

Annual Report 2018–19

New York University School of Law Journal of Legislation and Public Policy

Dear Friend,

On behalf of the 2018–19 Executive Board, it is my pleasure to report that the *Journal of Legislation and Public Policy* has had another highly productive and successful year here at the NYU School of Law. In keeping with tradition, this Annual Report provides an overview of all that the Journal has achieved in the past year, as well as a glimpse of the 2019–20 Executive Board’s plans for the months ahead.

This year, the Journal continued to publish high-quality and timely scholarship with the aim of assisting practitioners, policymakers, judges, and scholars with their work. The Journal is frequently cited in judicial opinions, litigation documents, treatises, and legal publications. These citations are summarized later in this Report and total 286 during the period from May 1, 2018 to April 30, 2019—an increase from the last academic year.

This year’s articles highlighted an impressive variety of current legal and political issues, from a proposal to reform class action *cy pres* distribution to constitutional challenges to the tribal Violence Against Women Act provisions. Notably, this year we published a lengthy symposium issue that featured articles and commentary from highly respected and nationally-recognized experts in tax law. In addition, we published an article regarding constitutional hardball by David E. Pozen, Professor of Law at Columbia University and one of our panelists at our fall symposium.

We also convened important intellectual events for the NYU community. In November 2018, we presented a two-panel discussion on how changes in procedural devices, cultural norms, and Senate composition have resulted in unanticipated consequences. The event, titled “Advice & Consent: The Senate’s (Changing) Role in Judicial Confirmations,” was moderated by Professor Bob Bauer of NYU Law and by Victoria Bassetti of the Brennan Center for Justice. In March 2019, we presented a discussion on the Department of Education’s proposed Title IX regulations. The event was titled “#MeToo on Campus: Title IX, Sexual Assault, and the Trump Administration,” and featured both academics and practitioners.

The Journal also underwent significant organizational and production-related changes. Some highlights of this year’s changes were as follows:

First, the Journal launched a highly popular Notes Program, providing a space for journal members interested in developing a note to learn more about note writing and development, to brainstorm with fellow editors, and to solicit feedback from Notes Editors at every stage of the writing process.

Second, the Journal reinstated standing committees. The committees were instituted, in part, to organize the necessary work of event planning, articles selection, *Quorum* content review, social media management, alumni relations, and more, and provide staff editors with ample opportunities to get involved in journal projects beyond the traditional production assignments. Specifically, the committees created were the Content Committee, the Intellectual Life Committee, and the Social Committee.

Third, the Journal expanded greatly upon its training and orientation procedures. The Executive Board instituted an end-of-year board transition orientation, formalizing the process for training incoming board members and ensuring a smooth and effortless transition. The Board also invested more energy into improving its new staff editor orientation, making use of new technologies and online platforms—as detailed below—to encourage familiarity with both production and non-production related journal functions.

It was my personal pleasure and privilege to lead the Journal as Editor-in-Chief during this past year. I would like to thank each member of the *Legislation* masthead, particularly the twelve other members of the Executive Board, for their hard work and unflagging commitment. I would also like to thank Professors Helen Hershkoff and Adam Samaha for their invaluable support and advice as our faculty advisors. I am sincerely excited for all that next year’s leadership has in store and have no doubt that the 2019–20 Annual Report will detail even greater plans and achievements as the new Executive Board guides the Journal into the future.

On Behalf of the Executive Board of 2018–19,

Zeinab Bailoun, Editor-in-Chief
New York City

Governance & Membership

The 2018–19 Executive Board was comprised of thirteen members. The remaining third-year students assisted as Articles Editors, Notes Editors, and *Quorum* Editors. Thirty-four second-year students joined *Legislation* as Staff Editors in August 2018 after completing NYU Law’s Writing Competition and Transfer Writing Competition over the summer. One LLM also joined the Journal.

Overall, the 2018 Journal admission cycle was a highly successful one. Managing Editor David Drew served on the inter-journal Writing Competition committee and participated in choosing the topic—on land use and affordable and fair housing—for the Writing Competition. He provided many of the sources for the prompt packet that students were provided, ensuring the relevance of submissions to this Journal’s commitment to legislation and policy considerations. Sources included enacted and model legislation, judicial opinions, news stories, and economic and environmental reports.

Non-Production Standing Committees

This year, *Legislation* successfully resumed its practice of requiring participation of all staff editors on non-production standing committees, under the leadership of David Drew, Managing Editor of Development for the Journal. The committees support the substantive work of *Legislation* by providing venues for targeted discussion and generation of journal development ideas. The committees were instituted, in part, to organize the necessary work of event planning, articles selection, *Quorum* content review, social media management, alumni relations, and more. The committees also provide staff editors with ample opportunities to get involved in journal projects beyond the traditional production assignments.

After receiving feedback from all staff editors on their committee preferences, each staff editor was assigned to one of the following three committees in 2018–19:

- **Content/Articles Selection Committee:** Tasked with reviewing content submitted for publication consideration over the course of the academic year.
- **Intellectual Life Committee:** Tasked with the execution of *Legislation*’s 2018–19 symposia and the preparation of the symposium application.
- **Social Committee:** Tasked with planning Journal social events and parties, as well as fostering camaraderie among journal members.

Notes Program

The Journal launched a wildly popular Notes Program this year, under the leadership of Andrew J. Sklar, Senior Notes Editor of the Journal. The aim of the Notes Program was to provide a space for journal members interested in developing a note to learn more about the note writing process, to brainstorm with fellow editors, and to solicit feedback from Notes Editors at every stage of the writing process.

On October 26, 2018, Professor Helen Hershkoff, the Journal's faculty advisor, conducted a note writing session to provide an overview of the process of generating a note topic and outlining and drafting a note. Over a third of the Journal's membership attended the session.

As part of the Notes Program, Andrew and the 3L Notes Editors conducted monthly notes workshopping sessions throughout the academic year for journal members selected to join the Program. The sessions specifically provided a space for Program members to discuss (1) the process of generating ideas for a note; (2) their preliminary research and outlines; (3) their first drafts; and (4) their revised drafts, before submission to the Journal for consideration for publication.

Andrew and the 3L Notes Editors were also available for office hours throughout the year for questions from any journal members and were accessible by email.

Journal Communications & Sponsorship

This year, *Legislation* moved the entire communications platform of the Journal to Slack, a cloud-based instant messaging platform that allows for the sharing of files and the creation of channels for specific groups. The Journal created channels for each of its discrete committees, for management of internal communications and documentation by the Executive Board, and for web development and branding. In addition, in keeping with the Journal's focus on legislative and regulatory policy, *Legislation* created a channel that updated members on policy issues in the news and on legal blogs.

Legislation also successfully began using Mailchimp to systematize alumni outreach. By streamlining the communications process, journal board members were able to provide journal alumni with periodic updates on *Legislation*'s growth and to invite alumni to attend the Journal's two symposia.

Finally, *Legislation* in 2018–19 instituted its sponsorship program, which aims to recognize the Journal’s alumni, friends, and donors for their generous contributions. Specifically, the Journal created a Senators’ Circle, a Representatives’ Circle, and a Donors’ Circle to recognize contributions of varying levels. In addition, the Journal created a designation for Madison Society Donors, showing its gratitude for its founding members as well as alumni who have supported the journal by naming its alumni-giving honors after the original Madison Society, the 1990s incubator for the *Journal of Legislation and Public Policy*.

Print Publications

For the Volume 21 production cycle, *Legislation* published four full issues, in a final nod to its tradition of publishing four issues per academic year. With an eye towards further developing *Quorum* and amplifying its online presence, the Journal’s incoming Board will reduce the number of issues published each year to three. Below, we provide synopses of the issues in Volume 21 and the content contained therein.

Volume 21, Issue 1

Issue 21.1 features three full-length scholarly articles and three student notes. Issue 21.1 contains the following articles:

- *Waving Good-bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*
 - Emily Haney-Caron, Ph.D. Candidate, Drexel University; Danielle Whiteman, Zubrow Fellow, Juvenile Law Center; Naomi E. S. Goldstein, Professor of Psychology, Drexel University; and Marsha Levick, Deputy Director and Chief Counsel, Juvenile Law Center.
 - This article synthesizes recent research in developmental neuroscience and explains how that research impacts prevailing understandings of voluntariness and consent, the two foundational elements of a valid waiver of *Miranda* rights. The article also provides policy recommendations to better align current criminal justice practices with the implications of this research.

- *Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles*
 - Mason Marks, Visiting Fellow, Information Society Project, Yale Law School; J.D., Vanderbilt University Law School; M.D., Tufts University School of Medicine.

- This article is the first comprehensive review of the social and legal obstacles to developing psychedelic medicines. It argues that the current mental health and opioid crises demand scientific exploration of the therapeutic potential of these drugs. The author advocates that, with subtle modifications to state and federal drug law, psychedelics could be thoroughly studied and made available to patients under carefully controlled conditions.
- *“The Ability to Pay” in Tax Law: Clarifying the Concept’s Egalitarian and Utilitarian Justifications and the Interactions Between the Two*
 - Michael Pressman, J.D. ’10, Stanford Law School; Ph.D. Candidate ’18, Philosophy, University of Southern California.
 - The author thoroughly examines philosophical rationales supposedly undergirding American tax law. The article finds that orienting policy around the concept of “ability to pay” simultaneously advances both egalitarian and utilitarian ends when properly conceived.

Issue 21.1 also contains the following student notes:

- *FOIA in the Executive Office of the President*
 - David Cohen, J.D. ’17.
 - In this note, the author describes the history of how the courts have determined the Freedom of Information Act status of each entity in the Executive Office of the President. The author argues that the test the courts have relied on does not accurately account for the complex nature of the EOP and suggests possible alternatives that should be explored.
- *Fifth Amendment Limitations on Criminal Algorithmic Decision-Making*
 - Cassie Deskus, J.D. ’18.
 - In this note, the author confronts the current use of criminal risk assessment algorithms in our criminal justice system. The author identifies a number of these algorithm’s features that implicate the Fifth Amendment and proposes Miranda-like warnings tailored to the risk assessment process.
- *The Future of Autonomous Vehicles in American Cities*
 - Eric Phillips, J.D. ’17.
 - In this note, the author comprehensively examines the challenges that cities and municipalities will face when autonomous vehicles supplant human-operated vehicles as the dominant mode of transit. The note proposes potential policy solutions to the likely challenges autonomous vehicles will pose.

Volume 21, Issue 2

Issue 21.2, the Journal's special symposium issue, features an introduction, five full-length scholarly articles, one practitioner comment, and six responses. It contains the following articles:

- *Examining the Landscape of § 501(c)(4) Social Welfare Organizations*
 - Ellen P. Aprill, John E. Anderson Professor of Tax Law, Loyola Law School, Los Angeles.
 - This article reviews relevant law and legislative history regarding § 501(c)(4) and explores troubling “border skirmishes” in identifying and regulating § 501(c)(3) and § 501(c)(4) organizations. The article suggests several changes to the tax treatment of § 501(c)(4) organizations, including the taxation of investment income for social welfare organizations that provide benefits to members, taxing appreciation on assets donated to § 501(c)(4) organizations, and taxing non-membership social welfare organizations on the lesser of their investment income or the amount spent on lobbying.¹

- *Social Welfare Organizations as Grantmakers*
 - David S. Miller, Partner, Proskauer Rose LLP.
 - In this article, the author explores the use by major donors of both domestic and foreign social welfare organizations as grantmakers for charitable purposes, an activity historically the domain of private nonoperating foundations qualifying as charities described in § 501(c)(3). The article argues that the exclusion of capital gains tax on the donation of appreciated property to social welfare organizations perpetuates income inequality and distorts the hierarchy among organizations described in § 501(c) b placing § 501(c)(4) organizations above § 501(c)(3) organizations in appeal for the “super-wealthy.” The article concludes that the law should be changed to treat the donation of appreciated property to any organization described in § 501(c) as a sale for income tax purposes.

- *A (Partial) Defense of § 501(c)(4)'s “Catchall” Nature*
 - Lloyd Hitoshi Mayer, Professor, Notre Dame Law School.
 - This article explores the vagueness of the legislative history and Internal Revenue Service (“IRS”) interpretation of § 501(c)(4) that has led commenters to criticize social welfare organizations as a “catchall” category of exempt organization. The article argues that, with a number of exceptions, the “catchall” exemption provided under § 501(c)(4) is logical and desirable and should be neither limited nor curtailed.

¹ The summaries for the pieces in Issue 21.2, excluding the responses, are excerpted from the Introduction to the issue by Harvey P. Dale and Jill S. Manny.

- *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*
 - Roger Colinvaux, Professor of Law, Columbus School of Law, The Catholic University of America; Legislation Counsel, Joint Committee on Taxation, 2001-2008.
 - This article addresses the use of social welfare organizations in a more typical role of political activity, surmising that social welfare organizations function as “essentially unregulated vehicle[s] for partisan speech.” The article explores the inconsistencies in the laws applying to social welfare organizations and political organizations that mislead the public and confuse regulators, and urges consistency in disclosure and financing rules between social welfare and political organizations. The article’s concluding proposal is to eliminate definitional limits on the political activity of social welfare organizations in order to eliminate restrictions on the free speech of social welfare organizations currently imposed under § 501(c)(4).

- *The Tax Exemption Under I.R.C. § 501(c)(4)*
 - Daniel Halperin, Stanley S. Surrey Professor of Law Emeritus, Harvard Law School; Deputy Assistant Secretary for Tax Policy, 1978-1980.
 - This article calls for reconsideration of the federal income tax treatment of organizations described in § 501(c)(4). The article argues that permitting exemption at the entity level without a charitable contribution deduction subsidizes only organizations that accumulate funds while denying subsidy to organizations that spend money currently. The article favors removing the subsidy of tax exemption on accumulations from most § 501(c)(4) organizations and treating those organizations like social clubs for federal income tax purposes.

Issue 21.2 contains the following practitioner comment:

- *Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying: Realities and an Alternative*
 - Rosemary E. Fei & Eric K. Gorovitz, principal attorneys at Adler & Colvin.
 - This practitioner comment explores the use of social welfare organizations as lobbying organizations, a role traditionally embraced by both charities and social welfare organizations. The piece argues for changes in rules to reduce real and perceived obstacles by charities to facilitate and increase lobbying directly by charities. The piece proposes a new structure to facilitate lobbying by charities, making the use of a social welfare organization or a “tandem” arrangement less necessary. The structure, to be called a Separate Segregated Lobbying Fund (“SSLF”), would consist of a fund or bank account held by a charity for lobbying purposes, and would not have the ability to engage in political campaign activity.

This would reduce the burden of setting up a whole new organization and maintaining it and would eliminate the risk of having partisan political activities of the affiliate attributed to the charity.

Issue 21.2 also contains the following responses:

- *Grantmaking Advice for Mega-Donors: A Second Opinion*
 - Stephen Schwarz, Professor Emeritus, University of California, Hastings College of the Law.
 - This piece responds to David S. Miller’s article, *Social Welfare Organizations as Grantmakers*, by offering a number of observations, including that (1) in discussing the use of § 501(c)(4) organizations as a grantmaking vehicle, Miller’s article understates and to some extent devalues other more traditional and widely used alternatives; (2) the donors most likely to benefit from using a domestic social welfare organization for grantmaking appear to be a relatively small subset of wealthy individuals living in rarefied air who are indifferent to the charitable income tax deduction and have an aversion to regulation and transparency; (3) those who would opt to use a foreign social welfare organization reside in an even smaller gated community, requiring expensive and highly specialized counsel to navigate through an imposing maze of substantive and procedural rules; and (4) as for the policy implications, the use and potential abuse of § 501(c)(4) organizations as grantmakers may not be a big problem because so few are affected, or if this is an emerging trend, there may be a need for targeted reforms that do not go quite as far as those proposed in the article.

- *Social Welfare Organizations as Grantmakers: Further Thoughts*
 - Robert A. Wexler, Principal, Adler & Colvin.
 - This piece responds to David S. Miller’s article, *Social Welfare Organizations as Grantmakers*, by presenting points of agreement, points of disagreement, and areas to be developed further. For example, the response points out that the article could have used examples of existing § 501(c)(4) grantmakers in the United States that do not involve funding from a wealthy donor, that the § 501(c)(4) structure might be a better choice for corporations than for individuals, and that Miller’s analysis would benefit from an exploration of § 863.

- *An Exempt Status Sorting Hat*
 - Richard Schmalbeck, Simpson Thacher & Bartlett Professor of Law, Duke University.
 - This piece responds to Lloyd Hitoshi Mayer’s article, *A (Partial) Defense of § 501(c)(4)’s “Catchall” Nature*, by proposing an alternative possibility to allowing

a charitable organization to choose the category under which it seeks exemption—creating a variation of the current form 1024 used by the IRS for organizations seeking § 501(a) exemption. Under this proposal, the IRS would review each organization’s application and then decide on the most appropriate pigeonhole for that organization. This resembles the function of the “sorting hat” in J.K. Rowling’s *Harry Potter and the Sorcerer’s Stone*.

- *Disclosing Donors to Social Welfare Political Activity*
 - Kenneth A. Gross, Partner, Skadden, Arps, Slate, Meagher & Flom LLP.
 - This piece responds to Roger Colinvaux’s article, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, by offering some refinements of Colinvaux’s proposals for consideration. The response proposes, for example, that the Tax Code be amended to remove material differences in tax treatment between § 501(c)(4) and § 527 organizations and applying a specific dollar limit on political activity by § 501(c)(4) organizations, limiting thereby the influence of dark money on elections. The response argues that this would increase transparency in elections, among other benefits.

- *The Importance of Using Affiliated § 501(c)(4) and § 501(c)(3) Organizations for Advocacy*
 - Terence Dougherty, General Counsel and Chief Operating Officer of the American Civil Liberties Union.
 - This piece responds to Rosemary E. Fei and Eric K. Gorovitz’s comment, *Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying: Realities and an Alternative*. The response presents comments and reactions to a number of the topics covered in the article, discussing more specifically the topics of governance of affiliated § 501(c)(3) and § 501(c)(4) organizations and the recent enhanced suspicion of nonprofit advocacy.

- *Realities and an Alternative*
 - Jill S. Manny, Professor, New York University School of Law; Executive Director, National Center on Philanthropy and the Law.
 - This piece responds to Rosemary E. Fei and Eric K. Gorovitz’s comment, *Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying: Realities and an Alternative*, by (1) seeking to answer the question of what the goal with respect to nonprofit legislative speech should be, based on policies and legislative history of the current statutory and regulatory regime, and (2) addressing different mechanisms for attaining that goal, including the current legal regime for nonprofit lobbying, a modified version of the current regime, and the Separate Segregated Lobbying Fund (SSLF) suggested by Fei and Gorovitz.

Volume 21, Issue 3

Issue 21.3 features three full-length scholarly articles and two student notes. It contains the following articles:

- *A Better Way to Cy Pres: A Proposal to Reform Class Action Cy Pres Distribution*
 - Abraham B. Dyk, Clerk, Honorable Kent A. Jordan of the United States Court of Appeals for the Third Circuit.
 - This article proposes requiring a binding voting mechanism for class members to ratify the recipients of a cy pres distribution as a solution to growing concerns surrounding cy pres distributions in class actions. Unlike alternative reforms, which focus on ensuring loyalty from class counsel, this proposal enhances class member voice and exit rights to ensure organizational legitimacy and relies on voting rights to compensate class members. As a result, this proposal is not only rooted well within modern class action doctrine, but also compensates all class members, something other proposed reforms are unable to do.

- *Undermining Constitutionalism in the Name of Policy: The Constitutional Costs of the War on Drugs*
 - Alejandro Madrazo, Schell Center Visiting Human Rights Fellow, Yale Law School; Antonio Barreto, Professor at Universidad de los Andes, Bogotá, Colombia.
 - This article proposes a new analytic framework for rendering visible and understanding the impact of policy decisions on constitutional design. The article calls this framework “constitutional costs,” simultaneously pointing to the fields of constitutional law and policy analysis. The article posits that, independently of their constitutionality, policy decisions and their consequences can come into tension with existing core constitutional commitments, significantly undermining them. Understanding how these dynamics play out in a long chronological arch is complex but important. By looking in detail at the war on drugs—a complex policy—in two salient case studies—Mexico and Colombia—the authors flesh out their analytical proposal and exemplify how it can be deployed.

- *If the Shoe Fits: Applying Personal Jurisdiction’s Stream of Commerce Analysis to E-Commerce—A Value Test*
 - Zainab R. Qureshi, Associate, Sidley Austin LLP.
 - This article argues that the working of new personal jurisdiction “tests” to confront Internet activity is misguided where established doctrine suffices to control the activity at issue. With the rise of ecommerce, the Internet has become an electronic

highway, or a virtual “stream” of commerce, and the placement of a product for sale in that stream is no different than its placement in the physical stream of commerce. The proper test for courts facing personal jurisdiction questions in e-commerce cases, therefore, should be Justice O’Connor’s stream of commerce “plus” test. The “plus” in Justice O’Connor’s test should focus on the value of business generated by the defendant in the forum state, an idea brought out by Justice Stevens’s concurrence in *Asahi*. As the article argues, this is preferable to Justice Brennan’s stream of commerce test from *Asahi*, which would result in assertions of jurisdiction too far-reaching to harmonize with the Court’s personal jurisdiction jurisprudence.

Issue 21.3 also contains the following student notes:

- *The Role of Process in Determining Judicial Deference to the Executive’s National Security Decisions*
 - Ally Scher, J.D. ’18.
 - This note argues that deference to the executive in the national security context is no longer automatic, and explores how courts have evaluated executive branch decisionmaking processes related to major national security decisions in the W. Bush, Obama, and Trump administrations. The courts’ treatment of legal challenges to the national security decisions of these administrations demonstrates that deference to the executive is afforded on a sliding scale—based on whether there is evidence that the executive came to its decision as the result of an informed, deliberate decisionmaking process.

- *“Reasonable Care to Prevent and Correct” : Examining the Role of Training in Workplace Harassment Law*
 - JoAnna Suriani, J.D. ’18.
 - This note reviews the ongoing incidence of workplace harassment and details the basic legal regime and policy goals under Title VII of the Civil Rights Act to address this problem. The note considers the proliferation of anti-harassment training as an employer practice putatively aimed at the prevention of workplace harassment, despite empirical evidence that casts doubt on the effectiveness of many trainings currently operating in the private sector. In light of inconclusive research findings on the preventative effectiveness of employer-offered trainings, the note then considers the judicial treatment of anti-harassment trainings in hostile work environment opinions. The note then considers whether state laws requiring private sector employers to hold anti-harassment trainings offer a plausible way forward in shaping preventative practices and whether those state requirements have an impact on judicial interpretations of the role of employer-offered trainings.

Finally, the note offers two recommendations: that research into training effectiveness be prioritized and aided by employment lawyers and that the effectiveness of training be considered in both judicial interpretations of an employer's preventative practices and in future legislation mandating anti-harassment training.

Volume 21, Issue 4

Issue 21.4 features three full-length scholarly articles and three student notes. Issue 21.4 contains the following articles:

- *How to Transform the Judicial System: Lessons From the Institutionalization of Veterans' Treatment Courts*
 - Barry C. Edwards, Lecturer, Department of Political Science, University of Central Florida; Ramon Hinojosa, Assistant Professor, Department of Sociology, University of Central Florida; Komysa Hassan, B.A., University of Central Florida.
 - This article examines the stunning growth of specialized treatment courts for military veterans in the criminal justice system. The nation's first veterans' treatment court convened in Anchorage, Alaska, in 2004. Since then, a wholesale transformation of the nation's criminal justice system has taken place; there are now nearly 500 VTCs diverting veterans from traditional criminal prosecution and general drug courts. The institutionalization of VTCs offers valuable insights to those interested in criminal justice reform. Why did this reform movement flourish while so many others have floundered? In this Article, the authors argue that courts have not established VTCs because they work; indeed, there is limited evidence that they are more effective than the alternatives. Instead, they argue that VTCs take advantage of existing federal services that address the unique needs of veterans, thereby shifting some of the significant costs of caring for veterans with mental health and substance abuse problems from the states to the federal government. Moving forward, states must resolve a number of VTC eligibility issues that bring the rehabilitative mission of these courts into conflict with the potential for cost shifting.

- *FARA on Facebook: Modernizing the Foreign Agents Registration Act to Address Propagandists on Social Media*
 - Joshua R. Fattal, Attorney-Advisor, Office of the General Counsel, U.S. Department of Homeland Security; J.D. '18.
 - This article begins by recounting the origins of FARA and telling the story of its uses up to the present day. The article then describes the advent of disinformation

on social media, focusing on the alleged Russian disinformation activity that began before the 2016 U.S. presidential election and that has continued in some shape or form until today. Next, the article tackles some of the novel statutory interpretation issues and enforcement questions that arise when applying FARA's terms to social media disinformation actors: Do the terms of the law retain significance when both the agent and the foreign principal are operating on foreign soil? What foreign propaganda materials should the Department of Justice require to be labeled under FARA, if any? What might a compliance regime look like in the context of foreign propagandists who reside outside of U.S. jurisdiction? The article attempts to put forth some possible answers to these questions, focusing on both the challenges that arise with registering disinformation actors on social media and the opportunities that may present themselves for tackling this threat.

- *Hardball and/as Anti-Hardball*
 - David E. Pozen, Professor of Law, Columbia Law School.
 - This article argues that anti-hardball is preferable to hardball, all else equal. As a rule, legal reformers should seek out anti-hardball solutions that align with their substantive political commitments. Many examples of constitutional hardball pursue narrow partisan gain and cannot plausibly be defended on good-government grounds; romanticizing ruthlessness is a big mistake. But certain other examples confound this calculus. In a period of intense polarization and congressional gridlock, some of the most morally and democratically compelling forms of anti-hardball may be unattainable without the aid of hardball, whether as a means to bring both sides to the negotiating table or as a means to push through a depoliticizing reform. One important task for scholars, activists, and policymakers is to develop a better understanding of these dynamics—and to tether short-term hardball tactics, when feasible, to longer-term anti-hardball strategies.

Issue 21.4 also contains the following student notes:

- *Measuring Hospital Post-Merger Effects: Developing a Standard for Antitrust Analysis*
 - Melissa Quintana, J.D. '19.
 - This note investigates the importance and challenges of understanding and measuring the full spectrum of the consequences of hospital mergers. It also offers policy recommendations for increased guidance for the FTC and the DOJ on methods of interpreting, considering, and weighing these consequences. Specifically, the note discusses the potential benefits and harms of hospital mergers for consumers, analyzes lessons learned from hospital post-merger analyses as well

as potential areas for refining future retrospective studies, and considers the improvement of the analysis of merger effects with a focus on evaluating post-merger quality improvements. The note also describes the agency approach and existing guidance on merger-specific quality improvements and efficiencies. Finally, the note provides policy recommendations that could benefit the FTC and the DOJ, such as amending the Horizontal Merger Guidelines and potentially the Statements of Antitrust Enforcement Policy in Health Care to provide more elaborate guidance on how to address merger-specific quality improvements in post-merger price increase contexts.

- *Answering Constitutional Challenges to the Tribal VAWA Provisions*
 - Kaitlyn Schaeffer, J.D. '18.
 - This note argues that the better view is that VAWA 2013 and legislation like it are not unconstitutional. Contrary to Justice Kennedy's concerns, political participation in a sovereign has never been a prerequisite to that sovereign's ability to prosecute those who commit crimes within its sovereign territory; additionally, the commission of a crime within a sovereign's borders constitutes implied consent to the criminal jurisdiction of that sovereign. As the note argues, Congress has the constitutional authority to pass legislation such as VAWA 2013 pursuant to its plenary power over Indian affairs, an unusually broad grant of power that enables Congress to regulate nearly every aspect of tribal life. Congress's plenary power includes the ability to alter the scope of inherent tribal power, so legislation such as VAWA 2013 need not require tribes to conform to the Constitution's edicts when exercising that power. However, even if VAWA 2013 is not a reaffirmation of inherent tribal power, and instead constitutes a delegation of federal authority, there are sound arguments that it is still constitutional.

- *Different Quids for Different Quos: Why Congress Should Amend Anti-Corruption Standards to Differentiate Between Campaign Contributions and Gratuities After McDonnell*
 - Alexander K. Wilson, J.D. '18.
 - This note suggests that when examining the proper boundaries of legal corruption, campaign contributions—which deserve special consideration under the free speech clause of the First Amendment—should be treated differently from gifts, personal favors, and direct monetary to government officials. Currently, campaign contributions and gratuities are subject to very similar legal tests to determine whether a form of criminally punishable conduct has occurred. Because the Supreme Court has recently clarified (and narrowed) the “official act” provision of the impermissible quid pro quo exchange, the note argues that Congress should act now to amend the anti-bribery laws to enhance the applicability of the gratuities

crime. Such an amendment would quell the risks of corruption that concerned the Framers by lowering the quo—or act—requirement for gratuities exchanges. This system would also retain the First Amendment protections afforded to campaign contributions while formally and functionally setting clearer guidelines for acceptable, or “normal,” political behavior in a republican democracy.

The Production Process

Legislation's production process saw substantial changes this year under the leadership of Editor-in-Chief Zeinab Bailoun, Managing Editor of Production Cris Ray, and Senior Executive Editor Molly Stein, with significant input from the journal's Executive Editors. Most importantly, the 2018–19 Board streamlined the production process by moving all work to Microsoft SharePoint, conducting trainings on use of the platform for all staff editors, and creating templates for each stage of the process. In addition, the Board pared down and systematized the journal processes for using Microsoft Word, pulling sources, conducting above the line edits, and addressing common citation check errors. All processes were clarified and detailed in one- or two-page documents on SharePoint, serving as key references for Staff Editors and Executive Editors completing their production assignments.

Quorum: Legislation's Online Companion

In keeping with *Legislation*'s mission to provide timely and practical scholarship to inform public debate on important issues, *Quorum* aims to publish shorter articles than the print journal at a correspondingly accelerated production schedule. *Quorum* provides a valuable outlet for faculty, practitioners, and students to address present-day legal controversies as they unfold, while maintaining the rigor and substance of traditional legal scholarship.

On the 2018–19 Executive Board, Senior *Quorum* Editor Jay Evans supervised content generation and production, working in conjunction with Managing Editor David Drew, eight 3L *Quorum* editors, and a rotating cadre of staff editors. Throughout the year, 3L *Quorum* editors published numerous blog-style articles on timely topics, published in an HTML format.

Overseen by the 2018–19 Executive Board, *Quorum* published nine new pieces:

- **Blog Post, *The Case for Electric School Buses***
 - Stephanie M. Thomas, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/thomas-the-case-for-electric-school-buses/>

- Back in 2007, New York City set ambitious air quality goals to reduce vehicle emissions, promote the use of new technologies and fuels, and achieve the cleanest air quality of any large U.S. city. Driving electric vehicles is one way to work toward these goals, and the city can and should take the lead by transitioning its public service vehicles to all-electric fleets. In fact, it should go beyond existing plans to transition city-owned vehicles by instead pursuing an electric school bus plan to take advantage of significant cost, health, and environmental benefits.
- **Blog Post, *Entity Choice After the Tax Cuts and Jobs Act***
 - Cameron T. Williamson, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/entity-choice-after-the-tax-cuts-and-jobs-act/>
 - The Tax Cuts and Jobs Act (TCJA) significantly changed the taxation of capital income. It increased the rate of return on capital through lowered marginal tax rates and other giveaways. Less clear is whether the TCJA changed incentives with respect to entity choice in a way that will improve upon the status quo. This piece argues that, by making the corporate form more appealing relative to the passthrough form, the TCJA makes business taxation more efficient, transparent, and equitable, resulting in more opportunities for optimal taxation and investment in the long-run.
- **Blog Post, *Employee Board Members and “General Public Benefit”***
 - Joshua L. Levin, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/levin-employee-board-members-and-general-public-benefit/>
 - Sen. Elizabeth Warren’s proposed Accountable Capitalism Act seeks to change the way companies fill their boards of directors. Joshua Levin breaks down the Senator’s bill and investigates what its effects could be.
- **Blog Post, *The NY Reproductive Health Act: A Vital Update***
 - Julie J. Bontems, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/bontems-ny-reproductive-health-act/>
 - Julie Bontems considers New York’s revived efforts to preserve abortion rights in the face of a potential Roe-reversal.
- **Blog Post, *Driving Energy Efficiency in NYC Buildings***
 - Alan H. Masinter, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/masinter-nyc-energy-efficiency/>
 - New York City has ambitious greenhouse gas reduction goals. Alan Masinter reviews how one proposed measure before the city council could advance them, along with lessons from Tokyo’s experiments in cap-and-trade.

- **Blog Post, *Keeping Government Open***
 - Alexander R. Duran, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/duran-keeping-government-open/>
 - America's got a government shutdown problem. Is there a legislative way out? Alex Duran examines the history of federal funding crises and discusses how legislative changes to funding default rules might provide a solution.

- **Blog Post, *Index Funds and Stewardship: A Practice Worth Encouraging***
 - Joshua L. Levin, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/levin-index-funds-and-stewardship-2/>
 - Joshua Levin explores whether the “Big Three” index-fund managers are doing too much, too little, or a Goldilocksian “just right” amount with their significant ownership of the United States equities market.

- **Blog Post, *Senses of Congress: The Green New Deal in Context***
 - Alan H. Masinter, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/masinter-green-new-deal-in-context/>
 - Alan Masinter shares his thoughts on the Green New Deal Resolution and its importance, despite the fact that it is a non-binding congressional resolution.

- **Blog Post, *Cracking Down on Money Laundering in U.S. Real Estate***
 - Stephanie M. Thomas, J.D. '19, *Quorum* Editor
 - <https://nyujlpp.org/quorum/thomas-cracking-down-on-money-laundering-in-u-s-real-estate/>
 - Money laundering through real estate has long been a problem in the United States. What more can be done to address this problem? Stephanie Thomas explores the various means by which the U.S. government is cracking down on money laundering in the United States through real estate transactions.

Fall 2018 Symposium

On November 15, 2018, the Journal of Legislation and Public Policy, the Brennan Center for Justice, and the NYU Law & Government Society presented a symposium entitled “Advice & Consent: The Senate’s (Changing) Role in Judicial Confirmations” at New York University School of Law. Specifically, the symposium addressed the fact that changes in procedural devices, cultural norms, and Senate composition led to President Trump’s appointment of more appeals court judges (by that point in his term) than any other recent president. These changes

also led to the extraordinary hearings surrounding the nomination of Judge Brett Kavanaugh to the Supreme Court. The symposium thus examined the ways in which the past few years of judicial advice and consent differed from “business as usual,” what advice and consent should mean in the current political and cultural climate, and what institutional changes we might want to see in the Senate going forward. A significant number of people from the Law School, the wider NYU community, and the broader legal world attended the lunchtime event.

The discussion was split into two panels, led by Professor Bob Bauer, of NYU School of Law, and Victoria Bassetti, Fellow at the Brennan Center for Justice at NYU School of Law, respectively. The panelists were Todd Cox, Director of Policy at the NAACP Legal Defense and Educational Fund, Inc.; Praveen Fernandes, Vice President for Public Engagement at the Constitutional Accountability Center; Jamil Jaffer, Founder of the National Security Institute and Adjunct Professor of Law and Director of the National Security Law and Policy Program at the Antonin Scalia Law School at George Mason University; Eric Lesh, Executive Director of the LGBT Bar Association and Foundation of Greater New York; Kristine Lucius, Executive Vice President for Policy at The Leadership Conference; Gregg Nunziata, Partner at Manatt, Phelps & Phillips, LLP; David Pozen, Professor of Law at Columbia Law School; and Russell Wheeler, Visiting Fellow at the Governance Studies Program of the Brookings Institution and President of the Governance Institute.

Spring 2019 Symposium

On March 13, 2019, the Journal of Legislation and Public Policy hosted a symposium entitled “#MeToo on Campus: Title IX, Sexual Assault, and the Trump Administration.” The symposium was co-sponsored by NYU Law’s Intellectual Life Fund, the Birnbaum Women’s Leadership Network, the Women of Color Collective, Law Women, and NYU’s chapters of If/When/How and the American Constitution Society.

The discussions centered on the Department of Education’s proposed Title IX regulations, which aimed to overhaul and unify school response to sexual assault, under Education Secretary Betsy DeVos. Heralded as a chance to provide “clarity for schools, support for survivors, and due process rights for all,” the new regulations were the first of their kind. They transformed Obama-era “guidance” into official regulations, federalize school response to sexual assault, and legally defined sexual assault in school investigations. The regulations also heightened due process procedures for the accused while at the same time limit Title IX investigations to on-campus incidents or school-sponsored events. Not everyone agreed with the direction of the proposed regulations. For some, the regulations threatened the safety of sexually assaulted students. For others, the regulations protected innocent students by establishing clear and fair

procedures. In the symposium, panelists assessed the impact of these regulations and envisioned their future.

The symposium was moderated by Laura C. Sorice, Senior Articles Editor, and Danielle A. Schulkin, Staff Editor and incoming Editor-in-Chief, respectively. Panelists included Lenora Lapidus, Director of the ACLU Women’s Rights Project; Julie Goldscheid, Professor at the CUNY School of Law; Samantha Harris, Vice President for Policy Research at FIRE; Stephen Schulhofer, Professor at the NYU School of Law; Priya Chaudhry, Partner at Harris, St. Laurent & Chaudhry LLP; and Brit Schoepp-Wong, Associate General Counsel at New York University.

Upcoming Symposia (Fall 2019 & Spring 2020)

During the 2019–20 Academic Year, *Legislation* will host two events engaging the intellectual and creative capacities of the Journal and the broader NYU Law community. Our goal is to reach beyond the traditional symposium format by inviting a broad range of legal and policy minds to address two major changes re-shaping American democracy and culture.

The Journal will devote our Fall 2019 Symposium to taking stock of the current state of federal clemency and considering the future of federal clemency reform. In a panel moderated by Professor Rachel Barkow, practitioners, advocates and academics will discuss current reform proposals, the First Step Act’s relaxed compassionate release requirements, initiatives by prior administrations, and proposals by the 2020 presidential candidates.

On March 2, 2020, the Journal will host a cybersecurity symposium on the legal threats of deepfakes, fake videos that have been realistically altered and presented as truthful. The event will be co-hosted by the NYU Center for Cybersecurity, a joint effort of the Law School and Tandon Engineering School. This symposium will feature multiple panels and a keynote address, including speakers from major technology companies such as Microsoft and Google. The symposium will address the regulatory, national security, and constitutional challenges deepfakes pose, as well as any potential legal, legislative, and technological solutions.

Legislation also will engage the creativity of NYU Law’s student body by continuing to run our annual Legislation Competition. This year, students will be tasked with critiquing a bill introduced to Congress by Congresswoman Yvette Clarke (D-NY) to tackle the growing problem of deepfake technology. Representative Clarke’s DEEP FAKES Accountability Act aims to “combat the spread of disinformation” largely through the implementation of watermark and disclosure requirements for many types of altered videos. Deepfakes missing the required elements would subject creators to civil fines, civil actions, and possible criminal penalties. The bill would additionally establish a Deep Fakes Task Force under the Department of Homeland Security to

investigate the technology’s potential threats. For the competition, we are asking students to evaluate Representative Clarke’s proposal by composing a response paper analyzing the DEEP FAKES Accountability Act, evaluating its strengths and weaknesses, and identifying and justifying any changes they believe necessary.

More information on these events will become available as they approach. If you are interested in participating in or supporting any of our intellectual life events for the coming year, please reach out to our Senior Symposium Editor Lisa Femia, J.D. Candidate ‘20 at edf258@nyu.edu.

Citation Statistics

Legislation was cited in 286 secondary sources from May 2018 until April 2019. Specifically, the Journal was cited 148 times in law reviews and journals, 6 times in Restatements, and 128 times in texts and treatises. The Journal was cited 10 times in the George Washington Law Review, 6 times in the Harvard Law Review, 6 times in the Yale Law Journal, and 5 times in the Notre Dame Law Review.

Legislation was cited in two federal and state court opinions: *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214 (Pa. 2018), and *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 2019 WL 1529692 (5th Cir. 2019). *Legislation* was also cited in a number of statutes and legislative reports, including 2019 HI S.B. 217 (NS) (proposing randomized order of candidates on ballots) and An Act To Amend the Tribal Law and Order Act of 2010 and the Indian Law Enforcement Reform Act To Provide for Advancements in Public Safety Services to Indian Communities, and for Other Purposes. Finally, *Legislation* was cited in seven Supreme Court briefs, four Second Circuit briefs, four Ninth Circuit briefs, four Eleventh Circuit briefs, and four D.C. Circuit briefs.

Awards and Achievements

Each year, the Journal formally honors two members of its graduating class.

The Flora S. and Jacob L. Newman Prize is awarded to the graduating student who has written the most outstanding note for the Journal. This year’s recipient was Victoria K. Hamscho, Articles Editor, for her note “*NIFLA v. Becerra*: The First Amendment and the Future of Mandatory Disclosure Laws,” slated for publication in Issue 22.1.

The Thomas Stoddard Award is awarded to the third-year editor who made the greatest contribution to the Journal. This year’s recipient was David Drew, our Managing Editor of

Development. David was instrumental in welcoming, training, and managing the incoming Staff Editors, in overhauling the journal website and its online platforms, in organizing the journal office, and in streamlining the journal's processes, and was praised for his commitment to *Legislation* at the highest level.

In addition, the Journal has instituted a tradition of presenting awards to members who show excellence in scholarship, commitment, or creativity in their roles as journal editors. This year, *Legislation* presented the following awards:

- Editor of the Year: Cris Ray
- Notes Editors of the Year: Laura Narefsky & Katherine Geithman
- *Quorum* Editor of the Year: Alan Masinter
- Articles Editor of the Year: Vineeta Nangia
- Staff Editor of the Year: Cara Hume
- Excellence in Translation Award: Peter Keffer

Future Plans

We are pleased to report on the plans of several of our recent alumni:

- Zeinab Bailoun, Editor-in-Chief, will join Baker Botts LLP as a Law Clerk.
- Cris Ray, Managing Editor of Production, will join Cravath Swaine & Moore as a Law Clerk.
- David Drew, Managing Editor of Development, will join Mintz as a Law Clerk.
- Molly Stein, Senior Executive Editor, will join Davis Polk as a Law Clerk.

Final Note

Greetings from Our 2019–20 Editor-in-Chief

Dear Reader:

If you made it this far into our Annual Report (thank you!), you will see that last year's board did a tremendous amount of work for the journal. With new procedures, new committees, and even a new addition to our office space,² we are more organized and better prepared for this upcoming year's production. Building off the extraordinary work of our predecessors, we hope to continue

² We call it the Journal Annex. For those still familiar with the Journal Basement, we have now acquired Tom Sarff's old office in addition to our journal office space.

to strengthen and grow the journal community. Below is a snapshot of each of our projects that we hope to accomplish for the upcoming year:

Community. To build our community, we have created new annual journal traditions as well as a monthly newsletter for all journal members. Our new annual journal events include events with other journals (a highlight being our Friendsgiving with our neighbors at the *Journal of International Law and Policy*). Our newsletter includes a summary of all upcoming Journal events, updates, and recent citations. We also recognize journal members who have special contributions and include a production tracker that monitors where we are at each stage of the production process.

Article Selection and Production Process. We are currently working on re-writing our mission statement, creating a diversity statement, and implementing an article selection rubric to better select articles that match the purpose and spirit of our journal. We will also be switching printers this year.

Increasing Online Presence. We are expanding our online presence in three ways. First, we are increasing the number of times we publish Quorum posts each year to one to two posts each month. Second, we are working with the school to create a new website. And third, we are laying the groundwork for the school's first journal podcast, which will diversify the ability of the journal to reach lawmakers, policymakers, and professionals.

Journal Competition. This year, we are re-thinking how to make the Journal Competition more accessible to busy law school students. Instead of asking students to write a piece of legislation, we are asking students to critique a piece of proposed legislation. We are collaborating with both the NYU Center for Cybersecurity as well as the student group Rights Over Tech to pick the winners.

The 2019–20 Executive Board is excited to take the responsibility of leading the Journal into this year. As always, we thank Professors Helen Hershkoff and Adam Samaha for their unwavering support as our faculty advisors. We look forward to contributing to advances in legislation and public policy as well as strengthening our network of like-minded peers.

On Behalf of the 2019–20 Executive Board,

Danielle Schulkin, Editor-in-Chief
New York City