

Footnotes⁶⁵



The Alumni Newsletter of the *Catholic University Law Review*
Spring 2016

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Letter from the Editor-in-Chief

Greetings!

Welcome to the relaunch of the *Law Review's* Newsletter, *Footnotes*! Since our last *Footnotes* issue, the law school and *Law Review* have undergone many changes. Here are some highlights:

- We welcomed a new Faculty Advisor, Professor Megan LaBelle who was recently tenured. We are forever indebted to Roger Hartley for his strong and steady commitment to the *Law Review* over the years.
- The production process is fully digital. Despite some problems with the PDF software purchased, this change has significantly improved the process and reduced our expenses. No more mountains of pull packets, bluesheets, or pull boxes . . . only the digital kind! The downside is that staff members spend less time in the suite printing, pulling, and . . . “hanging out.” Although the latter is more likely because Brookland Pint and Busboys & Poets are now within walking distance.
- We extended the writing schedule so that the due date for final submissions is at the end of February rather than November, and there is only one submission cycle. Although our staff members have been grateful for this change, feel free to remind them about how much better they have it in “I used to walk uphill both ways” fashion . . .
- We no longer offer print subscriptions following a big budget cut a few years ago. But, in October we launched a fundraising effort, the brainchild of Volume 64, that includes a digital subscription to the *Law Review* and a choice to opt for a print subscription. Please visit the *Law Review* website to donate!
- We added the position of Alumni Coordinator to the Editorial Board. Mike Dinet has fulfilled this role as an Editorial Assistant this year, and we decided to make it a full Board position. I am confident that our new Alumni Coordinator, Reese Goldsmith, will do a fantastic job continuing to build our Student-Alumni network. My gratitude to both of them for coordinating this issue of *Footnotes*.

You may be wondering: what has stayed the same? Plenty. We continue to live the clichés “time moves too quickly” and “there are never enough hours in the day.” We still have a love/hate relationship with the *Bluebook* and fear *** endnotes. Our annual Symposium was a huge success, and we continue to publish quality legal scholarship on a variety of topics, as described in the following pages.

At the end of January, we elected the Volume 66 Editorial Board. I can hardly believe the process of turning over the reins to our new Board has ended with the official “handover” date of March 31st. Yet again, the new Board is an exceptional, highly motivated group of students committed to continuing the *Law Review's* long tradition of excellent scholarship.

Alas, I've done the “lawyer thing” and gone on too long. It has been a privilege and pleasure to serve as Volume 65's EIC. A special thanks to the Volume 65 team for their hard work this year and to all of our readers for your continued support of the *Catholic University Law Review*. I hope you enjoy the rest of this issue of *Footnotes*.

Jennifer L. Bruneau, Volume 65 Editor-in-Chief

Volume 65 Masthead

CATHOLIC UNIVERSITY LAW REVIEW

VOLUME 65

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Law Review Elects New Board

Andy Bastnagel

The incoming board is excited to take the reins across the coming weeks of 2016 and completely transition into their respective roles by April. The new Editor-in-Chief Elizabeth Ottman is truly hitting the ground running, meeting will all members of the incoming board to identify the incoming board's strengths and prioritize the board's goals for the 2016 - 2017 publication cycle.

The additional Volume 66 Board of Editors include Andrew Bastnagel as the incoming Executive Editor; Samantha Bognar and John Vivian as the incoming Lead Articles Editors; Matthew Baker and Samuel Mott as the incoming Managing Editors; Patricia Leeson, Nicholas Putz, and Daniel Reed are the incoming Production Editors.

Incoming Note & Comment Editors include Dean Barr, Elizabeth Conti, Jose Espejo, Adilene Rosales, and Sawyer Traver. Incoming Associate Editors include Devin Barrett, Adam Bereston, Tamara Guillen, William Lane, Michael Marusak, and Alexa Zavada. The new Alumni Coordinator is Reese Goldsmith. Incoming Editorial Assistants include Justin Friedman, Jaclyn Haughom, and Giovanni Lamargese.

The upcoming board looks forward to welcoming a new class of staff members, and continuing the tradition of excellence in legal academic publication.



Members of the Volume 65 Team Gather for a Group Picture

Law Review Board Member Wins Major Award

Brendan Flynn

For many student authors of Notes and Comments, being published in the *Catholic University Law Review* is the big achievement. Once published, many authors take the “if you write it, they will come” attitude to their final product.

But not Daniel O’Connell.

Dan, a third-year day student who currently serves as a Production Editor for Vol. 65, wrote the article “Confounded Collectors, Confused Consumers: Time to Close the Circuit Split on Whether the Fair Debt Collection Practices Act Requires a Consumer to Dispute a Debt in Writing,” which was published in Vol. 64, issue 4. The Comment focused on the requirements under the Fair Debt Collection Practices Act (FDCPA) for consumers to contest a debt, and proposed that the FDCPA be amended to clarify that consumers may lodge oral or written disputes, solving the circuit split so as to benefit both consumers and debt collectors.

After publishing the article in September of 2015, Dan’s fellow Production Editor, Brian Connor, suggested that Dan submit the article to the American College of Consumer Financial Services Lawyers (ACCFSL) for consideration in its annual writing competition. Dan took Brian’s suggestion, submitting the award for the category “best student note or comment on a topic dealing with consumer financial services law.”

In February of 2016, Dan was notified that his article had been singled out, of all student papers submitted, as the winner in this category. As part of this recognition, Dan will receive a cash prize of \$1,500, as well as travel expenses to attend the annual meeting of the ACCFSL (held in conjunction with the Business Law Section of the ABA) in Montreal in April, 2016.

The ACCFSL is a professional association of lawyers particularly skilled and experienced in handling consumer financial services matters and dedicated to the improvement and enhancement of the skill and practice of consumer financial services law and the ethics of the profession. Among the members is CUA’s own Ralph J. Rohner, Dean of Columbus School of Law from 1987 to 1995, who served as President of ACCFSL from 2007 to 2009.

Consumer financial protection has been a passion of Dan’s since high school, when he spent a summer volunteering in the Montgomery County, MD Office of Consumer Protection. He chose the subject of consumer debt “because I like to learn about how the law affects the daily lives of ordinary people.” So while Dan isn’t necessarily setting himself up to be the next Elizabeth Warren—he is a member of the Securities Law Program and has accepted an offer from Skadden Arps to work as an associate in its derivatives group after graduation—these issues will always be close to his heart.

2016 Annual Symposium

Catholic University Law Review's annual symposium, "The Intersection of Civil Rights and Civil Procedure," provided an opportunity for students, faculty, and practitioners to hear from experts about recent amendments to the Federal Rules of Civil Procedure, the process by which the Rules were amended, and the impact of those Rule changes and recent Supreme Court cases on civil rights litigation.

The January 29 event opened with introductory remarks by **Jennifer Bruneau** (3L), Editor-in-Chief, *Catholic University Law Review*, Vol. 65, and Dean **Daniel F. Attridge**. The program consisted of two panel discussions and a keynote speech from **Paul Bland**, *Executive Director, Public Justice*.

The first panel focused on the recent amendments to the Federal Rules of Civil Procedure, which are directed primarily at discovery. The panelists discussed the new discovery rules, such as proportionality, and explored how they are likely to affect civil rights cases. Panelists included; **Allan B. Morrison**, *Lerner Family Associate Dean for Public Interest & Public Service, George Washington University Law School*, **Join Vail**, *Founder of Jon Vail Law PLLC*, and **Emery Lee**,

Senior Research Associate, The Federal Judicial Center. The second panel addressed the Federal Rules of Civil Procedure as interpreted through case law. In particular, the panel focused on the Supreme Court's decisions in *Twombly*, *Iqbal*, and *Wal-Mart v. Dukes*, and discussed how these cases have changed the practice of civil rights law. Panelists included; **Michael Kirkpatrick**, *Visiting Professor of Law at Georgetown University Law Center, and Director of the Civil Rights Clinic*, **Esther Lander**, *Partner Akin Gump Strauss Hauer & Feld LLP*, and **Join Vail**, *Founder of Jon Vail Law PLLC*.



Paul Bland, *Executive Director, Public Justice*, discussed how civil procedure and civil rights intersect at many points along the path to justice. Mr. Bland has argued and won more than 25 reported decisions from federal and state courts across the nation.

When asked about the event, **Melissa Soares** (3L), Lead Articles Editor of *Catholic University Law Review*, said, "We owe a great amount of gratitude to Professor Suzette Malveaux, who helped with the concept and design of our symposium topic this year. Overall, we were really pleased with the speakers we had at this year's symposium. Civil procedure is often viewed as something stodgy and dull, when in reality it is a dynamic area of the law that impacts so many other areas of law—something our speakers made clear throughout the day."

In the News

Volume 64 Lead Author Professor Mary Brigid McManamon Gets National Attention for Ideas Published in a *Catholic University Law Review* Article

Nicole Conte

Volume 64 lead author, Professor Mary Brigid McManamon, has received national attention for an article that she published with us last Spring: *The Natural Born Citizenship Clause as Originally Understood*. On Monday, January 14th, Professor McManamon published an op-ed in the *Washington Post* entitled *Ted Cruz is not eligible to be president*, that was subsequently picked up by a number of news outlets.

In her article, Professor McManamon examined pertinent English sources and statements from early American jurists and concluded that a presidential candidate must be born within the United States. As Article II, Section 2 of the Constitution declared; “No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution shall be eligible to the office of President...” With the citizenship of a major Republican candidate in question for the upcoming 2016 presidential election, the natural born citizen requirement has once again become a hotly contested topic. Ted Cruz isn’t the first candidate whose natural born citizenship has been questioned. Over the past 50 years, this issue has arisen with respect to several candidates: John McCain (born on a Navy Air Base in the Panama Canal Zone), George Romney (Mexico) and Barry Goldwater (born in Arizona territory prior to statehood). But what exactly did the Founding Fathers mean by “natural born citizen”? Constitutional scholars have two different schools of thought for what “natural born citizen” might mean. First, it could refer to candidates who were born strictly within the United States with very few exceptions. The second, more permissive approach, takes “natural born citizen” to mean any person, who by whatever immigration laws were in place at the time of his or her birth, was automatically considered a U.S. citizen. Professor McManamon sides with the former.

Regardless of your thoughts on the issue of natural born citizenship, this is an excellent example of the continued relevancy and importance of legal scholarship, and likewise the significance of the work we do on *Law Review*. Congratulations and gratitude to the Volume 64 Board who selected this article for publication.

Forthcoming Articles: Leads

At The Intersection of Religious Organization Missions and Employment Laws : The Case of Minister Employment Suits

Jarod S. Gonzalez

Reviewing the intersection of a religious organization's right to select employees based on their goals and mission and modern employment law, this article argues that the analysis of the ministerial exception will depend on the type of suit brought. Specifically, the Article identifies five analytical categories: (1) employment discrimination/employment retaliation claims; (2) breach of employment contract claims; (3) whistleblower claims; (4) tort claims; and (5) miscellaneous claims. The Article begins by describing the ministerial exception and ecclesiastical abstention doctrines that exist under the First Amendment through the lens of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. The Article then discusses case law development of ministerial/employment law conflicts pre and post *Hosanna-Tabor*. Next, the Article reviews five categorical approaches to resolving minister employment law suits. The Article concludes that judicial interpretations of the First Amendment in minister employment suits should provide as much room as possible for religious organizations to select their leaders free from governmental interference.

Mobile Banking: the Answer for the Unbanked in America?

Catherine Martin Christopher

In the United States, the poor often lack access to mainstream banking services. Instead, they rely on expensive, poorly regulated alternatives like check cashers, payday lenders, pawnshops, and auto title lenders. These financial products jeopardize poor people's financial and physical security. In pushing adoption of traditional banking products, both government officials and private enterprise have attempted to craft solutions to the banking access problem, but so far these attempts have fallen short. This Article asserts that mobile banking may be a transformative technology that can significantly increase financial inclusion in the United States. The Article discusses current statistics and demographics of mobile phone ownership in the United States, the success of overseas mobile banking programs aimed at helping the poor, and the current prepaid card industry in the United States. The Article draws lessons from these case studies and asserts that bringing the unbanked into the regulated banking system is worth private investment in mobile banking products and platforms. (The Article also argues that if private entities do not find it fiscally feasible to pursue this market, public funds can and should be expended.) The Article recommends specific account features that would benefit the currently unbanked, and proposes that customer identification procedures can be relaxed for small-balance accounts designed specifically to increase financial inclusion.

Talk Don't Touch? Considerations for Children's Attorneys on the Physical Touch of Clients

Andrea L. Dennis

Forming a positive attorney-client relationship with a child is a complex process that involves many considerations. Although it offers guidance on effectively communicating and creating a safe environment, the legal system has neglected to form appropriate standards governing physical touch of juvenile clients. There are numerous benefits to physical touch of clients. However, a lack of guidance on the appropriate ways to use physical touch creates the risk negative effects will result from the touch. Drawing from the standards of other child-focused professions, this Article provides guidelines for attorneys contemplating using physical touch to develop a positive rapport with child clients. This Article also suggests that all children's attorneys receive training on the matter.

Forthcoming Articles: Students

Over-the-Counter Derivatives in a Global Financial Marketplace: The Case for Uniform Global Identifiers and Compatible Reporting Requirements in Substituted Compliance Comparability

Kimberly Thomasson

The 2008 financial crisis prompted a global regulatory overhaul of over-the-counter derivative markets. The Dodd-Frank Act mandated the CFTC and SEC to issue new rules and regulations to bring the majority of the OTC derivative market out of the dark on onto regulated exchanges. Similar action was taken in the European Union and other G20 nations. There has been a push to harmonize rules for OTC derivatives across jurisdictions to make the market more efficient and eliminate regulatory arbitrage. This Comment focuses on the process for a regulated entity in the US and EU to “substitute compliance” with its home country’s jurisdiction instead of complying with both sets of similar, but not identical, rules. This Comment specifically advocates for the use of uniform global identifiers in swap and security-based swap data reporting and explains the importance of uniform data when making substituted compliance comparability determinations

The Quid Pro Quo Quark: Unstable Elementary Particle of Honest Services Fraud

Brian Connor

From 1946 to 1987, the federal mail fraud statute, 18 U.S.C. § 1341, was a powerful tool for the prosecution of political corruption. In a line of decisions beginning with the Fifth Circuit’s in *Shushan v. United States*, and ending with the Supreme Court’s decision in *McNally v. United States*, courts upheld the use of the statute to prosecute officials who had deprived the public of its “intangible right” to the official’s “honest services.” In 1988, after the Supreme Court held this theory unconstitutionally vague in *McNally*, Congress enacted § 1346, intending to restore “honest services fraud” doctrine to its pre-*McNally* expanse. Yet in the 2010 case of *Skilling v. United States*, the Supreme Court narrowed 18 U.S.C. § 1346 to prohibit only the “core” of honest services fraud: bribery and kickback schemes. This Comment argues that, in reining in honest services fraud in the *Skilling* decision to bribery and kickbacks, the Supreme Court left open a fundamental question at the heart of honest services fraud: whether and to what extent prosecution under that law requires proof of a “quid pro quo.” This Comment argues that the Third Circuit’s “stream of benefits” theory of bribery strikes the right balance between the vagueness problems that the court addressed in *McNally* and *Skilling*, and Congress’s intent to cast a wide net to fight political corruption in enacting § 1346.

Forthcoming Articles: Essays

Hopeful Clarity or Hopeless Disarray?: An Examination of Town of Greece v. Galloway and the Establishment Clause

Krista M. Pikus

Reviewing Establishment Clause jurisprudence of the Supreme Court, this article notes that the current state of this area of law is in hopeless disarray and argues that the Court should resolve this confusion by employing a few proposed solutions. The article begins by reviewing and analyzing the confusion surrounding modern Establishment Clause jurisprudence. The article then discusses what interpretation of the Establishment Clause should be controlling: strict-separationism, nonpreferentialism, enhanced federalism, or the incorporation doctrine. Next, the article details what is wrong with modern establishment clause jurisprudence, namely, the Court's inconsistent application of different tests to assess government action under the Establishment Clause and reviews the Lemon test, the endorsement test, the neutrality test, and the coercion test. Following this discussion, the article notes how the Supreme Court's most recent Establishment Clause case, *Town of Greece v. Galloway*, failed to clarify any of the above doctrinal confusion. Finally, the article concludes by suggesting steps to improve clarity in Establishment Clause jurisprudence. It suggests 1) that the Court take steps to remedy its doctrinal jumble by clearly declaring a definitive test as well as overruling incorrect precedent and 2) that the Court adjust the level of scrutiny applied in these cases to rationale basis or intermediate scrutiny.

The Impact of the United Nations on National Abortion Laws

Kelsey Zorzi

Reviewing UN initiatives in concert with changes in State abortion laws, this Essay argues that through consensus resolutions that emerge from UN conferences, the recommendations of the Treaty Monitoring Bodies, and the Human Rights Council's Universal Periodic Review, the UN has influenced State to adopt permissive domestic abortion laws. The essay discusses and provides examples of how the UN does this. The Essay also discusses the impact of pro-abortion interpretations of international treaties and the actions taken by signatory nations to require legalized abortions in their wake.

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