

# NEVADA LAW JOURNAL

Volume 22

Fall 2021

Number 1

## ARTICLES

Scrutiny-Determination Avoidance in First Amendment Cases: Laudable Minimalism or Condemnable Evasion? Clay Calvert .....	1
Corporate Governance Gaming: The Collective Power of Retail Investors Sergio Alberto Gramitto Ricci & Christina M. Sautter .....	51
Strength in Numbers (of Words): Empirical Analysis of Preambles and Public Comments Anthony Moffa.....	99
Re-Imagining Risk: The Role of Resilience and Prevention Timothy Malloy.....	145
Constitutional Avoidance and the Federal Common Law of Patent Subject Matter Eligibility Sam F. Halabi.....	211
Due Process on Campus: Where Do Procedural Rights Come from, and What Do They Require? R. George Wright.....	281
States and Systemic Risk: An Analysis of the Dodd-Frank Act's (Un)Cooperative Federalism Daniel A. Lyons .....	303
Unleashing Pets from Dead-Hand Control Kaity Y. Emerson & Kevin Bennardo.....	349

## NOTES

Tech Platforms Are Essential Facilities Joshua Nelson.....	379
Victims' Rights Moving Forward After the Epstein Case Jessica Phipps.....	405

# NEVADA LAW JOURNAL

Published by the  
**William S. Boyd School of Law**  
University of Nevada, Las Vegas

---

## BOARD OF EDITORS

### Editor-in-Chief

MADELEINE COLES

### Executive Managing Editors

WENDY ANTEBI

CAITLIN PYATT

### Executive Editors

NINA HEBIBOVICH

ALINA KRAUFF

CHAPMAN NOAM

### Lead Articles Editor

JOSHUA NELSON

### Symposium Editor

ALEXANDRA MATEO

### Forum Editor

THERESA TRENHOLM

### Articles Editors

ELI BERGIDA

CONNOR BODIN

BRENDON N. BRANDÃO

VICTOR KANG

JESSICA PHIPPS

ALEXANDRA RUSSELL

ASHLEY SCHOBERT

### Nevada Law Editors

TANNER CASTRO

JORGE "COCO" PADILLA

### Notes Editors

KELSEY DELOZIER

RACHAEL T. GONZALES

### Business Editor

CRISTINA PHIPPS

### SENIOR STAFF

MIA BACHER

KILEY HARRISON

DIANNA SAUCEDA-  
CHIRINOS

BRADY BATHKE

YOOSUN JUN

JULIA STANDISH

CECILIA DIAZ

ALLISON MANN

GREER SULLIVAN

MAGGIE ANN DIFEDERICO

MICHAEL MCGRADY

KRISTIN WILDE

SAMANTHA GOETT

LUIS MONTANEZ JUAREZ

SULLIVAN WINESETT

HOLLY PARR

### JUNIOR STAFF

KASSANDRA ACOSTA

SAMUEL HOLT

ADAM POND

KALEB BAILEY

VALARIE KUSCHEL

JESSICA RECAREY-  
VALENZUELA

JADEN BRAUNAGEL

R.J. LEMUS

ALYSSA ROGAN

ROLAND JAY BRUNNER

ANNE-GREYSON LONG

BRANDON RUSK

NAZO DEMIRDJIAN

MOLLY MARIAS

TERRA SHEPARD

ANNA DREIBELBIS

SERVANDO MARTINEZ

COURTNEY SINAGRA

COLLEEN C. FREEDMAN

CANDACE MAYS

KIM STRAUSS

TALI FREY

KAITLIN MCCORMICK-HUHN

SARAH VOEHL

KATELYN GOLDER

CAITLAN MCMASTERS

BRENNA IRVING

ALIX GOLDSTEIN

KALIN OLSON

ALYSSA WILLIAMS

MICHAEL GOUTSALIOUK

WINNIE WU

### FACULTY GOVERNING BOARD

PROFESSOR JEFFREY STEMPEL

PROFESSOR KEITH ROWLEY

PROFESSOR JOSEPH REGALIA

### Editorial Office

4505 S. Maryland Parkway, Las Vegas, NV 89154-1003  
TEL: 702.895.2435 • FAX: 702.895.2321

**William S. Boyd School of Law, UNLV**  
**Faculty and Administration for 2021-2022**

**ADMINISTRATION**

Sara Gordon, *Interim Dean; William S. Boyd Professor of Law*  
Ian C. Bartrum, *Associate Dean for Faculty Development and Research; Professor of Law*  
Angie Doran, *Assistant Dean of Finance*  
Nikki Harris, *Acting Assistant Dean of Career Development*  
Cameron Lue-Sang, *Interim Assistant Dean of Admissions and Financial Aid*  
Jeanne Frazier Price, *Associate Dean for Academic Affairs; Louis Wiener, Jr. Law Library Professor of Law; Director, Wiener-Rogers Law Library*  
Christine Smith, *Associate Dean for Public Service, Compliance and Administration*  
Anne Traum, *Associate Dean for Experiential Legal Education; Director, Appellate Clinic; Co-Director, Misdemeanor Clinic; Professor of Law*  
Brian Wall, *Associate Dean for Student Affairs*

**LAW FACULTY**

Rachel J. Anderson, J.D., University of California, Berkeley, School of Law, *Professor of Law*  
Ian C. Bartrum, LL.M., Yale Law School; J.D., Vermont Law School, *Associate Dean for Faculty Development and Research; Professor of Law*  
Mary Beth Beazley, J.D., University of Notre Dame Law School, *Professor of Law*  
Bret C. Birdsong, J.D., University of California, Hastings College of the Law, *Professor of Law*  
Stewart Chang, J.D., Georgetown University Law Center, *Professor of Law*  
Frank Rudy Cooper, J.D., Duke Law School, *Director, Program on Race, Gender, and Policing; William S. Boyd Professor of Law*  
Robert I. Corrales, LL.M., Georgetown University Law Center; J.D., University of Kansas School of Law, *Professor of Law*  
Benjamin Edwards, J.D., Columbia Law School, *Director, Public Policy Clinic; Associate Professor of Law*  
Ruben J. Garcia, LL.M., University of Wisconsin Law School; J.D., University of California, Los Angeles, School of Law, *Co-Director, UNLV Workplace Law Program; Professor of Law*  
Sara Gordon, J.D., University of Arizona College of Law, *Interim Dean, William S. Boyd Professor of Law*  
Leslie C. Griffin, M.A., M. Phil., Ph.D., Yale University, J.D., Stanford Law School, *William S. Boyd Professor of Law*  
Eve Hanan, J.D., University of Michigan Law School, *Co-Director, Misdemeanor Clinic, Associate Professor of Law*  
Joan Howarth, J.D., University of Southern California, *Distinguished Visiting Professor; Dean Emerita, Michigan State University College of Law*  
Lori D. Johnson, J.D., Northwestern University School of Law, *Associate Professor of Law*  
Michael Kagan, J.D., University of Michigan Law School, *Director, UNLV Immigration Clinic; Joyce Mack Professor of Law*  
Kay P. Kindred, J.D., Columbia University School of Law, *Professor of Law*  
Mary LaFrance, J.D., Duke University School of Law, *IGT Professor of Intellectual Property Law*  
Sylvia Lazos, J.D., University of Michigan Law School, *Justice Myron Leavitt Professor of Law*  
Francine J. Lipman, LL.M., New York University School of Law; J.D., University of California, Davis, School of Law, *William S. Boyd Professor of Law*  
Sydney Lisy, J.D., Valparaiso University, *Director of the Academic Success Program, Assistant Professor in Residence*  
Elizabeth L. MacDowell, J.D., University of California, Berkeley, School of Law, *Director, Family Justice Clinic; Professor of Law*  
Thomas O. Main, J.D., Northeastern University School of Law, *William S. Boyd Professor of Law*  
Ann C. McGinley, J.D., University of Pennsylvania Law School, *Co-Director, UNLV Workplace Law Program; William S. Boyd Professor of Law*

Rebecca Nathanson, Ph.D., University of California, Santa Barbara, *Director of Education Advocacy Clinic and Kids' Court School; James E. Rogers Professor of Education and Law*

Dawn Nielsen, J.D., University of Nevada, Las Vegas, William S. Boyd School of Law, *Director of Externships; Assistant Professor in Residence*

Lydia Nussbaum, J.D., University of Maryland Francis King Carey School of Law, *Director, Mediation Clinic; Director, Saltman Center for Conflict Resolution; Professor of Law*

David Orentlicher, J.D., Harvard Law School, M.D., Harvard Medical School, *Director, UNLV Health Law Program; Judge Jack and Lulu Lehman Professor of Law*

Jeanne Frazier Price, J.D., University of Texas School of Law, *Associate Dean for Academic Affairs; Director, Wiener-Rogers Law Library; Louis Wiener, Jr. Law Library Professor of Law*

Nancy B. Rapoport, J.D., Stanford Law School, *Garman Turner Gordon Professor of Law; Affiliate Professor of Law and Ethics, Lee Business School*

Joe Regalia, J.D., University of Michigan Law School, *Associate Professor of Law*

Addie C. Rolnick, J.D., University of California, Los Angeles, School of Law, *Faculty Director, Indian Nations Gaming and Governance Program; Associate Director, Program on Race, Gender & Policing; San Manuel Band of Indians Professor of Law*

Keith A. Rowley, J.D., University of Texas School of Law, *William S. Boyd Professor of Law*

Rebecca Scharf, J.D., Harvard Law School, *Professor of Law*

Kathryn M. Stanchi, J.D., Boston University School of Law; *E.L. Cord Professor of Law*

Jeffrey W. Stempel, J.D., Yale Law School, *Doris S. and Theodore B. Lee Professor of Law*

Jean Sternlight, J.D., Harvard Law School, *Founding Director, Saltman Center for Conflict Resolution; Michael and Sonja Saltman Professor of Law*

David Tanenhaus, Ph.D., University of Chicago Law School, *James E. Rogers Professor of History and Law*

Anne R. Traum, J.D., University of California, Hastings College of the Law, *Associate Dean for Experiential Legal Education; Director, Appellate Clinic; Co-Director, Misdemeanor Clinic; Professor of Law*

Marketa Trimble, J.S.D. and J.S.M., Stanford Law School; JUDr., Ph.D., Law School of Charles University in Prague, *Samuel S. Lionel Professor of Intellectual Property Law*

John V. White, J.D., Yale Law School, *Ralph Denton Professor of Law*

#### **DISTINGUISHED FELLOWS**

Anthony Cabot, J.D., Arizona State University, Sandra Day O'Connor College of Law, *Distinguished Fellow in Gaming Law*

Justice Michael Cherry, J.D. Washington University of Law, *Distinguished Fellow*

Senator Harry Reid, J.D., George Washington University Law School, *Distinguished Fellow in Law and Policy*

Governor Brian Sandoval, J.D. The Ohio State University, Moritz College of Law, *Distinguished Fellow in Law and Leadership*

#### **EMERITI FACULTY**

Peter Brandon Bayer, LL.M., Harvard Law School; J.D., New York University School of Law, *Emeritus Professor of Law*

Linda L. Berger, J.D., Case Western Reserve University School of Law, *Emerita Professor of Law*

Mary E. Berkheiser, J.D., University of Arizona College of Law, *Emerita Professor of Law*

Christopher L. Blakesley, J.S.D., and LL.M., Columbia University School of Law; J.D., University of Utah College of Law, *Emeritus Professor of Law*

Frank D. Durand J.D. Stanford Law School, *Associate Dean Emeritus*

Linda Edwards, J.D., University of Tennessee College of Law, *Emerita Professor of Law*

Douglas Grant, J.D., University of Colorado School of Law, *Emeritus Professor of Law*

Lynne Henderson, J.D., Stanford Law School, *Emerita Professor of Law*

Thomas B. McAfee, J.D., University of Utah College of Law, *Emeritus Professor of Law*

Richard J. Morgan, J.D., University of California, Los Angeles, School of Law, *Dean Emeritus*

Terrill Pollman, J.D., University of Arizona College of Law, *Emerita Professor of Law*

Elaine Shoben, J.D., University of California, Hastings College of the Law, *Emerita Professor of Law*

Jean M. Whitney, J.D., William Mitchell College of Law, *Emerita Professor of Law*

#### **LIBRARY FACULTY**

Youngwoo Ban, J.D., Oklahoma City University School of Law, M.L.I.S., University of Arizona, *Research Librarian and Assistant Professor*  
Justin Iverson, J.D., Savannah Law School, M.L.S., Emporia State University, *Research Librarian and Assistant Professor*  
Jim Rich, J.D., University of Nevada, Las Vegas, William S. Boyd School of Law, M.L.I.S. University of Missouri; *Research Librarian and Assistant Professor*

#### **SENIOR FELLOWS**

Nancy Brune, Ph.D., Yale University, Kenny Guinn Center for Policy Priorities, Nevada, *Senior Fellow*  
Honorable Jay S. Bybee, J.D., Brigham Young University Law School, *Senior Fellow in Constitutional Law*  
Frank Fritz, J.D., Columbia University School of Law, *Senior Fellow*  
Patricia Mulroy, M.A., University of Nevada, Las Vegas *Senior Fellow, Practitioner in Residence Saltman Center for Conflict Resolution*

#### **SALTMAN SENIOR FELLOWS**

Hal Abramson, LL.M., Harvard Law School; J.D., Syracuse University College of Law  
Lisa Blomgren Amsler, J.D., University of Connecticut School of Law

#### **VISITING LAW FACULTY**

Steven Light, Ph.D., Northwestern University  
Kathryn Rand, J.D., University of Michigan  
Monte Smith, J.D., The Ohio State University

#### **ADJUNCT FACULTY**

Jeanette Barrick, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Bovitz, J. Scott, J.D., Loyola Law School, Los Angeles  
Patrick Chapin, J.D., Capital University School of Law  
Jennifer Carr, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Patrick Chapin, J.D., Capital University Law School  
Thomas Chittum, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Sean Claggett, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Angela Cook, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Alissa Cooley, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Honorable Christy Craig, J.D., California Western School of Law  
Margaret Crowley, J.D., University of California, Davis  
Daron Dorsey, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Honorable Jennifer Dorsey, J.D., Pepperdine University School of Law  
Osvaldo Fumo, J.D., Whittier Law School  
Greg Gemignani, J.D., University of Wisconsin Law School  
John Harney, J.D., University of Wisconsin Law School  
Becky Harris, LL.M., University of Nevada, Las Vegas William S. Boyd School of Law; J.D., Brigham Young University, J. Reuben Clark Law School  
C. Stanley Hunteerton, J.D., Syracuse University College of Law  
Terry Johnson, J.D., University of Nevada, Las Vegas, William S. Boyd School of Law  
Marc Kligman, J.D., Tulane University School of Law  
Kristin Gerdy Kyle, J.D., Brigham Young University, J. Reuben Clark Law School  
John Lambrose, J.D., University of Idaho College of Law  
Eleissa Lavelle, LL.M., Pepperdine University School of Law; J.D., University of Utah College of Law  
Nancy Lemcke, J.D., Pepperdine University School of Law  
Katie Lever, LL.B., University of Windsor  
Erin McMullen, J.D., California Western School of Law  
Samuel McMullen, J.D., Georgetown University  
Joanna Myers, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Honorable Mike K. Nakagawa, J.D., University of California, Davis, School of Law  
Heidi Ojeda, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Stanford B. Owen, J.D., Stanford Law School  
Sarah Perez, J.D., University of Nevada, Las Vegas William S. Boyd School of Law

Susan Pitz, J.D., University of Nevada, Las Vegas William S. Boyd School of Law  
Richard Rawson, LL.M., University of Alabama School of Law; J.D., University of Nevada,  
Las Vegas William S. Boyd School of Law  
Jennifer Roberts, J.D., University of Utah S.J. Quinney College of Law  
Peter Sadowski, J.D., St. Louis University School of Law  
David Sandino, J.D., Santa Clara University School of Law  
Bryan Schwartz, J.D., University of Nevada, Las Vegas, William S. Boyd School of Law  
David G. Schwartz, Ph.D. History, UCLA; B.A. and M.A., University of Pennsylvania  
David P. Schwartz, J.D., Brooklyn Law School  
Howard Siegel, J.D., Syracuse University, College of Law  
Tom Standish, J.D., York University Osgoode Hall Law School  
Charles Stanton, J.D., New York University New York Law School  
Honorable Frank Sullivan, J.D., Depaul University School of Law  
Rene Valladares, LL.M., University of Miami School of Law; J.D., University of Florida  
School of Law  
Laura Vlieg, J.D., William and Mary Law School  
Honorable Gregg Zive, J.D., University of Notre Dame Law School