

Once the Land and More on American Law

The Marquette Law School Faculty Blog, on the school's website, is a wide-ranging forum. Consider this selection of recent postings from four professors, addressing passions past (the Milwaukee Braves) and present (Tim Tebow) and shedding light on matters as diverse as trends in copyright law and the constitutionality of anti-Sharia laws. Serious-minded and open-minded, the Faculty Blog offers lots more of this, in addition to reporting on what is going on at the Law School. Follow it at law.marquette.edu/facultyblog.

Why Milwaukee Lost the Braves

By J. Gordon Hylton, Professor of Law

Forty-six years ago, the baseball world trained its attention on the Wisconsin Supreme Court and its impending decision in the case of *Wisconsin v. Milwaukee Braves, Inc.*, soon to be reported at 31 Wis. 2d 699, 144 N.W.2d 1 (1966). At issue was whether a Milwaukee trial judge, acting on behalf of the State of Wisconsin, could prevent the Milwaukee Braves Major League Baseball team from relocating to Atlanta, Georgia.

After the team's Chicago-based owners had announced their plans to move to Atlanta for the 1966 season, a criminal action was filed in Milwaukee County Circuit Court. It alleged that the Braves and the other nine teams in the National League had conspired to deprive the City of Milwaukee of Major League Baseball and, moreover, had agreed that no replacement team would be permitted for the city. Thus, the complaint alleged, the defendants were in violation of the Wisconsin antitrust law.

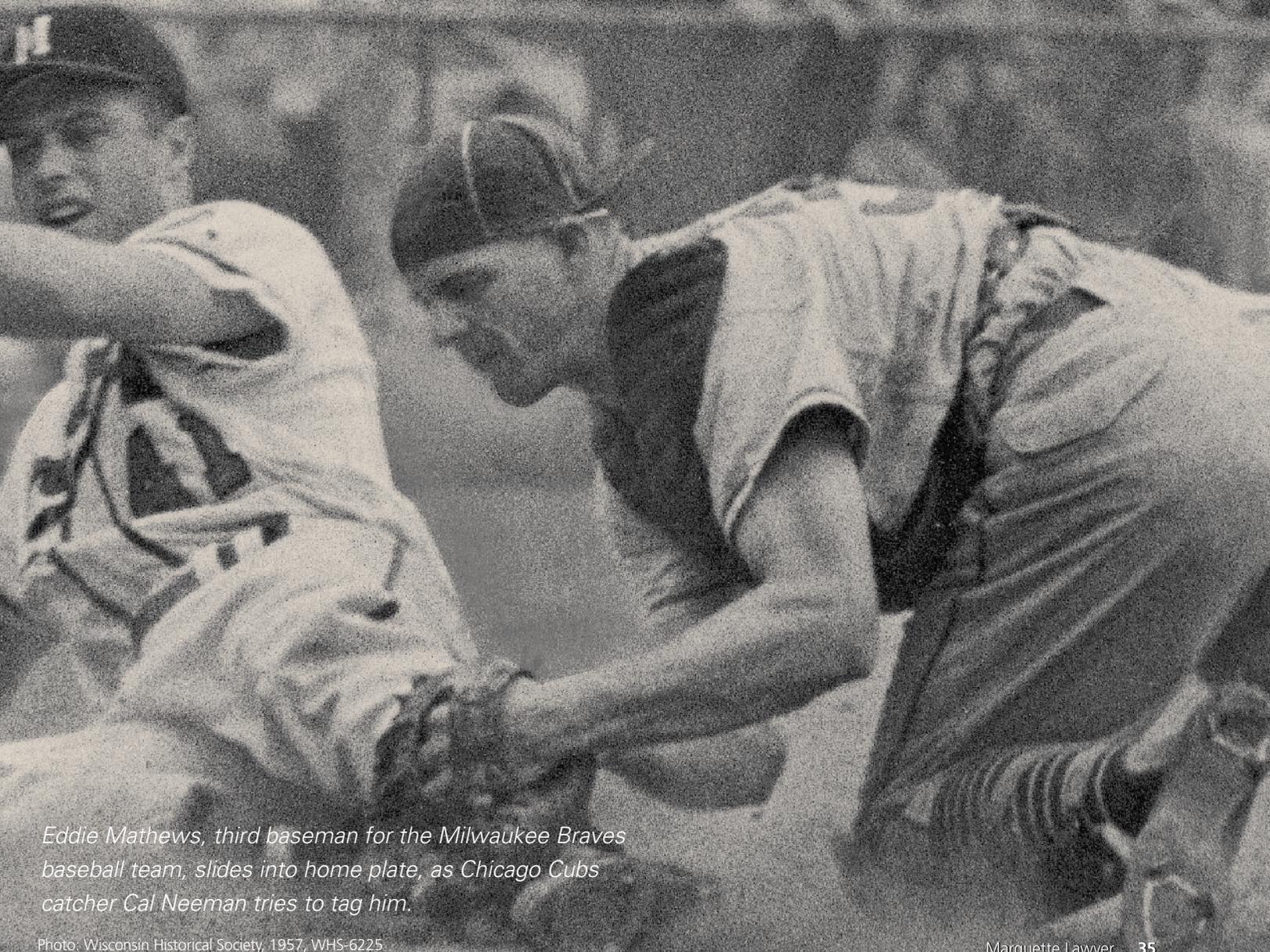
The defendants initially removed the lawsuit to the United States District Court for the Eastern District of Wisconsin, but on December 9, 1965, District Judge Robert Tehan, L'29, remanded the case to the state court. There trial was conducted before Judge (and former Marquette Law School Professor) Elmer W. Roller, L'22.

On April 14, 1966, only hours before the Braves were to open the season with a game against the Pittsburgh Pirates in Atlanta, Judge Roller ruled that the owners of the Braves and the other National League teams had acted in "restraint of trade" and thus were in violation of the Wisconsin antitrust law.

Roller fined the defendants \$55,000, plus costs, and enjoined the Braves from playing their 1966 home games anywhere other than Milwaukee, >>



of the Braves— and Legal Culture



Eddie Mathews, third baseman for the Milwaukee Braves baseball team, slides into home plate, as Chicago Cubs catcher Cal Neeman tries to tag him.

unless the National League agreed to place a new team in Milwaukee in 1967. To give the National League time to make arrangements for an expansion team for 1967, Roller stayed his judgment until mid-June, an act that allowed the Braves to continue playing in Atlanta.

The Braves' owners immediately appealed Roller's decision to the Wisconsin Supreme Court, which agreed to hear the case on an expedited basis. On June 9, 1966, the appeal was argued—a day on which the Braves, who never had a losing season while in Milwaukee, sat in sixth place in the National League with a record of 25-30.

With the stay extended, the Braves continued to play in Atlanta, and six weeks later, on July 27, a day that

would see the Braves slumping all the way down to eighth place, the Wisconsin Supreme Court overturned Roller's lower court ruling by a narrow vote of 4-3. (Justice E. Harold Hallows, also formerly a law professor at Marquette, was one of the three dissenters, who would have sustained Roller's injunction against the move to Atlanta.)

The Court's majority opinion was based on two different rationales, and the Court explained that one was embraced by two justices and the second by two

others. The first rationale was that organized baseball's exemption from the federal antitrust laws, most recently upheld by the U.S. Supreme Court in *Toolson v. New York Yankees* (1953), extended to state antitrust rules as well. The alternative theory concluded that even if organized baseball was not exempt from state antitrust regulation generally, the portion of the remedy imposed by Judge Roller that ordered the National League either to return the Braves to Milwaukee or else to give the city a new team ran afoul of the United States Constitution's Commerce Clause and constituted an unenforceable interference with interstate commerce. The majority did not dispute Roller's findings of fact concerning the monopolization of baseball in Milwaukee.

The three dissenters disagreed with both of the theories in the majority opinion and concluded instead that Congress should be presumed to have left the regulation of baseball to the states until it explicitly exercised its own regulatory authority. They also maintained that the legitimate interests of the State of Wisconsin in this case took priority over the "restrictive effect on interstate

commerce that might result from the enforcement of Wisconsin's laws."

Not willing to concede defeat after such a narrow loss, the State of Wisconsin sought review in the United States Supreme Court. However, while the state's petition for a writ of certiorari was pending, Judge Roller's lower court order was dissolved, and the Braves were free to play out the season in their new southern home.

Although the Braves lost again on July 28, to fall into ninth place, 14½ games behind the first-place Pittsburgh Pirates, the Wisconsin Supreme Court decision seemed to clear away the cloud of bad play that had hung over the team all season. The Braves played inspired baseball the rest of the season, and ended up with a record of 85-77, good for fifth place in the 10-team league and within 10 games of the pennant-winning Los Angeles Dodgers, who had overtaken the Pirates.

Milwaukeeans had to wait until December 12 to learn that the United States Supreme Court had denied the state's petition for certiorari. However, in an uncharacteristic move, the Court revealed that it was badly divided on whether to hear the case. Justices William O. Douglas, Hugo Black, and William J. Brennan, Jr., were in favor of hearing the case, but certiorari was opposed by Chief Justice Earl Warren and Justices Tom C. Clark, John Marshall Harlan II, Potter Stewart, and Byron White.

Although he had taken the oath of office as a Supreme Court justice on October 4, Justice Abe Fortas, according to the Court's announcement, "took no part in the consideration or decision of this petition." In any event, the attempt to involve the nation's highest court died as a result of the failure of a fourth justice to support the petition.

In another unusual development, Wisconsin filed a petition requesting that the Court rehear the petition for certiorari, perhaps in hopes that Fortas might be now willing to support the petition, but rehearing also was denied. On January 23, 1967, the litigation over the Braves' departure finally came to an end when the Court simply announced that the rehearing petition had been denied and that Justice Fortas had not participated in the review.

Thus, by late January, it was clear that the city of Milwaukee would be without major league baseball for 1967. When the National League announced in November 1967 that it would be adding two additional teams for the 1969 season, Milwaukee applied for one of the franchises, as did groups from Dallas-Ft. Worth, Denver, Buffalo, San Diego, Toronto, and Montreal.



However, when the two new franchises were awarded in May 1968, the National League ignored Milwaukee and awarded teams to San Diego and Montreal. As a result, except for a total of 20 Chicago White Sox games played in County Stadium in 1968–1969, Milwaukee remained without Major League Baseball until 1970. That, of course, is when Bud Selig and his associates bought the bankrupt Seattle Pilots shortly before Opening Day and moved the one-year-old American League team to Milwaukee, where they were renamed the Brewers.

The most interesting question arising out of the Milwaukee Braves litigation is why the Braves were so anxious to leave Milwaukee in the mid-1960s. After relocating to Milwaukee in 1953 (from Boston, where the team had played since 1871), the Braves were for the rest of the decade one of the showpiece franchises in all baseball. In a decade in which attendance at major league baseball games steadily eroded, the Braves set one National League attendance record after another.

Part of the answer to the question lies in the fact that, in the mid-1960s, Atlanta simply held much greater potential than Milwaukee as a source of revenue for a Major League baseball team. Not only was it based in a larger and still rapidly growing metropolitan area, but it was also located in an area (the Southeast) without Major League Baseball. In contrast, Milwaukee was bounded by the Chicago Cubs and White Sox to the south, the Minnesota Twins to the west, Lake Michigan to the east, and the underpopulated areas to the north.

In other words, Atlanta's superior location provided greater opportunities both for live attendance and for the sale of increasingly important broadcasting rights.

However, after the wave of team relocations between 1953 and 1961, Major League owners had become clearly reluctant to permit additional teams to change cities in search of greater revenues, particularly if it would leave the vacated city without a team. The proposals of Kansas City Athletics owner Charlie Finley to move his struggling team to various cities, includ-



An aerial view of Milwaukee County Stadium during a game in the Braves' heyday. Photo: Wisconsin Historical Society, WHS-54732

ing Dallas–Ft. Worth, Atlanta, Louisville, and Oakland, had been regularly rebuffed in the years between 1962 and 1966. It was highly unlikely that the other owners would have approved the Braves' relocation to Atlanta in 1966, had the only reason to move been a desire to make greater profits.

The sad reality was that between the mid-1950s and the mid-1960s, Milwaukee appeared to have gone from being a hotbed of baseball attendance to a city in which the citizenry seemed no longer willing to go to the ballpark to support the home team, even if the team was still a pennant contender. Although this was something of a misperception, it is easy to understand why many observers in the 1960s adopted that view. [The post on the faculty blog sets forth and analyzes the attendance numbers, which are among the things omitted here. – *ed.*]

The reasons for the falloff in attendance are complicated, especially given the fact that the team had a winning record during each of the 13 seasons that it played in Milwaukee. Fan exhaustion may have been a factor. This was certainly a much mentioned explanation in the press in the early 1960s. The Braves were located in one of the smallest markets in major league baseball, and Milwaukee's attendance totals represented a much higher percentage of the metropolitan population than those for any other major league team in the 1950s.

However, the drop in attendance was also related to the team's perceived declining performance beginning in 1960. By one measure, the Milwaukee Braves were

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the most consistently successful team in Major League Baseball history. On the other hand, the Braves were significantly more successful relatively to their competition in their first eight seasons in Milwaukee than in their last five.

After finishing second in the National League in 1953 and third in 1954, the Braves went on a remarkable run. In 1955 and 1956, they finished second behind the Brooklyn Dodgers, and by only one game in the latter year. They then won National League championships in 1957 and 1958 (and the World Series in 1957), and they finished in a tie for first place in 1959 with the Los Angeles Dodgers. (Unfortunately, they lost the 1959 playoff series, and thus missed a third straight World Series.)

Although the Milwaukee Braves' 1961 season was hardly a failure in terms of either on-field performance or attendance, it was the first year since arriving from Boston that the team failed to turn a profit. The team's attendance dropped by almost 400,000 fans, and the decline in attendance revenue, combined with the fact that the Braves probably had the highest payroll in the Major Leagues, converted a \$500,000 profit in 1960 into an \$80,000 loss in 1961.

Throughout 1963 and 1964, rumors were rampant that the new owners planned to move the team to Atlanta. Even with increased attendance and more games on television, the team incurred further losses in 1964, totaling a reported \$500,000. In light of continued losses, the decision was finally made to relocate the team to Atlanta in time for the 1965 season, and initially the other National League teams supported the move.

However, the Milwaukee County Board threatened to sue to enjoin the relocation of the team unless it complied with the terms of its lease, which ran through the 1965 season. A team offer to buy out the lease was rejected by the board, and, in the face of a potential lawsuit, the other National League owners refused to approve the 1965 relocation plan after all. However, they did declare that it was in the best interests of the National League to permit the Braves to move to Atlanta in 1966, essentially confirming the lame duck status of the Milwaukee Braves of 1965.

Fan reaction to this resolution was one of unrepressed anger. Although the Braves were in first place for most of the 1965 season, after opening day, the 1965 season was played under a fan boycott, and barely a half million people showed up for the Braves home games that year.

Was there anything that could have been done to prevent the situation that resulted in the Braves' departure? The real aberration in Milwaukee baseball history was the attendance figures of 1953–1959, not those for 1960–1965. Given its population, Major League Baseball attendance in Milwaukee in the early 1960s, at least through 1964, was actually pretty good. Selling the team to owners with no commitment to Milwaukee in 1962 probably made it inevitable that the team would soon be relocated to a larger, more lucrative market.



A Second Look at the Sharia Law Amendment

By Ryan M. Scoville, Assistant Professor of Law

In January, the U.S. Court of Appeals for the Tenth Circuit issued a decision on Oklahoma's "Sharia Law Amendment." A quick summary: In 2010, Oklahoma voters approved a ballot initiative that amended their state's constitution to prohibit Oklahoma courts from "considering or using" either "international law" or "Sharia Law" in making judicial decisions. A district court issued a preliminary injunction that at least temporarily prohibited the Oklahoma law from taking effect on the ground that its language regarding Sharia

Law violates the Establishment Clause. The Tenth Circuit decision held that the district court did not abuse its discretion in issuing the injunction.

Although not yet addressed by the courts, I think it's worth noting that the Amendment's language on international law also may be unconstitutional. The reason is the Supremacy Clause. First, note that the Amendment explicitly prohibits Oklahoma courts from "considering or using" international law in the form of both treaties and custom. This prohibition is unqualified, and thus at least facially encompasses treaties and custom of all kinds.

Now consider the text of the Supremacy Clause. Article VI, Section 2 of the U.S. Constitution establishes that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." By referring to treaties that are "made, or which shall be made, under the Authority of the United States," the Clause establishes supreme status for treaties to which the United States is a party.

The argument for the Sharia Law Amendment's unconstitutionality is pretty straightforward. Insofar as it refers to treaties without qualification and thus includes those to which the United States is a party, the Amendment bars Oklahoma courts from considering or using treaties that have the status of supreme federal law. To prohibit a ratified treaty's consideration or use is to deny its legal relevance, in effect even its existence, regardless of how significantly the treaty might otherwise affect the outcome of a case. Even litigation outcomes directly at odds with those dictated by U.S. treaties would seemingly be permissible in Oklahoma.

There's also a Supremacy Clause argument concerning the Amendment's language on customary law. International custom binds all states that have not timely objected to its development, and thus, as a formal matter, generally binds the United States. Though recently a subject of pretty heated debate, the traditional view is that such custom is a form of federal common law and thus backed by the Supremacy Clause. If one accepts that view, then it would be unconstitutional for the Sharia Amendment to bar Oklahoma courts from considering or using custom in much the same way that it would be unconstitutional to bar their consideration or use of U.S. treaties.

A court might attempt to avoid these problems in a couple of ways. The first would be to construe the Amendment narrowly. There is a fair argument that the text pertains only to treaties to which the United States

is not a party, and to custom not applicable to the United States. Certain language, for example, suggests a general intent to adhere to federal law—a body that obviously includes U.S. treaties and at least arguably includes customary norms. Other language states an opposition only to the application of the "legal precepts of other nations or cultures." The latter does not implicate ratified treaties or binding custom, which are the law of this country. The narrow interpretation would alleviate the Supremacy Clause problem by ensuring that the Amendment's prohibition applies only to treaties and custom that are not federal law.

Another potential way to save the Amendment from unconstitutionality would be to conclude that custom is simply not a form of federal common law. This position would be contrary to the traditional view, but it has gained at least some support since Professors Curtis Bradley and Jack Goldsmith first articulated it in the late 1990s. If customary law is not federal common law, then the Supremacy Clause does not encompass it, and Oklahoma courts would not be obliged to consider or use it in their decisions.

Both of these efforts to save the Amendment would encounter difficulties, however. First, the narrow interpretation would render the Amendment's text on international law essentially irrelevant in practice. I doubt that Oklahoma courts encounter many cases requiring them to resolve disputes concerning U.S. treaties, much less treaties to which the United States is not even a party. I also doubt that they encounter many opportunities to resolve disputes over obscure principles of international custom that do not bind the United States. And so long as that is true, the narrow interpretation would essentially tell the courts not to do something that they don't do anyway.

Second, concluding that international custom lacks the status of federal common law would require a departure from the traditional doctrine on that issue. There are, frankly, pretty intriguing arguments on both sides of the debate that the Bradley–Goldsmith argument has generated, but the U.S. Supreme Court has never squarely held that international custom lacks the status of federal common law.

In short, the constitutionality of the Sharia Law Amendment's language on international law is, at best, uncertain. Its treatment of treaties is either unconstitutional or essentially irrelevant. And its treatment of custom may require courts to resolve a longstanding debate about custom's domestic status.



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Tebowing and the Constitution

By Scott C. Idleman, Professor of Law

Much has been made of Denver Broncos (now New York Jets) quarterback Tim Tebow's outward expressions of his Christian faith, especially his practice of kneeling in moments of prayer—"Tebowing" as it is now called—after touchdowns, some of them admittedly a bit miraculous.

A recent issue of *Time* magazine, for example, included an article on Mr. Tebow, his faith, and the Tebowing phenomenon, with pictures of people in different locations "Tebowing Round the World." Fox Sports' website similarly offers a gallery of athletes and celebrities Tebowing in various settings.

So, what is the possible relationship between Tebow-like conduct and the Constitution? As long as the faith expressions of Tim Tebow and his imitators don't implicate the government, then the Constitution, which generally concerns only the government's actions, is not triggered. Whether non-governmental entities such as the NFL or the Broncos may place limits on Tebowing—e.g., as "excessive celebration" prohibited by NFL Rule 12, § 3, art. 1(d)—is a matter that could potentially infringe players' rights under federal or state civil rights statutes. But neither the First Amendment's ban on religious establishments nor its guarantee of religious free exercise would come into play.

The matter, alas, has not been confined either to Tim Tebow or to non-governmental settings. At least two public school students in New York, for instance, were suspended, allegedly for causing an obstruction,

after Tebowing in a school hallway. Whether their First Amendment speech and religion rights were violated is unknown—have all hallway obstructions led to such punishments?—but there can be no doubt that the Constitution applies to the school's actions.

Nor has Tebow-related conduct been confined to students. In Columbia, South Carolina, a high school coach seemingly encourages his athletes to be religious in the manner of Tim Tebow. That is entirely fine as a sentiment, but if it translates to pre- or post-game prayers led or promoted by the coach, then the Establishment Clause would almost certainly make such conduct unconstitutional. The same might even be true of Tebow-like touchdown prayers by players, if encouraged, let alone directed, by the coaching staff.

To be sure, it was in the context of a public high school's football game that even student-initiated and student-led prayer, when using the school's public address system on school property and under school faculty supervision, was held by the U.S. Supreme Court (in 2000) to be unconstitutional under the Establishment Clause. Although the Court noted that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day," it further remarked that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."

In summary, Tebowing or other Tebow-like conduct may in some instances be protected by the Constitution's First Amendment, while in others it may be circumscribed if not absolutely prohibited. Such calls, of course, will ultimately be made not by zebra-striped referees on the field of play but by black-robed judges in a court of law, with no set limit on either the number of challenges or the use of instant-replay footage.

The Conservative Turn in Copyright Politics

By Bruce E. Boyden, Assistant Professor of Law

David Brooks had an interesting column in the *New York Times* in which he asked, "Why aren't there more liberals in America?" According to Gallup Poll numbers, about 41 percent of Americans self-identify as conservative, versus 36 percent as

moderate and 21 percent as liberal. This strikes Brooks as a bit of a puzzle, since the financial crisis and the economic downturn would seem to support liberal beliefs in some ways. Brooks's answer: "Americans may agree with liberal diagnoses, but they don't trust the instrument the Democrats use to solve problems. They don't trust the federal government. A few decades ago they did, but now they don't. Roughly 10 percent of Americans trust government to do the right thing most of the time, according to an October *New York Times*, CBS News poll."

Brooks goes on to speculate about the basis for that distrust: "Why don't Americans trust their government? It's not because they dislike individual programs like Medicare. It's more likely because they think the whole system is rigged. Or to put it in the economists' language, they believe the government has been captured by rent-seekers."

This all sounds very familiar. It's essentially the basis of the current critique of copyright law: that Congress has become beholden to a few stakeholders, and, as a result, modern copyright law has become unmoored from any legitimate purpose and now simply apports rents to favored dinosaur industries.

But even that description of the situation is not dark enough. The pessimism, in copyright as well as politics generally, extends to the judicial branch as well. The Supreme Court, along with conservatives, has essentially given up on the courts and lawsuits as an instrument for civil justice. I think this is what explains the sharp turn in recent years away from discovery as the fire in which the truth proves its mettle, away from class actions, toward summary judgment, away from jury control over punitive damages, away from lawsuits generally and toward arbitration at every opportunity. Think of the rhetoric in favor of "tort reform"—limiting tort lawsuits and especially placing damage caps on actions, for example, for grievous injuries caused by negligence. The very idea of letting negligence determinations go to the jury—once a core function of juries—strikes many as intolerable. Tort lawsuits are said to be out of control, with liability highly unpredictable, and unreasonable, eye-popping damage awards that create a chilling effect that acts as a drag on innovation, supported only by a highly influential lobby that controls the relevant legislatures. Only the lawyers win. There's considerable skepticism in the tort reform rhetoric about the plaintiffs, too—who are these complainers? Why can't they just suck up the trivial misfortunes that come their way?

Concerns about copyright lawsuits are similar, which is a bit surprising, since most copyright critics are probably politically liberal. The law is said to be hopelessly nebulous, plaintiffs are out of control, the potential damages are huge, and even the faintest threat of a suit chills innovation and drags down individuals and businesses. There is no longer faith that judges and juries will sort the good cases from the bad at a reasonable price. And even if they could, the plaintiffs are looked at askance, as not really suffering an injury worth remedying at any non-trivial investment of time and resources.

Part of the common theme here is, I think, part of the long-term trend away from the common law in American jurisprudence. Once, a hundred years ago, nearly all of the law in its everyday application was non-statutory—entirely accreted from judicial opinions over the centuries, without any basis in statutes. Even where there were statutes, judges felt free to add to them with doctrines of their own making—fair use and secondary liability in copyright law are well-known examples. Indeed, much of the doctrine we have in copyright law was built during this era—substantial similarity, the idea/expression distinction, merger and *scènes à faire*—which explains copyright's different feel from patent law, which was statutorily codified in 1952 in a way that did not simply preserve the judicially developed doctrines that came before.

Copyright, like tort, is to a large extent a common law subject, and the zeitgeist is moving steadily away from courts as the locus of law's development—or, really, of any legitimate decision-making control over the law at all, beyond mere application. This trend is exemplified by the Supreme Court confirmation hearings in which nominees from both parties describe the enterprise of judging as more or less a routine application of existing law to facts. For whatever reason, nebulosity and uncertainty—in tort law, in litigation costs, in copyright—are becoming less tolerable, and the practice of legislatures of kicking key legal determinations to judges or juries is getting viewed with more and more suspicion and anger. I think that's a long-term problem, however, as the idea of being able to regulate conduct through the operation of some sort of fully specified, easy-to-apply set of rules identified in advance is just as unachievable now as it was when H.L.A. Hart made fun of it in *The Concept of Law* in 1961. ■

