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Editor-in-Chief's Forward

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Editor-in-Chief's Forward

I am honored to share Volume 51's final issue with you. It features some of the thorniest issues in our political discourse: how far does the freedom to speech go and why? Why should certain institutions have power and are they using it well? How should the states address our mental health crisis without abandoning our rights and dignities? Can national security justify taking away others' livelihoods built on social media apps? We hope the following articles and notes will help answer some of these questions and spark your curiosity.

The Foundation For Individual Rights In Education found that Americans are increasingly worried about the security of their First Amendment rights.¹ While there is a link between this fear and political affiliation, there is also reason to believe that the Court has contributed to this trend by making it harder for people to know when and whether they can speak.² In his article, *The Undignified First Amendment*, Professor Douglas Eldin investigates one way that the courts have muddied the waters. We now seem to focus more on individual expression than the real point of speaking at all: communication. He argues that Justice Holmes's popular "marketplace of ideas," which focuses on speaker's rights, has distorted the doctrinal development of First Amendment case law and distracted us from the historical and theoretical bases for constitutionally protected speech. He argues that we must reimagine our freedom of speech as a relational right. According to Professor Eldin, the primary form of constitutionally protected speech is and was meant to be reciprocal communication between speaker and listener. We should therefore differentiate speech based on whether it is communicative or expressive, and provide more protections for communication over

1. Sean Stevens, *Survey shows: Most Americans are concerned about the future of free speech*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUCATION (May 8, 2024), <https://www.thefire.org/news/survey-shows-most-americans-are-concerned-about-future-free-speech> ("All Americans are apprehensive about the security of their First Amendment rights, with only 1 in 4 saying that their rights are "very" or "completely" secure, and about half (48%) saying their rights are "somewhat" secure.").

2. The intersection of technological advancement and speech provides prime examples. *See, e.g.,* Gonzalez v. Google, 143 S.Ct. 1191 (2023); Twitter v. Taamneh, 143 S.Ct. 1206 (2023); Sophia Cope, et al., *The U.S. Supreme Court's Busy Year of Free Speech and Tech Cases: 2023 Year in Review*, ELEC. FRONTIER FOUND. (Dec. 27, 2023), <https://www.eff.org/deeplinks/2023/12/2023-year-review-us-supreme-courts-busy-year-free-speech-and-tech-cases>.

expression. Our team was excited to publish this article because of how so many of us view rights as a one-way street—something we can use however we want without regard to anyone else. Indeed, recent events have shown us that this “my way or the highway” approach to our rights has eroded our politics and sadly opened the door for disinformation to divide us.³ Professor Eldin, however, and this theory of reciprocal communication may provide us with a model that we can use to fight back against hyper-individualism and heal the wounds prioritizing expression over communication has caused.⁴ I hope that this article will inspire you to embrace the power of listening, particularly as we head into one of the most contentious election seasons in our nation’s history.

This issue then pivots from individual accountability for our actions to state accountability. The Court has repeatedly used the metaphor that the states are “laboratories of democracy,” to illustrate the power of states to influence national policy.⁵ While you may call me biased, there is no doubt that California is among the most influential of these laboratories.⁶ UC Law graduate Veronica Gray, who authored *A Government Branch of Its Own: Reining in the Power of the Regents of the University of California*, explores one of our state’s experiments: the University of California system and its governance structure. Unlike our federal agencies which derive their powers from authorizing statutes, the drafters of California’s 1879 Constitution created the Board of Regents to run this public good and whose members are largely insulated from politics. Californians as a result have virtually no say over its policies, which raises accountability concerns that echo those on the

3. See Calder McHugh, ‘It Feels Like the New McCarthyism’: How the Israel-Hamas War Is Redefining the Limits of Free Speech, POLITICO (Nov. 4, 2023 7:00 AM), <https://www.politico.com/news/magazine/2023/11/04/israel-hamas-cease-fire-free-speech-00125333>; Lesley Stahl, et al., *Balance between fighting misinformation and protecting speech on social media gets more complicated*, CBS NEWS (Mar. 24, 2024 7:30 PM), <https://www.cbsnews.com/news/social-media-misinformation-supreme-court-free-speech-60-minutes/> (exploring the balance between preventing the spread of misinformation and censoring political speech on social media).

4. The organization Life After Hate embodies this listening-forward spirit. They provide people trying to escape radical hate organizations with a support network to listen to and encourage them to unwind from violent extremism. LIFE AFTER HATE, *Who we are*, <https://www.lifeafterhate.org/about-us/> (last checked Apr. 30, 2024).

5. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2189 n.5 (“[T]he Supreme Court has invoked [the ‘laboratories’ metaphor] in scores of decisions on topics far and wide.”).

6. See, e.g., Matthew H. Ahrens, et al., *The California Effect: Visionary Climate Disclosure Laws Will Have Far-reaching [sic] Impact*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 10, 2023), <https://corpgov.law.harvard.edu/2023/11/10/the-california-effect-visionary-climate-disclosure-laws-will-have-far-reaching-impact/>; Natalie Sherman, *How California is changing the US*, BBC BUS. (Oct. 16, 2018), <https://bbc.com/news/business-45767736>.

federal level.⁷ The Regents' unparalleled autonomy and nearly full control over one of the foremost public university systems in the country has led to decades of conflict between the Regents, the public, and state legislators—disputes range from land use and labor rights to tuition increases and other changes that can dramatically affect students and the state at large. Ms. Gray argues that this vague, but constitutionally protected governmental status puts us in a sort of power limbo: on one hand, it provides these unelected persons with powers that exceed those of state agency heads, which allows the Regents to be nimble. And on the other, these members are also not exactly equal with the three branches of state government and thus must stay in their lane to retain their power. In order to honor the drafters' desire to maintain this body's independence to govern an ever growing university system, she proposes possible ways to rein in the Regents' power and increase accountability to the public. Ms. Gray argues, for example, that Sacramento could give the California Administrative Procedure Act more teeth by removing loopholes that allow the Regents to avoid rulemaking protocols that normally apply to state agencies. We are excited to share her work with you because we hope readers will think about state-based accountability structures that we can apply to our federal agencies. We should also ask ourselves whether our fascination with states as our "laboratories of democracy," can still further the goal of expanding the rights and dignity of all.

We are proud to publish two student notes: Wei Luo's *The Spy in Your Pocket: Montana's TikTok Ban and the Federalism Limits of State-level Foreign Policy*, and "*It's Not Ok To Not Be Ok*": *Suicide, California's Lanterman-Petris-Short Act, and the Constitution* by Christina Strohmann.

Most foreign policy experts agree that animosity and distrust between the United States and China has only grown in recent years as the countries' foreign policy interests continue to diverge.⁸ The popular short video app, TikTok, has become the newest stage for their proxy battles.⁹ Its parent company, ByteDance,¹⁰ allegedly has a close relationship with the Chinese

7. See, e.g., Daniel Epstein, *Procedural Pluralism: A Model for Enforcing Internal Administrative Law*, 51 UCL CONST. Q. 101 (2024); Kevin Bohm, *The President's Role in the Administrative State: Rejecting the Illusion of "Political Accountability"*, 46 HASTINGS CONST. Q. 191 (2018).

8. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, U.S. - CHINA RELATIONS, <https://www.gao.gov/u.s.-china-relations> (last visited May 1, 2024); COUNCIL ON FOREIGN RELATIONS, *U.S.-China Relations* (May 22, 2023), <https://www.brafton.com/blog/social-media/tiktok-vs-snapchat/#:~:text=The%20main%20difference%20is%20that,primary%20users%20of%20both%20platforms> (last visited May 1, 2024) (noting contentious events including then-Speaker Pelosi's trip to Taiwan in 2022 and when the U.S. shot down a Chinese spy balloon in 2023).

9. TIKTOK, *Our Mission*, <https://www.tiktok.com/about?lang=en> (last visited May 1, 2024).

10. See BYTEDANCE, *Our Mission*, <https://www.bytedance.com/en/> (last visited May 1, 2024).

Communist Party—for example, ByteDance’s vice president and editor-in-chief of the company’s Chinese operations, Zhang Fuping, serves as a secretary of the company’s in-house party committee.¹¹ Additionally, China amended its National Intelligence Law in 2018 to require any organization or citizen to “support, assist and cooperate with national intelligence work,” which means that “ByteDance is legally bound to help with gathering intelligence.”¹² Unsurprisingly concerned about the company’s capacity to provide their government with Americans’ personal data, Congress has passed and President Biden has signed legislation that will ban the social media app unless ByteDance sells TikTok to an American company.¹³ But this bill is not necessarily innovative because it follows on the heels of a state’s attempt to control the company. Mr. Luo’s note, *The Spy in Your Pocket: Montana’s TikTok Ban and the Federalism Limits of State-level Foreign Policy*, explores when Montana in May 2023 became the first state to ban TikTok. He proposes a two-prong analytical framework for evaluating the federalism limits of Montana’s statute and provides insight into how courts could assess future legislation. This framework would first ask courts to consider whether a state’s law can lawfully influence foreign policy without running afoul of constitutional safeguards—including Article I’s Section 10, preemption, and the dormant Commerce Clause. Mr. Luo then discusses a second, optional prong that would ask courts to evaluate whether the state can reasonably and persuasively argue for the law based on applicable economic theories and related available data. Applying this framework, he concludes that the Court should find that Montana’s SB 419 is unconstitutional because it fails as a matter of law and public policy. Although Mr. Luo’s work does not address some of the inevitable First Amendment concerns surrounding social media in general, I believe his proposed framework will undoubtedly inform that conversation as well because it gives the courts another way to balance freedom of speech with other national public policy priorities.¹⁴

11. Laura He, *Wait, is TikTok really Chinese?*, CNN BUS. (Mar. 28, 2024, 8:21 AM), <https://www.cnn.com/2024/03/18/tech/tiktok-bytedance-china-ownership-intl-hnk/index.html> (questioning how “Chinese” ByteDance really is).

12. Laura He, *Wait, is TikTok really Chinese?*, CNN BUS. (Mar. 28, 2024, 8:21 AM), <https://www.cnn.com/2024/03/18/tech/tiktok-bytedance-china-ownership-intl-hnk/index.html> (questioning how “Chinese” ByteDance really is).

13. See Liv McMahon, *US TikTok ban: When and why could the app be outlawed?*, BBC NEWS (Apr. 24, 2024), <https://www.bbc.com/news/technology-53476117>.

14. For more on TikTok and the First Amendment, see Bobby Allyn, *Legal experts say a TikTok ban without specific evidence violates the First Amendment*, NPR (May 14, 2024, 12:59 PM), <https://www.npr.org/2024/05/14/1251086753/tiktok-ban-first-amendment-lawsuit-free-speech-project-texas>; Taylor Lorenz & Drew Harwell, *TikTok creators to sue to block law that could lead to a ban*, WASH. POST (May 14, 2024, 3:00 PM), <https://www.washingtonpost.com/technology/2024/05/14/tiktok-creators-lawsuit-ban/>.

Finally, we return to one of the themes that I have sought to infuse into every issue of Volume 51: bodily autonomy. The Court has held that freedom from bodily restraint is a fundamental right.¹⁵ Thus, states must show that pre-trial involuntary detention is the only option available to protect the public from a dangerous individual and we must provide adequate medical care to incarcerated persons to honor “the concept of human dignity. . .”¹⁶ But what then must the state prove if we seek to involuntarily commit someone to a mental health institution to protect them from themselves? Suicide has become the second-leading cause of death for people between the ages of ten to twenty-four, but is that statistic really enough to blur the line between incarceration and healthcare? We end with Christina Strohmann’s note, “*It’s Not Ok To Not Be Ok*”: *Suicide, California’s Lanterman-Petris-Short Act, And The Constitution*, because it investigates this intersection of public safety, healthcare, and social justice. Of course, involuntary commitment remains necessary in some circumstances, but Ms. Strohmann’s note points out the pitfalls of too readily employing this treatment option. She argues that because the Lanterman-Petris-Short Act allows mental health professionals to force suicidal patients to go to psychiatric facilities with little accountability, this legislation violates our fundamental rights of liberty, self-determination, and substantive due process.¹⁷ The Act’s violations not only harm individuals, but also result in systemic problems that contradict the goal of the bill itself. Mental health professionals cannot effectively treat suicidal patients when they fear liability for under-diagnoses. Patients fear sharing information with their providers because they don’t want to be involuntarily committed, which in turn increases provider liability and leaves those patients more vulnerable. The result is a circular chilling effect that benefits no one. Another reason why I am excited to share this note with you is because of how Ms. Strohmann explains the dangers of vague statutory language: the statute discusses “competency,” for example, which has a test but still presents subjective inquiries.¹⁸ We need not look further than Texas’s anti-abortion legislation and surrounding litigation to see how vagueness undermines bodily autonomy and chills doctor’s willingness to

15. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

16. *United States v. Salerno* 481 U.S. 739, 751 (1987); *Brown v. Plata* 563 U.S. 493, 511 (2011).

17. Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE §§ 5000–5579.

18. The test requires proof that the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.” *Ryan v. Gonzales*, 568 U.S. 57, 65–66 (2013)). Factors to determine competency can include timing of an evaluation (*see Dusky v. United States*, 362 U.S. 402 (1960)), whether the defendant has waived representation (*see Godinez v. Moran*, 509 U.S. 389 (1993)), and whether she can help identify witnesses and decide on a trial strategy (*see Ryan*, 568 U.S. at 65 (2013)).

treat patients.¹⁹ Strohmann's work should motivate us to continue to question when a state's interests, like preventing suicide, veers from legitimacy.²⁰

As my time as Editor-in-Chief comes to a close, I want to reiterate what I have written in each of our Volume 51 issues: thank you. We have accomplished so much together. It has been a privilege to work with our outstanding authors to publish legal theories and ideas that will influence our national conversations about everything under the sun: from new approaches to preserving privacy rights under the *Glucksberg* test, Asian-American organizing power, and trans rights litigation to the future of accountability in administrative law and disability rights in higher education. We have also achieved so much as a journal. We have celebrated our first year as *UC Law Constitutional Quarterly* and moved into our new office. I am so proud of our wonderfully diverse and talented staff editor class. They include veterans, single parents, women of color, political organizers, and LGBTQ+ activists—all of whom brought a passion for scholarship and commitment to academic excellence to every step of our editing and publishing process. I want to thank my Executive Board for putting in long hours to get each issue over the finish line. None of these issues would've happened without this super team. I'm humbled and truly honored to have served as EIC.

I can't wait for what our Volume 52 team will do next, and I hope that you too will look forward to their upcoming issue.

My sincerest thanks,



Zoë Grimaldi
Editor-in-Chief, Volume 51
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19. See Ellen Ioanes, In Texas, a temporary win for abortion rights: Vague health exceptions to extreme abortion bans aren't just a Texas problem., VOX (Aug. 5, 2023, 5:15 PM), <https://www.vox.com/2023/8/5/23820360/texas-abortion-ban-medical-exception>; *Zurawski v. State of Texas*, 0-1-GN-23-000968 (Dist. Ct. Travis Cnty. 2023), <https://state-courtreport.org/sites/default/files/fastcase/additionalPdfs/processed/District%20Court%20Order%20Granting%20Injunction%20-08.04.2023.pdf>.

20. *Washington v. Glucksberg*, 521 U.S. 702, 728–29 (1997); *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 281 (1990).