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LAW REVIEW

Sixth Annual
American Constitution Society
Constitutional Law Scholars Forum

A Discourse on Cutting Edge Issues in Constitutional Law by International and National Scholars

March 26, 2021

Presenters

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Dr. Ahmed Oudah AL-Dulaimi
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Dr. Björn Arp
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Dr. Wayne Batchis
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Dr. Cynthia Boyer
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Professor Kimberly Breedon
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Professor A. Christopher Bryant
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New Jersey Consortium for Immigrant Children

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Dr. Ayaz Ahmad
Unitedworld School of Law, Karnavati University

Dr. Ayaz Ahmad is Associate Professor at Unitedworld School of Law, Karnavati University. He began his academic career from National Law University Odisha (NLUO) as Assistant Professor and moved to Glocal University to establish Glocal Law School as the founding faculty.

Dr. Ayaz has published several research papers in reputed journals and opinion pieces in leading newspapers, magazines and webzines. He has also contributed a few book chapters in edited volumes on Indian Supreme Court. He has participated in several national and international conferences, seminars and workshops. Dr. Ayaz teaches Constitutional Law, Environmental Law and Interpretation of Statutes. His research interests include constitutional theory and practice, privatization of higher education and social justice, environmental dispute adjudication and judicial process. In his research interests, Dr. Ayaz is always concerned with the expansion of the frontiers of equality, liberty and fraternity within the democratic frame work.

Freedom of the Press: Evolution of Media into Propaganda Machine

Thinking on freedom of the press in India has largely remained focused on various governmental measures designed to control the media directly or indirectly. As a result, the Supreme Court's valiant defense of the freedom of the press remained confined only to those governmental measures and how they might adversely affect this freedom. Consequently, evolution of the media into a virtual propaganda machinery of the State eludes explanation for most scholars of constitutional law. The question with which they are struggling is this: how did the media evolve into governmental propaganda machine when the Supreme Court had been guarding freedom of the press so zealously all along? This question cannot be answered without deconstructing the genealogy of the media, the Supreme Court, the State and the society from which all the three emanate. This paper is an attempt to understand social, cultural, political and legal conditions which enabled the metamorphosis of the fourth estate into the guard dog of the ruling powers.

Unlike the U.S. Constitution which specifically protects freedom of the press, in India freedom of the press rests within the freedom of speech and expression clause enshrined under Article 19 (1) (a) of the constitution. While in the U.S. the grounds to determine the scope of this freedom were evolved by the Supreme Court, the Indian constitution under Article 19 (2) lays down the grounds on the basis of which reasonable restrictions can be imposed on the exercise of the right to free speech. In this background, it is instructive to compare the nature of debates that were launched in U.S. and Indian Supreme Courts respectively and how they have shaped the very character of the freedom of the press in both the countries. These debates bring out the impact of equal opportunity and diversity laws on issues surrounding freedom of the press.

Dr. Ahmed Oudah AL-Dulaimi
University of Anbar College of Law and Political Sciences

Ahmed Oudah AL-Dulaimi has a Ph.D. in Constitutional law from Griffith University and currently works as a lecturer at the Department of Political Science, University of Anbar. His most recent publication is "Are all constitutional rules created equal?: substantive hierarchy in constitutions in theory and practice."

From Negative to Positive Legislator? On the New Role of Constitutional Courts as Lawmakers

Constitutional Courts that exercise judicial review have been described as "negative legislators," and when criticised, as activist lawmakers. This chapter will examine a new role that is increasingly being adopted by constitutional courts, that of "positive legislator." This role, that is now evident in a number of countries, requires Courts to exercise lawmaking power to remedy legal lacunae due to the absence of legislation or as a result of the legislation being struck down as constitutionally invalid. This chapter examines this new role in a number of countries to show the shift from their traditional role as a negative legislator to a significant role as a positive legislator. In doing so it will provide a comprehensive account of such 'positive legislator' role to distinguish it from its alternatives such as judicial lawmaking and judicial activism, and the extent to which this new role is consistent with notions of separation of powers and judicial legitimacy.

Joseph C. Alfe

Joseph C. Alfe holds a J.D. and LL.M. from the UIC – John Marshall Law School in Chicago and an LL.M. from the Straus Institute at the Caruso School of Law, Pepperdine University. Mr. Alfe is published in numerous legal journals on constitutional law and public policy topics. He resides in Chicago with his wife and five children.

Digital Privacy Concerns and the Fourth Amendment: Law Enforcement Overreach in Digital Surveillance

Does government use of a cell-signal emulator, often known by its trade names Stingray/Hailstorm/Triggerfish, etc., constitute an unreasonable search under the Fourth Amendment? Generally, when phone numbers are collected as part of service providers' regular business activities and conveyed to third-parties, the user's reasonable expectation of privacy is not violated. The retrieval of information by accessing the private location and aggregate history of a user's data, however, is always a search. The trajectory of Fourth Amendment jurisprudence, in the context of *Smith* and *Jones,* suggests that federal courts are tightening (or narrowing) the interpretation of "reasonable expectation of privacy" in the digital age. This paper first defines the technology in question and describes law enforcement use of digital surveillance upon an unsuspecting populace. Next, we examine digital surveillance under a third-party privacy framework. The focus then turns to a comparative analysis of past and present Fourth Amendment jurisprudence and its contemplation of privacy issues in a digital age. Lastly, a new digital privacy framework and test is proposed.

Dr. Björn Arp

American University Washington College of Law

Dr. Björn Arp is an Adjunct Faculty and Assistant Director of International and Comparative Legal Studies at the American University Washington College of Law. Björn Arp also acts as counsel on a wide range of matters of international law. Between 2016 and 2018, he was part of the List of Experts of the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank, and since 2017 he has been on the list of FINRA (Financial Institutions National Regulatory Agency) arbitrators in the United States. Dr. Arp is an attorney admitted in the State of New York, and he is also admitted before the United States Court for International Trade. He has spoken numerous times at panels and conferences in Latin America, the U.S., and Europe about international law developments. Björn Arp has a Law Degree from the University of Alicante in Spain, a Doctorate in International Law from the University of Alcalá in Madrid, and a LL.M. in International Legal Studies from the American University Washington College of Law. He is a member of the American Society of International Law.

Presidential Term Limits and the Right to Political Participation

Many Constitutions around the world provide for term limits for their Presidents. Some Constitutions limit presidential terms to two consecutive terms, or two terms regardless of when these terms were served. Other Constitutions extend term limits to other elected officials, for instance the Vice-Presidents and the Presidents of regional sub-divisions. Constitutions may also limit the access to office for the spouses and close family members of former presidents. Up until the late 2000s, these provisions rarely were the object of any judicial appeal or constitutional debate, as they were regarded as a reasonable and proportional limitation to safeguard the effectiveness of other individuals' right to political participation.

However, starting in 2009, a complaint brought by the President of Nicaragua, Daniel Ortega, to the country's Supreme Court argued that such term limits unduly restrict the President's fundamental right to political participation. The Supreme Court accepted these arguments and dismissed the Constitutional term limit as against the spirit of the Constitution itself and the internationally recognized right to political participation. The dicta of this first case spread like a virus through the American continent and the same legal arguments to dismiss presidential term limits found their way into several other legal systems. With the aim of curbing this jurisprudential development, the Inter-American Human Rights System is currently deciding on an international claim against Nicaragua for the damage the Supreme Court decision has done to democracy in the Central American country. In addition, the Inter-American Court of Human Rights is considering the same issue in an advisory opinion procedure.

This study will provide background to this issue of presidential term limits, including a review of the 22nd Amendment to the U.S. Constitution, assess the reasons why presidential term limits have an impact on the effective safeguarding of civil rights, and what may be valid legal requirements for removing those limits.

Professor Wayne Batchis
University of Delaware

Wayne Batchis is an Associate Professor of Political Science at the University of Delaware where he serves as the Director of the Legal Studies Program. He received his J.D. from the University of Pennsylvania Law School and a Ph.D. in Political Science from Johns Hopkins University. Professor Batchis' scholarship focuses on the intersection of constitutional law and politics. In 2016 he published "The Right's First Amendment: The Politics of Free Speech & the Return of Conservative Libertarianism" with Stanford University Press. His recent articles appear in the New York University Annual Survey of American Law and the University of Michigan Journal of Law Reform. Past works have appeared in a variety of venues, including the Stanford Journal of Civil Rights & Civil Liberties and the New York University Review of Law & Social Change.

Political Parties and the Switch from Equal Protection to the First Amendment

The Supreme Court's political party jurisprudence was once much more likely to rely upon the Equal Protection Clause than the First Amendment. It wasn't until the early 1980's that the Court moved sharply away from an equality framework and toward a First Amendment rubric. This piece examines the transition and explores its ramifications. The conversion from the liberal Warren Court, with its heavy emphasis on equality, to the increasingly conservative Burger – then Rehnquist and Roberts – Court, meant a move toward individualism and libertarianism. A First Amendment approach had the advantage of bridging the gap between the more politically liberal and conservative justices on the Court, but also carried numerous drawbacks. I argue that an equal protection approach is a better fit for many party-related constitutional questions. In the context of election law, an equal protection analysis retained a focus on the individual. By moving toward a First Amendment (associational) analysis, the Court largely abandoned the individual members of the party in the electorate in favor of the collective rights of the party organization. In contrast with the open-ended ad hoc balancing that would become the Court's hallmark under an exclusively First Amendment-based analysis, applying the Equal Protection Clause also had the benefit of providing a clearer doctrinal standard, reducing the demands on the Court to be an election law policymaker. Finally, a First Amendment approach has resulted in a Court jurisprudence that is considerably less accommodating to legislature-driven flexibility over political party regulation.

Dr. Rachel Bayefsky

Rachel Bayefsky is an attorney in Washington, D.C. Previously, she served as a Climenko Fellow and Lecturer on Law at Harvard Law School and as a clerk to the late Supreme Court Justice Ruth Bader Ginsburg.

What $1 Can Buy: Nominal Damages and Article III

The Supreme Court has just decided a case with fundamental implications for the jurisdiction and role of federal courts. In *Uzuegbunam v. Preczewski* (decided March 8, 2021), the Court faced the question whether a claim for nominal damages suffices to support an Article III case-or-controversy. Conceptually, the case raised the following conundrum. Nominal damages—"damages in name only," such as $1—are often sought when a plaintiff cannot show "actual" harm stemming from a legal violation. (In *Uzuegbunam*, the violation involved students' First Amendment right to speak about their religion at a public college.) But Article III standing doctrine requires "concrete" or "real" injury-in-fact. So does a suit seeking only nominal damages provide a constitutionally legitimate remedy adequate for the plaintiff to proceed in federal court? In addition to affecting the viability of certain civil rights litigation, this question has broader ramifications for Article III jurisprudence. My talk will examine several of these ramifications. They include: the relationship between the historical availability of certain remedies and the Supreme Court's modern standing doctrine; the classification of forms of relief as retrospective or prospective; and the constitutional status of suits brought to "vindicate" matters of principle.

Dr. Barbara Pfeffer-Billauer
University of Porto, Portugal

Professor Billauer is Professor of Law and Bioethics in the International Bioethics Program at the University of Porto, Portugal. She also holds a Research Professorship at the Institute of World Politics where she researches the intersection of law, science, and public policy. Professor Billauer holds a B.S. (Hons.) from Cornell University in biology, a J.D. from Hofstra University, an M.A. in Occupational Medicine from N.Y.U., and a Ph.D. (Law) from Haifa university. Before transitioning to academia, she was a litigator involved in health-related matters and contributed to the development of asbestos regulations at the federal and NYC levels. Most recently, she edited Professor Carmi's Casebook on Bioethics for Judges. Her current research addresses bioethical and public health dilemmas from a tort and constitutional law perspective. Among her research interests are overcoming first amendment obstacles in addressing non-science based misinformation, such as anti-vax rhetoric, which she labels "FEAR" speech.

Regulating Harmful Speech Via Compelled Speech and Government Speech

In recent years, the anti-vax movement has been enormously successful in stoking vaccine resistance. Efforts at muzzling the non-scientifically based, false, fraudulent, flawed and endangering (FEAR) rhetoric of these anti-vax groups have failed. Counter speech has proven rank ineffective – in some cases involving push-back in the form of death threats or other assaults. This research attempts to find an alternative means of squelching FEAR speech promulgated by these groups by investigating categorizing anti-vax activities as commercial speech, thereby escaping the penumbra of the sacred protection afforded political speech. Under this umbrella, I consider use of compelled speech, in the form of mandated warnings on conference advertising and pamphlets, and government speech, in the form of mandatory high school education programs that address the scientific issues manipulated and misrepresented by the anti-vax groups. These include immunology, epidemiology, and risk assessment.

Creating a New Category of Speech: Science Speech

Differences in free speech protections depend on the type of speech involved. Attempts to muzzle anti-vax speech have failed. Counterspeech has proved futile. I therefore postulate the creation of a third class of speech: Science speech, i.e., provably false data and facts disseminated to induce socially detrimental behavior. As junk science is not acceptable in a courtroom, junk science should be inadmissible in the court of public opinion, especially when the consequences jeopardize the public health. I propose the same mechanism used to determine admissibility of scientific evidence in a courtroom be adapted for the polity. Thus, I investigate creation of Daubert-type courts where scientific facts which are provably unreliable, invalid, prejudicial, are outlawed for the purposes of inducing socially dangerous behavior. The material eligible for outlawing would be content neutral, in that the scientific truth of the assertions – and the professional standing of the proponent -- would be evaluated, not the ultimate stance or position.

Professor Meghan Boone
Wake Forest University School of Law

I am currently an Assistant Professor of Law at Wake Forest University School of Law, where I teach Civil Procedure, Constitutional Law, Family Law, and Reproductive Rights. My research focuses primarily on reproductive rights issues, specifically the rights of pregnant, birthing, and parenting individuals. My work has appeared or is forthcoming in the California Law Review, the Georgetown Law Journal, and the George Washington Law Review, among others. My most recently published piece, Reproductive Due Process, 88 GEO. WASH. L. REV. 511 (2020), was named the winner of the 2020 American Association of Law School (AALS) Scholarly Papers Competition.

Perverse & Irrational

In order to be deemed constitutional, laws that do not implicate a fundamental right or suspect classification must only survive rational basis review – that is, the law must be rationally related to some legitimate government purpose. Rational basis review is often likened to review in name only – practically useless as a way to challenge the constitutionality of government action. Scholars have both problematized this canonical conception of rational basis review and suggested a slew of reforms intended to make it a more meaningful check on state power. Many of these proposals primarily focus on how rational basis review fails to meaningfully ferret out discriminatory intent, on the theory that state legislators are more likely to be intentionally discriminatory than unintentionally incorrect about the effect of any individual piece of legislation. In other words, most scholars focus on the first part of the rational basis test (ends) and not the second (means).

This focus, however, likely underestimates the incidence of legislators simply failing to correctly identify the likely results of legislation. This article focuses on this aspect of rational basis review. Particularly, it focuses on circumstances in which state actors are so misguided that they pass and enforce laws that have the opposite effect of the legislature's stated intent. It argues that demonstrated perversity – where a law clearly contravenes the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result – should form the basis for a finding that the law is unconstitutional under rational basis review. The argument relies both on analogies to canons of statutory construction and on how the modern accessibility of knowledge has shifted the understanding of the rationality of government action.

Dr. Cynthia Boyer
Institut Maurice Hauriou (Université Toulouse Capitole), France

Dr. Boyer's areas of research include Politics and Constitutional law, First Amendment, racial discrimination, judicial decision making, and civil liberties. Her scholarship has appeared in the Harvard Civil Rights-Civil Liberties Law Review, Berkeley Public Policy Press, the Institute of Governmental Studies and the California Constitution Center, The Constitutional Law Now Journal, Elon Law Review and other American and international journals and reviews.

Tweeter in Chief: Government Speech, Regulation and Social Media

Within the limit of 140 characters, tweets symbolize freedom of expression online. The conditions of their use raise however real legal and technical obstacles. The use of the media has a fundamental strategic dimension in the conquest or exercise of power. President Trump used Twitter as his main communication tool. Such government social media usage has historically gone unchecked by the courts until the *Knight First Amendment Institute v. Trump* ruling. In addition, Twitter began for the first time to suggest that some of President Trump's tweets might lack a factual basis by putting warnings on his posts. This generates the central question of policing political speech. As a consequence of Twitter's moderation the U.S President issued an executive order to potentially expose the company to considerable legal liability for user conduct attacking Section 230 of the Communications Decency Act. There are likely to be more lawsuits over how social media interpret their own user rules. This article will first deal with the issue of censorial power of government. Then it will analyze the idea of internet platforms trying to police political speech.

Professor Kimberly Breedon
Barry University School of Law

Kimberly Breedon, a graduate of Columbia University Law School (LL.M.) and the University of Cincinnati College of Law (J.D.), serves as an Assistant Professor at Barry University Law School, where she teaches Constitutional Law, Civil Procedure, and Legal Methods. Her research, which has been published in several major law journals and presented at international and national conferences, symposia, and workshops, focuses on the constitutional dimensions of corruption or potential corruption by government officials.

Professor A. Christopher Bryant
University of Cincinnati College of Law

Chris Bryant is the Rufus King Professor of Constitutional Law at the University of Cincinnati College of Law. A recognized expert on the scope and exercise of national legislative power and the respect that Congressional action is owed from the federal judiciary, he has published leading articles in the Cornell Law Review, George Washington Law Review, BYU Law Review, Notre Dame Journal of Legislation, and William & Mary Bill of Rights Journal. Professor Bryant's research in federalism and unenumerated rights include a co-authored book, "Powers Reserved for the People and the States": A History of the Ninth and Tenth Amendments (Greenwood Press 2006), and thirteen essays on landmark constitutional cases for the Encyclopedia of the Supreme Court of the United States (Macmillan 2008).

Bringing a Fork to a Gunfight: The Senate Acquittal on the Second Article of Impeachment and the Future of Congressional Oversight

This spring a divided panel of the D.C. Circuit held that the House Judiciary Committee lacked standing to compel former White House Counsel Donald McGahn to testify. The ruling provoked intense criticism and numerous predictions that, if left uncorrected, it would undermine Congress's oversight authority.

Fears about the future of congressional oversight are well taken, but the McGahn ruling is not the danger. Rather, the panel opinion reflects wisdom about the need to limit judicial intervention in interbranch disputes and, if followed, promises to spur Members of Congress to reinvigorate the tools they independently possess to compel executive branch cooperation with congressional demands for information. Far more dangerous for congressional oversight, and not coincidentally in direct conflict with the theory underlying the McGahn panel opinion, was the Trump defense team's response to the second article of impeachment, which faulted the House for not seeking judicial intervention. Our paper will undertake to substantiate the insights of McGahn and explore ways to limit the harmful effects of the Senate's acquittal on the second article.

Dr. Jason Buhi
Barry University School of Law

Jason Buhi is an assistant professor of law at Barry University's Dwayne O. Andreas School of Law in Orlando, Florida. Prior to joining Barry University, Professor Buhi earned his Ph.D. in constitutional law from the University of Hong Kong and taught at the Peking University School of Transnational Law. Professor Buhi's scholarly interests include subnational autonomy, elections, and freedom of assembly. His book, The Constitutional History of Macau, will be available from Routledge Press this Spring.

Reconstituting China's Peripheries: Twenty Years of the Macau Basic Law

After nearly 450 years of Portuguese presence the city of Macau was handed over to the exclusive jurisdiction of the People's Republic of China (PRC) in 1999. A decade prior, PRC leaders prepared for administration of Macau by drafting a charter for the city known as the Macau Basic Law (MBL). To do so, Beijing reconstituted the elite consultation method it had deployed at Hong Kong and proffered the resulting Hong Kong Basic Law as their template. The MBL differed in significant respects from its predecessor, however, as Portuguese negotiators had pursued a different set of bottom-line values. For example, the MBL does not contain any aspirational statements about achieving democratic gains; instead, the Portuguese won Beijing's concession on recognition of Portuguese passports for Macau residents. For this and other reasons including decades of de facto mainland supervision and the inability of the late Portuguese regime to suppress rampant corruption, the formal introduction of PRC authority was a relatively smooth process. Indeed, the MBL's nexus for socioeconomic autonomy allowed casino capitalism to propel a meteoric economic rise. However, that model also exacerbated income inequality, and the MBL's freezing of representative institutions in a mid-20th Century colonial configuration disenfranchises many of those left behind. The Macau Government has responded to these challenges by focusing on the twin pillars of social stability and public welfare, though economic diversification proves elusive and political diversification unwelcome. This presentation appraises those successes and failures to date. Ultimately, the PRC's governance model for Macau will be judged in 2049: the year that represents the formal end of 50 years of autonomy promised by the MBL as well as the 100th anniversary of the foundation of the PRC. Thus, Macau's success will reflect the PRC's success, and it remains to be seen if the dialectic will ultimately end in extension, convergence, or assimilation.

Emily R. Chertoff

New Jersey Consortium for Immigrant Children

Emily R. Chertoff is the first Executive Director of the New Jersey Consortium for Immigrant Children, a coalition of immigrant youth, families, and legal services providers working to uplift the civil and human rights of young immigrants in New Jersey. She was previously a founding attorney in the litigation and advocacy unit at Immigrant Defenders Law Center, the largest immigrant defense organization in Southern California, and a detained removal defense litigator. She has published academic articles in Yale Law Journal, Texas Law Review, and Texas Journal of International Law. Emily received her JD from Yale Law School in 2017.

Citizenship Federalism

This Article proposes a novel mechanism that can help us to answer one of the overarching questions of our time: how we define the boundaries of our American community. Along the way, it makes several normative and descriptive contributions to immigration, federalism, and constitutional law scholarship. It is the first systematic treatment of the effects of state law on former immigrants to the United States, a group that has grown into the millions with increased deportations and voluntary out-migration. It is also the first to uncover two substantive state-law legal issues that are harming these millions of former immigrants.

Building on these novel descriptive observations, the Article offers a new theoretical framework to guide state immigration law and policymaking. This framework, which the Article names "citizenship federalism" to highlight its linkages to and divergences from the antecedent concept of "immigration federalism," focuses attention on states' power to adopt different underlying values and criteria than the federal system does when deciding which noncitizens to place within the boundaries of community. This Article focuses on states' power to challenge federal law's reliance on territoriality, which federal law treats as the key boundary determining which noncitizens are within the American community's "circle of concern." Citizenship federalism opens up significant possibilities for academics and practitioners alike, both for understanding the states' role in constructing political and social membership and for moving towards a new generation of state-level immigration policy and advocacy.

Professor Gabriel "Jack" Chin
UC Davis School of Law

Jack Chin is the Edward L. Barrett Jr. Chair & Martin Luther King Jr. Professor of Law at the UC Davis School of Law. His Cornell Law Review article Effective Assistance of Counsel and the Consequences of Guilty Pleas, co-authored with a student, was cited in Padilla v. Kentucky, 130 S. Ct. 1473 (2010), and Chaidez v. United States, 133 S. Ct. 1103 (2013). Justice Sotomayor cited his University of Pennsylvania Law Review article The New Civil Death in her dissent in Utah v. Streiff, 136 S. Ct. 2056 (2016). His work with students includes persuading the Ohio legislature to ratify the Fourteenth Amendment, and the California Supreme Court to posthumously admit an attorney after he was excluded because of his race (In re Chang, 334 P.3d 288 (Cal. 2015)). He is a graduate of Wesleyan and the Michigan and Yale law schools.

The Blueprint for Dred Scott: United States v. Dow and the Multi-Racial Jurisprudence of White Supremacy

Chief Justice Taney's 1857 opinion in Dred Scott v. Sandford is justly notorious for its holdings that African Americans could never be citizens, that Congress had no power to prohibit slavery in the territories, and for its proclamation that persons of African ancestry "had no rights which the white man was bound to respect." For all of the interest in and attention to Dred Scott, however, no scholar has previously analyzed United States v. Dow, an 1840 decision of Chief Justice Taney which is apparently the first federal decision to articulate a broad theoretical basis for White supremacy. Dow identified Whites as the "master" race, and it explained that only those of European origin were either welcomed or allowed to be members of the political community in the colonies. Dow, however, was not a person of African descent, he was Malay, from the Philippines. Chief Justice Taney's employment in Dow of legal reasoning which he would later apply in Dred Scott suggests that Dred Scott should be regarded as in part about all free people of color, not only African Americans, free or enslaved. This understanding of Dred Scott helps explain the revival of Taney's reputation during the Jim Crow era after Reconstruction. Courts declined to invalidate restrictions with respect to a broad range of civil rights on citizens and immigrants of African, Indian, Asian, and Mexican ancestry to which Whites were not subject. Indeed, Whites could not be subject to them, unless it is conceivable that under the U.S. Constitution, the law could provide, for example, that all races would be ineligible to testify or vote. Accordingly, even after Reconstruction, just as Dred Scott and Dow contemplated, the White race remained the master race, in the sense that they were the exclusive holder of truly inalienable rights.

Professor Russell Christopher
University of Tulsa College of Law

Professor Christopher's research is in the area of criminal law and criminal procedure. His recent work includes articles on rape, statutory rape, rape by fraud, blackmail, victim's rights, the theory of punishment, attempts, and criminal defenses. His work has appeared in a wide variety of journals including Northwestern University Law Review, Georgetown Law Journal, Fordham Law Review, Ohio State Law Journal, Oxford Journal of Legal Studies, and Philosophy & Public Affairs. He has also published two books in Oxford University Press. Professor Christopher joined the TU College of Law faculty in 2002 after serving as a visiting assistant professor of law at Florida State University School of Law, as an adjunct professor of law at Fordham University School of Law, a research scholar in the faculty of law at Columbia University School of Law, and a judicial clerk in the United States Court of Appeals, Ninth Circuit.

Positive Autonomy, Consent, and Coercion

The law of rape and sexual assault is increasingly reflecting a balance between negative and positive sexual autonomy. Negative autonomy is freedom from unwanted intercourse; positive autonomy is freedom to engage in wanted sexual intercourse. Conventionally viewed, the greater the coercion employed to obtain intercourse, the greater the violation of the victim's negative autonomy, the less the victim consents (factually and legally), and the more readily the criminal law views it as rape or sexual assault. But this paper will advance a paradox stemming from the relationship of negative and positive autonomy: when the duration or pervasiveness of coercion in the victim's environment becomes sufficiently great, the greater the concern for the victim's positive autonomy, the more a victim factually consents, the more the victim's factual consent should constitute legal consent, and the less the criminal law should consider it as rape or sexual assault. The paradox has two implications. First, it supplies perhaps the first non-empirical rebuttal to Catharine MacKinnon's controversial claim that because of gender and socioeconomic disparities, intercourse between men and women in our society is inherently coercive, non-consensual, and essentially rape. Second, positive autonomy should not merely be an aspirational value reflected in our law of rape but an actual component in our analysis of consent.

Dr. Michael Conklin
Angelo State University

Michael Conklin is the Powell Endowed Professor of Business Law at Angelo State University. He received his JD from Washburn School of Law, MBA from Oklahoma City University, Postgraduate Certificate in International Business Law from University of London, and Masters in Philosophy of Religion from Biola University. His research focus is diverse but frequently applies survey methodology and statistical analysis to areas previously only covered theoretically. His research has led to publications in thirty-three of the top 100 law schools.

Botched Statistics on Botched Executions: Refuting Austin Sarat's Claims

Austin Sarat's statistics on execution botch rates have been cited by law review articles promoting various policies including the use of firing squads. They have also been cited by the United States Supreme Court. Sarat claims that there is a 0% botch rate for firing squads and a 7% botch rate for lethal injection. These frequently cited statistics are—at best—highly misleading. The claimed firing squad botch rate leaves out blatant examples of botched firing squad executions. Conversely, the lethal injection statistic arbitrarily implements a definition of "botched" execution so expansive as to render the ultimate result completely meaningless. Examples of what Sarat considers a "botched" lethal injection include inmates who resist, difficulties inserting the IV, the passage of fourteen minutes before official death is declared, and prison officials opening the curtain too early. This essay documents the various problems with Sarat's execution botch rate statistics and considers potential motivations for promoting the resulting misinformation.

Yes, Self-Pardons Are Constitutional, Even for Donald Trump

Lauren Mordacq's recent article argues that Donald Trump does not have the power to issue a self-pardon. However, she leaves out significant counterarguments, and the evidence she presents to support her conclusion—properly understood—works to undermine it. With Joe Biden recently becoming the president elect, the issue of a presidential self-pardon could move from a purely theoretical question among constitutional scholars to one for the Supreme Court in Donald Trump's last days as President. Indeed, Trump has even claimed that he has "the absolute right to PARDON [him]self . . ." This critical review of Mordacq's article covers the plain reading of the pardon clause, historical considerations, the impeachment exception, Supreme Court case law, and the importance of objective principles for making such determinations regardless of who the President is.

Professor Brendan M. Conner
St. Thomas University School of Law

Brendan M. Conner is an Assistant Professor of Law at St. Thomas University School of Law in Miami, where he teaches Torts, Constitutional Law, and Appellate Advocacy. Before joining St. Thomas, Brendan served as Visiting Professor of the Practice of Law at William & Mary Law and taught courses at the University of the District of Columbia and City University of New York Schools of Law. Brendan's present scholarship focuses on the constitutional implications of police- and prosecutor-led civil enforcement tactics, with a particular focus on the use of civil actions and remedies to raise revenue, circumvent constitutional protections, and realize traditionally criminal-law-enforcement ends. Additionally, his scholarship on U.S. and international protections for youth in conflict with the law has been published in a variety of legal and academic journals, including law reviews, interdisciplinary journals, and popular periodicals such as The Guardian.

Fine-Tuning: Reconciling Eighth Amendment 'Fines' and Police- and Prosecutor-Led Civil Enforcement Post-*Timbs*

In the past three decades, state and local police and prosecutors have ushered in an unprecedented convergence of criminal and civil law in America. Today, rural prosecutors and big-city police alike wield civil and administrative claims—nuisance abatement, eviction, license revocation, civil forfeiture—to raise municipal revenue, sidestep constitutional strictures, and better achieve retribution and deterrence. Many traditionally civil actions and remedies have simply collapsed into the machinery of American criminal punishment.

Only recently has society, and the judiciary, taken objection to the trend toward profit-driving policing. In Timbs v. Indiana (2019), by incorporating the Excessive Fines Clause as against the states, the U.S. Supreme Court opened the door to a reckoning. But the Court left intact its anachronistic approach to determining a sanction is a "fine" under the Eighth Amendment according to its punitive or remedial purpose. This distinction, developed largely by reference to federal criminal and civil forfeiture laws, is dangerously ill-suited to the raft of non-forfeiture-based sanctions now levied by state and local police and prosecutors.

In "Fine-Tuning," I revisit the Court's purpose-based distinction in light of non-forfeiture-based tactics—abatement, eviction, and license revocation—now common to police and prosecutors' offices in major cities and counties across America. Using New York's experiments in order-maintenance civil enforcement starting in the 1970s as a model, I trace the decades-long process by which state and local officials repurposed traditionally civil common law actions and remedies. This escalating pattern of constitutional avoidance and agency drift portends the flaws in the purpose-based test that, if left unaddressed, will permit states and localities to further press non-forfeiture-based remedies into the service of penal goals. Only by reconciling the legal-historical meaning of a "fine" with the emergent order-maintenance architecture of criminal-civil enforcement will the Clause fulfill its purpose of guarding against governmental abuse of criminal-law-enforcement authority.

Professor Scott Dodson
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Scott Dodson is the James Edgar Hervey Chair in Litigation and Geoffrey C. Hazard Jr. Distinguished Professor of Law. He is the author or editor of seven book titles, including books published by Oxford University Press and Cambridge University Press. He is the author or coauthor of around 100 shorter works, including articles published in Stanford Law Review, New York University Law Review, Michigan Law Review, University of Pennsylvania Law Review, California Law Review, Virginia Law Review, Duke Law Journal, Northwestern University Law Review, Georgetown Law Journal, Vanderbilt Law Review, and in leading peer-reviewed journals, such as American Journal of Comparative Law, American Journal of International Law, and Law & Society Review. His works have been downloaded more than 45,000 times, and he was listed as the 9th (tied) most-cited civil-procedure scholar in 2010-2014.

Article III and the Political-Question Doctrine

Courts and commentators have often sourced the political-question doctrine in Article III, a repository of other separation-of-powers doctrines applicable to the federal courts. Rucho v. Common Cause, a blockbuster political-question case decided in 2019, explicitly tied the doctrine to Article III. But a careful look at the development of the doctrine undermines the depth of that connection. Further, sourcing the doctrine in Article III leads to some very odd effects, including leaving state courts unrestrained from answering federal political questions. This Article argues that the source of the political-question doctrine is in the substantive law, not in Article III. Such a reorientation helps explain a number of puzzling attributes of the doctrine, including why federal courts retain jurisdiction over political-question cases, why state courts must follow the federal political-question doctrine, and why the political branches can delegate some political questions back to the courts. Refocusing the political-question doctrine on the substantive law, rather than on Article III, helps better allocate power among federal courts, state courts, and political branches.

Dr. Raff Donelson
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Raff Donelson is Assistant Professor of Law at Penn State Dickinson Law. His research and teaching focus on constitutional law, criminal procedure, legal philosophy, and moral theory. His writing has appeared in law reviews and philosophy journals, edited collections and more popular outlets. Over the past few years, Donelson has argued for expanded understandings of legal punishment and has shown that having an unduly narrow definition of punishment has major constitutional ramifications.

Natural Punishment

A man, carrying a gun in his waistband, robs a food vendor. In making his escape, the gun discharges, critically injuring the robber. About such instances, it is common to think, "he got what he deserved." This Article seeks to explores cases like that, cases of "natural punishment." Natural punishment occurs when a wrongdoer faces serious harm that results from her wrongdoing and not from anyone seeking retribution against her. The Article proposes that US courts follow their peers elsewhere and recognize natural punishment as genuine punishment for legal, specifically constitutional, purposes. Were US courts to do so, they would need to reduce the amount of punishment they would otherwise bestow on wrongdoers upon conviction, if a natural punishment has occurred or foreseeably will occur. A handful of foreign jurisdictions already accept something like this Article's proposal, but natural punishment has no formal legal recognition in the United States. The goal of this Article is twofold: first, it offers a rigorous and defensible definition of natural punishment, by distinguishing it from nearby notions and dispelling any association with supernatural ideas, and, second, it demonstrates that recognizing natural punishment as genuine punishment will not much disturb existing American legal institutions and understandings.

Professor Melina Girardi Fachin
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Multilevel Feminist Constitutionalism

Countless movements have been reshaping the contemporary landscape of constitutional law, enabling the formation of a (de) constructed (Balkin; Tushnet) scene, fostered by a critical movement (Gargarela), specially from the peripheral constitutionalism (Uprimny) that contrasts with the modern constitutional heritage.

This is due to the shortage of the prevailing constitutional discourse to fulfill its promises. Among the themes that reveal this insufficiency, stands out the historical and structural inequality between men and women, which persists with greater or lesser intensity in different realities (MacKinnon).

Seeing constitutional law through feminists' lenses - here understood as social, political and economic equality between the sexes (Adichie) – bring forth an epistemological turn that widen the latitude and foundations of constitutional theory, proposing a critical review of its structures.

As to latitude, feminist constitutionalism poses a global challenge to the State-only view of constitutionalism, opening it up to a complex, integrated, compared and multilevel view (Slaughther).

As to the foundations of constitutional theory, the principles of equality and non-discrimination gains new contours with the central idea of difference and otherness (Fraser).

The diversity focus is one of the most notable aspects of a feminist approach to constitutionalism. Difference is claimed here in its plural sense: inequalities and oppression experienced by women are not limited to a binary code of man/woman, but also embraces race, culture and social class categories (Davis). Feminist constitutionalism is not meant to be inclusive of all aspects of diversity, but it contains an epistemological key that connects them with constitutionalism (MacKinnon).

Throughout the history of constitutionalism, the most serious violations of human rights were based on intolerance; difference was a reason to violate rights. In contrast, the foundation of constitutionalism seen through feminists' lenses is the recognition of others - seen in their specificities and multiplicities (Davis) - as deservers of equal consideration and respect (Dworkin), guided by the protection of dignity and the prevention of human suffering.

Feminist constitutionalism triggers the expansion of constitutional discourse (multilevel) and reinstates difference and otherness as its foundations.

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Jorge M. Farinacci Fernós is currently an Associate Professor of Law at the Interamerican University of Puerto Rico Law School. He received his J.D. (magna cum laude) from the University of Puerto Rico (UPR) Law School, where he was awarded the Prizes for Highest Overall GPA and Highest GPA in the area of Public Law. He was also Associate Director of the UPR Law Review and worked as a law clerk at the Puerto Rico Supreme Court.

He obtained his LL.M. from Harvard Law School and his S.J.D. from Georgetown University Law Center. He has published Articles in the Southwestern Law Review, Hastings International and Comparative Law Review, Tulsa Law Review, Kansas Journal of Law and Public Policy, Barry Law Review, Montana Law Review, among others. In 2020, he received the "Mark Tushnet Prize in Comparative Law" from the American Association of Law Schools (AALS) for his article "Post-Liberal Constitutionalism."

The Transformation of the Territorial Clause: From Temporary Incorporation to Permanent Non-Incorporation

Prior to the Insular Cases, the Territorial Clause of the U.S. Constitution applied mostly to substantially populated lands under federal jurisdiction that, after achieving adequate levels of political organization, began their transition into a federated State. In the meantime, Congress acted as the territory's general legislature, unbound by the limitations of Article I of the Constitution. The Spanish-American War netted several new territories, mostly populated by non-Anglos. This presented a challenge to those in the United States who did not wish that these territories become U.S. states. The Supreme Court obliged.

The Insular Cases split the Territorial Clause atom by formally distinguishing, for the first time, between so-called incorporated and un-incorporated territories. The former was the 'classical' definition of the Clause; the latter constituted a doctrinal innovation that did not imply the start of the annexation process. Balzac v. Porto Rico reinforced the distinction and made clear that un-incorporation could be a permanent condition.

Recently, the Supreme Court announced a series of decisions regarding the territories, particularly Puerto Rico, that do not mention the incorporated/un-incorporated distinction at all. It just refers to 'territories' in general, without any additional characterization. Yet, unlike the pre-Insular Cases world, the new, singular definition of territory appears to be the un-incorporated version, which has totally replaced the classic definition.

This paper analyzes the journey of the Territorial Clause from its singular, classic, incorporated version, through its split into two distinct categories (classic; new) in the Insular Cases and Balzac, to its present form as a singular, un-incorporated version that appears to silently replace the classic version. The possibility of a populated territory remaining in permanent limbo signals that current U.S. law views colonialism as constitutionally valid.

David Froomkin

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David Froomkin is a J.D./Ph.D candidate at Yale with interests in democratic and constitutional theory.

Professor Michael Froomkin

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Fixing the Senate: A User's Guide

The Senate is the most undemocratic part of the U.S. Constitution – worse even than the Electoral College, although the two are related, and some versions of fixing the Senate would ameliorate the Electoral College also. Unfortunately, each state's 'equal Suffrage' in the Senate is protected by a unique Constitutional entrenchment clause. The entrenchment clause creates a genuine bar to reform, but that bar is not insurmountable. We argue first that the constitutional proscription on abolishing the Senate has been overstated, but that in any case there are constitutional reform proposals that range from abolishing the Senate to various degrees of disempowering it. We then argue that there are several promising reforms that could move in the direction of democratizing the Senate without constitutional amendment. In particular: admitting new states, breaking up the largest states, and a new Constitutional Convention. This paper canvases benefits, costs, effectiveness, and likely feasibility of each of these methods by which one might seek to make the Senate more representative despite the entrenchment clause. Several of the proposals create an opportunity for Supreme Court review and perhaps obstruction, raising questions about the relationship between Senate reform and Supreme Court reform.

Professor Joshua Ulan Galperin
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Josh Galperin is a Visiting Associate Professor at the University of Pittsburgh School of Law where he teaches and researches in constitutional, environmental, administrative, tort, property, and food law and policy. Prior to Pitt, Josh held a joint clinical and research appointment between Yale Law School and the Yale School of the Environment. Josh's research focuses on the way legal institutions can influence the development of public interest goals. Josh uses environmental, food, and agriculture law as articulations of public goals and then uses the doctrine of constitutional, tort, property, and administrative law to describe and compare legal institutions.

The Public Role in Private Governance

Private environmental governance (PEG) is a popular approach to environmental protection. It seeks to achieve public goals, such as climate change mitigation, through non-state leadership. Because it can fill the enormous gaps left when government is too polarized, unproductive, or even counter-productive, PEG has been the subject of significant scholarly attention. That scholarship has carefully defined the field, catalogued successes, and traced future opportunities. However, the literature has so far not asked deeper questions about private governance, particularly: what allows private firms to so effectively govern the environment?

This article is the first to address this question and it concludes that private firms can govern the environment because they have vast power but, unlike governments, private firms can wield power without the democratic, constitutional, and administrative practices that normally apply to public governance. Thus, relying on private initiative for environmental protection may mean accepting and reinforcing the distribution environmental power without sufficient collective control.

This article, therefore, asks whether PEG could offer more robust democratic opportunities. Constitutional democracy is a multidimensional practice, beginning with majoritarianism, but also including individual participation, reason giving, and deliberation. When we measure PEG against the standard of constitutional democracy it turns out to fall short.

Constitutional administrative law, however, helps address PEG's democracy deficit in two ways. First, administrative law offers specific models for improving the lack of participatory and collective decision-making structures within private institutions. Second, it provides a relatively accessible, functional, and democratic forum for launching public debate and locking-in public decisions about the distribution of power and, therefore, the role of private governance. In short, though PEG might avoid the political obstacles that hamstring environmental law, private governance is as much a political-democratic institution as public law, and we should treat it as such.

Professor Sonya Garza
Barry University School of Law

Professor Sonya Garza is a Phi Beta Kappa graduate of the University of Texas-Austin and Stanford Law School, where she was a Note Editor on Stanford Law Review. She started her career at Fulbright & Jaworski LLP, now Norton Rose Fulbright, in Houston, Texas as an associate in their family law section. In 2004, Professor Garza began her teaching career at Texas Tech University School of Law. She later joined the full-time faculty at New England Law – Boston and Elon University School of Law in North Carolina. She taught Constitutional Law, Family Law, Gender and the Law, and Children and the Law. She also taught a seminar for clinical students. After her time in academia, Professor Garza returned home to Austin, Texas where she worked at the Travis County Domestic Relations Office. She served as the manager of the office's Visitation Services Program. Professor Garza's scholarship is focused on the conflict between parents' constitutionally protected rights and the welfare of children. She is also interested in gender and racial issues in family law, specifically in the child welfare system.

Judicial Bypass in 2021: Substantial Obstacles or Absolute Ban?

The undue burden standard is defined as "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." Planned Parenthood v. Casey (1992). States requiring parental notification or consent for minors must have judicial bypass procedures in place.

In recent years, some states have passed laws creating a higher burden of proof in judicial bypass proceedings. Some states have also imposed shorter time requirements for minors seeking judicial bypass. Prior to these laws being passed minors had to overcome procedural constraints, including, but not limited to, obtaining and paying for representation.

In addition, minors in foster care and unaccompanied immigrant children in detention face even greater obstacles in seeking judicial bypass. Given these minors do not have a parent present, judicial bypass is the only option available when seeking access to abortion. Minors in state and federal custody must overcome practical (i.e., travel) and procedural constraints.

The purpose of my discussion is to explore whether minors who must overcome practical and procedural constraints in seeking judicial bypass are faced with an undue burden which cannot be overcome. In addition, do the government interests in protecting minors in state and federal custody overcome the undue burden test?

Professor Michael Gentithes
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Michael Gentithes is an assistant professor of law at the University of Akron College of Law. Professor Gentithes's teaching and research focuses on constitutional law, criminal procedure, and legal theory. His articles have been published in law reviews across the country, including the Iowa Law Review, Harvard Civil Rights-Civil Liberties Law Review, William & Mary Law Review, Georgia Law Review, Missouri Law Review, Tennessee Law Review, and Washburn Law Journal. He makes frequent presentations to bar associations on topics in constitutional law, criminal law, and appellate practice. He previously served as an appellate defender in the Office of the State Appellate Defender, where he represented indigent clients in criminal appeals throughout state and federal courts. Professor Gentithes earned an LL.M. in legal theory from New York University School of Law, his J.D. from DePaul University College of Law, and his B.A. from Colgate University.

It's Exigent Circumstances, Stupid! Reconceiving Warrant Exceptions in Officer-Citizen Interactions

Although the Fourth Amendment presumptively requires officers to obtain a warrant before conducting a search, the Supreme Court has created a labyrinth of exceptions to that requirement. But the Court has failed to elucidate a consistent rationale to justify the exceptions that arise during interactions between officers and citizens. The resulting confusion adds to the tension inherent in those interactions. Citizens assume that officers have unlimited authority to invade their privacy at will, while officers genuinely interested in solving crime struggle to understand the limits of their power.

To reconcile these disparate warrant exceptions, the Court should apply the "exigent circumstances" doctrine to a wider array of officer-citizen interactions. At their root, exceptions during officer-citizen interactions address officer responses to emergencies. If the Court reconceives the justifications for those exceptions under a single analytical rubric, it can clarify the normative case to limit or eliminate some exceptions—like purely evidentiary searches of cars or consent-based searches entered unwittingly. A reconceived exigent circumstances doctrine is also possible for officers to explain, and citizens to understand, as a normative basis for officers' actions. Officers should be able to respond to emergencies as they arise in the field without concern for the evidentiary repercussions of their actions. Thus, in an officer-citizen interaction, exceptions to the warrant requirement should follow a simple guiding principle: if officers have an objectively reasonable suspicion that the interaction creates a threat to officer or public safety, a warrantless search is permissible due to exigent circumstances.

Dr. Scott Douglas Gerber
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Scott Douglas Gerber is a professor of law at Ohio Northern University. He is also an associated scholar at Brown University's Political Theory Project and a member of the Ohio Advisory Committee to the U.S. Commission on Civil Rights. He has published nine books and more than 180 articles, book reviews, op-eds, and sundry pieces. He has made approximately 100 presentations, including at Harvard Law School, Princeton University, Stanford Law School, and Columbia Law School. He is a four-time winner of the Fowler V. Harper Award for excellence in legal scholarship and a three-time recipient of the Daniel S. Guy Award for excellence in legal journalism. In 2020, he was awarded the inaugural Christopher Collier Prize from the Connecticut Supreme Court Historical Society.

"We Who Differ With Regard To Religion Will Keep The Peace With One Another": The Intellectual History of European Laws about Religious Toleration Prior to the Planting of English America

Law matters, and laws about religion matter a lot. Both the European laws about religious toleration prior to the planting of English America and the laws about religious toleration enacted by the settlers who founded English American colonies for religious reasons employed law primarily as a means of social control. European monarchs wanted power, and they utilized laws about religion to help them acquire it and maintain it. The leaders of the English American colonies planted for religious reasons used law to effectuate their designs: to foster religious toleration in those colonies committed to that animating principle (Maryland, Rhode Island, and Pennsylvania); to try to create an ideal Bible commonwealth for the colonies dedicated to the idea that religion must be practiced as God had ordained (Connecticut and Massachusetts). In short, the settlers of English America were impacted by the European laws about religious toleration that preceded their voyages to the New World. The planters of religiously tolerant colonies tried to learn from what they regarded as Europe's mistakes, while those who strove for religious purity rejected the prevailing European notion that divine sovereignty must occupy a decidedly secondary place to the sovereignty of the state.

Professor Kent Greenfield
Boston College Law School

Kent Greenfield is Professor of Law and Dean's Distinguished Scholar at Boston College Law School. A graduate of Brown University and the University of Chicago Law School, Greenfield is the author of three books, including Corporations are People Too (And They Should Act Like It) for Yale University Press in 2018.

He is a frequent public commentator, with appearances on CNN, MSNBC, and Fox, and essays in the New York Times, the Washington Post, and the Atlantic. He has also published numerous scholarly articles in leading legal journals including the Yale Law Journal and the Virginia Law Review. Greenfield clerked for Justice David H. Souter of the United States Supreme Court and practiced at Covington & Burling in Washington, DC. Greenfield has lectured at 131 institutions in 44 states and ten countries, and has been the recipient of four teaching awards while at Boston College.

A New Constitutional Court

The Supreme Court needs saving - it has become too politicized to retain its legitimacy. The way to save it is to create another one. The United States should join scores of other nations, including Germany and France, and create a specialized court to decide constitutional questions. A special constitutional court can be achieved by statute, and it is consistent with Article III. Congress is squarely within its authority to create a constitutional court, and Congress can limit the Supreme Court's appellate authority over the court under Article III's exceptions clause.
The creation of such a court would raise difficult issues of design and authority: How many judges? How to appoint them? How much can the Supreme Court's appellate authority be limited consistent with the requirement that there be "one Supreme Court"?

Professor Andrew Hammond
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Professor Andrew Hammond is an Assistant Professor of Law at the University of Florida. He teaches and writes in the areas of administrative law, civil procedure, and poverty law. His articles have appeared or are forthcoming in the Michigan Law Review, the Northwestern University Law Review, and the Yale Law Journal, as well as other publications. Prior to joining the University of Florida faculty, Hammond taught in the College and the Law School at the University of Chicago. Before entering academia, Hammond practiced as a legal aid attorney at the Sargent Shriver National Center on Poverty Law, first as a Skadden Fellow and then Of Counsel. He clerked for Chief Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit and Judge Robert M. Dow of the U.S. District Court for the Northern District of Illinois. Hammond graduated from the University of Chicago, Oxford University, and Yale Law School.

Territorial Exceptionalism and the American Welfare State

Federal law excludes millions of American citizens from crucial public benefits simply because they live in the United States territories. If the Social Security Administration determines a low-income individual has a disability, that person can move to another state and continue to receive benefits. But if that person moves to, say, Guam or the U.S. Virgin Islands, that person loses their right to federal aid. Similarly with SNAP (food stamps), federal spending rises with increased demand—whether because of a recession, a pandemic, or a climate disaster. But unlike the rest of the United States, Puerto Rico, the Northern Mariana Islands, and American Samoa receive a limited amount of federal food assistance, regardless of need. And with Medicaid, federal law caps medical assistance for each of these five territories, a limit that does not exist for the fifty states or the District of Columbia.

This Article draws much-needed attention to these discrepancies in legal status and social protection. It surveys the eligibility rules and financing structure of disability benefits, food assistance, and health insurance for low-income Americans in the states and the territories. A comprehensive account of these practices provokes questions about the tiers of citizenship built by a fragmented and devolved American state. Part I elaborates the exceptional legal status of Americans who live in U.S. territories. Part II demonstrates how the American territories inhabit a different and, in many ways, dilapidated, corner of the American welfare state. Part III begins with an analysis of ongoing cases in federal court that challenge this facial discrimination and then canvasses proposed legislation. To conclude, Part IV brings the states back in, using the earlier discussion of territories as an invitation to imagine an American welfare state built on a foundation other than a racial order.

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The Author is currently a Ph.D. Scholar at National Academy of Legal Studies & Research, (NALSAR) India and currently carrying out his PhD research on Linguistic Rights of Indigenous Tribal Minorities of India (ITMs) as well as serving as Teaching Assistant of Constitutional Law at NALSAR. He has previously worked in various projects of UNDP, UNICEF & World Bank, apart from that he has also worked as a research associate under Mrs. Namrata Chadha Chairperson of Family & Child Welfare Committee, Government of Odisha. He has also presented and published many research papers related to Constitutional Rights, Human Rights & International Law in National & International Conferences and Journal.

Linguistic Discrimination Faced By Indigenous Tribal Communities (ITMS) Of India & Violation Of Constitutional Rights

Language is a means of communication. Defining it so simply will not be justifiable on its part. Language can be understood better in terms of its functions and role in the society. Language rights have a more disputed character than what some seem to suggest. There is no universal understanding of language rights. They are not essentially given and do not exist prior to positive enactment. Language rights are local, historically-rooted claims, not fixed universals. So, this research aims at exploring & analyzing the Language based discrimination of the Indigenous Tribal Minority community or ITMs of India. Coming to Indian Context, the State official languages have become more prominent in public life and in the life of a major part of the population. In almost all States a sort of linguistic convergence towards the majority language is in progress, which not only endangering absolute minority languages like that of ITMs but also it is directly affecting the public life and basic fundamental facilities to which ITMs are entitled under the Indian Constitution. Thereby, resulting in violation of their fundamental rights under Article 14 which provides for equality, Article 15 which prohibits discrimination on the basis of religion, caste, race and place of birth, Article 19 which provides for freedom of speech & expression as ITM people are forced to learn majority language and their expression of their own languages are limited especially in public spaces due to non-recognition. Also, most importantly their right to life under Article 21 is highly endangered and infringed especially when it comes the right to access health care facilities because of language barriers created. Due to non-recognition of their language, ITMs face a lot of challenges in communicating regarding their health issues to the doctors. Thus, this research ultimately aims at exploring how under the constitutional frame work, linguistic rights of ITMs can be ensured and to substantiate the study, comparative constitutional analysis will be made.

Professor Loren Jacobson
UNT Dallas College of Law

Professor Jacobson is an Assistant Professor of Law at UNT Dallas College of Law, where she has taught Constitutional Law, Health Care Law, Civil Rights Law, and Reproductive Rights and Genetic Technologies, among other courses. She received her undergraduate degree from Yale University, magna cum laude, and a Master's degree in European Literature from Cambridge University. She earned her J.D. at Columbia Law School, where she was a James Kent Scholar. After graduation, she clerked for the Honorable Alvin K. Hellerstein, United States District Judge for the Southern District of New York, and then for the Honorable Wilfred Feinberg, United States Circuit Judge for the Second Circuit. In 2004, she joined the law firm of Waters & Kraus LLP in Dallas, where she practiced for 12 years, mainly in the areas of asbestos personal injury and False Claims Act litigation and appellate work. She joined the College of Law in 2016.

Resurrecting Schechter Poultry and Panama Refining: A Call for a "Heightened Scrutiny" Nondelegation Doctrine as Applied to Congressional Delegations to the President

The nondelegation doctrine requires Congress to provide "intelligible principles" to guide the decision-making of any body to which it delegates authority. Since 1935, the Supreme Court has not invalidated a single delegation pursuant to the nondelegation doctrine. Thus far, the Court has looked at the substance and scope of the delegation to determine whether it contains "intelligible principles" and has rarely looked at the nature of the entity to which Congress has delegated, meaning it has not mattered whether the delegation is to the President or to an administrative agency. My article will posit that the nature of the delegee matters in other administrative law contexts and should matter when the Court applies the nondelegation doctrine. More specifically, it will argue that congressional delegations to the President should be viewed with more suspicion than delegations to administrative agencies because of the President's special constitutional status and the separation of powers concerns that his status engenders. The article will also argue that because judicial review of delegations to the President is more limited than judicial review of agency decisions, a more robust nondelegation doctrine is necessary to do the work of ensuring the President's actions pursuant to a delegation are proper. The article will propose that in reviewing congressional delegations to the President, the Court should adopt a "heightened scrutiny" approach to the nondelegation doctrine that requires courts explicitly to take into account particular factors the Court has highlighted (but not yet made explicitly relevant) in cases determining the constitutionality of delegations made specifically to the President.

Professor Howard Katz
Cleveland-Marshall College of Law

Howard Katz has been appointed as C|M|LAW's first Legal Educator-in-Residence. Katz is a former visiting professor at C|M|LAW, serving from 1995-98 and again from 2005-06. As a Legal Educator-in-Residence, Katz will provide ongoing advice to Dean Fisher and other faculty and staff on best practices across a variety of areas, including admissions, academic support, bar passage, curriculum and teaching.

Katz has served as a professor, an academic associate dean, an administrative associate dean, and as a special advisor to the dean at various law schools, most recently Duquesne University School of Law and Elon University School of Law.

Katz regularly makes presentations about teaching and curriculum at national conferences including the Southeastern Association of Law Schools (SEALS) annual conference, the Association of American Law Schools (AALS) annual meeting, the AALS New Law Teachers Workshop, and the Emory Transactional Law and Practice biennial conference . He is a member of the executive committee of the New Teachers section of the AALS.

Plenary Session on Pedagogy

Professor Katz will lead the plenary session on pedagogy. Attendees will be presented with suggestions to make their teaching more effective. Some general principles of pedagogy will be discussed, emphasizing examples and ideas particularly relevant to constitutional law and related courses.

Topics to be discussed include the following:
1. Setting the tone, including the issue of how political points of view held by professors and students can be addressed
2. Being transparent about expectations, given that constitutional law courses are different from other courses
3. Formative assessment
4. Progression of material, especially as it relates to introducing historical, theoretical, interpretive, and political science background material
5. A recurring decision in teaching – tell vs ask vs do: striking the balance between inductive and other methods of teaching
6. Wayfinding and signaling, including how to help students understand how various parts of the course relate to each other
7. Using multiple methods, including the use of out-of-class resources
8. Remembering that your students aren't you: the role of the course in students' education and how that informs the way we teach
9. Casebook selection: a process difficult in all courses but especially so in this area

In addition to some observations from the speaker, there will be an opportunity for attendees to share their ideas and suggestions.

Professor Robert Knowles
University of Baltimore School of Law

Robert Knowles is an Associate Professor at the University of Baltimore School of Law, where he teaches Civil Procedure and National Security Law. His scholarship explores the ways that the national security state acts as a regulator, and the legal and policy implications of this reality. His articles have been published in the Washington & Lee Law Review, the Washington University Law Review, the Iowa Law Review, and the Yale Law Journal Forum, among others. He graduated magna cum laude from Northwestern University Law, where he served as the Coordinating Articles Editor of the Northwestern University Law Review. Following law school, he clerked for Judge M. Margaret McKeown of the United States Court of Appeals for the Ninth Circuit. In practice, he represented 16 Yemeni detainees at Guantanamo Bay in federal habeas litigation.

LOVEINT

The National Security Agency acknowledged in 2013 that the most common willful abuse of power by its officials was the monitoring of current and former spouses, partners, and love interests. Within the intelligence community, such practices are frequent enough to have acquired their own label—"LOVEINT." (The term shares the same "INT" suffix as terms for other forms of intelligence-gathering, such as "HUMINT" for "human intelligence" and "SIGINT" for signals intelligence.) This article uses LOVEINT—both the label and the phenomenon itself—as a case study for exploring the ways the ostensibly-neutral legal and constitutional structures of the national security state both conceal and support gender inequality. Feminist critical scholars have begun to reveal how principles of military necessity and unit cohesion have long been used to mask gender discrimination and devalue the lives and contributions of women under the law of armed conflict and the military justice system. Similarly, this article hypothesizes, U.S. courts' exceptional treatment of national security in constitutional law creates and maintains a legal space where gendered distributions of power are protected.

Professor Antony Kolenc
UNT Dallas College of Law

Antony "Tony" Kolenc is an Associate Professor at UNT Dallas College of Law. He served 21 years in the United States Air Force, retiring as a Lieutenant Colonel from the Judge Advocate General's (JAG) Corps. During his career as a JAG, Tony litigated both civil and criminal cases before trial and appellate courts. He has also taught at the United States Air Force Academy in Colorado Springs and Florida Coastal School of Law. Tony received his Juris Doctor degree in 1999 from the University of Florida Levin College of Law. He has taught several courses, including Evidence and Constitutional Law. His professional writings have focused on matters of constitutional law and military policy, especially focusing on Freedom of Religion.

"No Help You God": The Intersection of Religious Liberty and the Federal Rules of Evidence

The United States is a nation that has cherished religious liberty from its founding, with the "first freedom" in the Bill of Rights protecting individuals from state-established religion and upholding their right to freely exercise religious faith. Modern state evidence codes, taking their cue from the Federal Rules of Evidence, have nearly all adopted the language of Federal Rule of Evidence 610, which states, "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility." The Article analyzes the limited protections available for religion-related evidence in the Federal Rules of Evidence and corresponding state codes, and it proposes a new evidentiary rule to handle evidence of a person's religious affiliation, beliefs, or opinions. It discusses the policy reasons supporting this new rule and illustrates the scant coverage in the current rules of evidence, and provides litigation examples demonstrating the need for stronger protections. The Article recommends raising the bar for religion-related evidence, except when offered by a defendant in a criminal case. It recounts instances where such evidence has been used in a demeaning way or to inflame the passions of the jury, especially in cases involving drug trafficking, Muslims, and Neo-Pagans. It also justifies its position not to raise the bar for relevant religion-related evidence that does not unfairly prejudice a person, such as when rehabilitating credibility or exploring the impact of damages. Finally, the Article proposes draft language for a new rule that will accomplish the noted policy goals. The proposed rule excludes unfairly prejudicial religion-related evidence through a reverse-403 balancing test, and it contains an express exception for criminal defendants.

Professor Brian K. Leonard
Alabama A&M University and Mitchell Hamline School of Law

Brian K. Leonard is an attorney and adjunct professor at Alabama A&M University and Mitchell Hamline School of Law in Spring 2021. His research focuses on civil rights law, employment discrimination, and the intersection of race and the law. He holds a B.B.A., in Accounting, from Tennessee State University, a J.D., from the Cumberland School of Law of Samford University, and a Master of Laws, (LL.M.) in Taxation from the University of Alabama School of Law. He's been published in the Journal of Employment and Labor Law, the West Virginia Law Review, and the Elon Law Review. He has presented his research at the West Virginia College of Law, Duke University Law School's Center on Law, Race, and Politics, and Elon Law School. He has a forthcoming book, entitled, Movement Mentors: Dred Scott, Homer Plessy, and Rev. Oliver Brown; Three Courageous Men, Their Landmark Cases, and Their Enduring Legacies.

Is Shelby County v. Holder the new Plessy v. Ferguson?

Over 124 years ago, the U.S. Supreme Court decided one of the handful of cases that would define this country for a generation, Plessy v. Ferguson. Almost 6 years, ago the U.S. Supreme Court decided another case, which like Plessy, would create a seismic shift in the landscape of this nation, Shelby County v. Holder. This paper will argue that Holder is the new Plessy. This paper will begin by examining the conditions which resulted in Plessy's decision by the Court. Next, it will discuss the significance of Plessy's result, particularly the states' response to it, including passage of laws that ushered in a period of Jim Crow segregation. Next, this paper will examine the circumstances leading to the Shelby County decision, as well its aftermath, including the strikingly similar response of states to it, by enacting legislation aimed at placing restrictions on voting. This paper will then discuss the extent to which the segregationist laws passed under Plessy undermined the gains provided by the Civil War Amendments to the U.S. Constitution as it relates to the rights of African Americans. Next, this paper will analogize the extent to which Shelby County has resulted in limiting the effects of the Voting Rights Act of 1965, for minorities. After that, this paper will discuss the strategies and campaigns which eventually led to Plessy being overturned by Brown v. Board of Education of Topeka. This paper will then argue how a similar campaign might help to alleviate the effects of Shelby County on voting rights for people of color. Thereafter, this paper will analyze the necessity and/or likelihood of another Supreme Court decision to overturn Shelby County, given the Court's current composition, as well as potential impact of the proposed John R. Lewis Voting Rights Act

Dr. Ken M. Levy
LSU Law School

Ken Levy teaches criminal law, criminal theory, international criminal law, white-collar criminal law, and tort law.

Ken continues to work primarily in criminal theory. His interests include free will and moral responsibility, criminal responsibility, criminal psychology, the act-omissions distinction, the relation between morality and criminal law, and theories of punishment.

May State Universities Fire Professors Who Endorse Trumpism?

Suppose that Alan, a state university professor, endorses white supremacy. If the university can fire Alan for this speech, then it would seem that they can also fire Alan's colleague, Bob, for endorsing white supremacy under a different name: Trumpism. If the university can fire Bob for endorsing Trumpism, then it would seem that they can also fire Alan's and Bob's colleague, Claudia, for endorsing egalitarianism. To suggest otherwise is to suggest that a state university can favor one political ideology over another political ideology. Such favoritism seems to constitute constitutionally impermissible viewpoint discrimination. So either all three professors can be fired or none of them can be.

This conclusion is highly counterintuitive; Alan and Claudia should not be in the same legal situation. I will argue that the problem with this argument is the assumption that all viewpoint discrimination by a state university is constitutionally impermissible. State universities—just like other state institutions—do not need to remain neutral between all values and therefore, neutral about all speech that expresses these values. Instead, state universities may endorse speech that promotes equality and repudiate speech that promotes inequality. So state university professors do have a First Amendment right to express their political views without fear of punishment unless those views are that certain humans are of lesser intrinsic value than other humans.

Dr. Bashar H. Malkawi
University of Arizona School of Law

Bashar H. Malkawi is a Global Professor of Practice in Law at the University of Arizona, He received his S.J.D from American University, Washington College of Law, and LL.M from the University of Arizona. He is well-versed in teaching and providing legal advice with 20+ years' experience in private and public sectors.

Prof. Malkawi is a prolific scholar, whose work covers a variety of subjects and which have appeared in such top-tier journals as Harvard Negotiation Law Review, American Journal of Comparative Law, and the Journal of World Intellectual Property. Prof. Malkawi is author, co-author, or chapter contributor of numerous books. In addition to law articles and academic books, his op-eds and other writings have been featured in the popular press and high-profile blogs. In addition to his scholarship, Prof. Malkawi frequently consults for a wide array of international organizations, governments, and international law firms.

Role and Structure of Parliaments in Arab Countries: The Status Quo

Although many Arab countries enjoy constitutional systems, parliaments played a small role in these systems. After the "Arab Spring" of 2011, there was a movement to reform the constitutional structures in these countries. In practice, litter has changed. The purpose of these reforms was to balance the relationship between the executive and the legislative chambers so as to give more power to the legislatures. For example, in Morocco, the constitution was amended through a referendum so people would select a prime minister, ending the longstanding practice in which the king has selected the prime minister.

The question remains whether constitutional reforms in Arab countries went enough and if they are long-term reforms. Reforms could be reversed or give way to a political reality. These reforms depend not only on how the executive acts, but also on the capacity of political organizations to build on the opportunities the constitution offers them. Through history, attempts of parliamentary reforms in Arab countries have failed. Therefore, any future attempts for reforms should avoid the many hurdles they may face such as division between secular and Islamist forces.

Constitutions should be drafted in a way to constrain power and go beyond traditional statements over national sovereignty and ideological commitments. Those statements served their purpose in the post-independence era. Now, there is a need for a new electoral system, decentralization, and effective political parties. The purpose of the paper is to examine the structure of constitutional structures in the post-independence era. The paper also analyzes in detail the nature and scope of reform adopted by some countries such as Egypt, Jordan, and Morocco. The following sections of the paper address the fate and limits of these constitutional reforms. The paper ends with a set of conclusions and recommendations.

Professor Csongor István Nagy
European University Institute (Florence)

Csongor István Nagy is Braudel senior research fellow at the European University Institute (Florence), professor of law at the University of Szeged, research chair at the Center for Social Sciences of the Eötvös Loránd Research Network, and recurrent visiting professor at the Central European University and the Sapientia University of Transylvania.

The Diagonality of EU Rule of Law: Why Should the European Union Rely on US Constitutional Ideas to Overcome Its Biggest Constitutional Crisis?

The paper provides a normative analysis of the emerging diagonality problem of EU rule of law and human rights (that is, application of EU/federal human rights against Member States), which, as a result of the ongoing rule of law crisis, is generally considered as a core issue of the European integration. The paper employs, with the use of carefully selected comparators, comparative federalism analysis in a comprehensive manner specifically as to EU rule of law. Although most "federations by aggregation" encountered the same problem and went through a "diagonalization" process concerning the applicability of federal rule of law to states (provinces), this comparative federalism perspective has never been used in a comprehensive manner to find a solution for the EU's rule of law predicament.

The paper addresses three fundamental questions of diagonality. First, what is the comparative law framework of the EU's rule of law predicament and how can it be localized and contextualized in comparative constitutionalism and comparative federalism. Second, why should EU rule of law be applied diagonally, what is the warrant for this, and what doctrinal scheme is justified on the basis of the diagonal application's ontological considerations? Third, what are the downsides of the federalization of human rights in terms of uniformity, lack of respect for diversity and imposition of majority understanding of rights?

Dr. Vladimir Nazarov
Plekhanov Russian University of Economics, Moscow

Vladimir Nazarov is a practical lawyer (Advocate), Legal researcher, and Associate Professor of Public Law (in Plekhanov Russian University of Economics, Moscow), holds three higher degrees in education (in Law, Economics and Engineering), and is a Candidate of Science (Ph.D. analog in Russia) (1994). Professor Nazarov's main research interests are in Public Law, including Constitutional bases of legal regulation and some related areas; Theory of Law; Methodology of Legal Researching; and Law and Economy. He has authored more than 100 publications, teacher books, books, articles and theses. His recent research focuses on the legal aspects of digitalization and its effect on relationships: breaching current laws and creating new relationships, which are not yet regulated by law and how to provide balance between public and private interests in a Digital era.

Constitutional Base of Law

This research was inspired by two events that happened this year when bills were drafted for amendments to the Constitution of the Russian Federation (RF-Constitution). The first involved the process of passing RF-Constitution's amendments, and the second involved amending one of the laws to satisfy the new RF-Constitution's provisions.

The Constitution is a central legal document in any modern constitutional democratic state's legal system. The most important constitutional property is its stability. At the same time, public life changes, leading people to change their views on constitutional provisions and the legal questions incorporating social changes to amend the constitution. Amending the constitution is often a part of the lawmakers' job.

This research includes a comparative analysis of active constitutions from around the world to compare lawmaking provisions.

Modern constitutions do not regularly contain legislative process fundamentals. Instead, constitutions usually establish three fundamentals: legislators, types of laws, and requirements for the legitimization of each type of law. This approach places the procedural regulation of the lawmaking process exclusively within the lawmakers' discretion.

Are there limits to lawmakers' discretion to establish procedural regulations and lawmaking stages? How should oversight of legislators be exercised to ensure they observe and act within the bounds of accepted regulations? What are the responsibilities of legislators and consequences for those who violate regulations over adoption of laws? What provisions have to become a part of constitutions for the procedural regulation of lawmaking?

Professor Eang Ngov
Barry University School of Law

Professor Eang Ngov received her J.D. from the University of California at Berkeley School of Law (Boalt Hall) and B.A. from the University of Florida, magna cum laude, Phi Beta Kappa. Before joining Barry University, Professor Ngov practiced domestically and internationally. She served as a Deputy Prosecuting Attorney in Washington and a Civilian Attorney to the Department of the Army JAG Corps in Germany. The U.S. Department of the Army awarded her the Commander's Award for Civilian Service and Performance Awards for her legal service that she provided to deploying soldiers and their families during Operation Iraqi Freedom.

Her scholarship focuses on individual rights, equal protection, and constitutional criminal procedure. Her articles have been published in Stanford's Journal of Civil Rights and Civil Liberties, Utah Law Review, and American University Law Review, among others. Her work has been cited in U.S. Supreme Court amicus briefs and by federal district and state supreme courts. Professor Ngov has taught Constitutional Law, Individual Rights and Due Process, Law and Religion, Federal Jurisdiction, First Amendment, Criminal Procedure, Criminal Law, Civil Procedure I and II, Criminal Litigation Skills, and Trial Advocacy. She was awarded the Teacher of the Year Award for Upper Level Courses in 2014 and 2015.

More Than Friends: Recognizing Dichotomous Relationships in the Fourth Amendment Third Party Doctrine

The third party doctrine, developed from a series of cases in which criminals shared information with other criminals, informants, and undercover agents, is premised on the rationale that we hold no reasonable expectation of privacy when we voluntarily expose information to others and consequently, are deemed to have assumed the risk that the third party would share the information. Subsequent cases, notably *Miller* and *Smith*, extended the doctrine to business records but took no notice of how the dynamics of trust change when you change the person receiving the trust. Whether a person has an expectation of privacy in the information shared should depend on with whom the information is entrusted and the context in which the information is shared.

This article proposes a new paradigm for the third party doctrine by paring it back to the concept of false friends, which originally animated the doctrine. If we accept that one should bear the consequences in making false friends, then we should examine what is a false friend. A false friend is one whom you have misplaced trust. One may have the misfortune to misplace trust with friends, colleagues, neighbors, and family, and any one of them could rightly be placed in the "false friend" position. However, to attribute the appellation of "false friend" to businesses would be inappropriate because the relationships with businesses are distinctly different from friendships. There is an expectation of privacy in information conveyed to businesses because we reasonably rely on them to keep our information private. Our reliance is reasonable because the commercial relationship is bound by contractual duties and rights, and there are industry norms to ensure proper business conduct, possibly assurances given by the business or an independent party to secure our confidence, and legal recourse to vindicate our expectations. The third party doctrine should not be applied to businesses and commercial relationships or transactions because there are significant differences in trust and privacy expectations between friends and businesses.

Dr. Keigo Obayashi
Chiba University, Japan

Keigo Obayashi is an Associate Professor, Faculty of Law, at Chiba University in Japan. He was a visiting scholar at the University of Pennsylvania Law School (2017-2019). He teaches constitutional law and public law at Chiba Law School. He received his Bachelor of Laws, Master of Laws and Doctor of Laws from Keio University. His doctoral thesis was published as "THE U.S. CONSTITUTION AND THE EXECUTIVE PRIVILEGE" (2008). Developing the research, he published "THE CONSTITUTION AND THE RISK" (2015), which analyzed constitutionalism in the age of the risk society. He was also co-editor of "THE MINORITY OPINION OF THE SUPREME COURT" (2016) and "THE CONSTITUTIONALISM OF THE ROBERTS COURT" (2017) (all above books are written in Japanese.). Recently, he is interested in public fiduciary and the concept of a living constitution.

Responding to a Pandemic and the Constitution: Costs and Benefits of the Moderate Model

Covid-19 has had great influence on society. Many countries enforced lock down and people had to endure the inconvenient life. The method of responding to a pandemic depends upon countries. Roughly speaking, there are three ways; mandatory model, self-restraint model, and hands-off model. The mandatory model imposes the restriction by laws and orders while the others do not carry out as compulsory. Although it is difficult to judge which model is best, the self-restraint model is remarkable in that it controls the spread of infection during the request for self-restraint.

This moderate model leaves freedom; however, people are obliged to refrain from going out and opening stores by peer pressure. In fact, some people are put off by others who do not follow the policy. This is de facto mandatory. As a result, some people who want to go on a trip and some retail shops that want to open have no choice but to follow the request.

Even if it constrains individual rights, it is hard to get relief because the court will not approve a de facto violation to freedom. How do we respond to this situation? I examine the cost and benefit about this model, with a focus on Japan.

Professor Christopher Ogolla
Barry University School of Law

Christopher Ogolla is an Assistant Professor at Barry University, Dwayne O. Andreas School of Law where he teaches civil procedure, health law, immigration law, and torts. Prior to joining Barry Law School, Ogolla was a visiting professor at Campbell University Law School in Raleigh, North Carolina. Ogolla has also taught at Savannah Law School, a branch of the John Marshall Law School in Atlanta Georgia. Prior to teaching, Ogolla worked at the Centers for Disease Control and Prevention in Atlanta as an Association of Schools of Public Health (ASPH) research fellow. Additionally, he served as a public health representative for the New York State Department of Health, Division of TB Control, in New Rochelle, New York. He obtained his J.D. from Thurgood Marshall School of Law in Houston, and his LL.M in health law from the University of Houston Law Center. He also holds a master of public health degree from the University of Massachusetts School of Public Health and Health Sciences and a master of arts in medical anthropology from the same university.

Constitutional Challenges of Using Race-Based Medicine During a Pandemic

There is a distinction between racial discrimination in medicine and race-based medicine. Racial discrimination in medicine is a practice that includes differential treatment on the basis of race. On the other hand, race-based medicine uses new methods in molecular analysis to better manage a patient's disease or predisposition toward a disease. Proponents of race-based medicine argue that physicians already take race into their treatment regimens and that understanding the genetics of patients will help tailor treatment. When dealing with a pandemic such as Covid-19 involving massive amounts of morbidity and mortality rates, can race-based medicine be applied without running into equal protection challenges?

The Supreme Court is likely to countenance race-based medicine if the use is narrowly tailored and essential to achieving a compelling government interest. In *Adarand Constructors, Inc v. Pena*, 515 U.S. 200, 239 (1995), Justice Scalia, concurring in part and concurring in the judgment, stated that "to pursue the concept of racial entitlement--even for the most admirable and benign purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." Similarly, Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1 et. al.*, 551 U.S. 701, 748 (2007) observed that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." This would seem to indicate that during a pandemic, the use of race-based medicine would be highly disfavored. This paper addresses two aspects of race-based medicine, i.e., minority participation (or lack thereof) in clinical research; the distribution of Covid-19 vaccines and the likely constitutional challenges.

Professor Reginald Oh
Cleveland-Marshall College of Law

Reginald Oh is Professor of Law at Cleveland-Marshall College of Law, Cleveland State University. He teaches Constitutional Law, Legal Ethics, and Civil Procedure. His scholarship is focused on the Fourteenth Amendment equal protection doctrine on race and racism. He has published in the Wisconsin Law Review, U.C. Davis Law Review, and American University Law Review.

Thick Discrimination and Equal Protection

My paper contends that the Fourteenth Amendment Equal Protection doctrine on race and racial discrimination has predominantly been about, and should be about eradicating what I call "thick racial discrimination." I contend that racial discrimination, defined as differential treatment on the basis of race, ranges in "thickness" or "thinness." Thick discrimination entails discrimination with multiple layers of superordination and subordination. The greater number of layers, the thicker the discrimination. The layers or elements of discrimination include whether the discrimination promotes a system of racial supremacy; promotes notions of racial superiority and racial inferiority; promotes racial segregation/isolation; promotes dehumanization; restricts political rights; is based on pernicious racial stereotypes.

I contend that discrimination, or differential treatment on the basis of race, can encompass none, some, or most of these layers. The more layers that exist, the thicker the discrimination, and core equal protection concerns are implicated. The less layers that exist, the thinner the discrimination, and core equal protection concerns are not implicated. Key equal protection cases such as Strauder, Korematsu, Brown, Gomillion, and Loving will be examined, and it will be shown that these cases involved highly thick discrimination. The affirmative action cases will also be examined, and it will be shown that these cases involved relatively thin discrimination. I contend that only thick discrimination justifies strict scrutiny, while thin discrimination requires only a lower level of scrutiny, whether it be intermediate or rational basis. Ultimately, I contend that a focus on the thickness of discrimination can help reshape the Equal Protection doctrine to ensure it furthers its core concerns about promoting equal respect and citizenship.

Dr. David Orentlicher

UNLV William S. Boyd School of Law

David Orentlicher is the Judge Jack and Lulu Lehman Professor of Law at UNLV William S. Boyd School of Law. Nationally recognized for his expertise in health law and constitutional law, David has testified before Congress, had his scholarship cited by the U.S. Supreme Court, and has served on many national, state, and local commissions.

In addition to his academic experience, David brings important hands-on experience. Between 2002 and 2008, he served in the Indiana House of Representatives, and in November 2020, he was elected to the Nevada Assembly. His recent scholarship draws on his experience with partisan conflict as an elected official and his expertise in constitutional law to discuss reforms that would address the country's high levels of political polarization.

Judicial Consensus

Like Congress and other deliberative bodies, the Supreme Court decides its cases by majority vote. If at least five justices come to an agreement, their view prevails. But why is that the case? Majority voting for the Court is not required by the Constitution, a federal statute, or Court rules.

Nor is it obvious that the Court should decide by a majority vote. When political decisions are made, it makes sense to follow the majority. The general will of the public ought to govern. But judicial decisions are not supposed to reflect popular sentiment. Rather, they must respect the rule of law. Thus, on many matters, courts override the preferences of the majority to protect the rights of the minority.

Moreover, juries decide their cases unanimously. As the Supreme Court has recognized, it is important for jury decisions to emerge from a deliberative process that represents the views of the entire community. For the same reasons why it is important for juries to decide cases unanimously, it is important for the Supreme Court, as well as other appellate courts, to decide cases unanimously. And deciding cases by consensus would not be new for the Court. For most of its history, the Court operated under a norm of consensus, with dissenting opinions being written infrequently.

This article will make several points: (1) Majority voting does not make sense on an appellate court, (2) majority voting on an appellate court violates principles of due process, and (3) unanimity promotes quality and fairness by ensuring that decisions reflect a broad range of perspectives, (4) unanimous decision making reflects the original intent of the Framers, (5) it is consistent with Supreme Court precedent, and (6) the experience of courts, juries, and other decision-making bodies indicates that a rule of unanimity can work well.

Professor Brian L. Owsley
UNT Dallas College of Law

Brian L. Owsley joined the faculty of UNT Dallas College of Law as Assistant Professor of Law in 2015. Professor Owsley has taught Constitutional Law, Constitutional Law II (Federal Criminal Procedure), Criminal Law, First Amendment, Fourth Amendment & Electronic Surveillance, and Torts.

Professor Owsley received his J.D. from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. He served as Executive Editor of the Columbia Human Rights Law Review. He also received a master's degree in International Affairs from the Columbia School of International and Public Affairs.

After law school, he served as law clerk to the Honorable Janis Graham Jack, United States District Judge for the Southern District of Texas; served as Leonard H. Sadler Fellow for Human Rights Watch in New York City; and clerked for the Honorable Martha Craig Daughtrey, United States Court of Appeals for the Sixth Circuit.

Geofencing and Geofence Warrants

Police are increasingly using a new technique known as a "geofence" warrant or a "reverse location" warrant to identify all cell phones and other similar devices within a given geographic area—frequently the area where a crime occurred—during specific time periods in the past. In some respects, this surveillance tool is reminiscent of cell tower dumps, which were attempts by law enforcement to obtain all cell phone numbers utilizing a specific cell tower.

For example, in *People v. Dawes*, the San Francisco police were investigating a robbery of a home but were not having much success in developing any leads or suspects. Consequently, the police turned to a geofence warrant, which sought to compel Google to search its large databases of location histories during a specific timeframe and date to gather data as to which cell phones and devices were in the targeted area.

Essentially, a geofence is an established electronic area creating a virtual perimeter encompassing a physical area within the real world. This electronic surveillance has led to law enforcement seeking search warrants for these areas. Specifically, a geofence warrant is issued by a judicial officer to a law enforcement official to obtain data from a provider regarding the active mobile devices within the geofenced area. Such officials often serve such warrants on providers like Google to obtain location information data that they regularly maintain.

There is no federal statute addressing or authorizing the use of geofencing for electronic surveillance. When officers receive information from a geofence warrant, they will analyze it in order to narrow down a large list of phone number, which are tied to numerous individuals, to a smaller group of phone numbers that may provide leads or suspects in the ongoing criminal investigation. A geofence warrant does not adhere to Fourth Amendment principles of particularity or specificity. Instead, this broad approach toward surveillance raises Fourth Amendment concerns about general warrants.

Professor Emeritus Jeffrey A. Parness
Northern Illinois University College of Law

Jeffrey Parness teaches a variety of civil procedure courses as well as administrative law. He taught for six years at the University of Akron School of Law prior to arriving at Northern Illinois University in 1982. He has been appointed a visiting professor at Marquette Law School, University of Kansas School of Law, Washington and Lee University School of Law, Southern Illinois University School of Law, Case Western University School of Law, The John Marshall Law School (Chicago), and Loyola University Chicago School of Law. He served as law clerk to Judge James B. Parsons of the U.S. District Court for the Northern District of Illinois from 1974-1976. His primary areas of scholarship include federal and state civil procedure laws, maternity and paternity laws, the legal status of the unborn, state constitutional equality laws, crime victim restitution, witness abuse in civil litigation, and judicial rulemaking. In January 2006 Professor Parness was named by "The Chicago Lawyer" as among the 10 Best Law Professors in Illinois.

Federal and State Constitutions on Nongendered Parenthood

State statutes and court precedents chiefly define parents for purposes of bestowing the federal constitutional right to the care, custody, and control of children. State laws largely continue to define parents by gender, as with husbands and wives when there are marital children or contemplated assisted reproduction births. Yet state laws have significantly moved away from genetic ties as the keys to parentage. The paper will explore where gendered parentage laws present constitutional (federal and state) issues and how these laws require change given the constitutional demands of equal protection under law.

Professor G. Michael Parsons
New York University School of Law

G. Michael Parsons is Associate Director and Acting Assistant Professor of Lawyering at New York University School of Law. His scholarship focuses on how courts justify the shifts in public power that attend judicial decision-making in the areas of federalism, separation of powers, and the law of democracy. His most recent works address justiciability, redistricting, campaign finance, and ranked-choice voting and were published or are forthcoming in the California Law Review, Minnesota Law Review, Indiana Law Journal, and University of Pennsylvania Journal of Constitutional Law, among others. Prior to joining NYU, Parsons practiced political, appellate, and antitrust law and clerked for the Honorable Norman H. Stahl of the U.S. Court of Appeals for the First Circuit and the Honorable Robert E. Payne of the U.S. District Court for the Eastern District of Virginia. He received his J.D., magna cum laude, from Georgetown, and his A.B., cum laude, from Davidson College.

SELECTIVE STRUCTURALISM

Over the past few decades, the Supreme Court has increasingly invalidated laws based on freestanding federalism and separation-of-powers principles. By enforcing these "structural protections," conservatives on the Court see themselves as vindicating the Framers' "simple" solution to government power: "divide it." Under this theory, the Court intervenes to restore the proper allocations of power, but then it can sit back, let politics play out, and an effective and accountable government will appear.

Yet this simplistic vision of republican government skips a critical component: representative elections. While the conservative justices claim it is their duty to prevent self-interested actors from short-circuiting the structural mechanisms that allocate power among constitutional offices and bodies, they increasingly foreswear any structural role in preventing those same self-interested actors from short-circuiting the electoral mechanisms that fill those offices and that constitute the power of those bodies. Why?

According to an emerging view, questions over federalism and the separation of powers ("allocative structuralism") fall within the realm of law, but questions about elections and the methods of filling constitutional offices ("constitutive structuralism") belong to politics. As Professors Tang and Stephanopoulous have observed, this dichotomy inverts the assumptions that lie at the heart of the political-process school. While the political-process theory of judicial review requires the courts to "clear the channels" of democracy and then stand aside to leave allocations of power up to the voters, the Court's current structuralism keeps the same dividing line between law and politics but flips the judiciary's role.

In this Article, I challenge the premise at the heart of each school: that either type of "selective structuralism" can provide a sustainable law-politics divide or meaningful boundaries for judicial review. Not only does each theory rely upon unrealistic assumptions about how "politics" will underwrite and support its selective approach to judicial review, the theories employ similar types of arguments and shift the levels of generality.

Professor Meg Penrose

Texas A&M University School of Law

Professor Meg Penrose teaches constitutional law courses at Texas A&M University School of Law. She received her J.D. from Pepperdine and her LL.M from Notre Dame Law School. Professor Penrose frequently writes, lectures, and litigates on a wide range of constitutional law related topics. Her recent focus is on the Court itself and its individual Justices. Her two recent articles, "The Way Pavers: 11 Supreme Court-Worthy Women" and "Goodbye to Concurring Opinions," were published by Harvard's Journal of Law and Gender and Duke's Journal of Constitutional Law. She also worked on the Icelandic Federalist Papers project, writing essays about judicial independence and the constitutional amendment process. Professor Penrose is a member of the American Law Institute and a Life Fellow with the American Bar Foundation.

First Among Equals: A look back at the 1971-1972 Supreme Court Term

This article provides a 50-year retrospective of the Supreme Court's 1971-1972 term. Each year, the Supreme Court issues opinions that change our country. These cases, often evaluated in isolation, may make a term memorable. But what if we were to evaluate the Court using a more holistic approach? What if we were to evaluate the staying power of an entire term? Where would we place the 1971-1972 term?

From Roe v. Wade's first appearance at the Court, to an expansion of criminal procedure rights, to the first major gender equity case, to seminal First Amendment cases, the 1971-1972 term may have had more lasting influence than any other modern term. I hope you will enjoy this look back at the 1971-1972 term.

Professor Ana Santos Rutschman
Saint Louis University School of Law

Ana Santos Rutschman is an Assistant Professor of Law at Saint Louis University. Her legal scholarship has appeared or is forthcoming in UCLA Law Review, Emory Law Journal, Arizona Law Review, Utah Law Review, Texas A&M Journal of Property Law, Yale Law Journal Forum, Michigan Law Review Online, and the Duke Law and Technology Review, among others. Her book on the regulation of vaccines (including vaccine-related speech) is under contract with Cambridge University Press (2022). Prior to joining academia, she worked as a legal consultant for the World Health Organization. She received a Beaumont Scholarship Research Award from Saint Louis University in 2020 and was named a Health Law Scholar by the American Society of Law, Medicine & Ethics in 2018.

Vaccine Misinformation and the Regulation of Speech in Social Media

The circulation of inaccurate information about vaccines in the online environment, particularly through social media, is deeply intertwined with the erosion of levels of public trust in vaccination. This article examines the harm(s) caused by vaccine-related misinformation circulating on social media and shows that the ongoing efforts to address vaccine misinformation – primarily in the form of industry self-regulation – are exacerbating rather than curbing the problem. The article then argues that a sound policy in this area would require further regulation of vaccine-related speech in social media, specifically through a narrowing of the liability shield currently provided under section 230 of the Communications Decency Act.

The article proceeds as follows. Part I briefly situates vaccine misinformation against the larger context of health misinformation in the offline and online environments and then turns to the specific embodiments of misinformation with reference to vaccine-related discourse in the online environment. Part II surveys and categorizes recent and ongoing responses to vaccine misinformation from the largest social media and online social networks, noting that they are largely ineffectual. Part III characterizes the harm(s) that vaccine-related speech, when manifestly incompatible with current scientific standards, causes to public health. It then details a proposal that would allow us to switch from the current paradigm of self-regulation to one that severely curtails vaccine-specific online misinformation at the source: a narrowly tailored amendment to section 230, which would limit the liability shield for vaccine-related speech. Part IV delves into the constitutionality of the proposal and argues that, even though it poses restrictions on speech based on its content, it is consistent with the historical roots of the First Amendment and recent caselaw.

Jennifer Safstrom, Esq.
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Jennifer Safstrom is Counsel at the Institute for Constitutional Advocacy and Protection. Prior to joining the Institute, she served as the Dunn Legal Fellow at the American Civil Liberties Union (ACLU) of Virginia, where she worked on litigation and legislation related to numerous civil rights issues. She received her J.D. from Georgetown University Law Center in May 2018, where she served as Editor-in-Chief of the Georgetown Journal of Law & Modern Critical Race Perspectives, Employer Outreach Chair for the Latin American Law Student Association, and member of the Appellate Litigation Clinic. She earned her B.A. in International Studies from the University of Miami in 2011. Her legal scholarship has been published in the Georgetown Law Journal, Yale Journal of Law & Feminism, Harvard Latinx Law Review, Barry Law Review, Georgetown Immigration Law Journal, and Loyola University Chicago's Annals of Health Law & Life Sciences, among others.

Time to SLAPP Back: Advocating Against the Adverse Civil Liberties Implications of Litigation that Undermines Public Participation

Strategic lawsuits against public participation, known as SLAPP suits, are designed to chill or punish the speech of individuals or organizations who speak out on issues of public interest or concern in a range of contexts, including employment, animal rights, environmental activism, and the Black Lives Matter Movement, among others. SLAPP lawsuits are effective in deterring disfavored speech because of the cost and inconvenience of defending against these actions in litigation, have been referred to as "legal bullying," and are used "to intimidate opponents' exercise of rights of petitioning and speech" and "to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." *John v. Douglas County School Dist.*, 219 P.3d 1276, 1280 (Nev. 2009).

This paper assesses the current trends in SLAPP litigation and potential implications on the exercise of First Amendment rights. Utilizing case examples, the paper underscores who is likely to be targeted by such claims and illuminates the burdens imposed on defendants. It also provides an analysis of anti-SLAPP legislation as well as some of the limitations of current policies. This analysis encompasses an assessment of a recently deepened circuit split on whether federal courts may entertain the various state iterations of the anti-SLAPP special motion. Some circuits hold state anti-SLAPP laws are procedural, and thus inapplicable in federal court because they conflict with Federal Rules of Civil Procedure 8, 12, and 56, rather than as substantive provisions that would supplement the federal rules. The paper provides some recommended solutions and suggested next steps.

Professor Bijal Shah
Arizona State University College of Law

Bijal Shah is an Associate Professor of Law at the Arizona State University, Sandra Day O'Connor College of Law. Her research lies at the intersection of administrative law and structural constitutionalism, and is grounded in the specifics of agency dynamics (particularly in matters of immigration and interagency coordination). Her work appears in publications including the Harvard Law Review, Yale Journal on Regulation, Minnesota Law Review, Columbia Human Rights Law Review, and NYU Law Review, among others. Her recent paper in the Stanford Law Review illustrates how executive agencies defend their turf and thereby wield control over the administrative state by litigating against independent agencies.

Prior to joining Arizona State, Shah was an acting assistant professor at the NYU School of Law. Before entering the academy, Professor Shah was Associate General Counsel for the Department of Justice / Executive Office for Immigration Review. Shah is a graduate of the Yale Law School and of the Harvard University, Kennedy School of Government.

Faithful Execution in Presidential Administration

Over the years, multiple presidents have directed agencies to shirk the requirements of a flagship environmental protection statute, in order to prioritize business and other competing interests. In the domains of social security, immigration, and elsewhere, courts have expanded the requirements of the appointments clause and diminished protection from political removal for expert agency decisionmakers. Across areas of regulation, agencies have reduced their adherence to the administrative requirements of policymaking in order to fulfill presidents' interests in accomplishing their policy goals as quickly as possible. What do these seemingly disparate scenarios have in common? All are paradigms in which the president's exercise of control over agency action is at odds with agencies' efforts to faithfully execute the statutory mandates that have given life to and continue to govern the administrative state.

Indeed, the vesting and take care clauses are at battle, and this conflict has been projected through the administrative agencies. This conflict is manifested as follows. First, the President manifests constitutional power by exercising control over agencies' priorities and actions and is also responsible for holding agencies accountable. Complementarily, administrative agencies are executive stewards of the law as well, and have an important role in ensuring that the Executive "takes care" that the laws are faithfully executed. However, the synergistic relationship between the President and agencies required to "take care" that the laws are faithfully executed is often lost in conversations about presidential control.

This article seeks to build this account. More specifically, it offers and evaluates presidential assertions of power over agencies. In doing so, this article reveals how the President's interests, as asserted via this intervention, may be at odds with and impact the extent to which administrative agencies conform to the expectations of legal and democratic stewardship as required by statutory law. This article also offers suggestions that allow both the legislature and courts to act as a bulwark against presidential efforts that deteriorate statutory law while also maintaining space for the President to intervene.

Dr. Timothy C. Shiell
University of Wisconsin-Stout

Shiell is a free speech scholar and activist at the University of Wisconsin-Stout. He is a Professor of Philosophy, founder and director of the civil liberty focused Menard Center for the Study of Institutions and Innovation (MCSII), and founder and former director of the Center for Applied Ethics. His most recent books are African Americans and the First Amendment (2019) and Civil Liberties in Real Life (2020). He has authored other books, articles, and publications, and done more than a hundred presentations, workshops, and panels. Shiell serves on committees and works with organizations protecting campus free speech and academic freedom. At MCSII, he directs a network of more than twenty Wisconsin universities and colleges funding civil liberty related faculty and student research and internships; conferences and symposia; speakers, panels and debates; workshops and reading groups, and more. And a little history quizlet: he was born the year Alaska and Hawaii became states.

Anti-Orthodoxy and Inclusion as a Foundation for Free Speech Justifications

Considerable debate surrounds the justification for freedom of speech. This paper joins the debate by arguing the values of anti-orthodoxy and inclusion provide a unifying foundation for the multitude of proposed free speech justifications by building on previous work by Nan Hunter on anti-orthodoxy and inclusion and Thomas Emerson and Kent Greenawalt on free speech justifications.

In her 2000 law review article "Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion," Nan Hunter argues anti-orthodoxy and inclusion provide a way to bridge the (perceived) gap between free speech and equality. This paper goes further in arguing the reciprocal values of anti-orthodoxy and inclusion also and more importantly provide a foundation unifying the multitude of free speech justifications.

Nine free speech justifications are explained in the work of two eminent constitutional scholars, Thomas Emerson and Kent Greenawalt. In the 1960s, Emerson articulated in Toward a General Theory of the First Amendment (1966) and The System of Free Expression (1970) an emerging consensus justifying robust free speech through four foundations: robust speech enhances the pursuit of individual self-fulfillment, the advancement of knowledge and truth, democratic participation, and provides a means to balance between stability and change. In his 1989 article "Free Speech Justifications," Greenawalt addressed five more justifications to the list: robust free speech exposes and deters abuses of authority, promotes tolerance, and protects consent and the private domain, autonomy and rationality, and dignity and equality. This paper shows that anti-orthodoxy and inclusion are essential components of all nine justifications.

To further support the role of anti-orthodoxy and inclusion in free speech justifications, the paper briefly discusses some prominent historical U.S. Supreme Court decisions establishing and expanding robust free speech constitutional protections.

Professor David Simson
New York University School of Law

David Simson is an Acting Assistant Professor of Lawyering at NYU Law School, where he teaches the first-year Lawyering course. David's research analyzes the relationship between law and equality, with a focus on how statutory and constitutional antidiscrimination law regulates race discrimination. His article "Whiteness as Innocence" was selected by the Denver Law Review as the journal's 2018 Emerging Scholar Award winner. Prior to coming to NYU in 2019, David was the Greenberg Law Review Fellow at UCLA School of Law, where he taught Employment Discrimination and a self-designed seminar on Race, Social Psychology, and the Legal Process. David grew up in Austria and initially pursued a career in professional tennis, but he eventually decided to move to the United States to compete in collegiate tennis, graduate from college and law school, and focus on an academic career. During law school, David served as the Academic Chair of UCLAW's ACS chapter.

Hope Dies Last: The Progressive Potential and Regressive Reality of the Antibalkanization Approach to Racial Equality

This Article uses Critical Race Theory and social science research to contribute to a longstanding debate of immense current importance: What is the relationship between social cohesion and racial equality progress? Recent events have put pressure on both social cohesion and racial equality progress. Racial justice activists have demanded immediate efforts to eliminate persistent systemic racism. At the same time, the public is perhaps more politically divided than ever, with clear racial dimensions. Calls to "unify" and "heal" as well as to "root out systemic racism" are made at the same time. Can these calls be realistically pursued at the same time or is there a need to prioritize one over the other? This is not just a question of policy but also of constitutional law. Over the last four decades, the Supreme Court's equal protection jurisprudence on race-consciousness has answered with an "antibalkanization approach" which prioritizes social cohesion and views such cohesion as a prerequisite for racial equality progress. It considers racial hostility and resentment among white Americans as the most important racial equality obstacle and polices governmental race-consciousness in an attempt to minimize such hostility and resentment. Policymakers in the past have agreed. But while this approach appears to be well-meaning, it is ultimately flawed because it misunderstands the dynamics of racial inequality and racial hierarchy. It attempts to solve a structural problem with a "bad apple" approach—what CRT scholars have called a perpetrator perspective. This Article illustrates the inner workings of this approach and how social science research on the social psychological dimensions of racial hierarchy prove it to be flawed. The approach ought to be replaced by a more accurate model of racial equality progress that would view white racial hostility and resentment not as an obstacle but as a likely inevitable side-effect of the path of structural change that is necessary for achieving both racial equality and social cohesion over the long-term. Adopting such a structural understanding of racial hostility and resentment would have important implications for both policymakers and for the Court.

Aparna Singh, Research Scholar
National Law University Odisha, Cuttack

Aparna Singh is a Ph.D. Research Scholar at National Law University Odisha (NLUO), Cuttack. Ms. Singh has been working as Assistant Professor of Law at Unitedworld School of Law, Karnavati University, Gandhinagar. Driven by her urge to pursue and excel in research & academics, she has been involved in teaching and research assignments since her post-graduation. Ms. Singh is an avid reader and has been an avid mooter in her law college. She has presented and authored numerous research papers in several national and international conferences held in the premium institutes on the subject area of Freedom of Speech & Expression, Marital Rape, Uniform Civil Code, Forward Reservation, Fourth Generation Human Rights, Constitutional Morality, etc. She has also published several research papers in national and international journals. She continues to research on the issues of constitutional prom-ises of access to justice to the people in India.

CONSTITUTIONAL PROTECTION OF ESSENTIAL RELIGIOUS PRACTICES IN INDIAN REFORMATIVE SECULARISM

Secularism is severely implanted in the Indian culture and has established an extraordinary example due to its distinct characteristics. Secularism indubitably provides equal protection to all religion, mutual respect for each other's religion. Religious freedom in India has always been in controversy despite its exemplary secular characteristic. In light of India's fidelity to reformative secularism, the judiciary evolved test of Essential Religious Practices is challenging. It provides several powers and control to the state over such religious practices which are not considered essential by the court. Realistically, 'essentiality of a religious practice' is determined erratically and contradictorily, and an absolute state-control over 'non-essential' practices is also observed. This juxtaposition of state and religious matters are creating a rift between the secular and religious matters and is disgracing the constitutional rights provided to the religious denominations.

Hence, the research aims to examine the three-step test of the essential religious practices to understand the intricacy of the doctrine. The research will also explore the aspect of essentiality with regard to the connotation provided by the Supreme Court of India. Other important research questions would also touch upon the state and judicial responsibility of ensuring religious freedom and protecting the secular ethos of India. It is one of the pertinent concerns: whether judicial intervention in essential religious practice is violating the essence of secularism? In this regard, I will peruse some of the prior works pertaining to the same field which raises pretty similar concerns. The research will also examine the judicial pronouncements through the lens of reformative secularism.

Professor David L. Sloss
Santa Clara University College of Law

David L. Sloss is the John A. and Elizabeth H. Sutro Professor of Law at Santa Clara University. His research and scholarship focuses on international law, U.S. constitutional law, and U.S. foreign relations law. He has published books with Cambridge University Press and Oxford University Press. His last two books both won prestigious book awards. He has published several dozen law review articles, including articles in Stanford Law Review, Cornell Law Review, Yale Journal of International Law, and Harvard International Law Journal. His next book is Tyrants on Twitter: Protecting Democracies from Chinese and Russian Information Warfare (Stanford University Press, forthcoming 2021-22). Before becoming a law professor, Sloss spent nine years in the federal government, where he designed verification systems for nuclear arms control treaties. His forthcoming book on information warfare draws on both his scholarly expertise in constitutional law and his prior government experience.

Information Warfare and the First Amendment

This paper is a draft chapter from a forthcoming book on information warfare and social media. The book proposes a transnational regulatory system for social media, including: 1) a new Alliance for Democracy whose purpose is to protect democracies from information warfare; 2) a rule prohibiting Chinese and Russian agents from operating accounts on U.S. social media platforms, to be implemented by domestic legislation/regulations in all Alliance member states (the "ban"); 3) a disclaimer regime that will warn domestic audiences in Alliance member states when foreigners from non-democratic countries transmit election-related messages via social media; 4) a registration system that would require social media users to provide their real names and declare their nationalities when they register accounts, including a verification system enabling governments to verify that social media users who claim to be nationals of Alliance member states are, in fact, nationals of those states; and 5) rules to provide robust protection for informational privacy and data security.

The chapter to be presented focuses on the First Amendment. It assumes that Congress will enact legislation to implement the proposed transnational regulation in the United States. The chapter explains why such legislation is constitutionally defensible. The analysis distinguishes between "Madisonian" and "libertarian" approaches to the First Amendment. I explain why the proposed legislation is clearly valid from a Madisonian perspective. Although the outcome of a hypothetical lawsuit challenging such legislation under the First Amendment is difficult to predict, there are sound constitutional arguments that might, or might not, persuade moderate libertarian Justices that the proposed legislation is constitutionally valid.

Professor Noah Smith-Drelich
Chicago-Kent College of Law

Noah Smith-Drelich is an Assistant Professor of Law at Chicago-Kent. His scholarship lies on the intersection of tort law, civil procedure, and health law, with a particular focus on constitutional torts. His articles have been published, or are forthcoming, in the Southern California Law Review, Indiana Law Journal, Public Health Nutrition (Cambridge University Press), and Loyola of Los Angeles Law Review. Before entering academia, Smith-Drelich was a staff attorney for the ACLU of North Dakota, South Dakota, and Wyoming, and he continues to pursue civil liberties impact litigation; he is lead counsel on Thunderhawk v. County of Morton, a putative class action lawsuit challenging police abuses related to the Standing Rock-led resistance to the Dakota Access Pipeline. The case is currently in discovery.

Smith-Drelich graduated from Stanford Law School, where he was an Articles Editor on the Stanford Law Review and the Editor-in-Chief of the Stanford Law & Policy Review.

The Constitutional Right to Travel Under Quarantine

The constitutional right to travel has long been an enigma for courts and academics alike. Despite being widely recognized and regularly applied, relatively little has been written about the breadth or limits of this constitutional guarantee. This gap is particularly striking in the context of quarantines. Although travel rights are directly implicated by such regulations, the law of quarantines (to the limited extent that one has been developed) has almost entirely disregarded the constitutional right to travel. This article seeks to close this gap by building a detailed model of the Constitution's protections of movement and travel and then applying this model to quarantine regulations. In so doing, this article makes contributions to the fields of constitutional law and quarantine law, while providing a robust framework of immediate use to policymakers, courts, and litigants responding to the SARS-COV-2 "novel coronavirus" pandemic.

Professor Boldizsár Szentgáli-Tóth

Eötvös Loránd University

Boldizsár Szentgáli-Tóth is a research fellow of the Hungarian Academy of Sciences, Institute for Legal Studies, and of the Eötvös Loránd University, Department of Constitutional Law. He holds a Ph.D., and his dissertation focused on legislation with qualified majority. His main fields of research are the legislative process, the law of elections, and freedom of expression. He participated and spoke at the World Congress of Constitutional Law in June 2018 in Seoul, and also took part as a presenter at the XXIX World Congress of Social Philosophy and the Philosophy of Law, which was held in July 2019 in Luzern. Apart from this, he holds several research scholarships and has published almost a hundred of academic pieces in English, Spanish, and Hungarian.

Evelin Burján

Eötvös Loránd University (Ph.D. Candidate)

Evelin Burján is a Ph.D. student at the Constitutional Law Department of the Eötvös Loránd University. Her research aims to determine the sufficient minimum and the necessary maximum of judicial review and empirically prove on the ground of concrete examples, whether what kind of Constitutional Courts fulfill these requirements or not. She holds a legal internship at the Hungarian Academy of Sciences, Institute for Legal Studies, where she participates in research on constitutional court decisions by text mining methods. She published several publications on the topic of the Hungarian Constitutional Court. She took part in Dublin Law and Politics Review (DLPR) Research Conference at the Dublin City University in March 2020 and the Central and Eastern European Forum of Young Legal, Political, and Social Scientists in September 2020.

Too much or too little?: The role of constitutional courts during the COVID-19 pandemic

During these challenging times, many governments used emergency powers to introduce COVID-related measures. The coronavirus crisis leads to severe restrictions almost globally, and these measures entailed the limitation of numerous basic constitutional concepts, such as the rule of law, separation of powers, and fundamental rights.

First, we classify how constitutional courts should behave during these times, especially because the legislative roles have changed, legislative processes have accelerated, and the scope for fundamental rights restrictions have been expanded. There is no doubt that rapid and effective responses are needed to address the crisis caused by the epidemic; however, we should not neglect the most basic principles of the rule of law. The role and task of the Constitutional Court are more crucial than ever: they must be the last strongholds of constitutionality, even in difficult times, when most of them work online just through electronic means.

Secondly, we examine decisions about cases that have already been adjudicated by constitutional courts, for example: The German Constitutional Court, in its decision dated 15 April 2020, held that citizens have the right to political protest if they adhere to social distancing rules to slow the spread of the coronavirus. In this case, the Court acknowledged the demands of decisive pandemic response; they have also ensured that fundamental rights should be considered, and the state should respect the basic principles of fundamental rights. Bosnia's Constitutional Court ruled that banning minors and people over 65 from leaving their homes because of the coronavirus pandemic breaches their right to freedom of movement and constitutes a disproportionate measure. The Constitutional Court of Kosovo stated that the restrictions on the right to freedom of movement violated the Constitution of Kosovo.

Professor Etienne C. Toussaint
University of the District of Columbia School of Law

Born and raised in the South Bronx, New York City, Etienne C. Toussaint is an Associate Professor of Law at the University of the District of Columbia, David A. Clarke School of Law. He teaches Contracts, Business Organizations, Law & Political Economy, and Co-Directs the Community Development Law Clinic. Professor Toussaint began his legal career as a project finance associate with Norton Rose Fulbright, US LLP. Subsequently, he served as a Law & Policy Fellow with the Poverty & Race Research Action Council in Washington, D.C., a civil rights advocacy organization. Professor Toussaint graduated from MIT with a B.S. in Mechanical Engineering, The Johns Hopkins University with an M.S.E. in Environmental Engineering, Harvard Law School with a J.D., and The George Washington University Law School with an LL.M. in Advocacy. His scholarship spans the fields of community economic development, economic and environmental justice, political theory, and contract law.

American Waste Land: Slavery, Swamps, and Specters of Colonial Modernity

The disparate impact of the COVID-19 pandemic on Black and Brown neighborhoods nationwide reflects America's uneven geography of public health. This Article argues that such health disparities – shaped by a multitude of social determinants, from social and economic status, to educational opportunity, neighborhood and environmental distress, and health care access – find their roots in American chattel slavery and the long shadow of white supremacy. To be sure, public health experts trace the heightened risk of coronavirus deaths among low-income Black and Brown populations to their high rates of diabetes, asthma, and hypertension. And, perhaps resultantly, food justice activists have called attention to the embeddedness of structural racism in America's global food ecosystem, urging a recommitment to government support for community-based and localized food systems that promote local food production and reduce food insecurity.

This Article takes such arguments one step further, noting that even legislation geared toward food sovereignty can be distorted by the politics of neoliberalism and the logic of racial capitalism. Accordingly, when neoliberal ideals shape the language of policy debates, define the contours of governmental power, and frame the ethics of private ordering and market functioning, seemingly progressive food justice programs – such as Washington, D.C.'s new urban farming initiative – risk weaponizing localized food markets into tools of exploitation, expropriation, and erasure. In so doing, such programs not only harm marginalized populations in an increasingly unequal nation, but more disturbingly, they reconstitute vestiges of American chattel slavery that violate the spirit of the Thirteenth Amendment to the Constitution. Not only do such outcomes degrade the citizenship of Black Americans and weaken the integrity of American liberal democracy, they also warp the fundamental public interest role of government into a silent linchpin of the age-old industrial engine of white supremacy.

Professor Michael Ulrich
Boston University School of Public Health and School of Law

Michael Ulrich is an Assistant Professor of Health Law, Ethics and Human Rights at the Boston University School of Public Health and School of Law. He also currently serves as a Solomon Center Distinguished Visiting Scholar at Yale Law School. His scholarship focuses on the intersection of public health, constitutional law, bioethics, and social justice, with an emphasis on how law impacts health outcomes for marginalized and underserved populations. His writings have appeared or are forthcoming in national and internationals journals, including Hastings Law Journal, SMU Law Review, Northeastern Law Review, Journal of Law, Medicine, & Ethics, American Journal of Law & Medicine, Yale Journal of Health Policy, Law, & Ethics, George Washington International Law Review, Yale Journal of Law & Feminism, and the American Journal of Bioethics. Prior to joining BU Professor Ulrich was a Research Scholar, Senior Fellow in Health Law, and Lecturer in Law at Yale Law School.

Second Amendment Rights and Race: The Constitutional Relevance of Disparities in Gun Violence

This presentation takes a social justice examination of the connection between Second Amendment debates and race. As a New York Times headline put it, "The Iconic Man With a Gun Is a White Man." White men bearing semi-automatic rifles, bulletproof vests, and facemasks in military-style camouflage are accepted and even embraced as protestors and protectors of liberty. Meanwhile, protestors against the murder of George Floyd are met with police resistance, tear-gas, and rubber bullets. Not to mention Philando Castile, a black man who was licensed to carry a gun but was shot and killed nonetheless (though he certainly is not the only example of this type of tragedy). So, who does the Second Amendment truly protect?

White men are pushing a predominantly white male Supreme Court for broader Second Amendment protections. This debate has significant impact on racial health disparities, with black men suffering disproportionately from shootings, a fact too often overlooked if not specifically rejected as constitutionally relevant. If communities of color, targeted by police rather than protected, increased their means of self-defense it may perpetuate stereotypes of the violent black man that is often used to justify shootings by police or citizens under "stand your ground" laws. An expansive interpretation of the Second Amendment could exacerbate gun violence in communities of color and increase tension and violence from police. Yet, this type of impact is absent from any Second Amendment analysis. Thus, this presentation aims to bridge the gap between empirical data on racial disparities of gun violence and constitutional theory with regard to Second Amendment rights.

Dennis Wall, Esq.

Dennis Wall is an "AV" rated attorney, an elected member of the American Law Institute, and author or co-author of four books. He supplements two of his books several times a year. One is Litigation and Prevention of Insurer Bad Faith, now in its Third Edition published in Two Volumes by West Publishing, 2021 Supplements in progress. The First Edition was published in 1985 by Shepard's/McGraw-Hill. He also supplements chapters in his co-authored book, Catastrophe Claims (Thomson Reuters).

He has written many other works published by Thomson Reuters West Publishing, Lexis-Nexis, the American Bar Association, and other publishers. He wrote these books and articles for various legal journals, and maintained two blogs, all while actively practicing law and testifying as an expert witness. Retired now from active practice and testimony, his full-time position is that of a writer including continuing to write the blogs he started fourteen years ago.

Stipulated Limitations on Disclosure of Information: The role of the First Amendment

This is a work in progress for a section in my book, LITIGATION AND PREVENTION OF INSURER BAD FAITH (West 3d ed., two volumes, & forthcoming 2021 Supplements), and for section(s) in my Chapters in a co-authored book, CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS (Thomson Reuters forthcoming 2021). The purpose of this article is to illuminate and explore the constitutional issues arising from agreements to keep documents and testimony designated "Confidential," secret from the public. The constitutional issues implicated by such agreements include First Amendment guarantees of access to the records of judicial and administrative proceedings, and the First Amendment right to petition government for redress of grievances.

Decisions by federal and state courts in the United States are in conflict over the extent of the public's right to access the records of judicial and administrative cases. In general terms, the right to public access of judicial records will be given greater effect by the courts when the question involves access to records of information actually considered during judicial decision-making than to discovery never seen by judges. However, little attention seems to have been paid to the parties' and their lawyers' decisions to limit disclosure in the first instance, and to invoke the protection of the courts for their decisions to restrict access after that.

Further, the effect of agreed restrictions on access to information has received little if any attention in terms of the right to petition government for redress of grievances guaranteed by the First Amendment.

This paper examines both of these constitutional implications, the rights being guaranteed by the First Amendment: the right of access to the records of judicial and administrative proceedings, and the right to petition government for redress of grievances.

Cornelia Weiss, Esq.

Cornelia Weiss is a retired military colonel, having served in the Americas, Europe, and the Pacific. Honors received include the US Air Force Keenan Award for making the most notable contribution to the development of international law. She holds a B.A. in Women's Studies from the University of Utah, an M.A .from Chile's National Academy of Strategy and Policy Studies, and a J.D. from Vanderbilt University School of Law. She first learned about UNSCR 1325 when attending the Inter-American Defense College in 2010-2011. Knowing that history is often used as an excuse to exclude women, she excavates forgotten history about women, peace, and power. Her 2020 publications include "The Nineteenth Amendment and the U.S. 'Women's Emancipation Policy' in Post-World War II Occupied Japan: Going Beyond Suffrage," Akron Law Review: Vol. 53: Iss. 2, Article 4 and "Discrimination Against Women, Rule of Law and Culture of Peace: Colombia's "Peace" Agreement," The Fletcher Forum of World Affairs Vol 44:1 Winter 2020, 97-120.

The Creation and Degradation of Women's Rights Under the Constitutions Erected in the German Laender Under Occupation by the U.S. in Post-WWII Occupied Germany

This paper addresses the creation and degradation of women's rights under the constitutions erected in the German Laender under occupation by the U.S. in post-WWII Occupied Germany. The paper starts by addressing the 1919 Weimar Constitution and its extinction under Hitler. The 1919 Weimar Constitution had not only preceded the U.S. in suffrage rights for women, but it had also provided for equal rights for women (which, now over 100 years later, the U.S. Constitution still does not provide for U.S. women). The paper then examines the role of the U.S. military government in Germany in the direction and formulation of the Laender constitutions, to include whether the U.S. military government in Germany promoted General MacArthur's first policy demand to the Japanese government in post-WWII Occupied Japan -- women's emancipation. The paper excavates the constitutional debates for the Constitutions of Hessen and Bavaria. It illuminates that at least one (male) member of the Hessen constitutional debates questioned whether women should have the right to suffrage under the Hessen Constitution (arguing that it was due to the women's votes that Hitler came to power). It highlights the argument by the (male) Secretary of Education of Bavaria that resulted in the Bavarian Constitution mandating that girls (not boys) take classes on child-raising and housekeeping. (He argued that if girls had been required to take classes on child-raising and housekeeping, Hitler would not have come to power). It examines whether the number of women in the Congress that created the Constitution of Wuerttemberg-Baden affected the priority given to women's rights in the Constitution. The paper then addresses the effect of the German Laender constitutions on the subsequently created 1949 Basic Law for Germany. It concludes by examining whether the German Laender constitutions anticipated the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by analyzing the current CEDAW Committee recommendations for Germany.

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Professor Wright joined the Levin College of Law in 1998 and serves as the Clarence J. Teselle Endowed Professor. At UF Law she has lectured on various subjects including: Constitutional Law, property, trusts and estates, legal history, feminist theory, constitutional law of property, and theories of property. Her research has delved into 19th Century English divorce and marriage law and 19th Century American property rights involving railroads and utilities. She has written extensively, including several book chapters, on recreational trails and rails-to-trails conversions as well as the history of English family law. Wright has written over 30 articles in publications such as the University of Richmond Law Review, Wisconsin Women's Law Journal, and the Washington and Lee Law Review. Her articles have tackled child custody in England; religion, law and women's rights in India; and taking public property for private use without just compensation. She has authored a popular Trusts and Estates casebook and co-authored a skills book for introducing students to the practice of trusts and estates.

Adventures in the Article V Wonderland: Justiciability and Legal Sufficiency of the ERA Ratifications

This article examines the paradoxical world of Article V, the amending power of the Constitution, in light of the recent ratification of the Equal Rights Amendment. It explores the question of whether Article V issues are justiciable, what role the federal and state courts play in determining Article V procedures, and who has the jurisdiction to evaluate the legal sufficiency of state ratifications. This is a confounding area of law, and with few judicial precedents, some textualism and originalism arguments, and recourse to logic and scholarship, I conclude that the ERA is validly the Twenty-Eighth Amendment. I provide a detailed analysis of the Congressional deadline and rescission issues that are right now before the courts and explore the unique role of the states in exercising their Article V powers to effect constitutional change.