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Editor-in-Chief's Forward

Zoë Grimaldi

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The Court began issuing decisions for cases argued in 2024 when I started writing this forward for Issue 3. Most of them have been procedural clarifications—such as *Sheetz v. County Of El Dorado*,[1] which found that the Takings Clause applies to both legislative and administrative building permit conditions, and *McIntosh v. United States* on criminal forfeiture processes.[2] I eagerly anticipate the outcome of other (and in my opinion more impactful) cases because we still cannot predict how this new Court will rule.[3] We have no crystal ball, but I hope that this Issue may someday help influence that path by persuading the Justices to adopt our authors' perspectives.

This issue begins with *A Model for Enforcing Internal Administrative Law* authored by Professor Daniel Epstein. Court watchers know that our more conservative Justices seem to distrust administrative agencies because they worry about whether the people have enough power to hold them accountable.[4] Professor Epstein acknowledges that agencies often ignore the procedural structures meant to restrain them. The prevailing assumption for this non-compliance and underenforcement blames the President because they appear to decide whether or not to enforce rules. However, this article presents new empirical evidence refuting this argument. Professor Epstein analyzes two variables that proponents use to justify their claim: presidential discretion and judicial deference to that discretion. This data show that public interest groups actually hold greater influence over the enforcement of administrative procedures—more than the President, Congress and sometimes even the courts. As a result, Professor Epstein concludes that power in the administrative state is in fact pluralistic, as in influenced by multiple parties, rather than presidentially centered. I found this article interesting

1. 144 S.Ct. 893 (Apr. 12, 2024).

2. 144 S.Ct. 980 (Apr. 17, 2024).

3. Like *City of Grants Pass v. Johnson* in which the court will determine whether the Eighth Amendment's protection against cruel and unusual punishment precludes cities, like my hometown of San Francisco, from enforcing ordinances that prevent homeless individuals from camping in public spaces. 144 S. Ct. 679 (pending as of Apr. 23, 2024).

4. .*See generally* C-SPAN, Relentless, Inc. v. Department of Commerce *Oral Argument* (Jan. 17, 2024), https://www.c-span.org/video/?532624-1/relentless-inc-v-department-commerce-oral-argument; C-SPAN, Loper Bright Enterprises v. Raimondo *Oral Argument* (Jan. 17, 2024), https://www.c-span.org/video/?532625-1/loper-bright-enterprises-v-raimondo-oral-argument.

because it pushes back on a theory of presential control that even my own professors have discussed raised. Readers interested in administrative law will no doubt see how Professor Epstein's article will add to our understanding our executive power and how third parties may decide to approach agency decision-making.

Professor Neil Fulton delves into another arena that our Justices say that they value: the intent of the Founders. Unlike other analyses that focus on the Founders' intentions for the structure of our government, his article, *Politicians the Founders Warned You About*, examines the traits that they believed were essential to leading our constitutional republic. Thought leaders like James Madison and Alexander Hamilton wrote at length about what virtues and qualifications that political leaders must possess to govern effectively and ethically. Instead of attempting to catalogue every possible trait the Founders valued, Professor Fulton identifies four dangerous archetypes––partisans, demagogues, ambitious, and tyrants—that the Founders wanted us to avoid because they predicted how the traits associated with these leadership styles could threaten the political health of our democracy. He then links each archetype to modern leaders to show how we've sadly ignored the Founders' warnings and allowed politicians with these traits to rise to power. I am no Pollyanna. I will likely doubt the sanity of someone who professes to be one when there are prominent leaders openly questioning the democratic process that I view as sacred. However, I wanted our journal to publish this article because Professor Fulton offers us hope: if we learn to recognize these warning signs, these negative traits, then we will give ourselves the chance to reform our contemporary political culture. We have the opportunity to do so by voting for leaders who reject these traits in our upcoming elections.

I am honored to present notes written by two of our journal members: our Executive Acquisitions Editor Joshua Arrayales and Fernanda González, one of our Senior Editors.

In *Getting Off Off-Duty: The Impact of* Dobbs *on Police Officers' Private Sexual Lives*, Mr. Arrayales explores how the *Dobbs* decision may dramatically change the privacy rights of some of our most valued public employees. While he agrees that we must continue to hold law enforcement officers to a high standard when we assess their conduct, he argues that this decision could opened the door to unreasonable intrusions into officers' off-duty sexual conduct. This note begins by explaining how police departments already exercise significant power over officers' private lives if they can label their activities as "unbecoming conduct." Courts struggled before *Dobbs* to adjudicate adverse employment actions taken against officers for off-duty sexual activities based on the department's determination. He highlights how the Court has made it significantly more difficult for officers to challenge these department decisions now that we do not know whether or when

we have a right to privacy. For instance, there is a long history and tradition of law enforcement authorities using this ambiguous concept to justify adverse employment actions ranging from demotion to termination. But does that history mean that "unbecoming conduct," permits departments to punish officers for their pre-employment sexual activities or their gender expression? While this note argues that it should be difficult for certain challenges to succeed, alternative strategies exist which may help secure off-duty sexual privacy for all. I am confident that readers will enjoy Mr. Arrayales's note not only because it offers another unique take on this monumental decision, but also because the details of the cases that he reviews are intriguing in and of themselves. More legal scholarship should strike this balance between informative and entertaining to entice more people to learn about how the law can affect their daily experiences.

Evidence of culpability is the only thing that should matter to the jury when deciding the appropriate sentence to punish a defendant's wrongdoing. Ms. González's note—*The Inadmissibility of Victim Impact Evidence*—explores why our failure to apply this basic tenant of criminal procedure to death penalty sentencing proceedings is unconstitutional. Specifically, she analyzes why the Supreme Court should overrule *Payne v. Tennessee*—a decision which allows prosecutors to introduce victim impact evidence (VIE) during these sentencing proceedings. She argues that VIE, which often focuses on the defendant's less favorable characteristics, violates the Eighth and Fourteenth Amendments because this evidence has no bearing on the defendant's culpability. Indeed, allowing prosecutors to introduce this evidence has only exacerbated racial disparities that are already prevalent in our criminal justice system. The numbers speak for themselves: 41% of inmates on death row in the United States are Black, even though Black people make up only 13.6% of the total population in the country. This clear racial disparity shows how highly prejudicial VIE can be and thus unconstitutionally influences the sentencing process. Ms. González offers a compromise to alleviate some of these inequalities while still allowing the states to authorize capital punishment in some form as an alternative to a life sentence. Specifically, she advocates for jurors to receive cultural competency training *before* either party can introduce VIE. This training would provide the jury with the opportunity to assess and take steps to guard against the influences of racial and other biases. It would in turn protect all defendants' constitutional right to mount a reasonable defense when they face the possibility of receiving the greatest penalty that our criminal justice system permits. I found this compromise particularly compelling because it seeks not only to reduce the negative effects of VIE on a juror's perceptions of the defendant, but would also protect victims from these same pernicious outcomes that VIE can produce. I hope that Ms. González's note will inspire readers who currently

practice or want to practice criminal law to choose evidence besides VIE to prove their case.

I will close by offering my take on preamble of the Constitution: as members of the legal community, we have the responsibility to "establish Justice," so our country can pursue our Founders' goal of creating "a more perfect Union."[5] I am proud to be an American precisely because we are future facing nation. And as Al Pacino said in Any Given Sunday: "Life is a game of inches."[6] For me, Issue 3 reflects the future that I hope our country can inch closer to: accountable administrative agencies, leaders who reject tyranny, sexual privacy for all, and a criminal justice system that puts facts above emotional pleas and tries to eliminate the biases that haunt us all. In addition to the incredible work of our authors, our outstanding Volume 51 team's diligence and dedication made it possible for me to share this vision for future with you.

Best wishes,

Zoë Grimaldi
Editor-in-Chief, Volume 51
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5. U.S. CONST. pmbl.
6. ANY GIVEN SUNDAY (Warner Bros. 1999).