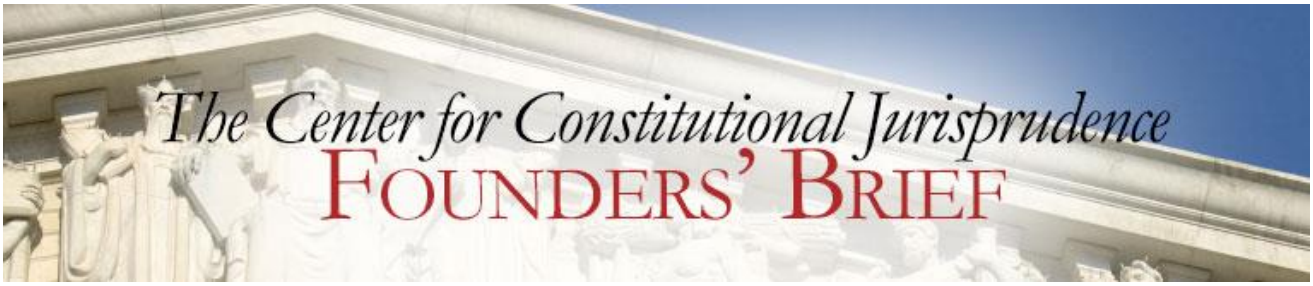
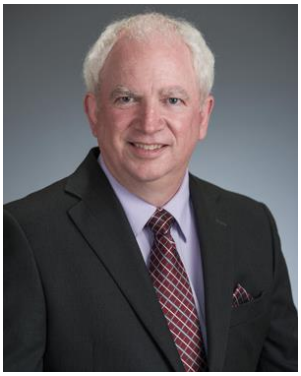




Volume 2 - Summer 2016

I founded the Center for Constitutional Jurisprudence to be the legal arm of the Claremont Institute.

Claremont is one of the few institutions that insists the Declaration of Independence, and its recognition of the natural law, must inform our understanding of the Constitution.

The natural law simply asserts that there are some rights and laws that pre-exist government. These are "endowed [to us] by [our] Creator" and protected by the documents that created our government. But what happens to those "unalienable rights" when the words used to enshrine them are untethered from their original meaning? How can the rule of law protect those rights if ambiguity can be found in even the most commonplace words?

Let me begin with some basic principles every first-year law student learns: law should be understandable and give clear notice to citizens of the standards to which they are held; law should not be contradictory; law should be applied prospectively and should remain relatively consistent over time; law should be administered by neutral officials. All of these principles rest on a single common sense rule—the *words* used to craft our laws must be intelligible and static enough to allow the law to meet these requirements.

When the words comprising law have no meaning, the courts are left in disarray. If a judge is constrained by the fixed meaning of a word, his discretion is similarly constrained. However, when a court manufactures ambiguity where none exists and rejects the common, fixed meaning of words, the original meaning of the Constitution no longer serves to limit government. The results of judicial interpretation, unencumbered from static definitions, can be seen everywhere in the way today's government conducts its business, but nowhere more clearly than in the breakdown of the separation of powers.

Unfortunately, the judiciary has spent the better part of the last century finding ambiguity in even the most unexceptional words, giving the courts the opportunity to transform laws duly passed by legislatures into judicially-created fiats. We find ourselves living in a world of Saul Alinsky's making, in which "All definitions of words, like everything else, are relative."

My former teacher Richard Epstein, currently a professor of law at NYU, observes that this:

view of language…marks a sharp departure from the Framers' confidence that the English language was clear enough to organize the fundamental institutions of government. They knew what it meant to divide government powers into the legislative, executive, and judicial branches, as is done in Articles I, II, and III of the original Constitution.

In *Federalist* #78, Alexander Hamilton asserted that the judiciary has "neither FORCE nor WILL, but merely judgment," which lead Hamilton to argue that "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." As the judiciary has become increasingly progressive it has taken increasing liberty with the limiting text, issuing opinions that assume an inherent ambiguity in the Constitution's words, making it difficult to maintain the original structure instituted by the framers.

Today, the framers' system of separation of powers and checks and balances has well and truly come undone. The legislative branch has cheerfully offloaded its obligation to write the laws to the executive bureaucracy. The judicial branch has assumed legislative powers of its own under the pretext of "interpreting" the law, while simultaneously restraining itself from "lawmaking" when it comes to evaluating and interpreting rules issued by the executive. And the president infamously has a pen and a phone and has actively used both to enact his own policy initiatives.

There are a few in the judiciary who are attempting to hold the line, but they can only do so much to stem the tide. We applaud those like Judge Scott Skavdahl who just last month wrote in*Wyoming v. United States Department of the Interior*:

In recent years…federal agencies have increasingly relied on *Chevron* deference to stretch the outer limits of its 'delegated' statutory authority by revising and reshaping legislation…No matter how important, conspicuous, and controversial the issue,…an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.… Congress' inability or unwillingness to pass a law desired by the executive branch does not default authority to the executive branch to act independently.

Justice Clarence Thomas also recently took his colleagues to task with his dissent in *Whole Woman's Health v. Hellerstedt*:

The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat…the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law', properly speaking, has any further application.

Unfortunately, these opinions and many like them have only occasionally stalled progressive efforts. For his first six years in office, President Obama insisted (correctly) that it was necessary for Congress to enact legislation to change immigration laws, stating, "I'm the president of the United States. I'm not the emperor of the United States." Nonetheless, two weeks after the 2014 election seemed to deny him the votes in Congress to pass his desired immigration reforms, his reading of the Constitution shifted dramatically. "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing." The state of Texas and 25 other states have challenged the executive's efforts to unilaterally change immigration laws by redefining

"prosecutorial discretion." The merits of the case remain in the district court, but thepreliminary injunction on the law remains in effect.

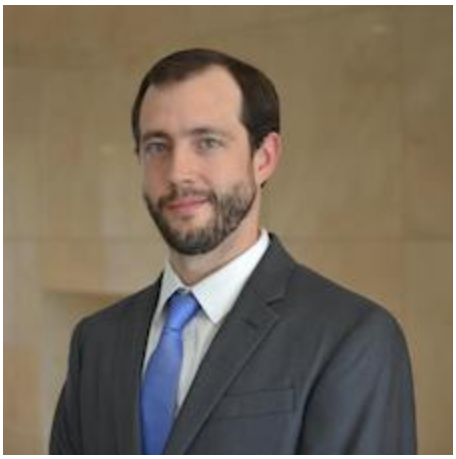
More recently, in March, North Carolina passed House Bill 2, which directed schools to "require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex." In response, the Obama Administration's Departments of Education and Justice released a "guidance" letter to schools across the nation instructing them on how to apply Title IX requirements to transgender students wishing to select the bathrooms and locker rooms they used. Passed in 1972, Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The Department of Education filed suit against North Carolina, arguing that the Title IX prohibition of discrimination based on "sex" should be reinterpreted *ex nihilo* to prohibit discrimination based on "gender identity." I am eager to weigh in on this newest progressive effort to untether a commonplace word from its universally understood meaning.

As with all human institutions, our country is not perfect, but the ideals of our nation deserve to be preserved. Our best hope lies in the ideal of liberty. The generation that broke from England in the Declaration defended their revolution in the name of natural rights. They framed the Constitution to create a limited government of the kind necessary to secure those rights. Justice Thomas recently reflected that the founders structured our government "so that it could not jeopardize the liberty that flowed from natural rights." The progressive path has shown us how quickly we can lose liberty. Faithfully reading and applying the laws that created our great nation can restore it.

Dr. John C. Eastman
Founding Director
Center for Constitutional Jurisprudence
Claremont Institute

Cristen Wohlgemuth
Executive Director
Center for Constitutional Jurisprudence
Claremont Institute

At Bar: Jeremy Talcott



The Claremont Institute's Center for Constitutional Jurisprudence played an integral role in Jeremy's legal education and growth, helping to lead him to a post-graduate fellowship in the College of Public Interest Law at the Pacific Legal Foundation (PLF), a public interest constitutional litigation firm headquartered in Sacramento. At PLF, Jeremy will work alongside his sister Johanna Talcott to promote economic liberty and the protection of private property.

Jeremy was born and raised on Fox Island in Washington State and lived for several years in Central Florida. His interest in the founding principles and the preservation of liberty brought him to Chapman University's Fowler School of Law, where he spent two semesters in the Constitutional Jurisprudence Clinic sponsored by the Claremont Institute. While at Chapman, he also served as president of the Federalist Society, competed in moot court, mock trial, and alternative dispute resolution, and was senior articles editor of the*Chapman Law Review*. He graduated *cum laude* in 2016.

Jeremy now resides in Fullerton, CA with his wife Emily, who is a veterinarian, their twin boys Maxwell and Elliott, and more pets than he cares to admit.

_____

My Time in the Constitutional Jurisprudence Clinic:

I began law school with a singular goal: obtain the education, skills, and experience necessary to enable me to embark on a career of fighting for the constitutional principles that are critical to American exceptionalism. When I accepted admission to Chapman University, I checked the box on the form to express my interest in constitutional law. Before long, Professor John C. Eastman personally called me to tell me about the incredible opportunities available in the Constitutional Jurisprudence Clinic (CJC). As soon as I was able to sign up for second year classes, the CJC was the first elective course I chose.

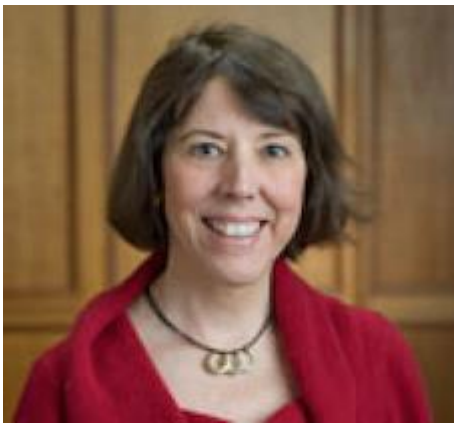
Before the fall semester even began, Professor Tom Caso emailed me with the opportunity to begin substantive research on an *amicus* brief the clinic planned to file in *Department of Transportation v. Association of American Railroads*. The issue in the case was whether Congress had impermissibly delegated the authority to regulate the industry to Amtrak, a private organization. These regulations

could potentially trigger penalties against freight carriers, allowing Amtrak to regulate their competitors. The clinic was arguing for a revival of the non-delegation doctrine, stressing the importance of the separation of powers for keeping the branches of government accountable to one another and to the people they are supposed to represent. The clinic provided me with an invaluable first introduction to many of the tools necessary to using the works of Locke, Montesquieu, and the Founding Fathers in order to craft a persuasive legal argument from an originalist perspective. The assigned work involved crafting memoranda of legal ideas and drafting the brief by focusing on one section at a time, learning to distill important principles into a concise argument. The unassigned (but encouraged and highly enlightening) work included reading materials such as *The Original Constitution* by Robert Natelson. While the court ultimately upheld the delegation of authority to Amtrak, ideas from the Center's brief were directly echoed in the concurrence by Justice Alito, underscoring the highly influential nature of the work accomplished by the CJC on behalf of the Claremont Institute.

In the fall of 2015, the CJC began a partnership with PLF to open the Liberty Clinic. Seeing an opportunity to further expand my skills and experience, I again enrolled in the clinic. Under the guidance of Professor Larry Salzman, I was able to focus on the trial court aspect of strategic constitutional litigation, working on takings challenges to burdensome regulations placed on the rights of property owners. During that semester, I was able to focus on the practicalities of identifying appropriate potential cases and litigating them in federal court, including preparing memoranda for specific legal issues and work on drafting a complaint.

I'm grateful for the semesters I spent working with the Claremont Institute in the Constitutional Jurisprudence Clinic. The experiences, knowledge, and personal connections I gained were invaluable as I explored my post-graduate career options and will apply directly to my future work at PLF. I look forward to continuing my relationship with the Claremont Institute in the future as they fight to protect the safeguards of liberty that are enshrined in our Constitution, and I would encourage others to contact Claremont and find ways to become involved in this important work.

At Bar: Gail Heriot



Gail Heriot is a long-time professor of law at the University of San Diego, where she teaches "Employment Discrimination," "The Law & History of Civil Rights," "Legislation in the Modern Administrative State," "Remedies," and "Torts." She is particularly noted for her work in the area of civil rights law. In 2007, she was honored with an appointment to the eight-member U.S Commission on Civil Rights. She continues to serve on that body today.

Gail graduated with highest distinction from Northwestern University with a B.A. in Political Science. She then attended the University of Chicago Law School, where she served as an associate editor of the *University of Chicago Law Review* and graduated *cum laude*. She is a member of both Phi Beta Kappa and the Order of the Coif.

Prior to joining the University of San Diego faculty, she clerked for the Honorable Seymour F. Simon of the Illinois Supreme Court and practiced law at Mayer, Brown & Platt (now Mayer Brown) in Chicago and Hogan & Hartson (now Hogan Lovells) in Washington, D.C. While on the University of San Diego faculty, she took time off to work as counsel to the U.S. Senate Committee on the Judiciary.

Gail writes for both academic and popular audiences. While her work has appeared in such legal journals as the *Michigan Law Review*, the *Virginia Law Review*, and the *Harvard Journal of Law & Public Policy*, she has also written for the *Wall Street Journal*, the *Los Angeles Times*, *National Review*, and the *Weekly Standard*. Her many dissents to the reports of the U.S. Commission on Civil Rights are both biting and informative.

In 1996, she served as one of three statewide co-chairs to the Proposition 209 campaign in California, which gained voter approval in November 1996. It amended the state constitution to prohibit state governmental institutions from considering race, sex, or ethnicity in the areas of public employment, public contracting, and public education.

For more than a decade, Gail has been a member of the board of directors of the National Association of Scholars and of its state affiliate, the California Association of Scholars. She is also the chair of the Federalist Society's Civil Rights Practice Group, a fellow of the American Conservative Union Foundation, and a founding member of the New American Civil Rights Project.

My Experience with CCJ:

Collaborating with the Claremont Institute's Center for Constitutional Jurisprudence on an *amicus*brief for the U.S. Supreme Court is always a pleasure. For many of the legal issues that I deal with, CCJ attorneys and I see eye to eye. But more important than our agreement on any particular issue is the fact that we share both a common approach to law and a common commitment to the success of the American experiment. Many Americans know the story of Mrs. Powel—the woman who asked Benjamin Franklin as he was leaving the Constitutional Convention what kind of government the new nation would be getting, a republic or a monarchy. "A republic," Franklin famously replied, "if you can keep it." John Eastman and the CCJ team are doing their best to ensure that we do. I could have no greater wish than to know that I, too, did my best to help keep our republic intact.

Drafting the CCJ *amicus* brief in *Schuette v. Coalition to Defend Affirmative Action* was a particular honor for me, in part because John and I were joined on that brief by former Attorney General Edwin Meese III. *Schuette* concerned the Michigan Civil Rights Initiative, which, like California's Proposition 209, prohibited discrimination or preferential treatment based on race, sex, color, ethnicity, or national origin in public education, public employment, and public contracting. Astonishingly, in an eight-to-seven vote that broke down on party lines, the U.S. Court of Appeals for the Sixth Circuit held that this *violated* rather than complemented the Constitution's requirement of equal protection under the laws.

We won the *Schuette* case at the Supreme Court level. I was always completely confident that we would. The notion that a ban on state-sponsored race discrimination could be an *un*constitutional violation of equal protection was just too much. But it should have been a unanimous decision. Somehow we lost the votes of Justices Ginsburg and Sotomayor. (Justice Kagan was recused.)

Maybe in the future I'll have to ratchet down my confidence a notch. We live in an era in which government overreach has become all too common. Another day, another bureaucratic edict with no grounding in the law—or at least so it is starting to feel. But Benjamin Franklin understood that maintaining the republic would be difficult and time-consuming. There was never any reason to believe that it would get easier after 240 years.

I feel fortunate to have worked with the CCJ on several occasions now. In the future, we won't always win. But we won't always lose either. I look forward to the challenge.