



# THE **Federalist** PAPER

THE MAGAZINE OF THE FEDERALIST SOCIETY • [FEDSOC.ORG](http://FEDSOC.ORG)

Winter 2019

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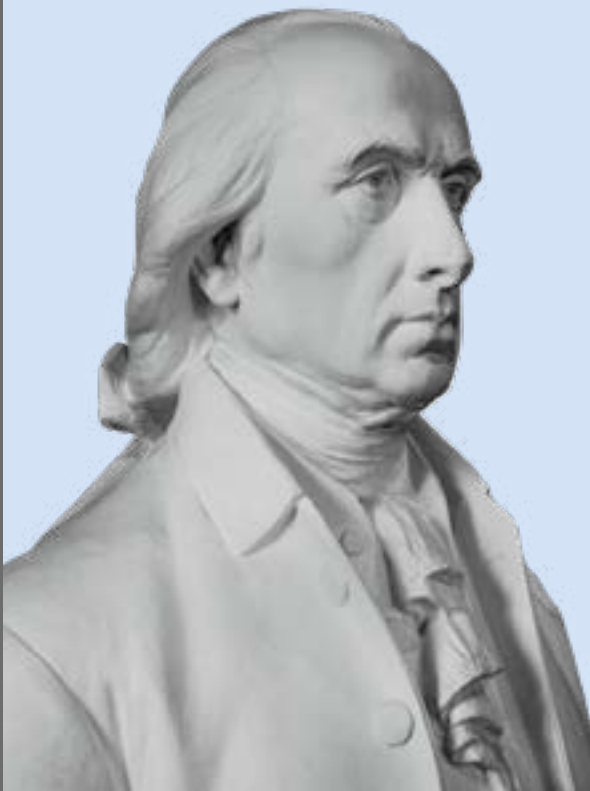
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“The courts must declare the sense of the law; and if they should be disposed to exercise **will** instead of **judgment**, the consequence would equally be the substitution of their pleasure to that of the legislative body.”



# EDITOR'S LETTER



The promenade of the Mayflower Hotel, where attendees mingle between panels at the National Lawyers Convention.

## Dear Friend,

The Federalist Society hosted the annual **National Lawyers Convention** this past November at the Mayflower Hotel in Washington, DC. The NLC continues to be the highlight of our year, and it has grown every year in both numbers and quality. This year's theme was **Good Government through Agency Accountability and Regulatory Transparency**, and our four showcase panels covered that topic from several interesting angles. Breakout sessions sponsored by our fifteen practice group touched on that topic and branched out into other areas of law. Thursday night's Antonin Scalia Memorial Dinner featured a keynote conversation between former White House Counsel Don McGahn and Senate Majority Leader Mitch McConnell about judicial selection. See inside for more details and photos of the Convention. Mark your calendar now for November 14-16, and join us for NLC 2019!

Our Student Chapters are doing great work as always. The **2019 National Student Symposium** is coming up March 15-16, and it will be held in sunny Phoenix, Arizona. See inside for profiles of an outstanding Student Chapter and a longtime and much-loved speaker. The annual Western Chapters Conference and Florida Chapters Conference were just held back-to-back this winter, and you can see photos from those events inside. The Faculty Division's annual conference took place in New Orleans in early January, and it featured several interesting panels and workshops.

Our Practice Groups have not slowed down since planning and sponsoring the breakout sessions at the NLC. They continue to produce excellent commentary on legal and policy issues in their teleforum conference calls, in the **Federalist Society Review**, and on the **Fed Soc Blog**.

The **Article I Initiative** has hosted or co-hosted several events recently, as has the International Affairs Division. Our Digital team has been hard at work producing mini-documentaries and other short videos; see inside for some examples, and watch them at [youtube.com/thefederalistsociety](https://youtube.com/thefederalistsociety). See inside for information about our new and improved **State Court Docket Watch**, a project of our External Relations team. The **Regulatory Transparency Project** continues to produce excellent papers, podcasts, and videos, some of which are listed in this issue and all of which you can access at [regproject.org](https://regproject.org).

We hope you enjoy this look at our recent events and commentary. Keep up with us between issues on social media and at [fedsoc.org](https://fedsoc.org), and please send us any comments at [info@fedsoc.org](mailto:info@fedsoc.org). We look forward to hearing from you!

Katie McClendon  
*Director of Publications*

# NATIONAL LAWYERS



Showcase Panel I: What is Regulation For?

- Prof. Richard Epstein, NYU Law
- Prof. Philip Hamburger, Columbia Law
- Prof. Kathryn Kovacs, Rutgers Law
- Prof. Jon Michaels, UCLA Law
- Hon. Britt Grant, 11th Circuit (moderator)



Showcase Panel II: Balancing Insulation and Accountability of Agency Decisions

- Hon. Steven G. Bradbury, U.S. Dep't of Transportation
- Dr. Cary Coglianese, Penn Law
- Prof. Susan Dudley, George Washington University
- Prof. Catherine M. Sharkey, NYU Law
- Hon. Michael B. Brennan, 7th Circuit (moderator)



Showcase Panel III: The States & Administrative Law

- Prof. Nestor Davidson, Fordham Law
- Prof. Chris Green, Mississippi Law
- Prof. Miriam Seifter, Wisconsin Law
- Hon. Jeffrey Sutton, 6th Circuit
- Hon. Michael Scudder, 7th Circuit (moderator)



Showcase Panel IV: Does Agency Regulatory Power Extend Beyond its Formal Power, and Should It?

- Hon. C. Boyden Gray, Boyden Gray & Assoc.
- Prof. Kristin Hickman, Minnesota Law
- Prof. Sally Katzen, NYU Law
- Prof. Nicholas Parrillo, Yale Law
- Hon. David Stras, 8th Circuit (moderator)



John Marshall: The Man Who Made the Supreme Court

- Mr. Richard Brookhiser, Author of *John Marshall: The Man Who Made the Supreme Court*
- Hon. S. Kyle Duncan, 5th Circuit
- Hon. Kevin Newsom, 11th Circuit
- Mr. David B. Rivkin, Jr., BakerHostetler
- Hon. William H. Pryor, Jr., 11th Circuit (moderator)



Senator Mitch McConnell and Former White Court discussed judicial selection at the Antonin Scalia



Judge Jeffrey Sutton of the U.S. Court of Appeals for the 6th Circuit delivered the 18th Annual Barbara K. Olson



RESOLVED: District courts do not have the authority to enter summary judgment on a motion for summary judgment.

Hon. Beth A. Williams moderated the Rosenkranz Prof. John Harrison (UVA Law) and Neal Katyal (UVA)

# ERS CONVENTION



Counsel Don McGahn  
Memorial Dinner.



Opening Address by Sen. Mike Lee



Address by HHS Secretary Alex Azar



s for the Sixth  
n Memorial Lecture.



## Evolution of the District Courts

- Hon. Thomas Hardiman, 3rd Circuit
- Hon. Michael B. Mukasey, Debevoise & Plimpton, Former U.S. Attorney General
- Hon. William E. Smith, District of Rhode Island
- Hon. Amul Thapar, 6th Circuit
- Hon. Carlos T. Bea, 9th Circuit



z Debate between  
(Hogan Lovells).



## CHAPTER PROFILE: University of Michigan Law School

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

### New Developments in the Chapter This Year

- The first issue of the *Madison Profile*—the University of Michigan Federalist Society's new newsletter—was published in December
- Record 1L involvement with more than twenty active 1L members
- Fed Soc outline bank
- Mini-lecture series on Bluebook citations by a recent alum to help 1Ls prepare for the Law Review write-on process

### Notable Chapter Events This Year

- *Supreme Court Preview* with Michael Huston (Assistant to the U.S. Solicitor General) and Professor Leonard Niehoff
- *Decriminalize Pot . . . Or Not: A Marijuana Decriminalization Debate* with Professors Lee Strang & Howard Bromberg
- *Judicial Celebrity and Cameras in the Courtroom* with David Lat (Above the Law) & Professor Len Niehoff
- *Kavanaugh & the 2nd Amendment* with Robert Alt (Buckeye Institute) & Professor Julian Mortenson
- *The Privileges and Immunities Clause* with Ilya Shapiro (Cato Institute) and Professor Richard Primus
- *Don't Talk to the Police: How I Learned to Stop Worrying and Love the Fifth Amendment* with Professors James Duane and Kimberly Thomas

### By the Numbers

- Fall semester events: 9
- Fall semester social events: 7
- Highest attendance at an event: 150
- Average attendance at fall events: 79

Register now for the

## 2019 National Student Symposium

March 15-16 • Phoenix  
The Resurgence of Economic Liberty

hosted by the Federalist Society Student Chapter at

**ASU** SANDRA DAY O'CONNOR  
COLLEGE of LAW  
ARIZONA STATE UNIVERSITY

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



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I'm honored to be the VP of our very active University of Michigan Fed Soc chapter. We encourage participation through inspiring and educational lunch events as well as Fed Soc group activities. It's a great time to be a member of Fed Soc, and I'm glad to be part of it!

- Kellie Majcher, VP

# DENT DIVISION



## SPEAKER PROFILE: Jordan Lorence

Senior Counsel and Director of Strategic Engagement,  
Alliance Defending Freedom



### How did you originally get involved with the Federalist Society?

I think my first encounter with the Federalist Society was at a DC Lawyers Chapter lunch at Tony Cheng's in the late 1980s or early 1990s. I loved going to hear great speakers. Then I started attending the National Lawyers Conventions, and I was immediately drawn to the robust debates on important issues among qualified individuals. That rarely happened when I was in law school at the University of Minnesota in the dark days before Fed Soc existed. Sometime after that, I started speaking at law school chapters. I can't remember the first one I did, but now I speak at about 10-12 law schools a year, usually on Supreme Court cases involving the First Amendment. I love doing it.

### What are you speaking about on campuses this spring?

This spring, I am speaking on the Establishment Clause challenge to the Bladensburg World War I cross memorial, which the Supreme Court will hear on February 27. I am also speaking on what's next for right of conscience and compelled speech cases after *Masterpiece Cakeshop*. I worked on *Masterpiece Cakeshop* when it was argued at the Supreme Court, and I litigated an earlier case defending a New Mexico photographer sued for declining to photograph a same sex commitment ceremony. I have litigated religious liberty and free speech cases since 1984, and Fed Soc law school chapters often invite me to speak on the cases I am working on. I have litigated a lot of challenges to state university policies that violate the First Amendment, like speech codes and speech zones. The one case I have argued at the Supreme Court was the *Southworth* case, which challenged mandatory student fees at the University of Wisconsin. In the last few years, I have worked with teams of attorneys on the winning side of such cases as *Trinity Lutheran*, *Hobby Lobby*, *NIFLA*, *Masterpiece Cakeshop*, and *Town of Greece*. Usually, I get asked to speak on the religious liberty and freedom of speech issues in these Supreme Court cases.

### What is your favorite annual Federalist Society event?

There are two. I love speaking at the Student Leadership Conference each July in the DC area with Clark Neily of the Cato Institute. We speak about the advantages of working in conservative and libertarian public interest legal groups. I love the chemistry and energy between Clark and me in our tag team speaking format at the event. My other favorite event is the annual National Lawyers Convention. It is difficult to say which is better, the outstanding panel

discussions or standing in the hallway at the Mayflower Hotel talking to all of the friends and colleagues walking by. I have stood in the same place for several hours talking to people. I feel like a grizzly bear standing in a stream during the salmon run, with so many great people walking by. Both of these events are highlights of my year.

### What is the biggest error you see law students being taught?

The biggest error they are being taught is that it is legitimate to silence those who say things that offend you. The Federalist Society's law school chapters help counter that wrong thinking by bringing in people with opposing views on controversial issues and conducting civil, respectful debates on campus. Fed Soc's debates demonstrate how people can disagree and treat each other with respect and dignity.

### How has law school improved over the years?

Increasingly, law students are hearing diverse views, including views supporting textualism and original public meaning originalism. I graduated in 1980 from the University of Minnesota Law School, two years before the Federalist Society started. I can attest to how difficult it was to endure three years of unrelenting advocacy of "the living Constitution" and liberal public policy positions, with little or no pushback from the other side. The Federalist Society has changed things at law schools by encouraging more conservatives and libertarians to teach at law schools, and by holding debates hosted by the student chapters.

### What is your favorite thing about speaking at law schools?

I like having my views challenged, and that happens at law school debates. I strongly advocate for my First Amendment positions, but I realize that I tend to live in a comfortable ideological bubble, and my debate opponents and the law students invariably ask me challenging questions or point out flaws in my thinking that I often had not thought about. The robust debates sharpen me, but also, I hope, the listeners. Many law students have not heard a thoughtful presentation on why, for example, government action forcing people to create messages that violate their consciences also violates the Constitution, or why government censorship of of unfavored viewpoints violates the First Amendment and harms us all.

# LAWYERS CHAPTER

## 2019 Annual Western Chapters Conference

January 26 • Reagan Library

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### Debate: Nationwide Injunctions

- Scott Keller, Baker Botts & Former Texas SG
- Michael Morley, Florida State Law
- Jordan Smith, Former Nevada Deputy SG
- Hon. Allison Eid, 10th Circuit (moderator)

### The Limits of Local Control

- John Eastman, Chapman Law
- Pratheepan Gulasekaram, Santa Clara Law
- John Yoo, Berkeley Law
- Hon. Carlos T. Bea, 9th Circuit (moderator)

### Lunch Address

- Don McGahn, Former White House Counsel

### Post-*Janus* Labor Law and the Future of Unions

- Steven Greenhut, R Street Institute
- William Messenger, Nat'l Right to Work Fdn.
- Hon. Chuck Reed, Former Mayor of San Jose
- Hon. Ryan Nelson, 9th Circuit (moderator)



## 2019 Annual Florida Chapters Conference

February 1-2 • Disney



### Stare Decisis and Precedent

- W. Neil Eggleston, Kirkland & Ellis
- Randy J. Kozel, University of Notre Dame Law School
- Richard H. Levenstein, Shareholder, Nason Yeager
- Stephen E. Sachs, Duke University School of Law
- Hon. Gregory G. Katsas, DC Circuit (moderator)

### Banquet

- Hon. Ashley Moody, Attorney General of Florida
- Hon. Ron DeSantis, Governor of Florida

### Round Table Discussion on Religious Liberty Court Cases

- Blaine Adamson, Hands On Originals, Kentucky
- Sherrie Laurie, Downtown Hope Center, Alaska
- Heidi Matzke, Alternatives Pregnancy Center, California
- Jack Phillips, Masterpiece Cakeshop, Colorado
- Barronelle Stutzman, Arlene's Flowers, Washington
- Ellie Wittman, Students for Life, Miami University of Ohio
- Kristen Waggoner, Alliance Defending Freedom (moderator)

### Election Law and Redistricting in Florida

- J. Christian Adams, Public Interest Legal Foundation
- Kendall Coffey, Former U.S. Attorney, SDFL
- Jessica Furst Johnson, Former General Counsel, NRCC
- Daniel Nordby, Former GC, Governor Scott, Shutts & Bowen
- Chris Sautter, Sautter Communications
- Joe Jacquot, General Counsel, Governor Ron DeSantis (moderator)

### Lunch Address

- Hon. Kenneth Starr, DC Circuit (1983-89); U.S. SG (1989-93)



# FACULTY

## 21st Annual Faculty Conference

January 3-4 • New Orleans

### Original Meaning and the Due Process of Law

- Randy Barnett, Georgetown University Law Center
- John Harrison, University of Virginia School of Law
- Nathan Chapman, University of Georgia School of Law
  - Ryan Williams, Boston College Law School
- Christina Mulligan, Brooklyn Law School (moderator)



### Debate: Resolved: The Supreme Court Should Overrule Qualified Immunity

- William Baude, University of Chicago Law School
- Christopher Walker, Ohio State U. Moritz College of Law
- Tara Leigh Grove, William & Mary Law School (moderator)



### Young Legal Scholars Paper Presentations

- Vince Buccola, U. Penn., The Wharton School  
*The Logic and Limits of Municipal Bankruptcy*
- Paul Crane, University of Richmond School of Law  
*Incorporating Collateral Consequences into Criminal Procedure*
  - Jennifer Mascott, GMU Scalia Law School  
*The Ratifiers' Theory of Officer Accountability*
- Lance Sorenson, Utah Office of the Attorney General  
*The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*
- Lael Weinberger, University of Chicago JD/PhD Candidate  
*Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*
  - Ilan Wurman, ASU O'Connor College of Law  
*The Origins of Substantive Due Process*
- Richard Epstein, NYU Law, U. Chicago Law (commenter)
- Larry Alexander, U. San Diego Law (moderator)



# DIVISION



## Social Media and Freedom of Speech

- Richard Epstein, NYU School of Law, U. of Chicago Law
- J.S. Nelson, Villanova U. Charles Widger School of Law
- Hannibal Travis, Florida International University Law School
  - Aaron Wright, Benjamin N. Cardozo School of Law
  - Gus Hurwitz, Nebraska Law (moderator and panelist)



## The Revived Debate About Antitrust

- Einer Elhauge, Harvard Law School
- Harry First, New York University School of Law
- Justin (Gus) Hurwitz, Nebraska College of Law
- Thomas Arthur, Emory U. School of Law (moderator)

## Scholarly Rigor & Intellectual Orthodoxy

- William Baude, University of Chicago Law School
  - Erwin Chemerinsky, Berkeley Law School
- Joshua Kleinfeld, Northwestern Pritzker School of Law
- Thomas Lee, Fordham University School of Law (moderator)



# PRACTICE GROUP

## Litigation



The Future of the Past: Stare Decisis

- Prof. John S. Baker, Jr., Georgetown Law
- Hon. W. Neil Eggleston, Kirkland & Ellis
- Mr. Kannon Shanmugam, Williams & Connolly
- Hon. Amy Coney Barrett, 7th Circuit (moderator)

## Administrative Law & Regulation



Rulemaking by Adjudication: What Judge?

## Federalism & Separation of Powers



Independent Agencies: How Independent is Too Independent?

- Prof. William W. Buzbee, Georgetown Law
- Prof. John Eastman, Chapman Law
- Hon. Henry Kerner, Office of the Special Counsel
- Prof. Jennifer Mascott, Scalia Law
- Hon. Diane Sykes, 7th Circuit (moderator)

## Criminal Law & Procedure



The Pros and Cons of Plea Bargaining

## Intellectual Property



Artificial Intelligence and Big Data Innovation: Navigating the Technology World of the Near Future

- Hon. Andrei Iancu, Director of the U.S. PTO (opening)
- Mr. James C. Cooper, FTC
- Mr. Shawn D. Hamacher, Steelcase
- Hon. Michelle K. Lee, Former Director of the U.S. PTO
- Ognian "Oggie" Shentov, Jones Day
- Hon. David J. Porter, 3rd Circuit (moderator)

## Religious Liberties



Masterpiece Cakeshop and Its Implications

## Labor & Employment Law



Joint Employment: The Unintended and Unpredictable 'Employment' Relationship

- Prof. Richard Epstein, NYU Law
- Mr. Richard F. Griffin, Jr., Bredhoff & Kaiser, PLLC
- Hon. Philip A. Miscimarra, Morgan & Lewis
- Hon. Timothy Tymkovich, 10th Circuit (moderator)

## Telecommunications & Electronic Media



The Current Landscape of Telecommunications Law

## Corporations, Securities & Antitrust



A New Approach to Antitrust Law: Transparency

- Hon. Frank Easterbrook, 7th Circuit
- Ms. Deb Garza, Covington & Burling
- Mr. Eric Grannon, White & Case
- Prof. Douglas Melamed, Stanford Law
- Hon. John B. Nalbandian, 6th Circuit (moderator)

## Financial Services & E-Commerce



Revisiting the Community Reinvestment Act

## NLC Breakout Panels



Who Am I to

- Prof. Jack Beermann, Boston University Law
- Mrs. Allyson N. Ho, Gibson, Dunn & Crutcher
- Mr. Stephen A. Vaden, Principal Deputy General Counsel, U.S. Dep't of Agriculture
- Prof. Christopher Walker, Ohio State Law
- Hon. Gregory G. Katsas, DC Circuit (moderator)

### Civil Rights



Discrimination Against Minorities

- Prof. Andrew Koppelman, Northwestern Law
- Dr. Althea Nagai, Center for Equal Opportunity
- Mr. Patrick Strawbridge, Consovoy McCarthy Park
- Prof. John Yoo, Berkeley Law
- Hon. James C. Ho, 5th Circuit (moderator)



aining

- Hon. Stephanos Bibas, 3rd Circuit
- Mr. Greg Brower, Brownstein, Hyatt, Farber, Shreck
- Prof. Carissa Hessick, UNC Law
- Mr. Clark Neily, VP for Criminal Justice, Cato Institute
- Hon. Lisa Branch, 11th Circuit (moderator)

### International & Nat'l Security Law



National Security Law & Doing Business Abroad

- Mr. William J. Haynes II, Former General Counsel of the Dep't of Defense
- Mr. Timothy J. Keeler, Mayer Brown
- Prof. Randal S. Milch, NYU Law
- Mr. Donald J. Rosenberg, Executive VP, Gen. Counsel and Corporate Secretary, Qualcomm
- Mr. Eric J. Kadel, Jr., Sullivan & Cromwell LLP (moderator)



mplications

- Prof. Thomas C. Berg, University of St. Thomas, Minnesota School of Law
- Prof. Gerard V. Bradley, Notre Dame Law
- Ms. Louise Melling, Deputy Legal Director and Director of Center for Liberty, ACLU
- Hon. Andrew S. Oldham, 5th Circuit (moderator)

### Free Speech & Election Law



Say What You Will?: Government Compelled Speech

- Prof. Mark L. Rienzi, Catholic University Law
- Prof. Amanda Shanor, U. Penn. Wharton School
- Prof. Eugene Volokh, UCLA Law
- Hon. Sandra Segal Ikuta, 9th Circuit (moderator)



- Hon. Ajit Pai, Chairman, U.S. FCC (keynote)
- Ms. Kathleen Ham, SVP, Gov't Affairs, T-Mobile
- Ms. Nuala O'Connor, Pres. and CEO, Center for Democracy and Tech.
- Mr. K. Dane Snowden, COO, NCTA
- Ms. Jamie Susskind, Chief of Staff and Legal Advisor, Office of Commissioner Carr, FCC
- Hon. Jerry E. Smith, 5th Circuit (moderator)

### Environmental Law & Property Rights



Climate Change Nuisance Suits

- Mr. David Bookbinder, Chief Counsel, Niskanen Center
- Mr. Eric Grant, Deputy Ass't AG, Environment and Natural Resources Division, DOJ
- Prof. James Huffman, Lewis & Clark Law
- Mr. Mark W. Smith, Smith Valliere PLLC
- Hon. John K. Bush, 6th Circuit (moderator)



vestment Act

- Mr. Bert Ely, Ely & Co., Inc
- Mr. Deepak Gupta, Gupta Wessler PLLC
- Mr. Keith Noreika, Simpson Thacher
- Mr. Jesse Van Tol, CEO, National Community Reinvestment Coalition
- Hon. Joan Larsen, 6th Circuit (moderator)

### Prof. Responsibility & Legal Education



Technology, Social Media and Professional Ethics

- Prof. Josh Blackman, South Texas Law
- Mr. John Browning, Passman & Jones
- Hon. Stephen Dillard, Georgia Court of Appeals
- Mr. David Lat, Founder, Above The Law
- Hon. Don Willett, 5th Circuit (moderator)

# ARTICLE I

## Recent Events



**How Should the United States Senate be Elected?**

A debate on the 17th Amendment.  
• Prof. Garrett Epps, Baltimore Law  
• Prof. Todd Zywicki, Scalia Law  
• Todd Tatelman, Dep. Gen. Counsel, U.S. House (moderator)



**The Legislative Branch and Trade**

A discussion of trade among experts, co-sponsored with the Capitol Hill Chapter and held on Capitol Hill.  
• Stephen Claeyls, Wiley Rein  
• Daniel McCarthy, Modern Age  
• Brian Pomper, Akin Gump  
• Molly Boyl Fromm, Financial Services Committee, U.S. House (moderator)



**A Discussion with Senator Jon Kyl**

A wide ranging conversation between Fed Soc VP Lisa Ezell and Senator Jon Kyl on the senator's years in Congress and analysis of the current legislative environment. Co-sponsored by the DC Young Lawyers Chapter.

For the best content and upcoming events about restoring Congress visit [fedsoc.org/articlei](http://fedsoc.org/articlei).



**The New Congress and Congressional Oversight**

A Capitol Hill discussion of congressional oversight co-sponsored by the Capitol Hill Chapter.  
• Steve Castor, Chief Investigative Counsel, U.S. House Comm. on Oversight and Gov't Reform  
• Prof. John C. Yoo, Berkeley Law  
• Amanda Neely, U.S. Senate Permanent Subcommittee on Investigations (moderator)

# INTERNATIONAL

In early November, the Federalist Society hosted seven Judges of the European Court of Human Rights for a Transatlantic Judicial Exchange in Atlanta, Georgia, where participants engaged in discussions on the latest developments in their jurisprudence at Emory Law School, the Supreme Court of Georgia, and the U.S. Court of Appeals for the Eleventh Circuit.



The Federalist Society also participated in a rule of law exchange among judges and officials of Ukrainian institutions aimed at discussing the ongoing creation of an intellectual property court in the country.

The Society hosted another Law and Liberty Circle event in London at which legal experts discussed the facts related to Brexit and the Irish border.

In mid-November, the Federalist Society hosted sixteen national Constitutional Court and Supreme Court Judges in Washington, DC, for meetings with officials of the U.S. State Department, Justice Department, and National Security Advisor, and for a luncheon with Justice Samuel Alito at the U.S. Supreme Court.



In October, the International Affairs project, in partnership with the Runnymede Society in Canada, sponsored a visit by Canadian judges and scholars to London and Oxford for an exchange with their British counterparts regarding the proper role of the judiciary and potential reforms in judicial selection.

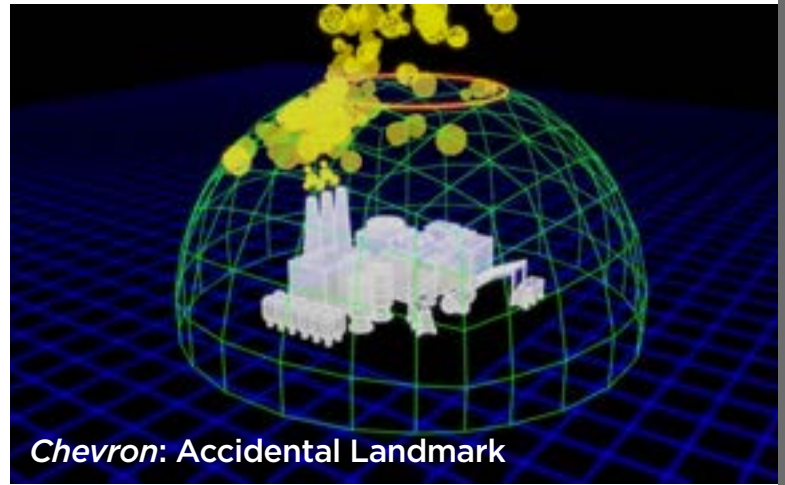


## FedSoc Films

FedSoc Films is a project of the Federalist Society's Digital team. The project's goal is to create engaging, entertaining, and educational documentary shorts about complex legal issues.

FedSoc Films recently released four films about *Chevron* deference, the role of the prosecutor, executive orders, and Justice Scalia's opinion in *Morrison v. Olson*. All of these documentaries and hundreds of other videos by Digital are available at [fedsoc.org](http://fedsoc.org) and on FedSoc's YouTube channel at [youtube.com/TheFederalistSociety](https://youtube.com/TheFederalistSociety).

The principle of deference set forth in Justice Stevens' majority opinion in *Chevron v. NRDC* has become one of the most hotly debated topics in administrative law. In ***Chevron: Accidental Landmark***, five administrative law experts discuss the history of *Chevron's* growth from a "puny little precedent" into a major landmark decision.

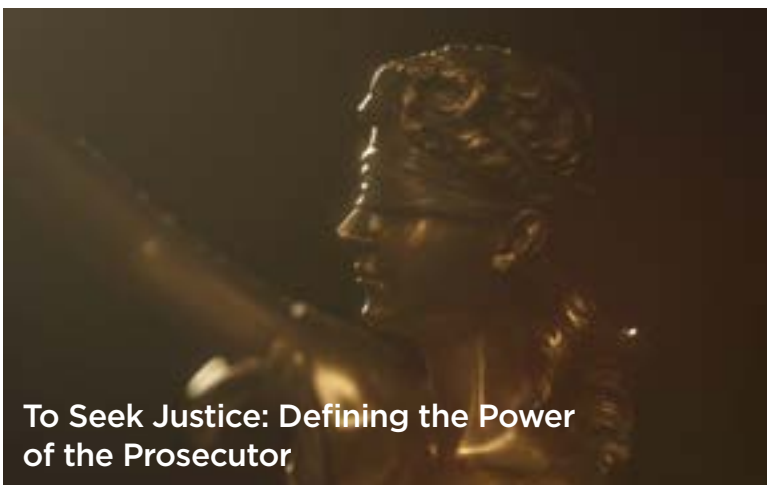


***Chevron: Accidental Landmark***



***The Great Dissent: Justice Scalia's Opinion in Morrison v. Olson***

Thirty years after the decision, questions raised in Justice Antonin Scalia's lone dissent in *Morrison v. Olson* continue to inform legal debate on the separation of powers and the unitary executive. In ***The Great Dissent: Justice Scalia's Opinion in Morrison v. Olson***, Professor Gary Lawson, Professor Richard Pildes, and Ted Olson discuss the decision, Scalia's dissent, and its lasting impact.



***To Seek Justice: Defining the Power of the Prosecutor***

The job of a prosecutor is not just to seek convictions, but to seek justice. So when reports emerge of prosecutors abusing their power, it can shake public confidence in the entire justice system. Seven experts discuss and define the power of the prosecutor in the documentary short, ***To Seek Justice***.



***By Virtue: Three Executive Orders that Shaped American Law***

Beginning with George Washington, presidents have used executive orders to direct government action; some executive orders have even changed the course of history. ***By Virtue*** explores three executive orders that had a profound effect on the nation: the Emancipation Proclamation, President Truman's seizure of the steel industry, and President Reagan's executive order on regulations.

# STATE COURTS



## STATE COURT DOCKET WATCH

### League of Women Voters v. Commonwealth of Pennsylvania

by Jason Torchinsky

In *League of Women Voters v. Commonwealth of Pennsylvania*, the Supreme Court of Pennsylvania determined that Pennsylvania's congressional districting plan, which had been in place since 2011, violated the Constitution of the Commonwealth of Pennsylvania. Based on this determination, a 5-2 party-line vote (Democrats comprised the majority of the court), struck down the plan and effectively reversed the lower court, which—serving as a special master—had held that the plan was constitutional and that plaintiffs failed to articulate a judicially manageable standard.

In December 2011, following the results of the 2010 Census, the Pennsylvania General Assembly passed a redistricting plan which apportioned the state into 18 congressional districts. This plan was passed with bipartisan support and remained unchallenged for over five years and three congressional elections. In June 2017, a group of Pennsylvania residents brought suit in state court challenging the 2011 Plan, alleging that it violated their rights under the free expression, free association, and equal protection provisions of the Pennsylvania Constitution. The plaintiffs claimed that the General Assembly acted unconstitutionally in drawing the 2011 Plan because it did so at least in part to enhance the Republican Party's representation in Congress. The plaintiffs argued that any partisan motive in congressional redistricting is unlawful under the Pennsylvania Constitution.

The Pennsylvania Commonwealth Court (the intermediate court in Pennsylvania, which has jurisdiction over election matters and acts as special master) concluded that the plaintiffs had failed to show a violation of any provision of the Pennsylvania Constitution. Specifically, the court found that the Pennsylvania Supreme Court had previously and consistently construed the applicable state constitutional provisions as “coterminous” with their federal constitutional analogs, and therefore found that they should be analyzed under the same standards. The applicable standards are set forth in *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002) and *Davis v. Bandemer*, 478 U.S. 109 (1986), which require plaintiffs to establish intentional discrimination against an identifiable political group resulting in an actual discriminatory effect. The Commonwealth Court found that the plaintiffs failed to present a “judicially manageable standard” by which to adjudicate a free speech partisan gerrymandering claim under the Pennsylvania Constitution, and that they failed to satisfy the equal protection standard in *Erfer* and *Bandemer* because they did not show that an “identifiable” political group had suffered a cognizable burden on its representational rights.

The Supreme Court of Pennsylvania expedited its review of the Commonwealth Court's recommendation and, on January 22, 2018, issued its order striking the 2011 Plan as unconstitutional. That court held, while providing no opinion, that the 2011 Plan “plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania.” Remarkably, the court did not identify which constitutional provisions the plan violated, provide any reasoned basis for its ruling, or indicate how the General Assembly could satisfy the Pennsylvania Constitution when re-drawing congressional maps. The court further enjoined the use of the 2011 Plan in any further congressional elections, beginning with the primary on May 15, 2018. In so doing, the court gave the General Assembly until February 9, to pass an alternative plan for submission to the Governor of Pennsylvania for signature. The court reserved for itself the right to review and overturn any new reapportionment signed into law. The court also ordered the Pennsylvania execu-

State courts are the workhorses of our judiciary. Nationwide, approximately ninety-five percent of all cases are initiated in state courts.

The Federalist Society publishes **State Court Docket Watch** to raise the profile of some of the most interesting and important state court cases across the country in an effort to widen understanding of the facts and principles involved in state court jurisprudence.

In 2018 we featured cases from Alabama, Alaska, Arkansas, California, Colorado, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

**State Court Docket Watch** is part of an ongoing conversation. We invite our members to consider writing articles or sharing their thoughts on current articles by reaching out to us at [statecourts@fedsoc.org](mailto:statecourts@fedsoc.org).

Please enjoy this SCDW article, published last year.

utive branch to reschedule the 2018 elections if necessary, but made clear that the court would adopt a plan of its own if the General Assembly did not enact a plan by February 9, 2018.

Two Justices dissented as to the substance of the order, and a third concurred in part but dissented on the timing of the implementation of the order. One dissenting opinion expressed concern that “the order striking down the 2011 Congressional map on the eve of our midterm elections, as well as the remedy proposed by the Court” raise “the implication that this Court may undertake the task of drawing a congressional map on its own,” which “raises a serious federal constitutional concern.” The other dissent similarly recognized that “[t]he crafting of congressional district boundaries is quintessentially a political endeavor assigned to state legislatures by the United States Constitution.”

The defendants, Michael C. Turzai, the Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, the Pennsylvania Senate President Pro Tempore, sought stays from both the Pennsylvania Supreme Court and the U.S. Supreme Court. Both of these applications were denied, with two Justices of the Pennsylvania Supreme Court dissenting and one Justice of the Pennsylvania Supreme Court concurring in part and dissenting in part on due process grounds.

The result of the Pennsylvania Supreme Court's Order in *League of Women Voters* has the potential to have wide-sweeping ramifications. It threw Pennsylvania's congressional campaigns into upheaval mere weeks before the nomination process was set to commence. Moreover, the precedent set by a state court's striking and re-drawing of a properly enacted and apportioned congressional map, without expressly applicable state constitutional provisions, creates deep federalism and judicial activism concerns.

The risk of this action by the Pennsylvania Supreme Court is that it could start a nationwide trend towards redistricting cases alleging gerrymandering being brought in state courts to attempt to insulate them from U.S. Supreme Court review. This only raises the stakes for the judicial selection process as this case could portend an increased role for the state-level judiciary in congressional redistricting disputes.

*Jason Torchinsky is a partner at Holtzman Vogel Josefiak Torchinsky PLLC. Jason served as counsel in these cases, but the views expressed here are his own and do not necessarily reflect the view of his clients. At the time of this writing, there was no majority opinion issued and no congressional map in place for the 2018 elections.*



## New at the Regulatory Transparency Project



### New Papers

Drug-Approval Clinical Trials in the Age of Precision Medicine: The Promise of Adaptive Trials

*Peter W. Huber, Roger D. Klein*

We Need Smarter Regulation of Food and Agricultural Biotechnology

*John J. Cofrssen, Henry I. Miller*

A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It

*Mark C. Rutzick*

When Considering Federal Privacy Legislation

*Neil Chilson*

Will Overzealous Regulators Make Your Smartphone Stupid?

*Adam Mossoff, Kristen Osenga, Hon. Randall Rader, Mark Schultz, Robert Stien*

Managing the Regulatory Thicket: Cumulative Burdens of State and Local Regulation

*Anastasia P. Boden, Braden Boucek, Paul J. Larkin, Jr., Clark Neily, Jonathan Riches, Lawrence VanDyke, Luke A. Wake*

How Antitrust Overreach is Threatening Healthcare Innovation

*Adam Mossoff, Kristen Osenga, Hon. Randall Rader, Mark Schultz, Saurabh Vishnubhakat*



### New Free Lunch Podcasts

Examining the California Consumer Privacy Act

*Eric Goldman, Lindsey L. Tonsager, Justin "Gus" Hurwitz*

What Should the FHFA's 2019 Agenda Be?

*Ed DeMarco, Alex J. Pollock*

Fintech Licensing and the OCC Charter

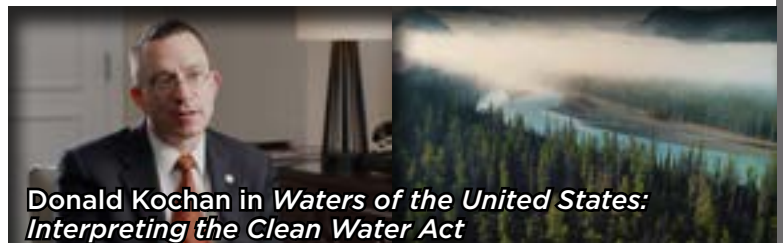
*Brian Knight, Margaret Liu*



### New Fourth Branch Videos

Waters of the United States: Interpreting the Clean Water Act

*Donald Kochan, Robert Glicksman*



Donald Kochan in *Waters of the United States: Interpreting the Clean Water Act*

RTP co-sponsored the Lincoln Network's Reboot 2018 Conference (photos by Lacey Seymour Photography).

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# MEMBERSHIP

## MEMBER PROFILE: Adam Gustafson



Partner  
Boyden Gray &  
Associates

JD  
Yale Law School  
BA (high distinction)  
University of Virginia

Practice includes  
Appellate Litigation  
Separation of powers  
First Amendment  
Energy & Environment  
Agency Deference

Clerked for  
Hon. Richard R. Clifton  
Ninth Circuit  
Hon. Janice Rogers  
Brown  
DC Circuit

### Federalist Society Leadership

Executive Committee, Administrative Law & Regulation Practice Group  
Enforcement & Agency Coercion Working Group, Regulatory Transparency Project

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

I got involved with the Federalist Society in my first semester at Yale Law School. Our chapter's debates were a refreshing departure from the typical classroom experience. I wanted to have a part in that intellectual diversity, so I served as a Vice President for Events during my second year, and I helped bring the Federalist Society Student Symposium back to Yale, where it all began in 1982. As a law student, the Federalist Society gave me a chance to interact with the leading lights of the conservative legal movement, to edit conservative legal scholarship in the *Harvard Journal of Law & Public Policy*, and even to write for the *Federalist Paper*.

### How are you involved today?

I'm on the Executive Committee of the Federalist Society's Administrative Law & Regulation Practice Group, and I'm involved in the Regulatory Transparency Project's Enforcement and Agency Coercion Working Group. Thanks to those organizations, I've participated in Federalist Society teleforums and podcasts, written for the Fed Soc Blog, and met a number of really thoughtful lawyers and scholars. The National Lawyers Convention, which I first attended as a volunteer in law school, keeps drawing me back every year—for the intellectual feast and for reunions with old friends, not to mention the CLE credit.

### How have you gotten you to where you are today in your career?

After law school I clerked for Judge Richard Clifton on the Ninth Circuit and for Judge Janice Rogers Brown on the D.C. Circuit. (I first heard Judge Brown speak at a Federalist Society Student Symposium during law school.) I learned a great deal from both of them about the rule of law, the legal craft, and judicial decisionmaking. After clerking, I worked at Cooper & Kirk, a litigation boutique I had heard about from fellow Federalist Society board member Claire McCusker Murray in law school. Chuck Cooper, Michael Kirk, David Thompson, and Howard Nielson modeled appellate advocacy at the highest level. I'm now a partner at Boyden Gray & Associates, working with former White House Counsel C. Boyden Gray, whom I first met at a Federalist Society event. No one knows more about how Washington works.

### What sparked your interest in administrative law?

I fell in love with administrative law while clerking on the D.C. Circuit, where federal agency appeals make up a big chunk of the docket. Administrative law united two interests—the separation of powers and statutory interpretation—that Professors Akhil Amar and Bill Eskridge had introduced to me at Yale. I came to see that today's most important battles over constitutional structure and legal meaning are being waged before and against the federal agencies that play an increasingly important role in our society.

### What are your favorite things to do outside of work?

I like to row (a single scull these days) and play chamber music (I'm a cellist). But my favorite thing to do is whatever my nine-year-old daughter is into at the moment. These days we're reading *A Series of Unfortunate Events* and making a lot of slime.

# RESOURCES

## Watch

### Mini-Docs

Exploring *Federalist 51*:  
Legislative Power



### SCOTUSbriefs

*Tennessee Wine & Spirits  
Retailers Association v. Blair*



### POLICYbriefs

The English Rule & the  
American Rule



### No. 86

*Wickard v. Filburn*: The  
Aggregation Principle &  
Congressional Power



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

Courthouse Steps: *Franchise  
Tax Bd. of CA v. Hyatt*: Reviving  
Sister-State Sovereign Immunity

Dispatches from the Patent  
Wars: The High-Stakes Battle  
Between Qualcomm and Apple

Book Review: *Diversity Delusion*



Fintech Licensing and the OCC  
Charter

What Should the FHFA's 2019  
Agenda Be?

Examining the California  
Consumer Privacy Act

### SCOTUScasts

*Nutraceutical Corp. v. Lambert*

*Helsinn Healthcare S.A. v. Teva  
Pharmaceuticals USA Inc.*

*Timbs v. Indiana*



The New Congress and  
Congressional Oversight

Discussion with Senator Jon Kyl

Fixing the American  
Immigration System

## Read

### FedSoc Blog

*Love Terminal Partners v.  
United States*: Where Wright  
Amendment Reform Went  
Wrong

The FCC Deserves Credit for its  
Efforts to Eliminate Outdated  
Satellite Regulations

Originally Speaking: Climate  
Change and Common Law  
Public Nuisance

OSHA Drones in the Workplace?

Right to Work Laws in the  
Courts - The Unions' Losing  
Streak Continues

Federalism and the Race to 5G  
Wireless Networks

### Federalist Society Review

Concealed Carry and the Right  
to Bear Arms

John Marshall's Jurisprudence  
Supports Preemption of  
California's Net Neutrality Law

Lessons in Reading Law: *Rimini  
Street v. Oracle's* Duel Over  
"Full Costs"

Can and Should the Federal  
Judiciary Rein In Our Expansive  
Administrative State?

The Fifth Amendment's Act  
of Production Doctrine: An  
Overlooked Shield Against  
Grand Jury Subpoenas Duces  
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You can find all of our great articles from  
2018 together in Volume 19 at [fedsoc.org](https://www.fedsoc.org).

### White Papers

2018 Civil Justice Update

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