

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

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This issue is the second of a two-part series—the product of the Fourth Annual Public Law Conference at Duke Law School—exploring the premise that “distinctive conservative and progressive legal ‘visions’ or ‘ideologies’ vie for influence within American jurisprudence.”<sup>1</sup>

The first issue focused on topics of public law and constitutional meaning. Some authors critiqued the importance or distinctiveness of the “progressive” and “conservative” labels for the meaning of race,<sup>2</sup> for their impact on criminal procedure,<sup>3</sup> or for their descriptive usefulness in the free speech arena.<sup>4</sup> Others questioned whether the labels of ideological division are categories that aid constitutional understanding, suggesting alternative understandings or different interpretive techniques.<sup>5</sup> Still others considered which, if any, any ideological label can best describe the Supreme Court’s current jurisprudence<sup>6</sup> and whether constitutional theory<sup>7</sup>—and perhaps even historical views of the Constitution<sup>8</sup>—must necessarily be understood as influenced by

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1. Christopher H. Schroeder, *Foreword*, 67 LAW & CONTEMP. PROBS. 1, 2 (Summer 2004).
2. Girardeau A. Spann, *Just Do It*, 67 LAW & CONTEMP. PROBS. 11 (Summer 2004).
3. Louis Michael Seidman, *Left Out*, 67 LAW & CONTEMP. PROBS. 23 (Summer 2004).
4. Robert Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83 (Summer 2004).
5. See Suzanna Sherry, *Warning: Labeling Constitutions May Be Hazardous to Your Regime*, 67 LAW & CONTEMP. PROBS. 33 (Summer 2004); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (Summer 2004).
6. See Erwin Chemerinsky, *Progressive and Conservative Constitutionalism As the United States Enters the 21<sup>st</sup> Century*, 67 LAW & CONTEMP. PROBS. 53 (Summer 2004); Neal Devins, *The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROBS. 63 (Summer 2004).
7. Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149 (Summer 2004).
8. See Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW &

ideological perspectives.

Continuing this inquiry into progressive and conservative visions of legal ordering, this issue of *Law and Contemporary Problems* presents a series of articles that explore topics in private law spheres (corporate law and torts), in criminal law, and in international law. The questions animating the specific topics here are tightly connected to the questions animating the previous issue: is the contrast of “progressive” versus “conservative” useful to legal inquiry or understanding? If so, what might the normative consequences be of such definitions? Whether we can come to any specific conclusions about defining those terms or identifying their normative consequences, what other interpretive lenses might help us better understand different spheres of law?

Among the questions raised during the Conference, one question is particularly prominent in the articles in this issue: if selecting either a “progressive” or a “conservative” approach to a given sphere of law is normatively attractive, what might be the substantive legal implications that flow? While the *Foreword* from the previous issue in this series explored the application of these “differing descriptions” on fields of law other than constitutional and public law in some detail,<sup>9</sup> it is worth noting here again that although constitutional law receives the most attention in the conservative-progressive debate, private law and international law provoke no fewer questions regarding policy preferences and ideology. How much do these policy preferences factor into substantive lawmaking in tort law, corporate law, and international law? What would the law look like if decisionmakers adopted different ideologies?

Examining tort law, Anita Bernstein looks closely at each of these questions.<sup>10</sup> Specifically, Bernstein uses tort reform rhetoric as her jumping-off point, and asks whether we can call tort law progressive.<sup>11</sup> After defining “progressive” and “conservative”—a running theme for the articles in both issues—she examines two sets of arguments in detail (both in favor of and against a progressive understanding of tort law) to come to a better understanding of how we might consider tort law progressive.<sup>12</sup> She concludes, “[t]ort law as practiced is continually poised to challenge rather than to sigh in acquiescence,”<sup>13</sup> suggesting that through the constant centripetal force of litigation, checked by rule-of-law values, “tort law jolts stasis into change.”<sup>14</sup>

Andrew Koppelman takes a different approach to the ideological divide in examining the viability of antidiscrimination laws in the wake of *Boy Scouts of America v. Dale*.<sup>15</sup> Critiquing what he refers to as the “neoliberalist” view of freedom of association, Koppelman—arguing against the idea that noncommercial associations have

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CONTEMP. PROBS. 175 (Summer 2004).

9. Schroeder, *supra* note 1, at 3-4.

10. Anita Bernstein, *Muss Es Sein?: Not Necessary, Says Tort Law*, 67 LAW & CONTEMP. PROBS. 7 (Autumn 2004)

11. *Id.* at 7.

12. *Id.* at 10-20.

13. *Id.* at 23-24.

14. *Id.* at 26

15. 530 U.S. 640 (2000).

an absolute right “to exclude unwanted members”<sup>16</sup>—seems to imply (without explicitly stating) that labeling views of core values like free speech as “conservative” or “liberal” papers over a panoply of different views that do not fit neatly into either one of these categories. Koppelman notes the different strands of the “libertarian” model informing freedom of speech and association and, while exploring the perpetual tension between different notions of liberty and equality, reminds us that all these political ideologies share a common heritage in the classical liberal tradition.<sup>17</sup>

Liberty and equality take on a different meaning in Brenda Sims Blackwell’s and Clark D. Cunningham’s article, focusing on the lack of “procedural justice” in the criminal justice system and attempting to find ways to “increase the legitimacy of the legal process” for criminal defendants.<sup>18</sup> They examine a number of different projects around the country designed to solve the problems they have identified, focusing primarily on restorative justice programs. Blackwell and Cunningham see their project as bridging the “left” versus “right” distinctions made in arguments over criminal law, proposing that the model of restorative justice, by “taking the punishment out of the process,” fulfills goals on both the left (making the process itself more fair to criminal defendants) and the right (reducing costs to taxpayers and making the streets safer).<sup>19</sup>

Moving in a different direction from these case studies, a number of other articles subsequently critique the normative basis for the current shareholder-centered model of corporate law, and consider whether it—or another model—can be considered “progressive.” Kellye Testy, examining the currently dominant shareholder-centered paradigm for understanding corporate law, notes “emerging” progressive models of corporate law that stand to challenge the dominant paradigm.<sup>20</sup> She argues that a “concern . . . over concentration and anti-democratic uses of corporate power” unites various progressive views, and makes the case for feminist legal theory as one that should inform any progressive corporate law model.<sup>21</sup> Adam Winkler agrees that the “conservative,” shareholder-centered view of the corporation is dominant, but suggests that progressives need not despair: the “broader law of business” protects progressive ideals in a way that corporate law and corporation rules do not.<sup>22</sup> Taking a different view, Kent Greenfield suggests that whatever paradigm replaces the current shareholder-centered view of corporate law and governance, the law itself ought to be more attuned to democratic values than the current legal regime, dominated as it is by Delaware corporate law and the internal affairs doctrine.<sup>23</sup> Greenfield makes the case

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16. Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 LAW & CONTEMP. PROBS. 27, 28 (Autumn 2004).

17. *See id.* at 31-42.

18. Brenda Sims Blackwell and Clark D. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice through Procedural Justice to Restorative Justice*, 67 LAW & CONTEMP. PROBS. 59, 63 (Autumn 2004).

19. *Id.* at 84-86.

20. Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87 (Autumn 2004).

21. *Id.* at 91.

22. Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109 (Autumn 2004).

23. Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP.

that corporate law will never be fair or democratic—whether or not those are “progressive” values—so long as one small state continues to dominate substantive corporate law.

The progressive-conservative debate takes on a different guise in the international law arena. Although they do not explore the specific question of progressivism or conservatism in explicit detail, three articles examine shifts in international law that can be thought of as influenced by shifts in ideology and policy preferences, and that may lead to changes in our understanding of international law’s substance. Examining an area of vital importance in the present geopolitical context, Thomas Lee asks whether preemptive war can be justified by the “canonical” norm of sovereign equality.<sup>24</sup> The conclusions he comes to—that the sovereign equality norm withstands the shock of present-day geopolitical reality—carries implications for those on both sides of the political divide, suggesting that preemptive war may be justified by this international law norm, but that it may require a multilateral approach.

While Thomas Lee looks to defend this canonical norm in the face of a new international reality, Martin Flaherty argues that new approaches for foreign affairs law may be shaking up these normative suppositions.<sup>25</sup> Specifically, Flaherty’s project is to reinterpret the understanding of history in the scholarly understanding of foreign affairs law. Flaherty observes that recent foreign affairs scholarship and Supreme Court opinions have suggested a new internationalist tilt to American law, and argues that this “reorientation is firmly grounded in the past.”<sup>26</sup> He makes the case that such an understanding of history and of current foreign affairs scholarship should pave the way for international relations law that, animated by the work of the Founders, is always forward-looking—or (though he does not use the term) “progressive.”

Finally, Peter Spiro looks at different paradigms of international relations theory and suggests that a different theory—one that looks at non-state actors defined by “powers and interest”—might aid us in understanding current interactions between nations.<sup>27</sup> In so doing, Spiro advocates using this model to understand “how international law might be incorporated into U.S. law,”<sup>28</sup> in turn shaping the Constitution and public understanding of it. Though Spiro does not entertain the progressive-conservative debate explicitly, his article suggests that those labels might not necessarily aid a theoretical understanding of international relations and may undermine attempts to make normative, policy- or ideology-driven assumptions about the role international law ought to play in our constitutional culture.

Together, these articles examine questions both at the center and the periphery of the debate over “conservative” and “progressive” legal orders. Read along with the

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PROBS. 135 (Autumn 2004).

24. Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 LAW & CONTEMP. PROBS. 147 (Autumn 2004).

25. Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169 (Autumn 2004).

26. *Id.* at 183.

27. Peter J. Spiro, *Disaggregating Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195 (Autumn 2004).

28. *Id.* at 196.

previous issue of *Law & Contemporary Problems*, they are part of a vibrant and important discussion not only about our understanding of what American legal culture is and what it ought to be, but also about the very terms we use in our discussion of that culture. These two issues of *Law & Contemporary Problems* should add new perspectives to our discourse about the nature of the American polity.