

**ANNUAL
REPORT**

2014-
2015



**NEW YORK UNIVERSITY
JOURNAL OF LEGISLATION
AND PUBLIC POLICY**

NEW YORK UNIVERSITY

JOURNAL OF LEGISLATION AND PUBLIC POLICY

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Dear Friend,

It is with great pleasure that I present the *Journal of Legislation and Public Policy* Annual Report.

Legislation has had another fantastic year. We expanded our online companion, *Quorum*; we held a successful full-day symposium; we grew our Legislation Competition; and we continued publishing four issues in Volume 17, securing top-notch scholarship from academics, practitioners, and students.

I am particularly proud of the development of *Quorum*. This year was the second for our online publication, which, under the leadership of Senior Quorum Editor Sean Petterson and Managing Editor Kurt Gosselin, published eleven pieces during the tenure of the 2014–15 Editorial Board. This included the introduction of *Quorum*'s comment program, which expanded student publication opportunities.

This year's Legislation Competition, a partnership between the Journal and the N.Y.U. chapter of the American Constitution Society, saw a 25% increase in student interest, with approximately 50 students participating. For the second year in a row, the winner of the competition will be published on *Quorum*.

In the fall, Senior Symposium Editor Edward Rooker and Symposium Committee Co-Chair William Piner oversaw our collaboration with the Brennan Center for Justice and the American Bar Association, producing a full-day symposium, "Courts, Campaigns, and Corruption: Judicial Recusal Five Years after *Caperton*." Among our panelists were five current and former state court judges, including three chief judges and justices of state high courts. Scholarship from the symposium will be published in Volume 18.

Legislation continues to partner with groups throughout our institution. Next fall, *Legislation* will be partnering with the Arthur Garfield Hays Civil Liberties Program to put on a half-day symposium, "It Is So Ordered?: Social Change and the Campaign for Marriage Equality," which will also honor former N.Y.U. School of Law Professor and gay rights advocate Thomas Stoddard, a founder of *Legislation* and in whose honor the Hays Program has a Fellowship.

As *Legislation*'s operations expand and improve, the N.Y.U. student body takes note: 65% of participating 1Ls applied to *Legislation* last summer, ultimately yielding one of the most accomplished, productive, and dedicated classes of Staff Editors we have had. This allowed us to expand next year's Executive Board by introducing the position of Senior Executive Editor, who will work directly under the Managing Editors and provide the additional high-level editorial capacity our growth has required.

It has been a pleasure and an honor to lead this publication. I am confident that the incoming Board will continue to improve our publication, and I look forward to reading next year's Report.

On behalf of the Executive Board of 2014–15,

Alessandra N. Baniel-Stark
Editor-in-Chief
New York City
June 2015

Governance & Membership

As in past years, a thirteen-member Executive Board led *Legislation* in the 2014–15 Academic Year. The remaining third-year students assisted as Articles Editors, Notes Editors, and *Quorum* Editors. Articles Editors assisted in editing and review of articles for the print publication, Notes Editors participated in our Notes program to work with journal members as they developed their individual student writing, and *Quorum* Editors assisted the Senior *Quorum* Editor **Sean Petterson** and Managing Editor **Kurt Gosselin** in editing pieces published in *Legislation*'s online supplement.

Forty-eight second-year students joined *Legislation* as Staff Editors in August 2014 after completing NYU Law's Writing Competition and Transfer Writing Competition over the summer.

The 2014 journal admission cycle was a highly successful one. Managing Editor **Kurt Gosselin** served on the inter-journal Writing Competition Committee, and it was his idea—the regulation of Internet gambling—that was ultimately selected as the topic of the Writing Competition. He provided many of the sources for the 100-page prompt, ensuring the relevance of submissions to this Journal's scope. Nearly sixty-five percent of N.Y.U. 1Ls who applied for journal membership applied to *Legislation*, and eighty-seven percent of those who joined ranked *Legislation* as one of their top three choices.

As part of *Legislation*'s ongoing reflection and improvement process, the thirteen-member Executive Board considered and recommended to the membership a series of amendments to the *Legislation*'s bylaws. Most notably, these amendments created a new position for the 2015–16 Executive Board, increasing the size of the Executive Board from 13 to 14 members.

January Bylaws Amendments

On January 22, 2015 at its scheduled Board Meeting, the *Legislation* Board voted unanimously to approve the bylaws amendments identified below. On January 26, 2015, the full membership of *Legislation* approved the bylaw amendments.

There are three distinct changes this approved bylaw amendment addressed. First, the bylaws changed the name of the Managing Editor–Projects to the Managing Editor–Development. The position remains identical in terms of duties and responsibilities, but the Board felt that the change in title more accurately reflected the role of this position plays, with a focus not only on the many non-printed book projects *Legislation* undertakes—the Legislation Competition, social media, budget management, the annual write-on competition, *Quorum*, and various other activities—but also a focus on the position's involvement in development of journal members from organizing and supervising committee work to pushing for the review and selection of student written content.

Second, the bylaws were changed to reflect the newly established electronic-only C&S system and more accurately describe the actual duties of various board positions in relation to C&S. In addition to the Staff Manual, the Bylaws are the only other place where Journal members and members of the law school community can learn about the delineation of roles and division of labor on *Legislation*. The Board felt

that it would be appropriate to ensure that these documents better reflect *Legislation's* day-to-day operations, as refined by experimentation and experience.

Third, as permitted by the bylaws, an additional Board Position was added to the *Legislation* Executive Board for 2015–16. The position—Senior Executive Editor—will play a critical role in improving the efficiency of the editorial process on the back-end. The SEE will be responsible for performing third line duties—a role that requires a close reading of all the pieces with a particular emphasis on perfecting below-the-line content and blue-booking. The SEE will perform these duties for both print and online content, a role that is currently performed by the two managing editors.

In turn, the managing editors will perform fourth line duties—a more comprehensive review of the pieces both above and below the line. The Managing Editor–Production will be responsible for fourth lines of all print material, and the Managing Editor–Development will be responsible for fourth lines of all *Quorum* material. Material will then be submitted to the Editor-in-Chief for “macrotizing”—formatting and preparing pieces for publication—at which time the Editor-in-Chief will also perform a final review of the piece for errors. This contrasts with the current system, in which the managing editors perform third-lines and the Editor-in-Chief performs both fourth-line and macrotizing duties. The Board believes that this change will result in greater efficiency of process and increased capacity for rapid publication.

Non-Production Standing Committees

Legislation continued its practice of requiring participation of all staff editors on non-production standing committees. The committees exist to support the substantive work of *Legislation* and provide staff editors with opportunities to get involved beyond traditional production assignments. Committees serve two primary purposes: (1) idea generation and (2) idea implementation. Thus, committees perform both an advisory and administrative function. With preferences in mind, each staff editor was assigned to one of the following four committees in 2014–15:

- **Content Committee** – Tasked with reviewing content submitted for publication consideration over the course of the academic year.
 - Co-Chair: **Vivake Prasad**, Senior Articles Editor
 - Co-Chair: **Adam W. Axler**, *Quorum* Editor
- **Development Committee** – Tasked with a wide variety of non-production journal operations, including but not limited to *Quorum*, social media, alumni relations, and the enrichment of *Legislation* members’ law school experience.
 - Co-Chair: **Kurt M. Gosselin**, Managing Editor
 - Co-Chair: **Hale L. Jacob**, Notes Editor
- **Social Committee** – Tasked with planning Journal social events and release parties, and fostering camaraderie among journal members.
 - Co-Chair: **Katharine M. Deabler**, Executive Editor
 - Co-Chair: **Erick S. Rabin**, Notes Editor
- **Symposium Committee** – Tasked with the execution of the *Legislation's* 2014 Symposium and the preparation of the 2015 Symposium Application.
 - Co-Chair: **Edward Rooker**, Senior Symposium Editor
 - Co-Chair: **William A. Piner**, Articles Editor

Print Publications

This year, *Legislation* again published four full issues. Of these books, one presented the fruits of the Fall Alumni Lecture hosted in 2014–2015. In all, *Legislation* published fourteen academic articles by scholars, practitioners, and judges, and eight notes by current or recently graduated members of the editorial staff. Below, we provide synopses of the issues and the content contained therein.

Volume 17, Issue 3

Legislation's Volume 17, Issue 3 opened with a presentation of remarks from “The Future of Voting Rights,” an event cohosted by the Journal and the New York University School of Law Office of Development and Alumni Relations. The conference focused on the potential ramifications of the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), striking down parts of the Voting Rights Act as unconstitutional. Speakers included Adjunct **Professor Robert Bauer** and **Benjamin L. Ginsberg**, Co-Chairs of the Presidential Commission on Election Administration, discussing the issue of voter lines as an indicator of election administration quality; **Julie Fernandes**, senior policy analyst of the Open Society Foundation, remarking on the losses resulting from the decision, perspectives on what a new voting rights act could look like, and potential challenges involved with finding a way to fill the gap after *Shelby County*; **Dale Ho**, Director of the ACLU Voting Rights Project, examining what voting litigation under Section 5 looked like before *Shelby County* and what it would look like without Section 5 moving forward; **Professor Samuel Issacharoff**, outlining three crises in our voting systems and the law of democracy; **Professor Spencer A. Overton, George Washington University School of Law**, discussing the possibility of preventing racial discrimination in voting while at the same time improving election administration in the states; and **Myrna Perez**, Deputy Director of the Brennan Center for Justice's Democracy Program and Adjunct Professor of Clinical Law, discussing the legislative history leading up to the *Shelby County* decision and notable trends emerging in the aftermath.

Issue 17.3 also contained two articles:

- *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*
 - By **Dale E. Ho**, Director, ACLU Voting Rights Project
 - This Article examines the use of Section 2 of the Voting Rights Act in the aftermath of the effective elimination of Section 5 by the Court in *Shelby County v. Holder*. Ho attempts to sketch a picture of what Section 2 vote denial litigation will look like after *Shelby County* by answering two closely related questions: (1) How will Section 2 litigation be different for litigants, as a practical matter, from the Section 5 preclearance regime in the context of vote denial?; and (2) How will the substantive standard of vote denial violations under Section 2 differ from the retrogression standard under Section 5? The Article argues that with regard to the first question, there are clear differences in the mechanics of Section 2 litigation that will make it harder for the victims of discriminatory vote denial practices to vindicate their rights. To answer the second question, the Article makes a preliminary argument that the courts may require Section 2 plaintiffs to establish additional factors tending to show that the disparate impact of a challenged vote denial

practice is not merely a statistical accident. In order to meet this requirement, plaintiffs may have to show that the disparate impact is intimately bound in a larger context of racialized politics or racial discrimination within the subject jurisdiction, which inhibits the ability of minority voters to participate equally within the process.

- *The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship*
 - By **Alina Ng Boyte**, Professor of Law, Mississippi College School of Law
 - This Article explores the concept of deemed authorship as a legal fiction in copyright law and describes how this fiction both obscures fundamental notions about authorship and creativity and complicates copyright jurisprudence, thereby preventing consideration of the proper legal questions about creativity and its impact on the progress of science. Boyte argues that the institutionalization of this legal fiction separates an author from the defining attributes of personhood and contradicts our basic understanding about human creativity. She suggests that this and other legal fictions that contradict our experiences of reality must be used with caution so that legal rules that are more consistent with institutional aspirations, individual and communal expectations, and the rule of law can develop.

Issue 17.3 also contained the following student note:

- *Lapides v. Board of Regents of the University of Georgia, State Sovereign Immunity, and the Proper Scope of Waiver-By-Removal*
 - By **Peter R. Dubrowski**, J.D. 2014
 - This Note examines the case of *Lapides v. Board of Regents of the University of Georgia*, where the Supreme Court held that when a state actor voluntarily removes a case from state to federal court, that action waives the state's sovereign immunity under the Eleventh Amendment to the United States Constitution. Dubrowski explores the history of the amendment, the reasoning in *Lapides*, and the arguments made by Courts of Appeals in arguing that only a blanket waiver-by-removal rule effectively furthers the Supreme Court's voluntary invocation jurisprudence, and protects the average citizen from the asymmetric advantages provided to states who should be held to the same standards as the private sector.

Issue 17.4

Volume 17, Issue 4 was an unthemed issue that featured five full-length scholarly articles and two student notes on an array of timely legal topics. Articles printed in this issue included:

- *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*
 - By **Gabriel Arkles**, J.D. 2004, Professor of Legal Skills, Northeastern University School of Law
 - This Article first provides background on the Prison Rape Elimination Act and on the constitutional and statutory standards that govern most claims related to sexual abuse in detention. It describes and analyzes the key ways in which PREA has failed prisoners, and advances proposals for preferable judicial approaches to PREA, including using PREA to inform judicial understandings of "evolving standards of decency" under the

Eighth Amendment. The Article also examines the implications of this analysis for larger questions about law reform and social justice.

- *Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Right Violations*
 - By **Jeffrey R. Boles**, Assistant Professor, Department of Legal Studies, Fox School of Business at Temple University
 - This Article argues that despite the benefits of illicit enrichment for thwarting corruption, this offense violates fundamental human rights of the accused and therefore must be replaced by alternate enforcement mechanisms. It sets forth a multifaceted, in-depth examination of the offense of unjust enrichment, uses a human rights-oriented approach to argue that the offense violates the fundamental rights of the accused, and discusses alternative measures that combat the underlying issue of unexplainable wealth of public officials while also respecting the rights of the accused.
- *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*
 - By **Kati L. Griffith**, J.D. 2004, Assistant Professor of Labor and Employment Law, Industrial and Labor Relations School, Cornell University
 - This Article employs an empirically grounded review of fifteen years of legislative history to analyze the federal-state conflict of laws that can occur when an unauthorized immigrant who is without rights under a federal legal scheme is simultaneously afforded labor rights under a subfederal regime. This review illustrates that denial of workplace protections to unauthorized workers runs contrary to immigration law purposes. In advancing this conclusion, this Article develops a more scientifically grounded forensic approach to legislative history, addressing some of the most important critiques of this tool and reviving it as a more reliable interpretive method in law and policy analyses.
- *Sovereignty, Citizenship, and Public Health in the United States*
 - By **Polly J. Price**, Professor of Law, Emory University
 - Sovereign boundaries, state borders, and distinctions between citizens and non-citizens undermine public health in the United States in a number of ways. Our system of federalism and a fragmented public health infrastructure mean that the cost of health control measures falls on state and local governments, with uneven effectiveness and greatly disproportionate impact in some communities. The problem is thus systemic: the fragmented structure of public health agencies in the United States can prevent an effective response to even wholly local epidemics. Nonetheless, because immigration laws affect public health in many complicated ways, policymakers can make progress by addressing the externalities of public health problems through creative approaches to federal law, along with providing the resources needed to support these changes.
- *Enabling Resistance: How Courts Facilitate Departures From the Law, and Why This May Not Be a Bad Thing*
 - By **Adam Shinar**, Assistant Professor, Radzyner School of Law, Interdisciplinary Center, Herzliya, Israel
 - The conventional view of constitutional adjudication depicts courts as institutions entrusted with safeguarding the rule of law. This view, however, is at odds with the reality of constitutional doctrine, in which courts in fact incentivize some departures from

the law. This Article argues that alongside their familiar role as law enforcers, courts design, maintain, and legitimize an incentive structure that enables public officials to resist the law. Notwithstanding important reservations, I argue that considerations of efficiency, democratic experimentation, justice, and—paradoxically—judicial legitimacy lend qualified support to courts enabling such departures from the law. By shifting attention from judges to the officials who interpret and implement constitutional law, this Article aims to contribute to the conversation about the consequences of constitutional doctrine for the work of public officials.

Issue 17.4 also contained the following student notes:

- *Reconsidering the Traditional Analysis: Should Buckman Alone Support Preemption of Fraud-on-the-FDA Exceptions to Tort Immunity?*
 - By **Joshua D. Lee**, J.D. 2014
 - This Note addresses whether *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001)—by preempting state law fraud-on-the-FDA claims—also preempted broader categories of traditional state law tort claims when plaintiffs sought to prove these claims using evidence of fraud on the FDA. In 2008, the Supreme Court split 4-4 on this question, thereby delaying meaningful resolution of the issue. In examining this question, the author also considers whether it may be appropriate for the courts to consider broadening the traditional preemption analysis, especially in cases in which state interests are intertwined with the preemption question.
- *Legislating Judicial Review: An Infringement on Separation of Powers*
 - By **Holly Martin**, J.D. 2014
 - This Note analyzes the separation of powers between the judicial and legislative branches through the lens of a Louisiana constitutional amendment. Passed by the Louisiana legislature and approved by a majority of citizens, the amendment says that the state courts must review all gun-related laws under a strict scrutiny standard. The consequences of this amendment not only threaten public safety in Louisiana, but also could impact the safety of citizens nationwide. This Note ultimately concludes that it is a violation of the principle of separation of powers for the legislature to instruct the judiciary as to what standard of review it ought to apply to any given law.

Issue 18.1

Issue 18.1 addresses a variety of timely issues and included the following articles:

- *House of Shards: How a Jurisdictional Quagmire in Congress Compromises Homeland Security*
 - By **Joan V. O'Hara**, General Counsel, House Committee on Homeland Security, **James A. Murphy, II**, **Jacobus A. Vreeburg**, **Steven Giaier**, **Derek Maurer**, & **Michael Geffroy**, Congressional staffers, House Committee on Homeland Security.
 - This article explains the problem of fragmented congressional oversight that hamstringing the Department of Homeland Security and provides suggestions for reforming its committee oversight structure. The authors argue that the House Committee on Homeland Security lacks control over homeland-security-related policy areas because of turf wars with other congressional committees. These competing committees claim

subject-matter jurisdiction over issues that should fall squarely within the Department’s purview, and this contestation threatens the Department’s ability to use its expertise to address threats to domestic security. The authors propose changes to the Rules of the House of Representatives that would ensure that the Department receives legislative referrals for projects that are related to its core mission of providing homeland security.

- *The Rationalization of Policy: On the Relation Between Democracy and the Rule of Law*
 - By **Ofer Raban**, Associate Professor of Law, University of Oregon
 - This Article examines the widely held presupposition that democracy and the rule of law stand together as the dual pillars of good government. By exploring the theoretical distinctiveness of these concepts and showing how each can operate independently of the other, Raban argues their perceived interdependence is not rooted in functional synergy. Rather, democracy and the rule of law complement each other as rationalizations of political power.
- *RLUPA: Re-Aligning Burdens of Proof, Clarifying Freedoms, and Re-Defining Responsibilities*
 - By **George P. Smith II**, Professor of Law, The Catholic University of America, & **Philip M. Donoho**, J.D. 2015, Georgetown University School of Law
 - Smith and Donoho argue that the Religious Land Use and Institutionalized Person Act (RLUIPA) is an example of “coercive” federalism that is more troubling than the dual and cooperative forms of federalism that preceded it. Because RLUIPA establishes an ex ante requirement of a compelling governmental interest to limit land use by religious entities, and because it is enforced ex post through strict judicial scrutiny, the Act establishes a new civil right for religious institutions that undermines state and local governments’ ability to regulate land use for the benefit of the community.

Issue 18.1 also contained the following student notes:

- *“Abusive” Acts and Practices: Dodd-Frank’s Behaviorally Informed Authority Over Consumer Credit Markets and Its Application to Teaser Rates*
 - By **Patrick Corrigan**, J.D. 2015
 - In the aftermath of the recent financial crisis, Congress granted the Consumer Financial Protection Bureau (CFPB) an unprecedented legal authority to protect distressed consumers. The touchstone of this new authority is the term “abusive.” This Note posits that the statutory language of the abusive authority rejects a traditional neoclassical economic logic. A central inquiry of the paper is how to map the sophisticated insights of behavioral law and economics into a legal standard that operationalizes the statutory text of the abusive authority and that is a meaningful, non-arbitrary legal inquiry.
- *Accessing Foreign Audit Work Papers and Conflicting Non-U.S. Laws Defense: A Recent Case Study*
 - By **Xiao Luo**, J.D. 2014
 - This Note traces the legislative history of the SEC’s ever-expanding power to access foreign audit work papers, with a focus on Section 106(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and maps the development of the violation of non-U.S. laws defense that accounting firms frequently assert to counter SEC document requests. Drawing upon federal courts’ long-time jurisprudence in handling extraterritorial discovery disputes in civil litigations, this Note proposes an alternative analytical framework that embraces a “good faith” defense to balance the SEC’s need to

access foreign audit work papers with a foreign country's authority to regulate its accounting profession.

Issue 18.2

Issue 18.2 will be released in late summer 2015 and will include the following articles:

- *NFIB v. Sebelius and the Right to Health Care: Government's Obligation to Provide for the Health, Safety and Welfare of Its Citizens*
 - By **Jack M. Beermann**, Professor, Boston University School of Law
 - This Article analyzes the Supreme Court's decision in *Sebelius* in light of the fact that there is, under *DeShaney*, no positive constitutional right that government provide for basic needs such as healthcare. He argues that the Court's holding that the proposed Medicaid expansion was coercive is based on a belief by the Court that there might in fact be a positive obligation to provide healthcare.
- *As the PSLRA Turns Twenty: The Status of Recklessness as a State of Mind in 10b Cases*
 - By **Ann M. Olazábal & Patricia S. Abril**, Professors, University of Miami School of Business Administration
 - This Article discusses the role of recklessness in cases of securities fraud and argues the concept is poor because of inherent precedential differences between criminal recklessness and civil recklessness, resulting in the absurd effect that a criminal trial and a civil trial relying on the same facts and the same underlying statute might reach different outcomes.
- *Birth Certificates for Children with Same-sex Parents: A Reflection of Biology Or Something More?*
 - By **Paula Gerber & Phoebe Irving Lindner**, Faculty of Law, Monash University
 - This Article analyzes domestic and international laws pertaining to birth certificates and asks where same-sex parents have a right to a birth certificate which accurately reflects their familial structure. It ends by providing best practices that might be adopted to ensure that birth certificates are reformed to take into account the new social reality of same-sex parents.

The issue will also include three student notes:

- *Land Costs as Non-Eligible Basis: Arbitrary Restrictions on State Policymaking Authority in the Low Income Housing Tax Credit Program*
 - By **Michael David Williams**, J.D. 2015
 - This Note discusses some statutory features of the low income housing tax credit program which prevent state policymakers from making effective policy decisions with respect to the location of affordable housing.
- *Is Change Always Good? The Adaptability of Social Norms and Incentives to Innovate*
 - By **Jennifer Basch**, J.D. 2014
 - This Note examines intellectual property right law and asks whether the classical view of intellectual property is useful in fields predominated by social norms. She cites as examples stand-up comedy and open-source software.
- *Indeterminate and Unrecognized: Exploring the Relationship Between the Morsi Ouster, Post-Coup Sanctions, and the Recognition Power*
 - By **Daniel N. Swartz**, J.D. 2015

- This Note addresses the Obama Administration response to the coup of a democratically-elected head of state in Egypt. The author argues that Congress's statutory imposition of requiring sanctions impermissibly infringes on the President's right to make foreign policy.

The Production Process

Legislation's production process has seen substantial changes this semester under the leadership of Managing Editor **Michael Williams**. Working to extend the pilot program from the previous year, *Legislation* implemented a fully electronic citation and substantiation check for every article. The production process was further streamlined to avoid duplicative revisions of articles and to provide staff editors with greater flexibility in managing their assignment schedules while ensuring close contact between executive editors and their staff editor teams.

In an effort to further improve the production process and eliminate potential bottlenecks on the back-end, *Legislation* passed an amendment to the bylaws to allow for a new position on the executive board. This new position, the Senior Executive Editor, will provide additional assistance in the editing process and allow for an improved division of labor between the Managing Editors and the Editor-in-Chief for both print and online content.

Quorum: Legislation's Online Companion

In keeping with *Legislation's* mission to provide timely and practical scholarship to inform public debate on important issues, *Quorum* aims to publish shorter articles than the print journal at a correspondingly accelerated production schedule. With a production schedule of six weeks and lower word counts, *Quorum* provides a valuable outlet for faculty, practitioners, and students to address present-day legal controversies as they unfold, while maintaining the rigor and substance of traditional legal scholarship.

Quorum is indexed on LexisNexis, and will soon be indexed on WestLaw as well. *Quorum* has been cited a total of six times, including citations in the *Seton Hall Law Review* and the Weinstein, Korn & Miller CPLR Manual.

Quorum is published on an annual calendar. In December 2014, its second full volume was completed. On the 2014–15 Executive Board, Senior *Quorum* Editor **Sean Petterson** supervised content generation and production, working in conjunction with Managing Editor **Kurt Gosselin**, six 3L *Quorum* editors, and a rotating cadre of staff editors.

In its 136-page 2014 volume, *Quorum* published 11 pieces of scholarship from a diverse array of contributors, and the 2015 volume has begun strong with three works thus far:

Quorum Volume 2014

- Comment, *Irreparable Harm to Whom? Parsing Utah's Odd Argument*
 - By **Patrick Andriola**, J.D./M.B.A. 2015
 - <http://www.nyujlpp.org/wp-content/uploads/2014/03/Andriola-Quorum-2014.pdf>
 - This Comment discusses the arguments made in *Kitchen v. Herbert* concerning same-sex marriage. In the recent wave of similar challenges to same-sex marriage prohibitions taking place in many states around the country, and due to the subsequent stay requests that will surely follow, the author hopes to provide guidance to both judges and the legal community as to how to approach “dignitary loss” arguments made by states.
- *Pension Forfeiture and Prosecutorial Policy-Making*,
 - By **Gary Stein**, J.D. 1986, Partner, Schulte Roth & Zabel LLP
 - <http://www.nyujlpp.org/wp-content/uploads/2014/03/Stein-Quorum-2014.pdf>
 - This Article analyzes the jurisprudence of the Southern District of New York in the area of pension forfeiture policies in light of the long-established doctrine that the power to prescribe the punishments for federal crimes belongs exclusively to Congress. Tracing the development of pension forfeiture legislation at the federal and New York levels, the article also argues that the SDNY's approach conflicts with congressional intent and with principles of federalism. The article concludes that the SDNY's new pension forfeiture policies exceed the limits of permissible policy-making by federal prosecutors.
- *Applying “Corrective Measures” to the ADA: Looking Beyond the Glasses Exception*
 - By **Eric C. Yarnell**, Fellow, U.S. District Court for the Northern District of Illinois
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Yarnell-2014-nyujlpp-quorum-35.pdf>
 - This Article argues that the Americans with Disability Act's sole exception for corrective lenses is inappropriate as currently written and proposes that the isolated exception be

- replaced with a general exception framework and test. Specifically, when determining whether an impairment substantially limits a major life activity, mitigating measures should be taken into account for any measure (1) that provides assured, total, and relatively permanent control of all symptoms; (2) that is reasonably inexpensive to use; and (3) whose use would not be viewed as socially stigmatizing from the perspective of the reasonable observer.
- *Should Counsel for a Non-Party Deponent be a “Potted Plant”?*
 - By **David L. Ferstendig**, J.D. 1981, Adjunct Professor, N.Y.U. School of Law, & **Oscar G. Chase**, Professor, N.Y.U. School of Law
 - <http://www.nyujlpp.org/wp-content/uploads/2014/05/Ferstendig-Chase-2014-nyujlpp-quorum-52.pdf>
 - This article analyzes practical considerations and ethical dilemmas implicated by the ruling of the New York State Appellate Division, Fourth Department in *Thompson v. Mather*, 70 A.D.3d 1436 (4th Dep’t 2010), that counsel for a non-party may not make objections at a deposition. The article concludes that the ruling rests on an improper interpretation of New York Civil Practice Law and Rules, flies in the face of established practice, is impractical, and raises serious ethical dilemmas for counsel representing a non-party at a deposition. Published prior to the New York Court of Appeals decision in the same case, the authors urged the Court of Appeals to reject the Fourth Department ruling and hold that important protections provided by counsel to party deponents are available to counsel for non-parties. Alternatively, the authors recommend legislation be enacted to achieve that end.
 - *Racializing Abortion: Standing and the Equal Protection Challenge to Sex-Selective Abortion Statutes*
 - By **Joshua D. Lee**, J.D. 2014
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Lee-2014-nyujlpp-quorum-63.pdf>
 - This Essay examines the equal protection challenge to recently enacted state statutes prohibiting the provision of an abortion on the basis of a fetus’s sex (so-called sex-selective abortions), as well as the standing obstacle that the plaintiffs must overcome. These statutes were justified under the pretense of allegedly curbing the sex-selective practices of Asian cultures, though critics were quick to point out that bill sponsors provided scant or no evidence of sex-selective abortions actually occurring. The statutes have, according to some, had the effect of unfairly stigmatizing Asian-Americans by relying on “invidious and unfounded” stereotypes, which are memorialized in the legislative history of the statutes.
 - *Model Fairness and Advocacy for Interested Recipients (FAIR) Act: Ensuring Fair and Balanced Treatment of Americans Participating in Social Security Act Programs Through Legal Representation and Counsel*
 - By **Cerin M. Lindgrensavage**, J.D. Candidate 2016
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Lindgrensavage-2014-nyujlpp-quorum-77.pdf>
 - This white paper was selected as the winning entry for the 2014 N.Y.U. *Journal of Legislation and Public Policy* Legislation Competition, and aims to explain to advocates and provide them tools to use when talking to legislators about the attached draft bill. The FAIR Act would provide authority for state agencies that run essential programs, such as Medicaid or welfare, to negotiate with the federal government to create demonstration projects that provide people with legal counsel. Demonstration projects allow states to waive federal rules

- and test new approaches to administering Social Security Act (SSA) programs. For example, states could run Medicaid demonstration programs that automatically enroll high-need patients in managed care, or invest in chronic disease management and quality-improvement programs to reduce overall health care costs. These demonstration programs provide a budget-neutral path forward to support the creation and expansion of legal services for people in need by leveraging our existing safety net programs and investments.
- *Why We Need a Comprehensive Recording Fraud Registry*
 - By **Randall K. Johnson**, Assistant Professor, Mississippi College School of Law
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Johnson-2014-nyujlpp-quorum-88.pdf>
 - This essay argues for a modest expansion of the Nationwide Mortgage Licensing System and Registry (NMLS) in order to detect and deter more recording fraud. It does so, initially, by explaining why this online registry limits mortgage fraud. The essay later describes how the NMLS could detect or deter other crimes, such as deed fraud and lien fraud. Lastly, it deals with concerns about a Comprehensive Recording Fraud Registry.
 - Comment, *Elonis, True Threats, and the Ontology of Facebook*
 - By **Alessandra N. Baniel-Stark**, J.D./M.A. (Philosophy) Candidate Jan. 2016
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Baniel-Stark-2014-nyujlpp-quorum-99.pdf>
 - *Elonis v. United States*, argued before the Supreme Court in December, raised the question of the applicable standard for determining whether speech is a true threat. Of particular interest in *Elonis* is how the Court will interpret appellant's speech, which took place on Facebook and often took the form of quoted rap lyrics. This Comment argues that, despite changes the Internet has wrought in how speech is delivered, the appropriate standard for determining whether speech is a true threat is an objective one, as such a standard best addresses the concerns that gave rise to the true threats exception. This Comment further discusses some of the challenges courts have faced in properly conceiving of rap music and urges that a particular view of rap not be enshrined as a matter of Supreme Court jurisprudence.
 - *Living in the Shadow: Class Actions in New York After Shady Grove*
 - By **Oscar G. Chase**, Professor, N.Y.U. School of Law
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Chase-2014-nyujlpp-quorum-114.pdf>
 - In *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, the Supreme Court wrestled with conflicting state and federal rules governing class action certification in a diversity case. The Supreme Court held in *Shady Grove* that the federal rule governed and that the class action could proceed. Future claims based on statutory penalties will qualify as class actions in federal but not in New York courts. Because the typical penalty recoveries authorized by New York law are too small to support individual actions, this article argues that the resulting inequitable treatment of claimants is unfair and violates the spirit of *Erie* and its progeny. New York should repeal § 901(b) in its entirety, or should decide on a statute-by-statute basis which, if any, should remain extant.
 - *Shop 'Til You Drop: Forums and Federalism in New York's Class Action Procedure*
 - By **Max I. Raskin**, J.D. Candidate 2016
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Raskin-2014-nyujlpp-quorum-121.pdf>
 - In the wake of the Supreme Court's decision in *Shady Grove Orthopedics Associates v. Allstate Ins. Co.*, some have proposed that New York repeal § 901(b) of its class action certification statute in order to establish uniformity with the Federal Rules of Civil

Procedure's analogue, Rule 23. This article argues against repeal of § 901(b) in order to further New York's sovereign calculus of determining what is best for the state. The New York legislature made a considered determination to bar certification where statutory penalties were available—acquiescing to the ukase of the Judicial Conference of the United States undermines this determination.

- Comment: *Young v. UPS, the Pregnancy Discrimination Act, and the Future of Pregnancy Discrimination Law*
 - By **Katharine M. Deabler**, J.D. 2015
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Deabler-2014-nyujlpp-quorum-1281.pdf>
 - Women who continue to work during pregnancy need legal protections to prevent discrimination. While the Pregnancy Discrimination Act strives to protect women from adverse employment actions stemming from pregnancy discrimination, a lack of clarity in the relevant case law has undermined the statute. This comment explores *Young v. UPS*, a case that will be heard by the Supreme Court this term. *Young* presents the Court with an opportunity to clarify the statute and enable the law to better protect working women.

Quorum Volume 2015

- *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*
 - By **Merf Ehman**, Staff Attorney in the Institutions Project at Columbia Legal Services, & **Anna Reosti**, Ph.D. Candidate, Sociology, University of Washington
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Ehman-Reosti-2015-nyujlpp-quorum-1.pdf>
 - In the state of Washington, there is no connection between prior criminal convictions and unsuccessful tenancy. Therefore, criminal history should not serve as a proxy to determine future tenant dangerousness. Washington landlords should not be liable for future harm to tenants based solely upon renting to an applicant with a criminal record. Refusing to hold landlords liable in this way will increase housing opportunities for individuals with criminal records, reducing recidivism, promoting the rehabilitation of these individuals, and increasing public safety.
- *Revisiting the FISA Court Appointment Process*
 - By **Douglas E. Lindner**, J.D./M.P.A., 2015
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Lindner-2015-nyujlpp-28.pdf>
 - The Foreign Intelligence Surveillance Act (FISA) courts appointment process lacks democratic legitimacy, threatens the separation of powers, undermines the ideological balance of the judiciary, and asks too much of generalist judges. FISA judges are not full-time judges appointed by the President, but are rather part-time judges unilaterally chosen by the Chief Justice of the United States. Proceedings are classified and only the government is represented, so the only legal or technical arguments against any surveillance request are the ones judges raise themselves. Whatever the wisdom of the FISA courts' decisions, they belong in the hands of permanent, specialist judges appointed by the President and confirmed by the Senate
- *Waiver of the Privilege Against Self-Incrimination in Congressional Investigations: What Congress, Witnesses, and Lawyers Can Learn from the IRS Scandal*
 - By **Jason Kornmehl**, J.D. 2014, The George Washington University Law School
 - <http://www.nyujlpp.org/wp-content/uploads/2013/03/Kornmehl-2015-nyujlpp-quorum-48.pdf>
 - Lois Lerner, former head of the IRS Tax Exempt Organizations Division, was required to testify before Congress. Her testimony is analyzed in order to illustrate that the issue of Fifth Amendment waivers in

congressional hearings is complicated and highly fact-specific. Measures that Congress should adopt to ensure that complex questions regarding waiver do not arise in future congressional hearings are proposed, and guidance to lawyers who represent clients in congressional investigations is offered regarding how clients should invoke their right to remain silent in the context of congressional proceedings.

2014 Fall Symposium

On Friday, November 14th, 2014 the *Journal of Legislation and Public Policy*, the Brennan Center for Justice, and the American Bar Association's Center for Professional Responsibility hosted a Symposium entitled "Courts, Campaigns, and Corruption: Judicial Recusal Five Years After *Caperton*." Over 200 people attended highly successful day-long symposium primarily organized by Senior Symposium Editor **Edward Rooker** and Symposium Committee Co-Chair **William Piner**.

The 2009 Supreme Court decision in *Caperton v. A.T. Massey Coal Co.* held that a litigant's due process rights can be violated when an elected judge refuses to recuse in a case in which that judge received significant campaign support from a litigant. The majority emphasized that *Caperton* was an extreme case, urging states to adopt recusal rules more stringent than the minimum necessary to protect due process. The dissent warned that "the cure was worse than the disease," predicting a flood of recusal motions would swamp state courts following the decision.

The Symposium looked at the state of affairs five years after *Caperton*, examined the effects of *Caperton* in the courtroom, evaluated the state of judicial recusal reform, and discussed the issue of judicial partiality and recusal beyond the context of campaign spending. The Symposium consisted of three panels focusing on different areas of the *Caperton* decision and issues of bias and recusal and a lunch roundtable during which several judges discussed judicial perspectives on those issues.

The first panel, "*Caperton* and the Courts: Did the Floodgates Open?" was moderated by **Adam Liptak**, Supreme Court Correspondent for the New York Times, and included panelists **James Sample**, Professor of Law, Hofstra School of Law; **Brad Smith**, Professor of Law, Capital University Law School; and **Keith Swisher**, Associate Dean and Professor, Arizona Summit Law School, & Swisher P.C.

The second panel, "The State of Recusal Reform," was moderated by **Charles Geyh**, reporter to the ABA Commission to Evaluate the Model Code of Judicial Conduct, and included panelists **Robert Peck**, J.D. 1978, President of the Center for Constitutional Litigation; **Myles Lynk**, Chairman of ABA Standing Committee on Ethics and Professional Responsibility; and the **Honorable Toni Clarke**, Associate Judge for the Seventh Judicial Circuit, Circuit Court for Prince George's County, Maryland.

The Judicial Lunch, "A View from the Bench," was moderated by **Barbara Gillers**, J.D. 1973, Adjunct Professor of Law, New York University School of Law, and included panelists the **Honorable Jonathan Lippman**, J.D. 1968, Chief Judge of the New York Court of Appeals; the **Honorable Sue Bell Cobb**, former Chief Justice of the Alabama Supreme Court; the **Honorable Maureen O'Connor**, Chief Justice of the Ohio Supreme Court; and the **Honorable Louis Butler**, former Justice of the Wisconsin Supreme Court.

The third panel, "*Caperton*'s Next Generation: Beyond the Bank," was moderated by **Jed Shugerman**, Professor of Law, Fordham University School of Law, and included panelists **Debra Lynn Bassett**, Professor of Law, Southwestern Law School; **Gregory Parks**, Assistant Professor of Law, Wake Forest

University School of Law; **Dmitry Bam**, Associate Professor, University of Maine Law School; and **Rex Perschbacher**, Professor of Law, UC Davis School of Law.

The collected remarks from this event will be published in Volume 18, Issue 3 this summer. A video of the proceedings is available on *Legislation's* website, at <http://www.nyujlpp.org/symposia/past-symposia/fall-2014-symposium-courts-campaigns-and-corruption/>.

Upcoming Symposia

Fall 2015

In Fall 2015, *Legislation* will partner with the Arthur Garfield Hays Civil Liberties Program to host “It Is So Ordered: Social Change and the Campaign for Marriage Equality,” a symposium examining the path forward for the LGBTQIA rights movement following. The Symposium was planned in anticipation of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), which held that there is a constitutional right to marriage equality. This symposium will explore the critical social, economic, and political issues that will continue affecting the LGBTQIA community, and it will also locate the campaign for marriage equality in the broader context of other civil rights movements that have attempted to use the law to change social and economic conditions in the United States.

The event will serve in part as a timely celebration of the late Professor Thomas Stoddard’s path-marking work on behalf of the gay rights movement, and will commemorate the twenty-year anniversary of both the Arthur Garfield Hays Civil Liberties Program’s Stoddard Fellowship and the founding of the Madison Society, the precursor to *Legislation*, in which Professor Stoddard was influential. We will invite scholarly experts on important equal-rights issues beyond the question of marriage equality, as well as practitioners and scholars whose experiences with other social change movements render them uniquely situated to examine the role of the law in the LGBTQIA campaign for equal rights.

The NYU Law Legislation Competition

In Spring 2015, the *Journal of Legislation and Public Policy*, in partnership with the N.Y.U. Chapter of the American Constitution Society, hosted the second annual Legislation Competition.

The aim of the N.Y.U. Legislation Competition is to engage today's brightest young legal scholars to research and propose practical solutions to some of today's most challenging public policy problems. The competition is open to all students at N.Y.U. School of Law, including first-year students, and is particularly focused on the art of policy advocacy through academic research and legislative drafting. The co-chairs of the 2015 competition were Managing Editor **Kurt Gosselin** and ACS Competitions Chair **Scott Rosenthal**.

All participants in the Competition received a written prompt and had approximately one month to produce (1) a piece of model state legislation that addresses the problem identified in the prompt and (2) a 5–10 page academic white paper in support of the model legislation. These submissions were graded by the co-chairs for content, creativity, feasibility, form, and persuasiveness. In its second year, nearly 50 N.Y.U. Law students from all three class years registered to participate in the Competition.

The inaugural policy problem in 2014 challenged students to tackle the issue of access to legal representation and produced a number of interesting proposals. The winning proposal, authored by Cerin Lindgrensavage, J.D. Candidate 2016, and published in the 2014 volume of our online companion *Quorum*, sought to address this concern by “authoriz[ing] state agencies that administer Social Security Act programs to open negotiations with the appropriate federal agencies to create demonstration projects that provide people with legal counsel.”

The 2015 competition asked students to focus on proposals for improving governance through the use of technology and/or open data. The Competition's parameters were intentionally left broad so as to encourage maximum diversity in response, and competitors took full advantage of this flexibility.

The winning entry of the 2015 Legislation Competition, entitled *Open Access for Parents to an Education Network (OPEN)*, was written by first-year law student **Robin Burrell**, J.D. Candidate 2017. The proposal advocated for “[f]acilitating effective and equal utilization of school choice and open enrollment options with an open data policy accessible to parents across the education landscape.”

The winning entry will be published in *Quorum* over the summer. *Legislation* looks forward to watching this competition continue to grow as a centerpiece of its non-production portfolio in the years ahead.

Citation Statistics

Articles in the *Journal of Legislation and Public Policy* continue to be cited in academic journals and legal treatises. In 2014 and 2015, JLPP was cited in 168 different journal articles including ones published in the Stanford Law Review, Harvard Law Review, NYU Law Review, University of Pennsylvania Law Review, and Virginia Law Review, as well as numerous journals devoted to topics as varied as legislation and public policy, law and technology, and tax. Articles were also cited in 79 treatises and practitioner guides, a slight increase from the previous year.

Articles also appeared in judicial opinions and other court documents in 2014 and 2015 including two amicus briefs filed before the Supreme Court (*Burwell v. Hobby Lobby Stores, Inc.* and *Mellouli v. Holder*) and judicial opinions in four cases, including in the Eastern District of New York.

Awards and Achievements

Convocation Awards

Legislation was honored to bestow convocation awards upon two of our third-year members, both by vote of journal membership:

- **Patrick M. Corrigan** was awarded the *Flora S. and Jacob L. Newman Prize* for the most outstanding Note in the *Journal of Legislation and Public Policy*.
- **Alessandra N. Baniel-Stark** was awarded the *Thomas Stoddard Award* for making the greatest contribution by a third-year editor the *Journal of Legislation and Public Policy*.

Clerkships

Three current members of *Legislation* secured clerkships over the past year. Articles Editor Daniel Swartz will be clerking for Judge Jeffrey R. Howard of the First Circuit Court of Appeals in the 2015 term. Articles Editor Hannah McDermott and Editor-in-Chief Alessandra Baniel-Stark will be clerking for Judge Martha C. Daughtrey of the Sixth Circuit Court of Appeals in the 2016 term.

Additionally, at least three members of the *Legislation* 2013–14 Executive Board secured clerkships in the course of the past year: Former Editor-in-Chief Peter Dubrowski (2013–14) will be clerking for Judge Shira A. Scheindlin of the Southern District of New York in the 2015 term. Former Senior Articles Editor Joel Todoroff (2013–14) will begin a clerkship for Judge Royce C. Lamberth of the District of Columbia in May 2016. Former Senior Quorum Editor Eric Messinger (2013–14) will be clerking for Judge Mary H. Murguia of the Ninth Circuit Court of Appeals in the 2016 term.

Editor-in-Chief's Post-Graduation Plans

2014–15 Editor-in-Chief Alessandra N. Baniel-Stark will complete her joint program of study with the N.Y.U. School of Law and Department of Philosophy and receive her J.D./M.A. in January 2016. After graduation she will join Paul, Weiss, Rifkind, Wharton & Garrison LLP in their Washington, D.C. office as a litigation associate for six months; in August 2016 she will begin a clerkship in the chambers of the Honorable Martha Craig Daughtrey of the Sixth Circuit Court of Appeals.

Final Note: Greetings From Our 2015–16 Editor-in-Chief

To the Reader:

This year marks the twentieth anniversary of the Madison Society, which was the deliberate precursor to the *Journal of Legislation and Public Policy* at N.Y.U. School of Law. We hope to commemorate this occasion both by recognizing the extraordinary work of our predecessors and by carrying on this tradition of excellence with an eye toward building the Journal's legacy. Even at this early date, we have made significant progress toward realizing these goals. This fall, we will host a symposium with the Arthur Garfield Hays Civil Liberties Program that will examine the future of the LGBTQIA movement and honor the late Professor Tom Stoddard, whose contribution to the movement and influence in the formation and development of the Journal cannot be overstated. We have already filled two full issues to capacity, and are committed to developing *Quorum* as an independent platform for cutting-edge legal scholarship.

We at the Journal are excited about a number of new initiatives and improvements that we have planned for the year ahead. Beginning this fall, our Development Committee leadership will implement a targeted author outreach strategy that we have created as a means of soliciting content from prominent and up-and-coming scholars. Many of our senior editors will work in collaboration to provide an unparalleled opportunity for Journal members' academic and professional development through our newly reinvigorated Notes Program, and our Executive Board will engage in a concerted effort to leverage our editors' interests and expertise using tailored assignment and submission review processes. Finally, our current Alumni Advisor and former Editor-in-Chief Sacha Baniel-Stark will spearhead our renewed efforts to expand and strengthen our alumni network, which will help past and present Journal members capitalize on the rich and varied experiences of nearly two decades' worth of our alumni.

While we eagerly look to the future, we also recognize that the Journal's success would not have been possible without the hard work and dedication of our predecessors. It is with the utmost honor, gratitude, and enthusiasm that we take up the responsibility to lead the *Journal of Legislation of Public Policy* during the year ahead. We look forward to reporting back in a year's time on our continued success as a publication and an institution.

On behalf of the Executive Board of 2015–16,

Amanda J. Sterling
Editor-in-Chief
New York City
July 2015

Acknowledgments

It takes a village to print a Journal. *Legislation* wishes to recognize those members of the N.Y.U. Law community who make our work possible, especially:

PROFESSOR HELEN HERSHKOFF

Our Faculty Advisor, a constant source of wisdom, assistance, and institutional memory. Without you there would be no *Legislation*. Thank you.

PETER DUBROWSKI

Our Alumni Advisor, available throughout year to answer questions minor to major, to offer advice, and to support the Journal in friendship and with great good humor.

DEAN TREVOR MORRISON

Thank you for your consistent support of *Legislation* and our assortment of programs, both directly related to journal publication and in other areas of our operation.

PAUL O'GRADY and TOM SARFF

Thank you for your support of the Journals at N.Y.U. Without you we would have no institutional understanding, no snacks, and no printed issues.

THE BRENNAN CENTER FOR JUSTICE

Thank you for your partnership and assistance in the planning and execution of our 2014 Symposium. We hope to work with you again in the future.