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Foreword

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FOREWORD

The *Saint Louis University Public Law Review* has a long tradition of creating an open and uncensored forum for legal scholars, practicing attorneys, legislators, and public interest advocates. Since 1981, the *Public Law Review* has published articles and held symposia in significant areas of public interest law and public policy. Our prior symposia topics have included matters such as “The Jury’s Role in Administering Justice in the United States,” “Voting: 45 Years After the Voting Rights Act,” and “The Urban Community: Emerging Solutions to Economic Justice, Housing, Violence & Recidivism.” We have had the privilege and pleasure to publish authors ranging from United States Supreme Court Justices to eminent law professors. The *Public Law Review* was created as an arena to attract works of the highest academic caliber, in which legal scholars could debate timely topics of general interest and importance.

The *Public Law Review* is now in its thirty-first year of publication, and our founding principles still serve as strong guideposts for the Editorial Board and Staff. These traditions directed the Editorial Board’s vision for the Volume XXXI, Issue Number 2. Accordingly, we set out to find articles by leading scholars addressing unique and timely ideas. This issue, therefore, presents a wide variety of captivating scholarship discussing new and important topics, sure to have significant effects on the legal world.

Cedric Merlin Powell, Professor of Law at the Louis D. Brandeis School of Law, offers a comprehensive critique of the Roberts Court’s doctrinal position in two seminal race cases, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Ricci v. DeStefano*, and of the concept of equality of opportunity versus equality in results. Professor Powell argues the Roberts Court’s race jurisprudence privileges reverse discrimination suits, inverting the Fourteenth Amendment and Title VII. Contending that *Parents Involved* reinterpreted *Brown v. Board of Education*, Professor Powell suggests that the Court also reinterpreted the central tenet of the Fourteenth Amendment. Additionally, Professor Powell argues the Court, in *Ricci*, reconceptualized Title VII claims. He urges for the Fourteenth Amendment and Title VII to embrace transformative equality and an interpretive analysis seeking to eradicate the present day effects of past discrimination. Professor Powell’s exploration of the doctrinal connection between these two sets of cases takes a unique look at the permissibility of race-conscious remedial approaches.

Or Bassok, a Robina Foundation Visiting Human Rights Fellow at Yale Law School, offers a rare analysis of the deep influence of public opinion polls on American constitutional thought, and in particular, on the judiciary. Mr. Bassok accomplishes this by explaining the differences between the two different forms of the countermajoritarian difficulty faced by the courts today. After clarifying the two countermajoritarian difficulties, and as a result of this clarification, Mr. Bassok uncovers other important issues in constitutional theory, including the connection between the countermajoritarian difficulty and “passive virtues,” the importance of the distinction between cases the media covers and those they do not, the basis of the Court’s power, and the rise of judicial power.

Mark R. Brown, Newton D. Baker/Baker and Hostetler Chair of Law at Capital University Law School, addresses the question of how to initiate civil rights actions against state agents under the logic of *Ex parte Young*. Professor Brown explores the circuit splitting question of whether Federal Rule of Civil Procedure 4 and its service-by-mail alternative can be used in cases wherein state officials are sued in their official capacities for prospective relief under 42 U.S.C. § 1983. After looking at the history of Rule 4, the Supreme Court’s treatment of § 1983, and the Eleventh Amendment, Professor Brown concludes that Rule 4’s original understanding is still controlling. Professor Brown represented the plaintiff as lead counsel in one of the principal cases in this area of law, *Moore v. Hosemann*, and he provides a unique and insightful analysis of the issue.

Deborah M. Hussey Freeland, Associate Professor of Law at the University of San Francisco School of Law, considers questions of legal ethics and analyzes them through a focus on a lawyer’s professional identity in her cutting-edge and stimulating article on the ethics of representation. She takes a novel approach to categorizing a lawyer’s identity and ethics by investigating United States Supreme Court jurisprudence and the judicial system structure and functions. Professor Hussey Freeland exposes strong evidence that the lawyer’s identity as an officer of the court is indeed, the defining basis of her identity.

Constance Z. Wagner, Associate Professor of Law at Saint Louis University School of Law, offers a thought provoking exploration of an unresolved issue of international trade law and policy in her article for the *Public Law Review*. Professor Wagner questions whether there is a need to consider gender-differentiated impacts of trade agreements, and if so, how such impacts should be addressed. She emphasizes the growing importance of regional trade agreements as a route to economic integration and trade liberalization, and explains the popularity and advantages of such agreements. Highlighting the rationale for incorporating a gender perspective into international trade treaties, Professor Wagner focuses on the development of gender-based critiques of international trade and recent trends aimed at helping

women impacted by trade liberalization. Finally, Professor Wagner argues that negotiations on regional economic integration may be the most appropriate forum in which to address gender concerns.

A student comment by Samuel D. Cardick highlights the difficulties faced by American Indian women, particularly the staggeringly high statistics of rape, and the jurisdictional failure that adds to their suffering. Mr. Cardick explains the inadequate federal services, protection, and means for redress these women are subjected to. He argues the Tribal Law and Order Act of 2010, enacted by Congress to overhaul the tribal judicial system, actually focuses on inappropriate issues, does not take significant action, and fails to sufficiently protect American Indian women.

Chet Hutchinson, in his student note, explores the use of custom, or non-judicial precedent, as a source of legal authority in the national security context since the beginning of the War on Terror. Mr. Hutchinson provides a timely analysis of the use of custom by the Supreme Court and as the use of custom as a justification for the executive practice of targeted killings. After discussing relevant Supreme Court precedent, Mr. Hutchinson argues that clear, congressional action concerning national security matters, including targeted killings, is long overdue.

In his intriguing student note, Timothy P. Powderly, examines the history of the cat's paw theory of liability and its application in several different areas of law. Mr. Powderly also analyzes the uncertainty left in the wake of *Staub v. Proctor Hospital*. After surveying the issues surrounding *Staub* and the cat's paw liability theory, Mr. Powderly argues the Supreme Court should have adopted a balanced causation standard and clarified the important issues surrounding the cat's paw theory.

The *Saint Louis University Public Law Review* would like to sincerely thank all of the authors for sharing their wonderful contributions with us. The expertise, enthusiasm, and patience each author provided during this process is deeply appreciated. Many thanks are also extended to the *Public Law Review* Editors and Staff, not only for their hard work on this issue, but for a wonderful year. Professor Matt Bodie has served as a wonderful faculty advisor to the *Public Law Review* for five years, and we were incredibly lucky to have his knowledge, advice, and support. Finally, we would like to thank Susie Lee and Will Fruhwirth for their tireless efforts to make the *Public Law Review* a success.

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