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Articles & Authors
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Unanimity and Disagreement on the Supreme Court
Cass R. Sunstein

Cass R. Sunstein is the Robert Walmsley University Professor at Harvard University. He has authored numerous books and articles and is currently working on various projects that involve group decision making and the idea of liberty.

In this Article, Sunstein examines the patterns of unanimity and dissent in Supreme Court decisions. Specifically, Sunstein documents the Supreme Court's voting patterns over time, explains those patterns, and evaluates the benefits and costs of expressed disagreement.

Sunstein's research reveals that from 1801 until 1941, there was a strong trend of unanimous decisions, but after 1941 there were more split decisions as well as a wider array of dissenting opinions. Thus, although the Court acted as a single body in mostly unanimous agreement in its early years, after 1941 the Court acted as nine separate law offices issuing independent decisions. Sunstein attributes these voting patterns to two factors: path dependence and institutional culture. At the turn of the century, Chief Justice Marshall established a norm of consensus; in the mid-twentieth century, Chief Justice Stone eliminated that norm and encouraged Justices to dissent and write conflicting opinions. Sunstein argues that after these Chief Justices left the bench, the institutional culture and norms that they created were important in maintaining voting patterns.

Since 1941, voting patterns have remained consistent because the actual level of disagreement has remained relatively constant. Furthermore, the norms governing the expression of disagreement have also remained constant. Actual disagreement has remained constant regardless of whether the Court has a nearly even division of Democratic and Republican presidential appointees or its membership consists largely of appointees from a single party. Sunstein explains that this phenomenon may be due to the fact that some Republican presidents have made liberal or moderate choices for nominees since the 1940s. Additionally, lower court judges are sensitive to Court composition because they are unlikely to issue decisions that are overwhelmingly likely to be reversed. Thus, the Court hears issues that are difficult in light of the Court's particular composition at the time.

This modern system of expressed disagreement has both benefits and costs. Sunstein argues that the benefits fall into three categories: dissenting opinions may have an effect on future adjudication, may influence the actions of Congress, and may improve majority opinions by ensuring that certain arguments are met with plausible answers. As suggested by Chief Justice Roberts, however, division may affect the Court's credibility and legitimacy. Sunstein argues that this is merely a hypothesis; a competing hypothesis argues that the credibility of Supreme Court decisions does not turn on the extent of division within the Court but on the relationship between those decisions and whether they are consistent with the Justices' prior convictions. Additionally, he suggests that the arguments in favor of higher levels of consensus rest on fragile empirical foundations.

Recent Events

On February 26, 2015, Cornell Law Review hosted an Author Talk featuring Professor John Blume and note author David Coriell.

Professor Blume discussed his Article, co-authored with Rebecca Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, which appeared in Volume 100:1.

David Coriell discussed his article *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, which appeared in Volume 100:2.

Many thanks to Professor Blume and David Coriell for an interesting and informative discussion.

Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor
Karen M. Tani

Karen M. Tani is an Assistant Professor of Law at the University of California, Berkeley, School of Law, where she specializes in the study of U.S. legal history and social welfare law. She is the author of a forthcoming book titled *States of Dependency: Welfare, Rights, and American Governance 1935–1972*, which is scheduled to be published in 2016 by Cambridge University Press.

In this Article, Tani explores the realm of "administrative constitutionalism," the phenomenon of federal agencies elaborating the meaning of the Constitution rather than the judiciary. Specifically, Tani draws on her own historical research to analyze the development of "administrative equal protection," administrative interpretations of the Fourteenth Amendment's Equal Protection Clause.

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Tani begins her analysis by discussing the passage of the Social Security Act of 1935, which created the Social Security Board (later merged into the Department of Health, Education, and Welfare). The Act tasked the Board with administering grants-in-aid to states under three support programs: Aid to Dependent Children, Old Age Assistance, and Aid to the Blind. Any state that sought federal funds under these programs was required to submit a state plan, and if the agency determined that the plan satisfied the federal requirements, the agency would distribute the funds accordingly. Due to the administrative responsibilities of issuing grants, conducting audits, and evaluating changes to state plans, the Social Security Act required that federal administrators review state laws, policies, and administrative decisions.

Tani's research shows that from 1936 through the 1950s, agency administrators viewed their role as not only making sure that state welfare programs complied with the requirements of the federal statute but also that the programs complied with constitutional requirements. Tani further argues that federal agency lawyers developed and applied a nondeferential rationality model of equal protection to assess state welfare rules. As the 1960s civil rights movement increased political pressure on welfare programs, however, administrators recharacterized their constitutional interpretation as a statutory interpretation to avoid scrutiny.

As the agency changed its interpretation of its role in administering decisions, welfare rights advocates adopted the agency's former rationality model. In *King v. Smith*, the Supreme Court held that states are free to add eligibility requirements and set their own standards of need for welfare programs, but such restrictions cannot be arbitrary nor an unreasonable interpretation of congressional intent. Tani argues that although *King* was not decided on equal protection grounds, it vindicated the agency's former understanding of the equal protection principle.

The study of administrative constitutionalism is rapidly expanding given that agencies continue to play an important role in interpreting the Constitution. Tani furthers this research by looking at the development of administrative equal protection during the rise of a robust federal administrative state and the occurrence of important changes in theories and practices of American federalism. In addition to providing this research to the study of administrative constitutionalism, Tani provides context for "new federalism," raises additional questions regarding "uncooperative federalism," and analyzes the effect of equal protection jurisprudence on the poor.

Gruesome Speech

Eugene Volokh

Eugene Volokh is the Gary T. Schwartz Professor of Law at the University of California, Los Angeles, School of Law, where he teaches free speech law, tort law, and a First Amendment amicus brief clinic, among other classes. He is also the author of several textbooks, including *The First Amendment and Related Statues*, and is the founder and coauthor of the blog *The Volokh Conspiracy*.

In this Article, Volokh notes that although content-based restrictions on political speech in public forums are almost always forbidden, some courts have permitted certain restrictions on so-called "gruesome speech." In these cases, gruesome speech often takes the form of visual or verbal references to aborted fetuses, slaughtered and injured animals, wars, slavery, or lynching. Volokh advocates for broad protection of gruesome speech under the First Amendment.

First, Volokh explains why gruesome speech merits First Amendment protection and why restrictions on gruesome speech are subject to strict scrutiny. He argues that gruesome speech, especially imagery, can bring to light conditions that are often unseen and can be the only means to reflect the severity of gruesome deeds that the speaker criticizes or denounces. Adopting this reasoning, the Supreme Court held in *Cohen v. California* that forbidding particular words may create a substantial risk of suppressing ideas, and later held in *Texas v. Johnson* that free speech protection is not dependent on the particular mode in which one chooses to express an idea.

Volokh also discusses in detail the types of restrictions that apply to gruesome speech and finds that most restrictions are content based rather than content neutral. Content-neutral time, place, or manner restrictions that leave open alternative channels for communication are constitutional and subject only to intermediate scrutiny. In contrast, content-based restrictions that ban depictions of particular conduct is subject to strict scrutiny because courts do not view the use of particular words or images as fungible. Volokh further argues that restrictions on gruesome speech cannot be treated as content neutral under the "secondary effects" doctrine because the emotive impact of gruesome speech on its audience is deeply related to the content of the expression itself.

In particular, courts have used four primary rationales to rebut the presumption of First Amendment protection of gruesome speech: preventing attacks on speakers, preventing traffic accidents, preventing offense to unwilling viewers, and preventing disturbance to children. Despite these rationales, overcoming the presumption of strict scrutiny is difficult; for instance, restrictions on "fighting words" are limited only to direct personal insults. Also, in cases where gruesome speech attracts the attention of drivers because of its hostility, eye-catching nature, or unusual character, the government must prove that the speech actually causes the harm of traffic accidents to an unusual degree. The "obscene-for-minors" exception only applies to sexually-based content unless there is a compelling government interest in preventing psychological harm to minors. Moreover, Volokh argues that in certain contexts, gruesome political speech can be valuable for minors.

Given the positive functions of gruesome speech, Volokh concludes that broad protection of offensive speech is a tradition that has served our country well, and that protection for gruesome speech should be maintained.

Student Notes

Protecting Winners: Why FRAP 7 Bonds Should Include Attorney Fees

Robert M. Belden

Robert M. Belden is an Articles Editor for Volume 100 of the *Cornell Law Review*. He received his B.S. from Cornell University in 2012 and will receive his J.D. from Cornell Law School in 2015. After graduating from Cornell Law School, he will clerk for The Honorable Jerry E. Smith on the United States Court of Appeals for the Fifth Circuit. Following his clerkship, he will join Williams & Connolly LLP in Washington D.C.

The Federal Rules of Appellate Procedure (FRAP) provide protection for appellees from increased litigation expenses in defending appeals. Under FRAP 7, a district court can require an appellant to file a bond ensuring payment of an appellee's costs on appeal. The costs that FRAP 7 covers include those associated with preparing and transmitting a record and transcript, premiums paid for bonds, and filing fees, but may not cover appellate attorney fees, which may be considerably expensive. The federal circuits are split on whether FRAP 7 appellate bonds may include attorney fees, with some circuits holding that attorney fees can be included in limited circumstances, such as when litigation proceeds under a fee-shifting statute. Other circuits have suggested that FRAP 7 bonds may not include attorney fees. Belden analyzes the circuit split and argues that FRAP 7 bonds should always include attorney fees when the underlying statute provides for fee shifting due to the high rate of affirmance on appeal, the purpose of FRAP 7, and the purpose of the fee-shifting statutes.

Belden argues that a better approach to FRAP 7 would involve four steps: First, the district court should automatically assess a FRAP 7 bond following the final disposition of a case, although the bond can be reasonably tailored to FRAP 7's purpose of protecting appellees. Second, the district court should allow the losing party to stay the bond only by demonstrating irreparable harm. Third, if the district court denies the motion to stay, the losing party should have an opportunity for an ex parte petition to the court of appeals to demonstrate a reasonable inference of irreparable harm from posting a FRAP 7 bond. Finally, if the losing party demonstrates a reasonable inference of irreparable harm, the appellee should have the opportunity to brief the court of appeals on its position regarding the appellant's irreparable harm. This method would allow the courts to ensure that bonds are reasonably tailored to protecting individual appellees. Belden concludes that the approach would give litigants more certainty when deciding whether to appeal.

The Transferred Immunity Trap: Misapplication of Section 1983 Immunities

David M. Coriell

David M. Coriell is the Senior Articles Editor for Volume 100 of the *Cornell Law Review*. He received his B.A. from Middlebury College in 2006 and will receive his J.D. from Cornell Law School in 2015. After graduating from Cornell Law, he will be working at Ropes & Gray LLP in Boston, Massachusetts.

Section 1983, a federal statute, provides a private cause of action for individuals deprived of their constitutional rights by officials acting under the color of state law. In this Note, Coriell argues that some lower courts have extended absolute immunity to officials who would not have been immune at common law. Specifically, these courts have adopted the theory that immunity can transfer from an official entitled to absolute immunity to an auxiliary official who assists the immune official, even if the auxiliary performs a different function as long as the function is integrally related to the judicial process. Coriell argues that the notion that immunity can transfer is an analytic mistake that misconstrues the Court's functional approach, and that courts are making impermissible policy decisions by transferring immunity.

Although section 1983 does not explicitly mention immunities, the Supreme Court has interpreted the law under the backdrop of the common law as it stood in 1871. The Court held that the common-law backdrop included firmly established immunities for government officials that were so fundamental that Congress could be presumed to have abrogated them silently.

The Court has also explained that the immunity applies to the function, not the official. This functional approach can both limit the absolute immunity of officials generally entitled to immunity for acts not covered by the privilege and expand immunity to cover officials not generally entitled to immunity when they perform a function historically deserving of immunity. In cases involving absolute judicial immunity, lower courts have extended absolute immunity, under the guise of the functional approach, to nonimmune officers who perform functions that have not historically deserved absolute immunity. In these cases, courts transfer immunity to functions that merely have an integral relationship with the judicial process. Coriell argues that these courts fail to properly analyze whether the function performed by the non-immune official is deserving of absolute immunity. Instead, he argues that extending immunity to non-immune officials performing functions not historically covered by absolute immunity expands the categories of absolute immunity and undermines section 1983's underlying purpose.

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