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Table of Contents

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TABLE OF CONTENTS

TRIBUTE

HONORABLE ARTHUR L. ALARCÓN
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT i

FOREWORD

THE ROBERTS COURT IN 2013–14—LOOKING BEYOND THE RHETORIC
by Evan Gerstmann 319

ARTICLES

"RAILS-TO-TRAILS" POTENTIAL IMPACT OF *MARVIN M. BRANDT REVOCABLE TRUST V. UNITED STATES*
by Shelley Ross Saxer 345

Across the United States, over 20,000 miles of land that formerly housed railroad corridors has been converted and reappropriated into public-use trails through a federal program aptly dubbed, "Rails-to-Trails." The viability of the "Rails-to-Trails" program has been threatened by the Supreme Court's decision in *Martin M. Brandt Revocable Trust v. United States*. In *Brandt*, the Court held that the underlying land in the "Rails-to-Trails" program constitutes an easement granted from the original private landowners to the railroad companies. Accordingly, once the railroad companies abandon the

easement, the land reverts back to the original landowners, not the government. This Article analyzes the *Brandt* opinion and discusses the wide-ranging consequences of the Court's holding. It begins by providing background on the original land conveyances in the eighteenth century that eventually gave rise to the current litigation in *Brandt*. It then proceeds to explain the *Brandt* decision and provide scholarly criticism of the Court's opinion and reasoning. Finally, the Article concludes by discussing the practical implications of the decision: by holding that the underlying rail corridors are easements that revert to private landowners, the Court opens the door for these private landowners to bring Fifth Amendment Takings claims against the government for converting the rail corridors into public-use trails. Ultimately, this may require the taxpaying public to compensate the private landowners impacted by the "Rails-to-Trails" program.

CONSTITUTIONAL MYOPIA: THE SUPREME COURT'S BLINDNESS TO RELIGIOUS LIBERTY AND RELIGIOUS EQUALITY VALUES IN *TOWN OF GREECE V. GALLOWAY*

by Alan Brownstein. 371

It is difficult to analyze a Supreme Court decision that is as fundamentally misguided and unpersuasive as last term's decision in *Town of Greece v. Galloway*, the case upholding state-sponsored prayers before Town Board Meetings. In attempting to do so in this Article, I critically evaluate the Court's repeated failures to adequately address the serious religious equality and religious liberty issues presented in this case. With regard to religious equality concerns, for example, the Court all but completely ignores the Town's discrimination in favor of established organized churches and against minorities with too few adherents to organize a congregation in the Town, nonaffiliated spiritual residents of the community, and nonreligious residents. Even worse, the Court suggests that allowing low level functionaries to develop informal and imprecise criteria to determine who should be invited to offer prayers at board meetings without adopting a policy or providing any guidance on how these decisions should be reached somehow immunizes the Town from serious constitutional scrutiny. Instead, I argue that this lack of guidelines and policy itself should be understood to violate the First Amendment because it so obviously increases the risk of biased and discriminatory conduct.

The Court's discussion of plaintiffs' religious liberty concerns is even more untenable. Plaintiffs argued that if a government official or deliberative body has the discretionary authority to make decisions that

will seriously impact the needs and interests of individuals or small groups of citizens, it is intrinsically coercive for those officials to ask these citizens to engage in a religious exercise such as a prayer before they submit their arguments or petitions to government decision-makers. In order to reject these claims, Justice Kennedy describes an understanding of social reality that is difficult to believe and impossible to share. Perhaps most egregiously, Kennedy's analysis treats prayer as if it is some kind of abstract ceremonial activity instead of what it is for most Americans—a personal, meaningful communication between the individual and G-D.

The Article concludes with a discussion of the possible implications of this decision for the constitutional protection of religious liberty and equality in other contexts and circumstances.

HARRIS V. QUINN AND THE CONTRADICTIONS OF COMPELLED SPEECH
by Catherine L. Fisk & Margaux Poueymirou..... 439

In *Harris v. Quinn*, the Supreme Court held that unionized home-care workers have a First Amendment right to refuse to pay their fair share of the cost of services that the union is statutorily required to provide. The Court thus transformed what had been a legislative debate about "right-to-work" laws, which about half of states have adopted, into a constitutional requirement for one narrow category of public sector employees. The problem with transforming this policy argument into a First Amendment requirement is that treating fair-share or agency-fee payments to a union as compelled speech raises First Amendment rights of both supporters and opponents of the union. If expenditures on union representation are speech—as the majority in *Harris* thinks they are—then the union's obligation to provide free representation compels speech by the union and its members. While, in our view, the requirement to pay for services is not compelled speech, the Court's entire agency-fee jurisprudence, including *Harris*, insists that it is. On the Court's analysis, contracts that require unionized employees to pay for union representational services compel speech of dissenters exactly to the same extent that their prohibition compels speech of unions and their members. Accordingly, the Court must alter its usual analysis of the constitutionality of agency-fee agreements and recognize that union representation requires balancing competing freedom of speech and association interests. Once the First Amendment rights of unions and union members are recognized, agency fees emerge as a constitutionally sound accommodation of the interests of dissenters, unions, and union members.

COMMENTS

PUTTING THE RABBIT BACK IN THE HAT: *NOEL CANNING*'S IMPACT ON EIGHTEEN MONTHS OF NLRB DECISIONS AND FUTURE PRESIDENTIAL APPOINTMENTS
by Paul Kind 493

RILEY V. CALIFORNIA—CELL PHONES AND TECHNOLOGY IN THE TWENTY-FIRST CENTURY
by Kelly Ozurovich 507

POM WONDERFUL V. COCA-COLA AND THE IMPLICATIONS OF GRANTING COMPETITORS THE RIGHT TO CHALLENGE FALSE OR MISLEADING FOOD AND BEVERAGE LABELS UNDER THE LANHAM ACT
by Matt Busch 525

CULPABILITY THROUGH ANONYMITY: WHY *NAVARETTE V. CALIFORNIA* VASTLY LOWERS THE STANDARD FOR REASONABLE SUSPICION BASED SOLELY ON ANONYMOUS TIPS
by Joshua Aberman 539

BASIC'S "BITTER HARVEST": THE COURT'S CONTINUED ADHERENCE TO A FLAWED ECONOMIC THEORY IN *HALLIBURTON*
by Julia Kline 557

THE CHANGING STANDARDS OF CAMPAIGN FINANCE REGULATION: THE REAL IMPACT OF *MCCUTCHEON V. FEC*
by Hannah Dunn 573