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GEORGIA LAW REVIEW

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ARTICLES

Judging Congressional Elections ..... *Lisa Marshall Manheim* 359

A pivotal clause of our Constitution suffers from uncertainty and neglect. The result has scrambled the law of contested congressional elections. These high-stakes disputes turn on questions of procedure, and in particular on questions of forum. Yet across the country, an unpredictable and ad hoc set of regimes governs these fundamental questions. The culprit behind the confusion is Article I, Section 5 of the United States Constitution, which states that "Each House shall be the Judge of the Elections . . . of its own Members." This command may seem straightforward, if a bit unsettling—it allows Congress to decide who has won its own elections. Despite its effect on the outcome of congressional elections, and notwithstanding its potential to influence the partisan makeup of each House, the provision is beset by dangerous and unrecognized ambiguity. It provides no guidance as to whether, or how, courts should assist each House of Congress in adjudicating these congressional election contests. No federal authority has fully entered the debate, much less ended it, and states have taken diametrically opposing views. The result is cacophony. Some states adjudicate electoral disputes, while others refuse. Still others warp their courts' procedures in response. The only consistent element of congressional election procedure is inconsistency.

This Article exposes the interpretive vacuum, the current state of the law, and the harm it all inflicts. It recognizes that precisely because there is no centralized body of law on which scholars and political actors can focus, this area has been plagued by an absence of scholarship, as well as an absence of doctrine—and this Article responds to both. It reveals the patchwork procedural landscape as it currently exists, arguing that the ad hoc system poses serious threats to democratic governance and legitimacy.

It then offers a novel theory of Article I, Section 5—a theory that could help to mitigate some of the harmful practical effects that plague the current regime. It concludes by calling on Congress to enact the procedural reforms this Article proposes. Such reforms are necessary to promote and safeguard democratic ideals in contested congressional elections.

Mass Suppression: Aggregation and the Fourth Amendment ..... *Nirej Sekhon* 429

The Fourth Amendment's exclusionary rule requires that criminal courts suppress evidence obtained as a result of an unconstitutional search or seizure. The Supreme Court has repeatedly stated that suppression is purely regulatory, not remedial. Its only purpose is to deter future police misconduct, not to remedy past privacy or liberty harms suffered by the defendant. Exclusion, in other words, is for the benefit of community members who might, sometime in the future, be subject to police misconduct like that endured by the defendant. Exclusion's regulatory purpose would be greatly aided if criminal courts could identify when a suppression motion involved Fourth Amendment violations that were representative of widespread patterns of police misconduct in the jurisdiction. Currently, state and local criminal courts—where the vast majority of Fourth Amendment suppression motions are litigated—decide those motions without the benefit of any contextual information regarding police practices within the jurisdiction. Informational bottlenecks and other design defects prevent criminal courts from systematically recording and analyzing all of the information that is available to them regrading patterns of police misconduct. Procedural and other reforms could correct these defects and allow state and local courts to realize their full regulatory potential. For example, criminal courts should, under appropriate circumstance, aggregate different defendants' Fourth Amendment claims and grant group-based suppression. This will, in turn, incentivize public defenders to systematically identify and challenge patterns of unconstitutional police conduct.

Originalism and Level of Generality .....*Peter J. Smith* 485

Even if one concedes that the meaning of the Constitution today is its original meaning, at what level of generality should one seek that meaning? In considering whether bans on same-sex marriage violate the Fourteenth Amendment, for example, should we seek to determine how the framers of the Amendment would have answered that question, or should we instead seek to discern the broad principle—perhaps "equality" or "no caste-like discrimination"—that the Amendment objectively incorporated, even if application of that principle today might produce results that the framers would not have anticipated? The level of generality at which we ask the question almost foreordains the answer. But how should a faithful originalist identify the proper level of generality?

The old originalism focused on the original intent of the framers, and it sought to ascertain that intent at the most narrow level of generality. Under this approach, if the framers believed that a particular practice was constitutional, then it is constitutional today. The old originalism was principally concerned with judicial constraint and judicial restraint; confining judges to a narrow historical inquiry promoted the former, and narrowing the scope of individual rights promoted the latter. But the old originalism suffered from serious defects, including the fact that it could not justify Brown v. Board of Education *and other cases that are central to our constitutional identity today.*

The new originalism, which generally seeks the objective original meaning of the text instead of the original intent and treats as non-binding the framers' expectations about how the text would apply, has addressed many of the theoretical defects of the old originalism. New originalists generally acknowledge that because many of the Constitution's most contested provisions are framed in abstract terms, we should seek their objective original meaning at a correspondingly high level of generality. But the higher the level of generality at which we seek original meaning, the more room there is for judicial creativity in applying the Constitution's broad principles to issues that arise today.

Indeed, by embracing interpretation of the text at a high level of generality, new originalists have opened the door

to interpretations that would have come as a big surprise to the old originalists: originalist arguments not only that Brown *was correct (notwithstanding the well-established view at the time of the framing of the Fourteenth Amendment that it would not disturb the common practice of racially segregated schools), but also that the Amendment prohibits gender discrimination, interference with a broad and potentially undefined group of unenumerated rights, and even bans on same-sex marriage.*

These arguments might come as a welcome surprise to those who are skeptical of originalism, but they also come at a cost. First, there is little to distinguish these ostensibly originalist arguments from non-originalist approaches to interpretation, most of which begin by reading the text at a high level of generality and then seek to rely on practical judgment to apply the principles behind the text to modern circumstances. Second, new originalism's flexible approach to the level of generality means that the approach cannot fulfill its promise of judicial constraint.

Indeed, in practice originalists have varied the level of generality at which they seek original meaning, often from case to case and issue to issue, in ways that cannot be explained simply by reference to the level of abstraction at which the constitutional text is expressed. This Article documents that phenomenon, and concludes that sooner or later originalists will have to choose between their claims of constraint and neutrality, on the one hand, and legitimacy, on the other.

NOTES

Simon Didn't Say: When Reconstruction of a Private Search Goes Awry Under the Private Search Doctrine ..... *John Grayson Chambers* 557

A private party conducting an unreasonable search of an individual need not fear the Fourth Amendment as the proscriptions therein are applicable against only the government. The government, however, need not fear the Fourth Amendment where it replicates that private party's unreasonable search. As such, the Fourth Amendment is not offended where the government directs the private

party to "reconstruct" its initial search. This reconstruction doctrine breeds many questions in application, particularly in the digital context. In grappling with these questions, this Note demonstrates that the current law provides no satisfying answers. It proposes a new test to assess reconstructed private party searches that avoids both arbitrary scope-drawing exercises and semantic squabbling inherent in agency determinations. The result provides law enforcement officer clear guidelines as to what constitutes misconduct and offers the judge a workable legal standard—a standard absent from current Fourth Amendment jurisprudence.

Trans-lating the Eighth Amendment Standard: The First Circuit's Denial of a Transgender Prisoner's Constitutional Right to Medical Treatment.....*Bethany L. Edmondson* 585

In December of 2014, the First Circuit Court of Appeals held, en banc, *that the Massachusetts Department of Corrections was not constitutionally obligated to provide Michelle Kosilek, a transgender prisoner, with sexual reassignment surgery. Kosilek sued the prison, arguing that her Eighth Amendment rights against cruel and unusual punishment were violated. The First Circuit held that Kosilek did not have a serious medical need, due to the prison's alternative treatment, and that the prison was not deliberately indifferent to that need. This Note argues that the First Circuit erred in applying the "serious medical need" prong of the cruel and unusual punishment standard by ignoring the transgender medical community's general acceptance of sexual reassignment surgery as a medically necessary procedure in cases of severe gender dysphoria. Specifically, the World Professional Association for Transgender Health Standards, the United States Tax Court, Medicare, Medicaid, and private medical insurance companies have all recognized, in some capacity, that sexual reassignment surgery can be medically necessary for persons with severe gender dysphoria.*

You Have the Right to Free Speech:
Retaliatory Arrests and the
Pretext of Probable Cause ..... *Katherine Grace Howard* 607

An important question about an individual's First Amendment freedoms arises when a citizen or journalist is arrested while verbally challenging, filming, or writing about police actions. Did the police officer have legitimate law enforcement reasons for the arrest, or was the arrest in retaliation for engaging in First Amendment activities the officer did not like? Courts have grappled with the best way to resolve this question, often importing the Fourth Amendment's bright-line rule about probable cause into analyses of First Amendment retaliatory arrest claims and barring those claims were the officer had probable cause to arrest. This Note argues that when retaliatory arrest claims are appropriately viewed within the framework of First Amendment jurisprudence—including the special timeliness and chilling effect associated with free speech claims—it becomes clear that the existence of probable cause should not bar a First Amendment claim for retaliatory arrest. Although probable cause may be evidence that the arrest was not, in fact, retaliatory, it can also be used as pretext to hide the fact that the arrest was made in retaliation against an individual's speech. Instead, as in discrimination cases, plaintiffs should be afforded the opportunity to demonstrate whether the probable cause was pretext to hide the unconstitutional retaliation.

Protecting Access to the Great Writ:
Equitable Tolling, Attorney
Negligence, and AEDPA ..... *Mandi Rene Moroz* 647

Since the creation of the Antiterrorism and Effective Death Penalty Act, attorneys have struggled to understand and properly apply the Act's statute of limitations. As a result, many attorneys have mistakenly filed federal habeas petitions outside the Act's statute of limitations—effectively barring their clients from federal court forever. Attorneys who mistakenly misfile habeas petitions are left with only one option: to request that the court equitably toll the statute of limitations. While courts will not toll the statute of limitations for mere negligence, courts are divided on exactly what circumstances must exist before

allowing equitable tolling. Some courts require a showing of professional misconduct or attorney abandonment, while other courts require a lower showing of gross negligence. This Note takes a closer look at the divided opinions and argues that courts should adopt the lower threshold of gross negligence. A standard of gross negligence will allow courts the flexibility needed in the habeas context to make sure that petitioners are not always barred due to the actions of their attorney.

An Aggravating Adolescence An Analysis of Juvenile Convictions as Statutory Aggravators in Capital Cases ..... *Lesley Alexandra O'Neill* 673

In death penalty cases there is a requirement that certain statutory aggravators must be present in order to reach a death verdict. One such statutory aggravator in most states is the defendant having previously committed a felony, which can include crimes committed as a juvenile. While the Supreme Court ruled in 2005 that sentencing a defendant to death for crimes they committed as a juvenile is unconstitutional, many states' death penalty statutes allow for the possibility that the sole aggravator relied on for a verdict of death is a previous juvenile conviction. This Note argues that based on the Court's logic in Roper, *and the continued developments in juvenile brain science bolstering the Court's decision, the use of such statutory aggravators to reach a death verdict should be deemed unconstitutional.*

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