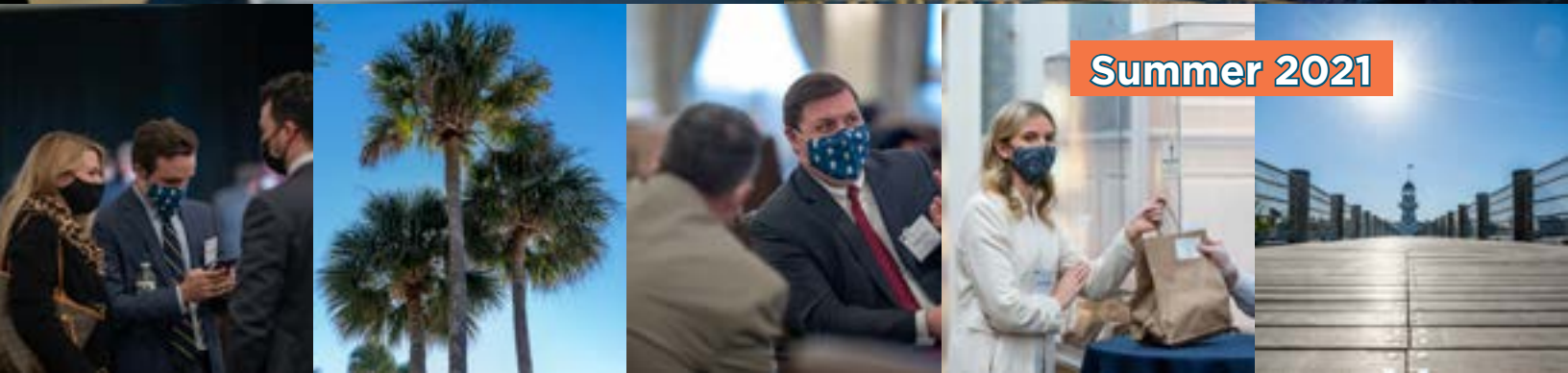




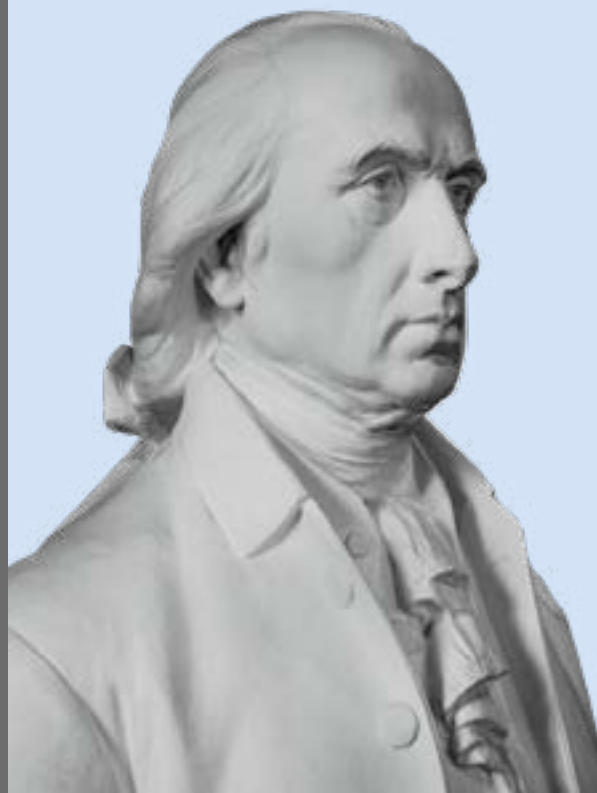
THE Federalist PAPER

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



Fed Soc masks set out for attendees of the in-person Texas Chapters Conference.

*Dear
Friend,*

The COVID-19 pandemic is coming to an end, and the Federalist Society is starting to get back to normal. That means more in-person events are in planning, especially the upcoming National Lawyers Convention (save the date!). As you'll see in this issue, we have already begun holding some in-person events in states that have opened up, albeit with decidedly pandemic-era precautions such as masks and social distancing. But if we must wear masks, they will surely bear the profile of James Madison! As always, our live panels were filled with engaging debate and discussion of legal ideas, and attendees were able to reconnect after a long year before and after events.

We have continued to be active in online programming as well, and that is one pandemic-induced innovation that is not going anywhere! Our webinars, teleforum calls, and publications have attracted record numbers of viewers, listeners, and readers, so it's become increasingly clear that there is a big appetite for Fed Soc ideas among those who may not be able to get time off to attend events. Please visit fedsoc.org or youtube.com/thefederalistsociety to watch panels you've missed or listen to podcasts and read articles. And please plan to attend the 2021 NLC, which will be back at the Mayflower Hotel November 11-13!

Our Student and Lawyers Chapters have been working hard, and they've hosted some wonderful events over the past few months, including the annual National Student Symposium and in-person state conferences in Texas, Florida, and Ohio. The Faculty Division gave Prof. Aaron Nielson the 2021 Joseph Story Award, and you can read about this excellent young scholar in this issue. Our Digital, RTP, and Article I teams are releasing new videos and podcasts all the time, all of which are worth checking out. Visit fedsoc.org to watch and listen, or connect via social media.

We hope you enjoy this issue of the **Federalist Paper**. Please send any comments to us at info@fedsoc.org. We look forward to hearing from you, and to seeing you at the NLC!

Sincerely,

*Katie McClendon
Director of Publications*

STUDENT DIVISION



Save the Date 2022 National Student Symposium

Hosted by University of Virginia Law School
Charlottesville, Virginia • March 4-5, 2022

*Federalists & Anti-Federalists:
Revisiting the Founding Debates*

Visit fedsoc.org or youtube.com/thefederalistsociety to watch panels from the symposium, and join us in person next year!

Keynote Address by Sen. Mike Lee
Intro by Penn Law Chapter VP Johnathan Sargent



Feddie Award Winners



Wrapping up a semester of virtual events.



Members of the George Mason Chapter pose with the Thomas Paine Award for Creative Publicity.



The Board of the American University Student Chapter.

LAWYERS CHAPTERS

Texas Chapters Conference February 18 • Houston



The Houston Lawyers Chapter hosted this year's Texas Conference at the Houstonian Hotel. The hybrid conference featured a Zoom webinar on **Sex and Gender Issues Following Bostock**, and in-person programming focused on executive power in the Trump Administration. The **Gregory Coleman Lecture's** keynote remarks were delivered by Hon. Edith H. Jones.

Ohio Chapters Conference May 7 • Columbus



After cancelling the 2020 conference, there was much anticipation for this year's Ohio Chapters Conference. Panels focused on interpreting state constitutions and departmentalism, and featured a discussion with newly confirmed judges. The keynote remarks were delivered by Hon. Janice Rogers Brown.

Florida Chapters Conference January 30 • Disney



The Florida Lawyers Chapters successfully hosted our first major in-person conference of the year. Panels focused on **COVID-19 and the Law**, **Corpus Linguistics**, and **SCOTUS after the Barrett Confirmation**. The conversations were live streamed on the website and continue to amass viewers on YouTube. The event also featured remarks from Florida Attorney General Ashley Moody and Governor Ron DeSantis.

Save the Dates

Florida Young Lawyers Summit
University Club of Tampa • June 25-26, 2021

2021 Texas Chapters Conference
George W. Bush Library • September 17-18, 2021

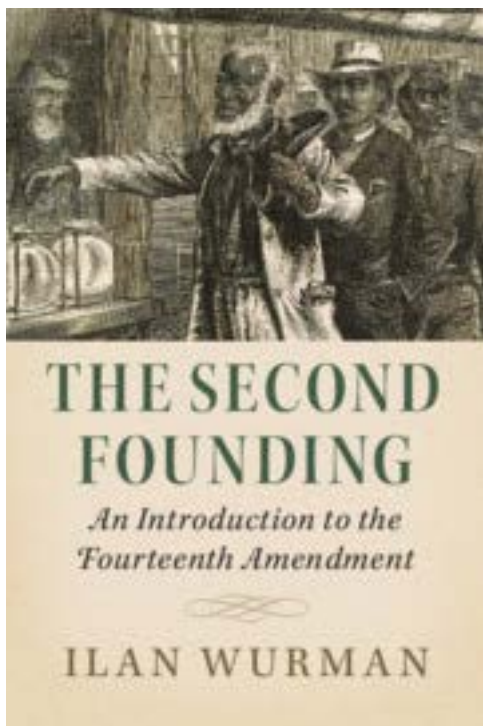
Kentucky Chapters Conference
Kentucky State Capitol House • October 18, 2021

Inaugural Arkansas Chapters Conference
Little Rock • October 22, 2021

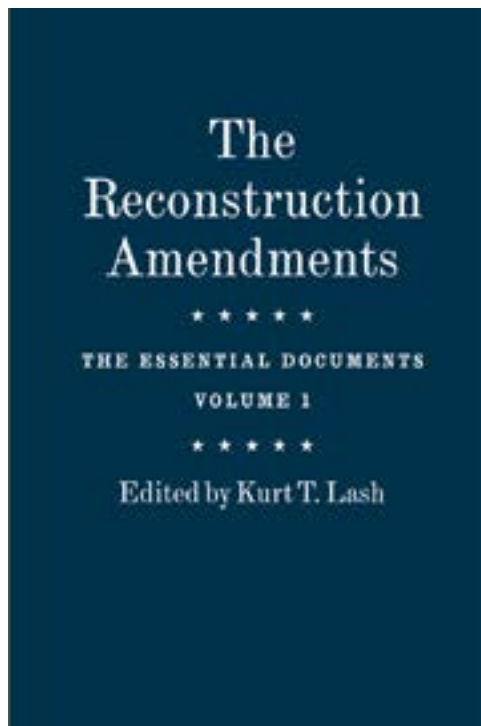
2022 Florida Chapters Conference
Disney • February 4-5, 2022

FACULTY DIVISION

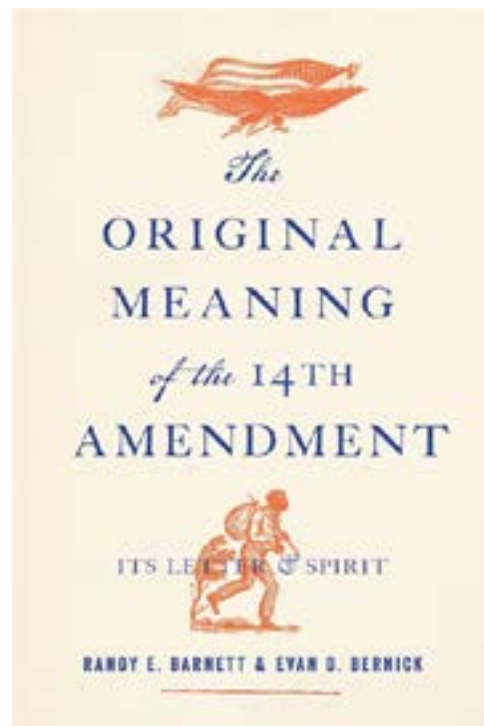
New Books By Academics



Cambridge University Press



University of Chicago Press



Harvard University Press

2021 Joseph Story Award

The Joseph Story Award is the successor to the Paul M. Bator Award, and is given annually to a young academic (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. Grant Strobl, the student representative on the selection committee, was delighted to present the 2021 Story Award to Prof. Aaron Nielson of Brigham Young University J. Reuben Clark Law School during the 2021 National Student Symposium (virtual this year on account of the pandemic). Professor Nielson is a “budding ‘lawyer’s Everyman,’” he noted. “First, Professor Nielson is the embodiment of excellence in legal scholarship. He has written dozens of articles on administrative law, including widely cited pieces on deference.” Strobl also pointed to Professor Nielson’s public service as a Supreme Court advocate. Appointed by the Court to brief and argue in support of the constitutionality of the structure of the Federal Housing Finance Authority in *Collins v. Yellen*, Professor Nielson discharged this important public responsibility with “exemplary briefing and poise,” Strobl remarked. Finally, Strobl emphasized Professor Nielson’s extraordinary commitment to his students. “One student said ‘his door has always been open to me and . . . my peers, and . . . he eagerly helps all students secure employment, understand the law, or rediscover hope. When the father of one of this student’s friends and fellow classmates passed away of cancer, Professor Nielson called him and offered help.’ As this student concluded, ‘Aaron Nielson is that kind of man, professor, lawyer, and leader.’”

Professor Nielson’s comments in accepting the award laid out an ideal for scholarly discussion and the relationship of that ideal to the Federalist Society. Citing a post by Professor Orin Kerr, a previous winner of the Bator award, Professor Nielson explained that the goal of argument is not to vanquish the opposing view, but to find the truth. “No one has a monopoly on wisdom, and when we’re mistaken, we should be happy to be corrected.” At the same time, Professor Nielson continued, it is also important to speak up. “We are not always wrong, and we need to be willing to say what we think. And just because some ideas are unpopular or peculiar doesn’t mean they are wrong.” Finally, Professor Nielson stressed the importance of engaging with others politely. “All too often, popular culture seems to say that because we are in a war of ideas, there is no time for measured conversation. But politeness is an idea. The idea is that we need to build institutions and social norms that allow new ideas to emerge.” While no person or group, including the Federalist Society, will always live up to this ideal, Professor Nielson noted that the Society aspires to, and at its best it does, which is a major reason for his longstanding involvement with the Society.



Prof. Aaron Nielson,
BYU Law

DIGITAL

Leave a Decent Comment: Section 230 & the Fight for the Future of the Internet

When politicians and big tech clash over political bias, fake news, and content moderation, who wins? And will it be “Game Over” for the internet as we know it?

In *Leave a Decent Comment*, a video collaboration between FedSoc Films, the Regulatory Transparency Project, and the Atlas Network, experts, politicians, and pundits debate the pros and cons of amending Section 230 of the Communications Decency Act by looking at how the internet developed and its many possible futures.

Section 230 is a once-obscure section of an unpopular law from the 90s that arguably brought the internet out of the wild west and made it what it is today. Why do some people argue it gives a voice to the powerless while others say it allows giant corporations to stifle free speech? And how will the outcome of this fight affect YOU?

Featured in the film are former Representative Chris Cox, Senator Ted Cruz, Ashken Kazaryan, Rachel Bovard, and Professor Jeff Kosseff, who explain the history and current issues around Section 230.



“ Competition and choice for internet consumers was what we had in mind when we wrote Section 230 in the first place. And it’s more important now than ever.

Former Representative Chris Cox

Jeff Kosseff, Author, *The Twenty-Six Words That Created the Internet*



Ashken Kazaryan, Former Director of Civil Liberties, TechFreedom



Rachel Bovard, Senior Director of Policy, Conservative Partnership Institute



Senator Ted Cruz

“ I think the biggest threat to free speech in America and the biggest threat to democracy in our elections, is big tech censorship.

Watch **Leave a Decent Comment** and other documentaries and event videos at youtube.com/thefederalistsociety.



PRACTICE GROUPS

The Federalist Society's Practice Groups present

2021 Executive Branch Review Week THE NEXT FOUR YEARS

Judicial Nominations and Confirmations

- Hon. W. Neil Eggleston, Partner, Kirkland & Ellis; Former White House Counsel
- Hon. C. Boyden Gray, Founding Partner, Boyden Gray & Associates
- Ms. Carrie Severino, Chief Counsel and Policy Director, Judicial Crisis Network
- Moderator: Hon. Andrew S. Oldham, Fifth Circuit

Sponsored by the Professional Responsibility & Litigation Practice Groups



Regulating Social Media in the New Administration

- Ms. Joan Marsh, Executive Vice President and Chief Regulatory Officer, AT&T
- Hon. Noah Phillips, Commissioner, Federal Trade Commission
- Hon. Nathan Simington, Commissioner, Federal Communications Commission
- Mr. K. Dane Snowden, President & CEO, Internet Association
- Moderator: Hon. Elizabeth L. Branch, Eleventh Circuit

Sponsored by the Telecommunications & Electronic Media Practice Group



State Sovereignty or Fair-Weather Federalism?

- Prof. Ed Rubin, University Professor of Law and Political Science, Vanderbilt Law School
- Prof. Carolyn Shapiro, Professor of Law, Chicago-Kent College of Law; former Solicitor General, Illinois
- Mr. Ilya Shapiro, Vice President and Director, Robert A. Levy Center for Constitutional Studies, Cato Institute
- Prof. Ilya Somin, Professor of Law, Antonin Scalia Law School
- Moderator: Hon. John B. Nalbandian, Sixth Circuit

Sponsored by the Federalism & Separation of Powers Practice Group



Settlement Payments to Non-Governmental Third Parties

- Ms. Anna St. John, President, Hamilton Lincoln Law Institute
- Mr. Jesse Panuccio, Partner, Boies Schiller Flexner LLP
- Mr. Justin A. Savage, Partner, Sidley Austin LLP
- Moderator: Hon. Alice M. Batchelder, Sixth Circuit

Sponsored by the Litigation Practice Group



Our 9th Annual Executive Branch Review Conference was held virtually this year. It featured fantastic panels on a wide range of topics, focusing on the next four years of the Biden administration.

STATE COURTS

State Court Docket Watch: State of Wisconsin v. Roundtree

Visit fedsoc.org to read more State Court Docket Watch articles and keep up with what's happening in your state!

By Amy E. Swearer

In January, the Wisconsin Supreme Court upheld the constitutionality of a state statute permanently banning felons from possessing firearms, even as applied to those who commit non-violent, public order offenses. Roughly 18 years ago, Leevan Roundtree was convicted in Wisconsin state court on three felony counts of failing to pay child support for more than 120 days, was sentenced to probation, and subsequently paid his past-due child support. Wisconsin is one of a minority of states that do not provide felons with a mechanism for having their civil rights—including gun rights—restored, except by gubernatorial pardon. Roundtree therefore effectively had his right to keep and bear arms permanently revoked.

In 2015, police executing a search warrant at Roundtree's home found a revolver and ammunition hidden under his bed. Roundtree admitted to purchasing the gun "from a kid on the street" but denied knowing that the gun had, in fact, been reported stolen in Texas. He ultimately pled guilty to unlawfully possessing a firearm as a convicted felon. Roundtree then filed for post-conviction relief, arguing that Wisconsin's felon-in-possession statute was unconstitutional as applied to him. The Wisconsin Circuit Court denied the motion for relief on the grounds that Roundtree waived his constitutional challenge by pleading guilty, and the Wisconsin Court of Appeals affirmed on the grounds that Roundtree's argument failed on the merits, regardless of whether he waived the constitutional argument.

In an opinion written by Justice Ann Bradley (joined by Chief Justice Patience Roggensack and Justices Annette Ziegler, Rebecca Dallet, and Jill Karofsky), the Wisconsin Supreme Court affirmed the Court of Appeals' decision. It applied intermediate scrutiny, finding such an approach to be consistent with Heller's statement that felon dispossession laws are "presumptively lawful" and reasoning that no federal court of appeals has applied strict scrutiny to similar challenges. The majority assumed that felon-in-possession statutes burden conduct falling within the scope of the Second Amendment's right but nevertheless concluded that Wisconsin's statute is substantially related to the government's important interest in addressing gun violence.

In the majority's view, failure to pay child support is a serious offense that, while not involving physical violence, deprives one's children from "receiving basic necessities." The state has a reasonable interest in keeping firearms out of the hands of "those who have shown a willingness not only to break the law, but to commit a crime serious enough that the legislature has denominated it a felony." Moreover, the majority pointed to several studies that, in its view, support a conclusion that the past commission of non-violent felonies is related to the likelihood of future commission of violent crimes.

Justice Dallet, joined by Justices Ann Bradley and Karofsky, wrote separately to express her

opinion on the question—left unaddressed by the majority opinion—of whether Roundtree waived his as-applied constitutional challenge by pleading guilty. In light of the United States Supreme Court's holding in *Class v. United States*, she concluded that he did not.

Justice Rebecca Bradley dissented, arguing that the majority applied an inappropriate standard of review for a blanket ban on a fundamental individual right. *Heller*, *McDonald*, and relevant state cases made clear that the right to keep and bear arms is fundamental, and under the Wisconsin Supreme Court's own precedent, strict scrutiny must be applied to statutes that restrict a fundamental right.

Additionally, she concluded that this blanket ban on a fundamental constitutional liberty for non-violent felons is inconsistent with the Second Amendment's original public meaning. The state may have some historically recognized authority to revoke Second Amendment rights based on an individual's dangerousness to society. But the Wisconsin statute predicates the loss of these rights on a felony conviction alone, while drawing "no distinction between an individual convicted of first-degree homicide and someone convicted of failing to comply with any record-keeping requirement for fish."

Justice Brian Hagedorn also dissented, but for different reasons. Like Justice Bradley, he found that the historical record failed to demonstrate state authority to broadly prohibit firearm possession based merely on the commission of a felony. He reasoned, however, that the same historical record supported "some [state] authority to dispossess those who posed a danger of engaging in arms-related violence, and to do so in ways that were both at least somewhat over- and under-inclusive." Intermediate scrutiny, therefore, is appropriate for analyzing felon dispossession laws.

Under intermediate scrutiny, the state failed to meet its burden of showing a substantial connection between dispossessing all felons—including those like Roundtree convicted of public order offenses—and the state's interest in remediating gun violence. In Justice Hagedorn's view, the majority completely misconstrued the two studies upon which it so heavily relied. One study failed to offer evidence establishing a relationship between past crime and a person's risk of committing gun-related violent crime in the future. The second study showed only a modest correlation that "falls far short of demonstrating why those convicted of . . . failure to pay child support should be dispossessed in the interest of preventing future gun-related violent crime."

The Wisconsin Supreme Court has now joined a growing list of courts applying intermediate scrutiny to uphold lifetime bans on gun possession for non-violent felons. Felon-in-possession cases will continue to present very real and pressing questions about the parameters of Heller's "presumptively lawful" dicta.

Published April 14, 2021

Save the Dates!

2021NLC

NOVEMBER 11-13, 2021 | WASHINGTON, DC
IN PERSON AT THE MAYFLOWER HOTEL

New at the
Regulatory Transparency Project

Videos



Cutting Through Government Action in COVID-19: Reasonable or Arbitrary?
Cal Bigari, Harriet Hageman, Leslie Jacobs, Jessie Santiago



How Do Regulatory Agencies Implement Laws?
Susan Dudley



How Does the FDA Evaluate Vaccines?
Henry I. Miller

Events

Third-Party Payments in Government Litigation Settlements
Ryan Dean Newman, Justin A. Savage, John Shu, Annie Donaldson Talley (moderator)

Is Common Carrier the Solution to Social-Media Censorship?
Richard Epstein, Joshua D. Wright, Elyse Dorsey (moderator)

Podcasts

The CFPB Taskforce Report on Federal Consumer Financial Law
David Silberman, Todd J. Zywicki, Brian Johnson (moderator)

Why Did Texas Lose Power?
James W. Coleman

Legal Issues for Commercial Drones: Privacy, Property Rights, and Federalism
Diana Marina Cooper, Brent Skorup, Adam Thierer (moderator)

THEY SAY IT | **CAN'T BE DONE**

Watch at RegProject.org/movie.



ARTICLE I

New at the
Article I Initiative

Writing Contest Winner



For our Fourth Annual Article I Initiative Writing Contest, we posed the following questions to young thinkers around the country: Has the judiciary usurped too much of Congress's legislative power? If so, how can Congress show greater ambition for their own institution and work against these trends? What innovations can the legislative branch create to claw back its legislative prerogative?

We were pleased to receive many thoughtful and well-argued essay submissions, which were evaluated by our all-star panel of judges featuring Ambassador C. Boyden Gray, Professor Lillian BeVier, and the Honorable Christopher DeMuth. We are grateful to all who submitted an entry and are pleased to recognize this year's winners for their excellent work!

For his entry titled *Negative Legislation*, our judges selected Roberto Borgert as the winner of this year's contest. Read his first-place essay in the *Federalist Society Review*, the introduction to which is reproduced at right.

Modern commentators have spilled much ink on the undemocratic nature of congressional delegations to executive branch agencies. Less discussed is the unchecked role of courts in declaring law through statutory interpretation. Whether federal courts have intentionally appropriated Congress's lawmaking function or reluctantly speak when Congress abdicates its legislative duties is, for purposes of this essay, largely irrelevant. Congressional response to judicial statutory interpretation is inhibited by structural features established by the Constitution and by political self-interest. In an era of polarization and weakening separation of powers, Congress is losing its voice in expounding the meaning of statutes.

To protect its lawmaking function from judicial encroachment, Congress should embrace negative lawmaking: the exercise of its power to say what the law is not. Underpinning this proposal is the view that Congress's difficulty in restricting judicial activism in the realm of statutory interpretation is primarily a problem of political economics. Negative lawmaking is a public-choice-informed innovation that can reduce the cost of producing legislation.

The Federalist Society's Columbia Student Chapter and
Article I Initiative Present:

Congress and the Administrative State

On January 21, 2021, The Federalist Society's Article I Initiative and Columbia Student Chapter co-sponsored a webinar on **Congress and the Administrative State**. In one portion of the program, Professor Christopher J. Walker gave a presentation on the proper role of Congress in modern administrative law.

Watch the video at articleiinitiative.org.

The Federalist Society's Article I Initiative and
Chicago Student Chapter Present:

Kisor and Gundy: The Future of Administrative Law?

On February 15, 2021, Erin M. Hawley and Jennifer Nou joined the Federalist Society's Chicago Student Chapter for a discussion on the future of administrative law.

View this program at articleiinitiative.org.

Follow us
articleiinitiative.org



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