ANNOTATED LEGAL BIBLIOGRAPHY

I. GENDER EQUALITY

Chinyere Ezie, Article, *Not Your Mule? Disrupting The Political Powerlessness of Black Women Voters,* 92 U. COLO. L. REV. 659 (2021).

Even after the ratification of the Nineteenth Amendment, there has been a continued fight for Black women voters. Black women are among the highest percentage of voters, especially for the Democratic Party. However, the author argues that these voters have actually become a "trapped constituency," which she defines as "a group whose votes are relied upon by the political establishment but whose political preferences are largely irrelevant." Their concern over issues including discrimination, immigration, abortion, and health care have not been implemented by the Democratic Party. The Party assumes that they will get these voters and focuses its efforts on less certain voters. Data of Black women's low employment and income and high poverty and criminalization rates rejects the postulation that Black women's votes align with their well-being. This is also seen by the inaction that Democratic Presidents have taken on their behalf and the Supreme Court's failure to preserve Black women's rights. The author also describes Black women partaking in "caretaker voting," which is "vot[ing] in ways that safeguard the rights of others while threatening their own political power." Black women do not vote for themselves, but for "American democracy." The author proposes strategies centered around Black women becoming "swing voters," such as voting for candidates who establish their efforts for racial and gender issues before the primaries, ensuring these promises actually happen, and not voting until the candidate makes these changes. The goal is for their votes to no longer be taken as commonplace by the Democratic Party.

Annotated by: Bailey Appel

Katherine Sharpless, Note, *California's S.B. 826: Will the Supreme Court Get on Board?* 42 WOMEN'S RTS. L. REP., 172 (2021).

California's S.B. 826 ("S.B. 826") is the first piece of legislation in the United States that *mandates* all publicly held corporations in the state to have at least one female on their board of directors. Already spurring three lawsuits, this article recognizes the contentious nature of this bill and analyzes its constitutionality, should it ever be granted certiorari by the Supreme Court. S.B. 826 was created in response to the gross disproportionality of women in corporate positions as opposed to men in similar positions. Women only make up 19.2% of corporate directorial positions in the United States. This problem plagues countries internationally. The Netherland's "Talent to the Top" initiative was a voluntary program which asked companies to pledge their dedication to appointing women to board of directors' positions and proved to be successful. As a mandatory binding law, S.B. 826 shows signs of being the most viable solution to bridging the gender divide, but with that success comes opposers, so the author preemptively discusses if S.B. 826 will survive a constitutionality challenge. If the Supreme Court decides to apply strict scrutiny, S.B. 826 would not be constitutional under the Equal Protection clause because there is no compelling governmental interest for a gender-based affirmative action program. However, should the Supreme Court apply heightened intermediate scrutiny, S.B. 826 would be constitutional because California's interest in the objective of S.B. 826 is exceptionally credible. If the Supreme Court determines S.B. 826 is unconstitutional, California is left with lesser solutions, such as instating a voluntary pledge or a comply or explain approach.

Annotated by: Hillary Borker

Mary Ziegler, Note, *CONTESTING THE LEGACY FO THE NINETEENTH AMENDMENT: ABORTION AND EQUALITY FROM ROE TO THE PRESENT*, 92 U. COLO. L. REV. 751, (2021).

The Nineteenth Amendment not only granted women the right to vote but provided women with societal equality. The definition of this equality is debated amongst pro-life and pro-choice groups; the former arguing the fetus constitutes a legal person and is therefore protected under the Fourteenth Amendment's Equal Protection Clause, and the later arguing a woman's right to abort protects her personal equality and autonomy—disagreeing on what women need to protect their right to equal treatment under the law. The divide over abortion simulated a shift the focus away from constitutional rights and toward disagreement over simple facts. Following the Supreme Court's decision in *Roe v. Wade*, pro-life groups have tried to narrow the ruling in hopes of eradicating it in the future while pro-choice groups try to protect the ruling and broaden its application. Pro-life groups successfully limited Roe's application by using widely rejected scientific data to argue that abortion undermined women's equality, providing state courts to rule against the opinion of leading medical professionals. In contrast, pro-choice groups argued for dilation & extraction claiming a lack of health exceptions could have a devasting impact on a woman's life. The author concludes that the court decisions regarding abortion will not determine whether the Nineteenth Amendment is meant to provide abortion rights or oppose them. The two opposing groups will continue to debate and oppose each other on equality and its connection to abortion for the foreseeable future.

Annotated by: Samantha Berger

Kathleen A. Bantley, Esq. et. al., Article, *A 'RUTH-LESS' COURT IN THE 21ST CENTURY: HOW THE LOSS OF RBG MAY HURL PROGRESS TOWARD WOMEN'S EQULAITY BACK TO THE DARK AGES*, 42 WOMEN'S RTS. L. REP. 157 (2021).

For centuries, women have been deemed inferior in society. Male dominance has permeated all facets of life, including the government and laws – particularly those that almost exclusively concern women. With the help of the late Supreme Court Justice Ruth Bader Ginsburg ("RBG"), women were able to attain more rights that have moved society forward in the name of equality. Laws that that passed because of RBG's influence, most notably, laws that affect women and marginalized groups of people, are in jeopardy because the dynamic of the Supreme Court has shifted since RBG's passing. The Court now has a conservative majority and is expected to revisit laws surrounding abortion, the Affordable Care Act, and issues regarding same sex marriage. In other words, these laws are in some form currently at risk of being overturned. The authors address issues that American women have historically undergone such as conservative feminism, protectionism, and the social control over women, that may ultimately play a major role in SCOTUS's overturning of rights that RBG has fought so hard to become recognized and protect. All women, even those who understand their rights and those who don't, have an interest in the laws that are under review. The goal is to avoid and prevent the ancient notions of what it means to be a woman from emerging in the 21st century. It is also important that in the conversations around at-risk rights, people consider the women whose voices may not be heard, particularly women of color and incarcerated women, who have been continuously left out because of the social control of women.

Annotated by: Niara Morrison

Julia T. Crawford, Article, *Imposter Syndrome for Women in Male Dominated Careers*, 32 HASTINGS WOMEN'S L. J. 26 (2021).

Women who enter male-dominated career fields, defying societal expectations, often experience imposter syndrome. These women often experience discrimination based on gender stereotyping and the "lack of fit" of what the societal expectation of what a professional in their field looks like. Research shows that this experience amplifies the ways that women experience imposter syndrome in male-dominated career fields. Yet, current interpretations of anti-discrimination laws lack protections against the types or discrimination that are more subtle and rooted in gender stereotyping and biases such as "tightrope bias" and "prove-it-again bias." The author then pivots into analyzing whether women can obtain relief for the effects of imposter syndrome under federal legislation. Under Title VII, plaintiffs may obtain a retroactive remedy in cases where they can provide an alternative practice, other than discrimination, with a lower systemic disparate impact that would also achieve the employer's needs. However, the Americans with Disabilities Act (the ADA) may provide better relief for imposter syndrome because of its disabling effects. Under the ADA, women suffering from imposter syndrome because of their experiences working in male-dominated career fields could be protected against discrimination and provided reasonable accommodations due to their imposter syndrome disability. The author concludes with the ways in which employers can mediate these negative effects of imposter syndrome, by changing workplace culture and creating a positive, morale boosting work experience. Recommended strategies include supportive, affirmative action policies that support women earlier rather than later, bias interruption training, and emphasizing communal attributes that diminish the use of prescriptive stereotypes and biases. These actions are unlikely to prevent imposter syndrome in its entirety but can tremendously improve the experiences of women in male-dominated career fields.

Annotated by: Heidi Sandomir

MaryAnn Grover, Article, The *Patchwork Quilt of Gender Equality: How State Equal Rights Amendments Can Impact the Federal Equal Rights Amendment*, 30 B.U. PUB. INT. L. J. 151 (2021).

The federal Equal Rights Amendment (ERA) is closer than ever to becoming the Twenty-Eighth Amendment of the United States Constitution, and the way the courts are most likely to interpret it is based on state courts' interpretations of state ERAs. Of the twenty-nine states that currently have some form of constitutional amendment or legislative statute which prohibits discrimination on the basis of sex, twelve use language essentially identical to the federal ERA. The Supreme Court will ultimately interpret the federal ERA, and is likely to follow the ten states with state ERAs similar to the federal one, and whose courts have applied a strict scrutiny standard of interpretation: sex-based classifications are only a permissible if they (1) serve a compelling government interest; and (2) no gender neutral options are an apt way of serving this interest. This standard provides a stronger level of protection against gender discrimination than the intermediate level which the Supreme Court currently uses in interpreting the Equal Protection Clause of the Fourteenth Amendment. In states using strict scrutiny interpretation of the ERA, women's rights, such as abortion access, non-discrimination in sports, and equal insurance rates have been upheld as necessary and lawful. The Supreme Court is likely to use the strict scrutiny standard because there is no federal case law for the Court to analyze on the ERA, and thus the most persuasive case law is from the highest state courts. A strict scrutiny interpretation of the federal ERA would significantly broaden women's rights and basic standards of gender equality in the United States.

Annotated by: Emily Silverman

II. LGBTQ+ RIGHTS

Christopher R. Leslie, Note, *The Gay Perjury Trap*, 71 DUKE L. J. 1 (2021).

The "gay perjury trap," a term used to describe the systematic discrimination embedded in our Nation's employment practices, has endured for too long. Employment applications often include a section pertaining to sexual orientation, whereby the applicant is asked to reveal his or her sexuality as a condition to be assessed in qualifying for the job. Those who identify themselves as gay are denied employment, while those who fail to disclose this information are subject to termination resulting from dishonesty. These practices are designed to humiliate gay individuals and continue the stigmatization of "LGBTQ" applicants by viewing them as deviant or unfit for employment, as opposed to simply identifying a person's sexual orientation for official purposes. Singling out gay individuals like this has always been driven by an intense fear and loathing for gays. The author explores avenues by which the courts should eliminate these discriminatory practices. The Supreme Court in *Bostock v. Clayton County*, extended Title VII's prohibition on sex-based employment discrimination to include discrimination based on sexual orientation and gender identity. The author suggests the courts should interpret Title VII as prohibiting employers from inquiring about sexual orientation at all, reject employers' rights to penalize gay workers for concealing or misrepresenting their sexual orientation, and read Title VII as a protection for employees who choose not to disclose this information. A person's sexual orientation does not depict how well he or she will perform the respective job. Title VII should safeguard individuals from these discriminatory practices.

Annotated by: Danielle Bluth

Eliza Chung, Note, *Trans Adults Deserve a Right to Sue for Gender-Affirming Care Denied at Youth*, 24 CUNY. L. REV. 145 (2021).

Despite the large medical consensus regarding transgender related medical issues, transgender individuals endure harmful societal, psychological, and financial consequences as a result of doctors' denial of the necessary gender-affirming care their livelihoods require in youth, without recourse in law. In addition to the familial and societal consequences that emerge after a transgender person "comes out," especially in her or his youth, these damaging consequences are only exacerbated and prolonged when they are also denied access to medical treatments by the health-care physicians they rely on for care. As the inability to begin gender-affirming care at youth makes it psychologically, financially, and physically more difficult to transition as an adult, those who were denied this deserving care deserve an extended statute of limitations and a cause of action to sue their physicians for the injuries they directly suffered. Due to traumas that result from fear of family backlash and years of inability to live as their true selves, similar to New York's Child Victims Act, the author argues that the statute of limitations for transgender adults to sue physicians who denied them gender-affirming care at youth should be extended, in recognition of these obstacles. As this medical denial, backed primarily by biases and prejudice, leads to dangerously higher rates of suicide, suicidal thoughts, and other life-threatening consequences, the law should afford a cause of action based in negligent malpractice to transgender adults who became victim to their doctor's neglect of the duty of care they owed to them in youth.

Annotated by: Brooke Hodgins

Laura Tracy, Article, *Presumption Junction, What's That Function: Louisiana Marriage and Parenthood Laws Post-Obergefell*, 81 LA. L. REV. 1523 (2021).

The Supreme Court decision in *Obergefell v. Hodges* established that marriage provides a fundamental right between any married couple, including same-sex couples. Louisiana has been unwilling to apply *Obergefell* to same-sex couples, explicitly facing complications regarding the presumptions of paternity. The presumptions of paternity are known as the "law of filiation," which is how the Louisiana courts determine who is responsible for establishing parental rights.

Boquet v. Boquet illustrates the issues of presumption of paternity in article 185, leaving same-sex couples disadvantaged when proving a parent-child relationship due to the language stemming from biology. Article 185 leaves same-sex couples with unfair opportunities to establish parental rights by proving a parental link to the child. Since one individual in a same-sex relationship can be the biological parent, the language of the Louisiana Civil Code is problematic because biological presumption can never apply to same-sex relationships.

The redrafting of the Civil Code needs to reflect *Obergefell* and achieve the author's goal of protecting children and spouses of same-sex relationships. The biological presumption is rebuttable because, in article 187, a husband can disavow paternity of the child, meaning the disavowal action can be used to rebut the presumption of paternity that exists in article 185. Additionally, the Uniform Parentage Act was redrafted to provide states with the legal framework to establish parent-child relationships. Under this approach, the Louisiana Civil Code would not have to be revised, but instead places the burden on the courts to apply the presumption of paternity to ensure the child has two legal parents.

Annotated by: Calli Schmitt

III. RACIAL EQUALITY

Vinay Harpalani, Article, *Racial Triangulation, Interest-Convergence, and the Double-Consciousness of Asian Americans*, 37 GA. ST. U. L. REV. 1361 (2021).

Asian Americans, like others of color, are victims of racial positioning and the interests of the elite white. Using 'racial triangulation theory,' and 'interest-convergence theory,' the author explains how Asian Americans are cast as both "model minorities who are high achievers" and "perpetual foreigners who can never truly be American." These racial ideologies emerged out of U.S. immigration policy that positioned Asian Americans as smarter and more hardworking than Black Americans; yet, also as foreigner's incapable of assimilation. In the past year, one can see first-hand the effects of such racial positioning through: (1) the challenges to affirmative action; (2) Andrew Yang's presidential run; and (3) the COVID-19 pandemic. As a result of racial positioning, Asian Americans feel pressure to balance their own identities with the expectations of white American norms and perspectives. This 'double-consciousness' and Asian Americans' overall racial positioning with respect to other groups of color has led to consequences not only for Asian Americans identities, but for coalition building and racial justice more generally. To combat such issues, the author argues that both Asian Americans, and other groups of color, must recognize their own double-consciousness, and how it relates to the double-consciousness adopted by others. The author concludes by stating that the first step in coalition-building is identifying the commonality. Doing so, the author argues, will allow groups to understand how their racial positioning not only keeps them marginalized, but also accords to the oppression of others.

Annotated by: Paloma Bloch

Robert F. Weber, *Against Discourse: Why Eliminating Racial Disparities Requires Radical Politics, Not More Discussion*, 37 GA. ST. U. L. REV. 1177 (2021).

Today, there is a heavy reliance on discourse to resolve racial tensions and eradicate prejudicial ideas, with the expectation that people with different backgrounds and beliefs will be receptive to one another's philosophies regarding race, as well as share a mutual understanding of the human condition. However, discourse is not the most effective means of achieving these goals. Particularly, "disparity discourse," which evaluates racial disparities in the country, serves to result in even more strife and polarized mindsets between the conversationalists than existed at the start. The author argues that expecting those with different "lifeworlds"—different backgrounds and, therefore, different perceptions about race and equality—to reconcile their differences through discourse shifts the blame from the structural racism that is ingrained in society to individuals' own inability to fully understand these racist systems. Instead of relying on such conversations, a better solution is to engage in active tactics such as "radical Black liberalism," which rejects capitalism as well as "race thinking" as it has been established, and instead advocates for the interests of antiracists—those working towards the elimination of racial inequality. Instead of relying on White people to properly advocate for antiracism through discourse, Black people will succeed in "lead[ing] the struggle against white supremacy" and disrupting the structures that maintain racism.

Annotated by: Lindsay Brocki

Karissa Provenza, Note, *Operating Within Systems of Oppression*, 18 U.C. HASTINGS RACE & POVERTY L.J. 295 (2021).

Karissa Provenza's article dares the reader, especially those endowed with privilege, to question how they continue to benefit from systems of racial and gender oppression, despite the talk of change and progress. Provenza highlights how old systems of oppression like American slavery have transformed to suit the times. After emancipation, the legislature and judicial system paved the way for the mass incarceration and disproportionate punishment of black men. This undermining of emancipation can be explained by the property interests of whiteness and maleness, and the legal protections and benefits that come with them. The desire to protect these interests encourages gatekeeping and upholding of systems of oppression in many areas of society. The courts too are guilty of upholding these oppressive systems. Specifically, legislature and courts' exclusive focus on objectivity has ignored the intersectionality of black women's existence in antidiscrimination law. It has allowed the criminal justice system to criminalize black transgender people, reinforce biases towards white and heterosexual norms in rape law. This is made more troubling when these systems are disguised as progress through tokenism and racial capitalization. Ultimately, success within an oppressive system is no success at all. While the author believes that it may be possible to make some progress by operating within our legal system, the real progress will come when our society decides to cast off the tools of the master and make a new system of its own.

Annotated by: William Seguin

Christopher Burton, Note, *3/5ths to 1/10th, How to Make Black America Whole: Exploring Congressional Act H.R.40 – Commission to Study and Develop Reparation Proposals for African-Americans Act*, 54 UIC J. MARSHALL L. REV. 530 (2021).

Christopher Burton's note draws attention to the "vast intergenerational economic disparities among White and Black Americans," and argues that America has not yet fully addressed these disparities. According to Burton, the best way for America to address this disparity is by enacting Congressional Act H.R. 40. Burton separates his note into four sections: (1) the overview of H.R. 40, (2) the history of economic disparities among Black and White Americans and success stories of past reparations, (3) the proposals in H.R. 40, discussing contrasting views, and (4) proposes the enactment of H.R. 30. In Part 1, Burton discusses the four aims of H.R. 40: (1) to address the fundamental injustice of slavery in the United States; (2) to establish a Commission to study and consider a national apology and proposal for reparations for slavery (3) to address the impact of these forces on living Black Americans; and (4) to make recommendations to the Congress on appropriate remedies. Part 2 discusses the history of economic disparity among white and black Americans in the country, as well as successful reparations like those in the form of returned property given to Native Americans. Part 3 explores four types of reparations under H.R. 40, ultimately advocating for community-based reparations, which would foster educational, occupational, and health care opportunities to black communities. Burton concludes that Congress should (1) Enact H.R. 40 & Establish a Commission to Study and Develop Reparation Proposals, and (2) Allocate Community-Based Reparations to the Black Community. By doing this, Congress can "Make Black America Whole."

Annotated by: Anda Totoreanu

Aviel Menter, Article: *Calculated Discrimination: Exposing Racial Gerrymandering Using Computational Methods*, 22 COLUM. SCI. & TECH. L. REV. 346 (2021).

Simulated redistricting software uses machine-learning algorithms to create district maps based on non-partisan criteria. In *Rucho v. Common Cause*, the Supreme Court declared partisan gerrymandering challenges nonjusticiable, and use of simulated redistricting software was rejected. However, Aviel Menter proposes that this technology can be used by courts to identify another problem in districting: racial gerrymandering. Simulated redistricting software can be modified to understand the considerations and effects of districting, which would help differentiate racially motivated gerrymandering, which is justiciable, from partisan gerrymandering, which is not. Two common defenses against racial gerrymandering claims include (1) asserting political and not racial motives and (2) that considering race was necessary to avoid Voting Rights Act (VRA) violations. Simulated redistricting software can generate many valid alternatives of proper district maps, showing that alternatives were indeed available to avoid racial gerrymandering. This could be an important step towards ending unconstitutional motivation behind districting and even the playing field for minority voters.

Annotated by: Elka Blonder

Jacqueline M. Prats, Column, *Labor and Employment Law: Diversity Initiatives and the Backlash of Reverse Discrimination Claims*, 95 FLA. BAR J. 42 (2021).

In 2020, following the killing of George Floyd by a Minneapolis police officer, protests swept the nation, calling for equal treatment to remedy past, and current, inequalities minority groups face in the United States. Among the issues that were discussed throughout this period of protest, inequalities affecting Black people and other minorities in the workplace was an issue that was brought to the forefront of debate. While affirmative action plans have shown strong results in increasing diversity in the workplace, backlash in the form of reverse discrimination claims have hindered employers' abilities to remedy inequalities in the workplace. Here, the author discusses how employers implementing certain diversity programs, especially affirmative action plans, run the risk of facing reverse discrimination claims, which are claims typically by a plaintiff of a majority group complaining of unfair treatment as a result of diversity programs. The author, however, writes that affirmative action plans are valid if they "remedy a 'manifest imbalance' in a 'traditionally segregated job category,'" and do not "unnecessarily trammel" the rights of employees in majority groups. The author notes that, due to the questionable validity of some affirmative action programs, many private-sector employers have turned to other diversity programs, including anti-discrimination training and setting goals to increase diversity through the hiring and promotion processes. Since a reverse discrimination claim cannot be made against an employer's affirmative efforts to recruit minority applicants, the author suggests that this diversity initiative may be effective.

Annotated by: Justin Danzinger

Laura G. Jensen, *Deadly Bias: Why North Carolina's Legacy Within Capital Sentencing Necessitates the Reinstatement of the Racial Justice Act,* 30 B.U. PUB. INT. L.J. 251 (2021).

Jensen's note argues that North Carolina should reinstate the Racial Justice Act in order to safeguard defendants from racial bias. The criteria a law must meet to demand strict scrutiny analysis under the Equal Protection Clause, Jensen purports, is too high a threshold for criminal defendants facing the death penalty, making it impossible for the Equal Protection Clause to fulfil its purpose. The Supreme Court held in *Batson v. Kentucky* that a court could reverse a capital sentence if the defendant proved intentional discrimination on the part of the prosecutor when using peremptory challenges during voir dire. However, *McCleskey v. Kemp* held that statistical evidence of racial bias was insufficient to prove the unconstitionality of an individual's capital sentence. The North Carolina Racial Justice Act was enacted in response to the court's decision in *McCleskey*. The Act lowered the burden of proof to allow statistical data to be sufficient evidentiary proof of racial discrimation and permitted review for re-sentencing in capital sentences where race was a significant factor in the outcome. This Act helped get people of color whose trials had seethed with racism off death row, but when Republicans re-took the state's House and Senate in 2003, they repealed the law. Jensen argues that North Carolina's particular history of racial discrimination in capital sentencing obligates the state to correct the racial discrimination that continues to rest at the heart of state institutions.

Annotated by: Peri Feldstein

IV. REPRODUCTIVE RIGHTS

Kerri Pinchuk, Note, *California Policy Recommendations for Realizing the Promise of Medication Abortion: How the COVID-19 Public Health Emergency Offers a Unique Lens for Catalyzing Change*, 18 HASTINGS RACE & POVERTY L.J. 265 (2021).

Medication abortion (MAB), colloquially known as "the abortion pill", has the potential to increase access to abortion and reproductive rights for patients everywhere, but there is a barrier of a stringent set of FDA regulations. During the COVID-19 pandemic, the in-person restrictions were temporarily lifted, and abortion via telehealth (TeleMAB) was permissible in California for July through December 2020. This provided a unique circumstance for studying the restrictions' impact on patient access to MAB, as well as the efficacy of abortion via TeleMAB. The pandemic highlighted the reduced access to MAB for vulnerable patient populations, specifically for low-income patients and those who live in rural areas far from hospitals and clinics. The author argues that making TeleMAB permanently available could remove many of the associated costs and stressors experienced by these patients. With three specific proposals, the author asserts that California should take steps to ensure maximal access to MAB beyond the public health emergency. The State should support collection and analysis of data on TeleMAB to evaluate its models, remove the requirement of a dual-ultrasound for Medi-Cal reimbursement, and change the current policy that prohibits minors from obtaining MAB via telehealth to align with existing laws that allow minors to legally consent themselves to services without parental involvement. Implementing these solutions would allow California to lead the nation by example, as a reproductive freedom state.

Annotated by: Emma Bruder

Nadia N. Sawicki, Article, *Unilateral Burdens and Third-Party Harms: Abortion Conscience Laws as Policy Outliers*, 96 IND. L. J. 1221 (2021).

Conscience laws enable healthcare providers unwilling to participate in abortion, with an absolute right to refuse medical care to patients on grounds of religion or conscience. Federal and state conscience laws in United States protect providers' right to refuse medical services even under circumstances where patients would likely be harmed. The author argues that these laws are outliers among other federal and state religious freedom and anti-discrimination legislations, which attempt to strike a more even balance between individual rights and prevention of harm to third parties. In the context of this article, third parties include patients burdened with finding alternative providers and employers who are prohibited from taking adverse action against providers who refuse to participate in abortions. The author proposes that these abortion conscience laws should incorporate limitations similar to those established in the Civil Rights Act (CRA) and the Americans with Disabilities Act (ADA) in order to minimize risks to third parties (patients and/or employers) who may get harmed by provider refusals. The conscience laws, in their current form, provide complete civil immunity to providers who choose to refuse to participate in abortion. These civil immunity provisions are an anomaly in other state and federal anti-discrimination laws. Therefore, the author proposes that the conscience laws should be amended to incorporate "undue hardship" and "direct threat" standards, modeled after CRA and ADA. This would greatly minimize the adverse consequences to third parties by limiting institutional and individual refusals, thereby striking a more even balance between providers' individual rights and harm to third parties.

Annotated by: Gursimran Kaur

Denise Cespedes, Article, *MOTHER MAY I?: THE CONSTITUTIONALITY OF FLORIDA'S REVIVED PARENTAL CONSENT REQUIREMENT FOR THE TERMINATION OF AN UNMARRIED MINOR'S PREGNANCY*, 21 FL. COASTAL L. REV. 1 (2021).

Several states have enacted statutes requiring parental consent for minors seeking an abortion. The Florida Supreme Court addressed a parental consent statute in *In re T.W*. and held that it was unconstitutional as it denied minors the right to privacy that was protected in *Roe v. Wade*. In June 2020, Florida Governor Ron DeSantis signed a bill that requires parents of minors seeking abortions to be notified of and consent to the pending abortion. It has not yet reached the Florida Supreme Court, but a decision from the Court regarding the parental consent requirement is inevitable. The author argues that the Florida Supreme Court should find the requirement to be unconstitutional for several reasons. First, *Roe v. Wade* conveys a constitutional right to privacy that includes a woman's right to have an abortion and this right applies to minors seeking abortions. Second, the Florida Supreme Court previously held that the right to privacy cannot be burdened unless the burden passes the strict scrutiny test. The strict scrutiny test states that any law putting a burden onto a fundamental constitutional right that furthers a state interest can only do so using the least intrusive means. The 2020 statute is not the least intrusive means as it requires a judicial hearing for a minor pursuing an abortion, which poses several risks to the minor. In addressing this issue, the Florida Supreme Court has the opportunity to set the tone for approaching a woman's right to choose in light of political division, as well as the opportunity to provide answers for young women seeking an abortion.

Annotated by: Olivia Nevola

V. OTHER

Hannah May, Comment, *Buried Alive: Gay v. Baldwin and Unconstitutional Solitary Confinement for Prisoners with Mental Illness*, 52 LOY. U. CHI. L.J. 1179 (2021).

Although solitary confinement is a common practice in the prison system, the use of this tool has been detrimental to the physical and psychological health of prisoners suffering from serious mental illness. Despite the growing judicial awareness of this harm, the Supreme Court has not addressed the constitutionality of this practice since 1994, resulting in different standards across jurisdictions for what constitutes cruel and unusual punishment per the Eighth Amendment. To address this issue, the author examines *Gay v. Baldwin*, a claim of extreme psychological harm arising from solitary confinement in the Central District of Illinois, which upon appeal, will sit in the Seventh Circuit. Despite only having a three-year sentence, Gay spent over twenty years in solitary confinement due to his borderline personality disorder, which manifested itself in behavior that was in violation of prison rules. Since no per se holding against solitary confinement exists for prisoners with mental illness, Gay's prolonged confinement exasperated his mental health to the point he needs acute inpatient care. Thus, the author concludes that the Seventh Circuit should adopt a new standard practice that holds that the use of solitary confinement as punishment for prisoners with serious mental illness constitutes per se deliberate indifference for the prisoner's health, for which prison officials may be held liable under the Eighth Amendment. A decision holding that Gay's constitutional rights were violated may serve as a catalyst for more advance protections for prisoners suffering from mental illness.

Annotated by: Katherine Dunayevich

Jonathan P. Feingold, *Deficit Frame Dangers*, 37 GA. ST. U. L. REV. 1235 (2021).

In Deficit Frame Dangers, the author coins the term "Deficit Frame" in demonstrating that well-intentioned civil rights litigation can be counterproductive to racial equality. The detrimental effect on equality is a result of the need for plaintiffs asserting educational adequacy claims to overcome the burden of showing that they have been deprived of an adequate education. The author presents his argument through studies involving four different constituencies: white parents, teachers, voters, and school administrators. In each section, the author describes how well-intentioned legal narratives can lead to opposite results. In addition, the author reports how knowledge of racial disparities may actually exacerbate racial biases. ¬ For example, the section describing white parents describes a study in which participants were asked questions after being shown a video of a neighborhood across one of five socioeconomic tiers and one of three racial compositions; The results showed that participants were inclined to hold pro-white biases and that racial biases tended to predict neighborhood evaluations. The section on voters illustrates the relationship between evidence of racial disparities in the criminal justice system and implicit stereotypical associations. Similarly, the section on Administrations shows that litigation portraying Black and Brown scholastic underachievement leads administrators to expect poor results and blame the students. Furthermore, the author demonstrates how stereotypes can influence expectations even when presented with contrary information. The author concludes with his hope that this article will lead to further discussion of the relationship between racial narratives.

Annotated by: Steven Kaufman

Yong-Shik Lee, Article, *The Last Call For Civil Rights: Toward Economic Equality*, 37 GA. ST. L. REV. 1265 (2021).

It has been over six decades since the inception of the civil rights movement, yet economic equality has not yet been realized. Economic inequality based on both race and geographic location persists. A 2019 survey finds the median household wealth for white households is $ 188,200, while the median household wealth for Black households is $ 24,100 and the median household wealth for Hispanic households is $ 36,100. The author looks at the "model minority" label and sees that the poverty rate of Asian American is lower than other minority races. The author proposes that this is because of educational attainment, dedicated family support of educational attainment, and stable family environments in compliance with social norms and laws ensuring parents are not separated from their children. While these factors are crucial to bridge the economic gap, it may not be possible in other minority households. The author next looks at Carbondale, a college town with a weak economy that is not caused by the racial divide. The poverty is instead cause by its small number of employers. The author therefore proposes the federal government should (1) assist minority families that have lost a provider or at risk due to accident, disease, death, or incarceration and (2) develop necessary infrastructure, improve public education, and promote the establishment and expansion of businesses in economically depressed areas. Economic equality is not something that can be achieved without targeted action; the author proposes that the federal government take such action to reach this goal.

Annotated by: Salisha Kayum

Christopher McCrudden, Essay, *Indirect Religious Discrimination: Resisting the Temptations of Premature Normative Theorization*, 34 HARV. HUM. RTS. J. 249 (2021).

Indirect religious discrimination claims frequently arise in educational settings or involve employment hiring and termination or refusal of services. Recent cases – including a school's prohibition on hijabs and termination of a registrar for refusal to marry same-sex couples – signify how common the claim is as a legal remedy, especially across many jurisdictions in the United Kingdom and European Union. The author evaluates various jurisdiction's legal approaches to indirect religious discrimination while assessing the practice's normative foundations. He approaches his argument in four parts: distinguishing between indirect discrimination and religious discrimination, outlining variables that affect the practice, including the relationship between religious discrimination, and freedom of religion claims and whether the jurisdiction regards direct and indirect discrimination as overlapping or distinct, and analyzing indirect religious discrimination law across various jurisdictions. In the last part of McCrudden's essay, the author argues that to establish a general normative theory underpinning modern practice of indirect religious discrimination law would be premature. Because the practice is evolving, and so many of its elements are rejected or under-scrutinized, the author maintains that "it is a brave scholar who offers a normative theory of the concept at its current stage of development."

Annotated by: Hannah Kramer

Brit J. Benjamin, Article, *Equal Protection and Ectogenesis*, 23 VAND. J. ENT. & TECH. L. 779 (2021).

Ectogenesis is the gestation of a fetus from conception to birth in an artificial womb. The practice faces resistance from various political groups and is at risk of being regulated against. However, the author contends, a ban on ectogenesis would be unlikely to pass constitutional muster due to the technology's potential to save infant lives and alleviate harms that can befall the mother in traditional gestation. The disproportionate effect on women posed by a ban on ectogenesis invokes the Equal Protection Clause. The author then discusses the procedures and likely outcomes of an equal protection analysis under each of 4 levels of scrutiny: intermediate, strict, rational basis, and rational basis "with bite." Intermediate is applied for discrimination on the basis of sex, and requires that the law serve an important government objective and be substantially related to achieving it. Strict is applied whenever a "fundamental right" is threatened by a law, and requires a compelling state interest behind the policy, and that the law is narrowly tailored. Such gender-based discrimination and threat to the "fundamental right" to procreate supports the use of *at least* intermediate scrutiny. The highly deferential rational basis, and the modified rational basis "with bite", would thus be inappropriate because of the applicability of the previous two tests. However, the author argues, a ban on ectogenesis would not even survive a rational basis due to the lack of any legitimate interest behind such legislation, because it is based only upon technophobia, disgust, and moral disapproval, which are not recognized by the law as legitimate interests.

Annotated by: Sean Murphy

Yong-Shik Lee, Article, *THE LAST CALL FOR CIVIL RIGHTS: TOWARD ECONOMIC EQUALITY*, 37 GA. ST. U.L. REV. 1265 (2021).

In the years since the civil rights movement, one of the movement's vital and intended goals of economic equality for all racial and regional groups has been left behind in the grand scheme of equal rights and the integration of society. Since the Civil Rights Act was passed, disparities in economic outcomes have remained mostly unchanged largely due to the nation's framework of favoring individualism in economy, which is flawed since the system is wrought with structural racism. The author draws on the Asian American experience and a city called Carbondale to highlight the racial and regional economic disparities active in the United States and their solutions. According to the author, to truly realize the goals of the civil rights movement, these disparities must be eliminated through a law and development approach. This approach towards institutional reform requires combined actions of mainly the federal government, local and state governments, and the private sector to implement laws and programs that address the underlying issues of economic inequality. For racial disparities, these legal reforms should target fostering the attainment of higher education in minorities with grant incentives for schools and creating stable and conducive environments to facilitate this learning by financially supporting economically distressed families. Legal reforms for regional disparities should aim to advance infrastructure, public education, and the growth of businesses via financial incentives and support measures through increased cooperation among the federal government, local and state governments, and the private sector. Due to increased American awareness of the failure of autonomy in economy and the tax revenue of the federal government, these legal and institutional reforms are feasible.

Annotated by: Julia Patz

Josh Hammer, Essay, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV, J.L. & PUB. POL'Y 917 (2021).

Modern conservative jurisprudence prioritizes its substantive goals of justice, human flourishing, and the common good, yet its methodology of positivist neutrality and judicial restraint hinders the aims of its followers and fails to answer whether people are capable of making these constitutional interpretations void of context. This struggle for substantive indifference is evident by the Republican Party's Supreme Court nominations continually construing the Constitution in a way contrary to the party's beliefs. However, legal conservatism has a chance for revival through self-reflection, which involves: reevaluating its values, retiring its trite remarks, and rebalancing caution and conviction. The more reliable form of conservative originalism, common good originalism, interprets the Constitution and statutes by accounting for American traditions and this country's goals that are evident in the Preamble. The author states that to further common good originalism, its followers must humbly admit that its methodology will not always arrive at the one, true legal answer, and looking at all possible interpretations will help to find the soundest one. Also reforming the rigid legal education system and the criteria for conservative Supreme Court nominees can protect conservative principles. The three modern forms of originalism have not been successful at promoting the substantive objectives of conservatism, but common good originalism can support a jurisprudence that promotes conservative traditions while being conscious of past judicial mistakes.

Annotated by: Payten Slaughter

Eric T. Kasper, *No Essential Reason to Restrict the Freedom of Speech: Why it is Time to Knock Out* Chaplinsky v. New Hampshire *and the Fighting Words Doctrine*, 53 Tex. L. Rev. 613 (2021).

In examining the Fighting Words Doctrine as established by the Supreme Court in *Chaplinsky v. New Hampshire*, Kasper argues that this long-held doctrine should be overruled; having no place in the Court's modern First Amendment jurisprudence. At issue in *Chaplinsky* was speech which Justice Murphy's 1942 Majority opinion categorized as unprotected forms of expression under the First Amendment; specifically, the concept of "fighting words," which Justice Murphy identified as words likely: (1) to inflict injury; and (2) to provoke retaliation from the average addressee, thus causing a breach of the peace. To support his argument of overturning *Chaplinsky*, Kasper cites to several decades of the Supreme Court's First Amendment jurisprudence, identifying various examples in which the Court deemed offensive speech—often more likely to inflict injury or disrupt the peace than in *Chaplinsky*—is protected by the First Amendment (e.g., racial epitaphs, particularly-charged political statements, etc.). Since *Chaplinsky*, the Court's own jurisprudence has all but overruled the Fighting Words Doctrine in so limiting its application. Further, the Court has since provided a plethora of exceptions to the rule; what is now protected free speech/free expression. Likewise, Kasper notes that the intersection of vagueness/overbreadth and viewpoint/content discrimination of the Fighting Words Doctrine creates an unclear and unevenly administered standard for adjudication. Kasper concludes the danger in permitting this all but overruled doctrine to remain good law is that the lack of clarity over the legal doctrine espoused in *Chaplinsky* runs the risk of being utilized as a weapon against racial, political, and religious minorities; potentially harming such folks as BlackLivesMatter protesters, communists/socialists, as well as the Jehovah's Witness respondent in *Chaplinsky*.

Annotated by: Davis Villano