

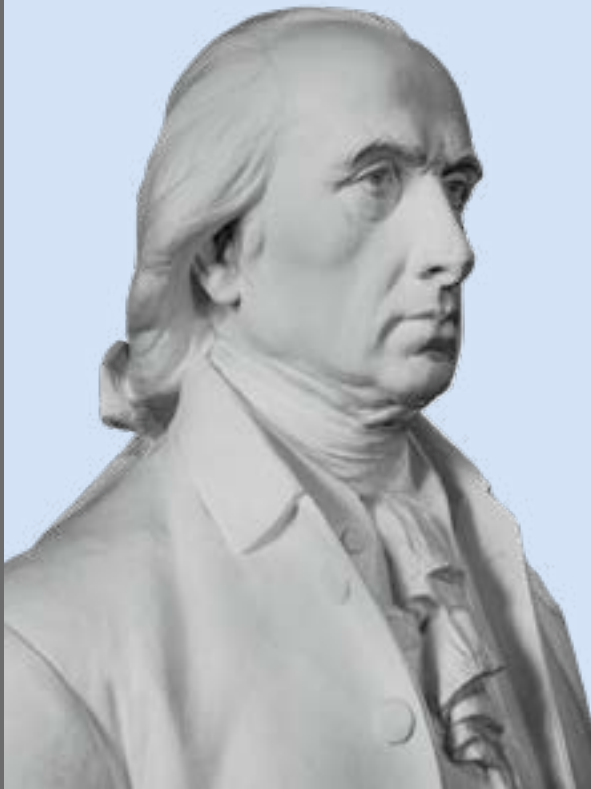


THE **Federalist** PAPER

THE MAGAZINE OF THE FEDERALIST SOCIETY • FEDSOC.ORG

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“The courts must declare the sense of the law; and if they should be disposed to exercise **will** instead of **judgment**, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

EDITOR'S LETTER



The Supreme Court of the United States.

Dear Friend,

Federalist Society chapters at law schools and in cities across the country hosted Supreme Court round ups this summer, and they began previewing the October 2019 term this fall. We hope you had the chance to attend one of these events, but if not, visit fedsoc.org to watch videos, listen to podcasts, and read articles about Supreme Court decisions and upcoming arguments you care about.

Fed Soc students take a break from classes during the summer, but our Student Division was busy as always as it hosted the annual Student Leadership Conference in Washington, DC. The conference brings student chapter presidents together to learn the ins and outs of Fed Soc leadership, and it culminates in a fun reception at the Supreme Court with local Federalist Society members and friends. See inside for photos from the conference, along with a profile of the growing student chapter at Northern Kentucky University's Chase College of Law.

The Fifth Annual Texas Chapters Conference took place in September in Austin. Check out photos from the event, and look out for upcoming conferences and events in your area.

This summer, our Faculty Division hosted programs for academics and aspiring academics, and our Practice Groups held several excellent live events on a variety of topics in Washington, DC. In October, the two divisions collaborated to host the annual Supreme Court Preview at the Mayflower Hotel in downtown DC, which featured a distinguished panel of commentators and insightful commentary on upcoming cases in the new Supreme Court term.

This issue features updates from our Article I Initiative and our Regulatory Transparency Project on pages 14-15. You can also see behind the scenes photos of our Digital team filming for a documentary and pictures from recent events on Capitol Hill. Finally, you can read a member profile and see a selection of our online resources, all of which are available at fedsoc.org.

We hope you enjoy this issue of the Federalist Paper. Stay in touch with us on social media, and please send any comments to us at info@fedsoc.org. We look forward to hearing from you!

Katie McClendon
Director of Publications

SUPREME COURT

This summer marked the end of the Supreme Court's October 2018 term, and we are closely watching the start of a new term this fall. As always, Fed Soc has been providing commentary at live events and on our website, including previews of upcoming arguments, analyses of decisions, and forecasts of what's ahead for the Court and those affected by its rulings. Visit fedsoc.org to watch, listen, and read:

SCOTUS Events

Supreme Court Preview

Robert Barnes, Josh Blackman, Megan L. Brown, Robert Cottrol, Amy Howe, Carrie Lynn Severino

Religious Freedom and the Establishment Clause Post-American Legion

UPenn Student Chapter, Richard W. Garnett, Tobias Wolff

The Kavanaugh Confirmation and Initial Impressions of the Justice

Indianapolis Lawyers Chapter, John Malcolm

SCOTUS Videos

Supreme Court Roundup: October Term 2018

Ilya Shapiro

Buckle v. Precythe: The Decision

John F. Stinneford

Rimini Street v. Oracle: The Decision

Joel S. Nolette

Department of Commerce v. New York

Amy Howe

Iancu v. Brunetti

Kristen Osenga

SCOTUS Podcasts

Air & Liquid Systems Corp. v. Devries

Karen Harned

Sturgeon v. Frost

Tony Franco

2019 U.S. Supreme Court Criminal Law Roundup

Greg Brower, Dean A. Mazzone, Kent Scheidegger

Dutra Group v. Batterton

Don Haycraft

Tennessee Wine and Spirits Retailers Association v. Thomas

Michael Bindas

The American Legion v. American Humanist Association

Christopher DiPompeo

SCOTUS Articles and Blog Posts

Can a New Establishment Clause Jurisprudence Succeed in Protecting Religious Minorities Where Lemon Has Failed?

Alexandra M. McPhee

The Ministerial Exception After Hosanna-Tabor: Firmly Founded, Increasingly Refined

J. Gregory Grisham, Daniel Blomberg

Top Scholars, Diverse Religious Groups Ask SCOTUS to Reconsider Employment Division v. Smith—Again

Joseph Davis

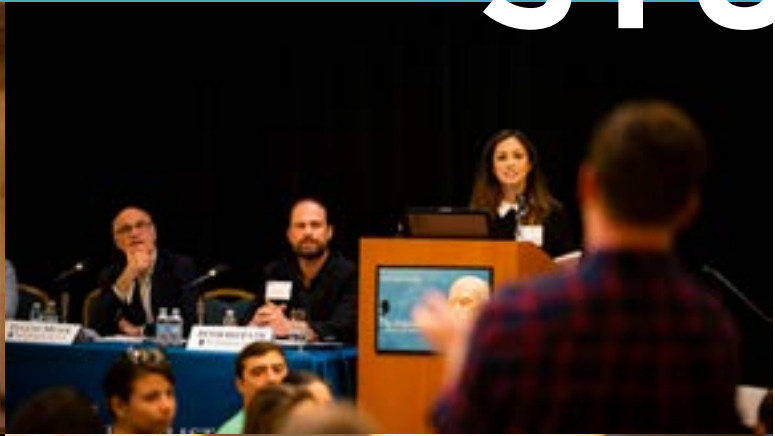
After More Than 30 Years, the Supreme Court Reopens the Door To Federal Takings Claims

Robert H. Thomas





See inside for photos from our annual SCOTUS gala, our DC Supreme Court Round Up, and more!



Student Leadership Conference

Fed Soc student leaders gathered in Washington, DC for training sessions on how to lead their campus chapters, then joined local lawyers for a reception at the Supreme Court.



DENT DIVISION

CHAPTER PROFILE: Northern Kentucky University Chase College of Law

NKU Chase Law's Federalist Society Student Chapter has been doing a great job this year. Check out some of the developments in their chapter!

Largest Student Organization on Campus

Average of 60 Attendees at Events

Speakers include

6th Circuit Judges Amul Thapar and John Bush

Congressman Thomas Massie

Professors Robin Wilson, Nadine Strossen, Josh Blackman, and Paul Rosenzweig

Think tankers David Azerrad, Ilya Shapiro, Robert McNamara, and Mary Hasson

Sending Large Groups of Students to National and State Fed Soc Conferences

Helping to Develop the Northern Kentucky Lawyers Chapter

Save the Date

2020 National Student Symposium

March 13-14 • Ann Arbor

The Structural Constitution in the 21st Century

hosted by the Federalist Society Student Chapter at



Don't miss out on the 50% travel scholarship we offer, thanks to Fed Soc's generous donors! Go to fedsoc.org/travelscholarship for info.



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- Kevin Parent, 2L Representative
- Jared Wyatt, 2L Membership & Recruitment Chair
- Daniel Crall, 2L Membership & Recruitment Chair



LAWYERS CHAPT

**Summer Associate Reception with
Senator Josh Hawley**
June 24 • DC



**South Florida Lawyers Chapter
30th Anniversary Gala**
August 2 • Miami



2019 Texas Chapters Conference

September 13-14 • Austin



Second Annual Gregory S. Coleman Memorial Lecture

Senator Ted Cruz



Proposed Reforms to Texas Judicial Selection

- Prof. Chris W. Bonneau, U. of Pittsburgh
- Prof. Brian T. Fitzpatrick, Vanderbilt Law
- Lee Parsley, GC, Texans for Lawsuit Reform
- Hon. Thomas R. Phillips, Baker Botts; Former Chief Justice, Texas Supreme Court
- Hon. Jeff Brown, S.D. Tx. (moderator)

Discussion on Nationwide Injunctions

- Hon. Beth Williams, Assistant AG, Office of Legal Policy, U.S. DOJ (intro)
 - Kyle Hawkins, SG, Texas
- Prof. Michael Morley, Florida State U. Law
- Prof. Alan M. Trammell, U. of Arkansas Law
- Hon. Andrew S. Oldham, 5th Cir. (moderator)

Election Issues Roundtable

- Erin E. Murphy, Partner, Kirkland & Ellis
- Patrick Rosenstiel, CEO, Ainsley Shea and Sr. Consultant, Nat'l Popular Vote Campaign
- Tara Ross, Author, *The Indispensable Electoral College* and *Enlightened Democracy*
- Prof. Nicholas Stephanopoulos, Chicago Law
- Hon. James Blacklock, TX S. Ct. (moderator)

Junior Scholars Colloquium June 14-15 • Annapolis

Winning
Papers
and
Authors

**Are Collateral
Consequences
Deserved?**

Brian Murray (Seton Hall)

**The Accountability
and System Resilience
of Clearinghouses**

Paolo Saguato (George Mason)

**Vertical Stare Decisis
and Three-Judge
District Courts**

Michael Morley (Florida State)

**The Independent
Board as Shield**

Greg Shill (Iowa)

**Bankruptcy's
Cathedral: Property
Rules, Liability Rules,
and Distress**

Vince Buccola (Wharton)

**Damages for
Privileged Harms**

Stephen Yelderman (Notre Dame)

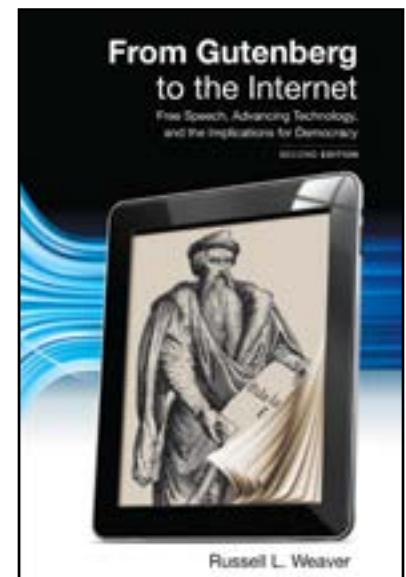
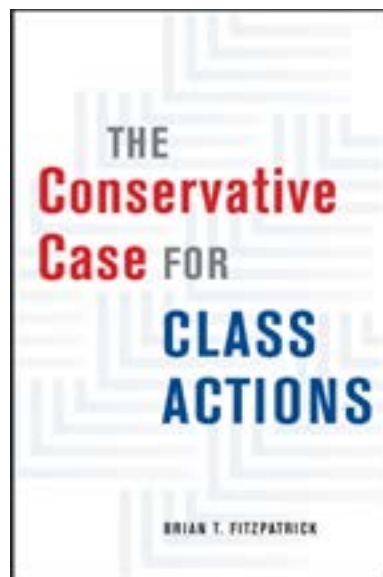
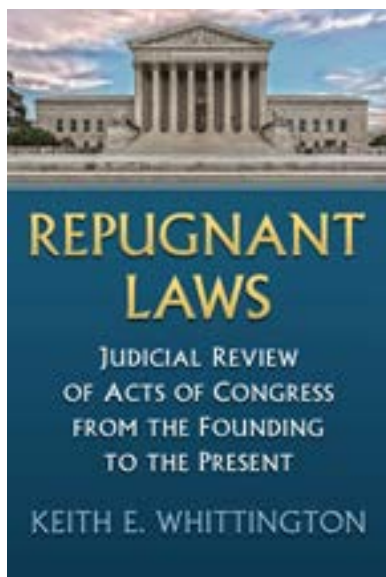
**What is Just
Compensation?**

Wanling Su (Fellow, Harvard)

**First Amendment
Categories of Harm**

Stephanie Barclay (BYU)

Don't miss these new books from faculty friends of Fed Soc!



ULTY DIVISION



James Kent Summer Academy

August 7-10 • Annapolis



PRACTICE GR

ALI: Unbiased Analyzer or Agenda Driver?

John Fund, Victor E. Schwartz, Seth P. Waxman, Edward Whelan, Susan G. Braden (moderator)



Ownership Limits in an Increasingly Competitive Audio Marketplace

Brendan Carr, Gordon Borrell, Francella Ochillo, Jeffrey Warshaw, Michelle Connolly (moderator)

Third Party Litigation Financing: A Distorting or Reinforcing Practice?

Brian Fitzpatrick, Andrew Grossman, Erin Hawley, Luther Strange, Dean Reuter (moderator)



Citizenship: The Road Ahead

John S. Baker, W. Neil Eggleston, David B. Rivkin, Stuart S. Taylor (moderator)

A photograph of Senator Marsha Blackburn speaking at a podium. She is wearing a blue blazer and glasses. A microphone is positioned in front of her. The background features a blue banner with the logo of The Federalist Society.

DC Lunch with Senator Marsha Blackburn

June 20 • DC

A photograph of Miguel Estrada speaking at a podium. He is wearing a dark suit and a patterned tie. He has his hands raised as if gesturing during his speech. A microphone is positioned in front of him.

Supreme Court Round Up with Miguel Estrada

July 12 • DC

ARTICLE I

Third Annual Article I Initiative Writing Contest



For videos, podcasts, papers, and information about events about restoring Congress visit fedsoc.org/articlei.

The Nondelegation Doctrine: Intelligible Principle or Unworkable Standard?

Theme: Our Constitution vests legislative, executive, and judicial powers in three discrete, separate branches. Can Congress modify this constitutional structure by delegating its power to write laws to the administration? According to the Supreme Court's ruling in *Wayman v. Southard*, the answer is no. How then do executive agencies possess the vast regulatory power we witness today? In *J. W. Hampton v. United States*, the Court held that agencies exercise executive, not legislative, power while writing regulations, so long as they are guided by an "intelligible principle" from Congress.

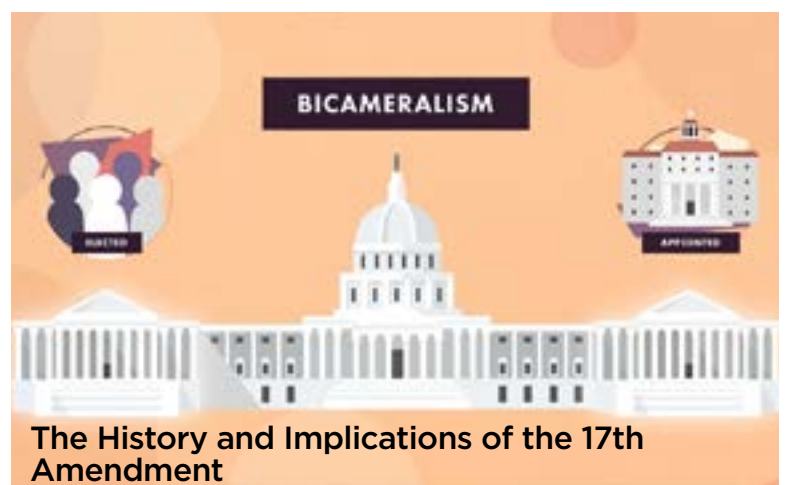
Whatever its justification, this caveat has proven to be the rule rather than the exception. Examples of the Court invalidating regulations for violating the doctrine laid out in *Wayman* are rare. However, in *Gundy v. United States*' striking dissent, three justices called for the revival of the nondelegation doctrine. With Justice Alito signaling agreement in his opinion concurring with the majority, and Justice Kavanaugh's recent ascent to the Court, it seems likely the issue will return to the Court's docket. Is the doctrine in need of resuscitation? What would a revived doctrine look like? What would be its practical effects? And how should Congress prepare if they are forced by the Court to take a more active role in generating regulations?

Prizes: The first-place winner will receive free registration, accommodations, and travel to the Federalist Society's 2020 Student Symposium and a \$7,000 cash prize. A runner-up \$2,000 cash prize and a \$1,000 honorable mention prize will also be awarded.



Laboratories of Democracy Part I: Early State Constitutions and Their Influence on the Legislative Branch

Professors Lynn Uzell and John Dinan discuss the impact that early state constitutions had on the formulation of the federal constitution by the founding fathers.



The History and Implications of the 17th Amendment

New at the Regulatory Transparency Project



Paper

The Proper Role of Rules in a Gloriously Unruly Economy

Howard Beales, Jerry Brito, Gregory Conko, J. Kennerly Davis Jr., Donald Devine, Susan Dudley, Todd Gaziano, Karen Harned, Brian Mannix, John McGinnis, Paul Noe



Podcasts

The Federal Reserve and Real-Time Payment Systems

Aaron Klein, George Selgin, J.W. Verret

Subdelegations of Rulemaking Power and the Appointments Clause

Todd Gaziano, Kristin Hickman, Anne Joseph O'Connell

The Green New Deal

Ann Carlson, James Coleman

The Dynamex Decision and Independent Contractors

Luke Wake

The Implications of Deep Fakes

Robert Chesney, Matthew Feeney, Will Rinehart



Videos

E-Cigarettes: Smoke & Mirrors

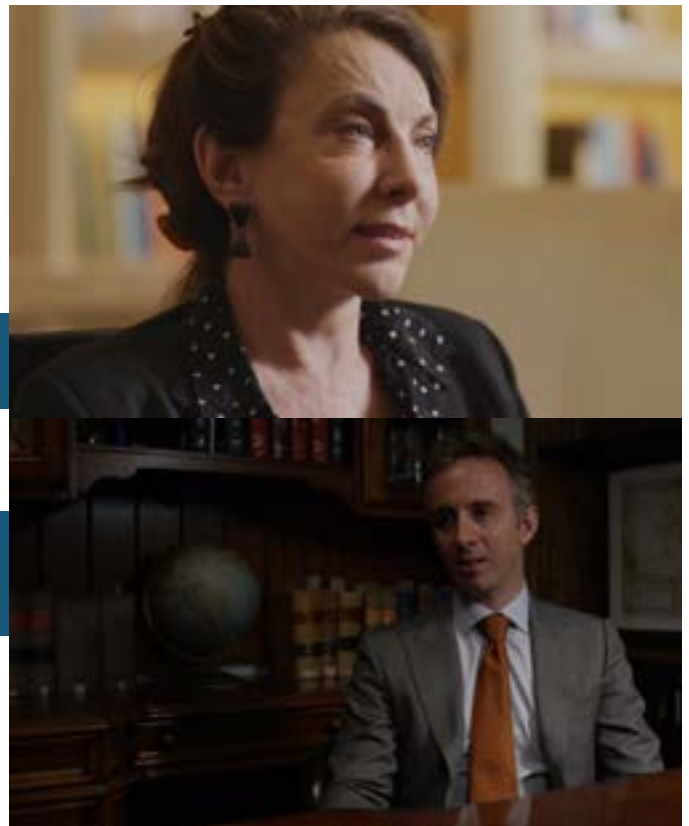
Roger Klein, Tom Miller, Sally Satel

The Jones Act: Debating the Lingering Effects of a 100-Year-Old Law

James Coleman, George Landrith

Agency Rulemaking: Unnecessary Delegation or Indispensable Assistance?

Brianne Gorod, Andrew Grossman, Jeff Holmstead,
Donald Kochan, Robert Percival



Learn more at regproject.org.

DIGITAL

Behind the scenes with FedSoc Films



THE FEDERALIST PAPER • FALL 2019 • FEDSOC.ORG

The FedSoc Films crew recently had their own “Night at the Museum” moment when they filmed after hours at the Smithsonian Institute’s National Museum of American History. Fed Soc was there to shoot footage for an upcoming documentary short about George Washington’s profound decision to not seek a third term as president. The crew focused their lenses on a marble sculpture finished in 1840 by Horatio Greenough titled “Enthroned Washington.” The sculpture depicts Washington as a Roman emperor with toga and sword. But instead of wielding the weapon, Washington is laying it down.

The crew was somewhat disappointed that Washington never stood up to stretch his legs or address the cameras, but nonetheless, FedSoc Films brought the statue to life with high-contrast lighting and camera work that culminated in some striking footage. Look for the George Washington documentary in early 2020. In the meantime, learn more about FedSoc Films and watch their work at youtube.com/thefederalistsociety.



CAPITOL HILL

Originalism

Prof. Randy Barnett



SCOTUS Round Up

Prof. Adam White, Jason Torchinsky,
Jeffrey Harris



Lawyering on the Hill

Andrew Ferguson, Rachael Tucker,
Ted Lehman, Nicole Gustafson



Fed Soc has held several events on a variety of topics on Capitol Hill in recent months. Visit fedsoc.org/events to learn about upcoming events on Capitol Hill and around the country.

Global Governance Watch®

Global Governance Watch is a project of the Federalist Society designed to raise awareness about global governance trends and developments, monitor how the work of transnational organizations influences domestic policies, and address issues of transparency and accountability within the UN, related intergovernmental organizations, and other non-state actors.

Visit globalgovernancewatch.org to learn more and to subscribe to weekly updates.

MEMBERSHIP

MEMBER PROFILE: Gail Heriot



Professor of Law
University of San Diego
Law School

JD
University of Chicago
Law School
BA
Northwestern University

Expertise in
Employment Discrimination
Products Liability
Torts
Civil Rights

Commissioner
U.S. Commission on Civil
Rights

Federalist Society Leadership

Chair, Executive Committee, Civil Rights Practice Group
Member, Race & Sex Working Group, Regulatory Transparency Project

When and how did you first get involved with the Federalist Society?

When the Federalist Society came to the University of Chicago, I was a third-year law student there and so busy with other things that I didn't even hear about it. Of course, it wouldn't have made any difference if I had. It wasn't until a year after graduation that a left-of-center friend of mine looked at me earnestly and said, "You're not a liberal. You do know that, don't you?" I had to think that one over for a while before I decided he was right. And it wasn't until I joined the faculty at the University of San Diego nearly a decade later that I heard about the Federalist Society and decided it was for me.

How are you involved today?

These days, my primary role at the Federalist Society is to be the chair of the Civil Rights Practice Group's Executive Committee. But over the years, I have done a variety of things, including advising student groups, organizing conferences, and speaking at events.

What's your favorite thing about being a law professor?

The single best part of my job is getting to announce the names of the graduates as they come forward to receive their diplomas on graduation day. I love that. I hope nobody ever takes that job away from me.

What's the biggest change you've seen on campus since you became a law professor?

Maybe the biggest change is that many of the things the faculty used to do are now being done by staff members. On the one hand, that's good. It means my time is freed up to concentrate on teaching and scholarship, presumably the things my faculty colleagues and I do best. On the other hand, it has helped to create a much more bureaucratic campus, and the faculty's influence over policy has been greatly reduced. There are certainly many reasons for this, but on the whole, I can't say it's been an improvement.

Tell us about the U.S. Commission on Civil Rights.

The U.S. Commission on Civil Rights issues reports on civil rights issues that are intended to inform the Congress, the President and the American people. The good news is that the Commission doesn't have any real power. Our reports are important only insofar as they are persuasive. We've turned out some great ones, of which I am very proud. And we've turned out some stinkers, from which I have vigorously dissented. Here's hoping that we can increase the number of good ones in the future.

What do you like to do outside of work?

I like to grow cactus. They are my kind of plants: They never complain about anything. And they come in eccentric shapes and sizes.

RESOURCES

Watch

Documentary

E-Cigarettes: Smoke & Mirrors
[Fourth Branch]



SCOTUSbrief

Supreme Court Roundup:
October Term 2018



POLICYbrief

Elected v. Appointed: Senators
& the Seventeenth Amendment



No. 86

Why Do We Need a Structural
Constitution?



Visit [youtube.com/thefederalistsociety](https://www.youtube.com/thefederalistsociety) to watch these and other videos, including speeches and panels from events you missed.

Listen

Teleforum Podcasts

Independent Contractor Or Employee: Sometimes, Things Are Not As Easy As A-B-C

Tragedy in El Paso: Is This Domestic Terrorism, And Do We Need New Laws?

James Comey, Andrew McCabe, and the Office of the Inspector General



The Techlash: Big Tech and Antitrust

The New Endangered Species Act Regulations

Civil Rights and Vanity Plates

SCOTUScasts

Gamble v. United States

The Dutra Group v. Batterton



Subdelegations of Rulemaking Power and the Appointments Clause

John Yoo and John Malcolm on Executive Privilege and Congressional Oversight

Read

FedSoc Blog

California Assembly Bill 5 Legislation – An Expansive and Potentially Onerous Definition of Employee Status Under California State Law

Key Points in the Treasury's Fannie/Freddie Paper

We Three Kings: Lacking Representation in Index Fund Corporate Governance

Alaska Attorney General Warns that Proposed Rule 8.4(f) Is Unconstitutional

New Op-Ed About Oklahoma Opioid Verdict

Telescope Media Group v. Lucero Decided: Religious Liberty in the 8th Circuit

Climate and the Courts: Juliana Oral Arguments

Money & the Constitution: Money, Credit, & Interest Rates

Human Rights in American Foreign Policy

Federalist Society Review

Two Views on Criminal Justice Reform: The Author and a Critic on *Locked In*

Have the American People Irrevocably Ceded Control of Their Government to the Modern Administrative State?

Whistling in Chevronland: Why Department of Labor Interpretations of the Sarbanes-Oxley Act Whistleblower Provisions Do Not Deserve Judicial Deference

More News on Powers Reserved Exclusively to the States

Read these articles and many more at [fedsoc.org/commentary/publications](https://www.fedsoc.org/commentary/publications).

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2019 NATIONAL LAWYERS CONVENTION

November 14-16
The Mayflower Hotel
Washington, DC

SAVE THE DATE

REGISTER
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