



THE **Federalist** PAPER

THE MAGAZINE OF THE FEDERALIST SOCIETY • FEDSOC.ORG

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

EDITOR'S LETTER



The socially-distanced Supreme Court Preview panel at the Mayflower Hotel in Washington, DC.

*Dear
Friend,*

The Federalist Society's staff and volunteer leaders are busy getting ready for the annual National Lawyers Convention in Washington, DC. We've done this every year for decades, but this year is especially exciting after last year's virtual convention. While the panels and speakers were as good as ever, we are looking forward to connecting with each of you personally at the Mayflower Hotel in November. This year's convention theme is *Public and Private Power: Preserving Freedom or Preventing Harm?* Showcase Panels and many breakout sessions will address that theme from various angles, including panels on Social Activism and Corporate Leadership, Private Control Over Public Discussion, When HR Goes Woke, and many more. This is also the 20th anniversary of the Barbara K. Olson Memorial Lecture, which you won't want to miss. Please visit fedsoc.org for more information and to register now!

All of our divisions have been busy hosting live events and maintaining online programming. Student Chapters have worked hard to put on great events and bring intellectual diversity to their campuses—often in the face of tough COVID-19 restrictions. The Faculty Division and Practice Groups jointly hosted the annual Supreme Court Preview, featuring an all-star panel discussing cases on the Supreme Court's OT 2021 docket. Lawyers Chapters around the country have been putting on events large and small, from intimate get-togethers hosted by the DC Young Lawyers Chapter to the annual Texas Chapters Conference. Practice Groups have addressed current and timeless issues in live events, including antitrust and whom corporations should serve. Our Digital team continues to make great videos on a wide range of legal topics. External Relations coordinated a Constitution Day teach-in, pairing FedSoc leaders with teachers across the country who wanted legal experts to teach their classes about the Constitution.

Please visit fedsoc.org or our YouTube page to watch events you've missed, view FedSoc Films videos, listen to podcasts, and read FedSoc Review articles and FedSoc Blog posts. 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 we'll see you at the NLC!

Sincerely,

Katie McClendon
Director of Publications

STUDENT DIVISION

REASONED ARGUMENT:

PRIOR TO, DURING, AND FOLLOWING THE
FEDERALIST - ANTIFEDERALIST DEBATE

BOOK CLUB



PRESENTED BY
PROF. JOHN S BAKER

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*



Members of the UVA Chapter in their Fed Sox uniforms!



The table for the Cincinnati Law Chapter at the student organizations recruitment fair!

The Student Leadership Conference was held in July in DC.



LAWYERS CHAPTERS

Texas Chapters Conference
September 17-18 • Dallas



Reception with Sen. Cotton
DC Young Lawyers • Sept. 20



The Terrorist Attacks of 9/11,
Then & Now
September 9 • New York



Florida Young Lawyers Summit
June 25-26 • Tampa



Save the Dates

2022 Western Chapters Conference
Reagan Library • January 29, 2022

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

FACULTY DIVISION



Supreme Court Preview: What's in Store for OT 2021? 09.22.2021 @ The Mayflower Hotel, DC

Thomas Goldstein, Goldstein & Russell • Carrie Severino, Judicial Crisis Network
Prof. Robert J. Cottrol, GW Law • Kannon Shanmugam, Paul Weiss
Moderator: Jan Crawford, CBS News



Junior Scholars Colloquium Winning Paper & Authors

Christian Buset
Notre Dame

An Empire of Laws: Legal Pluralism in the Eighteenth Century British Empire

Benjamin Chen
University of Hong Kong

Against the Fair Notice Argument for Textualism

Benjamin Johnson
Penn State

The Origins of Supreme Court Question Selection

Michael Morley
Florida State

Erroneous Injunctions

Erin Blondel
Assistant U.S. Attorney
Federal Criminal law as the Second Layer of Enforcement

Zalman Rothschild
Stanford Fellow

Free Exercise Partisanship

Christina Skinner
Wharton

Central Bank Activism

Chad Squitieri
Gibson Dunn

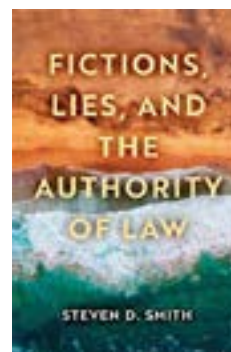
Towards Nondelegation Doctrines

Ilan Wurman
Arizona State

Constitutional Primary & Secondary Rules

Lael Weinberger
Harvard

Church Autonomy & Disestablishment: The Origins of Religious Institutionalism in America



Check out Prof. Steven D. Smith's new book, *Fictions, Lies, and the Authority of Law*, from Notre Dame Press.

Save the Date

Annual Faculty Conference
Boca Raton, FL • January 6-7, 2022
In-person & Livestreamed

James Kent Summer Academy 08.04-07.2021 @ Annapolis



On August 4-7, we held our 7th James Kent Summer Academy. This event brings students and recent graduates with strong academic prospects together with dedicated faculty for a conference devoted to preparation for an academic career. Participants are immersed in academic dialogue and receive personalized guidance. Workshops include hands-on opportunities to practice presenting the thesis of a paper and to discuss potential paper topics. Faculty members lead sessions on originalism (Randy Barnett), the administrative state (Julia Mahoney), business law (Robert Miller), and property (James Stern), as well as hands-on sessions on paper topics and presentations (Dan Kelly and Patrick Barry).

PRACTICE GROUPS

The Antitrust Paradox

09.15.2021

Where We've Been and Where We're Going

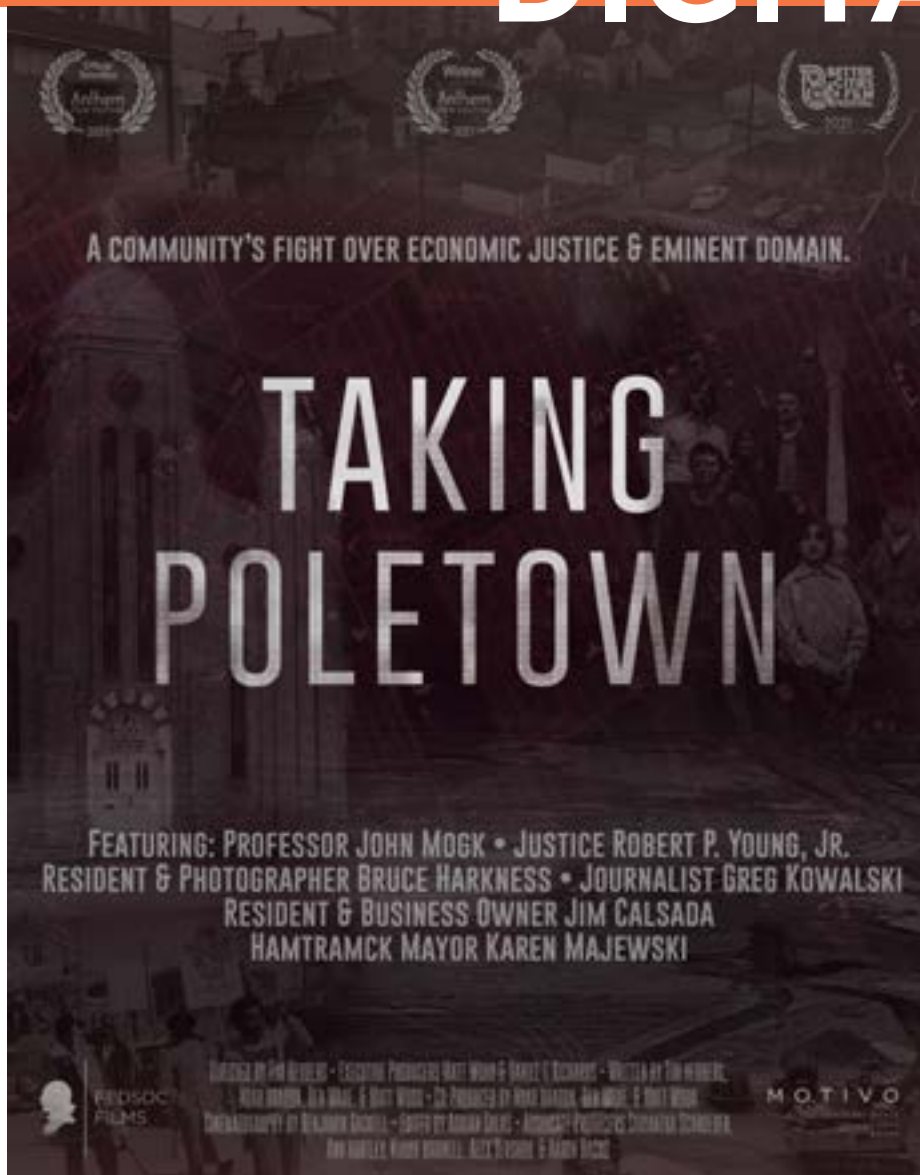


Shareholder/ Stakeholder

09.24.2021

A Symposium Presented by the In-House Counsel Working Group





In the early 1980s, General Motors found the perfect place to build a new factory in Detroit. That meant jobs, economic development, and prosperity. The only problem? An entire neighborhood stood in the way. **Taking Poletown** explores the battle of the City of Hamtramck, better known as “Poletown,” to stop GM and the city of Detroit from using eminent domain to take the property-in-question for “public use.”

A Michigan Supreme Court case and a Michigan constitutional amendment later, what lessons can we learn? Thirty years after the taking of Poletown, this award-winning FedSoc Film documentary provides key insights into that fight over economic justice and eminent domain, a battle that is still being fought today.

Taking Poletown: A Community’s Fight Over Economic Justice & Eminent Domain features Professor John Mogk, Distinguished Service Professor of Law at Wayne State University, former Michigan Supreme Court Justice Robert P. Young, Jr., photographer Bruce Harkness, Hamtramck Mayor Karen Majewski, and former residents of Poletown who paint a picture of one American city’s battle to save a struggling economy and preserve their community.

Taking Poletown won an award for Excellence in Filming in the Short Documentary category at Anthem Film Festival in 2021. Check out the FedSoc Films Podcast episodes featuring Professor Mogk and Justice Young who go deeper into the history, case law, and details of eminent domain in Michigan.



Watch **Taking Poletown** and other documentaries and event videos at youtube.com/thefederalistsociety.



MEMBERSHIP

How and when did you first become involved with the Federalist Society?

As a young lawyer, my mentor Brian Brooks encouraged me to attend Federalist Society events; the majority of my practice was with Brian while I was at O'Melveny & Myers. Later, my colleague and mentor Ted Frank encouraged me to become more involved and to present about our public interest law work at Federalist Society events. Mentors like Brian and Ted have been critical in shaping my career path.

How have your priorities for your career evolved over the years?

I left O'Melveny & Myers in Washington, DC, when I moved to a small city in the Midwest for my husband's medical training. I did some contract work and worked as a local prosecutor, but I missed the challenging work of a larger firm. I talked with some larger firms that were a couple hours away, but I had small children and wanted greater flexibility.

That is when I teamed up with Ted Frank. We worked together for eight years challenging unfair class actions and regulatory abuses. We were doing work that no other public interest law firm was doing and creating landmark legal precedent. But I was working from home and had total control over my workload and schedule.

I love talking to other lawyers about how we can make these types of opportunities more accessible. I'm sure there are many others who, like me, want to reshape their career to match changing priorities,

but without stepping back from the type of legal work they love.

How has your involvement with the Federalist Society continued over the years?

A few years back, I presented to the Salt Lake City Lawyers Chapter about my public interest work. When my family later relocated to Salt Lake, I reconnected with some of the chapter members and joined the board. We put on great local events and I've loved attending the leadership meetings.

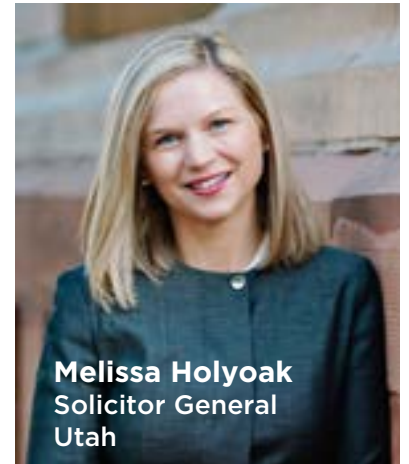
You were recently named Solicitor General of Utah. How did this opportunity come about?

The former Utah Solicitor General, Tyler Green, serves on the Salt Lake Chapter's board with me and introduced me to Utah Attorney General Sean Reyes. The important work I was doing with Ted Frank helped prepare me for the position. I gained incredible experience arguing in appellate courts across the country, including a successful D.C. Circuit appeal right before I started.

How have you seen Federalist Society principles or topics present in your work as Solicitor General?

Attorney General Reyes is devoted to defending the rule of law. Some of the most rewarding work I've done is partnering with other states in fighting federal overreach. We have brought actions challenging executive actions including President Biden's oil and gas leasing moratorium and social cost of carbon orders. It is such an honor to work with the extraordinary lawyers serving their states.

Member Profile



Melissa Holyoak
Solicitor General
Utah

Previously

President & General Counsel
Hamilton Lincoln Law Institute, Center for Class Action Fairness

Associate
O'Melveny & Myers

J.D.
University of Utah S.J. Quinney College of Law

EXTERNAL RELATIONS

Constitution Day - September 17, 2021

The Federalist Society partnered with the Bill of Rights Institute to connect volunteer FedSoc leaders with teachers across the country. FedSoc leaders were invited to teach classes (via Zoom) about the Constitution on the anniversary of the document's signing.



Thank you for taking time to tell us more about the constitution and your job. I really learned alot. I enjoyed learning about the job of a lawyer.

A 7th grade student's comments thanking attorney Matthew Cavedon for his presentation

Constitution Day was a great blessing for me. Being able to share with these wonderful high school students the unique significance of our Constitution, our Nation's Founding, and our governing principles was a special honor and source of jubilation. I am most grateful to the Federalist Society and indeed all organizers for making this possible.

R. Sohan Dasgupta, Schaerr Jaffe LLP

I appreciate your engaging commentary to help our class learn about the Constitution :) I gathered a lot of new information about the positions of power in each of the branches of government.

An 8th grade student's comments thanking Judge Mitchell Bishop for his presentation

New at the
Regulatory Transparency Project

Videos



How Should Flavored Vapes Be Regulated?
Jeff Stier



Net Neutrality and the Evolving Internet
Tom Hazlett



Government Funding of Medical Innovations: High Tech or Low Tech?
Henry Miller

Events

Immigration Policymaking in the Biden Administration
Susan Dudley, Richard Pierce, Shoba Wadhia, Christopher Walker

Examining the CDC's Eviction Moratorium
Lawrence Gostin, Kim Hermann, Steve Simpson

Podcasts

SEC v. Ripple Labs: Cryptocurrency and "Regulation by Enforcement"
John Berlau, John Deaton, Carol Goforth, Roslyn Layton, Curt Levey

State of Emergency? Kentucky's Legislature v. Governor
Mitchel Denham, Oliver Dunford

Rep. Harshbarger on the Freedom to Work Act
Diana Harshbarger, Shoshana Weissmann

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

Watch at regproject.org/movie.



ARTICLE I

New at the
Article I Initiative

Revitalizing the First Branch of Government by Ken Davis (read at the FedSoc Blog)

Can we have a government that is constitutional and also effective? For more than 100 years, we have operated under the profoundly mistaken belief that the answer to this fundamental question is no, we cannot have a government that is both constitutional and effective. We must choose one or the other.

If we want a constitutional government structured to protect our liberty, we must resign ourselves to the fact that its limited powers and separate branches prevent it from functioning effectively to provide the beneficial public policies we need and want as a society. On the other hand, if we want a government that can function effectively to provide the kind of beneficial public policies that we need and want, we must lay aside the constitutional government bequeathed to us by the Founders and forego the structural protection it provides for our liberty.

This belief that we must choose between constitutional government and effective government is profoundly mistaken. It represents a false dichotomy, one that has misdirected and restricted our thinking about constitu-

tional government for decades.

We wrongly came to believe that we must choose between constitutional government and effective government, and we fatefully chose to embrace the unconstitutional administrative state for its supposed effectiveness, because we first accepted the fallacious proposition that launched the progressive enterprise at the turn of the 20th century.

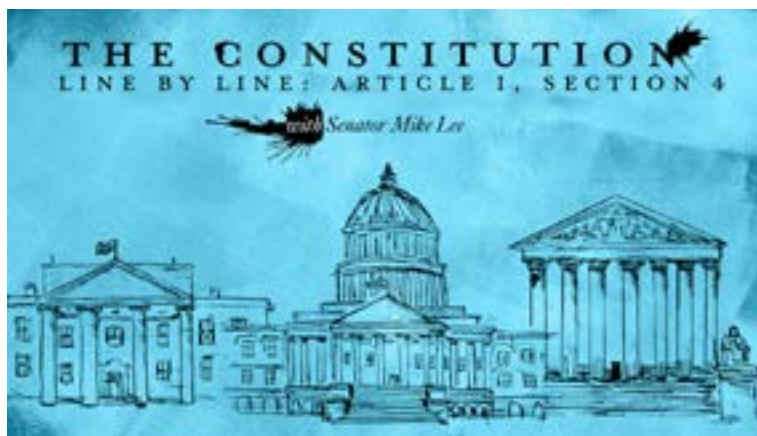
From the beginning, progressives have asserted that the Founders' constitutional government, with its clearly limited powers and separate branches, cannot possibly respond effectively to the many public policy challenges that confront a modern nation. They have rationalized the administrative state and its consolidation of sweeping powers by claiming that ordinary Americans, acting through their elected representatives, are simply not capable of directing the government in modern times. The issues to be dealt with are simply too complicated.

According to progressives, credentialed subject matter experts are needed to manage the demanding complexi-

ties of modern society; agency experts who can plan for us, direct us, care for us, and protect us. Such experts, to fulfill their critically important responsibilities, must be free to apply their professional judgments without interference from unschooled politicians and ordinary citizens. We must defer to the experts. Our elected representatives must accept and rely upon their judgements and directions. As the now familiar saying goes, we must follow the science and not be led astray by politics.

This progressive approach to policy making is fundamentally flawed. Scientists and technical specialists should never dictate public policy. Their perspectives are necessarily limited by specialization. Their information is inevitably incomplete. Their directives often lack the moderation that is fostered by accountability. Their personal interests may conflict with the best interests of society as a whole. As the pandemic made clear, overly deferential reliance on unaccountable experts can lead to disastrous public policy.

Please visit the [FedSoc Blog](#) to read the whole thing and other great posts, at [fedsoc.org/commentary/fedsocblog](#).



Keep following our video series with Senator Mike Lee, **The Constitution Line by Line**. We released episode 4 on Constitution Day, and more episodes are in the works and coming soon!

5th Annual Writing Contest

For more details, visit
[articleiinitiative.org](#).



ARTICLE I INITIATIVE
WRITING CONTEST

Topic: Congress and the Power of the Purse: Lost to History?

Under Article I of the Constitution, Congress's first two enumerated powers are "to lay and collect Taxes" and "to borrow Money on the credit of the United States"; a separate provision requires that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." These provisions invest Congress with comprehensive authority over federal revenues and expenditures—the "power of the purse"—and over the balance of taxing, borrowing, and spending that is now called fiscal policy.

Congress has allowed these powers to atrophy over the past half-century:

- The borrowing power has been delegated to the Department of the Treasury without effective limits on total public debt.
- Most federal spending is now determined by automatic "entitlement" formulas rather than congressional appropriations—and appropriations for other spending have become a charade, as Congress has ignored its own appropriating procedures (established by the Congressional Budget Act of 1974) and instead set annual spending through emergency "continuing resolutions."
- Most federal revenues are still raised through taxes established by Congress, but the executive branch now "lays and collects" hundreds of billions of dollars of administrative fees and enforcement fines each year; as a result, many programs and even entire agencies are now financially self-sufficient and appropriations-free.

Some observers believe that these developments are an important cause of the growth of deficit spending and federal debt, of the decline in effective congressional oversight of the executive branch, and of the emergence of "the administrative state."

What might have caused Congress to relinquish its critical financial powers? Were the growth of government and political polarization the causes or the effects of these developments? Do realistic means or appropriate incentives exist for Congress to reassert its power of the purse? Do the courts have a feasible role to play in enforcing constitutional discipline in the financial arena, akin to a revived nondelegation doctrine in regulatory law?

Prizes: The first-place winner will receive free registration, accommodations, and travel to the Federalist Society's 2022 Student Symposium and a \$7,000 cash prize. A runner-up \$2,000 cash prize and a \$1,000 honorable mention prize will also be awarded.

Follow us
[articleiinitiative.org](#)



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for Law and Public Policy Studies

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