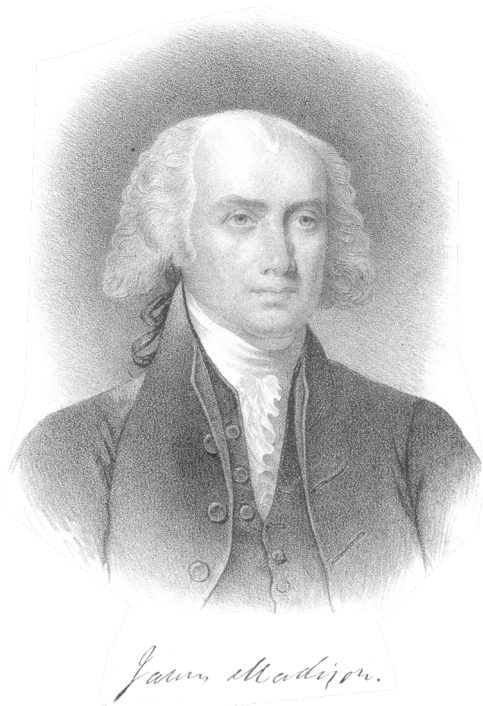




THE Federalist PAPER





THE FEDERALIST PAPER

Winter 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, photography by Sean Robertson.

EDITOR'S LETTER

Dear Friend,

The 2023 National Lawyers Convention explored the convention topic of *Originalism on the Ground*. In addition to discussions of how judges and practitioners should employ originalism, panels investigated the aftermath of the *Students for Fair Admissions* decision, cryptocurrency regulation, antitrust law, and more. Bari Weiss brought everyone to their feet with her Barbara K. Olson Memorial Lecture defending Western civilization just weeks after the 10/7 Hamas attacks on Israel. The Antonin Scalia Memorial Dinner was, as always, a highlight. It took place in a new venue—the Washington Hilton—and Judge Lisa Branch sat down with Justice Amy Coney Barrett for a fireside chat. For the 2024 convention, we will say goodbye to the Mayflower Hotel and hold the entire event at the Washington Hilton November 14-16. Save the date!

Our Student Chapters, Lawyers Chapters, Faculty Division, and Practice Groups have been as active as

ever hosting panels, gathering for events, discussing new ideas, and producing videos, podcasts, and articles to educate our members and the public about the law. Special projects such as the Regulatory Transparency Project, the Article I Initiative, and the Freedom of Thought Project do this as well in their specific domains.

There's more to read and explore in this issue, and we hope you enjoy learning about all the great things that are happening at the Federalist Society. Please visit fedsoc.org and check our weekly email to find out about upcoming events and newly released articles, podcasts, and videos. We couldn't do any of this without the tireless work and generous contributions of our volunteers and donors. We hope you've enjoyed a local or virtual event or benefitted from our digital content or publications recently. Please reach out to us at info@fedsoc.org if you'd like to share any feedback with us. We are so grateful for your support.

Katie McClendon

DIRECTOR OF PUBLICATIONS & PRO BONO



FedSoc Blog

Add the FedSoc Blog to your regular legal reading list! The FedSoc Blog publishes high-quality legal commentary from Federalist Society experts and friends from a variety of legal practice areas. Recent posts include *Does Modern Labor Law Violate the Fifth Amendment?*, *Two Quirky Appellate Decisions on Section 2 of the Voting Rights Act*, *What Musical Originalism Can Teach Us About Judicial Originalism*, and *Remembering Frederick Douglass's Plea For Free Speech*. Visit fedsoc.org/blog to read these and many other posts, and send submissions and feedback to us at blog@fedsoc.org.



Vol. 24 of the *Federalist Society Review*

Did you know that the Federalist Society publishes a legal journal? Volume 24 of the *Federalist Society Review* is now available in full! Volume 24 contains all of the articles released in 2023. Highlights include retrospectives on blockbuster Supreme Court cases, penetrating book reviews, and big-picture discussions of constitutionalism from a variety of perspectives. You can access *Review* articles through Westlaw and LexisNexis, or read them on our website at fedsoc.org/fedsoc-review. Keep an eye out for new articles, and please share your thoughts with us at info@fedsoc.org. Thanks for reading!

STUDENT DIVISION



1 Judge Ryan Holte visits the Tulane chapter. He is pictured here with Vice President Haley Fuller and President Reagan Mitchell.

2 A packed house for Berkeley's SCOTUS roundup.

3 Members of the Lincoln Memorial chapter pose with Judge David Duggan.

4 California Western chapter members pose with Alan Gura after a discussion about parents' First Amendment rights at school board meetings.

5 Members of the Chicago chapter attend the 2023 National Lawyers Convention at the Mayflower Hotel in Washington, DC.

6 The Washington & Lee chapter president Haley Carter poses with Washington & Lee Professor Alan Trammell and Alliance Defending Freedom's Bryan Neihart following a panel on *303 Creative v. Elenis*.



7 Members of the Texas chapter volunteer at the Federalist Society's 2023 Texas Chapters Conference in Houston, Texas.

8 Emory chapter president Sophia Bavaro and Emory Law faculty with Professor Alan Dershowitz and his wife Carolyn Cohen, an Emory alumna.

9 Professor Todd Zywicki and Professor Lois Lupica gather with members of the Denver chapter after speaking about junk fees.

10 Professor David Bernstein poses with members of the Texas A&M chapter after speaking about *SFFA v. Harvard*.

Highlights of Recent Student Chapter Events

Being Different and Succeeding as a Student with Diverse Ideologies

NEVADA STUDENT CHAPTER

Debate Night: Was the Andy Warhol case wrongly decided?

NOTRE DAME STUDENT CHAPTER

Student Discussion Series: Applying Originalism

CORNELL STUDENT CHAPTER

Small Group Discussion on the Incompatibility of the *Erie* Doctrine with Originalism

HARVARD STUDENT CHAPTER

Does A Red Tie Go with an Orange Jumpsuit?: A Debate on the Trump Indictments

UNIVERSITY OF MARYLAND UNDERGRADUATE CHAPTER

FedSoc Halloween Party: Night of the Living Constitution (What Could be Scariest than That?)

UNIVERSITY OF WASHINGTON-ST. LOUIS

Commendations for Student Chapter Officers

To honor graduating officers of Federalist Society student chapters, the Student Division has produced commendations to honor these students' bar passage and service to the Federalist Society. Featuring a silhouette of James Madison by classically trained artist Michael Curtis and compiled by a former Michigan Law School Chapter President, the commendations include a message of gratitude and a wax seal featuring the Federalist Society's logo.

If you are a graduate of the Class of 2023 and served as an officer in your law school's Federalist Society chapter, you may request your own commendation at fedsoc.org/commendations.





The Arizona chapter hosts a well-attended debate about free speech on college campuses, featuring Professors Eugene Volokh and Toni Massaro.

The Detroit Mercy chapter hosts a Thanksgiving event.



UPCOMING EVENT

2024 NATIONAL STUDENT SYMPOSIUM

March 8–9, 2024 | Cambridge, MA

The Harvard Law School Federalist Society Chapter will host the 43rd annual National Student Symposium on March 8–9, 2024. Symposium panels will focus on fundamental questions about our nation's constitutional structure and the allocation of power between the three branches of government, in keeping with the conference's theme: Why Separate Powers?

Agenda

Fireside Chat: Why Separate Powers?: A Conceptual Framework

Panel I: Federalism and the Separation of Powers

Panel II: The Executive Power, the Legislative Power and the Administrative State

Panel III: The Judicial Power and Evaluating Judicial Supremacy

Panel IV: Constitutions, Elections, and Procedure: (How) Can We Change How We Separate Powers?

50% TRAVEL SCHOLARSHIP FOR DUES-PAYING STUDENT MEMBERS

(TRAVEL ONLY — the scholarship does not include lodging.)



CHAPTER SPOTLIGHT

UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Connor P. Fraley
J.D. Candidate • Class of 2025

Our mission as a local chapter is twofold. First, our mission is to educate our members. With particular focus on the 1Ls in any given year, our goal is to expand the horizons of the legal education of our members beyond old cases from the 1800s that you learn in your first year courses to the hottest current legal issues of the day nationally and in North Carolina. For example, UNC was a losing defendant in the Students for Fair Admissions affirmative action rulings this year. We organized a debate focused on the case, and the school administration even included it as part of a series of events for students after the ruling. Outreach to various student affinity organizations on the issue led to an audience of over 140 students and faculty, most of whom were not Federalist Society members. These attendees had the opportunity to hear, perhaps for the first time, the principled conservative position on the affirmative action issue.

Second, our mission is to network with our members and outside leaders. Law school is a great time to meet people and learn about the job market, legal academia, and judicial clerkships. But three years is a short time, and the turnover of older students with experience and connections is fast. This year, we are sending significant delegations to local conferences as well as national Federalist Society conferences. We have hosted state legislative leaders, including our state Speaker of the House and Rep. Virginia Foxx, members of the state executive branch, and a majority of our state supreme court justices, with an eye toward identifying internship and job opportunities in our state. Through informal connections made in classes and at social events, our upper-level students work to connect those behind them with job opportunities and recommendations to match students to their interests and to provide a pipeline for interested employers who want to hire FedSoc members.



UNC Student Chapter President
Connor Fraley with other officers and
members of the chapter.

Judge Sentelle Scholarship Fund

In 2023, former clerks and others who wished to honor Judge David B. Sentelle on his retirement joined forces to establish and fund the Judge Sentelle Scholarship. The Fund supports deserving University of North Carolina Law students to enable them to attend Federalist Society programs, including the National Lawyers Convention and the National Student Symposium. The Federalist Society is grateful for the generous support that has made this special fund possible and provided for a lasting gift in support of our students and programs.

LAWYERS CHAPTERS

UPCOMING EVENTS

Ohio Chapters Conference

April 12
Columbus

Wisconsin Chapters Conference

May 10
Brookfield

Midwestern Regional Conference

June 7
Chicago

Texas Young Lawyers Summit

June 28–29
Dallas

Florida Young Lawyers Summit

July 12–13
Coral Gables

RECENT EVENTS

OCTOBER 6

North Carolina Chapters Conference
Raleigh



OCTOBER 13

Kentucky Chapters
Conference
Lexington, Ky.



OCTOBER 17

A Conversation with Theodore
Olson and Paul Clement
New York City



OCTOBER 20

Arkansas Chapters Conference
Bentonville, Ark.



OCTOBER 26

Dinner & Dissent: Why
Conservative Justices Disagree
Phoenix



JANUARY 19

Missouri Chapters Conference
Jefferson City, Mo.



JANUARY 26-27

Western Chapters Conference
Simi Valley, Calif.



FACULTY DIVISION



The 25th Annual Federalist Society Faculty Conference was held January 4–5, 2024, in Washington, DC. The conference took place under the general aegis of the AALS Annual Meeting, with our events and speakers cross-listed in the AALS Annual Meeting Program. Panels and meals were held in the Westin Washington DC Downtown.



Works In Progress

Attendees Sean Griffith (Fordham), Ben Johnson (Florida), Tyler Lindley, and Dwight Newman (Saskatchewan) participate in the “7 Minute Presentation of Works in Progress” session at the Annual Faculty Conference.



Consideration of Race After SFFA v. Harvard

Wilfred Reilly (Kentucky State) speaks at the “Consideration of Race After *SFFA v. Harvard*” panel with Stacy Hawkins (Rutgers-Camden) and Kimberly Robinson (Virginia).



Independent Agencies and Financial Regulation

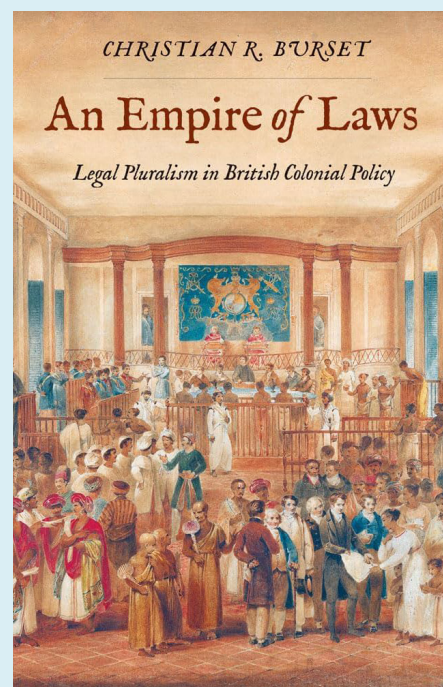
Featuring Aaron Klein (Brookings Institution), Ilan Wurman (Arizona State), Jennifer Mascott (George Mason), Jeremy Kress (Michigan), Todd Zywicki (George Mason), and moderator Christina Parajon Skinner (Wharton).



303 Creative Panel

Mark Movsesian (St. John's) and Amy Sepinwall (Wharton) field questions about *303 Creative v. Elenis* from the audience and moderator Dale Carpenter (Southern Methodist).

NEW BY FACULTY



An Empire of Laws

An Empire of Laws by Christian Burset (Notre Dame) was recently published by Yale University Press in its Yale Law Library Series in Legal History and Reference.



2023 NATIONAL LAWYERS CONVENTION

*T*he 2023 National Lawyers Convention took place November 9-11 at the Mayflower Hotel in Washington, DC. Over three days, the Convention featured four Showcase Panels discussing “Originalism on the Ground,” 18 breakout sessions sponsored by the Practice Groups, the 15th Annual Rosenkranz Debate, the 22nd Annual Barbara K. Olson Memorial Lecture, and the 2023 Antonin Scalia Memorial Dinner.



2023 ANTONIN SCALIA MEMORIAL DINNER

The 2023 Antonin Scalia Memorial Dinner was held at a new venue this year! In response to the ever-increasing demand for tickets and the extensive waitlists that had developed in years past, this year's Dinner was held at the Washington Hilton in Washington DC. Around 2,600 friends, members, and guests attended the event, which featured a variety of addresses including a fireside chat with Justice Amy Coney Barrett moderated by Judge Lisa Branch.





22ND ANNUAL BARBARA K. OLSON MEMORIAL LECTURE

On September 11, 2001, Barbara K. Olson was murdered in the terrorist attacks against the United States as a passenger on the hijacked American Airlines flight that was flown into the Pentagon. The 22nd Annual Barbara K. Olson Memorial Lecture, dedicated to her memory, was delivered by Bari Weiss, Founder and Editor of the Free Press. Weiss delivered an impassioned speech on the goodness of America, the indispensability of Western civilization, and the dangers of anti-Semitism, particularly in the aftermath of the October 7 Hamas attack on Israel. Her speech received an extended standing ovation.



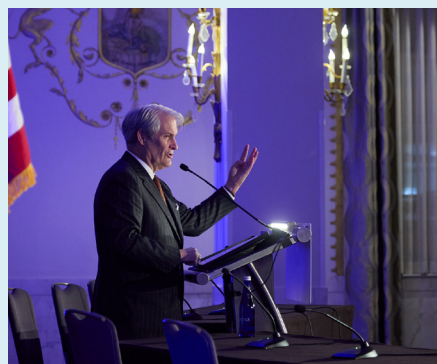
FIRESIDE CHAT WITH FTC CHAIR LINA KHAN

The Federalist Society was honored to host a Fireside Chat with FTC Chair Lina Khan moderated by Prof. Todd J. Zywicki on the current state of antitrust at the FTC.



15TH ANNUAL ROSENKRANZ DEBATE & LUNCHEON

In the 15th Annual Rosenkranz Debate Prof. Richard Epstein and Clark Neily debated the resolution “RESOLVED: States Can Constitutionally Regulate the Content Moderation Policies of Facebook and Twitter” in an event moderated by Prof. Nicholas Quinn Rosenkranz.



HON. ROBERT H. BORK MEMORIAL LECTURE

The Honorable Thomas Griffith, who retired from the U.S. Court of Appeals for the District of Columbia Circuit, concluded the conference by delivering the annual Hon. Robert H. Bork Memorial Lecture. The lecture's topic was “Toxic Political Polarization and the Judiciary.”



INSURRECTION AND THE 14TH AMENDMENT

Professors William Baude and Michael McConnell participated in a discussion on Insurrection and the Fourteenth Amendment, moderated by Professor Julia Mahoney.



**SHOWCASE PANEL I:
ROUNDTABLE: ORIGINALISM ON THE GROUND**

Our first Showcase Panel featured Paul D. Clement, Britt Grant, James C. Ho, Bernadette Meyler, Jason Miyares, Elizabeth Wydra, & moderator Judge Joan Larsen. The panel discussed originalism in practice at all levels of the legal system and whether originalism has a “legal culture.”



**SHOWCASE PANEL III:
ORIGINALISM ON THE GROUND**

John C. Harrison, Randolph Moss, Andrew S. Oldham, Jed H. Shugerman, & moderator Judge Gregory G. Katsas discussed the many questions relating to originalist historical research and its legal usage in our third Showcase Panel.



**SHOWCASE PANEL II:
WHITHER PRECEDENT?**

The second Showcase Panel discussed how modern originalists do and should handle case law that does not conform to originalist principles. It featured Tara Leigh Grove, Randy Kozel, Gary Lawson, John O. McGinnis, & moderator Judge William H. Pryor Jr.



**SHOWCASE PANEL IV:
HOW ORIGINALIST IS THE SUPREME COURT?**

The fourth Showcase Panel explored originalist jurisprudence in everyday practice, the effect of originalist methods on the Supreme Court, and possible alternatives to originalism. The panel featured Joel Alicea, Randy E. Barnett, Richard H. Fallon, Stephen E. Sachs, & moderator Judge Neomi Rao.

PRACTICE GROUP-SPONSORED EVENTS AT THE NATIONAL LAWYERS CONVENTION



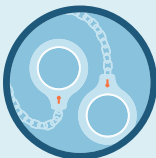
Administrative Law & Regulation
The Administrative State, Its Supporters and Its Discontents



Civil Rights
SFFA and Beyond



Corporations, Securities, & Antitrust
A Creature of Statute: American Antitrust Law



Criminal Law & Procedure
After *Dobbs* and *Samia*: The Potential Implications of Applying a *Dobbs* Lens to the Supreme Court's Constitutional Criminal Jurisprudence



Environmental Law & Property Rights
Defend the Constitution, Save the Planet: The Role of Public Interest Groups in Shaping Environmental Law



Federalism & Separation of Powers
Do States Enjoy a Special Solicitude?



Financial Services & E-Commerce
Hyperextension? Federal Financial Agencies & Cryptocurrency Regulation



Free Speech & Election Law
Fair Elections in an Era of Partisanship



Intellectual Property
The Injunction Function: Is IP Law Promoting Markets for Innovators and Creators?



International & National Security Law
FISA Section 702 Revisited: Originalist Interpretations and Constitutional Constraints



Labor & Employment Law
Nightmare on Half Street? Free Speech and the NLRB



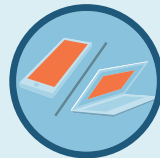
Litigation
The Judiciary's Federalist Revival



Professional Responsibility & Legal Education
Originalist Perspectives on Ethics and the Supreme Court



Religious Liberties
Religious Liberty in the Work-and-Market-place



Telecommunications & Electronic Media
Originalism and the Communications Act of 1934



Learn more or watch recordings from throughout the National Lawyers Convention at fedsoc.org.



MERE NATURAL LAW (SPECIAL SESSION)

Prof. Hadley P. Arkes, Prof. Randy E. Barnett, and Judge Edith H. Jones participated in a discussion of Arkes's new book moderated by Prof. Robert P. George.



SECOND AMENDMENT: WILL THE SUPREME COURT ADHERE TO *BRUEN* (AND ORIGINALISM) IN *RAHIMI* AND BEYOND?

Judge Lawrence VanDyke moderated a discussion of *Bruen*'s aftermath among Prof. William G. Merkel, Prof. Mark W. Smith, and David H. Thompson.



IHC: THE FUTURE OF DEI IN BUSINESS

Erin E. Murphy, Patrick Strawbridge, Seth P. Waxman, and moderator Judge Timothy M. Tymkovich discussed the future of diversity, equity, and inclusion initiatives in the business world.

PRACTICE GROUPS



DEI IN THE EXECUTIVE BRANCH LUNCHEON

Executive orders 13985 and 14035 outline what President Biden has described as an “ambitious whole-of-government equity agenda.” In light of that agenda, executive branch agencies are now charged with creating, implementing, and assessing a large variety of DEI initiatives. Should the executive branch maintain such a robust focus on DEI initiatives? Is the current administration’s focus constitutional? Is it appropriate? Does it serve the American people? Our Civil Rights Practice Group sponsored an expert panel to tackle these questions and more, featuring Veronica Venture, Hans von Spakovsky, Devon Westhill, Dean Todd Clark, & moderator Kenneth L. Marcus.

WEBINARS



Religious Liberty and the Court: Looking Ahead to the Next Term

SEPTEMBER 19

Mark Rienzi, *PRESIDENT, BECKET FUND; PROFESSOR OF LAW, CATHOLIC UNIVERSITY OF AMERICA*

William Saunders, *PROFESSOR AND CO-DIRECTOR OF THE CENTER FOR RELIGIOUS LIBERTY, CATHOLIC UNIVERSITY OF AMERICA*



College Admissions After SFFA

OCTOBER 30

Art Coleman, *MANAGING PARTNER AND CO-FOUNDER, EDUCATIONCOUNSEL*

Cory R. Liu, *ATTORNEY, BUTLER SNOW LLP*

William E. Trachman, *GENERAL COUNSEL, MOUNTAIN STATES LEGAL FOUNDATION*

Kenneth L. Marcus, *FOUNDER AND CHAIRMAN, LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW (MODERATOR)*



Loper Bright and the Next Steps for Chevron Deference at the Supreme Court

OCTOBER 23

Nicholas Bagley, *PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL*



Christopher J. Walker, *PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL*



Ilan Wurman, *ASSOCIATE PROFESSOR, SANDRA DAY O'CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY*



Eli Nachmany, *FORMER LAW CLERK TO HON. STEVEN J. MENASHI, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT (MODERATOR)*



Lockstep or Step Alone: Considering Interpretations of the Federal Constitution When Interpreting State Constitutions

OCTOBER 2

Judge David R. Stras, *UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

Chief Judge Jeffrey S. Sutton, *UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

Associate Justice Sarah Hawkins Warren, *GEORGIA SUPREME COURT*

Justice Clint Bolick, *ARIZONA SUPREME COURT*

Justice Sarah K. Campbell, *TENNESSEE SUPREME COURT (MODERATOR)*



Courthouse Steps Oral Argument: *United States v. Rahimi*

NOVEMBER 7

Mark W. Smith, *SENIOR FELLOW, AVE MARIA SCHOOL OF LAW; HOST, FOUR BOXES DINER SECOND AMENDMENT CHANNEL*



Navigating Self-Defense and International Law in Gaza

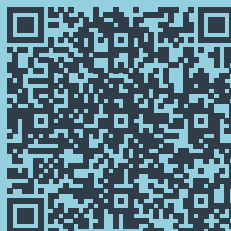
NOVEMBER 30

Jennifer Maddocks, *ASSISTANT PROFESSOR OF LAW, U.S. MILITARY ACADEMY, WEST POINT*

Paul Stephan, *JOHN C. JEFFRIES, JR., DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW*

Jeremy Rabkin, *PROFESSOR OF LAW, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY (MODERATOR)*

ALL PAST WEBINARS



Insights on the Supreme Court's New Ethics Guidelines

NOVEMBER 30

Arthur Hellman, *PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW*

David Lat, *FOUNDER, ORIGINAL JURISDICTION*

Judge Jennifer Perkins, *ARIZONA COURT OF APPEALS (MODERATOR)*

VOLUNTEER OF THE YEAR & EXECUTIVE COMMITTEE OF THE YEAR

The Federalist Society's Practice Groups Division is excited to announce **Svetlana S. Gans** (Gibson, Dunn & Crutcher) is the inaugural Volunteer of the Year award winner, and the **Civil Rights Practice Group Executive Committee** won the inaugural Executive Committee of the Year award!

The Federalist Society is indebted to the hard work of all our volunteers who serve our organizational mission to sponsor fair, serious, and open debate and discussion. We are thrilled to begin this tradition of recognizing the tremendous efforts of our most committed volunteers. The campaign for the 2024 awards begins now!



Learn about our winners and their accomplishments at fedsoc.org



EDUCATION CONFERENCE

This year's Education Law & Policy Conference, co-sponsored by the Federalist Society's Practice Groups and Defense of Freedom Institute for Policy Studies examined the federal, legal, and policy issues surrounding American education. The full day of programming included plenary sessions on teachers unions and U.S. Department of Education rulemaking, a debate on the constitutionality of religious charter schools, and addresses from author Phillip K. Howard, former Secretary of Labor Eugene Scalia, and former Indiana Governor Mitch Daniels.

The conference took place on Wednesday, September 13, 2023, at the Washington Hilton in Washington, DC.



Visit our website for more information and select event recordings





REGULATORY TRANSPARENCY PROJECT

A NEW DAWN OF WORKPLACE REGULATION



On January 10, 2024, the U.S. Department of Labor unveiled its final rule concerning the classification of workers as employees or independent contractors under the Fair Labor Standards Act. RTP's new mini-documentary, *A New Dawn of Workplace Regulation: The Gig Economy*, features labor law experts and gig economy workers who provide insights into the advantages and challenges confronting independent contractors within the dynamic realm of the "gig economy." This documentary explores the historical evolution of worker classification, tracking the changes in the DOL's rules during both the Trump and Biden administrations and examining different actions at the state level.

WHITE PAPER

Beyond Government-Assigned Schooling; Beyond Government-Mandated Teacher Licensure



In our latest white paper, author Lindsey Burke writes about the need to reform existing teacher certification practices and offers practical suggestions for state licensing regimes. An excerpt:

"As education freedom expands, teacher freedom will expand as well. Reforms to the teacher workforce—namely, hiring practices largely dictated by state certification laws—will need to accompany the growth of school choice, so that private providers will have a large hiring pool of qualified teachers who align with their schools' missions and values. A failure to reform existing certification practices that have served neither schools nor students well will risk replicating the existing public school model over time."

Read the Paper



IN-PERSON EVENT



Wong v. NYCERS and ESG Action at the State and Local Level: A Debate on the Right

On October 10, 2023, the Regulatory Transparency Project hosted a luncheon and debate on *Wong v. New York City Employees' Retirement System*. In the case, four current and former New York City municipal workers sued three New York City pension funds over the funds' decision to divest \$4 billion in fossil fuel securities. This case raises pivotal questions regarding the rights and responsibilities of pension funds, and it has important implications for how state and local governments address ESG matters.

PANELISTS

Paul Atkins, *CHIEF EXECUTIVE OFFICER, PATOMAK GLOBAL PARTNERS LLC*

Jonathan Berry, *MANAGING PARTNER, BOYDEN GRAY PLLC*

Akiva Shapiro, *PARTNER, GIBSON, DUNN & CRUTCHER LLP*

F. Vincent Vernuccio, *PRESIDENT, INSTITUTE FOR THE AMERICAN WORKER; SENIOR FELLOW, MACKINAC CENTER FOR PUBLIC POLICY*

FILM SCREENING AND DISCUSSION



SACKETT v. EPA: A TALE OF WETLAND REGULATIONS

On October 25, 2023, RTP and the American Conservation Coalition hosted a film screening and discussion of RTP's short film, *Sackett v. EPA: A Tale of Wetland Regulations*. Following the film screening, a panel of leading environmental experts discussed the property rights and environmental issues raised by *Sackett v. EPA*, the implications for agency implementation and enforcement of regulated waters under the Clean Water Act, and more.

PANELISTS

Daren Bakst, *DIRECTOR OF THE CENTER FOR ENERGY AND ENVIRONMENT AND SENIOR FELLOW, COMPETITIVE ENTERPRISE INSTITUTE*

Morgan Brummund, *GOVERNMENT AFFAIRS DIRECTOR, AMERICAN CONSERVATION COALITION*

William W. Buzbee, *PROFESSOR OF LAW, GEORGETOWN LAW*



PODCAST EPISODE HIGHLIGHTS

Why (and How) Does OMB Classify Americans' Race? A Brief History

October 11 • David Bernstein

Training Artificial Intelligence & Copyright Law

November 7 • Timothy B. Lee, Pamela Samuelson, Brent Skorup, Kristian Stout

Bias Response Teams, American College Campuses, and Free Speech

December 14 • Jonathan Butcher, Jon Riches

WEBINARS

WATCH



Minor Matters in Cyberspace: Examining Internet Age-Verification Regulation

Ashken Kazaryan, Clare Morell, Ben Sperry, Jamie Susskind, Shoshana Weissmann

How Risky Are the Banks Now? What Regulatory Reforms Make Sense?

William M. Isaac, Keith Noreika, Alex J. Pollock, Lawrence J. White

The EPA's Proposed Power Plant Rule: Will it Survive in the Courts?

Daren Bakst, Jeffrey Holmstead, Kevin Poloncarz, Justin Schwab

Litigation Update: Loper Bright Enterprises v. Raimondo

Ryan Mulvey, Eli Nachmany



Dram-Shop Liability and the State Constitution at the Arizona Supreme Court

Timothy Sandefur • Dec. 22, 2023

Excerpted from *State Court Docket Watch*

The Arizona Supreme Court made surprisingly quick work of what at first appeared to be a complex legal conundrum in *Torres v. JAI Dining Services*. The case concerned the Arizona Constitution's "anti-abrogation" clause, which forbids the legislature from "abrogat[ing]" any "right of action to recover damages for injuries." Does this prohibition—which was adopted in 1912—shield from legislative interference only those legal avenues of recovery that existed in 1912? Or does it block lawmakers from repealing or overriding causes of action that courts have recognized in the years since?

The *Torres* case involved "dram-shop" liability—that is, the liability of a tavernkeeper for injuries caused by an intoxicated person to whom the tavernkeeper served an excessive amount of alcohol. The Arizona Supreme Court recognized this theory of liability for the first time in a 1983 case called *Ontiveros v. Borak*. The *Ontiveros* court acknowledged that innkeepers

were not liable for such injuries in 1912, yet it never claimed to be creating a brand-new legal theory. The court simply said that dram-shop liability is a species of negligence, and that although tavern-keepers had traditionally enjoyed immunity from that particular tort, the common law is “dynamic” and can “grow and [] tailor itself to meet changing needs within the doctrine of stare decisis.” The rule immunizing barkeepers from liability was itself a judicial invention—and in light of modern circumstances, it was “impossible to imagine why, of all occupations, those who furnish liquor should be singled out for a judicially conferred blessing of immunity to respond in damages for their wrongful acts.” In other words, the *Ontiveros* court was not writing a new law, but merely acting within the traditional judicial role of applying tort principles to new facts.

The legislature responded to *Ontiveros* in 1986 by codifying the principle of dram-shop liability. But the new statute limited liability to cases in which a barkeeper serves someone who is “*obviously* intoxicated,” a higher standard than the common law version of this liability, which merely required that the drinker be so inebriated that it was “unreasonable” to serve him.

This set the stage, decades later, for the *Torres* case, in which the jury found a barkeeper liable under the *common-law* dram-shop theory, but not the *statutory* theory, because the customer (who killed two people in a drunk-driving collision) was not “obviously intoxicated” when served, but drunk enough that it

would create “an *unreasonable* risk of harm to others” to serve him.

On appeal, the Arizona Supreme Court had to determine whether the statute entirely preempted the common law theory—which, in turn, required it to decide whether such preemption would violate the anti-abrogation clause. That, said the justices in a 6-1 ruling, was an easier question than it might seem, because the anti-abrogation clause applies solely to causes of action recognized by courts in 1912. Since even *Ontiveros* conceded that dram-shop liability did not exist then, the clause did not bar the legislature from substituting the statute—with its more demanding evidentiary burden—for the common law action recognized in 1983.

But Vice Chief Justice Ann Timmer, writing in dissent, thought this easy answer was too easy. She argued that, “[d]espite its unique name,” dram-shop liability “is just [an action] for simple negligence,” and “a simple negligence action to recover compensation for physical injuries indisputably existed at statehood.” She conceded that the general rule in 1912 was that tavern-keepers enjoyed immunity for that type of negligence, but nothing in the constitution’s anti-abrogation clause froze such immunity in place. On the contrary, she wrote, the authors of the anti-abrogation clause were entirely comfortable with the idea of courts “develop[ing] then-existing common law causes of action, molding them to fit modern situations unimagined in 1912.”

Justice Clint Bolick responded to the Vice Chief Justice in a

concurrence. He argued that, under Timmer’s theory, “so long as the resulting [liability] rule derives from a generic tort recognized at statehood (here, negligence), the judiciary possesses unbounded power to create new duties, liabilities, and damages; not only those that did not exist when our state was established, but even those that were actually prohibited”—and these new liabilities would enjoy constitutional sanctity. This, he concluded, was a form of “living constitutionalism” that would contradict democratic principles. But as Vice Chief Justice Timmer observed, the “progressive-minded” authors of Arizona’s Constitution expressly chose to limit democratic power in this respect—precisely because they “feared governmental interference with people’s ability to recover compensation for injuries under common law actions.” What’s more, plentiful democratic checks on Arizona courts remain: the initiative process can override unpopular judicial decisions, and Arizona judges are subject to retention elections.

Although seemingly simple, *Torres* touches on one of the most charged of all constitutional tensions: on one hand, the fact that the principles of reason underlying the law must apply differently in different contexts, and on the other, the constitution’s role in limiting that evolution to ensure the safety and happiness of the people. ■

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



FREEDOM OF THOUGHT

DEIA Initiatives in the Workplace Post-SFFA

In June, 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 Fourteenth Amendment and Title VI of the 1964 Civil Rights Act. Two EEOC Commissioners, Democrat Vice Chair Jocelyn Samuels and Republican Commissioner Andrea Lucas, joined us to discuss their respective views on how this decision, the federal law banning employment discrimination (Title VII of the 1964 Civil Rights Act), and EEOC regulations apply to employers' DEI programs and initiatives. The Commissioners also discussed their views on related topics such as the benefits and risks related to various categories of DEI programs; how employers should assess the lawfulness of their initiatives; and promising practices and guardrails for employers.

Jocelyn Samuels, *VICE CHAIR, EEOC*
Andrea Lucas, *COMMISSIONER, EEOC*

Moderator: Kate Comerford Todd,
PARTNER, ELLIS GEORGE CIPOLLONE





Watch the discussions by following the QR code above or navigating to fedsoc.org/conferences/2023-freedom-of-thought-conference



WORK DIFFERENT: THE PATH TO IMPACT LITIGATION

For the past several years, the Freedom of Thought Project has hosted a panel at the NLC to showcase people who've been thinking outside conventional tracks about how to build a career that allows them to advance ideas that they care about. What are some less-conventional opportunities to do work that aligns with your priorities? And how can we help those in our networks put their talents to their best use?

Our panelists this year discussed their experiences transitioning to focus on impact litigation. For attorneys who want to have an impact in a concrete way, can you make money doing the right thing?

Heather Gebelin Hacker, *PARTNER,*
HACKER STEPHENS LLP

James M. Burnham, *PRESIDENT, VALLECITO*
CAPITAL, LLC

Moderator: Kate Comerford Todd,
PARTNER, ELLIS GEORGE CIPOLLONE

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WEBINARS

Academic Freedom and Freedom of Expression: Will the Proposed Accreditation Standard Support Freedom of Thought at Law Schools?

September 18, 2023

Recent high-profile incidents at law schools have raised questions about the scope of academic freedom for faculty and freedom of speech for students and faculty. At the suggestion of its Strategic Review Committee, the Council of the ABA's Section of Legal Education and Admissions to the Bar, which is the primary accreditor of American law schools, put out for comment a proposed new accreditation standard, "Standard 208, Academic Freedom and Freedom of Expression."

The Freedom of Thought Project assembled a virtual panel to discuss the proposed standard. Among other topics, the panel considered the rationale for the standard put forward by the Council as well as the likely efficacy of the standard. It also considered the role of accreditation standards in supporting freedom of thought at law schools.

Prof. Nicole Stelle Garnett, *JOHN P. MURPHY FOUNDATION PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME LAW SCHOOL*

Daniel R. Thies, *SHAREHOLDER, WEBBER & THIES PC*

Prof. Joshua Kleinfeld, *PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW*

Prof. Benjamin Eidelson, *PROFESSOR OF LAW, HARVARD LAW SCHOOL*

Moderator: Hon. Carlos G. Muñoz, *CHIEF JUSTICE, FLORIDA SUPREME COURT*

WATCH ON YOUTUBE



A Conversation Within the Right: Why Isn't There a Larger Conservative Plaintiffs' Bar?

November 6, 2023

For decades, the plaintiffs' bar has been populated by lawyers who support left-wing elected officials and liberal causes, while conservative lawyers have largely joined the ranks of defense-side firms. In recent years, large public companies have become increasingly associated with political liberalism, and promoted contentious social issues that many conservatives reject—with large law firms defending them throughout.

Given this shift in corporate behavior and business culture, should we expect to see a more robust conservative plaintiffs bar emerge? Is our culture shifting in a fundamental way that will realign the legal profession? Or will the tension between supporting big business and believing in conservative views soon pass?

James M. Burnham, *PRESIDENT, VALLECITO CAPITAL, LLC*

Ashley Keller, *PARTNER, KELLER POSTMAN*

Mark Behrens, *CO-CHAIR, PUBLIC POLICY GROUP AT SHOOK, HARDY & BACON L.L.P.*

Brandon Smith, *CHIEF OF STAFF, OFFICE OF THE TENNESSEE ATTORNEY GENERAL*

Moderator: Andrew Ferguson, *SOLICITOR GENERAL OF VIRGINIA*

WATCH ON YOUTUBE



ARTICLE I

How does the modern congressional budget and appropriation process compare to the Founders' vision?



The Article I Initiative recently released a short and timely video titled *Omnibus: Who Controls the Power of the Purse?* featuring Professor Frances Lee, former Congressman David McIntosh, and Professor Antony Davies.



These experts discussed the perpetual threats of government shutdowns and why omnibus legislation is often the only solution offered by lawmakers. This short film seeks to answer: What are the pros and cons of omnibus bills? Why do they inspire criticism from both sides of the aisle, yet are still a very common way to fund our federal government?



articleiinitiative.org

FEDSOC STUDIOS

MUSIC COPYRIGHT BEHIND THE SCENES

In January, FedSoc Studios filmed three interviews for our upcoming short documentary, *Creativity on Trial: The Music Copyright Dilemma*.

This film will explore the tension between intellectual property rights and creative musical expression, considering questions such as: Why is music such a difficult domain to apply copyright law to, and how can we better address the blurry line between imitation and inspiration? The project will feature a variety of perspectives, including that of Prof. Joe Fishman, of Vanderbilt Law, Prof. Bob Brauneis, of GW Law, and Prof. Joe Bennett, of Berklee College of Music.





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