PROFESSOR EXPLAINS FORCES BEHIND SAN FRANCISCO’S HOUSING WOES
MORIA 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 contributed to soaring housing prices in the city. 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 revealed—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 where her 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 Riber, 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 collaboratively look 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 building 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 require reasonable discretion to afford 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.”

She and a team of researchers—which included Tim Dodson ’24—as 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.

 “[The process allowed the city to impose conditions for approval that are not codified, that are not enunciated 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 element of notification, and approval 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 recommendations.

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 makes 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

MOIRA O’NEILL

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, Ahdoout argues.

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

Ahdoout 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.

Ahdoout’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 Ahdoout 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.

Ahdoout graduated with highest distinction from the University of Virginia School of Law with a J.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
Professor JOSH BOWERS was elected a member of the American Law Insti-
tute, 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 oth-
erwise improve 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’
work focuses on asset-forfeiture law and the Institute for European
and Comparative Law, which produces work meant to update or oth-
erwise improve the law.

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

Professor DARYL 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
released.

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 prosecu-
tion 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 in-
vestigate 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 lever-
age 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.

NAOMI R. CAHN, a Virginia professor, continues to serve as editor-in-chief of
the ACTEC Law Journal. She was elected treasurer of the ACTEC Law Journal.

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—Melissa Castro Wyatt
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 “ju-DEES”—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 politicians 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 several 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 ideological scores of 10 judges mentioned as possible replacements. The study, published online in The Washington Post, showed—based on their appellate records—that Brett Kavanaugh and Neil Gorsuch might be more moderate as justices than many had thought. That prediction has largely been borne out. “The existing ideology measures have been inaccurate meaning from language has long proven to be a huge challenge for data and social scientists,” COPE said. “Humans are really good at identifying meaning in legal writing, but computers can’t do 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.”

KEVIN COPE, professor of political science at the University of Virginia, began JuDJIS in 2013, after he and his team realized that the conclusions about ideological bias drawn from the study of Supreme Court justices’ speeches and opinions were being made with few systematic and objective measures. JuDJIS, 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 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 “commentary and MacArthur Fellows.” She also published a paper titled “From Bad to Worse: Digital Age,” co-authored with Daniel Godfrey and Allison Tait, in “The All at 100: Essays on Its Centennial.”


She was a panelist for the ABA Task Force for Democracy and the Rule of Law School. She was a keynote speaker at the ALI’s Conference on International Law and Policy of Our Children in the Immigrant System, an event co-sponsored by the ABA National Security of Our Children in the Immigrant System, an event co-sponsored by the ABA, at the University of Pennsylvania Law School.

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.

“Missouri v. Biden: Conversation on the Present and Future of Digital Age,” an essay co-authored with Yoram minimal risk of proceed. In recent months, he has presented research at the Latin American and Caribbean Academic Law Organizations associations meetings in Bógota, Colombia; at Austral University in Buenos Aires; and at UVa in connection with a symposium for the National Journal Public Choice. He gave a (remote) keynote lecture on his book “Political Corruption,” co-authored with DEBORAH HELLMAN, is forthcoming in the Oxford Handbook of American Law.

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CITRON Recognized for Scholarship on Privacy

Professor DANIELLE CITRON received the International Association of Privacy Professionals’ 2024 Privacy Leadership Award for 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. “I am honored to receive this award as a celebration of the continued growth and recognition of privacy issues across industries,” she said in a statement. “I’m excited to work with my colleagues in the privacy community to continue advancing our field.”

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 2021 and formerly served as section secretary. The Section on Clinical Legal Education is the largest section of the AALS. It supports clinical and externship teachers and students, promotes the dissemination of information about clinical education, and provides programming at the AALS Annual Meeting. The section also sponsors three annual awards recognizing clinical teachers; promotes collaboration across the nation; and advances clinical scholarship through support of the publication of the Clinical Law Review, workshops, and in-progress sessions throughout the year; and provides other mentoring, training, and help for clinical teachers. –Mike Fox and Mary Wood

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 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 of the Northern Virginia District, and Del. Rip Sullivan ’87, noted in part that she “made history at UVA Law both by leading 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. 
Four years ago, DAVID S. LAW and Bryant Garth of the University of California, Irvine, started working on an idea for a book series, "The Economics of the World System," 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 accessible 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, German, and Chinese law in India. Each of these short, interdisciplinary monographs includes a "Quick Guide"—a 15-page table-form battery of consistent questions that tie together the series and make them do comparative work on courts.


Beginning in September, MICHAEL A. LIEBERT will serve as the chair of the Academy of American Law Schools and a legal education conference on “Rethinking Pere Conzelman” organized by the Pacific Legal Foundation. In November, she moderated a panel on “In re Surrogacy and the 14th Amendment” at the Federalist Society’s National Lawyers Convention.

On Sept. 16, CHINQ Q. LE’VO 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 decision in Trump v. Texas on affirmative action decisions. On Sept. 28, he moderated the inaugural “Property & Race Live” panel event, organized by the Cleveland Academic Legal Education Coalition on School Diver- sity to discuss the intersection of school integration and school finance. This fall, he joined a small group of researchers, lit- igators and advocates that form a “community of practice” support- ing Brown’s Promise, a new nonprofit working to bridge the silos between school funding and school spending. He also moderated the “Creative Solutions to the Criminal- ization of Poverty” panel at this year’s Shaping Justice Conference. On Feb. 2, he will be presenting at the Online Work- ship 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 Columbia University and Yang Li of the University of Pennsylvania.

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 Koos Laursen, president of the European Court of Justice, at the inaugural event for the Max Planck Hub Fiscal and Social State. She con- tinues to write in Tax Notes about developments in the European Commis- sion’s state aid cases in- volving U.S. multinational- ed. Her 19th installation was about the advocate general’s opinions on the Apple case pending before the ECJ. She also orga- nized the UVA Tax Invita- tional Workshop in the fall. In February, she spoke at the IHA-Europe conference on “In re Surrogacy and the 14th Amendment” at the Feder- alist Society’s National Lawyers Convention.

DEBORAH HELLMAN, who is working on a manuscript on financial institutions and state power, will be presenting her work at several conferences, including the American Political Science Association, the International Political Economy Society, and the Organization of American States.

GERALD H. MILLER, professor of psychology and artificial intelligence, will be giving a course at the University of Southern California on the ethics of artificial intelligence.

JOY MILLUS, professor of law, published an article, “We (Who Are Not the People): Interpreting the Undemocratic Constitu- tion,” co-authored with BERTRAL ROSS, in the De- cember 2023 issue of the Texas Law Review. They jointly presented their article in August at a UVA law faculty workshop, and Milus will present at the University of Minnesota Public Law Workshop in September. She presented a work-in-progress, “The Constitutionalization of Economic and Social Rights,” at the Loyola Con- stitutional Law Colloquium in November, and spoke on a panel at the Association of American Law Schools Annual Meeting in January on “Brower, Equal Education and Democracy: Honoring the 70th Anniversary.

The University of Virginia Law Review has published a series of articles titled “Feudalism and the Economic Analysis of Law,” co-authored with Benjamin Klein, Kajsa Stensmo, and Michael Beeman. The articles are intended to highlight the potential for interdisciplinary scholarship in the field of law and economics. The series is a collaboration between the University of Virginia School of Law and the University of Chicago Law School, and features contributions from leading scholars in the field.

The series includes the following articles:

- "Feudalism and the Economic Analysis of Law," by Benjamin Klein, Kajsa Stensmo, and Michael Beeman
- "Feudalism and the Economic Analysis of Law: The Case of the United States," by Benjamin Klein, James L. Cliquet, and Brian K. Cantor
- "Feudalism and the Economic Analysis of Law: The Case of Germany," by Kajsa Stensmo and Michael Beeman
- "Feudalism and the Economic Analysis of Law: The Case of Japan," by Michael Beeman and Benjamin Klein
- "Feudalism and the Economic Analysis of Law: The Case of China," by Michael Beeman and Benjamin Klein
- "Feudalism and the Economic Analysis of Law: The Case of Russia," by Michael Beeman and Benjamin Klein

The series is open to contributions from other scholars and is intended to foster interdisciplinary research in the field of law and economics.
On Dec. 1, DANIEL R. ORTIZ gave a lecture on the School of Culture, Politics, and Democracy at the University of Sapienza, Rome, on “Lobbying in the U.S.A.” It was part of a larger 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 Law 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 strategy in cyberwar, with respect to its invasion of Ukraine.

MICAH SCHWARTZMAN ’05 co-authored with MARK S. LEVIN and LAT C. MITCHELL III, “Practical Implications of the Modern Military Commission” for the Denver Journal of International Law, August 2023, published by the Stetson University College of Law, in consultation with the American Association of Law Schools’ Section on National Security Law.

PAUL M. STEPHAN ’77 saw his Haggas Academy Lectures on “Municipal Law in International Disputes and the Structure of the Social World” was published in the Boston University Law Review, and his paper “Does Cash Bail Robach Misconstrue the academy’s Recueil des Cours in November and the procedure for a standalone paper on how the law of war has been published a chapter called “The Political Economy of U.S. Policy on the Global War” paper in the Journal of International Law and Trade in the Florida Bar IP section. She presented her working paper on the article “How We Express Our Rights at Risk in The Hague Academy Lecture on International Law & Policy.” He also presented 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 Law 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 strategy in cyberwar, with respect to its invasion of Ukraine.

MARTIN T. HICKS published “The Coercion of Child Protection in the Netherlands” in a forthcoming volume of the International Journal of Law and Psychology, which analyzes the history of a Dutch law that bans convicted child sex offenders from having contact with children. He also presented a paper on “The Political Economy of U.S. Policy on the Global War” paper in the Journal of International Law and Trade in the Florida Bar IP section. She presented her working paper on the article “How We Express Our Rights at Risk in The Hague Academy Lecture on International Law & Policy.” He also presented 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 Law 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 strategy in cyberwar, with respect to its invasion of Ukraine.

Professor SAIRA KISHRA 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 and the University of Texas at Austin and Northern Michigan’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, examined century-old 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. “Many people make assumptions about the clause and what the founders wrought—almost all of these assumptions are mis-takes.”

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 member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

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In the 21st century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 22nd century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 23rd century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 24th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 25th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 26th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 27th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 28th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 29th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.

In the 30th century, the term “commander in chief” was not as singular and powerful as it is today. It was a common military status, and every member of a military unit was considered its commander in chief. Each naval flag officer had a commander in chief, and every army unit had its own commander in chief. In the modern era, commanders in chief were seen as constitutional checks and balances, and their role was to prevent the president from drifting too far from constitutional norms.
FAIR SHAKE
Women and the Fight to Build a Just Economy

NAOMI CAHN, June Carbone and Nancy Levit, with Sharon Schierer

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. In their latest book, “Fair Shake: Women and the Fight to Build a Just Economy,” the authors argue that today’s “winner-take-all” economic system leaves many women feeling trapped in what they call a “triple bind.”

“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.”

The affirmative action decisions have more immediate consequences for employment, applying directly to public employers covered by the Constitution, Rutherglen said. They now 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 liable under Title VII for neutral policies that have disparately adverse effects on members of minority groups. Such claims are most likely to 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 that are 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

IN THE PAST TWO YEARS, THE SUPREME COURT has undergone seismic philosophical changes dramatic enough to leave even scholars struggling to predict the aftermath. In his latest 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 decisions—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 admirably, 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 Hungarian-Jewish author whose 2002 book, “The Future of the Past,” explores efforts to preserve important aspects 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 similar 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 of all, 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 Pregnancy Discrimination 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 now 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 liable under Title VII for neutral policies that have disparately adverse effects on members of minority groups. Such claims are most likely to 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 that are 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.”

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...
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.

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**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.