the burdens on interstate commerce exceeded the local benefits. *Edgar*, 451 U.S. at 643. The Supreme Court stated that the Illinois statute did not serve the legitimate state interest in protecting local shareholders because the definition of a target company posed the possibility that the Illinois secretary could prevent a takeover by an out of state corporation of a company not having any Illinois shareholders. *Edgar*, 457 U.S. at 644; *see infra* notes 154-62 and accompanying text (discussing *Edgar* holding under commerce clause and distinguishing Illinois statute and 24(e) of Maryland statute). A number of federal circuit courts have applied the *Edgar* holding to invalidate state antitakeover statutes. *See, e.g.*, Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1425, 1429 (10th Cir. 1983) (finding Oklahoma antitakeover act unconstitutional because statute resembled unconstitutional Illinois antitakeover statute); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 566-67 (6th Cir. 1982) (invalidating Michigan antitakeover statute based on *Edgar);* National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1128 (8th Cir. 1982) (invalidating Missouri antitakeover statute based on *Edgar* and Missouri statute's close resemblance to Illinois antitakeover statute).

98. *See* HAWES, *supra* note 2, at § 12.03 (state general antitakeover statutes aimed at a general corporate takeover which implicitly includes public utility companies).

99. *See supra* note 98 and accompanying text (state general antitakeover statutes implicitly include public utility companies).

100. MD. ANN. CODE art. 78, § 24(e) (1980); *cf. supra* notes 94-96 and accompanying text (unlike section 24(e) of Maryland Public Service Commission Law, other state statutes do not contain outright prohibitions of holding company acquisitions of public utility companies).

101. *See supra* notes 94-96 and accompanying text (state statutes use permissive procedures

Because section 24(e) of the Maryland Public Service Commission Law is a unique provision, various constitutional issues arise concerning the validity of the statute.[102] The Fourth Circuit first addressed BG&E's argument that section 24(e) violated the supremacy clause and correctly held that PUHCA did not preempt section 24(e).[103] The Supreme Court has articulated a two part inquiry by which a court should evaluate a claim of federal preemption.[104] First, a court must determine whether Congress has enacted a federal statute explicitly prohibiting the states from regulating the area in which the state statute seeks to regulate.[105] If Congress has enacted such a statute, federal law preempts state law.[106] Second, if the federal statute in question does not expressly prohibit state regulation, a court must determine whether the state statute stands as an obstacle to the achievement of the full purposes of the federal statute.[107] To establish the purpose of the federal statute, the court must consider the congressional intent.[108] In dealing with

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in which state public service commissions consider each proposed acquisition of public utility company by holding company or by another public utility company).

102. *See supra* notes 48-92 and accompanying text (discussing BG&E's constitutional challenges to section 24(e)).

103. *See Baltimore Gas,* 760 F.2d at 1414-16 (Fourth Circuit addressed BG&E's supremacy clause argument); *see also infra* notes 104-13 and accompanying text (Fourth Circuit in *Baltimore Gas* correctly applied Supreme Court test for preemption and appropriately found PUHCA did not preempt section 24(e)).

104. *See, e.g.,* Arkansas Elec. v. Arkansan Pub. Serv. Comm'n, 461 U.S. 375, 389 (1983) (federal government may preempt state law expressly or implicitly); Pacific Gas & Elec. Co. v. State Energy Resources Comm'n, 461 U.S. 190, 203-06 (1983) (federal law may preempt state law to extent that state law stands as obstacle to achievement of full congressional objectives, even though federal law contains no explicit preemptive language); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (*Fidelity*) (state law succumbs to federal law to extent compliance with both federal and state law is impossible); Edgar v. White, 457 U.S. at 631 (federal law preempts state law to extent state law blocks achievement of congressional purposes); Jones v. Rath, 430 U.S. at 525-26 (federal law preempts state law to extent federal law expressly prohibits state regulation or to degree that state law stands as an obstacle to congressional purposes).

105. *See* Jones v. Rath, 430 U.S. at 525-66. The two-step supremacy clause test requires a court to determine, first, if Congress explicitly prohibited state regulation within a particular area. *Id.* If federal law explicitly does not preempt state regulation, a court determines whether federal law implicitly precludes state law that might obstruct the achievement of congressional purposes. *Id; see also* Edgar v. MITE, 457 U.S. at 631. The Supreme Court in *Edgar* initially found that federal law did not explicitly prohibit state regulation of takeovers. *Edgar,* 457 U.S. at 631; *Fidelity,* 458 U.S. at 153 (congressional statute explicitly may prevent state regulation in given area).

106. *See supra* note 105 and accompanying text (federal law preempts state statute if federal statute expressly prohibits state regulation).

107. *See, e.g.,* Edgar v. MITE, 457 U.S. at 276-81 (finding that Illinois antitakeover statute frustrated purposes of federal law); *Fidelity,* 458 U.S. at 159 (federal law preempted state law because compliance with both statutes was impossible); Jones v. Rath, 430 U.S. at 543 (state regulation of packaging labels obstructed accomplishment of full purposes of Congress).

108. *Fidelity,* 485 U.S. 152-53. Since a court needs to know congressional objectives to determine if a state statute blocks achievement of a federal statute's purposes, congressional intent is an integral facet of a court's analysis of a preemption claim. *Id.* Congressional intent is indicative of the objectives that Congress seeks to achieve by enacting a statute. *Id.* at 153.

public utility companies, the SEC in interpreting PUHCA, as well as PUHCA on its face, acknowledges the significant role of states in regulating public utility companies and evinces a congressional intent of coordinated state and federal regulation of public utility holding companies.[109] In passing PUHCA, Congress intended to regulate evils inherent in public utility holding companies.[110] By preventing the initial formation of public utility holding companies, section 24(e) of the Maryland Public Service Commission Law does not obstruct PUHCA's aim of protecting the investing and consuming public of dealing with public utility companies.[111] Furthermore, section 24(e) does not hinder the SEC's regulation of public utility holding companies.[112] Since section 24(e) does not undermine the congressional goal of protecting the general public from the dangers of public utility holding companies, the Fourth Circuit correctly applied the preemption test and held that PUHCA did not preempt section 24(e) of the Maryland Public Service Commission Law.[113]

In addition to BG&E's argument that section 24(e) of the Maryland Public Service Commission Law violated the supremacy clause, BG&E argued that the classification in the Maryland statute that distinguished between holding companies presently controlling a public utility company and holding companies not presently controlling a public utility company was arbitrary and capricious and violated the equal protection clause.[114] To determine whether a statute violates the equal protection clause, the Supreme Court

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109. *See Jurisdiction, supra* note 1, at 116 n.168. The SEC stated that one of the major purposes of PUHCA was to facilitate state regulation of public utility companies. *Id.* For example, the exemption of intrastate holding companies from SEC review presumes that states regulate intrastate public utility holding companies. *Id.* at 116. If a state public service commission approves a holding company's acquisition of the assets or securities of a public utility company and all the public utility companies in question are intrastate public utilities, the SEC cannot prohibit the transaction. 15 U.S.C. § 79i(b); *see supra* notes 11-12 and accompanying text (both state and federal agencies regulate public utility holding companies under PUHCA).

110. 15 U.S.C. § 79-79z-6 (1982) (Public Utility Holding Company Act); *see supra* notes 5-7 and accompanying text (Congress perceived evils inherent in public utility holding companies and enacted legislation to prevent those dangers).

111. *See* MD. ANN. CODE art. 78, § 24(e) (1980). Section 24(e) of the Maryland Code has the effect of preventing a holding company not presently owning a Maryland public utility company from acquiring a public utility. *Id.* Section 24(e) encourages PUHCA aims of eliminating the evils inherent in a public utility holding company by preventing formation of public utility holding companies and completely avoiding all dangers inherent in a public utility holding company. *Id.; see* 15 U.S.C. § 79a (1982) (setting forth PUHCA aims of protecting consumers and investors in course of dealings with public utility holding companies).

112. MD. ANN. CODE art. 78, § 24(e) (1982). Despite section 24(e)'s preclusive effect, the SEC retains full authority to order simplification of existing public utility holding companies if the SEC determines that simplification is necessary. 15 U.S.C. § 79k (1982).

113. *See infra* note 114 and accompanying text (section 24(e) did not block congressional aims of PUHCA and actually furthered congressional purposes); *see supra* notes 109-12 and accompanying text (appropriate test for supremacy clause analysis).

114. *Baltimore Gas,* 760 F.2d at 1416. No state can deny any person equal protection of the law. U.S. CONST. amend. XIV.

has established a test that requires a court to determine initially whether the challenged statute serves a legitimate state purpose.[115] If the state statute serves a legitimate state purpose, a court must assess whether the legislature was reasonable in believing that the classification would promote that state interest.[116] In the context of state economic legislation, a court must defer to the state legislature's determination to avoid the judiciary substituting its judgment for the judgment of the legislature.[117]

Applying the Supreme Court's equal protection test to section 24(e) of the Maryland Public Service Commission Law, the Fourth Circuit correctly determined that section 24(e) did not violate the equal protection clause.[118] In the Maryland legislature's judgment, public utility holding companies had possessed the potential for risky management and financial practices that could hamper a public utility company's ability to provide adequate and reasonable service to local consumers.[119] The Fourth Circuit correctly found that a state limitation upon the formation of public utility holding companies, pursuant to the state police power and in light of the evils posed by public

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115. *See, e.g.*, Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668-72 (1981) (initial determination that court makes in equal protection analysis is whether state statute serves legitimate local interests); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-63 (1981) (promoting energy conservation and lessening solid waste disposal problems is legitimate state interest); Hunt v. Washington Apply Advertising Comm'n, 432 U.S. 333, 353 (1977) (state has legitimate interest in protecting citizens from deceptive marketing of foodstuffs); New Orleans v. Dukes, 427 U.S. 297, 304 (1976) (state economic statute aimed at enhancing commercial viability of tourist area serves legitimate state purpose); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (state has legitimate interest in encouraging employment of poor).

116. *See, e.g.*, Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. at 668 (classification must be related rationally to legitimate state interest but court cannot second-guess legislature); Minnesota v. Clover Leaf Creamery Co., 449 U.S. at 463-70 (court will uphold statute regardless of proof that legislature actually was mistaken in believing that classification would further state purposes when evidence before legislature reasonably could support classification); New Orleans v. Dukes, 427 U.S. at 303 (equal protection clause demands only that classification be related rationally to legitimate state interests and, in realm of economic legislation, legislature has wide latitude in rationality).

117. *See* Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963). In area of economic legislation, a legislature possesses economic expertise and a court cannot substitute the court's judgment for the legislature's determination. *Id.*

118. *See infra* notes 119-24 and accompanying text (explaining why Fourth Circuit's rationale for decision in *Baltimore Gas* that section 24(e) did not violate equal protection clause was correct);

119. *Baltimore Gas*, 760 F.2d at 1416-18; *see* S. Doc. No. 92, *supra* note 2 at 842-82 (summary of FTC report to United States Senate detailing dangerous elements inherent in public utility holding companies). The FTC found that public utility holding companies facilitated excessive fees, misleading and fraudulent accounting methods, and a fragile corporate structure. *Id.* at 842-82; M.E. PARRISH, *supra* note 5, at 147 (public utility holding companies charged subsidiary public utility companies higher interest rates, resulting in higher utility rates for consumers); RITCHIE, *supra* note 3, at 11 (holding company structure encouraged diversion of good management away from public utility company to nonutility areas); *see supra* note 5 and accompanying text (detailing and discussing evils of public utility holding companies that necessitated regulation to protect general public).

utility holding companies, constituted the pursuit of a legitimate state interest.[120]

In advancing Maryland's interest in protecting consumers of public utility services, the Maryland legislature could have concluded rationally that classifying holding companies was an adequate means of furthering state purposes.[121] A court cannot demand that a state use less discriminatory alternatives in state economic regulation when the state rationally pursues legitimate state interests.[122] A court acting otherwise would contravene the Supreme Court's doctrine that prohibits courts from sitting as a "super-legislatures."[123] Since the Maryland statute possessed a rational basis for the classification, and the legislature implemented the classification to further the legitimate state interest of protecting consumers, the Fourth Circuit properly denied declaratory judgment on BG&E's claim under the equal protection clause.[124]

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120. *See supra* note 119 and accompanying text (dangers of public utility holding company gives legitimacy to state interest in regulating public utility holding companies).

121. *See* S.E.C. v. New Eng. Elec. Sys., 384 U.S. 176, 179-80 (1966) (recognizing validity of economies of scale argument). PUHCA limits a holding company system to a single integrated system. 15 U.S.C. § 79k(b)(1) (1982); S.E.C. v. New Eng. Elec., 384 U.S. at 178 n.7 (single integrated system cannot include both gas and electric properties). PUHCA created an exemption for holding companies that show that each independent public utility company could not operate without significant economic loss. 15 U.S.C. at § 79k(b)(1)(A). Thus, PUHCA generally recognizes that single integrated holding companies because of their competitive characteristics are in the best interests of the general public. 15 U.S.C. at § 79k(b)(1). PUHCA acknowledges that, at times, the inclusion of an additional system to avoid substantial hardship to investors and consumers might better serve the public's interest. S.E.C. v. New Eng. Elec., 384 at 181-85.

122. *See* J. NOWAK, *supra* note 11, at 590-99. The Supreme Court does not review significantly legislative classifications in economic regulations. *Id.* at 591. If a slight possibility exists that the legislature had a conceivable basis for the classification the Supreme Court will not invalidate the law. *Id.* at 591.

123. *See* New Orleans v. Dukes, 427 U.S. at 303. In the area of economic legislation, a court should defer to legislative policy determinations and methods employed to implement the policy determinations unless the legislative act is wholly arbitrary or invidiously discriminates. *Id.* States have a wide latitude in deciding methods of regulating on economic issues pursuant to a state's police power to regulate local economic sphere. *Id.* Furthermore, a court should defer to the interpretation of a statute by the administrative agency the legislature authorizes to enforce the statute unless compelling evidence exists that the administrative agency's interpretation is incorrect. NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 177 (1981); Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 381 (1969).

124. *See* Grocery Mfrs. of Am. Inc. v. Gerace, 755 F.2d 993, 1005 (2d Cir. 1985) (finding New York statute regulating label requirements for cheese products constitutional). The Second Circuit stated that a court's first inquiry is whether a legitimate state interest exists. *Id.* at 1005. In *Grocery Mfrs.*, the Second Circuit held that the state had an interest in assuring that consumers received information on the contents of food products. *Id.* A New York statute distinguished between manufacturers of real cheese products and manufacturers of cheese alternatives, and imposed more stringent requirements on manufacturers of cheese alternatives. *Id.* The Second Circuit held the classification to be rationally related to legitimate state objectives. *Id.;* Salibra v. Supreme Court of Ohio, 730 F.2d 1059, 1063 (6th Cir.) (only minimal reasonable basis required for classification if challenged state statute does not implicate fundamental rights or suspect classifications), *cert. denied*, 105 S. Ct. 295 (1984); Minnesota

After rejecting BG&E's equal protection argument, the Fourth Circuit considered BG&E's claim that the Maryland PSC had violated the due process clause by selectively enforcing section 24(e).[125] BG&E argued that the PSC must explain what BG&E perceived to be a departure from the PSC's own precedent.[126] In the context of a direct review by an appropriate court of an administrative agency's action, the Supreme Court has stated that the administrative agency must explain its departure from precedent.[127] Different standards of review exist, however, for a court reviewing the constitutionality of a statute.[128] By opting for declaratory judgment in federal court, BG&E forewent direct review as provided under Maryland law.[129] In foregoing review, BG&E elected to have the federal court apply constitutional law standards of review rather than standards of review governing direct judicial review of an administrative agency.[130] The Fourth Circuit correctly held that BG&E would have had to prove that the PSC based its actions upon an unconstitutional criterion, such as race or sex, before the Fourth Circuit could hold that the PSC violated due process.[131] The Fourth Circuit correctly

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Ass'n of Health Care v. Department of Pub. Welfare, 742 F.2d 442, 448 (8th Cir. 1984) (in local economic sphere only wholly arbitrary act cannot withstand equal protection challenge), *cert. denied*, 105 S. Ct. 1191 (1985).

125. *Baltimore Gas*, 760 F.2d at 118-20.

126. Brief for Appellee, *supra* note 37, at 35-39.

127. *Id.*; Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (agency must explain departure from precedent so court can review adequately); *see also* K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE at § 8.9 (2d ed. 1978).

128. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82-83 (1978) (discussing due process standard of review). Only proof of legislative arbitrariness or irrationality will overcome the strong presumption in favor of constitutionality which attaches to state economic statutes. *Id.* at 83; Administrative Procedure Act of 1966, 5 U.S.C. § 706 (1982). A federal court reviewing an agency's action will set aside the agency's action if the court finds that the agency acted arbitrarily and capriciously manner. 5 U.S.C. § 706.

129. *Baltimore Gas*, 760 F.2d at 1419; MD. ANN. CODE art. 78, §§ 89-98 (1980); *see supra* note 71 and accompanying text (setting forth Maryland's provisions for direct review of state agency).

130. *See* Md. Ann. Code art. 78, § 97 (1980). The Maryland Code requires Maryland courts reviewing state agency action to affirm the agency unless the agency's action (1) violates the constitution; (2) exceeds the statutory authority of the agency; (3) achieves its result by unlawful procedures; (4) is arbitrary and capricious; or (5) is unsupported by substantial evidence. *Id.* A federal court reviewing a state statute challenged on due process grounds applies a federal scope of review. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. at 82-83 (applying narrow scope of review because plaintiff's due process claim attacked economic legislation which is presumed to be constitutional unless petitioner shows legislative irrationality). The constitutional due process test resembles the equal protection test. *See* Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 669 (11th Cir. 1984) (equal protection analysis of minimum court scrutiny parallels due process analysis when petitioner challenges commercial regulatory statute); J. NOWAK, *supra* note 11, at 382-84 (analysis under due process clause identical to analysis under equal protection clause); *see supra* notes 115-16 and accompanying text (Supreme Court's test for equal protection clause).

131. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. at 82-83 (presumption of constitutional validity in case of economic legislation); Roe v. Wade, 410 U.S. 113, 155 (1973) (fundamental right of individual to decide whether to undergo abortion). In due process

denied BG&E's due process clause arguments because BG&E could not prove that the PSC denied BG&E's application based on any unconstitutional criterion.[132]

Having disposed of BG&E's due process claim, the Fourth Circuit turned to BG&E's constitutional challenge under commerce clause.[133] The Supreme Court in *Pike v. Bruce Church* established how a court should analyze a party's claim that a state statute violates the commerce clause.[134] Under the *Pike* test, a court first determines whether the state statute incidentally affects interstate commerce.[135] The court then investigates whether the state statute

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litigation, if a state statute infringes on a fundamental right, the court must find that the statute serves a compelling state purpose and the statutory method is necessary to achieve the state purposes before the court may uphold the statute as constitutional. Roe v. Wade, 410 U.S. at 155. The Fourth Circuit in *Baltimore Gas* stated that the petitioner would need to show a suspect classification, such as discrimination based on race or sex, before the court would proceed with the more strict due process scrutiny. *Baltimore Gas,* 760 F.2d at 1419-20. The Fourth Circuit's use of suspect classification represents a harmless overlap into an equal protection analysis. *See* J. NOWAK, *supra* note 11, at 383-84 (detailing overlap of equal protection analysis and due process analysis).

132. *See supra* note 131 and accompanying text (absent impermissible criterion, courts minimally scrutinize state economic legislation for due process violations).

133. *Baltimore Gas,* 760 F.2d at 1420-26; *see supra* note 42 and accompanying text (detailing BG&E's claim that section 24(e) violated commerce clause).

134. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). When a state statute regulates evenhandedly in pursuit of legitimate state interests and affects interstate commerce only incidentally, a court will uphold the state statute unless the burden on interstate commerce clearly outweighs the local benefits. *Id. Pike* involved a challenge to an Arizona law that required all Arizona cantaloupes offered for sale to be packaged in closed standard containers. *Id.* at 138. Petitioner grew cantaloupes in Arizona and sent the fruits to California for packaging and processing. *Id.* The state of Arizona ordered petitioner to stop bulk shipment of fruit to California. *Id.* The practical effect of the state's order would have been to force the petitioner to build a packaging and processing plant in Arizona. *Id.* at 140. The state's purpose in the act was legitimately protecting the reputation of growers within the state by preventing misleading packaging of cantaloupes. *Id.* at 143. The Supreme Court, however, held that the state's interest in having the cantaloupes identified as grown in Arizona was especially tenuous in light of the significant cost to petitioner if forced to process the cantaloupes in Arizona. *Id.* at 145; *accord* Arkansas Elec. v. Arkansas Pub. Serv. Comm'n, 461 U.S. at 394 (applying *Pike* test). The Supreme Court in *Arkansas Elec.* noted that modern commerce clause analysis involves balancing the state statute's nature, the state statute's objectives, and the state statute's effect upon the national interest in commerce. *Arkansas Elec.,* 461 U.S. at 390. While the *Arkansas Elec.* Court discussed the balancing approach, the Supreme Court still applied the *Pike* test to the facts. *Id.* at 394-95. The Second Circuit, relying on *Arkansas Elec.,* found that the Supreme Court will continue to use the *Pike* test to analyze commerce clause challenges. Rochester Gas & Elec. Corp. v. Public Serv. Comm'n, 754 F.2d 99, 105 (2d Cir. 1985); *see supra* notes 76-92 and accompanying text (discussing Fourth Circuit's application of Supreme Court's commerce clause test).

135. *Pike,* 397 U.S. at 142; *see* Lewis v. B.T. Inv. Managers Inc., 447 U.S. 27, 36-42 (1981) (state statute does not regulate evenhandedly if statute prevents only out-of-state businesses from giving investment advice in-state); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981) (virtual *per se* rule of unconstitutionality exists for state statutes directly regulating interstate commerce); *see supra* note 134 and accompanying text (detailing Supreme Court's application of commerce clause analysis).

regulates evenhandedly in pursuing a legitimate state interest.[136] Finally, if a court finds a legitimate state interest, the court then may consider whether a means less burdensome to interstate commerce also might achieve the state purpose.[137] The Fourth Circuit, however, found that an inquiry into the existence of less burdensome means of achieving state goals is not mandatory unless the court initially finds that the statute discriminates against interstate commerce.[138] If a state passes legislation that a court finds to be evenhanded, and, therefore, not motivated by economic protectionism, the court already has determined the state's means to be non-discriminatory.[139] Initially, the Fourth Circuit found the Maryland statute regulated evenhandedly because the statute did not protect local economic interests at the expense of out-of-state businesses.[140] The legislation only addressed takeovers of Maryland public utilities.[141] Under the Maryland statute neither out-of-state nor in-state holding companies can acquire a Maryland public utility unless the holding company presently controls another Maryland public utility company.[142] If the legislation had precluded only out-of-state holding companies from acquiring a Maryland public utility company, the court probably would have found that the statute violated the commerce clause.[143] Since section

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136. *Pike*, 397 U.S. at 142.

137. *Id.*

138. *Baltimore Gas*, 760 F.2d at 1427. A court need not determine whether a state could have used less discriminatory alternatives to achieve the state's interests unless the court initially finds that the state statute discriminates against interstate commerce. *See* United States v. Taylor, 752 F.2d 757, 760 (1st Cir. 1985). If a statute's effects on interstate commerce are discriminatory, the state has the burden of showing the unavailability of nondiscriminatory means. United States v. Taylor, 752 F.2d at 760; *see also* Hughes v. Oklahoma, 441 U.S. 322, 337-38 (1979) (state statute forbidding transportation of minnows out-of-state for sale was discriminatory on face). When a state statute is facially discriminatory, the court must look for alternative means of achieving the state's purposes. Hughes v. Oklahoma, 441 U.S. at 338.

139. *See* Lewis v. B.T. Inv. Managers, Inc., 447 U.S. at 36-42 (1980) (state statute prohibiting out-of-state banks from giving in-state investment advice violated commerce clause). Discrimination against out of state businesses is not evenhanded regulation. *Id.* at 36.

140. *Baltimore Gas*, 760 F.2d at 1422-23. In commerce clause analysis, a court first must determine that a state statute does not discriminate against out-of-state interests. *Pike*, 397 U.S. at 142. Discrimination against out-of-state interests would be contrary to the national interest in freely moving national trade and commerce. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669 (1981) (invalidating state law prohibiting 65 foot double trailer trucks).

141. MD. ANN. CODE art. 78, § 24(e) (1980). The Maryland legislation could protect only local users of public utility companies because the PSC's jurisdiction extended to only Maryland public utility companies. *Id.* at § 1.

142. MD. ANN. CODE art. 78 § 24(e) (1980).

143. *See* Lewis v. B.T. Inv. Managers Inc., 447 U.S. at 36-42; FLA. STAT. § 659.141 (1972) (repealed 1980), § 660.10 (1972) (renumbered *as amended* § 660.41 1980). In *B.T. Inv.*, a Florida statute prohibited out of state banks and trust companies from giving investment advice within the state. 447 U.S. at 36-40; FLA. STAT. § 659.141(1) (1972) (repealed 1980), § 660.10 (1972) (renumbered *as amended* § 660.41 1980). The Florida statute overtly prohibited out-of-state businesses from competing in a local market. 447 U.S. at 339. The statute did not regulate evenhandedly and the Supreme Court in *B.T. Inv.* found the Florida statute to be unconstitutional. *Id.* at 142.

24(e) did not distinguish between Maryland and out-of-state holding companies, the statute regulated evenhandedly.[144]

After finding that section 24(e) regulated evenhandedly, the Fourth Circuit considered the legitimate state purpose issue and correctly found that the Maryland provision effectuated a legitimate state interest.[145] The power to regulate public utility companies to protect local consumers is within the state police power.[146] Congress acknowledged in PUHCA the state interest in regulating public utility holding companies.[147] State authority over public utility companies necessarily includes the power to regulate the corporate structure of a public utility holding company because the corporate structure of a public utility is related to the quality of services consumers receive.[148] Accordingly, Maryland's interest in regulating public utility holding companies is legitimate.

After the Fourth Circuit determined Maryland's interests were legitimate, the court balanced the state purposes advanced by section 24(e) against any burdens the statute imposed on interstate commerce and correctly found the state interests outweighed the burdens on interstate commerce.[149] The Fourth

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144. *See supra* notes 140-43 and accompanying text (section 24(e) applies to both in-state and out-of-state holding companies and, therefore, constitutes evenhanded regulation).

145. *See supra* notes 119-20 and accompanying text (explaining why Fourth Circuit in *Baltimore Gas* was correct in holding that Maryland legislature pursued legitimate state interest in protecting public utility consumer); *Baltimore Gas,* 760 F.2d at 1424-25.

146. *Arkansas Elec.,* 461 U.S. at 377. State regulation of public utility companies is a traditional police power arising out of the local nature of a public utility company and the consumer's need for the goods and services that the public utility provides. *Id.; see supra* note 1 and accompanying text (public utility provides services that consumers need on continual basis); *see also* Bridgeport Hydraulic Co. v. Council on Water Co., 453 F. Supp. 952, 954 (D. Conn. 1978) (state may impose regulations on public utilities different from regulations imposed on other private companies because public utility is public purpose entity franchised by state); Munn v. Illinois, 94 U.S. at 113, 125-26 (1876) (state may regulate private property once that private property affects public at large).

147. *See* Blackstone Valley Elec. Co. v. Public Utils. Comm'n, 486 A.2d 617, 618 (R.I. 1985) (state public service commission may scrutinize cost allocations between companies within holding company structure to check for impact on customer rates). Congress intended PUHCA to supplement state regulation of public utility companies. *Id.* Regulation of utility companies traditionally is within the realm of the state police power. *Id.; see supra* note 12 and accompanying text (provisions in PUHCA acknowledging state's role in regulating public utility holding companies).

148. *See* S. Doc. No. 92, *supra* note 3, at 881-82 (public utility holding company structure poses direct threat to consumer receipt of services); RITCHIE, *supra* note 3, at 11 (public utility holding company structure encourages rechanneling of managerial talent away from public utility sector to detriment of consumer).

149. *Baltimore Gas,* 760 F.2d at 1425-26. Section 24(e) burdened interstate commerce because the provision prevented BG&E from diversifying into areas beyond PSC control, affected BG&E's ability to get financing, and prohibited BG&E stockholders from exchanging BG&E shares for BGE CORP. stock. *Baltimore Gas,* 582 F. Supp. at 682. A countervailing state interest exists in assuring local customers adequate public utility services by protecting against the dangers posed by public utility holding companies. *See* S. Doc. No. 92, *supra* note 3, at 881-82. (FTC report linked public utility holding company's use of unsound business practices with threat to consumers' receipt of adequate and economical public utility services);

Circuit correctly characterized the effects on interstate commerce as minimal when balanced against the strong state interests in protecting the local consumer.[150] In balancing the competing interests, the Fourth Circuit appropriately rejected the commerce clause analysis adopted by the district court.[151] The district court found that while the burden that section 24(e) imposed upon interstate commerce was not excessive on its face, the burden was excessive because a less restrictive alternative existed.[152] The district court found authority for its analysis in *Edgar v. MITE.*[153] In *Edgar,* a party argued that an Illinois antitakeover statute that effectively allowed the Illinois secretary of state to prevent the takeover transaction violated the commerce clause.[154] The state claimed that the legislature designed the statute to protect local shareholders and was a valid exercise of state police power.[155] Furthermore, the state claimed an interest in protecting investors from decreases in the value of stock during a takeover.[156] The Supreme Court in *Edgar* agreed that state protection of local shareholders was a legitimate state goal.[157] The Supreme Court found that the Illinois statute, however, failed to serve the state interest because the Illinois statute extended Illinois jurisdiction to takeovers of companies that had no Illinois shareholders.[158] Furthermore, the Supreme Court criticized the statute's failure to serve the state interests

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M.E. PARRISH, *supra* note 5, at 147 (public utility holding companies charge operating companies high management fees that consumers eventually pay in form of higher rates); *see supra* note 5 and accompanying text (discussing evils of public utility holding companies that justify state regulation of public utility holding companies).

150. *Baltimore Gas,* 760 F.2d at 1425.

151. *Baltimore Gas,* 760 F.2d at 1425-26; *see supra* notes 42-45 and accompanying text (detailing district court's analysis of commerce clause in *Baltimore Gas).*

152. *Baltimore Gas,* 582 F. Supp. at 682.

153. Edgar v. MITE, 457 U.S. 624, 644 (1982).

154. *See* Edgar v. MITE, 457 U.S. at 644 (declaring state antitakeover statute unconstitutional). If a state asserts a specific interest and enacts legislation that, in part, does not serve completely the asserted state interest, the statute is at odds with the state interest. *Id.* Courts are reluctant to find that a state statute effectuates a legitimate state interest because the state's contradiction of itself undermines the state's asserted purpose. *Id.* at 628. At issue in *Edgar* was an antitakeover statute that potentially allowed the state of Illinois to prevent national takeover attempts. Edgar v. MITE, 457 U.S. at 624; Illinois Business Takeover Act, ILL. REV. STAT. ch. 121 ½, ¶ 137.51-137.70 (1979) (*repealed* 1983). The Supreme Court in *Edgar* found that the Illinois statute violated the commerce clause. *Edgar,* 457 U.S. at 644. The Illinois statute required a corporation making a takeover offer for the stock of a target company to register with the Illinois secretary of State. ILL. REV. STAT., ch. 121 ½, ¶ 137.54.A. (1979) (repealed 1983); *see supra* note 97 and accompanying text (defining target company under Illinois statute).

155. *Edgar,* 457 U.S. at 644. The Supreme Court in *Edgar* acknowledged that protecting state shareholders was a legitimate state goal. *Id.* The Court, however, stated that a state had no legitimate interest in protecting nonresident shareholders. *Id.*

156. *Edgar,* 457 U.S. at 644.

157. *Id.* at 644. The Supreme Court held that a state cannot regulate beyond its borders without violating the limitation of the state's authority to governing only the state's own citizens. *Id.* at 642-43.

158. *Edgar,* 457 U.S. at 644; *see* ILL. REV. STAT., ch. 121 ½, ¶ 137.52-10 (1979) (*repealed* 1983); *see supra* note 97 and accompanying text (according to definition of target company

in all circumstances, because the statute was inapplicable when a corporation sought to acquire its own stock.[159] The Supreme Court found that the Illinois statute did not protect shareholders sufficiently to justify Illinois' imposition of regulations governing takeovers.[160] Based on the incongruity between the claimed state interest and the statute's failure to advance the state's interests in all circumstances, the Supreme Court held that the state interest did not overcome undue burdens on interstate commerce.[161] The Supreme Court's holding in *Edgar* stands for the proposition that, even if a legitimate state interest imposes an acceptable degree of burden on interstate commerce, a court must examine the statute to assure that the statute serves the state's interest in all circumstances.[162] Applying *Edgar* to the Maryland statute demonstrates that the exception in section 24(e), which provides that a holding company presently controlling a public utility company may acquire another public utility company with the PSC's permission, is consistent with the state's interest in protecting local consumers.[163] The exception merely allowed the Maryland PSC to ensure the best services to consumers of public utilities because a holding company already controlling a public utility brings to the acquisition knowledge of public utility companies which will be significantly beneficial to consumers.[164] The Fourth Circuit properly found that section 24(e) pursued state interests in all circumstances outweighing burdens on interstate commerce.[165]

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under Illinois statute, potential existed for state regulation of takeovers involving no Illinois shareholders).

159. *Edgar*, 457 U.S. at 644; ILL. REV. STAT., ch. 121 ½, ¶ 137.52-9(4) (1979) (*repealed* 1983) (corporation exempt from provisions of Illinois Business Takeover Act when corporation attempts to reacquire corporation's own stock).

160. *Edgar*, 457 U.S. at 644.

161. *Id.*

162. *Id.*

163. *See supra* note 64 and accompanying text (economies of scale may further state interest in providing adequate and reasonable public utility service to consumers).

164. *See supra* notes 3-5 and accompanying text (comparing dangers public utility holding companies pose to customers with possible benefits to consumers).

165. *Baltimore Gas*, 760 F.2d at 1420-27. Other circuits' applications of the commerce clause test coincides with the Fourth Circuit's application of the commerce clause test in *Baltimore Gas. See*, Grocery Mfrs. of Am. Inc. v. Gerace, 755 F.2d 993, 1003 (2d Cir. 1985) (Supreme Court in *Pike* mandated manner for commerce clause analysis); *Pike*, 397 U.S. at 142. In *Grocery Mfrs.*, the Second Circuit found that the state's interest in protecting consumers of food products by imposing state regulations governing package labeling outweighed burdens on interstate commerce. Grocery Mfrs. of Am. v. Gerace, 755 F.2d at 1003; Texas v. United States, 730 F.2d 339, 351 (5th Cir.) (court should uphold state economic regulations unless clearly excessive burden on interstate commerce exists that outweighs legitimate state interest), *cert. denied*, 105 S. Ct. 207 (1984). The Fifth Circuit in *Texas v. United States* held that the power of state government varies directly with the importance of the local interest that the state seeks to assure. Texas v. United States, 730 F.2d at 351; Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 910 (8th Cir. 1985) (upholding state antitakeover statute). The Minnesota legislature revised a state antitakeover statute in light of the Supreme Court's ruling in *Edgar* to decrease the burden on interstate commerce while maintaining the state's legitimate role in protecting instate investors. Cardiff v. Hatch, 751 F.2d at 909. In *Cardiff* the Eighth Circuit

By enacting section 24(e) of the Maryland Public Service Commission Law, the Maryland legislature intended to regulate the evils inherent in public utility holding companies that adversely affect local consumers of a public utility's goods and services.[166] The Maryland legislature acted within the boundaries of the state's police power in pursuing the legitimate state interest of protecting Maryland consumers by assuring adequate and reasonable public utility service.[167] The Fourth Circuit, in upholding the statute despite four claims of constitutional violations, followed the constitutional analysis prescribed by the United States Supreme Court.[168] The Fourth Circuit's decision indicates that state regulation of public utility holding companies is permissible, as long as the regulation protects consumers of public utility products and services, does not discriminate against out-of-state interests, and does not conflict with PUHCA.[169]

G. MONIQUE ESCUDERO

B. Troy v. City of Hampton: *The Seventh Amendment Right to Jury Trial and the Veterans Reemployment Rights Act*

The Veterans Reemployment Rights Act (VRA) established a veteran's right to reemployment by the veteran's previous employer upon returning from military training or service.[1] The VRA provides a veteran with the right

held that a state may require an offeror to inform state shareholders of the impact on residents of a proposed takeover. Cardiff v. Hatch, 751 F.2d at 912; *see supra* notes 154-55 and accompanying text (state must be protecting only instate shareholders before state can regulate takeover attempts affecting interstate commerce).

166. MD. ANN. CODE art. 78, § 24(e) (1980); *see supra* note 5 and accompanying text (documenting evils inherent in public utility holding companies).

167. *See supra* note 11 and accompanying text (source of state police power authorizing Maryland's regulation of public utility companies).

168. *See supra* notes 103-13 and accompanying text (Fourth Circuit correctly held § 24(e) did not violate supremacy clause); notes 114-24 and accompanying text (Fourth Circuit correctly found § 24(e) did not violate equal protection clause); notes 125-32 and accompanying text (Fourth Circuit correctly determined § 24(e) did not violate due process clause); notes 133-65 and accompanying text (Fourth Circuit correctly held § 24(d) did not violate commerce clause).

169. *See supra* notes 11-12 and accompanying text (state protection of consumers of public utility company's services is legitimate objective); notes 140-44 and accompanying text (statute must regulate evenhandedly and not embody economic protectionism); notes 105-13 and accompanying text (state statutes do not violate PUHCA even if statute prevents initial formation of public utility holding companies).

1. *See* Veterans Reemployment Rights Act, 38 U.S.C. §§ 2021-2026 (1982). The Veterans Reemployment Rights Act (VRA) provides veterans with the right to reemployment by former employers following military service. *Id.* § 2021. Section 2021 of the VRA provides for reemploy-

to reemployment if the veteran applied for a leave of absence to perform military service or training[2] and if the veteran applies for reemployment within ninety days after receiving an honorable discharge.[3] Section 2022 of the VRA empowers federal district courts to compel employers who have violated the VRA to conform to the VRA's reemployment requirements by reinstating aggrieved veterans.[4] Furthermore, Section 2022 provides that federal district courts may require employers who violate the VRA to compensate wronged veterans by awarding backpay in the amount of wages and benefits that the veteran lost as a result of the employer's VRA violation.[5] An important issue arising in suits brought under the VRA is whether the seventh amendment right to jury trial attaches in VRA actions.[6] The seventh amendment right to jury trial will attach in VRA actions only if the remedies

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ment if the claimant satisfies the various requirements of the subsequent sections. *See infra* notes 2-5 and accompanying text (discussing requirements which veterans must meet to claim protection under VRA). Courts may waive an employer's duty to reemploy a veteran if the employer can show the employer's situation has changed so drastically that reemployment would be unreasonable. 38 U.S.C. § 2021(a)(B) (1982); *see* Goggin v. St. Louis, 702 F.2d 698, 703 (8th Cir. 1983) (court will not waive duty to reemploy veteran merely because temporary replacement was more efficient and personable); Davis v. Halifax County School Sys., 508 F. Supp. 966, 968 (E.D.N.C. 1981) (reemployment unreasonable only when reinstatement would create useless job or when reduction in number of employees would reasonably include veteran). Prior to the enactment of the VRA § 459 of the Military Selective Service Act of 1967 (MSSA) contained the reemployment rights now found in the VRA. *See* 50 U.S.C. §§ 451 & 459 (repealed 1974). The VRA was a recodification of previously existing reemployment and other rights for the benefit of veterans of the Vietnam era. *See* S. REP. No. 93-1240 at 35, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6313, 6344.

2. *See* 38 U.S.C. § 2021(a) (1982) (providing reemployment rights only for veterans receiving honorable discharge and applying for reemployment within 90 days of such discharge).

3. *See* 38 U.S.C. § 2024(d) (1982). Section 2024(d) requires employees who wish to perform military service or training to request that employers grant leaves of absence. *Id.* Upon honorable discharge from the military service, section 2024(d) requires employers to reemploy the former employee and to confer upon the employee all seniority status, vacation and wages that the employer would have accorded to the employee had the employee not taken a leave of absence to perform military service. *Id.*

4. *See* 38 U.S.C. § 2022 (1982). Section 2022 invests the federal district courts with jurisdiction over claims brought under the VRA. *Id.* Section 2022 gives the district courts the power to compel employers to reinstate complainants in the complainant's former employment. *Id.*

5. *See* 38 U.S.C. § 2022 (1982). Section 2022 empowers the federal district courts to compensate aggrieved veterans for wages or benefits lost as a result of the employer's violation of the VRA. *Id.* Section 2022 also provides that VRA claimants may apply to the United States Attorney or a comparable official to represent the VRA claimant in the VRA suit. *Id.* If the United States Attorney is reasonably certain that the claimant presents a valid claim under the VRA, § 2022 requires the United States Attorney to act as the VRA claimant's attorney. *Id.* Section 2022 further provides that no state statutes of limitation shall apply to VRA claims. *Id.*

6. *See* Mowdy v. ADA Bd. of Educ., 76 F.R.D. 436, 439 (E.D. Okla. 1977). In *Mowdy v. ADA Bd. of Educ.* the United States District Court for the Eastern District of Oklahoma granted a VRA claimant's request for a nonjury trial. *Id.* at 439. The *Mowdy* court reasoned that a claim for lost wages under the VRA is equitable in nature, as evidenced by the application of the equitable doctrine of laches to VRA suits, rather than state statutes of limitations. *Id.* at 438-49. The *Mowdy* court, therefore, determined that because the seventh amendment right to

provided for in the VRA are essentially legal, rather than equitable, in nature.[7]

Prior to the merger of law and equity in the 1938 enactment of the Federal Rules of Civil Procedure,[8] actions were equitable in nature if no adequate remedy at law existed.[9] An equitable action was triable only to a chancellor sitting in a court of equity.[10] In contrast, an action at law was

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jury trial does not apply to actions in equity, the seventh amendment does not entitle VRA claimants to jury trials. *Id.* at 437; *accord* Cox v. City of Kansas City, 76 F.R.D. 459, 459-60 (W.D. Mo. 1977); *see also infra* notes 77-84 and accompanying text (discussing whether application of laches to VRA claims indicates legislative intent that VRA claims are equitable and thus not triable to jury). The jury trial issue is important to VRA claimants as it is important to all claimants, considering the traditional emphasis placed upon the role of the jury in a democratic system of government. *See infra* notes 125-29 and accompanying text (discussing role of jury in democratic government).

7. *See Mowdy,* 76 F.R.D. at 439 (whether seventh amendment right to jury trial attaches depends on whether action is legal or equitable in nature). Most courts that have considered the VRA jury trial issue hold that VRA claimants do not have the right to trial by jury. *See supra* note 3 and accompanying text (discussing case precedent supporting nonjury trial of VRA claims). Courts that refuse to grant jury trial under the VRA commonly base such refusal on the ground that remedies provided in the VRA are equitable and the seventh amendment applies only to legal causes of action. *See Mowdy,* 76 F.R.D. at 439 (VRA remedies are equitable in nature); Hirschberg v. Braniff Airways, Inc., 404 F. Supp. 869, 872 (E.D.N.Y. 1975) (VRA claims are equitable). One jurisdiction has supported granting a right to jury trial to MSSA claimants. *See* Steffen v. Farmer's Elevator Serv. Co., 109 F. Supp. 16, 20 (N.D. Iowa 1952) (MSSA claimants seeking backpay have right to jury trial). In *Steffen v. Farmer's Elevator Serv. Co.,* the United States District Court for the Northern District of Iowa held that MSSA claims were triable to juries because MSSA remedies are legal in nature. *Steffen,* 109 F. Supp. at 20. The United States Court of Appeals for the Third Circuit also has held that an award of backpay to veterans seeking reemployment is a legal remedy. *See* Gruca v. United States Steel, 495 F.2d 1252, 1256-57 (3d Cir. 1974) (Backpay is legal in nature). In *Gruca v. United States Steel,* the United States Court of Appeals for the Third Circuit considered the remedy of backpay as provided in the MSSA, the precursor of the VRA. *See Gruca,* 495 F.2d at 1256-57 (MSSA backpay is legal in nature); 50 U.S.C. § 459 (repealed 1974); *see also supra* note 1 (discussing MSSA as precursor of VRA).

8. *See* FED. R. CIV. P. 2. Rule 2 of the Federal Rules of Civil Procedure establishes only one form of action—a civil action. *Id.* Enacted in 1938, the Federal Rules of Civil Procedure abolished the longstanding practice of having separate courts of law and courts of equity. *See* C. WRIGHT, FEDERAL COURTS § 67 (4th ed. 1983) (federal rules abolished system of separate courts of law and equity) [hereinafter cited as WRIGHT]. The practical result of the merger of law and equity was to provide a uniform and orderly procedure through which claimants could obtain any appropriate remedy. WRIGHT, *supra* § 67. Before the merger, the existence of two entirely independent court systems prevented either law courts or chancery courts from joining an equitable claim with a legal one. WRIGHT, *supra* § 78. The premerger system, therefore, required plaintiffs to choose which court would try a claim based on estimation of what a prediction of the appropriate remedy might be. WRIGHT, *supra,* § 67; *see infra* notes 9-12 and accompanying text (discussing distinction between law and equity).

9. *See* Judiciary Act of 1789 § 16 (providing that courts should not sustain suits in equity when an adequate remedy at law exists). *See generally* R. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY at 11-53 (1961) (tracing development of law and equity in Anglo-American legal system).

10. *See* Parsons v. Bedford 28 U.S. (3 Pet.) 433, 446-47 (1830) (no trial by jury in courts of equity).

triable to a judge and jury in a law court.[11] After the 1938 merger of law and equity eliminated the existence of separate courts of equity,[12] all federal actions were triable in the federal district courts.[13] The distinction between equitable actions and actions at law, however, remained important in that equitable claims were triable to a judge only, while the seventh amendment required jury trial in claims at law.[14] In *Ross v. Bernhard,*[15] the United States Supreme Court enunciated a three part test to determine when the seventh amendment entitles litigants to jury trials.[16] The *Ross* Court stated that the seventh amendment entitled litigants to trial by jury first, if the premerger custom was to employ a jury in such actions, second, if the litigants sought an essentially legal remedy, and third, when the complexity of a case does not exceed the practical abilities of a jury.[17] In *Troy v. City of Hampton,*[18] the United States Court of Appeals for the Fourth Circuit considered whether the remedies provided in the VRA are essentially legal or equitable in nature, and thus whether VRA claimants are entitled to trial by jury as specified in the seventh amendment.[19]

In *Troy,* veterans Johnny Blackmon and William Troy had taken leaves of absence from employment in order to undertake reserve military training.[20] Blackmon brought suit in the United States District Court for the Western District of North Carolina, claiming that Blackmon's employer had violated Section 2024(d) of the VRA by refusing to reemploy Blackmon following a leave of absence for reserve military training.[21] Blackmon sought reinstate-

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11. *See supra* note 9 (claimant may not bring suit in equity when adequate remedy exists at law).

12. *See* J. MOORE, MOORE'S FEDERAL PRACTICE § 209(b) (2d ed. 1985) (discussing that basic remaining distinction between actions of law or in equity is right to jury trial).

13. *Id.*

14. *Id.*

15. 396 U.S. 531 (1970).

16. *See id.* at 538 n.10 (discussing three part test to determine when claimants have right to jury trial); *infra* notes 17-18 and accompanying text (discussing *Ross* test).

17. *Id.* at 538 n.10. In *Ross v. Bernhard,* the United States Supreme Court held that courts must consider three elements in jury trial inquiries. *Id.* First, courts must consider the custom before merger of law and equity. *Id.* Second, courts must determine the nature of the remedy sought. *Id.* Third, courts must examine the practical abilities of the jury. *Id.* The Supreme Court based the *Ross* test on the rationale that courts should preserve and perpetuate the respective jurisdictions of law and equity in the form in which law and equity existed in 1791 at the adoption of the seventh amendment. *See* Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom,* 68 NW. U. L. REV. 503, 506 (1973) (discussing historical basis for *Ross* test); *see also infra* notes 85-124 and accompanying text (discussing application of *Ross* test).

18. 756 F.2d 1000 (5-4 en banc decision) (4th Cir.), *cert. denied,* by Blackmon v. Observer Transp. Co. ___U.S.___, 106 S. Ct. 182 (1985).

19. 756 F.2d at 1001; *see supra* notes 8-14 and accompanying text (discussing importance of distinction between legal and equitable actions to determination of whether seventh amendment right to jury trial exists).

20. 756 F.2d at 1001.

21. *See id.* (citing unpublished opinion of United States District Court for Western District of North Carolina); *supra* note 3 and accompanying text (discussing provisions of VRA).

ment and backpay.[22] The district court denied Blackmon's motion for a jury trial, stating that the VRA provided equitable remedies triable only to the court.[23] In the ensuing nonjury trial, the district court found for defendant, Blackmon's former employer.[24] The district court held that the VRA did not entitle Blackmon to reemployment because Blackmon failed to apply for a leave of absence before departure, as required by Section 2024(d) of the VRA.[25]

Troy brought suit under Section 2024 of the VRA against the City of Hampton, Virginia, in the United States District Court for the Eastern District of Virginia.[26] The City of Hampton requested a nonjury trial, but the district court denied the City's motion and conducted a jury trial.[27] Troy requested reinstatement and backpay.[28] The subsequent jury trial resulted in a jury verdict in favor of Troy.[29] The City of Hampton appealed to the Fourth Circuit from the jury verdict in favor of Troy.[30] Blackmon appealed to the Fourth Circuit from the nonjury verdict in favor of Blackmon's former employer.[31] The Fourth Circuit consolidated the City of Hampton's and Blackmon's appeals in the present suit.[32] The Fourth Circuit in *Troy* held that neither the United States Constitution nor the VRA provided a right to jury trial for claimants under the VRA.[33] The *Troy* court held that the remedies of reinstatement and backpay provided in the VRA are equitable, and thus not triable to a jury.[34] The Fourth Circuit in *Troy,* therefore, affirmed the decision in Blackmon's nonjury trial and reversed and remanded the decision in Troy's jury trial.[35]

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22. 756 F.2d at 1001.

23. *Id.*

24. *Id.*

25. *See id.* (citing unpublished opinion of United States District Court for Eastern District of Virginia). In *Troy v. City of Hampton,* the plaintiff, William Troy, applied for and received a leave of absence for training in the Armed Forces Reserve. *Id.* Troy asserted that after returning to Troy's employment with the City of Hampton, Virginia, the City of Hampton wrongfully discharged Troy on the pretext of improper behavior. *Id.* Troy claimed that the City of Hampton actually discharged Troy due to Troy's six month absence for reserve training. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* The *Troy* court's consolidation of Troy's and Blackmon's separate actions into one suit was proper under Rule 42(a) of the Federal Rules of Civil Procedure. *See id.* (consolidating Troy's and Blackmon's separate actions); FED. R. CIV. P. 42(a). Rule 42 endows federal judges with the authority to consolidate actions if the actions involve a common question of law or fact. FED. R. CIV. P. 42(a). *See generally* WRIGHT, *supra* note 8, § 97 (discussing power of federal judges to consolidate separate actions).

33. *Id.; see infra* notes 67-124 and accompanying text (discussing whether constitution, statutory language, or legislative history of VRA provide right to jury trial for VRA claimants).

34. *See infra* notes 67-124 and accompanying text (discussing whether VRA claimants have right to jury trial).

35. 756 F.2d at 1001.

In *Troy,* the Fourth Circuit first acknowledged that the VRA does not discuss the question of jury trials.[36] The *Troy* court then noted that most jurisdictions addressing the VRA jury trial question have held that the VRA does not entitle claimants to jury trials because VRA remedies are equitable in nature.[37] The *Troy* court rejected the view established in the United States Courts of Appeals for the Third and Eighth Circuits that VRA claimants seeking backpay enjoy a right to jury trial.[38] The *Troy* court recognized that the United States District Court for the Western District of Iowa in *Steffen v. Farmer's Elevator Service Co.,*[39] and the United States Court of Appeals for the Third Circuit in *Gruca v. United States Steel*[40] had effectively held that backpay under the VRA is legal in nature. The *Troy* court, however, distinguished the holdings in *Steffen* and *Gruca* from the issues presented in *Troy.*[41] The *Troy* court observed that the *Steffen* claimant sought monetary relief alone, a traditionally legal remedy.[42] In contrast, the *Troy* claimants requested both reinstatement and backpay.[43] Consequently, the *Troy* court reasoned that the *Steffen* holding did not apply to the *Troy* facts.[44] The

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36. *Id.; see* 38 U.S.C. §§ 2021-2026 (1982) (no indication of whether VRA claimants have right to jury trial in VRA actions).

37. *Id.* The United States Court of Appeals for the Fourth Circuit, in *Troy v. City of Hampton,* cited several cases in support of the court's statement that most jurisdictions consider VRA remedies as essentially equitable in nature. *Id.; see* Bunnell v. New England Teamsters, 486 F. Supp. 714, 719 (D. Mass. 1980) (VRA remedies are equitable), *aff'd,* 655 F.2d 451 (1st Cir. 1981), *cert. denied,* 455 U.S. 908 (1982); Goodman v. McDonnell Douglas Corp., 456 F. Supp. 874, 876 (E.D. Mo. 1978) (same), *aff'd,* 606 F.2d 800 (8th Cir. 1979), *cert. denied,* 446 U.S. 913 (1980); Ufland v. Buffalo Courier Express, 394 F. Supp. 199, 201 (W.D.N.Y. 1974) (same).

38. 756 F.2d at 1001-03; *see infra* notes 36-57 and accompanying text (discussing *Troy* court's rationale for rejecting minority view that VRA claimants have right to jury trial); *see also infra* notes 36-57 and accompanying text (analyzing *Troy* majority's rationale).

39. 109 F. Supp. 16 (N.D. Iowa 1952).

40. 495 F.2d 1252 (3d Cir. 1974).

41. 756 F.2d at 1001-02; *see infra* notes 39-46 and accompanying text (discussing *Troy* court's interpretation of *Steffen* and *Gruca).*

42. 756 F.2d at 1001-02. *See generally* 1 POMEROY'S EQUITY JURISPRUDENCE § 62 (4th ed. 1918) (discussing distinction between legal and equitable remedies). In addition to noting that *Steffen* held backpay to be a legal remedy, the *Troy* court stressed that *Steffen* held reinstatement to be an equitable remedy. 756 F.2d at 1001. The *Troy* court further emphasized that the claimant in *Steffen* requested monetary relief only. *Id.* (citing *Steffen,* 109 F. Supp. at 20). The *Steffen* court considered a plea for monetary relief alone as a legal claim related to traditional money damages. 109 F. Supp. at 20. Courts considering VRA claims that include pleas for both backpay and reinstatement sometimes consider backpay as an element of the equitable right to reinstatement. *See Troy,* 756 F.2d at 1003 (backpay is part of equitable reinstatement). Poman v. General Dynamics Corp., 574 F. Supp. 147, 149 (D.R.I. 1983) (same); Cox v. City of Kansas City, 76 F.R.D. 459, 459-60 (W.D. Mo. 1977) (same); Ufland v. Buffalo Courier Express, 394 F. Supp. 199 at 200-01 (W.D.N.Y. 1974) (claim for backpay is element of VRA claimant's equitable right to reinstatement).

43. 756 F.2d at 1001; *see supra* note 42 (discussing case precedent holding that backpay is part of equitable remedy of reinstatement).

44. 756 F.2d at 1001-02; *see supra* notes 41-43 and accompanying text (explaining *Troy* court's rationale for distinguishing *Steffen).*

Fourth Circuit distinguished the *Gruca* holding on the ground that the *Gruca* court did not consider whether backpay under the Military Selective Act (MSSA), the effective precursor of the VRA, was a legal or equitable remedy.[45] Instead, the *Gruca* court noted that because Congress had been silent as to the method by which courts should determine timeliness under the MSSA, courts should employ state statutes of limitations, rather than the equitable doctrine of laches, in addressing MSSA claims.[46]

In enacting the VRA in 1974, Congress embodied the MSSA's reemployment rights guarantees, by providing that veterans could seek relief under the VRA when employers of those veterans violated the VRA.[47] The MSSA reemployment provisions did not specify whether the doctrine of laches or state statutes of limitations applied in veterans' reemployment actions.[48] In 1974 Congress amended the VRA's reemployment provisions.[49] The 1974 VRA amendments provided, in pertinent part, that no state statutes of limitations would apply in VRA actions.[50] The *Troy* court, therefore, suggested that the 1974 VRA amendments effectively made the *Gruca* holding obsolete because Congress had provided expressly that the doctrine of laches apply to VRA actions.[51] Consequently, since the doctrine of laches is traditionally characterized as an equitable doctrine, the *Troy* court reasoned that remedies provided for in the VRA were equitable in nature.[52] The *Troy* court, therefore, concluded that VRA actions are equitable in nature and, thus, not triable to a jury.[53]

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45. 756 F.2d at 1002 (citing Gruca v. United States Steel, 495 F.2d 1252, 1256-57); *see supra* note 1 (discussing MSSA as precursor of VRA's reemployment rights).

46. 756 F.2d at 1002 (citing Gruca v. United States Steel, 495 F.2d 1252, 1256-57); *see* 50 U.S.C. §§ 451 & 459 (repealed 1974).

47. 50 U.S.C. § 459 (repealed 1974); *see supra* note 1 (discussing MSSA a precursor of VRA).

48. *See Gruca,* 495 F.2d at 1256-57 (MSSA did not specify which statute of limitations applied in reemployment rights actions); 50 U.S.C. § 459 (repealed 1974).

49. *See* 38 U.S.C. § 2022 (amendments to VRA); *infra* note 50 (discussing 1974 VRA amendments).

50. *See* S. REP. No. 93-907, 93rd Cong., 2d Sess. 111-12 (1974). The 1974 amendment to § 2022 of the VRA provided that courts toll time in VRA claims by the equitable doctrine of laches, rather than by local statutes of limitations. *Id.; see infra* notes 78-84 and accompanying text (discussing legislative intent for choosing laches rather than state statutes of limitations).

51. 756 F.2d at 1002; *see* S. REP. No. 93-907 at 111-12 (providing that doctrine of laches applies in VRA claims).

52. 756 F.2d at 1002-03.

53. *Id.* The *Troy* court noted that Congress' intent in creating the 1974 amendments to the VRA was to render VRA actions equitable in nature. *Id.* In particular, the *Troy* court relied on specific language contained in the Senate Report of the Committee on Veterans. *Id.; see* S. REP. No. 93-907, 93rd Cong. 2d Sess. 111-12 (1974). Senate Report 93-907 provides in pertinent part that application of the equitable doctrine of laches to VRA actions promotes Congress' policy that equitable principles of law govern legal proceedings brought under the VRA. S. REP. No. 93-907 at 111-12. The Report further states that application of laches to VRA claims promoted the congressional policy of keeping the enforcement rights available to returned veterans as uniform as possible throughout the country. S. REP. No. 93-907 at 111-12; *see infra*

Finally, the *Troy* court refused to adopt the view that VRA backpay is legal in nature because the court reasoned that VRA backpay is most closely analogous to backpay under Title VII of the Civil Rights Act of 1964.[54] The *Troy* court pointed out that the United States Courts of Appeals for the Fourth and Fifth Circuits have held consistently that Title VII backpay is an equitable remedy.[55] Therefore, since claimants requesting backpay under Title VII did not enjoy a right to trial by jury under the seventh amendment, the *Troy* court reasoned that claimants seeking reinstatement and backpay under the VRA likewise did not enjoy a right to trial by jury.[56] The *Troy* court supported the characterization of backpay as equitable by reasoning that backpay constitutes an indispensable element of the equitable remedy of reinstatement under the VRA.[57]

The dissent in *Troy* agreed with the majority's conclusion that the VRA does not specifically provide VRA claimants with the right to jury trial.[58] Nevertheless, the dissent contended that the majority had neglected to apply the controlling Supreme Court test to determine whether the *Troy* claimants had a right to jury trial.[59] The *Troy* dissent urged a reexamination of the *Troy* facts in light of the Supreme Court's tripartite test enunciated in *Ross v. Bernhard.*[60] In *Ross,* the Supreme Court created the standard to determine when the seventh amendment right to jury trial attaches.[61] The dissent asserted that proper application of the *Ross* test indicates that VRA claimants have a right to trial by jury.[62] In addition, the dissent in *Troy* objected to

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notes 78-83 and accompanying text (analyzing congressional intent in enacting the 1974 amendments to the VRA).

54. 756 F.2d at 1002 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1982)); *see infra* notes 109-22 and accompanying text (comparing backpay awards under various federal statutes).

55. 756 F.2d at 1002; *see* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.) (backpay under Title VII of Civil Rights Act of 1964 is equitable in nature), *cert dismissed,* 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (backpay under Title VII of Civil Rights Act of 1964 is equitable in nature); *see also infra* notes 110-15 and accompanying test (discussing Title VII backpay).

56. *See supra* notes 51-55 and accompanying text (discussing nature of Title VII backpay); *infra* notes 110-15 and accompanying text (discussing jury trial issue in Title VII actions).

57. 756 F.2d at 1002; *see infra* notes 110-15 (discussing *Troy* court's analysis of Title VII backpay).

58. 756 F.2d at 1004, (Ervin, J., dissenting).

59. *Id.* at 1005-06 (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)).

60. 756 F.2d at 1005-07 (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10); *See supra* notes 15-17 and accompanying text (discussing *Ross* test and applying *Ross* test in *Troy); infra* notes 79-110 (discussing same).

61. *See supra* notes 15-17 and accompanying text (discussing *Ross* test).

62. *See* 756 F.2d at 1007-09. The *Troy* dissent reasoned that the *Troy* claimants satisfied each of the three prongs of the *Ross* test. *Id.; see also supra* notes 15-17 and accompanying text (discussing *Ross* test). First, the *Troy* dissent asserted that VRA claims are analogous to claims that litigants pressed in law courts rather than in equity courts prior to the merger of law and equity. 756 F.2d at 1007; *see also infra* notes 94-100 and accompanying text (discussing common-law analogs to VRA claims). Second, the *Troy* dissent reasoned that VRA backpay is

the majority's interpretation of the VRA's legislative history.[63] The dissent recognized that the 1974 amendments to the VRA provided that the equitable doctrine of laches, in contradistinction to state statutes of limitations, govern questions of timeliness in actions brought under the VRA.[64] The dissent, however, suggested that in choosing to apply laches, Congress merely intended to promote uniformity in the vindication of veterans' rights nationwide, rather than permitting differences in state statutes of limitations to create inequitable treatment.[65] According to the dissent, therefore, the majority incorrectly interpreted the laches provision as a congressional characterization of VRA actions as essentially equitable in nature.[66]

Although the United States Supreme Court has not considered the VRA jury trial issue, the Court generally has not found a seventh amendment right to jury trial in other statutory schemes that provide reinstatement and backpay remedies.[67] Furthermore, most jurisdictions that have considered whether VRA remedies are legal or equitable have concluded that VRA backpay, like reinstatement, is equitable in nature.[68] In most jurisdictions, therefore, the seventh amendment does not entitle VRA claimants to jury trial.[69] For example, in *Ufland v. Buffalo Courier Express,*[70] the United States District Court for the Western District of New York held that a

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legal in nature because courts have little discretion over when courts must award backpay under § 2022 of the VRA. 756 F.2d at 1008; *see also infra* notes 105-22 and accompanying text (discussing significance of court discretion in assessing whether backpay is equitable or legal). Third, the *Troy* dissent suggested that VRA claims are not overly complex for the practical abilities of civil juries. 756 F.2d at 1009.

63. 756 F.2d at 1008-09.

64. *Id.*

65. *Id.* (citing S. REP. No. 93-907, 93rd Cong. 2d Sess. 111-12 (1974); *see supra* note 50 (discussing contents of S. Rep. 93-907 on subject of laches); *see also infra* notes 77-84 and accompanying text (analyzing legislative intent of 1974 amendments to VRA).

66. 756 F.2d at 1009.

67. *See* Curtis v. Loether, 415 U.S. 189, 197 (1974). In *Curtis v. Loether,* the United States Supreme Court considered whether the seventh amendment right to jury trial attaches in claims under Title VIII of the Civil Rights Act of 1968. *Curtis,* 415 U.S. at 190-91 (citing 42 U.S.C. 3612(c) (1970)). Section 3612 of Title VIII permits private plaintiffs to sue alleged violators of the fair housing provisions of the Civil Rights Act of 1968. *See Curtis,* 415 U.S. at 190-91 (citing 42 U.S.C. 3612 (1970)). The Supreme Court in *Curtis* held that the monetary relief that courts may award under Title VIII is legal in nature because § 3612(b) invests courts with little discretion as to whether to award monetary relief. *Curtis,* 415 U.S. at 197. In effect, if a Title VIII claimant proves a violation of the fair housing provisions, the courts must award monetary compensation. *Curtis,* 415 U.S. at 197. The *Curtis* court, therefore, held that the seventh amendment entitles Title VIII claimants to jury trials. *Curtis,* 415 U.S. at 198; *see infra* notes 108-22 and accompanying text (comparing Title VIII monetary relief with monetary relief under Title VII of Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA) and the VRA).

68. *See supra* note 42 (citing case precedent supporting proposition that VRA backpay is equitable because backpay is indispensable element of equitable remedy of reinstatement); *see also infra* notes 118-24 (discussing equitable nature of VRA remedies).

69. *See infra* notes 70-75 and accompanying text (discussing cases holding that backpay under VRA is equitable in nature).

70. 394 F. Supp. 199 (W.D. N.Y. 1974).

veteran's claim for backpay under the VRA was a component of the veteran's right to reinstatement into his former position with all attendant benefits.[71] The district court in *Ufland,* therefore, held that a veteran's claim for backpay under the VRA is equitable in nature.[72] Similarly, in *Pomon v. General Dynamics Corp.,*[73] the United States District Court for the District of Rhode Island held that in the VRA, Congress created a federal cause of action that was entirely equitable in nature.[74] The *Pomon* court, therefore, held that the seventh amendment does not entitle VRA claimants to trial by jury.[75]

Case precedent, therefore, supports the *Troy* court's holding.[75] An analysis of the *Troy* majority's reasoning, however, indicates some potential weaknesses.[77] The *Troy* majority concluded that Congress' preference in the VRA for the use of laches instead of state statutes of limitations required a finding that VRA actions are equitable in nature and, consequently, that VRA claimants have no right to jury trial.[78] As the *Troy* dissent noted, however, the majority's conclusion is questionable.[79] The *Troy* dissent indicated that the report of the Senate Committee on Veterans regarding the 1974 VRA amendments explains that Congress chose laches over state statutes of limitations only to ensure that veterans in all states had uniform opportunities to bring claims under the VRA.[80] Congress, therefore, did not necessarily intend the 1974 amendments to affect the manner in which courts adjudicate VRA claims after a VRA claimant institutes a VRA suit.[81] Consequently, Congress probably did not express a desire to prevent a VRA claimant seeking reinstatement and backpay from obtaining trial by jury.[82] Rather, Congress merely attempted to avoid the potentially unjust results that would follow from the application of vastly divergent state statutes of limitations to causes of action arising under a single federal statute.[83] Thus, to the extent that the *Troy* majority relied on erroneous interpretation of

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71. *Id.* at 200-01.

72. *Id.*

73. 574 F. Supp. 147 (D.R.I. 1983).

74. *Id.* at 149.

75. *Id.*

76. *See supra* notes 67-75 and accompanying text (discussing support for *Troy* majority's holding that VRA claimants do not have right to jury trial).

77. *See infra* notes 78-102 and accompanying text (discussing possible weaknesses in *Troy* majority's reasoning).

78. 756 F.2d at 1002-03; *see* S. REP. No. 93-907, 93rd Cong., 2d Sess. 111-12 (1974); *supra* notes 47-53 and accompanying text (discussing *Troy* majority's interpretation of legislative history of 1974 amendments to VRA).

79. 756 F.2d at 1009; *see infra* notes 63-66 and accompanying text (discussing *Troy* dissent's criticism of *Troy* majority's interpretation of legislative history of 1974 VRA amendments).

80. 756 F.2d at 1009; *see* S. REP. No. 93-907, 93rd Cong., 2d Sess. 111-12 (1974).

81. 756 F.2d at 1009.

82. *Id.*

83. *Id.*

legislative intent, the dissent's recognition that courts should not deny jury trials to VRA claimants solely on the basis of the laches provision of the 1974 VRA amendments is persuasive.[84]

A second weakness in the *Troy* majority's reasoning is the court's failure to apply the *Ross* test to the VRA jury trial question.[85] The *Troy* dissent correctly noted that the Supreme Court created a three part test to determine whether the seventh amendment right to jury trial attaches in a particular action. [86] The *Troy* majority, therefore, should have applied the *Ross* test to determine whether the seventh amendment right to jury trial attaches in VRA claims.[87] The *Troy* dissent applied the *Ross* test to the *Troy* facts and concluded that the seventh amendment entitled the VRA claimants in *Troy* to jury trials.[88] The *Troy* dissent's *Ross* analysis was correct as to the first and third prongs of the *Ross* test.[89] The dissent's incorrect application of *Ross'* second prong, however, renders invalid the dissent's conclusion that the seventh amendment right to jury trial attaches in VRA actions.[90]

In applying the *Ross* test, the *Troy* dissent properly noted that the United States Supreme Court has held that the seventh amendment applies to statutory causes of action.[91] The first prong of the *Ross* test requires courts to determine whether the claim is one which, before the merger of law and equity, litigants would have pursued in a law court or in chancery.[92] The dissent in *Troy* acknowledged that most courts considering the VRA jury trial issue have labeled VRA backpay as an indispensable element of the equitable remedy of reinstatement.[93] In applying the first prong of *Ross,* the *Troy* dissent examined several actions arising before the merger of law and equity that were analogous to VRA claims.[94] Before the merger of law and

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84. *Id.*

85. *See infra* notes 86-90 and accompanying text (discussing applicability of *Ross v. Bernhard* jury trial test to *Troy); see also Ross,* 396 U.S. at 538 n.10 (discussing three part test to determine when claimants have right to jury trial).

86. *See* 756 F.2d at 1005-07 (Troy dissent argues that *Troy* majority should have applied *Ross* test in *Troy).*

87. *See supra* notes 15-17 and accompanying text (discussing jury trial test that Supreme Court set forth in *Ross v. Bernhard); see also Ross,* 396 U.S. at 538 n.10 (discussing three part test to determine when claimants have right to jury trial).

88. 756 F.2d at 1007-09; *see supra* notes 58-62 and accompanying text (discussing *Troy* dissent's application of *Ross* test to *Troy* facts).

89. *See infra* notes 91-104 and accompanying text (discussing *Troy* dissent's correct application of prongs one and three of *Ross* test).

90. *See infra* notes 105-24 and accompanying text (analyzing *Troy* dissent's incorrect application of second prong of *Ross* test in *Troy).*

91. *See* Curtis v. Loether, 415 U.S. 189, 193 (1979) (Supreme Court often has held that seventh amendment applies to statutory causes of action).

92. *Ross,* 396 U.S. at 438 n.10; *see supra* notes 8-12 and accompanying text (discussing 1938 merger of law and equity into one form of civil action under Federal Rules of Civil Procedure).

93. 756 F.2d at 1007; *see supra* note 37 (citing case precedent to support proposition that most jurisdictions hold that VRA actions are equitable).

94. 756 F.2d at 1007. The *Troy* dissent relied heavily on the historical analysis in *Ochoa*

equity, these analogous actions were triable in courts of law rather than in chancery.[95] For example, the dissent noted that VRA actions are analogous to wrongfully discharged servant actions.[96] At common law, wrongfully discharged servants had the right to bring suit in the law courts requesting the practical equivalent of backpay, the remainder of wages owed for the balance of the contractual work period following the wrongful discharge.[97] Alternatively, wrongfully discharged servants could bring suit for breach of contract in law courts, rather than in chancery.[98] Applying the first element of the *Ross* test,[99] the dissent concluded that VRA claims are analogous to claims which, at common law, would have been triable not in equity but as traditionally legal causes of action.[100] In addition, the third prong of *Ross* requires courts to consider whether in practical terms a case is too complex

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v. American Oil Co. to support the conclusion that statutory claims for backpay are analogous to certain forms of action at common law. *See* 756 F.2d at 1007-08, (citing Ochoa v. American Oil Co., 338 F. Supp. 914, 918 (S.D. Tex. 1972)); *infra* notes 95-100 and accompanying text (discussing common-law analogs to claims brought under VRA). *See also* Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 636 (E.D.N.Y. 1982) (citing *Ochoa* court's analysis of common-law analogs to statutory backpay actions); Cook v. Cox, 357 F. Supp. 120, 124 (E.D. Va. 1973) (same).

95. *See Ochoa,* 338 F. Supp. at 918 (describing common law analogs to claims for backpay under Title VII of Civil Rights Act of 1964). In *Ochoa,* plaintiffs were discharged employees who claimed their employer engaged in employment practices in violation of section 2000(e) of Title VII of the Civil Rights Act of 1964. *Ochoa,* 338 F. Supp. at 915; *see* 42 U.S.C. § 2000(e) (Civil Rights Act of 1964) (prohibiting discrimination in employment based on race, color, religion, sex or national origin). The *Ochoa* plaintiffs demanded a jury trial. *Ochoa,* 338 F. Supp. at 915. The *Ochoa* court, in applying the *Ross* jury trial test, noted that statutory claims for backpay were analogous to several types of actions which at common law were legal in nature. *Id.* at 918. The *Ochoa* court concluded that courts should grant jury trials to Title VII claimants since Title VII claimants apparently satisfied all three prongs of the *Ross* test. *Id.* at 923. Nevertheless, the *Ochoa* court reluctantly followed case precedent and refused to grant the plaintiff's request for jury trial. *Id.* Citing *Johnson v. Georgia Highway Express, Inc.,* the *Ochoa* court held that Title VII claimants do not have a right to jury trial under the seventh amendment. *Ochoa,* 338 F. Supp. at 923; *see* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (no right to jury trial in Title VII actions).

96. *See Ochoa,* 338 F. Supp. at 918. The *Ochoa* court reasoned that statutory claims for backpay are analogous to the common-law action of *indebitatus assumpsit,* which provided a remedy for a wrongfully dicharged servant. *Id.* The *Ochoa* court reasoned that a wrongfully discharged servant's suit for the remainder of wages which accrued after wrongful discharge is similar to modern suits for backpay. *Id.* The action of *indebitatus assumpsit* was triable to a court of law, as opposed to a chancellor in equity. *Id.* The *Ochoa* court, therefore, believed that courts should grant jury trials in Title VII actions for backpay. *Id. But see supra* note 95 (discussing *Ochoa* court's ultimate decision to deny jury trial).

97. *See supra* notes 94-96 and accompanying text (discussing action at common law for wrongful discharge).

98. *See Ochoa,* 338 F. Supp. at 918 (wrongfully discharged servant has cause of action at law, rather than in equity, for breach of contract).

99. *See Ross,* 396 U.S. at 538 n. 10 (first prong of *Ross* test requires court to consider premerger custom for similar cases).

100. *See supra* notes 94-99 and accompanying text (discussing common-law analogs to modern statutory claims for backpay).

for the practical abilities of a jury.[101] The dissent properly asserted that juries are fully capable of considering VRA claims.[102]

Consequently, proper application of *Ross*[103] supports the *Troy* dissent's analysis of the *Troy* facts, in light of prongs one and three of the *Ross* test.[104] Nevertheless, the dissent's application of the remaining element of *Ross* is questionable.[105] *Ross* requires courts to examine the nature of the remedy which the claimant has requested.[106] In *Curtis v. Loether,*[107] the United States Supreme Court recognized that, in determining whether any kind of monetary relief constitutes a remedy at law or in equity, courts have considered that the amount of discretion with which the statute invests the court is an important factor.[108] In *Curtis,* the Supreme Court held that in suits brought under Title VIII of the Civil Rights Act of 1968, monetary awards are legal in nature because the statute invests the court with no discretionary power as to whether to include or exclude money damages in the remedy.[109] Once a plaintiff has proved that the defendant has violated

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101. *See Ross,* 396 U.S. at 538 n.10 (third prong of jury trial test requires court to consider practical abilites of jury).

102. *See Troy,* 756 F.2d at 1009 (jury is capable of hearing VRA claims). As the *Troy* dissent correctly asserted, VRA claims do not resemble the types of actions that courts consider overly complex for jury consideration. *See* 756 F.2d at 1009 (Ervin, J., dissenting) (Dissent in *Troy* argues that VRA claims are not too complex for jury trial). The United States District Court for the Southern District of New York's holding in *Bernstein v. Universal Pictures, Inc.* is an example of the operation of the complexity exception to the seventh amendment right to jury trial. *See* Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978). In *Bernstein,* the district court denied the plaintiffs' jury trial demand because the court believed that consideration of 1200 exhibits, 70 depositions, and 2500 pages of highly complex accountants' worksheets was beyond the capabilities of a civil jury. 79 F.R.D. at 62-63. *See generally* Rodiger, *Has the Right to Jury Trial as Guaranteed Under the Seventh Amendment Become Outdated in Complex Civil Litigation?,* 8 PEPPERDINE L. REV. 189 (1980) (arguing that courts should conduct jury trials even in complex litigation).

103. *See supra* notes 91-102 and accompanying text (discussing *Troy* dissent's application to *Troy* facts of prongs one and three of *Ross* test).

104. *See Ross,* 396 U.S. at 538 n.10 (first prong of *Ross* test requires court to examine premerger custom, while third prong of *Ross* test inquires into practical abilities of jury).

105. *See infra* notes 106-24 (discussing application of second prong of *Ross* test to *Troy).*

106. *See Ross,* 396 U.S. at 538 n.10 (second prong of *Ross* test requires examination of nature of remedy sought).

107. 415 U.S. 189 (1974).

108. *Id.* at 197; *see supra* notes 107-09 and accompanying text (discussing *Curtis* holding that amount of discretion invested in court is factor in determining nature of remedy). In *Albemarle Paper v. Moody,* the United States Supreme Court reiterated and explained the importance of judicial discretion in determining whether a remedy is equitable or legal in nature. Albemarle Paper v. Moody, 422 U S. 405, 443 (1975). The *Albemarle* Court explained that when an award must follow if a claimant proved a violation, the remedy is legal in nature. *Albemarle,* 422 U.S. at 443. If, however, the court has discretion as to whether to make an award, then the remedy is equitable in nature. *Albemarle,* 422 U.S. at 443.

109. *Curtis,* 415 U.S. at 197; *see* Civil Rights Act of 1968, 42 U.S.C. §§ 3061, 3612(c) (1982) (fair housing provision).

Title VIII fair housing guarantees, Title VIII entitles the plaintiff to money damages in the amount of damage proven as a matter of law.[110]

In contrast, courts consistently have considered monetary awards of backpay under Title VII of the Civil Rights Act of 1964 equitable in nature because Title VII invests courts with great discretion to determine appropriate remedies.[111] Under section 2000e-5(g) of the Civil Rights Act of 1964 courts may enjoin employers from engaging in unlawful employment practices and order any other appropriate action including, but not limited to, reinstatement, backpay or any other equitable relief deemed appropriate.[112] Inherent in Title VII's broad grant of discretion is the court's duty to consider equitable principles in evaluating the proper remedy for a specific case.

As a final analogy, backpay awarded under the Age Discrimination in Employment Act (ADEA) of 1967[113] is legal in nature because Section 626b of the ADEA incorporates the command of the Fair Labor Standards Act (FLSA).[114] The FLSA provides that employers who violate the FLSA, and by incorporation the ADEA, shall be liable for backpay.[115] Unlike Title VII's broad grant of discretion, the ADEA grants courts no discretion in shaping remedies in ADEA suits.[116] Consequently, ADEA remedies, like Title VIII remedies, are legal in nature.[117]

In comparing the VRA with Title VII, Title VIII, and the ADEA, the *Troy* majority properly concluded that the VRA's grant of discretion is most similar to the broad discretion accorded to courts under Title VII.[118] Section 2022 of the VRA merely grants federal district courts the power to require violators to comply with the VRA, and to compensate the veteran for wages lost as a result of the violation.[119] Unlike the ADEA, the VRA does not command that the violator shall be liable for monetary compensation if the

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110. *Curtis,* 415 U.S. at 197; *see* Title VIII, 42 U.S.C. § 3612(c) (1982) (violators of Title VIII are liable for money damages).

111. *See* Pearson v. Western Elec. Co., 542 F.2d 1150, 1151-52 (10th Cir. 1976) (Title VII backpay is equitable); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (no right to jury trial under Title VII because Title VII backpay is equitable in nature); Williams v. General Foods Corp., 492 F.2d 399, 407 (7th Cir. 1974) (Title VII backpay is equitable); Robinson v. Lorillard, 444 F.2d 791, 802 (4th Cir.) (Title VII claims not triable to jury because Title VII backpay is equitable), *cert. dismissed,* 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (same); *see also supra* text accompanying note 110 (discussing discretionary nature of Title VIII backpay awards).

112. 42 U.S.C. § 2000e-5(g) (1982).

113. 29 U.S.C. § 621-634 (1982).

114. *Id.* § 216 (1982).

115. *See id.* Section 216 of the Fair Labor Standards Act (FLSA) provides in pertinent part that employers who violate the FLSA shall be liable for backpay. *Id.*

116. *See* Lorillard v. Pons, 434 U.S. 575, 583 (1978) (ADEA claimants have right to jury trial); Smith v. Flax, 618 F.2d 1062, 1066 (4th Cir. 1980) (ADEA claimants entitled to jury trial); Harris v. United States Dept. of Treasury, 489 F. Supp. 476, 479 (N.D. Ill. 1980) (public employees who bring ADEA claims entitled to jury trial).

117. *See supra* notes 113-16 (discussing legal nature of ADEA claims).

118. 756 F.2d at 1002.

119. 38 U.S.C. § 2022 (1982).

claimant has proved a violation.[120] Rather, as in Title VII, the VRA grants to courts the power to shape appropriate remedies.[121] Since the VRA invests courts with great discretion in fashioning remedies, application of *Ross* and *Curtis* suggests that VRA remedies are equitable in nature.[122] The *Troy* majority did not expressly apply the *Ross* test.[123] Nevertheless, the *Troy* majority's conclusion that the seventh amendment right to jury trial does not attach in equitable VRA actions is entirely consistent with a proper analysis of the *Troy* facts in light of the *Ross* standard.[124]

Neither case precedent[125] nor application of the *Ross* test,[126] however, supports the dissent's assertion that the VRA entitles VRA claimants to jury trials. While acknowledging contrary case precedent, the *Troy* dissent, nevertheless, suggests that the seventh amendment and a strong historical tradition may support liberal granting of jury trials.[127] The jury trial issue is particularly important in statutory cases. Congress may certainly indicate through express statutory language that courts should consider the rights and remedies which a statute creates as equitable in nature. Furthermore, legislatures, as well as the judiciary, may want to avoid the possibility that juror bias might interfere with the proper functioning of a statute dealing with controversial issues.[128]

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120. *See supra* notes 113-16 and accompanying text (discussing legal nature of ADEA claims).

121. *See supra* notes 111-20 and accompanying text (discussing jury trial under Title VII and VRA).

122. *See supra* notes 105-21 and accompanying text (under second prong of *Ross* test remedies are equitable when statute grants court great discretion in shaping a remedy).

123. *See supra* notes 85-87 and accompanying text (discussing *Troy* court's failure to apply *Ross* test).

124. *See supra* notes 105-123 and accompanying text (discussing how application of second prong of *Ross* test indicates *Troy* court correctly held that VRA remedies are equitable).

125. *See supra* note 37 (citing case precedent supporting denial of jury trial in VRA claims).

126. *See supra* notes 91-124 and accompanying text (discussing application of *Ross* jury trial test to *Troy*).

127. *See* 756 F.2d at 1004-05. The *Troy* dissent noted that Thomas Jefferson believed that the jury trial provided the most effective means through which the people can compel the government to comply with the provisions of the Constitution. *Id.; see also* 3 *Writings of Thomas Jefferson* 71 (1979) (jury trial serves as check on government power and thus compels government to follow constitution principles). Pronouncements by the Supreme Court have reinforced the importance of jury trials to democratic government. *See* Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1884) (practical experience of 12 jurors is invaluable in providing wise conclusions from facts in lawsuits); Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (court should give great weight to importance of function of jury in evaluating challenges to jury trial); Simler v. Conner, 372 U.S. 221, 222 (1963) (historical presumption towards trial by jury is of lasting importance).

128. *See Comment, supra* note 17, at 538. In addition to questions of jury bias, another element courts should consider in defining the proper role of the seventh amendment is the desirability of creating a consistent body of law for new statutorily created rights through employment of nonjury trials. *See id.* at 538 (discussing need for initial development of uniform body of law under new statutory cause of action). Although juries are officially admonished to consider only properly admitted trial evidence and testimony and to apply the law as embodied in the judge's charge, jurors often base decisions on other factors. *See* Sonaike, *The Influence*

To allow Congress unlimited authority to characterize statutory rights as legal or equitable, however, would essentially endow Congress with the power to legislate away the seventh amendment right to jury trial.[129] The judiciary, through application of the *Ross* test, then, serves as a check on Congress' power to expand the equitable jurisdiction of the federal courts.

In *Troy,* the Fourth Circuit adhered to prevailing case authority in holding that the seventh amendment right to jury trial does not attach in claims brought under the VRA.[130] Although the *Troy* court failed to apply the controlling *Ross* test,[131] the court's conclusion is entirely consistent with a correct *Ross* analysis.[132] Considered more broadly, the *Troy* opinion highlights for Fourth Circuit attorneys important questions about the role of the seventh amendment in statutorily created rights and remedies.[133] When the language of a federal statute does not provide expressly for jury trial, the *Troy* majority suggests that federal courts should examine the legislative history surrounding the federal statute.[134] The dissent in *Troy,* however, suggests that Fourth Circuit attorneys should weigh the import of such legislative history against the *Ross* standard and the traditional presumption in favor of jury trial in arguing for or against the right to jury trial under a particular federal statute.[135]

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of Jury Deliberation on Juror Perception of Trial, Credibility and Damage Awards, 1978 B.Y.U.L. REV. 889, 889-90 (1978) (discussing "unofficial" facts that juries wrongly consider in the decisionmaking process).

129. *See* Comment, *supra* note 17, at 533 (Congress should not have absolute authority to characterize actions as equitable).

130. *See supra* notes 36-57 and accompanying text (discussing and analyzing Fourth Circuit's holding in *Troy).*

131. *See supra* notes 85-124 (discussing *Troy* majority's failure to apply the *Ross* test); *see also supra* notes 58-60 and accompanying text (discussing *Ross* test).

132. *See supra* notes 85-124 (discussing analysis of *Troy* under *Ross* test).

133. *See supra* notes 125-29 and accompanying text (discussing policy considerations in defining role of seventh amendment).

134. *See supra* notes 47-53 and accompanying text (discussing *Troy* majority's analysis of VRA's legislative history). *But see supra* notes 58-66, 79-84, and accompanying text (discussing *Troy* dissent's criticism of *Troy* majority's interpretation of VRA's legislative history).

135. *See supra* notes 125-29 and accompanying text (discussing policy goals courts should consider in decisions to grant or deny jury trials under the seventh amendment).