

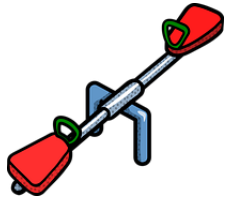


*eGnus*

June 15, 2020

Good Morning!

**A Terrible Toll:** As we watched on screens across the nation, the United States is engulfed in the most widespread, sustained unrest since the era of Vietnam. The searing photos of the brutal beating of already handcuffed George Floyd have triggered marches across the country—and helped focus the terrifying role of police officers in every city and county—a role more dangerous than in any other nation, because, unlike in most countries across the world, so many citizens are armed. Between 2000 and 2014, some 2,445 police officers were killed while on duty—compared to just 25 in England. But the toll is aggravated, because, unlike police forces in most other countries, police officers return fire: that fire takes the lives of about 1,000 lives each year, with African Americans three times as likely as whites to be killed. Indeed, the death by police fire is currently the sixth leading cause of death for young black men. Policing in our country is hard, because the U.S. is more violent than in any other rich country—and far more heavily armed.



**A Governor's Toll: to reopen or not to reopen?** For a Governor, the old Shakespearean quote “to be, or not to be” is the question for the nation’s Governors as they struggle to decide how and when to reopen. How does a leader balance human lives versus a devastated economy? In Arizona, Gov. Doug Ducey on May 15<sup>th</sup> allowed his state to reopen, notwithstanding 340 patients who were in intensive care units across the state in treatment for the coronavirus—and experts in public health at the University of Arizona were pleading for him to hold off, fearing projections that the number of cases were projected to grow. Tragically, it turns out the experts were right. By the end of last month, the state experienced a precipitous rise in new cases—straining hospitals, and forcing Arizona’s top medical officer to reissue and order urging every hospital in the state to activate emergency plans. Arizona was not alone: more than a dozen states have eclipsed old records for positive coronavirus (a contradiction in terms) cases or hospitalizations. The coronavirus ignores governance boundaries, complicating federalism: which level of government is responsible for creating a war plan to take on this unprecedented threat to the country? How do governments balance between ailing economies and protecting human lives?

**State & Local Takeover?** The unrest over policing and police departments has stirred Congress to push forward efforts to reduce federal assistance to police departments, as well as to make it easier to prosecute officers for misconduct, to collect national data, and to establish new training programs to stem some of the kinds of actions which appear to have disproportionately impacted minority communities.

**Fiscal Stewardship?** Federal Reserve Chairman Jerome Powell warned the coronavirus pandemic could mean millions of Americans could remain out of work for a long time to come: “This is the biggest economic shock, in the U.S. and in the world, really, in living memory: We went from the lowest level of unemployment in 50 years to the highest level in close to 90 years, and we did it in two months.” Chairman Powell warned, however, that the Federal Reserve’s “balance sheet can’t go to infinity.”

**Moral Leadership?** President Trump this week found himself enmeshed in a growing apprehension about his leadership of the nation from key Pentagon leader, with the Chairman of the Joint Chiefs of Staff, General Mark A. Milley, apologized for appearing alongside the President in a church photo just minutes after federal authorities forcibly removed peaceful protesters from the area.

**A Danger to the Nation?** Former U.S. National Security Advisor and Chairman of the Joint Chiefs of Staff Colin Powell joined a number of other former U.S. military leaders to criticize the President’s threat to use military forces, calling the President a chronic liar who had “drifted away” from the Constitution and become a danger to the nation. He expressed apprehension about the silence of his party, Republicans in the Congress for their silence: “The Republican Party, the President thought they were immune, they can say anything they wanted...and even more troubling, the Congress would just sit there and not resist in any way what the President is doing. The one word I have to use with respect to what he’s been doing for the last several years is the word I would never have used before, never would have used with any of the four Presidents I have worked for, he lies.”

**Seeing Red.** The U.S. Treasury plans to issue some \$2.9 trillion for the current fiscal quarter, an amount nearly 250% greater than for all of FY2019, expanding the already record current national debt to \$2.5 trillion—of which China holds \$1 trillion. The red ink came as, last month, the federal budget deficit nearly doubled. Congress is likely to add more debt this summer, leading a bipartisan coalition led by Reps. Scott Peters (D-Ca.) and Jodey Arrington (R-Tx.) to author a Dear Colleague, writing: “We therefore respectfully request that further pandemic –response legislation include provisions for future budget reforms to ensure we confront these issues when the economy is strong enough.” Their letter came as the debt held by the public, according to the Congressional Budget Office is now projected to rival the size of the entire U.S. economy by October 1<sup>st</sup>.

**Digging the Debt & the Deficit Deeper?** The federal government this month reported it would borrow a record \$2.9 trillion in the third federal fiscal year quarter, with the Committee for a Responsible Federal Budget projecting that debt held by the American public is now slated to grow by about \$4 trillion in FY2020—and exceed the size of our economy by the end of the year. To reduce the record debt to GDP by half by 2031, Congress and the President would have to identify a combination of spending cuts and tax increases of more than \$20 trillion—equivalent to 61% of GDP over the next decade.

**Tempus Fugit.**

- Reauthorization of the National Flood Insurance Program
- Senate *Work* Periods: July 3-17; August 10—September 7.
- October 1: new federal fiscal year begins

**Longer term:**

- 2022: Highway Trust Fund exhaustion

**U.S. Debt Ceiling:** The U.S. debt ceiling is \$20.455 trillion, meaning the U.S. Treasury must use incoming tax receipts and raid federal pension funds to keep from issuing new debt. Congress had last extended the debt ceiling on March 1, 2019.

**State & Local Finance**

**What Are the Governing Challenges for State & Local Leaders?**

**Will the Coronavirus Pandemic Change the Physical & Fiscal Shape of Cities & Counties?**

Economist Erik Brynjolfsson and his colleagues in April published a survey, which determined that nearly half of all workers have shifted to working remotely in response to the coronavirus pandemic. What might have been imagined as a temporary step now appears now to mark a likely permanent change. Already

Facebook has announced that it expects half its employees could be working from home within the next five to ten years. Others, such as Nationwide, Twitter, Barclay's, and Shopify, either have instituted or are considering making these changes permanent. It was a switch beginning nearly a decade ago, when the quasi-federal Municipal Securities Rulemaking Board offered us as employees the option of working at home instead of at the office. Now, with apprehension that the pandemic could come back in the wake of demonstrations in cities across the country or as part of its inherent patten, the concept of elimination of brutal commuting could mean there will be signal changes in the old 9-5 concept. However, it could also have implications for metropolitan areas—areas which, after all, have a greater range of jobs, entertainment, and access to first class health care.

Heretofore, the nation's cities have been the center points of innovation and commerce—conglomerations of tens of thousands of people working in downtown office buildings, and increasingly, in spaces so that they can share ideas. It began an era of diverging paths—with manufacturers moving away from city centers, but the emerging knowledge economy encouraged the opposite: shared space was valued for sharing innovation. According to Coresight Research, as many as 25,000 retails stores could close permanently this year, setting a record for the retail industry. Simon Property Group, the biggest mall operator, last week, took legal steps to obtain nearly \$66 million in unpaid rent for April, May, and June. It sued Gap, the owner of retail chains, including Old Navy and the Banana Republic. Gap has been forced to close the bulk of its 3,300 stores and furlough approximately 80,000 retail employees. The bulk of those closures are anticipated in malls. Coresight founder and CEO Deborah Weinswig noted: "Given that recovery to pre-crisis levels may be gradual, retailers that were struggling to stay in business pre-crisis are unlikely to have the wherewithal to stay the course on the road to recovery." Indeed, J. Crew, Neiman Marcus, J.C. Penney, Tuesday Morning, and Stage Stores have filed for bankruptcy. Coresight has tracked more than 4,000 planned closures just since January 1<sup>st</sup>—on pace to beat last year's total of 9,800. The closings could accelerate in the wake the recent unrest, which has postponed re-openings of malls—as well as increasing coronavirus infections in some regions.

By some estimates, the toll from the coronavirus death rates in large urban counties has been far greater than those of high-density suburbs. Some have dubbed this phenomenon as "exposure density." New York City, with 3% of the U.S. population, suffered a death rate of 19%; across the Atlantic, one in four pandemic deaths in France were in the Paris metro region.

### **So What Do States & Local Leaders Do?**

First, we have to remember history: we can harken back to the bubonic plague, which savaged Florence in the 14<sup>th</sup> century: the plague killed more than half the city's population. Yet, Florence is cited by historians as the epicenter of the Renaissance.

On our side of the pond, Philadelphia, our nation's capital in 1793, when it was the nation's largest city, was the victim of a grave epidemic of yellow fever: an epidemic in which 10% of the city's residents succumbed. Philly suburbanite—and future President—Thomas Jefferson, later wrote that the disease, like "most evils, are the means of producing some good. The yellow fever will discourage the growth of great cities in our nation." It could be one issue for city and county leaders will be how to address income inequality—which, today, is growing in metropolitan areas—areas where we seem to be reverting to certain parts characterized by highly educated, growing middle class and a low-wage, poorly educated service sector. The reversion reminds me of a time when driving or walking in downtown Denver was considered unsafe after dark.

Today, as cities appear to be reverting to being places increasingly divided between a highly educated, growing middle class and a low-wage, less educated and trained population, as Richard Florida has warned, these city residents are transfixed between high living costs and low wages. It could be that, once again, cities are being hollowed out—reeling from disproportionate losses from the coronavirus pandemic, and low wages, but high living costs.

Nevertheless, cities are like an economic beehive: Americans in cities with more than a million residents are 50% more productive than those elsewhere. Around the globe, the largest 300 metropolitan areas generate not only half the world's GDP, but also two-thirds of the GDP's growth.

The growing gap can also be seen to be at risk from property taxes. The Windy City, Chicago, has the third highest commercial property tax rate amongst large cities, trailing only Detroit and New York City. Now, with the coronavirus feasting on close proximity of people, densely populated urban areas, one can anticipate adverse impacts on assessed property values, lower revenues from sales and use taxes—and corporate and individual income tax revenues—even as these areas appear to face the highest costs to respond to the health care crisis.

It is too early to be able to assess how covid-19 will affect future housing choices—whether New York City will see an exodus and we will experience another era in the nation's history where citizens want to leave urban areas for the perceived health safety outside of cities and urban counties. But it is not too early for Councils of Government in the nation's metropolitan areas to begin discussions with regard to this growing inequality and its implications.

### State & Local Leader of the Week

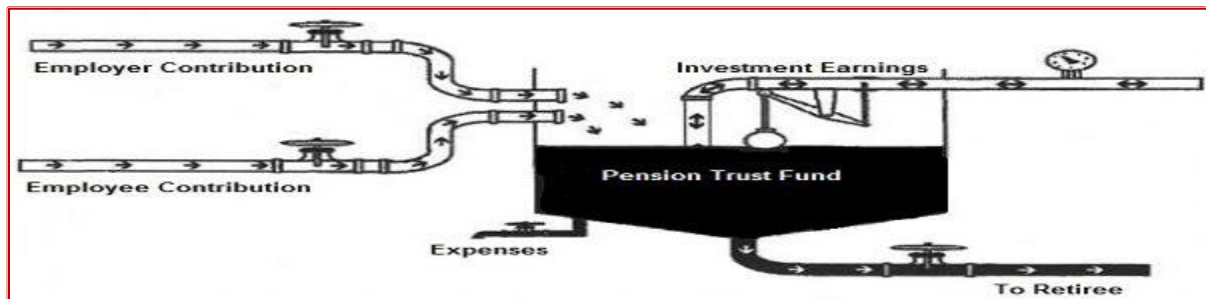


Our State & Local Leader of the Week is Donley County, Texas Judge John Howard, M.D., who also serves as his County's only physician. He commenced his career looking for a county that might need a doctor—and then volunteered for military service, where he became a flight surgeon with a Marine Corps fighter attack squadron. After two decades of such service, he said he wanted to get back to people. And has he ever: now he reports he is so proud of his community's response to the coronavirus pandemic—asking businesses to adapt from his own perspective as both a community leader and physician, noting that dual

role “provided some credibility to my pronouncements as County Judge. Now, as his community faces this grave challenge, he notes that “Our efforts at mitigation thus far have exacted an enormous cost, both economically and psychologically...The lessons we have learned about personal and social hygiene must continue to be observed: Ultimately, it is the personal responsibility and civic duty of everyone to contribute to the safety of the most vulnerable. As leaders, we must provide timely and credible information to our constituents. By doing so calmly and decisively, we will instill confidence in our ability to respond to the changes, which will be inevitable. And, finally, it should be obvious that the virus does not respect jurisdictional boundaries. My view is that our approach should be consistent.”

- **Where Will the Sharing Economy Take State & Local Leaders Next?** The Sharing Economy has been hammered by the covid-19 pandemic, which has reversed the allure of renting a room from a stranger—especially where that room might have had any number of strangers in it in recent weeks. Airbnb cut nearly 25% of its work force, while Hertz last month filed for bankruptcy. The City of San Francisco wrote to Globe a warning letter for appearing to violate the city's shelter-in-place requirement, the city's short-term rental code, and its planning ordinance.

- **Sharing a bumpy ride?** The California Public Utilities Commission, which regulates Uber and Lyft in the state, ruled that ride-sharing companies’ drivers, such as for Uber and Lyft will be considered employees under the golden state’s new gig worker statute, with the decision coming six months after the statute went into effect.



### Pensionary Matters



**A Slow Moving Crisis?** Because pension funds rely on their investments to pay out benefits to retirees, the temperature of the stock market matters. Thus, as the Center for Retirement Research notes, the average funding ratio of U.S. state and local government pension plans for the fiscal year ending this month will be 69.5%--the lowest level in a century. That is a steep plunge from 2000, when the average plan was fully funded. The Center estimates that state and local government contributions to their plans could rise from their current 19.7% to 29.1% by 2020 if the markets are slow to recover. This appears to be a slow-moving crisis—even

though by 2025, the Center estimates eight funds may have only enough assets to cover less than four years of benefits. The Center adds that three of those may have only enough assets to cover less than four years of benefits.

### What Might City, County, & State Ethics really mean?



**Unethics in Montana?** Montana House Speaker Greg Hertz (R-Polson) has denied a request by a watchdog group asking that for an investigation of Rep. Kerry White (R-Bozeman) for an ethics violation—a request the Speaker rejected, saying the Legislature is not in session, the issue is likely moot, and the official has made the proper disclosures. The request to the Speaker was made by the Washington, D.C.-based nonprofit Campaign for Accountability. The epistle noted that Rep. White serves as the

Executive Director of the Citizens for Balanced Use, which advocates for recreational uses of public land, including timber harvesting, and is on the Montana Legislature’s Environmental Quality Council; it also notes he was paid \$24,000 from the Citizens for Balanced Use in 2016—so they would like him to be investigated by the House Ethics Committee. The Executive Director of the Campaign for Accountability, Daniel E. Stevens, stated: “Rep. White’s serial misconduct should immediately be investigated by the state Legislature.” In the nonce, he added that Rep. White should recuse himself from all matters pending before the Montana Legislature Environmental Quality Council, stating: “No one is above the law.”

In response, Rep. White suggested: “Maybe these people should investigate past actions of the Obama Administration.” Speaker Hertz stated that the Legislative Ethics Committee cannot be convened to hear the complaint as the Montana Legislature is not in session and statutorily prohibited from meeting between sessions.

**Unethical Disrespect Tweeting?** In the age of tweeting, Twitter and Facebook have been transfixed by challenges with regard to untrue statements, deliberate falsehoods, and now what President Trump has

tweeted with regard to Martin Gugino, the 75-year old bachelor from Buffalo whom we witnessed last week on TV as he lay bleeding on the street from a grave head wound he suffered from two Buffalo police officers who had shoved him to the ground and left him bleeding at a demonstration over the police killing of 75-year old George Floyd. In his tweet, the President speculated that Mr. Gugino may have been trying to sabotage police equipment—or fell intentionally to generate an outcry over police brutality. It was a tweet which U.S. Sen. Mitt Romney (R-Utah) described as “shocking,” and Senate Majority Whip John Thune (R-South Dakota) and former South Dakota Municipal League Director described as a “serious accusation, which should only be made with facts and evidence, and I haven’t seen any yet.” Nonetheless, the President’s un-factual tweet did not trigger a label warning from Twitter—where, according to a spokesperson, the President’s tweets did not violate its rules. Twitter adds fact-checking labels to tweets which contain misinformation with regard to civic integrity or the coronavirus, as well as tweets which contain what it describes as “manipulated media,” such as photos which have been doctored; Twitter also places warnings on tweets from world leaders which violate its policy against promoting violence; however, no other content—even offensive or inaccurate claims are labeled.

### Little Legalities?



### Decisions

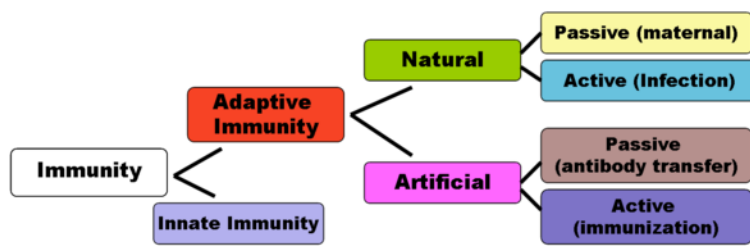
**§1983.** In a case in West Virginia, Wayne Jones, a homeless, black man, was stopped by law enforcement in Martinsburg, West Virginia—a stoppage for walking alongside, rather than on the sidewalk—and a stoppage which led to his death, after he was tased for times, hit in the brachial plexus, kicked, and placed in a chokehold. In his last few minutes alive, as he lay on the ground between a stone wall and a wall of five police officers, who collectively fired 22 bullets, he died. In the wake of his shooting, his estate sued under §1983, bringing a Fourth Amendment claim against the officers, as well as a claim against the City of Martinsburg. The U.S. District Court granted summary judgment to the defendants on both claims, holding that the officers were protected by qualified immunity and that the City is insulated under a *Monell* theory for failing to train these officers. Even though, on appeal, the court here agreed Martinsburg was insulated from *Monell* liability premised on one incident of excessive force, the court reversed, finding, on qualified immunity grounds, that a reasonable jury could find Mr. Jones was both secured and incapacitated in the final moments before his death. *Estate of Wayne A. Jones v. City of Martinsburg*, 4<sup>th</sup> U.S. Circuit Court of Appeals, No. 18-2142, June 9, 2020.

**Rights—Title VII.** In a case where a Houston city employee with the Fire Department filed a complaint



against the City, the employee, Carla West, who commenced her service with the Houston Fire Department in 1994, after enrolling in the city’s Fire Academy. She, however, failed the Academy’s graduation test—and was fired. She subsequently was rehired—and passed, and was later promoted to the role of engineer/operator paramedic at Station 9—where she subsequently took issue with her fellow firefighters’ behavior. In her complaint, she complained about denial of overtime opportunities, because, she asserted, she was denied such due to her sex and race. The court here held that

her allegations failed, because neither of her coworkers held the same job or responsibilities, or shared the same supervisor—and determined that she failed to show a genuine dispute of material fact with regard to the hostile work environment, because she failed to show that the claimed harassment affected a term, condition, or privilege of employment. In addition, the court noted that the plaintiff here failed to demonstrate that her colleagues’ actions were severe, physically threatening, or humiliating. *Jordan v. Houston*, 19-20294, U.S. 5<sup>th</sup> Circuit Court of Appeals, #19-20294, June 9, 2020.



**Qualified Immunity?** In a decision overturning the trial court’s decision to extend qualified immunity to five officers of the Martinsburg, West Virginia police officers in a case involving the death of a homeless, black man who was shot 22 times after already being tazed, kicked, and placed in a chokehold; the 4<sup>th</sup> U.S. Circuit

Court of Appeals overturned the lower court, with Judge Henry Ford, writing for the court: “To award qualified immunity for fear-based use of deadly force, which we cannot accept.” *Estate of A. Jones v. City of Martinsburg, W. Va.*, U.S. 4<sup>th</sup> Circuit Court of Appeals, #18-2142, June 9, 2020.



**Challenging a City’s Tour Guide Licensing Ordinance?**

In a suit challenging the City of Charleston, South Carolina’s Tour Guide Licensing Ordinance—an ordinance which mandates that a prospective tour guide must obtain a license by passing a 200 question written exam on the city’s history, architecture, and historic preservation efforts—the U.S. District Court had found the ordinance to be unconstitutional. The District court concurred, and deemed the ordinance unconstitutional, assuming the ordinance imposes an unconstitutional restriction on free speech, because it imposes a content-

neutral restriction on speech. In sustaining the lower court, the Court of Appeals noted the tourism-based economy of the City, adopted by ordinance in its Tourist Management Plan in 1983, prohibits unlicensed tour guides from giving paid tours throughout the historic districts of Charleston, and bars anyone from becoming a guide unless she or he has first passed a written exam. The Circuit court affirmed, holding that notwithstanding the city’s interest in protecting its tourist industry, the ordinance failed intermediate scrutiny, because the city had failed to establish that the ordinance here was narrowly tailored. *Billups v. City of Charleston*, U.S. 4<sup>th</sup> Circuit Court of Appeals, No. 19-1044, June 11, 2020.



**Watering down a Covenant?** The Town of Monument, a statutory town in El Paso County with an estimated population of 700,000, purchased a piece of property on which it planned to build a water tower. Unsurprisingly, neighbors objected: they argued the property in question was subject to a restrictive covenant limiting construction to a single family residence., arguing that if Monument were to violate the covenant, the Town would be taking the restrictive covenant from each of the covenant-subject properties; therefore, the Town would have to compensate each of the property owners for the diminution of value caused by the taking. In an earlier takings decision, 64 years ago, (*Smith v. Clifton Sanitation District*), the state’s mile high court had held that when a state or local government acquires property subject to a restrictive covenant and uses it for purposes inconsistent with said covenant, “[N]o claim for damages arise by virtue of such covenant as in the instant case, in favor of the owners of other property” subject to the covenant. The petitioners here had asked the state Supreme Court to confine “*Smith* to its facts or overrule it. The court declined to do that. Instead, the court

reaffirmed that where a government entity has obtained property for public purposes, the government may use that land for a purpose inconsistent with a restrictive covenant without compensating all of the other landowners who are subject to the restrictive covenant. *Forest View Co. v. Town of Monument*, 2020 CO 52, Colorado Supreme Court, June 8, 2020.



**Deliberate Jail Indifference?** In a case where family members of Chad Ernest Lee Silvis sued officers of the Kemah Police Department—Kemah being a small city on the water in Texas renamed with its current name in 1914, when it had a population of 200—with the suit filed in the wake of Mr. Silvis having committed suicide in a jail cell by hanging himself with a blanket which one of the officers had provided him. The suit charged deliberate indifference to his serious medical needs in violation of the 14<sup>th</sup> Amendment. The U.S. District Court dismissed the claim of qualified immunity. The court here noted that a critical issue was “whether the jail guards had the subjective knowledge that the bedding posed a substantial risk of suicide.” The court reversed the lower court’s dismissal of the plaintiff’s claims based on qualified immunity,, holding that the complaint contained sufficient factual allegations to state a claim for relief and to allow the court to draw the reasonable inference that the officers are not entitled to qualified immunity, because they were subjectively aware that Mr. Silvis was at significant risk of suicide and responded unreasonably to that risk by failing to remove said blanket from his cell in violation of the 14<sup>th</sup> Amendment. *Ronald Lee Converse v. City of Kemah Police Department*, #17-41234, U.S. 5<sup>th</sup> Circuit Court of Appeals, June 12, 2020.