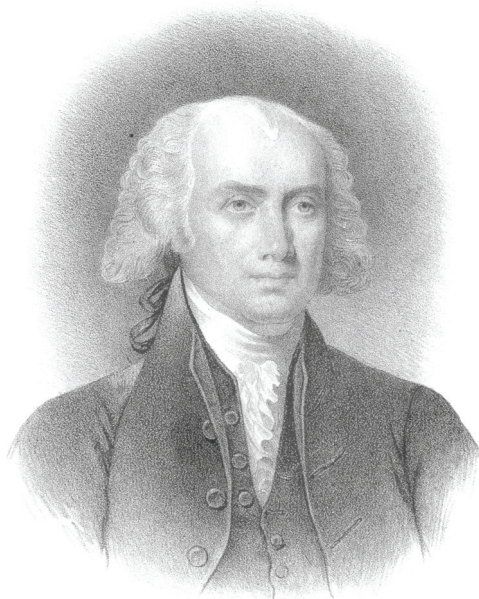




THE Federalist PAPER





James Madison.

THE FEDERALIST PAPER

Summer 2024

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We hope you enjoy this issue of the *Federalist Paper*. Please send any questions or comments to us at info@fedsoc.org.

DESIGN: Aaron Sandford || COVER ART: design by Aaron Sandford with photography by Greg Rosenke and FedSoc photos from the 2024 National Student Symposium.

EDITOR'S LETTER

Dear Friend,

This spring has been one to celebrate here at FedSoc national headquarters! We continued our tradition of providing high-quality and balanced programming on the most important legal issues facing our country, and our many chapters have been as active as ever.

In March, the Student Division hosted its 43rd annual National Student Symposium with over 700 attendees from law schools across the country. Students listened to panels featuring judges, academics, and practitioners on the theme “Why Separate Powers?” Several notably successful student chapters were recognized with Freddie Awards, and law students from all over the country had the opportunity to meet like-minded students and lawyers from other schools and cities.

This year's Florida Chapters Conference was a great success. It featured a panel with three former U.S. Attorneys General, along with many other excellent panels and events. The Lawyers Division also hosted several other statewide and regional conferences this spring, including in Ohio and Wisconsin.

The Practice Groups remain very active, and they hosted the Twelfth Annual Executive Branch Review Conference this year. As always, the conference featured excellent debate and discussion about the role of the executive branch in important legal and policy issues such as immigration, the environment, and religious liberty. The Practice Groups also revived our long-standing DC Lunch tradition, now held at Carmine's Italian Restaurant.

All of these things and so much more are featured in this issue of the Federalist Paper, and we hope you enjoy learning what we're up to here at FedSoc! Be sure to visit [fedsoc.org](https://www.fedsoc.org) and subscribe to our weekly newsletter to stay up to date on everything going on at the Federalist Society.

We couldn't do any of this without the generous support of our volunteers and donors, and we hope that you've benefited from FedSoc events or digital content recently. Please reach out to us at info@fedsoc.org if you have any feedback. We are so grateful for your support.

Katie McClendon

DIRECTOR OF PUBLICATIONS & PRO BONO




In case you missed it, Justice Amy Coney Barrett joined Judge Lisa Branch for a fireside chat at the Antonin Scalia Memorial Dinner at the 2023 National Lawyers Convention. This year's NLC will take place November 14-16 at the Washington Hilton. Save the date!

ORGANIZATION PRIORITIES

The Federalist Society is focusing its efforts on three priorities in the coming year.

The Society has identified three core places American institutions and the rule of law are undergoing some challenges: DEI's focus on identity, attacks on the courts, and the goodness of the Constitution. The Society seeks to focus attention on these three topics in programming for members, and by bringing discussion, debate, and legal analysis to the broader conversation. We have already been doing significant programming in these areas, and we are looking for more experts to involve, particularly as we work to break through to new audiences using new tactics.



DEI and the Aftermath of *Students for Fair Admissions v. Harvard*

The Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* made it clear that the institutions that shape our future leaders—selective colleges and universities—run afoul of the U.S. Constitution when they seek to socially engineer our society using racial preferences. Underpinning the decision is the Court's rejection of the idea that people should be treated differently on the basis of their identity. Higher education is not the only arena that has been affected by diversity, equity, and inclusion ideology and bureaucracy. Various identity-based preferences have become very widespread in business, government, the arts, K-12 education, and many other key institutions. We will explore the applicability of the *SFFA* decision and its reasoning to these other institutions.



The Integrity, Legitimacy, and Centrality of the Courts

The Federalist Society will foster discussions about the ongoing attacks on the Supreme Court and the judiciary more broadly, and we will present a more accurate picture of the third branch's role in our constitutional system than what is commonly portrayed in the media. We hope to get diverse voices—left, right, and center—to distinguish between critiques of and attacks on the judiciary. We will examine the dangers of threats and slander. We will highlight the role of the Supreme Court and the federal courts within our constitutional design, ideally as institutions which apply legal reasoning and interpretation, not ones that conduct politics by other means.



The Constitution Is Good

When the Federalist Society began, it was broadly assumed both in the legal culture and among the general public that the Constitution was fundamentally good—even if flawed. Forty years ago, our debates were over interpretation, spirit versus letter, and equality versus liberty. But in 2024, many of our most influential institutions and intellectuals challenge the goodness of the Constitution, arguing or assuming that it is inherently bad. This is a dramatic change from prior generations, who would invoke phrases in the Constitution even as they advocated for their expanded meaning for progressive ends. It is clear that we now need to make a focused effort to educate our audiences on the history, significance, and lasting impact of the U.S. Constitution and on the success of this uniquely American form of government, instead of taking it for granted.

STUDENT DIVISION



SPRING STUDENT EVENTS

1 Judge Patrick Wyrick posed with Oklahoma chapter board members after his talk about Second Amendment jurisprudence.

2 Judge Ryan Holte posed with members of the Washington & Lee chapter after speaking about patent trolls.

3 During the inaugural Michigan Chapters Banquet, Judge Joan Larsen, Judge Hala Jarbou, and Judge Christopher Murray presented a panel on pathways to the judiciary.

4 The Texas chapter had a packed house for their first event of the spring semester: a panel on the Trump indictment featuring Susan Klein, Theodore Rave, Lee Kovarsky, and Stephen Vladeck.

5 Members of the Kentucky chapter listened to a career panel.

6 Members of the Texas A&M chapter gathered with Judd Stone after an event about the power of federal courts to rein in big government.



7 Members of the Chicago chapter hosted their first book club meeting of the quarter.

8 The Yale chapter went bowling in matching Mad head shirts.

9 FedSoc members from 15 chapters across Texas and Oklahoma met in person at the Student Symposium.

10 Members of the IU-McKinney chapter observed historical documents in person at the chapter's Remnant Trust event.

NATIONAL STUDENT SYMPOSIUM

11 Judge Raymond M. Kethledge and Professor Cass R. Sunstein sat down for a fireside chat, exploring the conceptual questions around the separation of powers.

12 Professor Maureen Brady, Judge Sarah K. Campbell, Professor James E. Tierney, and Professor Ernest A. Young presented a panel on “Federalism and the Separation of Powers,” moderated by Judge Stephanos Bibas.

13 Professor Julian Davis Mortenson, Eli Nachmany, Professor Jed Handelsman Shugerman, and Professor Christopher J. Walker presented a panel on “The Executive Power, the Legislative Power, and the Administrative State,” moderated by Judge Jennifer Walker Eilrod.



1 Professor Sherif Gergis and Professor Lawrence Lessig presented a panel on “Constitutions, Elections, and Procedure—(How) Can We Change How We Separate Powers?,” moderated by Judge Britt C. Grant.

2 Professor Josh McDaniel, Professor Amanda L. Tyler, Professor Christopher J. Walker, Professor Stephen E. Sachs presented a panel on “Becoming an Academic,” moderated by Lee Liberman Otis.

3 Louis Capozzi, Eli Nachmany, and Jacob Bradford Richards participated in a breakout session on FedSoc’s Lawyers Division, moderated by Lisa Budzynski Ezell.



FEDDIE AWARD WINNERS

4 The University of Texas-Austin School of Law chapter was presented with the Federalist Society Debate Champion Title Belt.

5 The Emory University School of Law chapter was presented with the Alexander Hamilton Award for Most Improved Chapter.

6 Professor Aditya Bamzai of the University of Virginia was presented with the 2024 Joseph Story Award.



CHAPTER SPOTLIGHT

STANFORD LAW SCHOOL

Mary Margaret Neville Chalk

Stanford's Federalist Society chapter has had a busy and exciting year. During the fall term, we hosted several practitioners including Christina Martin and Ashley Keller, who spoke about recent arguments, as well as Chris Grieco and Emily Kapur to discuss cryptocurrency regulation in true Silicon Valley fashion. Judge Newsom and Judge Bumatay also paid a visit. Additionally, our largest contingent to date made the trip to the Washington, DC, for the National Lawyers Convention (we have an enthusiastic class of 1Ls to thank for our growing membership numbers).

In the new year, multiple pairs of judges made their way to Palo Alto. First, Justices Bolick and Liu lectured on their approaches to state constitutional law, and later, Judge Bress and Judge McFadden discussed their respective positions in the federal judiciary. Leo Strine, former Chief Justice of the Delaware Supreme Court was another highlight. Aside from numerous other speakers, a trip to the Western Conference in Simi Valley, California, and social events including our annual crawfish boil, several women's dinners, and a beach outing to Half Moon Bay have made this year a success. We're looking forward to a great new school year.

7 The University of Michigan School of Law chapter was presented with the Thomas Paine Award for Most Publicity Creativity.

9 The University of Alabama School of Law chapter was presented with the James Madison Award for Chapter of the Year.

8 The Arizona State University School of Law chapter was presented with the George Washington Award for Most Innovative Chapter.

LAWYERS CHAPTERS

RECENT EVENTS

FEBRUARY 2

Florida Chapters Conference
Kissimmee



UPCOMING EVENTS

Florida Young Lawyers Summit

July 12-13
Coral Gables

Alabama Chapters Conference

September 5
Homewood

Tennessee Chapters Conference

September 13
Nashville

Texas Chapters Conference

September 20-21
Fort Worth



MARCH 12

DC Young Lawyers Chapter Event

A Conversation with Hon. Kyle Duncan & Don McGahn



APRIL 12
Ohio Chapters Conference
Columbus



MAY 10

Wisconsin Chapters Conference
Brookfield



FACULTY DIVISION



JOSEPH STORY AWARD

The Federalist Society is honored to announce that the winner of the 2024 Joseph Story Award is Professor Aditya Bamzai of the University of Virginia School of Law. The annual award recognizes a junior academic (ten years or less on the tenure track or 40 and under) who has demonstrated excellence in legal scholarship, a commitment to teaching, a concern for students, and who has made a significant public impact in a manner that advances the rule of law in a free society. It is named for Joseph Story, who was appointed to the Supreme Court at the age of 32, served as the first Dane Professor of Law at Harvard, and wrote Commentaries on the Constitution of the United States. The Story Award is the successor to the Paul M. Bator Award, established in 1989 in memory of Professor Bator for similar purposes. Keith Zimmerman, a student at the University of Chicago Law School and the 2024 Joseph Story Award Chair, presented the award to Professor Bamzai on March 9th at the Federalist Society's 2024 National Student Symposium. The Symposium was hosted by Harvard Law School's Federalist Society Student Chapter.

JUNIOR SCHOLARS COLLOQUIUM

The Junior Scholars Colloquium provides eight junior faculty members with the opportunity to present competitively selected, unpublished papers and receive comments from more senior faculty members to help improve their scholarship. The 2024 Junior Scholars Colloquium will take place over the course of two days in an environment conducive to both scholarly reflection and convivial discussion. The days will be divided into four two-hour sessions, during which each junior scholar will have ten minutes to present his or her paper, followed by eight minutes for comments from an assigned faculty commentator and approximately thirty minutes of general group discussion.

PRACTICE GROUPS

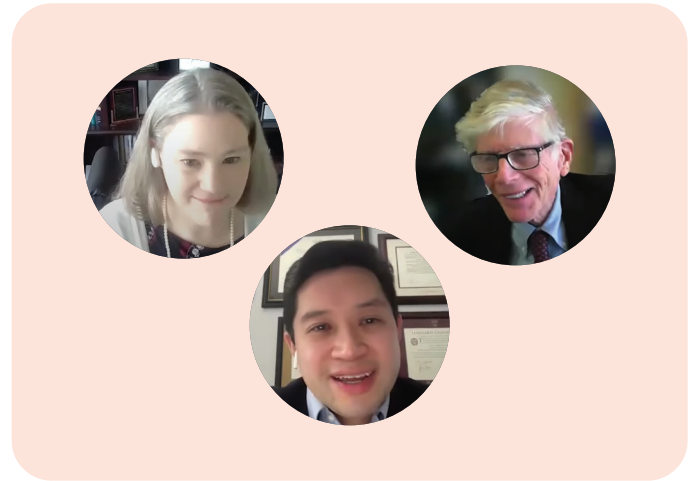


CHEVRON UNDER REVIEW: COURTHOUSE STEPS PREVIEW: LOPER BRIGHT & RELENTLESS

“*Chevron* Deference” has been a topic of great debate since its creation on *Chevron v. NRDC*. Experts on both sides argue it has implications in the role of judges, judicial independence, separation of powers, stare decisis, governmental accountability, and the rule of law.

In two cases in the OT 2023 term (*Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce*) the Court considered whether the “*Chevron* Doctrine” should be overturned. This FedSoc Forum previewed these two important cases in a discussion of what the *Chevron* doctrine has done, how these cases may affect it, the body of precedent surrounding it, and what they may mean moving forward.

Prof. John F. Duffy
Prof. Philip A. Hamburger
Prof. Kristin E. Hickman
MODERATOR Judge Stephen Alexander Vaden



AN UPDATE IN THE CASE OF JUDGE PAULINE NEWMAN

At the age of 96, Judge Pauline Newman is the nation’s oldest federal judge. In 1984, Judge Newman became the first judge appointed directly to the U.S. Court of Appeals for the Federal Circuit. In April of last year, reports surfaced that Federal Circuit Chief Judge Kimberly Moore had initiated a complaint against Judge Newman under the Judicial Conduct and Disability Act of 1980. Although the complaint was initially based on alleged “cognitive decline,” it later morphed to focus on her unwillingness to cooperate with Judge Moore’s investigation.

This program provided an update on Judge Newman’s case and discussed issues related to this most-unusual set of circumstances, the state of judicial conduct, and more.

David Lat
Prof. Arthur Hellman
MODERATOR Judge Jennifer Perkins



COURTHOUSE STEPS PREVIEW: *TRUMP V. ANDERSON*

On February 7, 2024, a panel of experts participated in a well attended preview program on *Trump v. Anderson*. The case raised legal questions including whether Section 3 of the Fourteenth Amendment is “self-executing” or requires an additional act of Congress, whether the events of January 6, 2021, constitute an insurrection, and if so whether Donald Trump participated in that insurrection, and whether the President is an “officer of the United States” as meant by Section 3.

Prof. Kurt T. Lash
Prof. Ilya Somin
MODERATOR Prof. Derek T. Muller



AI MEETS COPYRIGHT: UNDERSTANDING *NEW YORK TIMES V. OPENAI*

Artificial intelligence is one of the most important technological tools being developed today, but the use of preexisting copyrighted works to train these AI systems is deeply controversial. At the end of 2023, the New York Times sued OpenAI and Microsoft, alleging that OpenAI’s use of articles from the New York Times to train their ChatGPT large language model constitutes copyright infringement. This panel discussed that case and the issues of fair use, transformative use, and the existing precedent surrounding these issues.

Prof. Charles Duan
Prof. Zvi Rosen
Steven M. Tepp
MODERATOR John P. Moran



COURTHOUSE STEPS ORAL ARGUMENT: *NETCHOICE CASES*

NetChoice—which represents social media giants like Facebook, Twitter, Google, and TikTok—brought free speech challenges to state laws in Texas and Florida regulating social media platforms. The Supreme Court heard both cases this term. Allison Hayward joined us for a FedSoc Forum discussing these cases. She addressed the oral arguments and discussed the split between the 11th and 5th Circuits on whether the laws in question implicate protected speech.

Allison R. Hayward



EXECUTIVE BRANCH REVIEW CONFERENCE

The Twelfth Executive Branch Review Conference (EBRXII) took place on Tuesday, April 16, at the Mayflower Hotel in Washington, DC. The day-long conference centered around the theme “The Constitution and Regulatory Overreach” and provided attendees with the option to get 335 minutes of CLE. Programming included an opening address by the Hon. Paul Ray, a plenary session focused on the “Whole of Government,” four breakout sessions, and a luncheon panel featuring a bi-partisan array of former senior policymakers from the SEC and CFTC who discussed the current state of U.S. financial regulation.



DC LUNCHES

It's a new era for DC Lunches (featuring the same fantastic programming)! This year, the Practice Groups team has moved forward with a new location for DC Lunches in order to protect the safety of staff and guests and to maintain the highest quality experience for both our attendees and speakers. Lunches are now hosted at Carmine's Italian Restaurant which is conveniently situated in the heart of the District. These meals still feature family-style food service in a private room and allow attendees to engage with presenters in an off-the-record setting. DC Lunches hosted this year include:

- April DC Lunch with Judge Carl Nichols on April 24, 2024
- May DC Lunch with Congresswoman Elise Stefanik on May 8, 2024



THREE DECADES ON: RFRA'S MODERN PRESSURE POINTS

The Religious Freedom Restoration Act (RFRA) turned 30 in 2023. Since its passage, RFRA has been the topic of much conversation, including debates over how it should be applied, how protections for religious liberty should be balanced with other potential protections, and whether there should be attempts to revise it. In light of that ongoing conversation, the Religious Liberties Practice Group hosted a lunch panel titled *Three Decades On: RFRA's Modern Pressure Points* on January 31 at the Mayflower Hotel.

FEATURING

Paul Clement
Prof. William Galston
Rachel Laser
Prof. Mark Rienzi

MODERATOR Jennie Bradley Lichter

UPCOMING 2024 Education Law & Policy Conference

Save the Date! The third annual Education Law & Policy Conference, co-sponsored with the Defense of Freedom Institute, will take place on Wednesday, September 11, 2024, at the Mayflower Hotel in Washington, DC. This year's conference will continue the tradition of examining the legal and policy issues currently facing education in the United States, and it will feature a full day of programming including panels, addresses, lunch, and a closing reception.



REGULATORY TRANSPARENCY PROJECT

IN-PERSON EVENTS



Congress and the Future of Agency Authority: A Discussion of Three Major Administrative Law Cases and Their Implications for Congress

The Federalist Society’s Capitol Hill Chapter and the Regulatory Transparency Project hosted a luncheon at the Capitol Hill Club on January 19. The event featured a panel of experts discussing the U.S. Supreme Court’s then-upcoming administrative law decisions in *Loper Bright v. Raimondo*, *SEC v. Jarkesy*, and *Consumer Financial Protection Bureau v. Community Financial Services Association of America*.

PANELISTS

Kimberly Wehle, *PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE LAW SCHOOL*
Will Yeatman, *SENIOR LEGAL FELLOW, PACIFIC LEGAL FOUNDATION*

MODERATOR Trevor N. McFadden, *JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA*

Legal Licensing Reform: Does the World Need More Lawyers?

On April 2, 2024, the Federalist Society’s Regulatory Transparency Project brought together distinguished practitioners and scholars to examine the legal and practical implications of the current legal licensing regime, highlighting challenges and opportunities for reform.

SPEAKERS

Braden Boucek, *VICE PRESIDENT OF LITIGATION, SOUTHEASTERN LEGAL FOUNDATION*

Daniel Greenberg, *GENERAL COUNSEL, COMPETITIVE ENTERPRISE INSTITUTE*

Andy Kvesic, *MANAGING PARTNER, RADIX LAW*

Lucian Pera, *PARTNER, ADAMS AND REESE LLP*

Jon Riches, *VICE PRESIDENT FOR LITIGATION, GOLDWATER INSTITUTE*

Paul Sherman, *SENIOR ATTORNEY, INSTITUTE FOR JUSTICE*

Caleb Trotter, *ATTORNEY, PACIFIC LEGAL FOUNDATION*

Luke Wake, *ATTORNEY, PACIFIC LEGAL FOUNDATION*

Shoshana Weissmann, *DIRECTOR, DIGITAL MEDIA, COMMUNICATIONS AND FELLOW, R STREET INSTITUTE*

Stephen Younger, *SENIOR COUNSEL, NIXON PEABODY LLP*



Navigating the Capital Adequacy Rule: Legal and Policy Perspectives

On April 10, 2024, the Federalist Society’s Regulatory Transparency Project hosted a distinguished panel of experts, moderated by former Secretary of Labor Eugene Scalia. The panel explored the legal and policy issues raised by the Capital Adequacy Rule that was recently jointly proposed by the FDIC, Federal Reserve, and OCC. The rule would substantially increase the capital that banks are required to hold, based on the so-called “Basel III Endgame” package developed internationally. Some estimate it will reduce national GDP by nearly \$70 billion.

PANELISTS

Eugene Scalia, PARTNER, GIBSON, DUNN & CRUTCHER, AND FORMER UNITED STATES SECRETARY OF LABOR

Peter Conti-Brown, PROFESSOR OF FINANCIAL REGULATION, ASSOCIATE PROFESSOR OF LEGAL STUDIES & BUSINESS ETHICS, THE WHARTON SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA

Jeremy Newell, SENIOR FELLOW, BANK POLICY INSTITUTE

Trent McCotter, PARTNER, BOYDEN GRAY PLLC

Randy Quarles, CHAIRMAN & CO-FOUNDER, CYNOSURE GROUP

America’s Energy Future: Abundance of Scarcity

On May 2, 2024, the Federalist Society’s Regulatory Transparency Project hosted an in-person conference with panel discussions at the Mayflower Hotel. Panelists discussed the current demand and supply of American energy and the challenges raised by the Biden Administration’s efforts to transition away from fossil fuels, including obstacles to permitting new energy infrastructure.

SPEAKERS

Andrew Wheeler, FORMER ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY; PARTNER, HOLLAND & HART LLP

James P. Danly, PARTNER, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP

Edward Boling, PARTNER, PERKINS COIE LLP

Michael Buschbacher, PARTNER, BOYDEN GRAY PLLC

James W. Coleman, ROBERT G. STOREY DISTINGUISHED FACULTY FELLOW AND PROFESSOR OF LAW, SOUTHERN METHODIST UNIVERSITY DEDMAN SCHOOL OF LAW

Eli Dourado, CHIEF ECONOMIST, ABUNDANCE INSTITUTE

Travis Fisher, DIRECTOR OF ENERGY AND ENVIRONMENTAL POLICY STUDIES, CATO INSTITUTE

Louis Finkel, SENIOR VICE PRESIDENT OF GOVERNMENT RELATIONS, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Alex Herrgott, PRESIDENT & CEO, THE PERMITTING INSTITUTE

Jeffrey Holmstead, PARTNER, BRACEWELL LLP

Mario Loyola, SENIOR RESEARCH FELLOW, ENVIRONMENTAL POLICY AND REGULATION, CENTER FOR ENERGY, CLIMATE, AND ENVIRONMENT, THE HERITAGE FOUNDATION

WEBINARS



Grading the Biden DOL and NLRB's Use of Regulatory Authorities

The Regulatory Transparency Project hosted a stellar panel of top labor and employment law experts for a lively discussion in which our panelists graded the Biden Administration's administrative, regulatory, and enforcement activity under the Department of Labor and the National Labor Relations Board.

PANELISTS

Greg Jacob, *PARTNER, O'MELVENY & MYERS LLP*
Timothy Taylor, *PARTNER, HOLLAND & KNIGHT LLP*
Philip Miscimarra, *PARTNER, MORGAN & LEWIS*
Judy Conti, *DIRECTOR OF GOVERNMENT AFFAIRS, NATIONAL EMPLOYMENT LAW PROJECT*



Courthouse Steps Oral Argument: Murthy v. Missouri

Murthy v. Missouri, originally filed as *Missouri v. Biden*, concerns whether federal government officials had violated the First Amendment by "coercing" or "significantly encouraging" social media companies to remove or demote particular content from their platforms.

PANELISTS

Adam Candeub, *PROFESSOR OF LAW & DIRECTOR OF THE INTELLECTUAL PROPERTY, INFORMATION & COMMUNICATIONS LAW PROGRAM MICHIGAN STATE UNIVERSITY COLLEGE OF LAW*
Matthew Seligman, *PARTNER, STRIS & MAHER LLP; FELLOW, CONSTITUTIONAL LAW CENTER, STANFORD LAW SCHOOL*
Stewart A. Baker, *PARTNER, STEPTOE & JOHNSON LLP*

Fourth Branch

PODCAST



Explainer Episode 63

Super Elections Year

Katie Harbath, *CHIEF GLOBAL AFFAIRS OFFICER, DUCO*
Kathryn Ciano Mauler, *CORPORATE COUNSEL, GOOGLE*

Katie Harbath and Kathryn Ciano Mauler delve into the complexities of worldwide political elections while discussing how to counteract and recognize how these elections will intersect with emerging technologies like AI.

Explainer Episode 64

Union Release Time: Who Should Pay?

Jon Riches, *VICE PRESIDENT FOR LITIGATION, GOLDWATER INSTITUTE*
James Sherk, *DIRECTOR, CENTER FOR AMERICAN FREEDOM, AMERICA FIRST POLICY INSTITUTE*

Jon Riches and James Sherk explore the nuances between public and private unions, their influence on public policy, and the concept of release time.

Explainer Episode 65

Reviewing Michael Cannon's Book Recovery

Michael F. Cannon, *DIRECTOR OF HEALTH POLICY STUDIES, CATO INSTITUTE*
Christina Sandefur, *EXECUTIVE VICE PRESIDENT, GOLDWATER*

Listen in as these experts consider the role of government agencies like the FDA in health spaces across America.

VIDEO SERIES



Regulation and Red Tape Series

View all five episodes of our new video series. Leading legal experts debate some of the most controversial regulatory issues in America today. Moderated by former OIRA Administrator, Hon. Paul J. Ray, Regulation and Red Tape tells true stories of how federal regulatory actions impact the lives of ordinary Americans and the economy they rely on.

Episode 1

Mergers, Monopolies, & the FTC

Episode 2

Sackett v. EPA: A Tale of Wetland Regulations

Episode 3

Tax Inversions: Unpacking the Pfizer Case

Episode 4

Boucher v. USDA: Navigating the Swampbuster Provisions

Episode 5

TARP: Examining the 2008 Bank Rescue Plan

FILM



A New Dawn of Workplace Regulation

This film explores how the Department of Labor's worker classification rules have changed over time, and what the current proposed rule will mean for workers in the "gig economy."



FREEDOM OF THOUGHT

FREEDOM OF THOUGHT PODCAST



NEW EPISODES

Open Minds with Jonathan Mitchell & James Burnham Part I
March 13, 2024

Open Minds with Jonathan Mitchell & James Burnham Part II
March 17, 2024

Open Minds: A New Approach for Putting Conservatism into Practice Part 1
April 25, 2024

Watch any of these episodes on YouTube or listen to them wherever you get podcasts. Subscribe to stay up to date!

NetChoice and Murthy

Speech and Coercion in the Digital Age

What can state actors do to protect or interfere with online public discourse? The recent argument in *National Rifle Association of America v. Vullo* suggests that there is some outer limit of government coercion on private actors to interfere with disfavored ideas. But questions from the bench in *Murthy v. Missouri*, argued the same morning, have some wondering if those limits might allow for significant “informal” pressure by government actors on platform operators to restrict user speech.

Together, the cases highlight the significance of the *NetChoice* cases heard last month. Can laws like those adopted in Texas and Florida create counter-pressure against coercion from the federal government? What responsibility do states have in protecting their own citizens’ participation in online public discourse?

Alan Gura, VICE PRESIDENT FOR LITIGATION,
INSTITUTE FOR FREE SPEECH

Prof. Julia D. Mahoney, JOHN S. BATTLE
PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Matt Stoller, DIRECTOR OF RESEARCH, AMERICAN
ECONOMIC LIBERTIES PROJECT

Moderator: Prof. Todd J. Zywicki, GEORGE
MASON UNIVERSITY FOUNDATION PROFESSOR
OF LAW, ANTONIN SCALIA LAW SCHOOL,
GEORGE MASON UNIVERSITY

When Mozilla Fired Its Founder

On the 10 Year Anniversary of Brendan Eich Leaving His Company

Co-founder of Mozilla and creator of JavaScript, Brendan Eich had made remarkable contributions to the technology sector. He also had contributed \$1,000 to the (successful) Proposition 8 campaign against same-sex marriage. On April 3, 2014, Mozilla forced him out of the company he had founded, with apologies for not having acted sooner.

Watching it all unfold, Prof. Todd Zywicki was concerned, warning that this would not stop with financial contributions for ballot initiatives – that it was not a stable equilibrium. At least at the time, Inez Stepman was less troubled, confident that such disagreements could be resolved through market forces. Prof. Zywicki and Inez Stepman had a conversation where they reflected on the campaign against Brendan Eich, considered the lessons learned, and discussed the implications for freedom of thought today.

Prof. Todd J. Zywicki, GEORGE MASON
UNIVERSITY FOUNDATION PROFESSOR OF LAW,
ANTONIN SCALIA LAW SCHOOL, GEORGE MASON
UNIVERSITY

Inez Stepman, SENIOR POLICY ANALYST,
INDEPENDENT WOMEN’S FORUM

NetChoice and the Future of State Regulation of Big Tech

A panel of experts from a variety of political perspectives discussed the range of briefing and arguments in *Moody v. NetChoice, LLC* and *NetChoice, LLC v. Paxton*.

Ryan L. Bangert, SENIOR VICE PRESIDENT,
STRATEGIC INITIATIVES & SPECIAL COUNSEL TO
THE PRESIDENT, ALLIANCE DEFENDING FREEDOM

Prof. Julia D. Mahoney, JOHN S. BATTLE
PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Prof. Ganesh Sitaraman, NEW YORK ALUMNI
CHANCELLOR'S CHAIR IN LAW, VANDERBILT
UNIVERSITY LAW SCHOOL

Prof. Zephyr Teachout, PROFESSOR OF LAW,
FORDHAM LAW SCHOOL

Moderator: James M. Burnham, PRESIDENT,
VALLECITO CAPITAL, LLC

Race at Work

Can Businesses Treat People Differently on the Basis of Race?

In June of last year, the Supreme Court held that consideration of applicants' race in admissions decisions of Harvard and the University of North Carolina violated both the Equal Protection Clause of the Constitution and Title VI of the 1964 Civil Rights Act.

But what are the implications outside of university admissions? How might this decision affect the interpretation and enforcement of federal laws against discrimination in employment, contracting, and other business practices?

This is the first in a series of webinars, as we consider the larger implications of *Students for Fair Admissions* for employees and businesses.

On February 12, our panelists considered the continuing relevance of voluntary affirmative action plans under *Weber and Johnson*, the risks of adopting "diversity" commitments or pressuring outside contractors on diversity metrics, and newer defenses like asserted First Amendment interests in the consideration of race.

Jason C. Schwartz, PARTNER, GIBSON DUNN & CRUTCHER

Jay Edelson, FOUNDER & CEO, EDELSON PC

Prof. Stacy Hawkins, PROFESSOR OF LAW, RUTGERS LAW SCHOOL

Jonathan Berry, MANAGING PARTNER, BOYDEN GRAY PLLC

Moderator: Hon. Gregory G. Katsas, JUDGE, UNITED STATES
COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

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REVERSE KEYWORD SEARCH WARRANT UPHELD AT COLORADO SUPREME COURT

Brent Skorup
April 9, 2023

Excerpted from
State Court Docket Watch

A house fire in August 2020 in Denver killed a Senegalese family—three adults, a toddler, and an infant—sleeping inside. Three more inhabitants, a man, woman, and child, escaped with their lives out of a second story window. Early in their investigation, police suspected arson in this tragic case in part because a neighbor’s home-security video showed three hooded figures wearing masks and approaching the home in the middle of the night. However, after two months of investigation, the police had not identified a single suspect. The next step by investigators, obtaining a “reverse warrant” from a judge to review the search history of certain Google users, initiated

a legal and public policy controversy about privacy, constitutional protections, and criminal investigations.

The legal controversy was documented and ruled on by the Colorado Supreme Court in an October 2023 decision, *Colorado v. Seymour*. The court’s decision to deny the defendant’s suppression motion was a narrow one. However, the decision is one of the first to analyze the constitutionality of reverse warrants when no suspects have been identified.

As that decision explains, investigators had no leads in the fall of 2020 but had a theory the burned home had been deliberately targeted and that arsonists had probably entered the home’s address in a Google search or on Google Maps in the days and hours leading up to the crime. Police therefore turned to a novel investigation technique: seeking a “reverse keyword warrant” from a judge. Whereas a typical warrant is obtained after identifying a suspect and describing a place where police believe evidence is located, a reverse keyword warrant is obtained before identifying a suspect. The reverse warrant describes potentially incriminating internet history—here, a search of an address related to a crime—and authorizes police to obtain from Google a list of associated users or accounts to help identify a suspect.

In this case, Google refused, consistent with its privacy policies, to provide police with the sensitive information initially requested, including names and birthdates of its users who had searched the home address at issue. However, after police narrowed their inquiry and the scope of the reverse warrant, Google provided police an anonymized list of devices, identified by device identifiers and IP addresses, associated with a search of the address within fifteen days of the fire. Google, the court said, “produced a spreadsheet of sixty-one searches made

by eight accounts.”

With these promising leads, the police were able to narrow their search to a handful of people and gather more evidence of a crime, including incriminating evidence and private messages found on other social media sites. Police eventually identified three suspects—teenage boys who lived in the area. Based on other evidence discovered, prosecutors alleged the teenagers had splashed gasoline on the house and lit it on fire under the mistaken belief that someone in the home had earlier stolen a phone from one of the suspects.

One suspect, Seymour, argued the reverse keyword warrant was unconstitutional—that it was not adequately particularized and lacked probable cause. He made a pre-trial motion to suppress all evidence resulting from the search executed under the reverse keyword warrant. Courts generally will suppress evidence gathered under a deficient warrant in order to encourage investigators’ compliance with the U.S. and state constitutions. The trial court denied the motion to suppress, and Seymour appealed to the Colorado Supreme Court.

In its October 2023 decision, the Colorado Supreme Court noted the novelty of this legal issue—the constitutionality of reverse keyword searches apparently had not been examined by any state supreme court or federal appellate court. The court therefore declined to make a “broad proclamation about the propriety of reverse-keyword warrants” and “proceed[ed] incrementally based on the facts before [it].”

Nevertheless, the Colorado Supreme Court decision was notable in several respects.

For one, the court found that Seymour had “a constitutionally protected privacy interest in his Google search history” under the state constitution. Under the federal Fourth Amendment’s “third-party

doctrine,” most federal courts deny that people have a protected privacy interest in information voluntarily shared with third parties; a person’s internet search sends information to a search engine operator like Google to obtain search results, so the third-party doctrine removes Fourth Amendment protection from such information. However, the Colorado Supreme Court noted it has “long rejected the third-party doctrine” because the state constitution “provides greater privacy protections than the Fourth Amendment” to the U.S. Constitution. Therefore, a search had occurred because Seymour had “a reasonable expectation of privacy in his Google search history.”

The court also determined that Seymour “had a constitutionally protected possessory interest in” his Google search history under the state constitution and under the Fourth Amendment to the U.S. Constitution. This meant police had also “seized” Seymour’s search history. For evidence of this possessory interest, the court noted that “Google’s licensing agreement makes clear that it does not own its users’ content. Instead, users own their Google content, which, according to testimony from a Google policy specialist, includes their search histories.” Therefore, the copying of Seymour’s history by police effected a constitutional “seizure”: “the act of copying . . . meaningfully interferes with the owner’s possessory interest because it infringes on one’s rights to exclude and to control the dissemination and use of that digital data.”

“In sum,” the court held, “law enforcement conducted a search of Seymour’s Google activity under the Colorado Constitution and a seizure of that information under both the Colorado Constitution and the Fourth Amendment.”

This was not a warrantless search, however, so the court turned to the constitutionality of the reverse warrant. To be

constitutional, a warrant must (1) describe with sufficient particularity both the place to be searched and the things to be seized and (2) demonstrate probable cause.

The court was satisfied that the reverse warrant was reasonably particular in scope: namely, “the narrow search terms, the timeframe constraints, and the fact that the initial search was anonymized all served to minimize any invasion of privacy resulting from the search.”

As for probable cause, however, the court “assume[d] without deciding that the warrant lacked probable cause.” The court was skeptical that investigators’ belief that arsonists would “digitally case” a property by searching the address beforehand would qualify as a “substantial basis” for the magistrate judge to issue the reverse warrant.

Typically, if an invalid warrant is issued, any evidence gathered as a result of the invalid warrant is suppressed at trial. Here, however, despite treating the reverse warrant as lacking probable cause, the court declined to suppress the evidence gathered. Colorado courts recognize a “good faith” exception to the suppression of evidence when investigators are gathering evidence in an unprecedented—but impermissible—way, so long as the investigators acted reasonably. Here, the court said, the investigators had no way of knowing that an individual’s Google search history is constitutionally protected, as that issue had not been litigated before in Colorado. Therefore, police had “no reason to know [they] might have needed to demonstrate a connection between the alleged crime and Seymour’s individual Google account.”

In the end, though the warrant may have been invalid, Seymour’s motion to suppress the evidence was denied in the October 2023 decision. In January 2024, Seymour pleaded guilty to second-degree murder.

Two justices dissented from the

majority opinion. They believed the reverse warrant was completely deficient and the motion to suppress should have been granted. The dissent said “a reverse-keyword warrant functions like a digital dragnet” since these warrants don’t identify a suspect, and “[t]hey are tantamount to a high-tech version of the reviled ‘general warrants’ that first gave rise to the protections in the Fourth Amendment.”

The dissent disagreed with the majority that the warrant was sufficiently particularized “with respect to the place to be searched,” that is, “Google’s entire database of a billion user accounts.” The dissent also stated that “the warrant was so facially deficient that it forecloses application of the good-faith exception to the exclusionary rule.” The dissent predicted “that reverse-keyword warrants will swiftly become the investigative tool of first resort. Because, why not? It’s a tantalizingly easy shortcut to generating a list of potential suspects.”

Surely other courts and lawyers will study this decision, and the dissent, for years to come. Reverse warrants for search histories and similar reverse warrants for geolocation—identifying, via GPS tracking in smartphones, the accounts of people in a designated location at a particular time—are an increasingly common tool of law enforcement. The court’s finding that Google users have a protected possessory interest in their search histories, and that law enforcement copying of that information effects a seizure, will change how modern-day investigations into digital data are conducted if other state and federal judges agree. ■

Visit fedsoc.org for citations and to read the article online



FEDSOC STUDIOS

JAWBONED

In April, FedSoc Studios premiered *JAWBONED: Miss Information vs. Free Speech* at the Cato Institute. The event included a screening of the film, a panel discussion and Q&A featuring FedSoc Studios director Matt Wood, as well as two of the film's interviewees, and an evening reception. *JAWBONED* is a short documentary exploring the extent to which the government's power to speak can be used to combat online misinformation before it becomes "jawboning" against the free speech rights of private actors. This film, starring Adam Kovacevich, Katie Harbath, Nicole Saad Bembridge, and Will Duffield, addressed the then-ongoing Supreme Court cases *Murthy v. Missouri* and *NRA v. Vullo*, making it the first FedSoc Studios documentary that focuses directly on active SCOTUS cases.





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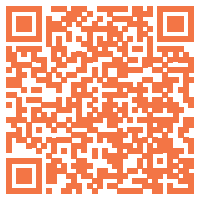
The Federalist Society Review



Racial Preferences in Economic Benefits: From Widely Accepted to Legally Indefensible

George R. La Noue • April 10, 2024

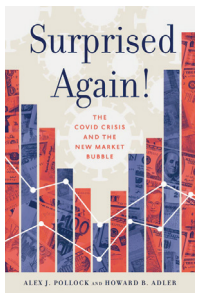
“Beginning in the 1970s, American governments began to use racial preferences to distribute economic benefits and public procurements. ... But in recent years, the judiciary has adopted far-reaching rules invalidating race-preferential procurement and economic benefit programs in public and private institutions. ... Racial preferences in awarding government economic benefits have become very difficult to defend.”



Toward a More Confident State Constitutionalism

Stephen J. Markman • May 2, 2024

Adapted from a speech Justice Markman delivered to the Florida Annual Education Conference of District Appellate Judges in Jacksonville, Florida, in January 2024.



Surprise, the Only Constant

Julius L. Loeser • April 15, 2024

A review of Alex Pollock and Howard Adler’s book *Surprised Again! The COVID Crisis and the New Market Bubble* (2022). “The book also opens a fascinating window into the thinking of two highly placed government officials, the two authors, who had enormous financial responsibilities during the Covid crisis. ... [It] provides a fascinating mosaic of economic data illuminated by easily comprehensible charts deployed in the service of informing the reader of every currently foreseeable consequence of the Covid financial crisis.”



The FedSoc Blog

PWFA Rule Keeps Abortion Accommodations and Fulfills EEOC Wish List

*Rachel N. Morrison
May 23, 2024*

Major Questions Raised by EPA’s EV Mandates

*Stephen G. Bradbury
May 13, 2024*

To Appease Protestors, Universities Promise to Violate Civil Rights Laws

*GianCarlo Canaparo
May 7, 2024*

Noncompetes, Overtime, and the Status Quo: How Agency Rulemaking Distorts Federal Policy and Why Only Courts Can Fix It

*Alexander Thomas MacDonald
April 30, 2024*

The Bayh-Dole Act and the Debate Over “Reasonable Price” March-In Rights

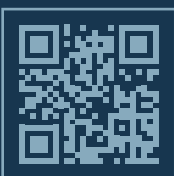
*Andrei Iancu and Cooper Godfrey
April 18, 2024*

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— fedsoc.org/probono



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