

THE **Federalist** PAPER

THE MAGAZINE OF THE FEDERALIST SOCIETY • FEDSOC.ORG

IT IS UNDENIABLY THE
PROVINCE AND DUTY OF
THE JUDICIAL DEPARTMENT
TO SAY WHAT THE LAW IS

MARSHALL V. MADISON
1803

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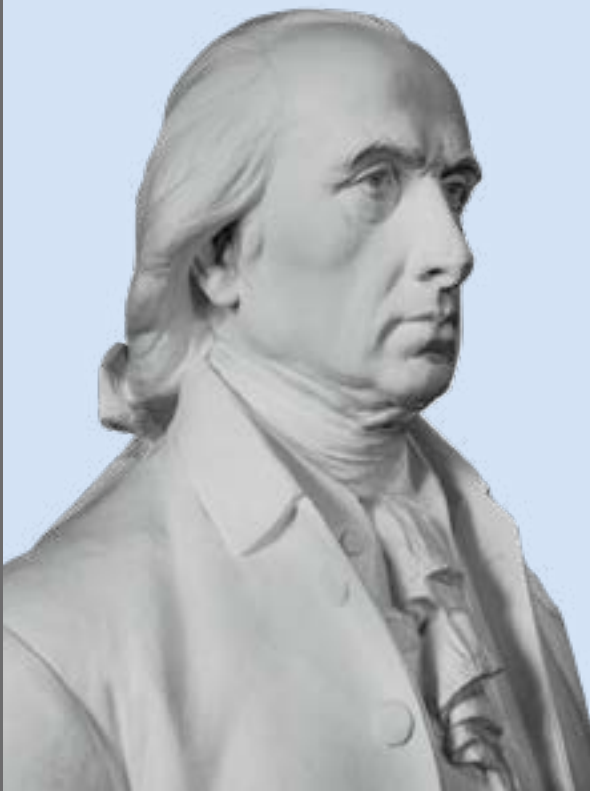
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“The courts must declare the sense of the law; and if they should be disposed to exercise **will** instead of **judgment**, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

Federalist No. 78



EDITOR'S LETTER



The ceiling of the Great Hall of the Supreme Court, where the annual Supreme Court reception was held this summer.

Dear Friend,

This summer marked the end of the Supreme Court's 2017-18 Term, and we have already started watching the Court consider a new round of briefs and arguments this fall. The Federalist Society covered all of the Court's major cases this past term, and many of its minor cases too. We hope you had the opportunity to attend one of our many Supreme Court Round Up events, which were held in cities across the country. But don't worry if you missed out on these live events. You can visit our website to watch videos, listen to podcasts, and read articles and blog posts about the cases you're most interested in. See inside for more information about our Supreme Court coverage. And keep visiting fedsoc.org for previews of upcoming cases.

Student Chapters at law schools around the country recently started a new school year. Members of the Arizona Student Chapter are bound to have a particularly exciting semester as they plan to host the **2019 National Student Symposium** on their campus. The Texas Lawyers Chapters just got together in Fort Worth for their annual conference, which featured among other excellent presentations an address by Justice Clarence Thomas. The Faculty Division focused on young and aspiring scholars this summer, as it hosted a colloquium for junior faculty and its annual Kent Academy for those interested in academia. Several Practice Groups hosted riveting events recently on everything from antitrust to

outer space. The Practice Groups also continue to produce excellent commentary on legal and policy issues in their teleforum conference calls, in the **Federalist Society Review**, and on the **Fed Soc Blog**.

The Article I Initiative has hosted or co-hosted several events recently, and it is currently advertising its Second Annual Writing Contest; see inside for details. The International Affairs Division hosted a meeting between a group of European students and Senator Ted Cruz. The Capitol Hill Lawyers Chapter has also been hosting many events lately, including one on Emerging Technology in Transportation that was co-sponsored by the Regulatory Transparency Project. RTP continues to produce excellent papers, podcasts, and videos, some of which are listed in this issue and all of which you can access at regproject.org. Our Digital team is producing short videos on a variety of topics including recent Supreme Court decisions, major historical cases, and jurisprudential debates, and you can view them all at youtube.com/thefederalistsociety.

We hope you enjoy this look at this summer's events and our Supreme Court coverage. Keep up with us between issues on social media and at fedsoc.org, and please send us any comments at info@fedsoc.org. We look forward to hearing from you!

Katie McClendon
Director of Publications

SUPREME COURT



Miguel Estrada speaks at the DC Lawyers Chapter's annual Supreme Court Roundup, which was held at the National Press Club on July 13.



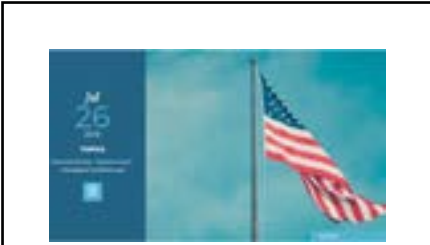
Masterpiece Cakeshop: The Decision [SCOTUSbrief] (Ilya Shapiro)



SCOTUScasts are produced by the Faculty Division in collaboration with top faculty members and other experts.



Federalist Society Lawyers Chapters around the country held Supreme Court Round Ups this summer.



The FedSoc Blog covers Supreme Court cases and issues throughout the year.



The Journey of a SCOTUS Case: Briefs, Arguments, and Decisions [No. 86] (Douglas Ginsburg)



Minnesota Voters Alliance v. Mansky [SCOTUSbrief] (Wen Fa)

Visit fedsoc.org
to find our
coverage of the
Supreme Court's
2017-18 term.

Read

The Federalist Society Review

Inter Partes Review Under the AIA Undermines the Structural Protections Offered by Article III Courts (Richard A. Epstein)

Partisan Gerrymandering and Party Rights: Why *Gill v. Whitford* Undermines All Future Partisan-Gerrymandering Claims (Richard Raile)

Minnesota Voters Alliance v. Mansky Strikes Down a Vague Ban on Speech in Polling Places, But Future Bans May Be Upheld (Michael R. Dimino)

Compelled Speech in *Masterpiece Cakeshop*: What the Supreme Court's June 2018 Decisions Tell Us About the Unresolved Questions (James A. Campbell)

Party Like It's 1935?: *Gundy v. United States* and the Future of the Non-Delegation Doctrine (Matthew P. Cavedon, Jonathan Thomas Skrmetti)

The FedSoc Blog

The President's Immigration Travel Ban: What *Trump v. Hawaii* Has to Say About Stating a Claim Under the Establishment Clause (Carl H. Esbeck)

Qualified Immunity Lurks in the Background of the Fourth Amendment Question in *Collins v. Virginia* (Jay R. Schweikert)

Listen

Courthouse Steps Teleforum Podcasts

Masterpiece Cakeshop v. Colorado CRC Decided (Dale A. Carpenter, Kim Colby)

Janus v. AFSCME Decided (Raymond J. LaJeunesse)

Trump v. Hawaii Decided (Carl H. Esbeck, Steven S. Giaier)

Lucia v. SEC Decided (Mark Chenoweth, John C. Eastman)

Murphy v. NCAA Decided (Elbert Lin)

Gerrymandering in the Supreme Court (Hans A. von Spakovsky)

SCOTUScast

Encino Motorcars v. Navarro (Tammy McCutchen)

Gill v. Whitford (David Casazza)

Jennings v. Rodriguez (Richard Samp)

U.S. Bank National Association v. Village at Lakeridge (Thomas Plank)

Watch

No. 86

How Does a Case End Up at the Supreme Court? (Douglas Ginsburg)

The Journey of a SCOTUS Case: Briefs, Arguments, and Decisions (Douglas Ginsburg)

SCOTUSbrief

Byrd v. United States (Natasha Babazadeh)

NIFLA v. Becerra: Can a State Regulate Professional Speech? (Andrea Picciotti-Bayer, Meggan Dewitt)

Trump v. Hawaii (Amy Howe)

Carpenter v. United States (Ilya Shapiro)

Oil States v. Greene's (Brian Pandya)

City of Hays, Kansas v. Vogt (Lisa Soronen)

South Dakota v. Wayfair, Inc. (Allyson Ho)



Student Chapter leaders gathered at the annual Supreme Court Reception this summer after attending a training seminar on how to lead their chapters.

DENT DIVISION



save the date for the

2019 National Student Symposium March 15-16 in Phoenix, AZ The Resurgence of Economic Liberty

hosted by the Federalist Society Student Chapter at

ASU SANDRA DAY O'CONNOR
COLLEGE *of* LAW

ARIZONA STATE UNIVERSITY



LAWYERS CHAPTER



Gregory
Justice C

In June, Senator Chuck Grassley spoke at an event that was co-sponsored by the DC Young Lawyers Chapter and the Article I Project.



The Michigan Lawyers Chapters came together in Plymouth, MI this summer for their 2018 Annual Dinner and Grano Award Presentation. Attorney General Jeff Sessions gave the keynote address, and Judge Richard F. Suhrheinrich of the U.S. Court of Appeals for the Sixth Circuit received the Grano Award.



2018 Texas Chapters Conference

September 7-8 • Fort Worth



S. Coleman Memorial Lecture
Clarence Thomas



Supreme Court Review: Justice Gorsuch at Year One

- John F. Bash, Office of the U.S. Attorney, W.D. Tex.
- James Sullivan, Deputy General Counsel, Gov. Abbott
 - Aaron Streett, Partner, Baker Botts LLP
- David O. Taylor, Co-Dir., Tsai Center for Law, Science and Innovation and Associate Professor, SMU Law
 - Hon. James C. Ho, Fifth Circuit (moderator)

Criminal Justice Review: Trump, Sessions, and the States

- Erin Nealy Cox, U.S. Attorney, N.D. Tex. (introduction)
- Stephen Fahey, Crim. Div., Office of the U.S. Att'y, N.D. Tex.
- Wes Hendrix, App. Div., Office of the U.S. Att'y, N.D. Tex.
- Marc Levin, VP of Criminal Justice Policy, Texas Public Policy Foundation and Right on Crime
- John Malcolm, VP, Institute for Constitutional Government, Director, Meese Center for Legal & Judicial Studies and Senior Legal Fellow, The Heritage Foundation
 - Hon. Reed O'Connor, N.D. Tex. (moderator)

Religious Liberty and Conscience Rights in the Trump Era

- Justin Butterfield, Conscience and Religious Freedom Division, Health and Human Services
 - Eric Rassbach, Deputy General Counsel, Becket
- Kelly Shackelford, President and CEO, First Liberty Institute
 - Prof. Nelson Tebbe, Cornell Law School
 - Hon. Don R. Willett, Fifth Circuit (moderator)

FACULTY



Junior Scholars Colloquium



DIVISION



Kent Academy

August 8-11 in Annapolis



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PRACTICE GROUP



Corporations, Securities & Antitrust Practice Group



The Antitrust Paradox

A conference dedicated to the 40th anniversary of Hon. Robert Bork's book *The Antitrust Paradox*. The conference took place on June 22 at the Capitol Hill Club.

- Hon. Makan Delrahim, Asst. AG, Antitrust Div., DOJ
- Susan Creighton, Partner, Co-Chair, Antitrust Practice, Wilson Sonsini Goodrich & Rosati
- Andrew Finch, Principal Dep. AG, Antitrust Div., DOJ
- Charles (Rick) Rule, Co-Chair, Antitrust Gp., Paul Weiss
- Hon. Joshua Wright, Executive Director, Global Antitrust Institute, Scalia Law
- Hon. Laurence Silberman, DC Circuit (moderator)
 - Deb Garza, Partner, Covington & Burling LLP
- Diana Moss, President, American Antitrust Institute
 - Hon. Noah Phillips, Commissioner, FTC
 - Hon. Douglas Ginsburg, DC Circuit (moderator)

Tech Titans and National Security

A symposium for discussing the role that leading technology companies should play in cybersecurity and national security. The symposium took place on June 28 at Jones Day. It was co-sponsored by the National Security Institute at Scalia Law.

- David Lieber, Senior Privacy Policy Counsel, Google
- Dr. Andrea Little Limbago, Chief Social Scientist, Endgame; Visiting Fellow, National Security Law & Policy Program, Scalia Law
- Angela McKay, Senior Director, Cybersecurity Policy and Strategy, Microsoft
- Jamil N. Jaffer, Adjunct Professor, NSI Founder, and Director, National Security Law & Policy Program, Scalia Law (moderator)
 - Craig Albright, VP, Legislative Strategy, BSA
 - Stewart Baker, Partner, Steptoe & Johnson
- Mark Champoux, Principal Dep. Asst. AG, Office of Legal Policy, DOJ
 - F. Scott Kieff, Research Professor of Law, GW Law
 - David Kris, Advisor, Intellectual Ventures
- Matthew R. A. Heiman, Visiting Fellow, NSI, Scalia Law (moderator)
- Hon. Kenneth L. Wainstein, Partner, Davis Polk & Wardwell LLP



Modernizing American Space Policy

An event focused on the Administration's efforts to modernize and reform commercial space policy and the FCC's regulatory approach to the American space industry. The event took place on July 26 at the National Press Club.

- Michael Beavin, Senior Policy Advisor, National Space Council
- Maj. Gen. Jim Armor, USAF (Ret.), Director, Government Relations, Northrop Grumman Corporation
- Jennifer A. Manner, Senior VP of Regulatory Affairs, EchoStar Corporation/Hughes Network Systems LLC
 - Maureen McLaughlin, VP, Public Policy, Iridium Satellite, LLC
- Jennifer A. Warren, VP, Technology Policy & Regulation, Lockheed Martin Government Affairs
 - Erin McGrath, Legal Advisor, Wireless, Public Safety and International, FCC (moderator)
 - Hon. Michael O'Rielly, Commissioner, FCC

Telecommunications & Electronic Media Practice Group



International & National Security Law Practice Group



ARTICLE I



Second Annual Writing Contest

Theme: Ambition Counteracting Ambition: Enduring Principle or Failed Experiment?

Description: In the annals of republicanism and civil government, few documents surpass the *Federalist Papers* in terms of influence and exposition. In Federalist 51, James Madison asserted that “ambition must be made to counteract ambition.” The three branches of government—Legislative, Executive, and Judicial—were each imbued with separate, distinct, theoretically balanced powers of government, in the hopes that the ambition of each branch would “check” the ambitions of the other two branches, thereby ensuring that power remains separated and limited. In light of Congress’ modern forbearance within our constitutional order, was Madison correct that ambition, rightly channeled, is the best preservative of free government? If so, how can the ambition of Congress best be restored to renew the separation of powers as originally envisioned? If not, what superior alternative exists to make government effective, but limited? What factors—be they political, cultural, geographic, etc.—account for this distortion in Madison’s vision?

Prizes: The first-place winner will receive free registration, accommodations, and travel to the Federalist Society’s 2019 Student Symposium, March 23-24 in Phoenix, Arizona, and a \$5,000 cash prize. A runner-up \$2,500 cash prize will be awarded, and two honorable mention \$1,000 cash prizes will also be awarded.

Rules: Available at fedsoc.org/articlei.

Founding Principles as Pillars of Our Foreign Policy

In June, Congressman Mike Gallagher gave an address in which he reflected on the views of the Founders, discussed the current state of Congress, and made the case that his home state of Wisconsin has had a particular impact on American foreign policy. This speech was followed by a panel discussion with Prof. Henry Nau (GWU), Ilya Shapiro (Cato), and Prof. Jeremy Rabkin (Scalia Law) who covered a wide range of foreign policy topics and discussed the modern Congress’ role.



Sen. Paul with Georgetown Chapter officers Ryan McNulty, MJ Kirsch, Ethan Womble, and Pete McGinley.

In April, the Georgetown Student Chapter of the Federalist Society presented its Lifetime Service Award to Senator Rand Paul. The Senator delivered remarks and responded to audience questions on many interesting separation of powers and Article I issues. The event was cosponsored by the Initiative.

INTERNATIONAL



The Federalist Society's International Affairs Division organized a meeting with Senator Ted Cruz for French students and young professionals visiting the U.S. through the Tocqueville Fellowship program.

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CAPITOL HILL

Campus Free Speech



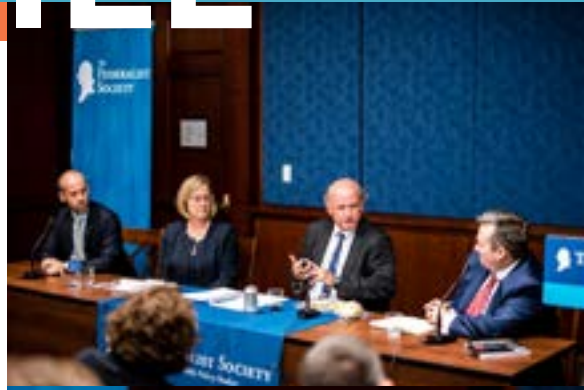
Tyler W. Coward,
Foundation for
Individual Rights in
Education

Shelby S. Emmett,
Center to Protect
Free Speech, ALEC

Stanley Kurtz,
Ethics and Public
Policy Center

Nicole Neily, Speech
First

Suzanne Nossel, PEN
America



Scott Keller
Solicitor General, Texas

Beth Brinkmann
Partner, Covington & Burling

Michael Carvin
Partner, Jones Day

Sheldon Gilbert
Director, Judicial Engagement
Center, Institute for Justice

SCOTUS Round Up



New at the
Regulatory Transparency Project



New Papers

Modern Privacy Advocacy: An Approach at War with Privacy Itself? (Justin “Gus” Hurwitz, Jamil N. Jaffer)

Ending Sex Discrimination in Campus “Sexual Misconduct” Proceedings (Linda Chavez, Roger Clegg, Stuart Taylor, Jr.)

The GDPR and the Consequences of Big Regulation (Matthew R.A. Heiman)



Saurabh Vishnubhakat is interviewed for the Fourth Branch video *How Do Markets Respond to Patents?*



New Free Lunch Podcasts

What to do about Facebook: On Data Privacy and the Future of Tech Regulation (Thomas Hazlett, Jamil N. Jaffer, Megan Stifel, Matthew R.A. Heiman)

Visiting the EPA’s CAFE: What’s on the Menu for Fuel Economy and Greenhouse Gas Standards? (Sean H. Donahue, Jacqueline Glassman, James “Jimmy” Conde)

Net Neutrality and Federalism (Justin “Gus” Hurwitz, Brent Skorup, Geoffrey A. Manne)



New Fourth Branch Videos

Are U.S. Colleges and Universities Barring Asian Applicants Based on their Race? (Terry H. Eastland, Althea Nagai, Brenda Shum, Yukong Zhao, Stuart Taylor, Jr., Linda Chavez)

Intro to the IT & Emerging Technology Working Group (Gregory S. McNeal)

The Founding Fathers as Economic Innovators (Adam Mossoff)

Determining Patent Quality (Saurabh Vishnubhakat)

Emerging Technology in Transportation

Ryan Hagemann, Niskanen Center

Christopher L. Koopman, Center for Growth and Opportunity, Utah State U.

Gregory S. McNeal, Pepperdine University School of Law

Brent Skorup, Technology Policy Program, Mercatus Center at George Mason U.

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MEMBERSHIP

MEMBER PROFILE: Adam Mossoff



Founder
Dir. Academic Programs
Senior Scholar
Center for the Protection
of Intellectual Property
Professor of Law
Scalia Law School
George Mason University

JD
University of Chicago
Law School
MA, Philosophy
Columbia University
BA, Philosophy
University of Michigan

Teaches
Property
Intellectual Property
Remedies
internet law

Writes about the theory
and history of patents
and IP rights as funda-
mental property rights.

Previously taught at
Michigan State Law
U. of San Diego Law
Washington & Lee Law

Clerked for
Hon. Jacques Wiener, Jr.
Fifth Circuit

Federalist Society Leadership

Chair, Intellectual Property Practice Group
Chair, Intellectual Property Working Group,
Regulatory Transparency Project
Contributor, FedSoc Blog

When and how did you first get involved with the Federalist Society?

I joined Fed Soc when I was law student back in 1999. I was aware of the organization before going to law school, and I was inclined to join given my commitment to the principles of individual rights and limited government. But experiencing the Fed Soc events that were hosted in my law school really made me jump at the opportunity—the quality of intellectual engagement, the open exchange of ideas, and the reasonable debate really blew me away. I was coming from a Ph.D. program in philosophy, and Fed Soc events achieve the academic ideal in a way the humanities aspire to but often fail.

How have you been involved since then?

I remained a member after law school. I started to speak at some local chapter events on topics in intellectual property, and I eventually joined the Executive Committee of the Intellectual Property Practice Group. I've been active on the Executive Committee for over a decade—organizing teleforums, panels at the National Lawyers Convention, etc.—and I am now the Chair of the Executive Committee.

How have you gotten you to where you are today in your career?

Several factors played a role in getting me to where I am today in my academic career. First and foremost, I received incredible mentoring from my law school professors, especially Philip Hamburger, Richard Epstein, and Eric Claeys. Mentoring is absolutely essential to the start of an academic career and to working as a junior scholar in the pre-tenure years.

I also received important support from Fed Soc. I started my academic career as a John M. Olin Fellow in Law at Northwestern University School of Law in 2001-02. This was the predecessor fellowship program to the Olin-Searle-Smith-Darling Fellows in Law program currently offered by Fed Soc to aspiring academics. I wrote my second substantial law review article, *What is Property?*, as an Olin Fellow, and to this day it is one of my top-cited works. This fellowship gave me invaluable academic experience that laid the foundation for my academic career, which began with my appointment as a professor at Michigan State in 2003 and my lateral move to Scalia Law in 2008.

What would you be doing if you weren't a law professor?

That's a hard question to answer, because I always wanted to be a professor. Before law school, I was in a Ph.D. program in philosophy, specializing in legal philosophy, which one doesn't do unless one wants to be in academia. While in graduate school, I realized I would enjoy my career and do more of the work I wanted to do as a law professor than as a philosophy professor. I suppose if I was not a law professor, I would still be working at the intersection of law and policy—perhaps working at a think tank or as an attorney at a public interest law firm, such as the Institute for Justice or the Pacific Legal Foundation.

What are your favorite things to do outside of work?

I love being a dad to my three kids and riding my motorcycle, but I'm also a geek, which explains in part my love for intellectual property. So I also love reading about science and technology and watching sci fi; I'm well known as a Star Wars fan, much to the chagrin of my students sometimes.

RESOURCES

Watch

Mini-Docs

Exploring Federalist 51:
Separation of Powers



SCOTUSbriefs

McCoy v. Louisiana



POLICYbriefs

National Injunctions: Judicial
Authority in the Federal Courts



No. 86

The Declaration & Constitution:
The Legal Status of Founding
Documents



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Teleforum Podcasts

UPDATE: Release of Nunes
Memorandum

Justice Department and
Marijuana Enforcement

51 Imperfect Solutions by Judge
Jeffrey S. Sutton



What to do about Facebook:
On Data Privacy and the Future
of Tech Regulation

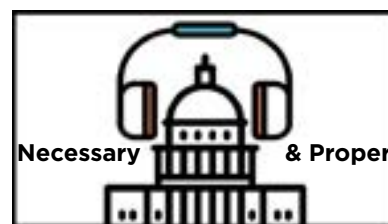
Visiting the EPA's CAFE:
What's on the Menu for Fuel
Economy and Greenhouse Gas
Standards?

Net Neutrality and Federalism

SCOTUScasts

Jesner v. Arab Bank, PLC

Murphy v. NCAA



Episode 17: Georgetown Law
Federalist Society's Lifetime
Service Award - Sen. Rand Paul

Episode 20: Founding Principles
as Pillars of Our Foreign Policy -
Expert Panel Discussion

Read

FedSoc Blog

Court strikes down policy
requiring union members to
resign in person with a photo ID

Docket Watch: *Tetra Tech
v. Wisconsin Department of
Revenue*

Originalism and the Contract
Clause

Originally Speaking: Climate
Change and Common Law
Public Nuisance

AT&T/Time Warner Decision:
The Triumph of Economic
Analysis

Maine Supreme Judicial Court
Considers ABA Model Rule
8.4(g)

Affirmative Action Confusion at
the College of Charleston

Federalist Society Review

Impeachment: The
Constitution's Fiduciary
Meaning of "High . . .
Misdemeanors"

Why Constitutional Lawyers
Need to Know Latin

Why DoD Should Adopt a Multi-
Cloud IT Strategy

Did the Constitution Grant
the Federal Government
Eminent Domain Power?:
Using Eighteenth Century
Law to Answer Constitutional
Questions

"Advice" in the Constitution's
Advice and Consent

Clause: New Evidence from
Contemporaneous Sources

Capital Punishment: A One-
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