

FACULTY

A photograph of the Golden Gate Bridge in San Francisco, with the city skyline and water in the background. The bridge's towers and suspension cables are prominent in the foreground, leading the eye towards the city and the bay.

**PROFESSOR EXPLAINS
FORCES BEHIND
SAN FRANCISCO'S
HOUSING WOES**

O'NEILL EXPOSES DRIVERS OF SAN FRANCISCO'S HOUSING CRISIS

MOIRA O'NEILL, an urban planning and local government law scholar at UVA, produced a widely heralded California-funded investigative research report in October that prompted the state to require the city to overhaul a zoning and permitting process that has stymied new construction and helped cause housing prices to skyrocket.

As O'Neill told *The New York Times* after her report was released, San Francisco has progressive zoning laws on paper, but its actual practices—which her report uncovered—have resulted in a city that excludes middle- and lower-income workers.

"It's a progressive city, but there's this contradiction," she said in the *Times* article. "It's really, really important to highlight not just for California, but for the country, how it's possible to use procedural rules to be exclusive and block the ability to house people."

It was particularly important to O'Neill—a longtime resident of the San Francisco Bay area whose research interests include addressing climate change—to disprove that environmental regulations were driving the costs.

Now holding a joint faculty appointment in UVA's School of Architecture and School of Law, O'Neill still serves as an associate research scientist at the University of California, Berkeley, where she also previously taught at the College of Environmental Design and at the law school.

Back in 2016, she told a colleague at Berkeley Law, Eric Biber, who taught environmental law, about her concerns and about a data method she was creating that could analyze the connection between environmental regulations and housing costs.

The two launched an initial study in San Francisco and released their first working paper in February 2018, sharing initial findings from the dataset that would become known as CALES, short for the Comprehensive Assessment of Land Use Entitlements Study.

Over the next several years, O'Neill and her colleagues at Berkeley continued to collaborate on papers looking at the CALES data from different angles. In one instance, the CALES data showed that local governments were choosing to write their local law to trigger state environmental laws that block housing construction.

Finally, California's Department of Housing and Community Development launched this investigation into San Francisco's land use policy and practices, and provided O'Neill a grant to use her data to identify barriers to housing approval and affordable housing construction. O'Neill was also tasked with checking to see whether San Francisco's processes were consistent with California's housing law, which is supposed to remove local discretion to reject affordable housing that meets certain criteria.

The October report showed how San Francisco has maneuvered around California's housing law by applying other parts of its local

law, including a provision in its business and tax code. That provision requires discretionary review of all permits of any type.

As a result, she said, "There is no proposal to do anything that is not subject to discretionary review. If you want to do anything, even build a deck—there's always the element of notification, and neighbors and 'interested parties' can just request a hearing on it."

O'Neill calls it "process to an extreme."

O'Neill and a team of researchers—which included Tim Dodson '24—also looked at every detail of how San Francisco's process unfolds in practice. Some of what she found came through the CALES data set. By interviewing developers, planners and housing advocates, they also uncovered the city's informal conditions for approval, which were rarely referenced in hearing transcripts and documents.

"[T]he process allowed the city to impose conditions for approval that are not codified, that are not enumerated in writing, that are not predictable and that come up in between hearings," O'Neill said.

The biggest takeaway of her 94-page academic report, O'Neill said, is that the housing approval process in San Francisco makes it hard to create any kind of new multifamily housing, affordable or otherwise.

In response to the report, the state mandated 18 specific actions the city must take, including eliminating the right of any individual to object to projects that comply with city rules and speeding up building permits once a project is approved. O'Neill's state report also provided another 10 recommended actions.

If the city doesn't make the required changes within the specified timeframes, California could withhold state funding and revoke local control over development in San Francisco.

While the San Francisco project had personal relevance for O'Neill, she said she hopes to be part of building a more equitable and sustainable future for Charlottesville, Albemarle and the South generally—a place where her husband, Malo Hutson, the dean of UVA's School of Architecture, has family ties.

"I believe in research that helps local and state governments implement policy to tackle climate change and inequality—that's everything I do in my research," she said. "I love teaching land use law and state and local government law, because of how relevant it is to our daily lives. It may not be the area of law you think about first when you come to law school, but the fact is, your day-to-day experience is deeply impacted by state and local laws that affect your choice of schools, how you get to work and your ability to pay for your housing."

—Melissa Castro Wyatt



KENNETH S. ABRAHAM published "The Glaring Gap in Tort Theory," co-authored with New York University law professor Catherine Sharkey, in the *Yale Law Journal* and "The Insurability of the Tort Trial and Insurance Practice Law Journal."



PAYVAND AHDOUT presented her paper "Layered Constitutionalism and Structural Interdependency," co-authored with Bridget Fahey and forthcoming in the *Columbia Law Review*, at the New York University School of Law's Constitutional Law Colloquium. She presented a new project, "Political Mootness," at a Judicial Decisionmaking Symposium at Washington University in St. Louis and at Duke Law School's Bolch Institute. She developed a course with **TIM HEAPHY '91** on congressional investigations, centered on the Jan. 6 investigation, which brought, among others, members of Congress and the former counsel to the House of Representatives to the Law School (see p. 11).



MICHAL BARZUZA presented a paper at the annual Conference on Empirical Legal Studies at the University of Chicago; at the conference on "The Essential Role of Securities Regulations" at Fordham University; at the ECGI Modern Capitalism and Corporate Purpose Conference at Copenhagen Business School; and at the Hebrew University faculty workshop.



RACHEL BAYEFSKY'S article "Judicial Institutionalism" is forthcoming in the *Cornell Law Review*, and she has presented the article at several law schools, including at the universities of Michigan and Minnesota. Her piece on Article III standing and disability "testers" was published in the *New York University Law Review Online*.



In addition to teaching *Children and the Law*, and

AHDOUT WINS AALS AWARD FOR PAPER ON FEDERAL COURTS



Professor **PAYVAND AHDOUT** won an award from the Association of American Law Schools for her article on what happens when federal courts avoid separation-of-powers questions.

The AALS Section on Federal Courts named "Separation-of-Powers Avoidance" the best article by an untenured faculty member for 2024. Published in the *Yale Law Journal*, the article looks at how federal appellate courts in recent years have gone to great lengths to avoid compelling coordinate branch officials to act in cases in which Congress and the executive branch are in conflict. That avoidance distorts legal meaning and creates vacuums that will ultimately be filled by someone other than a judge, Ahdout argues.

This year's winners were recognized during an awards ceremony at the AALS annual meeting on Jan. 4.

Ahdout previously discussed her paper in an episode of the Law School podcast "Common Law," and the paper was highlighted in a UVA Lawyer article on how federal courts are shaping democracy. Her co-taught course Congress, Oversight and the Separation of Powers, which explored the investigation into the Jan. 6 attack on the Capitol (see p. 11), examined some real-life examples discussed in her paper.

Ahdout's research focuses on the structures that undergird the government institutions that are most often before federal courts. Her work incorporates multiple legal disciplines, including constitutional law, civil procedure, and criminal law and procedure.

In 2022, the *Yale Law Journal* honored Ahdout as the journal's inaugural Emerging Scholar of the Year for her "significant contributions to legal thought and scholarship" and her work's "potential to drive improvements in the law." Her work has appeared or is forthcoming in the *Harvard Law Review*, *Yale Law Journal* and *Columbia Law Review*.

Ahdout graduated with highest distinction from the University of Virginia, where she was a Jefferson Scholar, with a B.A. in economics and government. She holds a law degree from Columbia Law School and clerked for U.S. Supreme Court Justice Ruth Bader Ginsburg.

—Mike Fox

BOWERS ELECTED TO AMERICAN LAW INSTITUTE



Professor **JOSH BOWERS** was elected a member of the American Law Institute, the organization announced Dec. 19.

There are now 35 members of the UVA Law faculty currently affiliated with the institute, which produces scholarly work meant to update or otherwise improve the law. The organization includes judges, lawyers and law professors from the U.S. and around the world who are “selected on the basis of professional achievement and demonstrated interest in improving the law,” according to the institute’s website. Members were selected from confidential nominations submitted by ALI members.

Bowers, who joined the faculty in 2008, is the Class of 1963 Research Professor of Law in honor of Graham C. Lilly and Peter W. Low. Bowers’ primary teaching and research interests are in the areas of criminal law, criminal procedure, legal theory and constitutional law.

Bowers has written numerous articles, essays and book chapters on police and prosecutorial discretion, plea bargaining, misdemeanor enforcement and adjudication, drug courts, drug policy reform, life without parole, capital punishment, grand juries, pretrial release and the right to counsel. His work has been published in several books and journals, including the Columbia Law Review, the University of Pennsylvania Law Review, the Virginia Law Review, the UCLA Law Review and the Stanford Law Review.

Bowers is a member of the Virginia Criminal Justice Conference. Additionally, he was the lead reporter for the Uniform Law Commission’s “Alternatives to Bail” Committee, and he served as a founding member of the Civilian Review Board for the city of Charlottesville, which engages in oversight of the Charlottesville Police Department.

He earned his J.D. from the New York University School of Law and his bachelor’s degree from the University of Wisconsin.

—Mike Fox

directing the State and Local Government Policy Clinic, **ANDREW BLOCK** was named a Learner in Residence at Spring Point Partners in the fall. The Learners in Residence program provides “time, space, and resources for values-aligned thought leaders to develop unique projects that inspire new thinking and shift narrative in their respective fields.” With support from Spring Point, he is partnering with faculty in the School of Medicine, law students and graduate students in the Department of Psychology to develop policy solutions to the problem of youth gun violence. His work is relying on the ideas and insights from youth in communities in Virginia affected by such violence. He also published a law review article examining the many challenges facing rural Virginians, which has led to legislative proposals in the General Assembly to study the feasibility of establishing a new secretary for rural affairs—as proposed in his paper—to implement a holistic and cross-cutting approach to supporting rural communities in the state. Beyond those efforts, the clinic this year has taken on an unprecedented number of legislative clients and is working on bills on diverse topics, ranging from special education and foster care to human trafficking and behavioral health.



DARRYL K. BROWN '90 is spending the spring semester as a visiting scholar at Trinity College Dublin, where he is working with Irish colleagues on issues

related to challenges for criminal justice administration in the context of states experiencing forms of democratic erosion. He presented work related to these themes at the Southwestern Criminal Law Scholars Conference in October and will do so with Irish law faculties in the spring and at the Law and Society Association Annual Meeting in June.



NAOMI R. CAHN, continues to serve as editor-in-chief of the ACTEC Law Journal. She was elected treasurer for the Section on Trusts and Estates of the Association of American Law Schools. Cahn has presented at the following conferences: “Digital Fertility Tracking” at the Zoom International conference in February; “Health, Equity, and the Law After *Dobbs*,” hosted by American and George Washington universities in February; “Medication Abortion,” hosted by If/When/How at UVA Law in February; “Gender Equality After CEDAW” at Indiana University in March; “The Abortion Pill,” hosted by the Center for American Progress, in March; “Adolescents and Reproductive Equity,” hosted by the Pediatrics Academic Societies, in May; “Informal Sperm Donation” at the American Society of Law, Medicine & Ethics Conference in June; “Child Labor” at the Arkansas Law Review Symposium in October; “Retrenchment by Diversion,” hosted by the New York Area Family Law Roundtable in October; and “Mid-Atlantic Family Law Scholars” at Duke University in December. She moderated the “Sin-

BROWN '90 AND SÁNCHEZ PREPARE REPORTS FOR CLOONEY TRIALWATCH PROJECT



Two professors assessed sham prosecutions for TrialWatch, a project run by the Clooney Foundation for Justice.

Professor **DARRYL K. BROWN '90** produced a TrialWatch report released in December that found an opposition leader in Azerbaijan was unfairly prosecuted and convicted—then, just days later, he was arrested again.

Based on the human rights organization’s letter grade system, Brown’s report gave the Azerbaijani trial a “D” for court fairness, with an “F” being the worst.

“Yagublu’s case ha[d] all the hallmarks of a politically motivated trial,” Brown said. “The trial court ignored significant evidence that the charges were a sham and an effort to target Yagublu as a prominent opposition voice.”

Yagublu is a former journalist, former deputy chairman of the opposition party and senior member of the National Council of Democratic Forces, a coalition of opposition parties and activists. The outspoken critic had faced criminal and administrative prosecutions for decades before he was tried, convicted and sentenced to four years on “hooliganism” charges stemming from a 2020 incident involving a car accident in the former Soviet republic.

He was released on parole in July 2021 after serving 15 months but was arrested again on Dec. 20—just six days after Brown’s TrialWatch report went public. A district court ordered Yagublu to be held in pretrial custody for up to four months, pending investigation on new forgery and fraud charges, according to Human Rights Watch.

Before Yagublu was arrested on the 2020 hooliganism charges, the European Court of Human Rights had already condemned the Azerbaijani authorities’ conduct in two earlier cases against Yagublu. Brown found that Yagublu’s hooliganism charges matched a broader pattern of harassment of journalists and opposition party members in Azerbaijan—often on ostensibly neutral charges.



In another case, Professor **CAMILO SÁNCHEZ**, director of UVA Law’s International Human Rights Law Clinic and Human Rights Program, served as TrialWatch’s expert and co-authored a report, released Feb. 5, that found numerous breaches of international and regional fair trial standards in Guatemala.

An award-winning Guatemalan journalist, José Ruben Zamora, was tried and convicted in 2023 on charges of money laundering and sentenced to six years in prison.

Sánchez gave the trial an “F,” concluding that Zamora’s prosecution and conviction “appear to be in retaliation for his work as an investigative journalist reporting on government corruption.”

“The trial was marred by severe fair trial violations,” Sánchez said.

Zamora’s case is part of a broader crackdown on anti-corruption work in Guatemala, where “journalists and media outlets who investigate or criticize corruption and human rights violations face harassment campaigns and criminal prosecution,” according to Reporters Without Borders.

Zamora was tried alongside a former anti-corruption prosecutor. Zamora is now facing trial in another case and retrial in the money laundering case. His detention is under review by the U.N. Working Group on Arbitrary Detention.

“We know corrupt governments aren’t going to pay attention to this, but we do hope that it can have some influence on companies and others who are doing business with these countries,” Brown said of TrialWatch’s work. “It also brings it to the attention of the international human rights community to hopefully get some leverage with players who might be able to influence the governments.”

The Clooney Foundation for Justice was co-founded by George and Amal Clooney and does work in more than 40 countries. Amal Clooney is a practicing human rights lawyer.

—Melissa Castro Wyatt

COPE LEADS INITIATIVE FOR MEASURING JUDICIAL IDEOLOGY

A breakthrough new empirical initiative developed by Professor **KEVIN COPE** could provide the most accurate estimate to date of federal judges' ideologies, using automated analysis of text to evaluate lawyers' written observations.

Cope started the project, called the Jurist-Derived Judicial Ideology Scores—or JuDJIS, pronounced “judges”—in 2016, but it arrives in another presidential election year, a time when

court watchers speculate about potential judicial nominees and how their ideology might shape the direction of society. JuDJIS will offer researchers, journalists and policymakers the first systematic scoring of judges' ideologies based on direct observations, while previous initiatives have relied on proxies and affiliations to calculate an ideological score.

The results have already yielded some surprises.

When Justice Anthony Kennedy announced his retirement in 2018, Cope used preliminary data from an earlier stage of the JuDJIS project to estimate the ideologies

of 10 judges mentioned as possible replacements. The study, published online in *The Washington Post*, showed that—based on their appellate records—both Brett Kavanaugh and Neil Gorsuch might be more moderate as justices than many had thought. That prediction has largely been borne out, Cope said.

“The existing ideology measures have been cited in thousands of studies—they’re a cornerstone of the field of courts and judicial behavior—but, like any measure, they each have strengths and limitations,” Cope said. “I hope it will be a breakthrough for the sort of research that can be done in this field, in part because it will rate every Article III judge [those who have life tenure] on a single scale.”

In addition to evaluating judges individually, the JuDJIS data can show the ideological bent of different courts and track ideology of specific courts, or the entire judiciary, over time.

“The data actually show the judiciary has become less polarized over the last few decades,



which is contrary to what some might expect and certainly the opposite of what has happened with Congress,” Cope said.

Despite the cutting-edge methods used to make JuDJIS, Cope built the alternative analytical model on an old-school underlying technology: loose-leaf paper inserts to the Wolters Kluwer “Almanac of the Federal Judiciary,” a subscription service that includes “candid, revealing commentary” by lawyers based on their experiences before federal judges, according to their website.

“For most of the almanac’s history, three times a year, library staff around the country took out and discarded the old pages,” Cope said.

And no electronic backup was retained. “So I thought, if I could somehow get ahold of all of those hundreds of back issues and digitize them, I could create a new data set going back to the ‘80s.”

In 2017, Wolters Kluwer officials gave Cope hundreds of thousands of pages dating back to 1985—the world’s only

remaining copy. In 2023, the PDFs were then digitized and organized using a text-analysis program developed with the help of Li Zhang, head of the Legal Data Lab in the UVA Law library.

The two have a separate working paper, “A Hierarchical Dictionary Method for Analyzing Legal and Political Texts Via Nested n-Grams,” to explain how the methodology could be used for a host of other applications in law and political research, such as corporate statements and human rights country reports.

“Figuring out how machines can derive accurate meaning from language has long proven a huge challenge for data and social scientists,” Cope said. “Humans are really good at finding meaning in legal writing, but every time a person does it—even the same person—they may find a slightly different meaning. Computational methods of text analysis can address this problem, if it’s done right.”

—Melissa Castro Wyatt

gular Selves” book launch at the Second Singlehood Studies Conference in December. She spoke at “Trusts in a Family Context” and “What Faculty and Administrators Need to Know about the Media” at the Association of American Law Schools’ Annual Meeting in January. She published “Supporting Families in a Post-*Dobbs* World: Politics and the Winner-Take-All Economy,” co-authored with June Carbone, in the *North Carolina Law Review*; and “The Restatements of Trust—Revisited,” co-authored with Deborah Gordon and Allison Tait, in “The ALI at 100: Essays on Its Centennial.”



DANIELLE K. CITRON has several forthcoming articles: “The Surveilled Student” in the *Stanford Law Review*; “From Bad to Worse: Threats, Stalking, and Chilling Effects” in *The Supreme Court Review*; “A More Perfect Privacy” in the *Boston University Law Review*; and “Resilience in a Digital Age,” co-authored with **KRISTEN EICHENSEHR**, in the *University of Chicago Legal Forum*. In the fall, she published several pieces, including “Intimate Privacy in a Post-Roe World” in the *Florida Law Review*, “The Continued (In)Visibility of Cyber Gender Abuse” in the *Yale Law Journal Forum* and “Combating Online Harassment” in *Democracy Journal*. She continues to work closely with Spotify, TikTok and Twitch on their safety policies. During the fall and winter, she spoke at events held by the National Association of Attorneys General, the State Depart-

ment and MacArthur Fellows Gathering. She also appeared on “CBS News Primetime With John Dickerson.”



Last summer, **ASHLEY DEEKS** presented her article “Checks and Balances in the Technological Cold War,” co-authored with **KRISTEN EICHENSEHR**, at a UVA faculty workshop. At a conference hosted by the Australian National University, she presented a paper on the delegation of war-initiation to machines. In September, she gave a keynote address to the U.S. Department of Defense, “The Double Black Box: National Security, AI, and Democratic Accountability.” She also spoke to the U.S. Attorneys’ Subcommittee on Terrorism and National Security about the relationship between the Department of Justice and the National Security Council. In October, she was the keynote speaker at a Harvard Law School symposium on sanctions, where she discussed “Cognitive Biases in the Economic Sanctions Ecosystem.” She also presented her paper “Sub-Delegating National Security Powers” at a symposium hosted by the University of Pennsylvania Law Review. In November, she participated on a panel at the American Bar Association’s Subcommittee on Law and National Security about the national security implications of artificial intelligence. She helped guide a conversation at the State Department’s Advisory Committee on International Law, which addressed the prospects for a tribunal to prosecute the crime of ag-

gression related to Ukraine. In December, as part of a Congressional Study Group organized by the Brookings Institution, she discussed how to regulate AI in U.S. law. During this period, she published blog posts on Lawfare related to the use of AI in nuclear command and control, the regulation of national security AI and the legality of using force against Mexican drug cartels, and she spoke on Lawfare’s “National Security AI: Year in Review” podcast.



KRISTEN EICHENSEHR presented “Major Questions About International Agreements,” co-authored with Yale law professor Oona Hathaway, at the University of Pittsburgh’s American Society of International Law Midyear Meeting in November and at the University of Pennsylvania Law Review Symposium on “The Statutory Foreign Affairs Presidency” in October, both with Hathaway. She also presented “Resilience in a Digital Age,” co-authored with **DANIELLE CITRON**, at the University of Chicago Legal Forum Symposium in November. She was a panelist for “The Ecology of Nations,” hosted by UVA’s Miller Center in December; for “Private Actors in Cyber Operations and Hostilities in Cyberspace,” hosted by the Oxford Process on International Law Protections in Cyberspace at Yale Law School in October; and for “Transforming Tech in Government” at the Government Leaders Forum, hosted by the Miller Center and McKinsey Center for Government in September. She was a presenter for

“*Missouri v. Biden*: Conversation on Recent Court Decision Prohibiting Government Communications with Social Media on Mis/Disinformation” at the National Academies of Science, Engineering and Medicine’s Forum on Cyber Resilience in September. She was also a discussant for “The Application of Non-Intervention Principles in Cyberspace,” hosted by the State Department’s Advisory Committee on International Law in June.



In the spring, **AMANDA FROST** published her essay “Paradoxical Citizenship: A Response to Chin and Finkelstein” and an article, “Reparative Citizenship,” both in the *William & Mary Law Review*. Also in the spring, she published the article “Dred Scott’s Daughters: The Path from Birthright Freedom to Birthright Citizenship” in the *Yale Journal of Law & the Humanities*. In September, she was a panelist on “Rebuilding the Bench” at the NAACP Legal Defense Fund Civil Rights Training Institute; presented at a symposium on the Naturalization Act of 1790 at the University of California, Davis; was a panelist for a Citizenship Day event at the University of California in San Francisco; and was a speaker at Constitution Day at Dickinson College. In November, she presented “Dred Scott’s Daughters” at the New York University Nineteenth Century Interdisciplinary Workshop, and was a panelist at the Karsh Institute of Democracy for “Is Immigration Law Broken? How

Polarized Politics Shape the Law and Policy of Our Current Immigration System,” an event co-sponsored by UVA’s Immigration Law Program. In February, she moderated a panel, “Unaccompanied Children in the Immigration System,” co-hosted by the Karsh Institute of Democracy and UVA Law; and presented her book project on birthright citizenship as part of UVA’s Global Legal History workshop. In March, she was a panelist at a symposium titled “Attachment to Place in a World of Nations” at the Clough Center for the Study of Constitutional Democracy at Boston College. In May, she will present her book project on birthright citizenship at the UCLA Center for the Study of International Migration, and be a panelist on judicial ethics at the Federal Judicial Center’s Mid-Career Seminar for U.S. Court of Appeals Judges at the University of Pennsylvania Carey Law School.



MICHAEL D. GILBERT continues to serve as vice dean of the Law School. In recent months, he has presented research at the Latin American and Caribbean Law and Economics Association meetings in Bogotá, Colombia; at Austral University in Buenos Aires; and at UVA in connection with a symposium for the journal *Public Choice*. He gave a (remote) keynote lecture on his book, “Public Law and Economics,” at the Latin American Workshop on Law and Economics in Brazil. He helped organize the University of Maryland’s

Constitutional Law and Economics Conference, and he selected papers for presentation at the meetings of the European Association of Law and Economics. In March, he taught a course titled *The Law of Democracy in the United States* at Université Panthéon-Assas in Paris. His paper “Truth Bounties: A Market Solution to Fake News,” co-authored with Yonathan Arbel, is forthcoming in the *North Carolina Law Review*. His chapter, “Political Corruption,” co-authored with **DEBORAH HELLMAN**, is forthcoming in the *Oxford Handbook of American Election Law*.



RISA GOLUBOFF joined the executive committee of the Association of American Law Schools and joined the Guggenheim Foundation board. She was a panelist for the ABA Task Force for Democracy at the AALS Annual Meeting. She was the keynote speaker at the Al-bemarle County Historical Society Annual Meeting and the UVA Retired Faculty Association, both on “Charlottesville’ as Legal History.”



RACHEL HARMON is spending this academic year (continued on p. 52)

FACULTY HONORS IN BRIEF

Federalist Society Honors **BAMZAI**

Professor **ADITYA BAMZAI** was named this year's recipient of the 2024 Joseph Story Award at the Federalist Society's National Student Symposium at Harvard Law School on March 9. Recipients demonstrate excellence in legal scholarship, a commitment to teaching, a concern for students and make "significant public impact in a manner that advances the rule of law in a free society," according to the Federalist Society.



On March 27, Bamzai delivered Harvard Law School's 2024 Scalia Lecture, "Statutory Interpretation and the Separation of Powers," in which he argued that the Supreme Court should create an analytical structure for lower courts to follow when deciding whether to defer to administrative agencies.

Bamzai is the Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law. He is co-author of the forthcoming ninth edition of the casebook "Administrative Law: The American Public Law System, Cases and Materials."

Also at the symposium, the Federalist Society chapter at UVA Law was named recipient of the 2024 Samuel Adams Award for Membership Growth.

CITRON Recognized for Scholarship on Privacy

Professor **DANIELLE CITRON** received the International Association of Privacy Professionals' 2024 Privacy Leadership Award at the Global Privacy Summit on April 2. The Leadership Award recognizes an individual or organization who demonstrates an ongoing commitment to furthering privacy policy, promoting recognition of privacy issues, and advancing the growth and visibility of the profession, according to the association. She previously won the association's award for best paper in 2016 and 2014. IAPP has more than 80,000 members worldwide.



Citron, who co-directs the school's LawTech Center, is the author of the books "The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age" and "Hate Crimes in Cyberspace." She is the Jefferson Scholars Foundation Schenck Distinguished Professor in Law, and the Caddell and Chapman Professor of Law.

Goluboff is the Arnold H. Leon Professor of Law and a professor of history at UVA.

GOLUBOFF Tapped for AALS, Guggenheim Roles; Commended by Virginia Assembly

Dean **RISA GOLUBOFF** was elected to the Association of American Law Schools Executive Committee and named a John Simon



RISA GOLUBOFF with fellow AALS Executive Committee members Dean John Valery White of the William S. Boyd School of Law at UNLV and President-elect Austen Parrish, dean of the University of California, Irvine School of Law.

Guggenheim Memorial Foundation trustee. In March, the Virginia General Assembly recognized Goluboff through a resolution.

The AALS executive committee appoints the organization's executive director and the members serve staggered, three-year terms. Goluboff's nomination was announced in advance of the AALS Annual Meeting on Jan. 6.

"AALS plays a critical role in advocating for law schools, faculty members, students, and the legal profession as a whole," she said in a statement. "I'm honored and excited to join the Executive Committee and help pursue this important mission."

Goluboff was named a Guggenheim trustee in November. In 2009, she was named a Guggenheim Fellow in the field of constitutional studies. Comprised of fellows and supporters, the board of trustees is the steward of the foundation's endowment and the final arbiter in fellowship selection, according to the foundation.

The Virginia General Assembly passed a resolution March 4 commending Goluboff's term as dean, which ends June 30. The resolution, sponsored by Sen. Creigh Deeds, Sen. Scott Surovell '96 and Del. Rip Sullivan '87, noted in part that she "made history at UVA Law both by becoming the school's first female dean and through her achievements in the areas of faculty hiring, fundraising, and student experience."

Goluboff is the Arnold H. Leon Professor of Law and a professor of history at UVA.

RILEY Leads National Academies Report

A committee chaired by Professor **MARGARET FOSTER RILEY** released a report that recommends improving the safe and ethical inclusion of pregnant and lactating women in clinical research.



"Clinical Research with Pregnant and Lactating Populations: Overcoming Real and Perceived Liability Risks" was commissioned by the National Academies of Sciences, Engineering, and Medicine. The report says pregnant and lactating women are excluded from most clinical studies but found limited exposure to legal liability in including these women and that omitting them poses a greater risk.

"The current reality facing many pregnant and lactating women who are deciding whether to use an approved drug or medical treatment is that they are essentially taking part in a large and uncontrolled safety experiment," Riley said in a statement.

The report's release was accompanied by Riley's article "Including Pregnant and Lactating Women in Clinical Research: Moving Beyond Legal Liability," published in JAMA.

Riley is the Dorothy Danforth Compton Professor at the Miller Center, Professor of Public Health Sciences at the School of Medicine, Professor of Public Policy at the Batten School of Leadership and Public Policy, and director of the Law School's Animal Law Program.

'COMMON LAW' Focuses on 'Free Exchange' of Ideas

Listeners are getting a glimpse into the kind of vigorous discussions and debates that go on behind the scenes among the Law School's luminary scholars for the sixth season of the school's podcast, "Common Law."

The season, called "Free Exchange," launched Feb. 13 with guests **AMANDA FROST** and **RICHARD M. RE** discussing ethics at the U.S. Supreme Court. Dean **RISA GOLUBOFF** is again hosting the show while two guests dive deep on cutting-edge legal topics, such as socially responsible investing and the *Chevron* doctrine at issue in



one of the most-discussed cases before the U.S. Supreme Court.

"UVA Law School is a special place—we foster a robust and collegial intellectual community with a true diversity of viewpoints," Goluboff said.

"This season of the podcast is meant to offer a glimpse into the kinds of discussions we have all the time, in which we share our approaches to legal

issues, test our arguments and make our own ideas better by hearing from colleagues with a wide variety of perspectives."

In addition to Frost and Re, guests this season include Professors **QUINN CURTIS**, **JOHN DUFFY**, **CRAIG KONNETH**, **PAUL G. MAHONEY**,

JOY MILLIGAN, **CYNTHIA NICOLETTI** and **DANIEL ORTIZ**.

One episode will feature Melody Barnes and John Bridgeland '87, former officials for two White House administrations on either side of the political aisle. Barnes, who ran domestic policy in the Obama administration and now leads UVA's Karsh Institute of Democracy, and Bridgeland, who ran domestic policy under George W. Bush, will discuss advancing democracy across political differences.

Episodes will post every two weeks throughout the spring.

ROBINSON Appointed to NAS Committee

Professor **GERARD ROBINSON** was appointed to a new ad hoc committee of the National Academies of Sciences, Engineering, and Medicine to improve learning for low-income students.



The Committee on Promoting Learning and Development In K-12 Out of School Time Settings For Low Income and Marginalized Children and Youth study will focus on students from low-income households across urban, suburban and rural settings. NAS will publish a national report in 2025.

Robinson is a Professor of Practice in Public Policy and Law at UVA's Frank Batten School.

SHALF To Co-Chair AALS Section

Professor **SARAH SHALF '01** was elected co-chair of the AALS Section on Clinical Legal Education at the AALS Annual Meeting.



She was elected a member of the Section's Executive Committee in 2022 and formerly served as section secretary.

The Section on Clinical Legal Education is the largest section of the AALS. It supports clinic and externship teachers, hosts an annual national clinical conference, assists with multiple regional clinical conferences and provides programming at the AALS Annual Meeting.

The section also sponsors three annual awards recognizing clinical teachers; promotes clinical scholarship through support of the publication of the Clinical Law Review, workshops and works-in-progress sessions throughout the year; and provides other mentoring, training and help for clinical teachers.

—Mike Fox and Mary Wood

working on criminal justice policy for the Domestic Policy Council at the White House. Harmon also published the second edition of her casebook, “The Law of the Police.” In addition, Harmon produced a custom edition of the casebook along with teaching materials for the American Bar Association Legal Education Police Practices Consortium, which is developing a nationwide course based on “The Law of the Police.” Harmon also published “The Federal Government’s Role in Local Policing,” co-authored with Barry Friedman and Farhang Heydari in the Virginia Law Review, which argues that both Congress and the president wield considerable power to influence local policing, and that both branches could use that power far better than they have in the past.



ANDREW HAYASHI published “Present Bias and Debt-Financed Durable Goods” in the American Law & Economics Review, “Christianity and the Liberal(ish) Income Tax” in the Notre Dame Journal of Legal Ethics & Public Policy, and “Technology, Markets and the Income Tax Frontier” in the Southern California Law Review. He presented his paper “Law and Economics for Empaths,” co-authored with **MICHAEL D. GILBERT**, at the George Mason Antonin Scalia Law School and Georgetown Law Center, and presented his paper “The Federal Architecture

of Income Inequality” at Columbia Law School and the UVA Law Fall Tax Invitational.



DEBORAH HELLMAN published two pieces: “Defining Disparate Treatment: A Research Agenda for Our Times” in the Indiana Law Journal and the short online piece “The Zero-Sum Argument, Legacy Preferences and the Erosion of the Distinction Between Disparate Treatment and Disparate Impact” for the Virginia Law Review Online. Hellman also presented her work at several events, including a Legal Theory Conference at the University of Southern California from Oct. 13-14; a symposium hosted by the Georgetown Law Technology Review on Jan. 30; a University of California, Berkeley, seminar, Intelligence: Human, Animal and Artificial, hosted by the law school and departments of philosophy and political theory on March 15; and Fordham Law School’s Law and Philosophy Colloquium on April 11.



A. E. DICK HOWARD '61 has been heavily focused on

the 50th anniversary of the Constitution of Virginia. Howard was the executive director of Virginia’s Commission on Constitutional Revision, was counsel to the General Assembly when it received and acted on the commission’s recommendations, and directed the successful campaign for the constitution’s ratification. The constitution became effective on July 1, 1971 (see p. 38). Howard wrote articles on the history of Virginia’s Constitution in publications of the Virginia Bar Association, the Virginia Museum of History and Culture, and the Colonial Williamsburg Foundation. He also wrote a series of articles in the Richmond Times-Dispatch. In Philadelphia, he delivered a keynote address as part of a program on state constitutions sponsored by the National Constitution Center. Lectures in Virginia have included an address at the annual meeting of the Virginia Bar Association; the keynote for “Looking Back, Looking Forward” on the anniversary date at the Library of Virginia; a lecture in an ongoing constitutionalism series at James Madison’s Montpelier; a conversation with university presidents sponsored by James Madison University and Norfolk State University; conversations with Virginia teachers at the Library of Virginia’s Teachers Institute in Abingdon, Norfolk, Northern Virginia and Richmond; a Banner Lecture at the Virginia Museum of History and Culture; and a radio interview for Virginia Public Media’s “With Good Reason.” For his work over the years since the current constitution, Howard was recognized at a reception July 1 at the governor’s mansion. The John Marshall Foundation

honored Howard by naming a Virginia History Day prize for him.



CATHY HWANG published “Business Associations: A Modern Approach,” co-authored with Paolo Saguato, by Foundation Press in September; “Non-Party Interests in Contract Law,” co-authored with Omri Ben-Shahar and David Hoffman, in the University of Pennsylvania Law Review; “The Lost Promise of Private Ordering,” co-authored with Jeremy McClane and Yaron Nili, forthcoming in the Cornell Law Review; “National Security Implications of Corporate Transactions,” co-authored with Steven Davidoff Solomon, forthcoming in “The Oxford Handbook of Corporate Governance”; “The Limits of Governance,” co-authored with Emily Winston, forthcoming in the Seattle Law Review as part of the Berle XIV Symposium; and “Musk & Twitter: A Case Study in M&A and Contractual Certainty,” co-authored with Steven Davidoff Solomon, forthcoming in the “Research Handbook on the Structure of Private Equity and Venture Capital.” She also gave talks at the Swiss Institute of Comparative Law on national security review of transactions and at Ecole HEAD in Paris on transactional lawyering. She presented “Refracted Intent” at Cornell Law School; “The Curious Case of Corporate Relational Contracting” at the Conference on Empirical Legal Studies at the University of Chicago; and “Refracted Intent” at the University of Pittsburgh School of Law.

She spoke at the conference in honor of Jill E. Fisch at the University of Pennsylvania Carey Law School. Her paper “Shadow Governance,” co-authored with Yaron Nili, was cited by the Delaware Chancery Court in *Texas Pacific Land Corp. v. Horizon Kinetics LLC*.



With Sarah Matsumoto and Cecily Banks, **CALE JAFFE '01** will be presenting at the May 2024 Association of American Law Schools Conference on Clinical Legal Education in St. Louis. The title of their presentation is “Shortcomings of Legal Ethics for Community Lawyering,” which explores the ways in which clinical teaching offers an opportunity to reconsider the conventional model of the attorney-client relationship and to rethink what certain ethical rules mean in the context of public interest advocacy. The presentation asks how, or whether, certain values that are essential to community lawyering, like patience and humility, fit into the American Bar Association Model Rules.



Four years ago, **DAVID S. LAW** and Bryant Garth of the University of

California, Irvine, started working on an idea for a book series, “Judicial Systems of the World,” for Oxford University Press. The first book in the series, “The Judicial System of Russia,” by Kathie Hendley and Peter Solomon, has been published. The series is intended to offer short, readable and empirically informed introductions to foreign judicial systems—for a wide range of audiences, both scholars and practitioners—and to emphasize geographically diverse coverage by highly diverse and distinguished authors. The series will also focus on China, Germany, Mexico and India. Each of these short, interdisciplinary monographs includes a “Quick Guide”—a 15-page table-form battery of consistent questions that ties together the series and makes it easier to do comparative work on courts.

A review of Law’s book “Constitutionalism in Context” by Jaakko Husa was published in the Journal of Comparative Law, and another review, by Oran Doyle, is forthcoming in the next issue of the International Journal of Constitutional Law.



On Sept. 16, **CHINH Q. LE '00** was a speaker on the plenary panel at the National Conference of Vietnamese American Attorneys to discuss the implications of the U.S. Supreme Court’s recent affirmative action decisions. On Sept. 28, he moderated

the inaugural “Poverty & Race Live” panel event, convened by the Poverty & Race Research Action Council and the National Coalition on School Diversity to discuss the intersection of school integration and school finance. This fall, he joined a small group of researchers, litigators and advocates that form a “community of practice” supporting Brown’s Promise, a new nonprofit working to bridge the silos between school funding and school integration work. He also moderated the “Creative Solutions to the Criminalization of Poverty” panel at this year’s Shaping Justice conference Feb. 2. He is one of several authors or editors who contributed to the revised version of the “Federal Practice Manual for Legal Aid Attorneys,” released in February.



Beginning in September, **MICHAEL A. LIVERMORE** started a one-year residency in Paris as a research chair in “Major Changes” at the Sorbonne University and Paris Institute for Advanced Study. During the residency, he has been working on a manuscript that examines environmental and techno-ethical challenges of the current geological age within the framework of law and economics. The project is an extension of arguments he offered in his recent article, “Valuing Diversity,” published in the Journal of Ethics and Social Philosophy. In December, he presented work at the Center for Environmental and

Technology Ethics at the Czech Academy of Sciences in Prague and the Complexity Science Hub in Vienna. Livermore has also recently published several articles that use artificial intelligence tools to study the law and legal institutions, including “Judicial Hierarchy and Discursive Influence,” co-authored with Felix Herron, Keith Carlson and Daniel N. Rockmore, in the Philosophical Transactions of the Royal Society A; and “Judicial Dark Matter,” co-authored with Nina Varsava, Keith Carlson and Daniel N. Rockmore, in the University of Chicago Law Review. He continues to convene the Online Workshop on the Computational Analysis of Law, a scholarly forum for cutting-edge research applying computational techniques to legal data. Presenters this spring include Jed Stiglitz of Cornell University, Hajin Kim of the University of Chicago, Jon Choi of the University of Southern California and Florencia Marotta-Wurgler of New York University.



In September, **JULIA D. MAHONEY**, together with **ANN WOOLHANDLER**, presented their article “State Standing After *Biden v. Nebraska*” at the Article III standing conference at the Constitutional Law Institute at the University of Chicago Law School. The article will be published in the Supreme Court Review in 2024. In October, Mahoney presented her paper “Property Rights, Corruption, and Redistribution” at a

conference on “Rethinking Penn Central” organized by the Pacific Legal Foundation. In November, she moderated a panel on “Insurrection and the 14th Amendment” at the Federalist Society’s National Lawyers Convention.



RUTH MASON'S paper “Bounded Extraterritoriality” will come out in the Michigan Law Review, and she presented the paper at the University of Pennsylvania’s faculty workshop. In January, she spoke with Koen Lenaerts, president of the European Court of Justice, at the inaugural event for the Max Planck Hub Fiscal and Social State. She continues to write in Tax Notes about developments in the European Commission’s state aid cases involving U.S. multinationals. Her 11th installment was about the advocate general’s opinion in the Apple case pending before



Koen Lenaerts, president of the European Court of Justice, joined Professor **Ruth Mason** at a Max Planck Institute event.

the ECJ. She also organized the UVA Tax Invitational Workshop in the fall. In February, she spoke at the IFA-Europe conference in Paris on state aid.



JOY MILLIGAN published an article, “We (Who Are Not the People): Interpreting the Undemocratic Constitution,” co-authored with **BERTRALL ROSS**, in the December 2023 issue of the Texas Law Review. They jointly presented the draft article in August at a UVA Law faculty workshop, and Milligan presented it at the University of Minnesota Public Law Workshop in September. She presented a work-in-progress, “The Constitution of Racial Repair,” at the Loyola Constitutional Law Colloquium in November, and spoke on a panel at the Association of American Law Schools Annual Meeting in January on “Brown, Equal Education and Democracy: Honoring the 70th Anniversary

of *Brown v. Board of Education*.”



JOHN T. MONAHAN co-authored two articles: “Pre-trial Risk Assessment, Risk Communication, and Racial Bias” in the journal *Criminal Justice and Behavior*, and “The Predictive Performance of Criminal Risk Assessment Tools Used at Sentencing: Systematic Review of Validation Studies” in the *Journal of Criminal Justice*. In addition, the 10th edition of his casebook with Professor Emeritus **LAURENS WALKER**, “Social Science in Law,” was recently published. Monahan directs a research project for the John D. and Catherine T. MacArthur Foundation’s Safety and Justice Challenge program on ways to improve pretrial risk assessment. He also serves on the advisory board for *Advancing Pretrial Policy & Research*, a project supported by Arnold Ventures.



On Dec. 1, **DANIEL R. ORTIZ** gave a lecture at the School of Cultures, Politics, and Democracy at the University of Sapienza, Rome, on “Lobbying in the U.S.A.” It was part of a larger lecture series on “Lobbies and Democracy: How the Regulation of Interests Affects the

Implementation of Social, Cultural, Environmental and Digital Rights.” Professors from the University of Sapienza, the University of Florence and the University of Enna commented on the lecture. He also recorded a video for UVA on the legal regulation of elections in America.



SAIKRISHNA PRAKASH presented his draft paper “Spirit” at the University of Florida Levin College of Law and delivered the Doyle-Winter Lecture on “Spirit” at the Yale Law School. His article, “Deciphering the Commander-in-Chief Clause,” appeared in the *Yale Law Journal* and won the 2023 Mike Lewis Prize for National Security Law Scholarship (see p. 55).



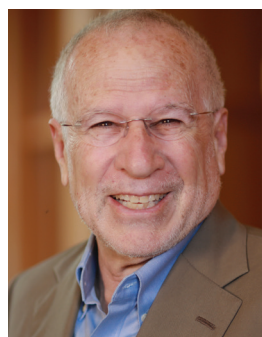
KIMBERLY JENKINS ROBINSON published “Rodriguez at 50: Lessons Learned and the Path Forward” in the *Loyola Law Journal*, as part of a symposium on the 50th anniversary of the U.S. Supreme Court case *Rodriguez v. United States*. She lectured on “The Right to a Quality Education” at the UVA Colonnade Club Martin Luther King event on Jan. 31. She spoke on “Consideration of Race after *SFAA v. Harvard*” for

the 25th Annual Federalist Society Faculty Conference on Jan. 5; “Affirmative Action and the Way Forward” for the Association of American Law Schools 2024 Annual Meeting on Jan. 4; and “In Conversation: The Supreme Court, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Affirmative Action and Equal Protection,” at the University of Connecticut School of Law on Nov. 15. She was a guest lecturer for “Thirteen Ways of Looking at *Brown*” at Yale Law School on Nov. 14.



ELIZABETH A. ROWE published two co-authored books: “Trade Secret Case Management Judicial Guide” and “2022 Update to Selected Intellectual Property, Internet and Information Law Statutes, Regulations, and Treaties.” She also published “Academic Economic Espionage?” in the *William & Mary Law Review*, which she presented at the Chicago IP Colloquium and at the 2023 Trade Secret Scholars’ Workshop. She served as a senior editor on “The Sedona Conference, Commentary on the Equitable Remedies in Trade Secret Litigation.” She was a panelist on a big data panel for the American Bar Association-Intellectual Property Law Annual Conference and on a panel at the Georgetown University Law Center about employees who leak confidential information. She presented a 2023 Trade Secret Update to the Florida Bar IP section. She presented her working paper “Owning

Data” at the Scholars in Technology Equity Policy workshop and at the Intellectual Property Scholars Conference. At UVA, she delivered her chair lecture on “Espionage in Academia.” She was interviewed for the “Common Law” podcast on facial recognition technology and gave presentations to the American Constitution Society and served on a panel discussing women in academia.



FREDERICK SCHAUER presented his paper “Rules of Order” at William & Mary Law School. His article “Legal Theory and Comparative Law” was published in the “Elgar Encyclopedia of Comparative Law.” He presented “Analogizing Guns,” co-authored with **BARBARA SPELLMAN**, at a University of Notre Dame and Duke University conference on “History, Tradition, and Analogical Reasoning,” with an article to be published in the *Notre Dame Law Review*. He also delivered a public lecture at UVA, “Freedom of Speech and the American University.”



RICHARD C. SCHRAGGER published “Seeing Like a

Region” in *Theoretical Inquiries in Law* as a part of an international symposium on approaches to regionalism. His paper “Religious Freedom and Abortion,” co-authored with **MICAH SCHWARTZMAN '05**, appeared in the *Iowa Law Review*. He spoke to the International Municipal Lawyers Association on “Practical Implications of the Supreme Court’s Recent Free Exercise and Establishment Decisions.” He presented “Underdevelopment in an (Up) Zoned City” at the State and Local Government Works in Progress Conference at Northwestern University and also at the Land, Climate, and Justice Conference he co-organized with **MOIRA O’NEILL**, sponsored by the Program on Law, Communities and the Environment (PLACE) at UVA Law School. He also presented “Re-Establishing Religion,” a paper co-authored with Schwartzman and Cornell law professor Nelson Tebbe, to a number of different audiences.



PAUL B. STEPHAN '77 saw his Hague Academy Lectures on “Municipal Law in International Disputes” published in the academy’s *Recueil des Cours* in November and they will appear as a standalone paperback this spring. He also published a chapter called “The Political Economy of U.S. Law Reform with Respect to International Law and Transactions” in the book “Law Reforms Around the World,” published by Routledge, and

the article “How Do We Express Our Outrage at Russia?” in the *Wake Forest Journal of Law & Policy*. He also gave a lecture on international law and the Supreme Court to the annual visitation of the Middle Temple Society, and took part in a colloquium on “Reimagining National Security” for the Chicago Legal Forum. In January, he will give a lecture to the Judge Advocate General’s Legal Center and School on the Gaza war and the law of war and will teach a course on foreign investment in the energy industry in Melbourne University’s winter program. He also is contributing frequently to *Lawfare’s* “Cyberlaw Podcast” on various issues and publishing in various blogs and other media outlets on both the Gaza war and the design of sanctions for Russia with respect to its invasion of Ukraine.



MEGAN T. STEVENSON'S paper “Cause, Effect and the Structure of the Social World” was published in the *Boston University Law Review*, and her paper “Does Cash Bail Reduce Misconduct?” was published in the *American Economic Journal: Applied Economics*. Her paper “Algorithmic Risk Assessment in the Hands of Humans” is forthcoming in the *American Economic Journal: Economic Policy*. She wrote an op-ed for the *Philadelphia Inquirer* about the high rates at (continued on p. 58)

PRAKASH WINS NATIONAL SECURITY LAW SCHOLARSHIP PRIZE

Professor **SAIKRISHNA PRAKASH** was awarded the 2023 Mike Lewis Prize for National Security Law Scholarship for his article “Deciphering the Commander-in-Chief Clause.”

The prize is given by the Strauss Center for International Security and Law at the University of Texas at Austin and Ohio Northern’s Pettit College of Law, in consultation with the American Association of Law Schools’ Section on National Security Law.

Prakash’s article, published in the *Yale Law Journal*, uses 18th-century understandings of what it meant to be a commander in chief to topple the modern reading of the clause—a reading that ascribes to the president the authority to start wars, create military courts, direct and remove officers, and wield emergency wartime powers.

“Anyone interested in war powers should be interested in this key puzzle piece,” Prakash said. “People often make assumptions about the clause and what the founders wrought—almost all of these assumptions are mistaken.”

While the commander-in-chief clause does grant the president military powers such as operational control over the military, Prakash argues that the modern interpretation of this clause as granting absolute and exclusive military powers to the president is a significant departure from its original intent.

In the 18th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every leader of a military unit was considered its commander in chief. Each naval flotilla had a commander in chief and every army unit had its own commander in chief, so “commanders in chief” were plentiful and unexceptional.

By making the president the commander in chief of the army and navy, the commander-in-chief clause makes the president the principal commander, akin to a “first general and admiral.” The clause did nothing to preclude the existence or authority of other commanders in chief. Nor did it constrain Congress’ power to govern and regulate the armed forces.

Prakash said that the modern, expansive understanding of the powers conferred by the commander-in-chief clause has been driven by

various factors, including overseas crises that require quick action, a military-legal complex intent on amassing power, the absence of judicial pushback, and the modern perception of the clause as a far-reaching grant of authority.

Without clear boundaries, Prakash warns, the clause could become a “wandering clause”



capable of swallowing up new authorities as crises cause the president to put the clause’s powers to the test. The drift toward an increasingly powerful and autonomous executive could threaten the balance of powers envisioned by the Constitution.

“For too long, presidential administrations have argued that, whatever the clause’s hypothetical limits might be, that discussion should be saved for some other day,” Prakash said. “And yet, administration after administration, that day never quite comes.”

Prakash is the James Monroe Distinguished Professor of Law and the Albert Clark Tate, Jr., Professor of Law.

—Josette Corazza

AFTER AFFIRMATIVE ACTION

The Future of the Past in Employment Discrimination Law

GEORGE RUTHERGLEN
FOUNDATION PRESS

OVER THE PAST TWO YEARS, THE SUPREME COURT has undergone seismic philosophical changes dramatic enough to leave even scholars struggling to predict the aftershocks. In his new book “After Affirmative Action: The Future of the Past in Employment Discrimination Law,” Professor **GEORGE RUTHERGLEN** looks at three of the most high-profile recent precedents—on abortion, affirmative action and religious accommodations—and attempts to predict how they might play out in future employment litigation.

“What I wanted to do is just explore what we are going to do in this brave new world where states can criminalize abortion, where affirmative action is prohibited, and where there are more and more claims for religious freedom and religious exceptions,” Rutherglen said.

Rutherglen teaches admiralty, civil procedure, employment discrimination and professional responsibility. A longtime observer of federal courts, he clerked for two Supreme Court justices, William O. Douglas and John Paul Stevens, and one judge on the Ninth U.S. Circuit Court of Appeals.

His title draws from the work of Alexander Stille, a journalist and author whose 2002 book, “The Future of the Past,” explores efforts to preserve important pieces of history in a rapidly changing world.

Rutherglen predicts multiple “waves” of coming litigation, not only over anything resembling affirmative action by public or private employers, but also for employment policies that may have disparate impacts on different groups of employees and for accommodations for a widening concept of religious belief.

Ironically, Rutherglen said, the Supreme Court’s abortion ruling in *Dobbs v. Jackson Women’s Health Organization* may engender the most employment-related litigation, in part because of the way it sets up a conflict between federal anti-discrimination law and state laws that prohibit or criminalize abortion.

The potential legal morass surprises even Rutherglen. The 1978 Pregnancy Discrimination Act may require employers to provide medical care that is necessary because of an abortion, he said, and the 2023 Pregnant Workers Fairness Act requires reasonable accommodation of all pregnant women—which may require employers to give leave to pregnant workers who want or need to go out of state for an abortion.

What happens, however, when the employer and employee are situated in a state that might prosecute women

who seek out-of-state abortions? It may not be possible for employers in that situation to stay in compliance with both federal and state law, Rutherglen said.

“The obvious safe harbor is for employers to relocate to a state that’s favorable to abortion, and there might be some pressure to do that,” Rutherglen said. “Or they could transfer the [pregnant] employee to New York, for instance, but even in liberal states the window for responding to the pregnancy closes pretty quickly.”

The affirmative action decisions have more immediate consequences for employment, applying directly to public employers covered by the Constitution, Rutherglen said. They also have profound implications for private employers because of statutory prohibitions that apply to all, like the anti-discrimination provisions in Title VII.

“In the current legal and political climate, [the decisions] ensure that consideration of race or national origin in almost any employment decision will be held to be illegal,” Rutherglen said.

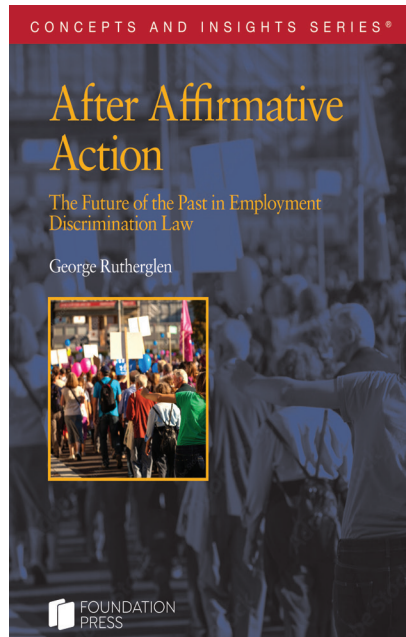
In the past, employers have also been held liable under Title VII for neutral policies that have disparately adverse effects on members of minority groups. Such claims will most likely be more difficult to bring in the future, and any “racial balancing” to undo such disparate impact is now effectively prohibited in employment and college admissions by the recent affirmative action decisions.

In light of ongoing and future developments such as these, Rutherglen wrote the book to illustrate how tricky and technical the field of employment discrimination has become, and to help employers and practitioners create policies to be able to respond as these issues arise in real time.

However, he doesn’t attempt to prescribe what those policies should be.

“I can’t predict where this is certain to go—I think there are too many variables in play and we haven’t even seen many lower court decisions yet exploring these questions,” Rutherglen said. “But there will be decisions along these lines, and they will have cascading effects.”

—Melissa Castro Wyatt



BOOKS

FAIR SHAKE

Women and the Fight to Build a Just Economy

NAOMI CAHN, June Carbone and Nancy Levit
SIMON & SCHUSTER

A NEW BOOK BY PROFESSOR **NAOMI CAHN** AND HER FREQUENT CO-AUTHORS, June Carbone and Nancy Levit, tackles the persistent issue of women’s economic inequality.

While more women are entering the workforce than ever before, the authors argue that today’s “winner-take-all” economic system leaves many women feeling trapped in what the authors call a “triple bind.”

“If women don’t compete on the same terms as the men, they lose; if women do compete on the same terms as men, they are judged more harshly than men,” Cahn said. “And by the time women see the terms of this game, they’ve either been pushed out or they’ve taken themselves out.”

“Fair Shake: Women and the Fight to Build a Just Economy” takes aim at that zero-sum, winner-take-all system—which the authors say unfairly disadvantages women—and the first three parts of the book are structured around legal cases that illustrate each strand of the triple bind they describe.

The fourth part suggests a path forward that they believe will lead to a more just economy by taming the excesses of the winner-take-all system.

“We use legal cases as a way of personalizing the people behind the lawsuits, dramatizing the issues and drawing out lessons on what has changed since Title VII and the Equal Pay Act, and why women are no longer advancing,” Cahn said. “It looked for a while as though women’s wages would start to catch up to men’s. However, during the 1990s, the gender wage gap stalled and there’s been little improvement.”

No matter which part of the economy they looked at—law, finance, tech, retail—the story seemed to be the same, Cahn said. In law, specifically, the authors found that while the percentage of law-firm equity partners who were female grew by six percentage points over the last 15 years, the wage gap between male and female equity partners grew by 12 percentage points over roughly the same period.

The problem, she said, is that the winner-take-all economic system reserves a disproportionate share of institutional power and rewards for the executives at the very top of the pyramid. Although women are not excluded from that system altogether, the zero-sum nature of the rewards fosters a culture of cutthroat competition that women are punished for joining—if they don’t opt out altogether.

The authors point to a lawsuit by Ellen Pao, a former Silicon

Valley venture capitalist, who claimed she received mixed messages and criticism for “pushing too hard to establish herself instead of being collaborative” and not being “a team player.”

Elon Musk, with his \$56 billion Tesla compensation package (since struck down by a Delaware court, see p. 16), is treated as Exhibit A for slash-and-

burn leadership that looks to promote those who buy into the same vision and ethos.

This isn’t a self-help book telling women how to navigate a broken system, Cahn emphasized.

“‘Fair Shake’ is not a fix-the-woman/lean-in kind of book,” Cahn said. “It doesn’t say, ‘OK women, act the same way as men and you will succeed.’ If women do play on the terms as men, they are accused of having sharp elbows.” In any event, the authors conclude, women should not lean into a system that is rigged.

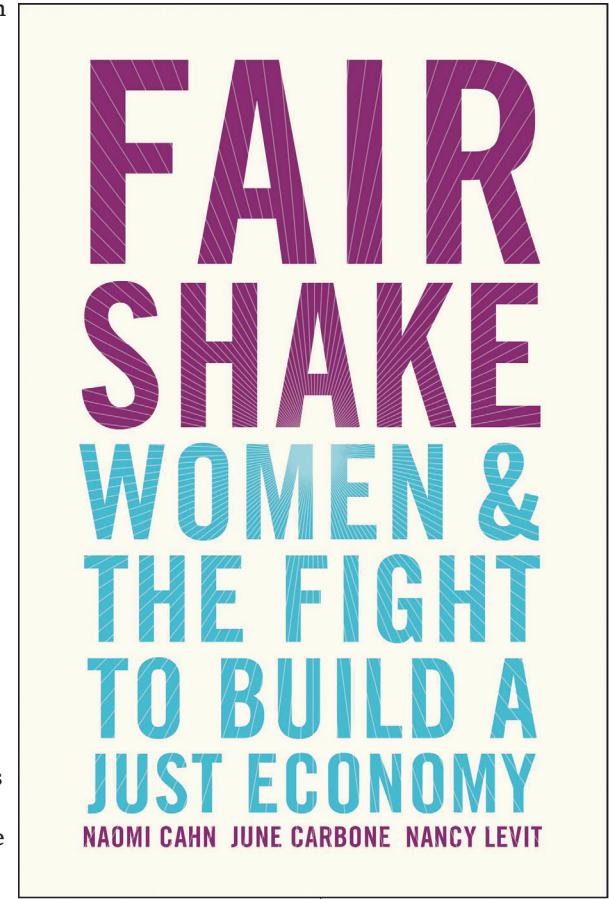
Instead, the book calls for a “new ethos” in corporations that focuses on transparency and cooperation.

“Our goal is to change corporate culture, and by changing corporate culture, we also want to change cultures outside of companies, including what happens in the education system,” Cahn said. “What we’re hoping for is a reevaluation of what has come to be known as ‘feminine values’—that is, values of community and cooperation—but in the 1950s, those were the values of [good] organizations.”

The authors offer a roadmap for change through collective action and a systemic overhaul that emphasizes the rule of law. They advocate for building an economy that benefits everyone, not just a privileged few.

Cahn is the Justice Anthony M. Kennedy Distinguished Professor of Law, the Armistead M. Dobie Professor of Law and co-director of the Family Law Center at UVA Law. In writing “Fair Shake,” she once again teamed up with Carbone of the University of Minnesota Law School and Levit of the University of Missouri-Kansas City School of Law. All three are law professors (and mothers) who research and write in the areas of employment discrimination, family law and gender theory. Together or separately, they have written both popular books and law school casebooks, including “Red Families v. Blue Families,” “Marriage Markets” and “The Gender Line.”

—Melissa Castro Wyatt



WANG WINS AALS AWARD FOR PAPER ON RELIGIOUS FREEDOM

Professor **XIAO WANG** won an Association of American Law Schools award for his paper on a recent trend in religious freedom litigation.

For his paper “Religion as Disobedience,” Wang received the 2024 Harold Berman Award for Excellence in Scholarship, presented to

found plaintiffs sincere 93% of the time,” he writes, adding that in employment discrimination and Americans with Disabilities Act cases, plaintiffs meet the burden of proof for their claims just 27% and 60% of the time, respectively.

“Without appropriate tools to discern genuine religious practice from opportunistic litigation, free exercise becomes an open invitation to true believers and make-believers alike to break the law,” he writes.

Wang thanked Professor **MICAH SCHWARTZMAN '05** for his “valuable feedback and advice” on the paper.

This year’s winners were recognized during an awards ceremony at the AALS annual meeting on Jan. 4.

Wang, who joined the Law School this academic year, writes about federal courts, constitutional law, and law and religion. His research addresses generally how lower courts implement and apply Supreme Court precedent. Wang is also an assistant professor

of public policy at the Batten School of Leadership and Public Policy.

He co-directs the school’s new Supreme Court and Appellate Litigation Program (see p. 34), directs the school’s Supreme Court Litigation Clinic, organizes the En Banc Institute and supervises the National Appellate Clinic Network. He has led appeals before state courts, federal circuit courts and the U.S. Supreme Court.

Wang graduated from Yale Law School, where he was a Truman Scholar, and earned his master’s in public policy and B.A. in economics from the University of Virginia, where he was a Jefferson Scholar.

—Mike Fox

which police officers, lawyers, victims and witnesses fail to appear in court. She is also a keynote speaker at the University of Pittsburgh’s Cross-Disciplinary Carceral AI Workshop.



PIERRE-HUGUES VERDIER

recently completed two articles that will appear this spring. The first, “Transnational Enforcement Leadership and the World Police Paradox,” examines the causes and consequences of the leadership role certain states—prominently but not exclusively the United States—take in transnational enforcement in areas such as bribery, money laundering and cybercrime. It will be published in the *Virginia Journal of International Law*. The second, “The Role of Regional Journals in Comparative International Law,” which will appear in the *Yale Journal of International Law*, is part of a project by the Consortium on Scholarship and Analysis of International Law, a group of scholars whose objective is to examine how scholarly publications shape the field of international law, especially in the context of the Global South’s growing presence. Verdier is currently planning the Law School’s spring 2025 Sokol Colloquium on Private International Law on geopolitical conflict and international financial governance. He is working on an article on the same theme.



scholars for an outstanding article on the subject of law and religion published within their first 10 years teaching at an AALS member school.

Published in the *Vanderbilt Law Review*, the article argues that courts have allowed plaintiffs to use federal religious freedom statutes to make it harder for governments to defend and enforce policies such as vaccine mandates and anti-bias laws. Analyzing the sincerity of plaintiffs’ beliefs will help prevent religion from being used as a tool of disobedience, Wang argues.

In the first analysis of its kind, Wang reviewed 350 federal appeals and found that in the past 30 years, the Supreme Court has never found a single plaintiff to be insincere in a religious freedom case.

“Federal appellate courts, likewise, have