THE NEW U.S. SUPREME COURT - LEADER OF THE NATION'S LEGAL PROFESSION OR JUST A MERE PHILOSOPHICAL ADVISORY BOARD

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Is the U.S. Supreme Court what it purports to be, or as a matter of substance if not form, has it become something else? Is it in fact substantively the "Supreme Court" of the United States? Does it decide cases, interpret the law, lay down the law, and issue legal dictates that are then complied with by State Supreme Court Justices, Federal Judges, trial court Judges, lawyers, legislators, law enforcement personnel and the general citizenry?

Or alternatively, has the Supreme Court become just a bunch of nice guys and gals who get together and engage in stimulating intellectual discussion similar to how people do at a family dinner table or a Friday happy hour. Do they then write a bunch of interesting, but essentially meaningless opinions under the misguided belief that what they say really means something, or that anybody will really do what they say?

This article asserts the Supreme Court is somewhere in between the two characterizations and moving toward the latter. For the most part, in many legal matters, Judges and law enforcement personnel probably do give some consideration to what the Supreme Court writes, although they certainly do not allow the Court's opinions to dictate their conduct entirely. Furthermore, there are certain narrow areas of the law such as the State Bar admissions process in which U.S. Supreme Court opinions are blatantly violated by State Supreme Court Justices on a regular and pervasive basis.

Before demonstrating how U.S. Supreme Court opinions are given short shrift it is important to note that the impact of State Supreme Courts failing to comply with U.S. Supreme Court opinions communicates a strong message to lower courts. It conveys a message that if the State Supreme Court can violate U.S. Supreme Court opinions, there is no reason for lower Courts to comply with State Supreme Court opinions. Lower court Judges, like children who watch their parents, see what's going on above them. They will assume the same prerogative as their superiors even if told to conduct themselves differently. They will act as those who regulate their conduct act, rather than as they are told to do. Just like a child who watches their parents do one thing and then tells them to do another. The speech takes a back seat to the conduct observed.

Attorneys then tend to assume the same prerogative and function with the understanding that they can get away with violating trial court rulings. It seems to make sense that if lower court Judges can get away with impunity when they violate appellate court holdings, then lawyers may expect impunity when they violate trial court rulings. Ultimately, the matter filters all the way down to the members of the general public. Citizens come to understand that there really is no steadfast rule of law for them to rely upon because they see the Judges and attorneys violating the written law.

Each person can then be expected to regulate their own conduct as they deem appropriate. The failure of State Supreme Court Justices to comply with the letter and spirit of U.S. Supreme Court opinions is causing a general deterioration of the rule of law in this nation on a wide-scale basis. At this stage, most intelligent people realize that to Judges and lawyers, the written law has become substantively a presentation of "good suggestions" that each gives consideration to complying with. Not much more. This carries with it the corollary rule that for "good cause" Judges and lawyers will often violate the written law. The phrase "good cause" is of course, subject to their own personal interpretation.

With the foregoing in mind, I present now a few of the most blatant, systemic violations of the express language or spirit and intent of U.S. Supreme Court opinions. These violations of the law by State Courts pertain to the State Bar admissions process and Unauthorized Practice of Law prohibitions. First, there is the U.S. Supreme Court's opinion in the Schware case discussed originally in the first part of this book on pages 195 - 196. The Court wrote:

> "A state can require high standards of qualification . . . but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . .
> . . .
> The mere fact that a man has been arrested has **very little, if any**, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." [1]

A fair reading of the above passage would lead any rational individual to conclude that in the absence of a criminal conviction, the Court is asserting the mere fact a Bar Applicant has been arrested, has "**very little, if any**" probative value in determining whether he engaged in misconduct. That is what the express words of the opinion state. The inferential spirit is that since an "arrest" not resulting in a criminal conviction has "very little, if any" probative value;

then State Supreme Courts should not deny admission to the Bar based on an arrest.

Whether State Supreme Courts agree or disagree with what the U.S. Supreme Court wrote in Schware is irrelevant to the same extent it is irrelevant as to whether citizens agree or disagree with a particular law. Maybe you think the U.S. Supreme Court was wrong, and maybe you think they were right. Regardless of an individual's personal opinion, if we are to have a uniform rule of law it has to be followed by everyone. This includes most particularly State Supreme Court Justices and State Bars. It is untenable for State Bars and State Supreme Courts to deny admission simply based on arrests, when the U.S. Supreme Court has issued a strong opinion manifesting a condemnation of such.

Yet, as indicated in the Bar admission cases on pages 250 - 588 in the first part of this book, Applicants are regularly denied admission specifically due to an arrest. Currently, to my knowledge every single State Bar application inquires whether an Applicant has been arrested. That is wrong. If an arrest is not a valid ground for denial of admission based on Schware, an inquiry about arrests should not be on the application. Such an inquiry violates the spirit and intent of Schware.

Admittedly, the U.S. Supreme Court did not expressly mandate removal of the arrest question from State Bar applications. However, if an arrest is of "very little" probative value, and may not be of "any" probative value, compliance with the SPIRIT of the opinion mandates State Supreme Courts treat "mere arrests" as being of "very little, if any" probative value. The operative term used is SPIRIT.

There is a difference between the express mandate of a U.S. Supreme Court opinion and its SPIRIT. The express mandate determines precisely and exactly what is to occur. The SPIRIT however, is not an express mandate. Rather instead, the "SPIRIT of the Laws" determines the manner in which a rational individual should conduct himself based on the opinion taken as a whole. The notion of laws having a SPIRIT was expounded in the historic work "The SPIRIT of the Laws" written by the philosopher Montesquieu.

In Schware, any fair and rational reading of the express language in the opinion confirms that arrests must be treated as having "very little, if any" probative value. Yet, State Supreme Courts consistently decline to treat arrests as having "very little, if any" probative value. Their repugnant refusal to comply with Schware is manifested in their continuous treatment of arrests as having extremely high probative value. State Supreme Court bar admission opinions are replete with extensive and detailed analysis of arrests that did not result in a criminal conviction.

It is highly inappropriate for State Supreme Courts to decide whether an arrest not resulting in a criminal conviction, should be given close and piercing examination. The U.S. Supreme Court has already decided that issue. Rather instead, if citizens are to be expected to comply with the written law then State Supreme Court Justices need to become amenable to complying with both the express mandate and SPIRIT of U.S. Supreme Court opinions. Since they do not do so, they require an appropriate attitude adjustment.

Like any person who violates the law, State Supreme Courts try to justify their noncompliance. Their manipulative and logically infirm scheme to justify noncompliance of Schware is fairly well laid out in the Oregon case, Application of Taylor, 647 P2d 462 (1982). For the most part, this case presents the strategic course that State Supreme Courts have adopted to evade and frustrate Schware. In Taylor, the Oregon Supreme Court cites the Schware statement holding that arrests have "very little, if any" probative value. However, the Oregon Court then holds that dismissal of a charge after arrest does not preclude inquiry into whether an offense was committed. This deceptive manipulation resultantly opens the door for the State Bar to investigate underlying facts surrounding the arrest.

The obvious infirmities of logic associated with this convoluted theory are multiple. First, it results in State Bars determining innocence or guilt with respect to dismissed criminal charges. The impact is that the well-accepted doctrine that a person is "innocent until proven guilty" is totally demolished. Second, if the State Bar examines the facts and then concludes the offense was committed, they are inescapably also concluding that the Court which, dismissed the charge let a guilty man go free. This effectively undermines faith and confidence in the legal system. Third, by independently examining facts surrounding a mere arrest the State Bar is treating disclosure of the arrest as being of "highly probative" value. Otherwise, why would they ask? Since the Bar's determination of whether an offense was committed relies on an examination of the facts surrounding the arrest, which can only occur by an Applicant's disclosure of the arrest, it is irrefutable they are treating arrests as having highly probative value. This violates Schware's express mandate that mere arrests are of "very little, if any" probative value.

An interesting case on this issue is Louisiana State Supreme Court case No. 06-0B-0136 (2007). The Court's opinion is interesting, not for what it says, but for what it doesn't say. The Applicant was denied admission based on five arrests for driving while intoxicated. The Court's opinion does not mention any criminal conviction resulting from any of the arrests. The opinion also does not mention anything about the underlying facts of any of the arrests. Stated simply, in this most recent case, the Louisiana State Supreme Court didn't even adopt the

Oregon Court's "underlying facts" theory. Rather instead, the so-called opinion (if it can even be called an "Opinion") is about one page and just denies admission based upon five arrests.

There is another part of the Schware opinion equally significant to the arrest issue. Schware was decided in 1957 before the advent of the doctrine of Intermediate Constitutional Scrutiny. In addition, it was decided before the scope of Strict Scrutiny was expanded beyond race to include fundamental constitutional rights. As a result, the constitutional standard adopted in Schware for assessing Bar admission standards was understandably the lowest level of scrutiny, which is Rational Basis Scrutiny. The Court wrote (emphasis added):

> "A state can require high standards of qualification . . . but any qualification **must have a rational connection with the applicant's fitness or capacity to practice law**" [2]

Unsurprisingly, while State Supreme Courts tend to ignore the importance of Schware's holding about arrests because it limits State Bar power, they consistently emphasize the Schware statement indicating Rational Basis Scrutiny is appropriate. The reason is because that part of the Court's opinion appears to provide them with expansive discretion to render arbitrary decisions. By their interpretation it gives them precisely what they seek. Thus, what State Supreme Courts have done is to pick and choose those parts of Schware they like because it furthers their interests, and then ignore the parts they don't like. This communicates an incredibly disturbing message to the citizenry. It conveys a message that we should comply with those laws we like and approve of, and then use semantics and twisted logical reasoning to ignore those laws we don't like or which don't suit us.

Interestingly, the same State Supreme Courts that manipulatively contort the meaning of U.S. Supreme Court opinions to augment their self-interest, hypocritically assert without hesitation that their own opinions must be complied with both as to the express holdings and intent. Trial court Judges typically follow the same modus operandi. It is fair to say that when a litigant accused of violating a Court Order presents sophistical logical arguments they do not make out particularly well and are often held in Contempt by the Court. Yet, they are really just doing the exact same thing that State Supreme Court Justices do, to evade holdings of the U.S. Supreme Court. Trial court Judges constantly tell such litigants that they are being manipulative, deceptive and irrational by the manner in which they are interpreting the court's orders. Thus, the adopted rule

is as follows. Judges can be manipulative, deceptive and irrational when assessing opinions of courts that are above them, but litigants are precluded from using the same tactics. As the comedian George Carlin once said, "Pretty good deal, huh? How did it come about? We made the whole F---ing thing up!"

I turn now to a Second systemic example of State Supreme Court Justices violating the SPIRIT of a U.S. Supreme Court opinion. In the Konigsberg case discussed originally in the first part of this book on page 197 - 198, the U.S. Supreme Court wrote the following landmark statement regarding the so-called good moral character standard of admission (emphasis added):

> "Such a **vague qualification**, which is easily adapted to fit personal views and predilections, can be a **dangerous instrument** for **arbitrary and discriminatory** denial of the right to practice law." [3]

A rational reader of the foregoing statement would interpret it to mean three things based on its express language. First, the "good moral character" standard is a "vague qualification." Second, it can be a "dangerous instrument." Third, it can easily be used to effectuate the "arbitrary and discriminatory denial" of the right to practice law. These three express dictates considered in conjunction with each other indicate the Court is communicating a strong message to State Bars. The message is that utilization of the good moral character standard should be used extremely carefully and circumspectly, and not recklessly. The SPIRIT of the statement is that the standard should not be applied to deny an Applicant admission based simply on whether State Bar admission committee members like or dislike the Applicant. Yet, as indicated by the vast array of cases presented on pages 250 - 588 of the first part of this book, that is precisely what is occurring.

Essentially, there is virtually no reasonable restraint exercised during the investigative process by State Bars. The Bars ask about whatever they feel like asking on their applications. They then claim a virtually unlimited right to expand their investigation into the most personal aspects of an individual's life. Consider the following statement made by the Georgia Supreme Court in 282 S.E. 2d 298 (1981), discussed on page 337 of the first part of this book:

> "A hearing to determine character and fitness should be more of a mutual inquiry for the purpose of acquainting the court with the applicant's **innermost feelings and personal views** on those aspects of morality, attention to duty, forthrightness and self-restraint which are usually associated with the accepted definition of "good moral character." [4]

When you read such an incredulous statement by the Georgia Supreme Court you almost can't help but to conclude that when confronted by the express language in Konigsberg about the dangers of moral character assessment, the Georgia Supreme Court Justices simply said something like this to each other:

> "Wow. That's really good stuff. Now throw that Shit away, so we can get down to business and do whatever the Hell we want."

Then, once you realize that the foregoing was the SPIRIT adopted by the Georgia Supreme Court regarding U.S. Supreme Court opinions, you can't help but conclude to yourself:

> "Well, if the Georgia Supreme Court is going to treat U.S. Supreme Court opinions like such crap, then from now on I'm not going to give two craps about complying with what the Georgia Supreme Court says."

The foregoing would not only be a rational assessment by the citizenry, but also by lower court Judges in Georgia. Thus, it is easy to see how, the Georgia Supreme Court's disdainful treatment of the U.S. Supreme Court can be anticipated to lead to diminishment in respect for the rule of law by everyone. Such occurs nationwide precisely as a result of morally reprehensible conduct by those sworn to uphold the law in the highest Courts of each State.

This brings me to the "Catch-All" question, which has been added to numerous State Bar applications over the last several years. The "Catch-All" question typically makes a written inquiry as follows:

> "If there is any information (event, incidence, occurrence, etc) in your life that was not specifically addressed and/or asked of you in the application and/or in the instructions that could be considered a character issue, you are required to provide a detailed explanation for each event, incident/occurrence."

The foregoing inquiry is known in technical legal terms as "Crap." The question is totally vague. There is absolutely no way for any person to be assured they are answering it completely and honestly. The question is nothing more than a Trap for the public set by State Bar Hunters. The average rational individual would not have the slightest idea after reading the question as to what they must disclose. The inherent legal and moral infirmity of this type of question is discussed in greater detail on pages 33 - 34 of the first part of this

book. For purposes of this Supplement however, the interesting thing is what has occurred since 2002, when my book was first published. More and more State Bars that previously had abandoned using this type of question in the early 1970s have reverted back to using it again. That is an extremely disturbing trend. For purposes of this article, consider the nature of the "Catch-All" question in light of the U.S. Supreme Court's opinion in Shuttlesworth v City of Birmingham, 394 U.S. 147 (1969) where the Court wrote:

> ". . . the ambit of the many decisions of this Court over the last 30 years holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, **without narrow, objective, and definite standards** to guide the licensing authority is unconstitutional." [5]

This is a Third example of systemic maltreatment of U.S. Supreme Court authority by State Supreme Court Justices. The Catch-All question is neither narrow or objective. It is wholly indefinite, completely vague and nothing more than a wide subjective snare. Yet, State Bars with the blessing of their immoral State Supreme Court Justices, unhesitatingly use it. To them, it is just as if Shuttlesworth (or the many other cases cited in the Shuttlesworth opinion) didn't even exist. Shuttlesworth is literally being treated as nonexistent by State Supreme Courts. The disgracefully immoral treatment of Shuttlesworth by State Supreme Court Justices is positively the equivalent of a citizen upon being accused of violating a State statute responding as follows to the trial court:

> "Well yeah Your Honor, I violated the statute. But come on now, that thing doesn't apply to me. That's for everybody else. You didn't really think the law regulated my conduct in any manner did you Judge?"

A Fourth example of arrogant, immoral disobedience by State Supreme Court Justices of U.S. Supreme Court opinions concerns the issue of bankruptcies by State Bar Applicants pursuant to the Bankruptcy Act. In Perez v Campbell, 402 U.S. 637 (1971) the U.S. Supreme Court wrote quite strongly as follows (emphasis added):

> "Turning to the federal statute, the construction of the Bankruptcy Act is similarly clear. **This Court on numerous occasions** has stated that **"one of the primary purposes** of the bankruptcy act" **is to give debtors "a new opportunity in life and a clear field** for future effort**, unhampered by the pressure and discouragement of preexisting debt**." . . .
> **. . .**

> **. . .** We can no longer adhere to the **aberrational doctrine . . . that state law may frustrate the operation of federal law** as long as the state legislation in passing its law had some purpose in mind other than one of frustration. . . . such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy . . . . any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." [6]

The foregoing contains pretty strong language. The Court states in unequivocal terms that on "numerous occasions" it has held that one of the primary purposes of the Bankruptcy Act is give an individual a "clear field" that is "unhampered." The Court also stated unequivocally that it is not going to buy into any purported or alleged purposes adopted by State legislatures that frustrate the Bankruptcy Act. Yet, that is precisely what virtually all State Supreme Courts have done a wide-scale basis with respect to Bar Applicants. State Supreme Courts nullified Perez with respect to Bar Applicants by adopting the sophistical trickery outlined in the Minnesota case of In Re Application of Gahan, 279 NW 2d 826 (1979). In that case the Minnesota State Supreme Court abrogated its duty to uphold Federal law by writing:

> "**The fact of filing bankruptcy . . . cannot be a basis for denial of admission** to the bar of the State of Minnesota. **Any refusal so grounded would violate the Supremacy Clause of the United States Constitution** since applicable Federal law clearly prohibits such as result. . . .
> **. . .**
> **However, these constitutional limitations do not preclude a court from inquiring into the bar applicant's responsibility or moral character in financial matters**. The inquiry is impermissible only when the fact of bankruptcy is labeled "immoral" or "irresponsible," and admission is denied for that reason. . . . Thus, in the present case, Gahan's conduct . . . surrounding his financial responsibility and his default on the student loans may be considered to Judge his moral character. However, the fact of his bankruptcy may not be considered. . . ." [7]

The foregoing lame logic is essentially the theory that Supreme Courts throughout the nation have adopted to justify their immoral disobedience of Perez. I reiterate that the U.S. Supreme Court stated in Perez:

> "This Court on numerous occasions has stated that "one of the primary purposes of the bankruptcy act" is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." [8]

By requiring disclosure of bankruptcy on the Bar application, or by giving consideration to debts discharged in the bankruptcy, it is logically irrefutable that the debtor is not getting "a new opportunity in life and a clear field." The exact reverse is occurring. They are being penalized for their bankruptcy by denial of admission to the State Bar. Notably, the U.S. Supreme Court pointed out in Perez that its holding had been stated on "numerous occasions." Also notably, this issue is not one exemplifying a mere of violation of the SPIRIT of the Laws, but instead constitutes an overt, blatant violation of an express judicial holding by the U.S. Supreme Court.

The Fifth example of a systemic breakdown in the rule of law propagated by State Supreme Court Justices involves Unauthorized Practice of Law prohibitions, discussed on pages 35 - 42 of the first part of this book. UPL prohibitions are universally recognized by rational individuals as functioning in the current legal environment primarily to benefit self-serving economic interests of lawyers. Any incidental protection provided to the general public has regrettably become nothing more than a secondary effect to the extent UPL prohibitions are reasonable.

In South Carolina v McLauren, 563 SE 2d 346 (2002) the South Carolina State Supreme Court ruled it was the unauthorized practice of law for a prison inmate to help other inmates prepare applications for post-conviction relief. This was despite the fact the inmate was not paid for his work and never appeared in court on behalf of the prisoners he helped. The South Carolina Justices then affirmed the three-year prison sentence he received from the trial court for engaging in the unauthorized practice of law. He was a guy just trying to help out his fellow man for free and was sentenced to three years in prison for violating the UPL statute. The purpose of his prison sentence as it pertains to the unauthorized practice of law was to penalize him, for the purpose of safeguarding and promoting the monetary interests of South Carolina lawyers. Nothing more.

The McLauren case reflects adversely upon the moral character of South Carolina Supreme Court Justices when considered in light of U.S. Supreme Court opinions in Johnson v Avery, 393 U.S. 483 (1969) and Bounds v Smith, 430 U.S. 817 (1977). Johnson expressly held that unless the State provides some reasonable alternative to assist inmates in the preparation of post-conviction petitions for relief, it may not validly enforce a regulation barring inmates from furnishing assistance to other prisoners. The limitation of Johnson was conditioned upon the premise "unless the State provides some reasonable alternative." Subsequently, the holding of Johnson was explained further by the U.S. Supreme Court in Bounds where the Court wrote:

> "Since these inmates were unable to present their own claims in writing to the courts, we held that their "constitutional right to help" . . . required at least allowing assistance from their literate fellows. But, in so holding, **we did not attempt to set forth the full breadth of the right of access.** . . .
> . . .
> Moreover, our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." [9]

Although the condition set forth in Johnson for the State to provide alternative means of assistance appears to remain intact even after Bounds, the Court also stated in Bounds that Johnson did not "set forth the full breadth of the right of access." The door was thus left open for holding in the future that prisoners have a constitutional right to provide legal assistance to their fellow prisoners, even if the State does in fact offer alternative means for such legal assistance.

The general SPIRIT of Bounds and Johnson is that the emphasis is on ensuring meaningful access to legal assistance for prisoners. The very essence of Johnson is that the provision of legal assistance by prisoners to their fellow man is often a good thing, not a bad thing. In neither opinion did the U.S. Supreme Court even faintly envision the prospect that their holding would become so perverted so as to treat provision of such free legal assistance by a prisoner as a Felony.

The South Carolina Supreme Court in McLauren turned the SPIRIT of Bounds and Johnson on its head. McLauren did not merely deny the right of one prisoner to help another relying on the limitation set forth in Johnson, by asserting that the State provided adequate alternative means of legal assistance. That would have at least been understandable. Instead, the South Carolina Supreme Court treated the provision of free legal assistance by one prisoner to another as a Felony. It was an absolute Spit in the face to the SPIRIT of Johnson and Bounds. Notably, the McLauren Court did not even address the issue of whether South Carolina provided adequate alternative means of legal assistance, as even Johnson's limitation required. In fact, the South Carolina Supreme Court didn't even have the guts to mention the Johnson case at all. As is often typical of State Supreme Court Justices, they preferred to just ignore the U.S. Supreme Court.

In rare instances, State Supreme Courts are not simply content to violate U.S. Supreme Court opinions, but instead prefer to flaunt their disobedience. It's like a teenager asserting himself. They don't just want to break the law, but also want everyone to know they did so. When such occurs, they are seeking to

establish as case precedent their practical ability to disobey U.S. Supreme Court authority. The following quote by the Oregon Supreme Court is a good example:

> "Thus, we are neither bound nor relieved of our own duty in the matter by the United States Supreme Court's prior estimation of the proper ethical course of action. . . ." [10]
>
> State v Balfour, 311 Or. 434 (1991)

Concededly, overt statements of defiance such as this one made by the Oregon Supreme Court are quite rare, as they are not particularly prudent. More often State Supreme Courts avoid direct confrontation with the U.S. Supreme Court and rely instead on their time-honored judicial practices of engaging in a sophistical manipulative twisting of logic and semantics. Like most teenagers they prefer to sneak out of the house to go to a party, rather than overtly disobey their parents.

The five examples set forth above demonstrate that in the narrow area of the law most affecting self-serving interests of State Supreme Courts, the opinions of the U.S. Supreme Court are violated on a regular, pervasive and systematic basis. The three issues I consider now are First, why is this occurring; Second, what can the U.S. Supreme Court do about it; and Third, what will happen if this devolution of the rule of law by State Supreme Court Justices continues?

As to the First issue, the reason U.S. Supreme Court opinions are disobeyed by State Supreme Court Justices is largely attributable to the element of Fear. Stated simply, the U.S. Supreme Court is afraid to assert its authority over State Supreme Courts. Their Fear is quite well warranted. No one likes being told what to do. This is particularly the case when they believe they are right and I do not dispute that State Supreme Courts believe they are right, even if for the purpose of promoting their own self-interest.

Like anyone else with a rebellious tendency against proper legal authority, State Supreme Court Justices can be expected to respond offensively if relegated to their proper role of subservience to the U.S. Supreme Court. Whenever people are told what to do there is a natural inclination to oppose the authority attempting to regulate their wrongful, immoral conduct. Thus, the more the U.S. Supreme Court tries to ensure compliance with the law by State Supreme Courts, the greater is the likelihood of inviting opposition from those Courts.

Basic arithmetic plays a major role. The U.S. Supreme Court is comprised of nine Justices. The State Supreme Courts together are comprised of roughly 400 Justices. That's 400 against 9. In addition, the U.S. Supreme Court

has historically faced significant opposition to its authority from the Executive branch of government, which also tends to do as it pleases. Then there is the constant friction between Congress and the Court. Then pile on the fact that the Court itself has been a fractured and divided institution for the last few decades. This is evidenced by the multiplicity of 5-4 opinions rendering it difficult to conceive what the Court's genuine position really is on any given issue. Next, you need to consider the media and general public. Neither the media nor the public, provide much support to the Court.

All of the above considered in conjunction with each other lead to the fact that the U.S. Supreme Court for the most part has nowhere to turn and is understandably afraid. They deal with their fear by declining to take decisive authoritative steps to ensure their opinions are complied with by State Supreme Courts. Instead, they retreat into a submissive condition of being satisfied, so long as State Courts just decline to openly flaunt their disobedience. An unwritten gentleman's agreement has thus developed between the U.S. Supreme Court and State Supreme Courts. That understanding is predicated upon State Supreme Courts giving "lip-service" compliance to U.S. Supreme Court opinions as a matter of form, which for the most part they do. In exchange, State Supreme Courts are then allowed to frustrate the express mandates and SPIRIT of U.S. Supreme Court opinions so long as they make the effort to justify their disobedience with a manipulative crafting of logic.

In the historic work Leviathan published in 1651, during a period of immense friction between the British Parliament and Monarchy, Thomas Hobbes asserted many flawed propositions about government. The primary reason he did this was to promote his own self-serving interests consisting of improving his own standing and position with the existing monarchy. Nevertheless, Hobbes did expound some merit-worthy concepts in that work. For instance, applying his work to the modern world, he captured perfectly the manner in which State Supreme Courts have succeeded in achieving a tacit acceptance of their disobedience of U.S. Supreme Court opinions. That manner is as follows.

Hobbes asserted that men are prone to violate laws in three ways. First, by a presumption of false principles. Second, by false teachers who misinterpret the laws. And third, by erroneous inferences from true principles. That is essentially what the State Supreme Courts are doing. They're taking U.S. Supreme Court opinions and manipulatively twisting them in order to meet their own self-serving needs, interests and opinions. They presume false principles and combine such with erroneous inferences from true principles in order to justify their goal of misinterpreting the laws.

As stated, instances of State Supreme Courts expressly flaunting their disobedience of U.S. Supreme Court opinions such as in the Oregon Balfour case, are quite rare. In contrast, the standard accepted modus operandi is the type of defiance exemplified by In Re Application of Gahan, 279 NW 2d 826 (1979). In that case, the Minnesota Supreme Court made a disingenuous facial effort to justify obvious noncompliance with the law and abandonment of their duty to uphold Federal law. However, at no time did the Minnesota Supreme Court expressly state, "we're not going to comply with the U.S. Supreme Court's opinion in Perez" even though that was the precise substantive impact of what they did.

Another facet of this gentleman's agreement entails reluctance on the part of State Supreme Courts to disobey opinions written by current sitting Justices of the Court. This premise relies on the expectation that current U.S. Supreme Court Justices will be less offended when opinions written by U.S. Supreme Court Justices who are no longer on the bench are violated, than when their own opinions are disobeyed. It is obviously less personally offensive for a State Supreme Court to disobey what a U.S. Supreme Court Justice wrote 40 years ago, than it is for them to disobey one of the current sitting Justices. That is basic human nature. Of course, the concept has the impact of turning Stare Decisis on its head, because that judicial doctrine is purportedly predicated upon giving greater, not lesser credence to long-lasting judicial opinions.

Stare Decisis supposedly relies on the theory that the longer a case has been in existence without having been overruled, the greater is its legitimacy. For instance, the historic case of Marbury v Madison has been valid law for over 200 years. As a result, for the most part it is no longer challenged by anyone. The problem is that when State Supreme Court Justices have an increased propensity to disobey U.S. Supreme Court opinions written in the 1960s and 1970s, but exercise restraint in disobeying recent opinions they are diametrically reversing a major principle of Stare Decisis.

The impact is that recent U.S. Supreme Court opinions are embodied with greater authoritative weight than opinions, which have been in existence for decades. Older judicial opinions then have minimal authoritative weight and may be freely violated. The prime example is Shuttlesworth, described previously. Shuttlesworth held that licensing standards, which do not contain narrow, objective and definite standards are unconstitutional. It has been in existence since 1969. Yet, for the most part, it is treated as an opinion that nobody has an obligation to comply with. It is violated so pervasively on so many different levels. Shuttlesworth, although never overruled by the U.S. Supreme Court, as a matter of substance has been overruled by State Supreme

Court Justices simply by virtue of their massive disobedience to its dictates. That's a major power grab.

The ultimate impact of the U.S. Supreme Court's decision to not exercise its authority as a result of its Fear of opposition from State Supreme Courts, is a divestment of its power. Undoubtedly, judicial power should be used sparingly in order to maintain maximum effectiveness when it is used. However, there is a converse to this well-accepted maxim. That converse is that a power never used ultimately lapses into nonexistence by its nonuse. This is what has been in the process of occurring to U.S. Supreme Court authority for the last several decades.

In the last ten years, their have been several cases where the U.S. Supreme Court denied review in highly publicized cases, that dealt with incredibly important constitutional issues. I am sensitive to the difficulties the Justices face in deciding, which cases to grant review. But, there are certain times when you just get a sense that the reason review was denied was because they were simply too afraid of dealing with the issue. Such fear is not without justification. We all tend to be reluctant to deal with various issues in our lives because we are afraid of them. And when it comes right down to it, Justices of the U.S. Supreme Court are people. They have likes, dislikes, emotions, attitudes, positive personality traits, and negative personality traits just like everyone else. Just like a lawyer does not check his First Amendment rights at the State Bar door when he becomes a lawyer; a Judge does not check his humanity, personal feelings, or personal fears at the bench when he becomes a Judge.

There are three cases I've selected to briefly address, in which the U.S. Supreme Court irrefutably should have granted review and failed to do so out of nothing more than fear. Regardless of whether you believe the lower courts should have ruled as they did, these cases, positively should have been reviewed by the U.S. Supreme Court. I further submit the reason they declined to grant review was a result of their fear. The three cases are the reprimand of Michigan attorney Geoffrey Fieger; the Terry Schiavo case, and the Disbarment case of F. Lee Bailey. While I don't intend to get too deeply into the facts of any, I will briefly comment on two and then comment a bit more in depth regarding the Fieger case, which I believe to be the most egregious denial of review.

First, F. Lee Bailey. The guy was an American icon. Some people hated him. Other people loved him. I render no opinion on that matter, but simply note he was positively the best-known lawyer in the entire nation during modern times. He won numerous criminal acquittals (whether justifiable or not). He was willing to spend some time in jail himself at an elderly age on a charge of contempt of court prior to his disbarment. Like or dislike him, support him or

not, the guy had guts and an unbelievable reputation from both a positive and negative perspective. He was probably the only lawyer in the nation who grammar school kids knew the name of. He may have embodied everything bad about the legal profession or what is good about the profession depending on your perspective. But the bottom line is, he did embody the legal profession. You just can't disbar the most well known lawyer in the country without the U.S. Supreme Court addressing the matter.

A key facet of Bailey's disbarment was related to his acceptance of payment from a client whose money the government claimed was tainted. Yet, after he was disbarred, the New York Times reported that a Federal District Court Judge threw out $5 million in penalties that had been assessed against Bailey. The same Court also ruled that Bailey did nothing wrong when he accepted payment from the client whose money the government claimed was tainted. Thus, he was apparently cleared with respect to the main issue leading to his disbarment. The U.S. Supreme Court definitely should have granted review in his disbarment case.

Second, the Terry Schiavo case. The entire nation was as entranced and captivated by the Schiavo case, as they were by the 2000 presidential election. It involved conflicts between state and Federal judicial power, as well as conflicts between judicial and legislative power. Both Federal and State laws were enacted and then struck down by Courts specifically and precisely because of her. That's virtually unheard of. The legal issue dealt with the right to continue or discontinue life support of an individual and is one of monumental national importance. The case was all over the media. When you have a case getting so much publicity that it entrances the entire nation, involving significant legal issues pertaining to the powers and limitations of branches of government, calling into play the entire scheme of Federal versus State legal authority, and also addressing the immensely important legal issue of life support, it is my opinion the U.S. Supreme Court had an obligation to the general public to accept its responsibility to sort the mess out. Once again, I submit the reason they did not do so was a product of fear. Stated simply, denying review was the easy way out.

One of the most interesting aspects of the Schiavo case was what happened to Congressional House Majority Leader Tom DeLay as a result of it. I'm really not a fan of the guy, particularly considering the fact that I'm a registered Democrat. Nevertheless, the bottom line is that the collapse of his political career had nothing to do with the ostensible issue of funneling political campaign contributions. Tom Delay's political career was ended because he made the following public statement about the Schiavo case during the height of national emotion on the issue:

> "The time will come for the men responsible for this <Judges> to answer for their behavior. . . . <We need to> look at an arrogant, out-of-control, unaccountable Judiciary that thumbed their nose at Congress and the president." [11]

I still vividly recall thinking to myself when Tom Delay made the above widely publicized statement, which was before he was prosecuted ostensibly on a political campaign contribution issue:

> "Well, that pretty much takes care of his political career. He's a political goner. You can criticize anybody except Judges. How could the guy not have known that? If you criticize Judges, you don't have a chance. They'll quickly find a way to get back at and take care of him."

Subsequent to my having the above thought, the allegation that Delay had funneled campaign contributions came up. Totally unrelated. I'm sure. Not a doubt in my mind about it. A blind man could have seen his prosecution coming a mile away, as soon as he made his statement about the Judiciary. And like I say, I don't even like or support the guy. But, I know a set-up and payback when I see one.

The third case is the reprimand of Michigan attorney, Geoffrey Fieger. The denial of review in this case really ticks me off more than the others because it doesn't even involve a close issue. Instead it involves an incontestable violation of the First Amendment by the Michigan Supreme Court due to personal political considerations of the individual Justices on that Court. In this case, the majority opinion of the Michigan State Supreme Court just basically said, "Screw the First Amendment. We're nailing this guy." This is what occurred.

In July, 2006 in a 4-3 opinion the Michigan Supreme Court reprimanded attorney Geoffrey Fieger for twice appearing on Detroit radio shows and calling State Court of Appeals Judges jackasses and other names. He also compared the Judges to Nazis. Fieger quite correctly maintained that his comments were protected by the First Amendment because they were made after the case was completed and not in a courtroom. The imposition of professional discipline upon him specifically for exercising his constitutional rights involved one of the most serious abridgements of the First Amendment I've ever seen. To uphold Fieger's reprimand essentially nullified the First Amendment.

The State Supreme Court opinion in the Fieger case is remarkable because the Justices in the opinion did to each other exactly what Fieger did on the radio

show. To say the Court's opinion was split would be a mild understatement. Instead, the 4-3 opinion exemplified State Supreme Court Justices being totally vicious to each other. The following are some examples from the opinion:

> "With her dissent, Justice Weaver completes a transformation begun five years ago, when all six of her colleagues voted not to renew her tenure as Chief Justice of this Court. This transformation is based neither on principle nor on "independent" views, but is rooted in personal resentment. This transformation culminates today in irresponsible and false charges that four of her colleagues are "biased and prejudiced" . . . Justice Weaver's personal agenda causes her to advance arguments . . . that would lead to nonsensical results . . .
> . . .
> . . . This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution. . . .
> . . .
> The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues." [12]
>
> **JUSTICES Clifford Taylor, Maura Corrigan, Robert Young, Stephen Markman**

Justice Weaver then writes as follows in her Dissent:

> "I write separately to dissent from the participation of Chief Justice Taylor and Justices Corriga, Young and Markman in this case.
>
> Statements made during their respective judicial campaigns displaying bias and prejudice against Mr. Fieger require . . . to recuse themselves from this case in which Mr. Fieger is himself a party. . . .
> . . .
>
> In their joint opinion, Chief Justice Taylor and Justices Corrigan, Young and Markman mischaracterize my dissent and motives. Further, their criticism and personal attacks in the joint opinion of the majority justices are misleading, inaccurate, irrational and irrelevant to the issues in this case. The majority appears to be attacking the messenger rather than addressing the genuine issue. . . ." [13]
>
> **JUSTICE Elizabeth Weaver**

The majority opinion of the Michigan Supreme Court was a shameful immoral violation of the First Amendment promulgated by a cabal of State Supreme Court Justices who apparently had records exemplifying the existence

of their bias and prejudice against Fieger during their own personal judicial campaigns. This assertion was clearly made by the dissenting State Supreme Court Justice. However, regardless of whether judicial bias was the driving force for the majority opinion, its holding positively violated the First Amendment. In addition, the vicious statements made by the Justices to each other, totally undermined the opinion's legitimacy. It was inexcusable for the U.S. Supreme Court to decline review in this case. It not only dealt with an issue of monumental importance, but in addition the State Supreme Court's opinion was a practical nullity because of the personal animosities between the Justices.

Notwithstanding the disgracefully pitiful nature of the Michigan Supreme Court's opinion in the Fieger case there is admittedly an amusing aspect about it. The Court reprimanded Fieger for being discourteous, but the Justices did the exact same thing to each other. Typically, the hypocrisy of judicial opinions is not quite so blatant. In this case, the hypocrisy was so blatant, that it was actually kind of funny.

Overall, the U.S. Supreme Court's trepidation of granting review in key cases involving the legal profession as a result of their fear of retribution from State Supreme Court Justices has had disturbing results. Lower courts, prosecutors and defense attorneys are starting to look at U.S. Supreme Court opinions as being primarily of advisory importance in their day-to-day activities. The prosecutors and defense attorneys are concerned only with what the trial court Judge thinks and pay minimal attention to Justices above the trial court. U.S. Supreme Court holdings on issues are starting to be viewed with a minimal degree of practical importance, since any of their opinions can be evaded through manipulation of logic. Attorneys have come to the realization that their only real professional responsibility is to comply with beliefs and local customs of judicial officials in their individual State, and most particularly the individual Judge they are in front of. They then leave it to State Supreme Court Justices to neutralize the U.S. Supreme Court. Concededly, that task is being accomplished quite effectively.

Thus, the failure of the U.S. Supreme Court to bravely and aggressively exercise its authority over the legal profession and State Supreme Court Justices is causing their power to increasingly move towards substantive nonexistence. As indicated in the first part of this book the last time the U.S. Supreme Court directly addressed the good moral character standard for bar admission was in 1971. It handed down three sharply split cases on the exact same day. It has now been almost 40 years since the Court addressed the issue. That is quite remarkable considering that the Court was so split on the issue in 1971 and no coherent stance was even adopted by the Court in the three opinions issued that day.

So essentially, you have a sharply divided U.S. Supreme Court that hasn't addressed the good moral character standard for Bar admissions in almost four decades out of fear, afraid of being opposed by State Supreme Courts, and receiving virtually no support from anyone. That is a major telegraph communication to State Supreme Court Justices. It conveys a message that they are basically free to do as they please and disobey U.S. Supreme Court opinions. Those State Supreme Court Justices, although immoral in many ways, are nevertheless smart enough to understand the vulnerability of the U.S. Supreme Court's political position and to capitalize on such.

Additionally, unlike the sharply disjointed U.S. Supreme Court, there is immense cohesiveness between State Supreme Court Justices of all the States. They have all as a matter of substance fully supported the disobedience of Schware, the Bankruptcy issue, Shuttlesworth, Konigsberg and UPL issues. They quite correctly consider themselves in possession of an absolute blank check to do whatever they please concerning matters affecting the legal profession. Why shouldn't they?

The U.S. Supreme Court has historically demonstrated a lack of ability to issue an understandable cohesive opinion on Bar admissions and also doesn't do anything when State Supreme Courts violate their opinions in other legal subject areas. The U.S. Supreme Court is tacitly moving towards acceptance of the fact that the best it can do is maintain a facade of authority. In this regard State Supreme Court Justices do their part encompassed within the gentlemen's agreement by at least humoring the U.S. Supreme Court and don't tend to flaunt their disobedience of Federal authority.

Of course, there is one rather significant catch to the foregoing. Or should I say "Catch-All" since that is the type of admission question the State Bars like to use. It is as follows. Although the U.S. Supreme Court has declined out of fear to actually exercise its authority to quell State Supreme Court disobedience of U.S. Supreme Court opinions, it has also quite astutely declined to give the irrational and cognitively deficient doctrines promulgated by State Supreme Courts their rubber stamp of approval. In fact, quite the reverse is true.

I have not come across one single U.S. Supreme Court opinion in the last 25 years that condones the arbitrary and capricious decision-making utilized by State Supreme Courts with respect to the Bar admissions process or Unauthorized Practice of Law prohibitions. Quite to the contrary, in Supreme Court of New Hampshire v Piper, 470 U.S. 274 (1985) the U.S. Supreme Court wrote (emphasis added):

> "The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "**fundamental right**." [14]

The impact of the foregoing statement was to set in place the precise, exact mechanism that would allow the U.S. Supreme Court to assume its proper role of control over the nation's legal profession. The reason is that it is now universally accepted that fundamental rights are subjected to Strict Scrutiny and not Rational Basis Scrutiny. Thus, at its leisure and discretion, the U.S. Supreme Court is now, and has been for more than two decades, perfectly poised to constitutionalize the Bar admissions process.

Arguably, before making its move, the U.S. Supreme Court may be strategically granting State Supreme Court Justices a wide realm of ability to engage in unconstitutional conduct with respect to Bar admission denials. This possible theory would be akin to the concept of "let them dig their political hole deeper and deeper, until they can't get out of it." Whether this is occurring or not, I am not entirely sure of. It is however, irrefutable that the U.S. Supreme Court has been declining to give State Supreme Courts the rubber stamp of approval they need to continue their unlawful practices. It is also irrefutable that the U.S. Supreme Court has concurrently set in place numerous opinions that establish a foundation of judicial precedent for them to assume the authority they have been denied. In turn, State Supreme Courts have given the U.S. Supreme Court ample justification to assume such power by their pervasive disobedience of U.S. Supreme Court opinions.

The open question is whether the U.S. Supreme Court will ever be able to summon the courage to take the risk of "stepping up to the plate" so to speak. Alternatively, it may just continue to defer to State Supreme Courts due to its concededly justifiable fear of State Supreme Court Justices. As stated, the State Supreme Courts are very well unified. The U.S. Supreme Court is not. It's my guess that if the U.S. Supreme Court grants review in a significant Bar admissions case and then issues a well-unified strong opinion, it will not be received particularly well by all 50 State Supreme Courts. If it's a splintered opinion, it won't stand a chance. Ultimately though, the U.S. Supreme Court like any person in life is going to have to make a decision. It will have to face its own moment of truth.

The U.S. Supreme Court is going to have to assume authority with respect to the legal profession to ensure State Supreme Court Justices comply with U.S. Supreme Court opinions. Or alternatively, the U.S. Supreme Court and general public will have to accept the fact that U.S. Supreme Court opinions really don't carry much authoritative weight, and can be disobeyed by State Supreme Court Justices by a simplistic manipulative use of semantics and legal sophistry.

I will say this though. As much as I'd like to see the U.S. Supreme Court take appropriate steps to educate State Supreme Court Justices about their duty to comply with the express mandate and SPIRIT of U.S. Supreme Court

opinions, if it decides to do so it better make damn sure the opinion is unified and decisive. One of those 5-4 fractured opinion deals just ain't gonna cut it. In such a sensitive subject area, a disjointed split opinion would probably make the authority of the U.S. Supreme Court ripe for finishing off by State Supreme Court Justices. If they can't take a definite and coherent stance on the issue (one way or the other I might add) then they'd be better off continuing to function from their current perspective of deferring to the State Supreme Courts out of fear.

Ultimately, the U.S. Supreme Court will either become the leader of the nation's legal profession or it will be relegated to nothing more than a mere philosophical advisory board by virtue of allowing its own power to lapse into practical nonexistence. A bunch of nice guys and gals who get together to engage in stimulating intellectual discussion similar to how other people do so at a dinner table or a Friday afternoon happy hour. This does not mean their opinions will ever become entirely worthless or totally ignored. People like me will probably still read them since they are enjoyable reading. Shuttlesworth and Schware are certainly entertaining to read. But, they're not worth much more than that anymore.

On November 13, 2006 the new Chief Justice of the U.S. Supreme Court John Roberts appeared on Nightline. The following exchange took place:

JAN GREENBURG (ABC NEWS): So, you can't tell Justice Scalia what to do?

CHIEF JUSTICE ROBERTS: I don't think anybody can tell Justice Scalia what to do. [15]

I actually like that theory. Although generally speaking, I consider myself a Warren Court liberal, I am wholly on board with Justice Scalia's theory as expressed by Chief Justice Roberts. I also like Scalia's writing style. He writes with acidic humor backed up by logic and law. He's also not as conservative as everyone thinks, particularly in the area of the First Amendment. I don't agree with a lot of his opinions, but I definitely love his writing style.

And it seems to me that if nobody can tell Justice Scalia what to do, then nobody can tell me what to do. Similarly as evidenced herein, State Supreme Court Justices throughout the nation have adopted the same approach. They've made it clear they're not going to be told what to do. Certainly, they've indicated in their opinions that they're not going to be told what to do by the U.S. Supreme Court.

So, notwithstanding my stern criticism of the approach to the rule of law adopted by immoral State Supreme Court Justices, we all appear to currently

have some common ground. Nobody's going to tell Justice Scalia what to do. Nobody's going to tell State Supreme Court Justices what to do. And nobody's going to tell me what to do. It's always nice when people on opposing sides of an issue find some points of common ground. Of course, if the U.S. Supreme Court wants to change this point of common ground, then I will eagerly be the first to relent on the matter. But, the bottom line is that it's going to be a lot tougher for the U.S. Supreme Court to obtain the consent and agreement of all the Justices sitting on Fifty State Supreme Courts.

I'm a pushover compared to them.