ANNOTATED LEGAL BIBLIOGRAPHY

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I. VOTING RIGHTS

Travis Crum, Note, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261 (2020)

Racially polarized voting has been a prevalent issue dating back to the time of reconstruction. However, racially polarized voting cannot be defined so simply. This is because it does not occur based on what race the candidate is, rather it is more along party lines. The author does not define racially polarized voting but explains that it can be more easily demonstrated by the fact that Blacks uniformly support the democratic party, while White southerners vote for the republican party. Vote dilution claims regarding racially polarized voting have been decreased due to the *Gingles* factors. The *Gingles* factors require plaintiffs to establish that racial minorities are "politically cohesive" and that the "majority votes sufficiently as a block to enable it." Therefore, in order to bring a claim for a statutory vote dilution, under *Gingles*, racially polarized voting is necessary. This note proposes that vote dilution claims and the *Gingles* factors should be reconceptualized in two ways. The first is that even though the Fourteenth Amendment prohibits intentional racial vote dilution, the court has not consistently held this. The second is that the Court should reimagine vote dilution claims as violations of the Fifteenth amendment. As such, the author concludes that reconstructing racially polarized voting will ensure voting doctrine closely aligns with the Fifteenth amendment and Congress is well within its authority to remedy these racially polarized voting issues.

Annotated by: Morgan Berenbaum

Edward B. Foley, Article, *Assessing the Validity of an Election's Result: History, Theory, and Present Threats*, 95 N.Y.U.L. REV. ONLINE 171 (2020)

With President Trump running for re-election after an impeachment acquittal and during a pandemic causing uncertainty in how citizens will be able to vote, there are concerns that plague the validity of the election. The author argues for a "renewed conception of electoral validity" while explaining foreseeable threats in the 2020 and upcoming elections. A review of the history of electoral validity demonstrates how the United States has dealt with issues such as missing votes, inaccurately counted votes, disseminated disinformation, voter suppression, and impeachment previously. Currently, implications of COVID-19 is a new threat to election validity. The author argues the standard for electoral validity needs to be narrow and measure democratic legitimacy to determine if the election result is valid. Direct attacks negate voter choice and indirect attacks manipulate voter choice in elections. Indirect attacks, like disinformation that impact a voter's electoral preference, are different from direct attacks that prevent voter participation. Unlike indirect attacks, direct attacks undermine validity. Categorizing present attacks such as ICE agents at polling locations, private-sector vigilante groups at polling locations, accidental disenfranchisement, and COVID-related complexities as either indirect and direct attacks helps to uncover whether the attacks undermine the validity of an election. The author argues that focusing direct attacks as a measure of validity is the most sustainable as it is centered on assessing whether individuals were deprived of the choice to effectuate their will within an electoral process; therefore, the test for validity is "whether there has been direct…interference sufficient to negate genuine electoral choice."

Annotated by: Annslee Renee Perego

Jacob Leer, Note, *The Roberts Court, Compelled Speech, And A Constitutional Defense of Automatic Voter Registration*, 115 NW. U. L. REV.169 (2020)

Despite the current trend towards broadening the scope of the compelled speech doctrine and expanding the protections to subjectively expressive conduct, it is the author's view that a hypothetical First Amendment Challenge to Advanced Voter Registration would fail. AVR shifts the burden of voter registration onto the state by making registering to vote an "opt-out" rather than "opt-in" process and requiring that state agencies and not registered voters, electronically transfer registration information to election administrators. Critics of AVR consider voting to be "the embodiment of political speech protected by the first amendment" and thus labels AVR as compelled political speech because some citizens chose not to register as a means of "expressing displeasure with the electoral process." However, it is the author's view that even though it is possible for someone to register to vote with the intent to convey a particular message of support for the electoral process, that action does not become inherently political conduct simply because the actor intends to express an idea. *See Spencer v. Washington*. Critics also claim that AVR should be subject to strict scrutiny because it is an election regulation that imposes "severe" burdens on first amendment rights and must be "narrowly drawn to advance a state interest of compelling importance." Nonetheless, the author points out rational basis review applies, and not strict scrutiny when the election law imposes only "reasonable nondiscriminatory restrictions" upon the first amendment rights of voters. Accordingly, it is the author's proposal that a hypothetical first amendment challenge to AVR would fail despite the current trends because AVR is not compelled speech, if it was it would be subject to lesser scrutiny, and therefore would not be affected by a First Amendment challenge.

Annotated by: Abigail Reid

II. FIRST AMENDMENT

Douglas B. McKechnie, *Government Tweets, Government Speech: The First Amendment Implications of Government Trolling*, 44 SEATTLE U. L. REV. 69 (2020).

The issue in this Note is whether Donald Trump, acting as President of the United States, violated the First amendment through his twitter use. In July 2018, on President Donald Trump's visit to Finland with Russian President Vladamir Putin, when Trump was asked whether Russia interfered with the 2016 election, Trump responded, "I don't see any reason why [Russia did]." After former CIA director John Brennan called Trump's response "treasonous" and "imbecilic," White House Press Secretary Sarah Huckabee Sanders confirmed President Trump was exploring ways to remove Mr. Brennan's security clearance. Speaker Paul Ryan called Trump's plan "trolling" and the author uses this term to determine whether Trump's "trolling" tweets are used to dissuade others from criticizing him, ultimately violating critics First amendment rights. The author uses the *Summum* and the *Walker* Courts test to determine whether President Trump's twitter account constitutes government or private speech. The factors are: (1) the history of the medium used to deliver the message, (2) whether the medium and the message are closely identified in the public mind with the government, and (3) whether the government maintains direct control over the messages. @realDonaldTrump, Trump's twitter account, has been used since the start of his presidency, is considered by the public to be associated with the government as they rely on it for news, and is directly controlled by President Trump and potentially Dan Scavino Jr., Director of Social Media and Assistant to Trump. Hence, @realDonaldTrump is government speech and is capable of quelling the free speech of others. The author concludes that when Trump used twitter to threaten his former lawyer Michael Cohen with a criminal investigation or "trolled" his detractors by threatening to fire them, Trump violated the first amendment by going against its very foundational purpose, protecting free speech.

Annotated by: Jacob Diamond

Tawanna D. Lee, Article, *Combating Fake News with "Reasonable Standards,"* 43 HASTINGS COMM. & ENT. L. J. 81, (2021).

With the rise of social media, there is a recent trend of online disinformation regarding political speech, known as "fake news," that has been left for the industry to self-regulate. Fake news, a media product fabricated and disguised to look like credible news, is posted online and circulated via social media and can erode public trust—during an election, this can impact or weaken the full exercise of democracy. The Supreme Court, in a plurality opinion, has buttressed any attempts to regulate fake news since regulating political speech "trenches upon an area in which the importance of First Amendment protections is at its zenith." On top of First Amendment protections, the Communication Decency Act gives the Internet media industry even broader protections for what is posted on their forums, given them "power without responsibility." This self-regulation is lacking in coordination, leading to altered videos such as "Drunk Nancy Pelosi," being amplified instead of stopped, and requires the federal government to create a new regulatory framework. Currently, only a few steps have been made by federal legislatures to try and regulate fake news, one such being the Honest Ads Act in 2017 that would require internet media companies to transparency and record keeping regulations but was stalled. The author suggests a proposed amendment to Section 230©(1) that would "take[] reasonable steps to prevent or address unlawful uses of its services," in order to replace the broad immunity and allow for more regulation of fake news. The amendment proposed would also act more like the DMCA does for copyright, where if there was reasonable moderation of the content and removing false information, the internet media companies would keep their immunity. Despite the argument that the amendment may be a form of censorship, Internet Media companies still retain Section 230 immunity if they have the "reasonable standard," and not hamper any particular element of speech, keeping a modest extension of current jurisprudence.

Annotated by: Jessica Friedman

Michael Cheah, Note, *Section 230 and the Twitter Presidency*, 115 Nw. U. L. Rev. Online 192 (2020).

Section 230 of the Communications Decency Act provides immunity for platforms like Twitter and Facebook when it comes to moderating user content, in good, faith to block offensive content. President Trump signed Executive Order 12, 925, "Preventing Online Censorship," which intended to punish large social media platforms for the same by instructing the Commerce Department to file a rule making petition to have the Federal Communications Commission "clarify" the existing immunity provided by Section 230. President Trump signed the order two days after twitter took action on his twitter account. If the Executive Order were to be issued, content moderation rules would allow more harmful, offensive speech as well as misinformation to get online as the platforms would be forced to provide, in detail, the reasons that the content was removed. The author, argues however, that the Federal Communications Commission does not have the authority to promulgate rules under Section 230 as they do not have the ability to regulate Internet content. The Federal Communications Commission have the capability of issuing the proposed rules of the Executive Order as the Communications Decency Act is unambiguous, and thus the Executive Order cannot alter the statute. If however, the Federal Communications Commission did have the power to enforce the proposed rules, the results would be increased moderation challenges which would result in more expensive and less effective moderation of harmful content. Further, the proposed regulations would be limited to certain categories of harmful speech leaving hate speech, fake news, and defamation protected from moderation. The results directly contradict the legislatures purpose in enacting Section 230 of the Communications Decency Act.

Annotated by: Dana Gambardella

Catherine A. MacKinnon, Article, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223 (2020).

The last century has seen the First Amendment, once a source of protection for the defenseless, shift into a weapon for the powerful. This has occurred through the Supreme Court's denial of substantive equality via the doctrine of content neutrality ("protection against governmental discrimination on the basis of speech content"). Content neutrality refers specifically to laws that apply to expression without regard to its substance or message. Decisions in which the Court has done this include the invalidation of an ordinance that would have denied Nazis the right to march with Swastikas in a heavily Jewish town, and a lack of acknowledgment of the necessary underlying facts when upholding pornography as protected speech. The author then posits that pornography should not be protected under the First Amendment because of harm it causes on specific groups within society as well as society as a whole. Because of this, the author proposes adopting a First Amendment standard of substantive equality that acknowledges harms caused by historic and socioeconomic inequality. The author contends that such a standard would remove the Amendment from its current use as a protector of the dominant. In doing so, First Amendment jurisprudence could swing back towards its original role as protector of the subordinated.

Annotated by: Evan Garfinkel

Colette Langos & Paul Babie, Article, *Social Media, Free Speech and Religious Freedom*, 20 RUTGERS J. L. & RELIGION 239 (2020).

Social media is a crucial component of modern-day society. Through its development, one of the most difficult challenges democratic nations have faced is regulating constitutionally protected free speech on social media. The authors highlight a recent case in Australia that exemplifies the complicated intersectionality of these issues. In 2018, a well-known Australian soccer player, Israel Folau, was released from his contract after voicing anti-LGBTQ+ views through his Instagram account. The article offers an analysis of the facts had they been in front of a court of law, as well as a comparison of actions other countries have taken in similar situations. Under Australian free speech jurisprudence, the authors explain that his case would have been analyzed utilizing a three-part test inquiring about whether the law burdens free speech, the means implemented to accomplish the law's goals, and the reasonableness of such means. The authors suggest several other solutions seen around the world for the challenge of policing speech on social media, such as self-regulation in accordance with platform privacy policies, laws of general application, and anti-vilification statutes. The authors state that Folau's expressions would almost certainly fall within the protection of the United States' Constitution but could not say with confidence how the situation might play out in an Australian Court. They conclude by emphasizing that an assessment of such important liberties can only be made by taking into account the values and dignity of the communities involved.

Annotated by: Rachel Gold

III. COVID-19

Yongtian Tina Tan and Aaron S. Kesselheim, *HEALTH POLICY PORTAL: Implementing U.S. Covid-19 Testing: Regulatory and Infrastructural Challenges,* 48 J.L. MED. & ETHICS 608 (2020).

When COVID-19 hit the United States, diagnostic testing was not available like it was in other countries, such as South Korea and the European Union, which caused the United States to fall behind in testing capacity till this day and have a vastly different experience with the pandemic. Like the United States had done before with Ebola and Zika, the United States opted to develop its own diagnostic test for COVID-19 instead of adopting the World Health Organization (WHO) test, but it was nevertheless approved by the FDA and no hospital, academic centers, or companies were allowed to use any other test. The FDA's focus was on accurate surveillance, which hindered the US public health system to develop rapid widespread testing in a time that it was extremely necessary due to the rate the virus was spreading because no private labs were allowed to develop and implement their tests. When the testing kits were distributed, serious technical issues arose and by the time private labs were allowed to implement their own tests, crucial time had already passed without sufficient diagnostic testing in the United States leading to a lack of regulatory flexibility and fragmented testing infrastructure. Had the United States simultaneously pursued multiple options, allowed both state and private labs to work on testing, and adopted the WHO test when the CDC test initially failed, they would have been safeguarded by against unexpected breakdowns. In addition, the lack of instrumentation standardization contributed to the United States handicapped testing for the first two weeks, which could have been addressed through public-private partnerships to coordinate the national testing effort. By analyzing the different responses to the COVID-19 outbreak this article highlights lessons the United States could learn and implement from South Korea and the European Union in order to efficiently respond, implement, and deliver testing for the sake of fighting the pandemic and keeping society safe. These include practices that allow for efficient responses in times of crises such as immediate approval to testing in emergencies and effective coordination between the federal, local, and state governments.

Annotated by: Laurenne Ferber-Kaufman

Samuel D. Hodge & Jack E. Hubbard, Article, *COVID-19: The Ethical and Legal Implications of Medical Rationing*, 59 GONZ. L. REV. 159 (2020).

The novel coronavirus ("COVID-19") illness has infiltrated the United States and instilled lasting medical, ethical, and legal implications on society. Individual states have the power to enact laws pertaining to public health emergencies, such as COVID-19, but such laws must also comply with federal laws, which are grossly deficient in terms of legislation and guidelines for pandemic responses. The author explains how the states are left with the immense responsibility of rationing the limited supply of breathing assistance ventilators required for COVID-19 related treatment; on average, across the United States, there is only one viable ventilator available for every thirty-one patients in need. Ethical and legal implications have arisen because the majority of state solutions for ventilator distribution center around a theory of using the ventilators on the patients who have the strongest chance of survival. Further legal implications arise from a liability standpoint because medical institutions lack the equipment for proper care, and medical professionals have to decide where to allocate the limited resources necessary to care for infected patients. Thus, the author articulates that although the science of medicine has progressed over time, it is not progressing fast enough. The ethical and legal implications stemming from inadequate healthcare provisions may call for the adoption of an alternative standard of care to be employed in the medical community during public health emergencies so that healthcare providers do not fear liability in times when they do not have reliable access to the limited equipment required to provide care for sick patients.

Annotated by: Sara Gruber

Lawrence O. Gostin, Safura Abdool Karim, and Benjamin Mason Meier, Article, *Facilitating Access to a COVID-19 Vaccine through Global Health Law*, 48 J.L. MED. & ETHICS 622 (2020).

The COVID-19 pandemic has devastating effects on global human health and economic growth, and in the absence of an effective COVID-19 vaccine, it is difficult to control it globally. It is thus critical to find a way to ensure universal access to the COVID-19 vaccine among all the countries, especially low- and middle-income countries (LMICs). Global governance plays a critical role in ensuring equitable distribution of the vaccine because it promotes collaboration and coordination among all the countries. To accomplish equitable distribution, the distribution issue should be examined through the lens of human rights where the COVID-19 vaccines are classified as "essential medicine." The authors point out that global health law is the best solution to address possible issues encountered with vaccine distribution, such as intellectual property protection. In their conclusion, the authors acknowledge that COVID-19 imposes "the world's greatest challenge" in our generation, and recommend that global governance through Global Health Law is necessary in facilitating equitable access to COVID-19 vaccine globally.

Annotated by: Jianyuan Hua

Lawrence O. Gustin, et al., Column, *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats: Global Health Law*, 48 J.L. MED. & ETHICS 376 (2020).

In light of the weakness of the global response to COVID-19, global health law, which is crucial to infectious disease response efforts, must be further developed and better unified to ensure stronger preparedness for future pandemics. Although International Health Regulations require states to share a common obligation to work together to combat health crises, due to nationalism, states have failed to do so amidst COVID-19, therefore contributing to worldwide devastation. The column addresses this issue by providing recommendations states can follow, including increasing funding to the World Health Organization, and enhancing international surveillance, mandatory reporting, and transparency regarding global health conditions, so that states are aware of each other's statuses. These changes will take time, as many states are currently in especially weak positions. However, once this information becomes available, more uniform and effective solutions to widespread health threats can be implemented globally. In the midst of COVID-19 ravaging countries around the world, the need to reform global health law is more urgent than ever, and action must be immediately taken to build global governance so that history does not repeat itself.

Annotated by: Gabriella Javaheri

Mark A. Rothstein, Column, *The Coronavirus Pandemic: Public Health and American Values: Currents in Contemporary Bioethics*, 48 J. L. MED. & ETHICS 354 (2020).

The United States' failures during the coronavirus pandemic revealed that the countries fragmented public health institutions and political divisions are a barrier to successfully handling a public health crisis. This should spur coordinated policy changes to address public health preparedness. The country suffered due to a decline in public health resources and from three traits: fragmented public health controls, individualism, and partisanship. First, states and local governments have the task of controlling public health, but they often lack proper funding, expertise, or political commitment to address public health, causing disfunction. Second, the United States fosters self-reliance and independence in individuals, which the author believed would hamper the effectiveness of social distancing policies but was surprisingly most people still followed safety guidelines. Third, the United States has a long history of partisan politics interfering with public health which continues to hamper acknowledgement of the virus and the coordinated rollout of conditions for "reopening" the economy by reducing social distancing. The author believes that these faults should necessitate three policy changes: (1) an overhaul of the public health system by increasing funding and coordination between federal, state and local authorities and insulating the authorities from partisan politics; (2) the Congressional enactment of paid sick leave and income support for individuals in quarantine; and (3) the Congressional enactment of universal healthcare.

Annotated by: Dario Rabak

James G. Hodge, Jr., *et al*., Article, *Column: Public Health and the Law: Legal "Tug-of-Wars" During the COVID-19 Pandemic: Public Health v. Economic Prosperity*, 50 J.L. MED. & ETHICS 603 (2020).

The sudden outbreak of the COVID-19 virus introduced a tremendous wave of public health/legal combined responses as a means of controlling the massive spread of the virus in the United States, which killed over 180,000 Americans. With no currently approved vaccine or cure, millions are vulnerable to the condition, leaving a power struggle between federal and state powers. Numerous states have relied on emergency authorities as a means of restricting the spread of the virus, to the chagrin of the federal government who sought to ease restrictions during the virus' peak. This clash of powers is best acknowledged in President Trump's refusal to comply with Michigan state law and to wear a mask when visiting a Ford Company plant in the state after asking the Michigan governor to "give people their lives back." Tribal nations have also suffered tremendously during the COVID-19 pandemic, and like states, these tribal nations are simultaneously juggling preserving their main source of revenue (cassinos and public attractions) while attempting to control the virus' spread. Determining what rights—and the limits to these rights—that both states and tribal nations have to order restrictions, closures, and stay-at-home orders have resulted in discourse over the extent of federalism. While some businesses and churches defy government orders to stay at home and continue to operate, arguing constitutional rights, other employers have found themselves sued—and not by the government, but by sick and beleaguered employees who allege workplace discrimination, wrongful termination, negligence, and other claims. While the authors do not enumerate a specific solution, they do suggest that reassessment of disease mitigation, public health reporting, and the scope of social distancing powers is one way to better balance the interests of state, tribal, and federal governments.

Annotated by: Miles Taylor

Sharon Dolovich, Essay, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (Nov.16, 2020)

While COVID-19 has posed a unique and challenging problem for American society in general, the pandemic has had a wildly outsized effect on the incarcerated. This essay has two central purposes: first, to describe the impact COVID has had on the incarcerated and the steps taken to mitigate any future threat; and second, to understand the dynamics underlying the failure of the official response. The author noted that state and federal prisons had seen infection rates that are more than five times higher than the national rate, while incarcerated persons were dying at a ratio of three to one relative to society as a whole. Looking at the factors underlying this disparity, Dolovich focuses on the close, poorly ventilated spaced inhabited by people who are likely to have an underlying condition known to exacerbate the symptoms of COVID. In March 2020, the U.S. Centers for Disease Control (CDC) issued a document enumerating the best practices for corrections facilities; the author provides several examples of corrections facilities failing to correctly implement these policies and procedures. Many public officials sought to decrease the incarcerated population to drive down the spread of COVID in jails and prisons. As of mid-May 2020, a 31% decrease in the median national jail population had occurred; that decrease was only temporary as jail populations have slowly increased through October 1, with all signs indicating a continued increase. The author argued that the American corrections administrators had fostered a culture of secrecy, which has exacerbated the threat of COVID on the incarcerated, and that American carceral policy should be reoriented to create a more hygienic, less crowded carceral environment with better access to medical staff and treatment.

Annotated by: Elliott Williams

IV. CONSTITUTIONAL RIGHTS

David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71 (2020).

How do emerging developments in technology affect the way we interpret the Constitution? In recent years courts have increasingly been called upon to apply longstanding constitutional rights doctrine to new and heretofore unimagined factual circumstances created by technological developments. New technology—like the internet, smartphones, aerial surveillance, television, and social media—create novel scenarios that reach beyond the circumstances upon which the existing scope of constitutional rights was established. The current frameworks defining the scope of First and Fourth Amendment rights to speech and privacy, for example, were established at a time where speech had physical boundaries, like public gatherings or the circulation of leaflets, and when the "cutting edge" technology that presented a potential threat to individuals' privacy consisted of pen registers and beepers. Thus, whether by expanding the capacity for individuals' speech to perpetrate social harm, or by largely boosting the government's capability to encroach into people's private lives, technological advancements can drastically alter the boundaries between individual and government interests. Failure to recognize this tension between technological advances and antiquated constitutional rights doctrine risks the perpetuation of outdated doctrinal frameworks that no longer fit the realities of the modern world. To confront this challenge, the author advocates for an "incremental" approach to evolving constitutional jurisprudence—such as crafting new exceptions, creating new categories or subcategories within a rule, or reformulating existing rules to incorporate new standards—rather than total abolition or creation of sweeping categorical rules. In the present context, where technological advancements outpace the ability of courts to fully assess their consequences—this approach alleviates the risk of poorly calibrated rules by affording courts more time and flexibility to sufficiently evaluate the degree to which such technological change should modify the existing constitutional rights doctrine.

Annotated by: Maegan Gorman

Melissa Murray, Comment, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 208 (November, 2020).

In a sharply-developed analysis of the Supreme Court's jurisprudence, Murray, a professor of law at NYU, examines the Court's decision in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), an abortion case. The author describes the primary holding of *June Medical* as a pure exercise in the doctrine of *stare decisis* based on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) and a reflection of how the Court may see its duty to precedent in upcoming terms. Examination of those cases reveals that the strict adherence to *stare decisis* in those cases is the main driver of the Court's continued support for the abortion right, as opposed to an actual assertion of the right under the Due Process clause. The central prediction of the Comment is that, because the author predicts that future abortion cases will be adjudged only by their adherence to the precedential standards of previous cases, that this could result in a weakening of the right to an abortion. In order to illustrate her point, the author examines the larger ramifications of the stare decisis jurisprudence as originated in the abortion cases, through case studies that apply *Casey*'s four precedent-breaking factors to cases implicating the First Amendment, the Sixth Amendment, affirmative action, capital punishment, and organized labor. Using the *Abood v. Detroit Board of Education* cases as an example, the Comment shows that opinions that on their face attempt to clarify and cohere collective labor rights in fact were attacks on the foundation of the right; attacks which succeeded 40 years after the initial precedent was set, in *Janus v. AFCSME, Council 31.* that attempts to clarify and cohere the abortion right doctrine are in fact thinly veiled attacks at the foundation of the right that may in time succeed. The author concludes with an assurance that the *Roe* and *Abood* precedents are not identical, because although attacks on *Abood* were few and far between, *Roe* has been the subject of numerous court challenges over the past five decades, and as a result a symbiotic relationship has grown up between modern stare decisis and the abortion right, such that most of the modern judicial theory of stare decisis was espoused in abortion cases, and to undo the abortion right may be to send shockwaves through the legal system.

Annotated by: Andrew Reisman

Suzanna Sherry, Article, *Our Kardashian Court (and How to Fix it)*, 106 IOWA L. REV. 181 (2020).

Public confidence in the Supreme Court has become increasingly low as the Court Justices have become more celebrity-like in nature and the way to fix that is not by using others' suggestions like setting term limits or requiring a supermajority for confirmation because that would not address the issues of celebrity incentivization; instead the author would require the Court to write one opinion with no attribution, no concurrences, and no dissents. Two decades ago, Justices worked in obscurity; today, Justices sell out stadiums for interviews, appear on mainstream television, make public speeches, and go on book tours. Justices chasing fame incentivizes the maintenance and enhancement of status as an individual of a politicized Supreme Court and disincentives the ability to collaborate and cooperate with one another, creating confusing written opinions for lower courts. The author suggests that Congress enact a law that dictates the Court must issue one per curium opinion with no attributions, concurrences, or dissents. This, the author suggests, would encourage majority opinions and force the Court to be an institution, not a group of individual actors looking to reinforce their fan base's support or their institutional loyalties. In looking at potential objections, the author asserts: (1) getting rid of dissents and concurrences is not a violation of freedom of speech because the Justices are acting within their official duties, so their speech may be limited; and (2) that this proposal is within the Court's limited jurisprudence on how they may decide cases and that Congress enacting such a law is within its power under the Necessary and Proper Clause. Ultimately, the author recognizes the proposed solution to the problem of celebrity Justices guarantees nothing and poses real risks; but the author asserts that this is the best solution to repair the public trust in the Court because it will temper the ability of Justices' to play to their polarized fan bases with anonymity and so restore the constitutional function of the Court.

Annotated by: Marie Simpson

Editors, Dedication, *Honoring the Life and Legacy of Justice Ruth Bader* Ginsburg, 40 COLUM. J. GENDER & L. i (2020).

The editors pay tribute to late Justice Ruth Bader Ginsburg, by highlighting her educational background, her inspirations, and her time as a Supreme Court Justice. Specifically, the authors point out that Ginsburg's anti-discrimination work was partially inspired by her time in Sweden where she encountered an American woman who traveled to Sweden for an abortion, and a newspaper article that questioned why women should work two jobs while men only had to work one. At her time with the ACLU, the Justice strived to move the Court toward gender equality with her fierce advocacy in *Frontiero v. Richardson*. She argued that a female Air Force Lieutenant's spouse should be given access to the same benefits as her counterparts. All her years advocating to stop gender discrimination came a full circle when Ginsburg wrote the majority opinion in *United States v. Virginia*, striking Virginia Military Institute's discriminatory policy against admitting women. The authors remind us to embody Ginsburg's indomitable spirit during these times of uncertainty.

Annotated by: Laura Song

Andrew K. Jennings & Athul K. Acharya, Note, *The Supreme Court and the 117th Congress*, 11 CALIF. L. REV. ONLINE 407 (2020).

Following Justice Ruth Bader Ginsberg's passing, Senate Republicans have promised to fill the vacancy on the Supreme Court, either prior to the 2020 presidential election or in the post-election lame-duck period; such an act would swing the Court strongly to the right, with a 6-3 conservative ideological balance. The authors suggest that if this happens, and Democrats then come to have unified control of the government following the election, the 117th Congress will have four simple and hypothetical options to restore ideological balance to the Court. These four possible options are: (1) adding seats to the Court; (2) limiting the Court's discretion, specifically by increasing how many justices are needed to grand certiorari from the current "Rule of Four" requirement; (3) restricting the Court's jurisdiction, or preventing the Court from hearing cases with high political or ideological value; or (4) instead of restricting the Court's jurisdiction, alternatively re-routing excluded cases to a more trusted venue, as Congress has done in the past with patent cases. If this hypothetical Congress mistrusts the Justices, but not the institution of the Court itself, the authors suggest employing either of the first two options. However, if this hypothetical Congress mistrusts the institution of the Court itself, the authors suggest employing either options (3) or (4). The authors express no normative or pragmatic views on whether the 117th Congress should take any of the above actions, but in the event the late Justice Ginsberg's seat is filled, the authors explain how the 117th Congress will have ample options to carry out an effective response.

Annotated by: Taylor Tesher

Gillian E. Metzger, Article, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353 (2020).

As political polarization has resulted in increasingly fraught debates over many political institutions the Supreme Court has not been immune from these battles, and questions about the Court's legitimacy, and future, are more frequently being raised from all sides. The author raises questions concerning how we determine the legitimacy of the Court and its decisions, and, importantly, should that affect how the Court operates? The author focuses their analysis on Richard Fallon's book *Law and Legitimacy in the Supreme Court* and Fallon's theory of sociological legitimacy: broad public acceptance of the authority of the Constitution and of the Court, which undergirds and enables constitutional adjudication, with the author's assessment being that Fallon's analysis leaves us in an uncertain position regarding how, or whether, the Court itself should respond to these considerations. The author discusses Fallon's three premises of legitimacy: sociological legitimacy, moral legitimacy, and legal legitimacy, before agreeing with Fallon that while all three concepts are interrelated and interdependent, sociological legitimacy is the most distinct because it is more objective rather than normative in nature. The author examines survey data and political science scholarship to determine the extent to which the Court's decisions may call public acceptance of the Court into question. Metzger posits that because in an era of partisan and ideological conflicts it is incumbent on the Court to develop a proper accounting of when and how they consider public confidence, because this may be its best defense against attacks on its judicial candor. Thus, the author concludes that the Court must develop new ways of explaining their reasoning, particularly when they take public confidence into account in their judicial decision-making, and convince the public that they are acting with legal legitimacy in mind, not merely as "politicians in robes."

Annotated by: Alexander Toke

V. IMMIGRATION

Geoffrey Heeren, Article, *Distancing Refugees*, 97 DENV. L. REV. 761 (2020).

In the 1980's, the international community largely warehoused refugees in terrible conditions in the least developed countries. Ultimately, refugees rejected this warehousing framework and began traveling to more developed countries to seek asylum. The aftermath is the phenomenon that is refugee distancing. Developed countries began to evaluate asylum seekers' cases by placing them in isolation and erecting procedural barriers, such as the Migrant Protection Protocol (MPP) in the United States. As a result, these policies have contributed to one of the most significant failures of the modern era: millions of displaced refugees remain in refugee camps or other poor conditions. As a result, the struggle over programs like MPP can only be modestly adjusted around humanitarian catastrophe. Here, the author proposes that a transnational legal process may work to counteract refugee distancing over the long term. A transnational legal process would include governmental officials, courts and international institutions working to maintain the international norms of asylum and nonrefoulment. Outspoken constituencies in favor of asylum, such as faith groups, immigrant rights advocates, internationalists, and perhaps even business interests must work to maintain a transnational legal process geared towards reserving the hospitability of asylum in order to reverse the effects of refugee distancing.

Annotated by: Rajan Kambo

Medha D. Makhlouf, Jasmine Sandhu*, Immigrants and Interdependence: How the Covid-19 Pandemic Exposes the Folly of the New Public Charge Rule,* 115. NW U. L. REV. ONLINE 146 (Oct. 14, 2020).

The Public Law charge is an immigration law that restricts the admission of certain noncitizens based on the likelihood that they will become dependent on government assistance. Historically, while the public law charge policy has been part of immigration law since 1999, its loose interpretation led the government to rarely deny admission for noncitizens on public law grounds. However, the new rule passed in 2019 not only redefines public charge as an "alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36 month period, but it also expanded the types of public benefits to include enrollment in Medicaid, Food Stamp programs and subsidized housing programs, to be considered when conducting a public charge analysis of an applicant. The authors argue that the new interpretation of the public charge statute poses a threat to the lives of noncitizens and their willingness to enroll in government assistance programs. Furthermore, the chilling effects of this policy change has been magnified by the current Covid-19 Pandemic, as noncitizens, who are already vulnerable to risk of exposure to the virus, are declining to enroll in governmental programs which would better equip them to practice social distancing and decrease their chances of contracting the corona-virus. The authors thus are arguing that it is clear that the new interpretation of the public law charge statute cannot stand, for its effects cause more harm than good as made increasingly obvious by the Covid-19 pandemic. Soon after the passing of the new rule, U.S. Citizenship and Immigration Services, a subagency of DHS issued an alert, modifying the public charge process in order to encourage noncitizens to seek treatment if they were experiencing Covid-19 related symptoms, however it was not codified. UCIS's modification further evidence that this new rule is deeply flawed for the chilling effects that flow is detrimental not only to noncitizens but citizens as well.

Annotated by: Raquel A. Levy

Carrie L. Rosenbaum, Article, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797 (2020).

In this article, it will directly take on the question of whether rule of law can facilitate challenging the racializing and subordinating function of immigration plenary power. Immigration plenary power has been studied extensively but this article considers it through the lens of settler colonialism along with a theory of rule of law to elaborate in how it undermines rights. The article also explores that rule of law has been predetermined by the history of the settler colonial project. Settler colonialism is now experienced by immigrants in the U.S. who are subject to American settler colonial immigration laws that do not see them in similar ways to the way former slaves were not formally granted full membership rights in society. The article further argues that the plenary power is functioning as a tool that provided a reason and rationale to limit the rights of people of color and that that rule of law could potentially be strengthened by formal legal equality and a remaining of constitutional norms; but the article does note that formal equality does not mean actual equality will happen. The article concludes that rule of law cannot dismantle the disempowerment of people of color due to its strong colonial infrastructure and that the answer may mean that democracy must be decolonized.

Annotated by: Fatima C. Ouedraogo