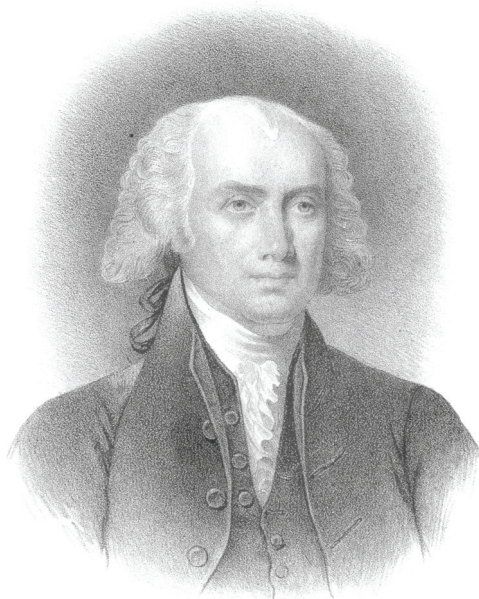


THE Federalist PAPER





James Madison.

THE FEDERALIST PAPER

Summer 2023

3	Editor's Letter
4	Student Division
8	Lawyers Chapters
12	Faculty Division
14	Practice Groups
18	Regulatory Transparency Project
20	Article I Initiative
22	Freedom of Thought
23	In Memoriam
24	External Relations
26	Digital

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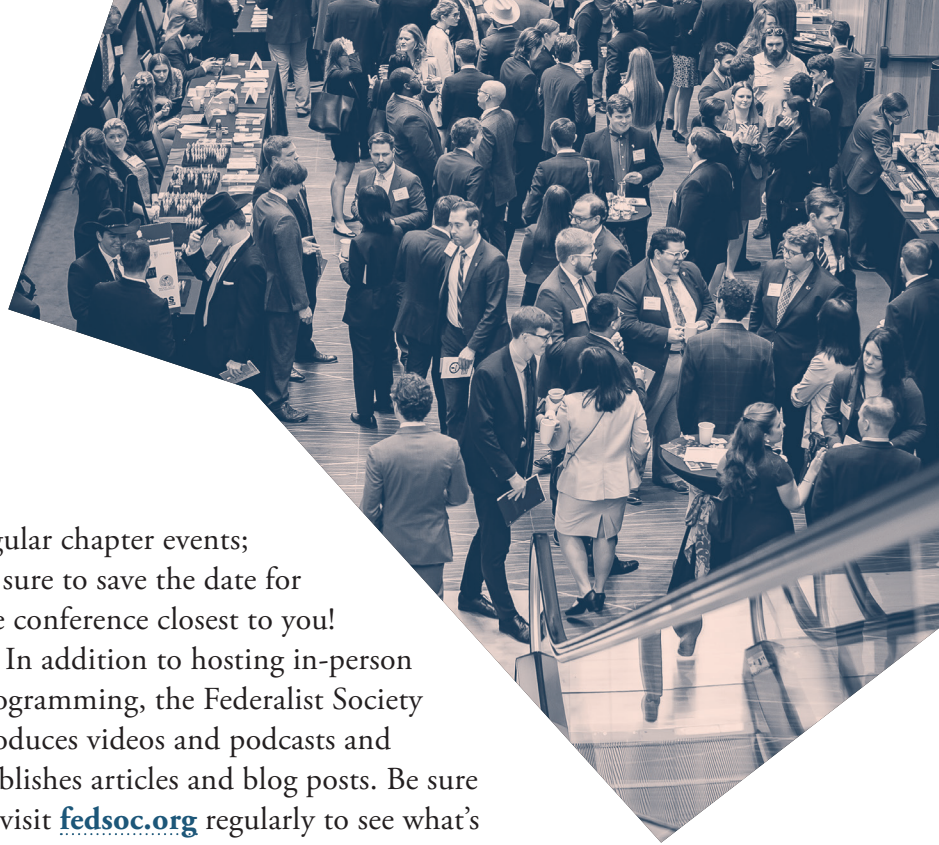
Pro Bono Center

Carrie Ann S. Donnell, *DIRECTOR (CONSULTANT)*

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

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EDITOR'S LETTER



Dear Friend,

After a busy spring and an exciting Supreme Court term, the Federalist Society is excited for our summer events and looking ahead to the National Lawyers Convention this fall. Mark your calendars for the NLC, which will be held November 9-11. We look forward to seeing you there!

Our 42nd annual National Student Symposium took place this past spring in Austin, and it featured excellent discussions of Law and Democracy, as well as fantastic FedSoc fellowship. The 11th annual Executive Branch Review Conference was held in DC in May, and the conference continues to draw a large audience and high caliber speakers to discuss the administrative state. The Lawyers Chapters continue to host state-wide and regional conferences alongside

regular chapter events; be sure to save the date for the conference closest to you!

In addition to hosting in-person programming, the Federalist Society produces videos and podcasts and publishes articles and blog posts. Be sure to visit fedsoc.org regularly to see what's new, and check out our weekly email newsletter for new releases. You can see a selection of our recent webinars in this issue, along with information about our various podcasts.

We look forward to seeing you at an event soon!

Katie McClendon

DIRECTOR OF PUBLICATIONS

Your FedSoc HQ

The Federalist Society is pleased to welcome two new individuals to the team in member-facing roles.

Craig Kreinbihl joined the Federalist Society as our Vice President and Director of Development right before last year's National Lawyers Convention. He comes to FedSoc after a long stint with Hillsdale College as a major gifts officer. He looks forward to helping advance the mission of the Federalist Society and stands ready to assist if you have any giving questions, referrals, or suggestions.

Debbie McFetridge is our new Associate Director of Membership, who began working for FedSoc this spring. She will assist with initiating and renewing members and helping members register for events as a part of our membership team.

Both Craig and Debbie, as well as our entire FedSoc staff, look forward to being of service to you, our members.



DEVELOPMENT QUESTIONS

Craig Kreinbihl

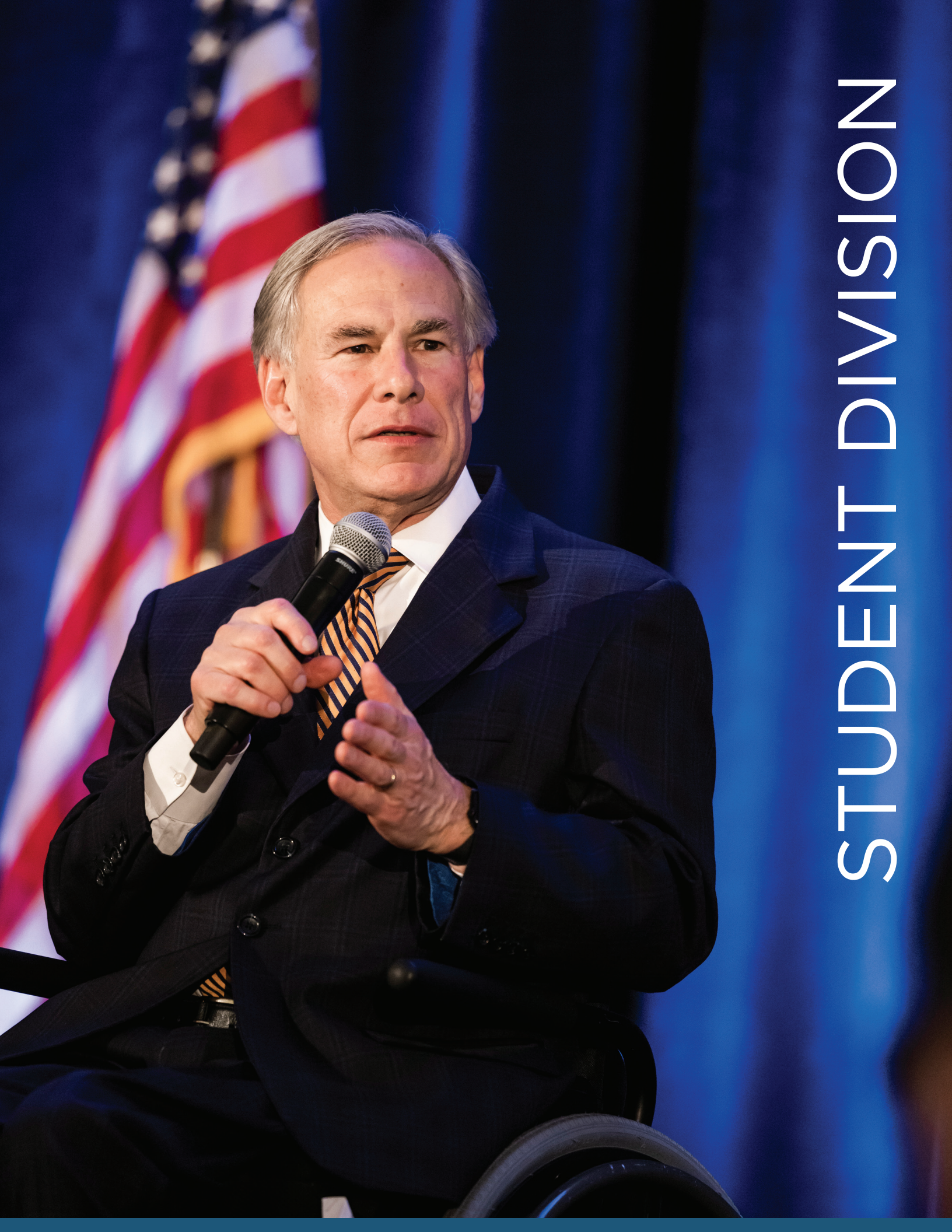
craig.kreinbihl@fedsoc.org



MEMBERSHIP QUESTIONS

Debbie McFetridge

debbie.mcfetridge@fedsoc.org



STUDENT DIVISION

This year, our 42nd annual National Student Symposium was hosted by the University of Texas Chapter on March 3-4. The topic was “Law & Democracy,” and it featured many prominent speakers, including Judge James Ho, Judge Edith Jones, Professor Joel Alicea, Professor Tara Leigh Grove, and Professor Keith Whittington. The Symposium concluded with a keynote address by Governor Greg Abbott. The 43rd annual National Student Symposium will be held at Harvard Law School March 8-9, 2024, and the theme will be “Why Separate Powers?”

OPPOSITE

Governor Greg Abbott gives the Keynote Address at the banquet dinner.

TOP LEFT

The University of Texas Chapter receives the 2023 Debate Championship title belt.

BOTTOM LEFT

Panel Discussion: *Does Federalism Lead to a More United or Disunited Democracy?*
 Judge Andrew Oldham, Prof. Ilya Somin, Prof. Jud Campbell, and Prof. Michael S. Greve

TOP RIGHT

Breakout Session: *Becoming an Academic*
 Lee Liberman Otis, Prof. Stephanie H. Barclay, Prof. Steven T. Collis, Prof. Tara Leigh Grove, and Prof. Derek T. Muller

BOTTOM RIGHT

Panel Discussion: *Unique Aspects of American Democracy: Structural Bugs or Features?*
 Judge Patrick J. Butmatay, Prof. Sanford V. Levinson, Prof. Bradley A. Smith, Prof. Stephanie Barclay, Prof. Lori A. Ringhand



Student Chapter Highlights

- Overtuning *Roe: Dobbs* and the Future of Abortion – OHIO NORTHERN
- Debate: Was the Constitution of 1787 a Pro-Slavery Document? – HARVARD
- A Radical Prescription for America’s Criminal Justice System: Originalism – NORTHERN KENTUCKY
- The Words That Made Us: America’s Constitutional Conversation – DUKE
- From YLS to Zoom Law School: How COVID-19 Will Change the Legal Profession – YALE
- Visual Diversity and the End of Affirmative Action – MICHIGAN



LEFT
 Panel Discussion: *The Democratic Election Process: What is Fair and Who Decides Fairness?*
 Judge Timothy M. Tymkovich, Audrey Perry Martin, Lee L. Goodman, Prof. Derek T. Muller, and Prof. Richard Pildes

OPPOSITE
 Tristan Silva, FedSoc Law Fellow, presents Harvard Chapter leaders, Ethan Harper and Jack Kieffaber, with the 2023 James Madison Award for Chapter of the Year.

RIGHT
 Bobby Ramkissoo, Assistant Director of the Student Division, presents Matthew McKnight, president of the Duke Chapter, with the 2023 Thomas Paine Award for Most Creative Publicity.



ABOVE
 Panel Discussion: *What is Democracy?*
 Judge Edith H. Jones, Prof. J. Joel Alicea, Prof. Bruce E. Cain, Prof. Daniel Lowenstein, and Prof. Stephen I. Vladeck



ABOVE
 Panel Discussion: *Is Judicial Review Democratic?*
 Judge James Ho, Prof. Tara Leigh Grove, Prof. Lawrence Sager, Prof. Keith Whittington



RIGHT

Kate Alcantara, Deputy Director of the Student Division, and Peter Redpath, Vice President and Director of the Student Division, present incoming Michigan Chapter president Eric Walker with the 2023 Alexander Hamilton Award for Most Improved Chapter.



LEFT

Prof. Josh Blackman speaks with students at the cocktail reception.



STUDENT SPOTLIGHT

Rachel Wolff and Amber Hulse 3Ls at Georgetown Law

“Being leaders in the Federalist Society at Georgetown Law has been an incredible experience for us. Serving on the executive team as Events and Communications Directors last year provided us with a unique opportunity to understand the inner workings of the chapter and ensure that students at Georgetown Law have the chance to engage with like-minded individuals and explore important legal issues from an alternative perspective.

Looking ahead, our goal for the chapter is to leave a lasting

legacy by growing our chapter and strengthening our reputation both on-campus and nationally. With our school situated in the heart of the nation’s capital, we aim to take advantage of the DC connection and establish continuing community engagement with alumni, professionals, and other scholars in the area. By striving towards this objective, our team hopes to make a significant impact on the legal profession and the wider community.”



LAWYERS CHAPTERS

The Lawyers Division continues to plan and execute statewide conferences and local chapter events featuring speeches, debates, and panel discussions on current legal topics. Our Ohio, Third Circuit, and Wisconsin Chapters conferences brought together attorneys, legal experts, judges, and policy leaders for day-long programs highlighting topics such as judicial courage, the role of federal circuit courts, and the future of the Wisconsin Supreme Court. Planning for additional statewide programming for 2023 is well underway.

The Lawyers Division would like to encourage graduating 3Ls to take advantage of our Special Graduation Offer, which includes one year of free membership in our Division. Benefits of membership include discounts to chapter events, CLE credit, and the opportunity to closely network with prominent policy officials, judges, scholars, and business leaders.

Save the Dates

Midwestern Regional Conference
June 16, Indianapolis

Florida Young Lawyers Summit
July 22, Miami

Alabama Chapters Conference
September 8, Birmingham

Tennessee Chapters Conference
September 15, Nashville

Texas Chapters Conference
September 22-23, Houston

North Carolina Chapters Conference
October 6, Raleigh

Kentucky Chapters Conference
October 13, Lexington

Arkansas Chapters Conference
October 20, Bentonville

MARCH 16

DC Young Lawyers Chapter Event
Judge Ben Beaton and
Justice Sarah Campbell



APRIL 21

Ohio Chapters Conference
Columbus, Ohio



APRIL 28

Third Circuit Chapters Conference
Philadelphia, Pennsylvania



MAY 4

DC Young Lawyers Chapter Event
Ben Flowers, Jon Urick, and
Lauren Willard



MAY 5

Wisconsin Chapters Conference
Pewaukee, Wisconsin





2023 JOSEPH STORY AWARD

The Federalist Society is honored to announce that the winner of the 2023 Joseph Story Award is Professor Jennifer Mascott of George Mason University's Antonin Scalia Law School. 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. Matt Phillips, a student at the University of Chicago Law School and the 2023 Joseph Story Award Chair, presented the award to Professor Mascott on March 4th at the Federalist Society's 2023 National Student Symposium. The Symposium was hosted by the University of Texas School of Law's Federalist Society Student Chapter.

FACULTY DIVISION

SAVE THE DATES

SEALS Reception

July 25, 2023 • 6:00 p.m. ET
Boca Raton, FL

2024 Annual Faculty Conference

January 4-5, 2024
Washington, DC



Annapolis,
Maryland,
location of the
2023 Junior
Scholars
Colloquium

JUNIOR SCHOLARS COLLOQUIUM

June 2-3, 2023 • Annapolis

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 2023 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.

Eligible scholars are tenure-track law faculty who have been teaching for no more than 10 years. Aspiring scholars who have not yet obtained their first tenure-track appointments, including teaching or other fellows and visiting assistant professors, are also welcome to submit papers for consideration.



Eleventh Annual Executive Branch Review Conference

The Practice Groups hosted the Eleventh Annual Executive Branch Review Conference (EBRXI) at the Mayflower Hotel in Washington, DC. Centered on the theme of “Transparency, Accountability, and the Administrative State,” the Conference included a full day of programming touching on several new and longstanding conversations and developments in the Administrative State: from a proposed regulatory review reset, to the pursuit of environmental justice via a whole of government approach, to the current state of antitrust. Attendees had the opportunity to get 350 minutes of CLE credit across the plethora of panels addressing key legal topics. The Conference concluded with a fireside chat with 48th Vice President Michael Pence followed by a reception and book signing.



Speakers and participants at the Eleventh Annual Executive Branch Review Conference

PRACTICE GROUPS

FEATURED WEBINARS



Section 230 Goes to Court: *Gonzalez v. Google* and the Future of the Electronic Town Square

JANUARY 24, 2023

Social media platforms have emerged as the new “town square” and a key forum for public debate, but some have questioned whether that debate is as open and robust as it should be. On the other hand, some worry that toxic ideas could spread through social media without effective regulation. At the heart of the discussion is Section 230 of the Communications Decency Act. A panel of experts discussed what Section 230 permits and doesn’t permit—a question the U.S. Supreme Court considered in *Gonzalez v. Google*.

Ashkhen Kazaryan, Senior Fellow, Free Speech & Peace, Stand Together

Randolph May, President, The Free State Foundation

Joel Thayer, President, Digital Progress Institute

MODERATOR: Boyd Garriott, Associate, Wiley Rein LLP



WATCH





The Respect for Marriage Act & Religious Liberty: At Odds or Unaffected?

FEBRUARY 15, 2023

In December 2022, Congress passed and President Biden signed the Respect for Marriage Act (RFMA). The bill is hotly debated with conversation centered on (1) whether legislation to protect same-sex marriage was necessary; (2) the extent to which it would threaten the religious liberty of those who believe that marriage is between one man and one woman and (3) the efficacy of the religious liberty provisions in the bill. Now in the wake of the RFMA passing, those discussions continue. To what degree does the RFMA affect or possibly impinge on religious liberty? Has anything really changed, or is this simply the codification of the status quo? Is this a statute ripe for abuse that threatens the exercise of religious liberty, or are the warnings issued concerning it perhaps overblown?

Our experts discussed these questions and others in this panel analyzing the Respect for Marriage Act, what it is, and what it means for religious liberty.

Gregory S. Baylor, Senior Counsel & Director of the Center for Religious Schools, Alliance Defending Freedom

Prof. Carl H. Esbeck, R.B. Price Professor Emeritus of Law / Isabelle Wade & Paul C. Lyda Professor Emeritus of Law, University of Missouri School of Law

MODERATOR: Matt Clark, President, Alabama Center for Law and Liberty



WATCH



Does the Administrative Procedure Act Provide for Universal Vacatur?

FEBRUARY 17, 2023

Section 706 of the Administrative Procedure Act instructs courts to “set aside” agency action that is unlawful. These two words—“set aside”—have sparked much debate among lawyers, jurists, and scholars. In particular, administrative law enthusiasts disagree about whether the “set aside” language means that courts must enter universal injunctions against unlawful regulations. Some suggest that “set aside” contemplates wholesale invalidation of regulations. Others take the position that the scope of the “set aside” remedy is more limited. In *United States v. Texas*, which is before the Supreme Court this term, the Court is set to decide whether the “set aside” language requires universal vacatur of regulations. This Teleforum panel, held in advance of the Court’s ruling, discussed this difficult question.

Beth A. Williams, Member, United States Privacy & Civil Liberties Oversight Board, Professorial Lecturer in Law at the George Washington University Law School, and former Assistant Attorney General for the Office of Legal Policy, United States Department of Justice

Prof. John Harrison, James Madison Distinguished Professor of Law and Thomas F. Bergin Teaching Professor at the University of Virginia School of Law

Prof. Ron Levin, William R. Orthwein Distinguished Professor of Law at the Washington University in St. Louis School of Law

MODERATOR: Judge Steven J. Menashi, U.S. Court of Appeals for the Second Circuit



WATCH



Title IX and the Major Questions Doctrine

MARCH 9, 2023

In *West Virginia v. EPA*, the Supreme Court held that the major questions doctrine requires courts to, “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” Some argue that the Court’s opinion in the case leaves doubt as to how the doctrine will be applied in future cases and how it will impact future regulatory policy.

In the past, executive branch agencies have invoked Title IX to introduce many new rules and regulations. Some of these rules and regulations have faced significant opposition from inside and outside of government. Do elements of modern Title IX administration constitute a major question that Congress is best suited to consider? If so, how will this impact the future administration of Title IX regulations?

In this webinar, Jennifer Braceras and Professor Daniel Farber discussed the future of Title IX in the wake of *West Virginia v. EPA*.

Jennifer Braceras, Director, Independent Women’s Law Center
Prof. Daniel Farber, Sho Sato Professor of Law, Berkeley Law

MODERATOR: Farnaz Farkish Thompson, Partner, McGuireWoods LLP



WATCH



Public Defenders and Political Advocacy: What Is a Public Defender’s Role?

MAY 4, 2023

Over the past several years, a debate has erupted within the world of indigent defense: to what degree is it appropriate or indeed vital for public defenders to be involved in political advocacy? Some contend such advocacy is outside the role and responsibility of public defenders, who should instead focus on defending their clients to the best of their ability. Others assert that involvement on social issues that arguably affect their clients is integral to the public defender’s mission and work.

In this Teleforum, former public defenders discussed these questions on the role of public defenders in political advocacy.

Maud Maron, Interim Executive Director, Foundation Against Intolerance and Racism

Tiffany Roberts, Public Policy Director, Southern Center for Human Rights

MODERATOR: Matthew Cavedon, Robert Pool Fellow in Law and Religion & Senior Lecturer in Law, Emory University School of Law



WATCH



EEOC Commissioner Keith Sonderling delivers the keynote address at an event RTP hosted to discuss "AI & Antidiscrimination."



REGULATORY TRANSPARENCY PROJECT

PODCAST EPISODE HIGHLIGHTS



Apple Podcasts

Spotify



Utility Rate Modeling

February 8 • James Coleman, Mark Ellis

Beyond Medicaid? Potential Paths Forward to Better Healthcare

March 7 • Thomas P. Miller

What Came Next: FDA's Response to the Reagan-Udall Foundation's December Reports on FDA's Tobacco and Human Foods Program

March 8 • Jeff Stier

WEBINARS

WATCH



Food Safety: When Regulatory Jurisdictional Battles and Public Safety Collide

Mindy Brashears, Dr. Stephen Ostroff, Frank Yiannas, Judge Stephen Vaden

The EU’s Proposed Regulations of SEP Licensing and Litigation: A Solution or Setback for the Global Innovation Economy?

Jorge Contreras, Adam Mossoff, Elisabeth Opie, Urška Petrovčič

FTC: Cost/Benefit Analysis of Proposed Rules — A Deeper Dive

Svetlana Gans, Paul Metrey, Paul Ray, Andrew Stivers, Jonathan Wolfson

Litigation Update: AHM v. FDA: Challenging the FDA on “Chemical Abortion Drugs”

Erik Baptist, Dr. Roger D. Klein

Cryptocurrency Regulation in the Aftermath of FTX

Todd H. Baker, J.C. Boggs, Julius Loeser, Steven Lofchie, Sen. Cynthia Lummis, Alex J. Pollock

A Discussion on the FAR Council’s Federal Supplier Climate Risks and Resilience Proposed Rule

Adam Gustafson, John Kostyack, Brian Richman, Markus Speidel

IN-PERSON EVENTS



AI & Antidiscrimination: AI Entering the Arena of Labor & Employment Law

Keith E. Sonderling, Aram A. Gavoor, David Fortney, Philip A. Miscimarra

The Regulatory Transparency Project hosted a live event on AI’s entrance into the labor and employment space. The event featured a keynote address from EEOC Commissioner Keith Sonderling, followed by a panel discussion.



A Roundtable on Recent Developments at the FTC

Debbie Feinstein, William Kovacic, Richard Pierce, Joshua Wright, Bilal Sayyed

The Federalist Society’s Corporations, Securities, & Antitrust Practice Group and Regulatory Transparency Project cosponsored a live event following recent developments at the FTC. Antitrust law experts examined these developments and debated what might come next at the FTC.

PAPER

State Mandates for Digital Book Licenses to Libraries are Unconstitutional and Undermine the Free Market

READ



Alden Abbott, Adam Mossoff, Kristen Osenga, Zvi Rosen

The authors of this paper assert that the proposed compulsory licensing by the states threatens the well-founded principle of a uniform federal copyright law established by the U.S. Constitution and its designation of Congress as the body responsible for securing to authors their exclusive rights.

The Federalist Society's Article I Initiative Presents:

The Major Questions Doctrine, Chevron Deference & the Future of the Regulatory State



The Major Questions Doctrine, Chevron Deference & the Future of the Regulatory State

MARCH 21, 2023 — UNIVERSITY OF RICHMOND

The Article I Initiative sponsored a panel discussion at the University of Richmond on March 21 featuring Prof. Joel B. Eisen, Prof. Christopher J. Walker, and Jonathan Wolfson.

The D.C. Crime Bill: What Happens Next?

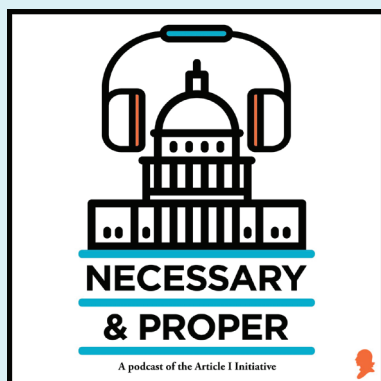
MARCH 8, 2023 | 11:30 AM ET



The DC Crime Bill: What Happens Next?

MARCH 8, 2023 — VIRTUAL DISCUSSION

On March 8, U.S. Senator Bill Hagerty and the Heritage Foundation's Zack Smith joined the Article I Initiative and the Criminal Law & Procedure Practice Group to discuss the U.S. Senate's vote on the D.C. City Council's "Revised Criminal Code Act of 2022."



NECESSARY & PROPER PODCAST

Official Podcast of the Article I Initiative

The Framers of the Constitution intended the legislature to be the most powerful branch of government. In its present state, as the government operates on a day to day basis, it is not. Has the institution of Congress developed practices that are not compatible with the text of the Constitution? Why has Congress ceded much of its authority to the executive branch and to administrative agencies? Periodic releases from *Necessary & Proper* feature experts who can shed light on what the Framers envisioned for the legislative branch and how it can be restored to its proper place in the constitutional order. Join more than 75,000 listeners at articleiinitiative.org/podcast.

SUBSCRIBE



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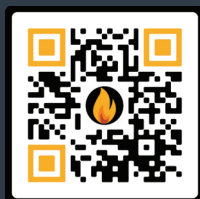
Spotify

Freedom of Thought PODCAST



The Freedom of Thought Podcast launched in January of 2023. This podcast gives listeners an opportunity to better understand the people contributing to the law and public discourse. We interview the scholars and attorneys who are bringing fresh thinking to new challenges and questions, and ask: What makes you different? What formative experiences and lessons have informed your moral vision? What are the convictions behind your work on cutting edge questions? How have your ideas evolved? What have you learned about the value of freedom of thought?

SUBSCRIBE



EPISODES AND GUESTS

- Open Minds with Prof. Eugene Volokh & Prof. Joshua Kleinfeld — Part 1
- Open Minds with Prof. Eugene Volokh & Prof. Joshua Kleinfeld — Part 2
- Open Minds with Prof. Eugene Volokh & Prof. Joshua Kleinfeld — Part 3
- Open Minds: Applying Libertarian Convictions in The Real World with Prof. Randy Barnett & Prof. Joshua Kleinfeld
- Open Minds: What Sparked the Fascination With Economics and Government? Part 1 with Matt Stoller and Prof. Joshua Kleinfeld
- Open Minds: Who is Exercising Private Power and What Do They Control? Part 2 with Matt Stoller and Prof. Joshua Kleinfeld
- Open Minds: Thinking like a Conservative Plaintiff's Lawyer — Corporations' Rights and Corporate Power with Judge Gregory Katsas and Ashley Keller

REMEMBERING C. BOYDEN GRAY

1943–2023

By Eugene Meyer and Lee Liberman Otis
Originally published May 22, 2023 on the FedSoc Blog

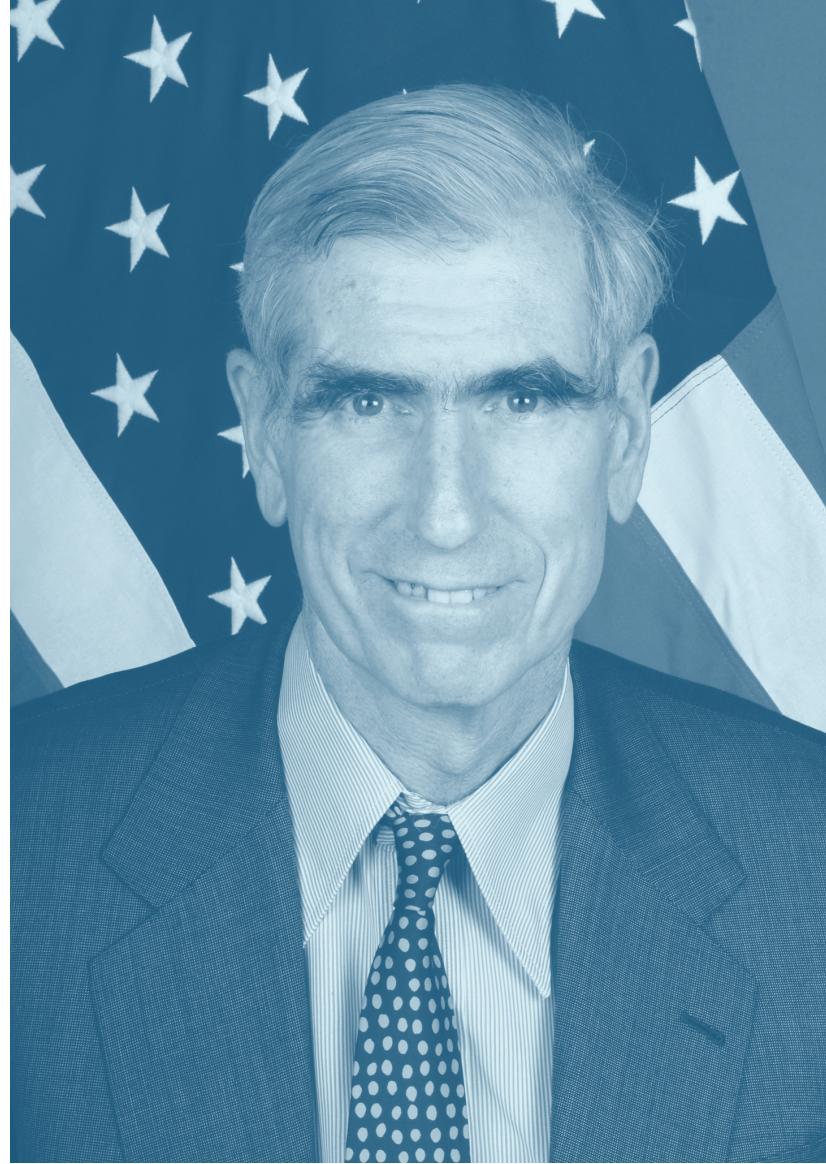
We are deeply saddened by the passing of Boyden Gray. He was a wonderful man, witty, humble, and incredibly generous. He was an advisor to presidents, an Ambassador, and a leader inside the government and outside. Most of all, he was a patriot.

When asked to join our Board of Directors, Boyden responded, “yes, I think this is something I ought to do.” That response was typical of Boyden’s very strong sense of duty. We are especially grateful for his long service on our Board and for his many other contributions to the Federalist Society. More than that, we are grateful for his dedication to doing what was right and in the service of the nation, even if adverse to his own interests.

Boyden was relentlessly committed to the law and spent a lifetime working to support the principles he believed in. When he was attacked for following those principles, it often became grist for one of his hilarious dinner stories.

Boyden was a brilliant, imaginative, and original thinker. But he was also a man of exceptional judgment—of ideas, of people, and of what was called for at any given moment. The combination was wonderful and formidable. Occasionally his imagination ran away with him. But far more often, he saw problems—and solutions—that would only become visible to others years later.

Finally, Boyden was a gentleman, both in the ordinary meaning—he was a fundamentally gentle person—and according to many of the classic



C. Boyden Gray in his official portrait as United States Ambassador to the European Union, a position to which he was appointed by President George W. Bush in 2006.

Photo by Mark Stewart / Department of State (Public Domain)

definitions. He was the person who, at a party, goes to the person whom others are treating as unimportant and makes that person feel at home. This is a particularly unusual way to behave in Washington. But Boyden did it routinely. And it is true according to Teddy Roosevelt’s famous line, that a gentleman is one who puts more into the world than he takes out of it. Boyden did that as a matter of course. He was a truly good man and his death leaves the world a poorer place.

We send our deepest condolences to his beloved daughter Eliza.



IMAGE: "Art Deco Ohio Supreme Court in Total," Joffre Essley, Flickr.com. (CC BY-SA 2.0)

OHIO SUPREME COURT HOLDS THAT THE COURTS, NOT STATE AGENCIES, “SAY WHAT THE LAW IS”

Zack Smith
February 9, 2023

Excerpted from the
State Court Docket Watch

In a recent opinion by Justice Patrick DeWine, the Ohio Supreme Court unanimously reaffirmed that “it is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means.” The court made clear that “the judicial branch is never required to defer to an agency’s interpretation of the law,” but that an agency’s interpretation is “simply one consideration a court may sometimes take into account in rendering the court’s own independent judgment as to what the law is.”

The dispute in this case came about when TWISM Enterprises, a start-up engineering firm based in Ohio, hired James Cooper as an independent contractor to be its manager. The Ohio Board of Registration for Professional Engineers and Surveyors regulates the engineering profession in Ohio and provides the necessary authorization for engineering firms to do business in the state.

As a prerequisite to receiving the Board's authorization, the Ohio law in question states that a firm "shall designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering or professional surveying activities and decisions" of the firm. This person must be a state-registered engineer, and the Board also adopted an administrative rule defining the "responsible charge" and "full-time" requirements. Neither the statute nor the rule addresses whether the person fulfilling these responsibilities must be an employee or an independent contractor.

Here, the Board denied TWISM's application based on Cooper's status as an independent contractor, saying that he could not satisfy the full-time manager requirement for the firm to receive a certificate of authorization. Under the Board's view, only an employee of the firm could satisfy that requirement.

When TWISM appealed the Board's determination to an Ohio Court of Common Pleas, that court afforded the Board's

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interpretation of the relevant statute no deference and reversed its decision, saying that the Board's determination is "not mandated by the plain text of the statute."

But Ohio's First District Court of Appeals disagreed. It gave Chevron-like deference to the Board's decision. It held "that a court must defer to an administrative interpretation only if the court first has found the statute to be ambiguous." But the court of appeals then defined ambiguity very broadly, stating that a "statute is ambiguous when its language is subject to more than one reasonable interpretation." And because it found the term "full-time manager" to be subject to more than one reasonable interpretation, it deferred to the Board's interpretation and ruled in its favor.

The Ohio Supreme Court agreed to hear the case to determine whether TWISM should be awarded a certificate of authorization and, more importantly, to resolve the Ohio courts' "admittedly muddled" approach to administrative deference. The court said that there had "never been a case to systematically explain the contours of our deference doctrine, its theoretical justification, and its application in particular cases."

The need to do so was particularly pronounced because, as the court explained, "if one parses our caselaw, one can find at least three different—and irreconcilable—formulations by this court of deference standards."

The court said that because of the "confused state of our case law and our failure to articulate any justification or consistent standard for agency deference," it wanted to "take a step back and examine the matter in light of first principles."

And looking at those first principles—such as separation of powers concerns—the court concluded that "Ohio's system of separation of powers precludes any sort of mandatory deference to agency interpretations." It said that the Ohio legislature had not delegated any policymaking responsibility to administrative agencies and that while "the other branches of government must follow and apply the law [in carrying out their day-to-day obligations]—a task that entails some level of interpretation, . . . the ultimate authority to render definitive interpretations of the law has long been understood as resting exclusively in the judicial power." When a court defers to an agency's interpretation of the law, it hands to the executive branch the judicial authority to "say what the law is."

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