JOHN C. JEFFRIES JR.
ENTERING HIS 40th year on the Virginia faculty, John Jeffries is one of its central figures. A former dean and an alumnus, the most renowned teacher on a faculty known for outstanding teaching, and one of our most visible scholars, he is a substantial reason for our success as a scholarly community.

Jeffries’ scholarship defies easy categorization. It is doctrinal in the sense that its starting point is what courts say and do. But it pursues an objective more often associated with social science and law, that of understanding how the law affects primary behavior. This pragmatic, functional orientation helps explain why Jeffries is one of the most frequently cited scholars on the Virginia faculty.

But it is not the full explanation. Reading Jeffries’ scholarship is a pleasure, not a chore. His style is Churchillian: sophisticated, but free from jargon; elegant, but with a persistent undercurrent of irreverence. This style was visible even in his student note, which carefully analyzed the situations in which foster children and others not formally adopted are nevertheless allowed to inherit from an intestate guardian. The note’s title, “Equitable Adoption: They Took Him Into Their Home and Called Him Fred,” 58 Va. L. Rev. 727 (1972), served notice of Jeffries’ ability to write with style and wit but without pretense.

That ability is evident in his most influential works, including one article he wrote early in his career, “Legality, Vagueness, and the Construction of Penal Statutes,” 71 Va. L. Rev. 189 (1985). The article looks at three foundational doctrines of criminal law: the principle of legality, which rejects judicial rather than legislative definition of crimes; the vagueness doctrine, which forbids excessive legislative delegation to courts in the criminal area; and the rule of strict construc-
tion, which orders courts to resolve interpretive ambiguity in favor of the accused.

The article observes that these doctrines were born of particular historical circumstances that may be no longer relevant. Modern scholars have offered theories to justify their continued existence, but Jeffries finds these explanations either too abstract to provide predictive power or simply implausible in light of the practical reality of criminal adjudication. Jeffries then identifies three kernels of practical concern that should undergird these doctrines and define their scope. One is a fundamental rule of fairness: criminal law should avoid unfair surprise in the sense that an ordinary, law-abiding person should be aware that her activity is criminal. Jeffries contrasts this rule to “lawyers’ notice,” which exists when an informed review of the relevant primary legal materials would support the imposition of criminal liability. The second concern is certainty, or a preference for interpretations that close off potential avenues of ambiguity rather than opening new ones. The final concern, and also the most original and penetrating, is impersonality. Courts interpreting penal statutes should adopt the meaning that offers the fewest opportunities for enforcement authorities to pursue idiosyncratic agendas or vendettas. Impersonality’s centrality and importance may have been only dimly visible at the time of the article’s publication, but no one could fail to grasp the point today.

The article concludes with an application of its framework to United States v. Margiotta, a case involving the “honest services” theory of liability under the federal mail fraud statute. Jeffries notes that despite the novelty of the prosecution’s theory under which a political party operative who was not a public official could be prosecuted for intangible-rights violations, Margiotta could not reasonably have believed his activities were legally unproblematic. The issue, as Jeffries sees it, is not unfair surprise, but the creation of uncertainty and wide prosecutorial discretion—concerns also visible in Judge Winter’s dissent in the case.

The subsequent history of the honest services doctrine vindicated Jeffries’ view. The Supreme Court took up the doctrine in McNally v. United States, another case involving a defendant who was not a public official. Rather than focus on the concerns Jeffries identified, the Court

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1 43 Law & Contemp. Probs. 7 (1980).
2 483 U.S. 350 (1987)
John C. Jeffries Jr. employed the standard, under-theorized version of the strict construction doctrine and concluded that in the face of uncertainty, the “less harsh” reading must be adopted. The Court therefore limited the reach of the mail fraud statute to deprivations of property rights. Congress almost immediately rejected this narrow reading by adopting an explicit “honest services” clause in 18 U.S.C. §1346, creating further interpretive disputes. While we can’t know with certainty whether Congress would have rejected a decision simply declaring that only public officials could commit honest services fraud, it seems quite plausible that the current landscape is more uncertain and gives greater scope for prosecutorial discretion in politically charged situations than would have been true under Jeffries’ analysis.

Jeffries’ determination to see legal rules as part of an integrated system of social control rather than as individual units of analysis was even more evident in “In Praise of the Eleventh Amendment and Section 1983,” 84 Va. L. Rev. 47 (1998). The article responds to the common view that jurisprudence under the Eleventh Amendment is an incoherent mess. While that may be so, Jeffries points out that in practice it matters very little because the jurisprudence itself matters very little. In most cases in which the Eleventh Amendment bars direct recovery against a state, the same plaintiff can pursue the same recovery, from the same ultimate source, through the indirect means of a Section 1983 suit against a state or local officer. Jeffries notes that as a practical matter, indemnification for officials sued under §1983 is nearly universal. Thus, “[t]he real role of the Eleventh Amendment is not to bar redress for constitutional violations by states but to force plaintiffs to resort to Section 1983.” At a functional level, this means that liability for constitutional violations is usually fault-based. While one could find that result normatively appealing (as does Jeffries) or objectionable (as some others do), it can hardly be called incoherent.

In addition to taking separate doctrines and institutional arrangements and presenting them as a coordinated and logical whole, the article has the virtue of not overselling its points. Jeffries is scrupulous in identifying the small gaps that §1983 does not cover, gaps where Eleventh Amendment immunity is indeed absolute. He also notes that at a strictly doctrinal level, liability for constitutional torts is not invariably fault-based. But he presents a detailed and compelling argument that in the vast majority of cases, the Eleventh Amendment, §1983, and typical indemnification arrangements coalesce into a rational and nor-
Jeffries also presents a penetrating treatment of the shifting and confusing law of aid to religious schools in “A Political History of the Establishment Clause,” 100 Mich. L. Rev. 279 (2001), written with our then-colleague and education law expert Jim Ryan, now dean of Harvard’s Graduate School of Education. The article observes that the Establishment Clause began to function in the Court’s eyes as a “wall of separation” between the state and religious instruction at the rather late date of 1947 with the decision in Everson v. Board of Education. For fifty years thereafter, the Court struck down most forms of state aid to secular schools, although it permitted a few. Beginning in 1997, however, the Court began to express doubt about the doctrine and subsequently permitted forms of aid that would have been forbidden just a few years before.

One could of course argue that this apparent shift is just par for the course in an area that even the justices admit has not been a model of analytical clarity and consistency. Alternatively, one could attribute it to a change in the Court’s ideological composition. Jeffries and Ryan do neither. Instead, they argue that the evolution of Establishment Clause jurisprudence reflects the evolution of the politics of religious education in America. That focus on social beliefs outside the courtroom echoes the work of another former Virginia colleague, Mike Klarman, who has prominently cataloged the shift in racial attitudes in the years after World War II that powerfully contributed to Brown v. Board of Education.

Jeffries and Ryan demonstrate that the Everson Court’s purported grounding of the wall of separation in original intent is highly questionable. As they put it, “Both majority and dissent treated the history of the United States as if it were the history of Virginia.” At the time of the Founding, most other states in fact had an established church. Akhil Amar has noted the incongruity of reading the Fourteenth Amendment to deny the states the right to establish a church—a right that the Establishment Clause clearly reserved to the states while denying to Congress.

Jeffries and Ryan therefore argue that one cannot understand Everson without understanding the political history of religion in the public schools. They recount that Protestant denominations in the nineteenth century compromised with one another to create a system
of public education that was non-sectarian but distinctly Protestant. This was not hospitable to Catholics, who in large numbers opted out of public schools and created parochial schools. Soon the question of public support for these schools arose. Protestants drew a line between “non-sectarian” public education, which could and did include teaching the (King James) Bible and (Protestant) religious doctrine, and “sectarian” education, which in principle could have meant Baptist or Methodist instruction but in practice meant Catholic schools. They made the self-interested argument that only the latter, not the former, were constitutionally problematic.

This line was ultimately enshrined in law; states adopted constitutional provisions forbidding public support for sectarian education. As Catholic voting strength grew in the Northeastern cities, however, Catholics struck back by pressuring school districts to ban (Protestant) religious instruction in the public schools. The pattern of barring religion from public schools and barring state aid for sectarian schools therefore began to take shape as a result not of the Establishment Clause but of political maneuvering born of mutual antagonism between Protestants and Catholics.

As Catholic political power continued to grow in the early twentieth century, Catholics became increasingly aggressive in pursuing state aid to parochial schools. By the time Everson was decided, the political tide had turned and Protestants, as well as the growing Jewish community, turned to the courts to stop public funding for Catholic education. This dynamic, and not a Founding-era tradition that was demonstrably inapplicable outside Virginia, led to Everson.

But the resulting political equilibrium lasted only half a century. As Jeffries and Ryan note, by the late twentieth century, evangelical and fundamentalist Protestant sects became as unhappy as their Catholic counterparts with the “wall of separation” as applied to primary and secondary education. Thus, a growing number of Protestants have unexpectedly allied with Catholics in support of public aid to sectarian schools. This dynamic, and not the changing makeup of the Court, best explains recent leaks in the wall of separation.

The article is a tour de force that meticulously describes the evolution of religious instruction in both public and private schools and the resulting legal disputes. To carry its points, the article simultaneously analyzes cultural, ecclesiastical, legislative, and state and federal constitutional developments.
In addition to his strictly academic work, Jeffries wrote the 1994 biography *Justice Lewis F. Powell, Jr.*—published two decades after Jeffries clerked for Powell at the Supreme Court of the United States. In a *New York Times* book review, Professor Vince Blasi described the book as “one of the finest judicial biographies ever written.” It is a traditional biography pitched to a generalist reader but illuminating for a legal academic audience. Simultaneously sympathetic and analytical, it is a model of the genre.

Jeffries’ scholarly impact is a function not only of his own academic output, but of his many former students who have themselves become prominent scholars. He has co-authored with several, including Daryl Levinson, Jim Ryan, Paul Stephan, and Bill Stuntz. As a teacher, mentor, dean, and scholar, Jeffries’ influence has been extraordinarily wide. His post-decanal work has returned to the liability and remedial systems for constitutional torts. His most recent article, “The Liability Rule for Constitutional Torts,” *Va. L. Rev.* 207 (2013), takes an explicitly normative turn and suggests ways to align liability, remedy, and policy. Both courts and scholars would be wise to pay attention.
In 2004, the Supreme Court, to the surprise of many, reaffirmed the validity of affirmative action in higher education and did so along lines that closely tracked Lewis Powell’s deciding opinion, for himself alone, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). At the invitation of the Supreme Court Review, Jeffries commented on those decisions, concluding with an avowedly “personal” endorsement of Powell’s position:

I have come—slowly—to the view that Powell in Bakke was exactly right. He was right to allow racial preferences and also right to deploy the Constitution against their formalization and entrenchment. Moreover, the reasons for thinking Powell right [today] are essentially the same as those he would have given in 1978—namely, the unacceptability of the alternatives. If all consideration of race were squeezed out of admissions decisions, the prospects of white and Asian applicants would be marginally improved (owing to the impact of a few additional places on their greater numbers), but the prospects of African-American applicants (and certain other minorities) would be drastically reduced. A sharp cutback in African-American enrollment would hurt the law schools and hurt the nation. It would exacerbate a sense of grievance that already has more than adequate foundation. It would deprive the African-American community of a cadre of potential leaders. And it would make it that much harder for minorities to maintain a full commitment to our common future as Americans.

Additionally, rigorous color-blindness would deprive nonminority students of the personal, professional, and educational advantages of living and learning with minorities. This last point is sometimes dismissed by those who are far away from educational institutions, but I believe it is keenly felt by those who work and study in them... Under current conditions, strict color-blindness, if unambiguously adopted and rigorously enforced, would impair the quality of the edu-
cation of all law students.

Perhaps less obviously, I think we would also have come to rue the more generous approach advocated [in Bakke] by Brennan, White, Marshall, and Blackmun. Racial set-asides in higher education, which they were prepared to tolerate, would have been the most efficient way to achieve diversity in the classroom, but they would have proved corrosive. Any allocation of spaces on the basis of race or ethnicity would have been challenged as conditions changed, and those challenges would have been anything but edifying. Imagine the questions that would have been triggered by the growth of the Latino population. ... If the number of Latino spaces increased, would the additions come from other ethnic minorities with their own claims for special treatment? From African-Americans? From capping the growing Asian population? Or would the category of undifferentiated “whites” become the universal donor for ever-increasing commitments elsewhere?

These are not pretty questions, and the debates occasioned by them could scarcely fail to divide and wound. ... Whatever allocations were made on day one would quickly come to feel like permanent entitlements to those who benefited from them, and whatever adjustments were not made on day two would as quickly become sources of grievance to those who did not prosper. The prospect of perpetual competition over racial and ethnic allocations is one that none should welcome, yet it is hard to see how approval of [racial set-asides] could have led anywhere else.

It is against this prospect that the uses of ambiguity come to the fore. ... If the advantages accorded racial and ethnic minorities are not explicitly stated, they need not be explicitly undone. If adjustments are not announced and contested, a steady progression of divisive debates can perhaps be avoided. The burying of racial preferences in “plus” factors for certain individuals obscures and softens the sense of injury that even the most dedicated proponents of affirmative action must acknowledge will be felt by those who are disadvantaged for reasons they cannot control. Law schools will be better, happier, and more productive places if the lines separating the students who inhabit them are not harshly drawn.

... Racial preferences in admissions may be justified, as I believe, by pressing necessity, but they are not something to which we should
readily become accustomed. They are desirable only in the limited sense that, under current conditions, living with them is better than living without them. As conditions change, we should be alert to the necessity to change with them and to curtail or eliminate racial “plus” factors as soon as possible. This inchoate future negative, the preservation of doctrinal objections and normative understandings that call for racial preferences to end, is also part of Powell’s legacy. It is as important—and as valuable—as his willingness to allow racial preferences in the interim.
Jeffries has written several articles on constitutional tort law. His farewell to the field came in 2013. The opening paragraphs of that most recent article describe the disorder he sought to remedy and illustrate the approach of his scholarship.

There is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other. The choice among them does not depend, as the proverbial Martian might expect, on the role of money damages in enforcing particular rights. The right being enforced is irrelevant to constitutional tort doctrine. What matters instead is the identity of the defendant or the act she performs. States and state agencies are absolutely immune from damages liability, no matter how egregious their conduct may be. The same is true for those who perform legislative, judicial, and certain prosecutorial actions. In contrast, local governments are strictly liable for constitutional violations committed pursuant to official policy or custom, even if the right found to have been violated was first recognized after the conduct triggering liability. Most defendants—including federal, state, and local officers—are neither absolutely immune nor strictly liable. Instead, they are protected by qualified immunity, a fault-based standard approximating negligence as to illegality.

This fracturing of constitutional torts into disparate liability rules does not reflect any plausible conception of policy. Although the Court occasionally makes functional arguments about one or another corner of this landscape, it has never attempted to justify the overall structure in those terms. Nor could it. The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible.

... This Article attempts a unified theory of constitutional torts. Less grandly, it offers a comprehensive normative guide to the award of damages for violation of constitutional rights. It seems generally to align the damages remedy on one liability rule, a modified form of qualified immunity with limited deviations justified on functional
grounds and constrained by the reach of those functional justifications. As this analysis is explicitly normative, it will not be persuasive to all. That is especially true, given that the analysis is normative in a lawyerly way. It does not assume a blank state in the law of constitutional remedies, but takes existing doctrine as the place to start and seeks to propose changes to the landscape that we know rather than to substitute a world we can only imagine.
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