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A NEW ERA FOR FEDERALISM

ESSAYS

Over the last twelve months or so, federalism principles have been repeatedly invoked by state and local governments in a range of lawsuits and legislative proposals seeking to block or temper federal policy initiatives emanating from the new Administration of President Donald Trump. In this essay, I hope to sketch out a few of the more high-profile federalism flashpoints that have emerged over the past year or so, and offer some preliminary assessments of some of the decisions that lower courts (and legislative bodies) have been rendering in some of them. I try to highlight areas of agreement and areas of divergence. And even as to some areas of agreement, I try to explore plausible arguments to be made that the Supreme Court will (and in some cases perhaps should) see things differently as these disputes begin to make their way up the appellate ladder in the coming months and years.

The Concealed Carry Reciprocity Act (H.R. 38) is a gun bill that would force each state to recognize and enforce the concealed carry laws of every other state. State laws governing the concealed carry of firearms vary widely in how effectively they screen out reckless or unlawful gun carriers. Weaker state laws let more people carry with fewer background checks or other restrictions, and H.R. 38 would extend the geographic scope of the weakest concealed carry laws in the nation, without requiring that Congress actually adopt a weak national standard. This Essay argues that forced reciprocity violates the division of federal and state authority established in the U.S. Constitution by conscripting state officials to

enforce laws other than their own, requiring states to bear substantial enforcement costs, and diminishing the accountability of elected officials to voters—all without any justification or support from the Second Amendment.

SYMPOSIUM: HATE SPEECH LAWS IN JAPAN

This Article engages in a comparative examination of three different approaches to finding the right balance between legal limits on hate speech and the right to freedom of expression. The Japanese and American systems have struggled to find both a sufficiently important purpose to justify hate speech laws, or an appropriate limiting principle to narrow their scope. Neither system views hate speech laws as implicating equal protection rights, and so the balance is heavily in favor of freedom of speech. The American doctrine views hate speech laws as justifiable only if they can come within other ill-fitting categories of lesser-protected speech, which are mostly concerned with imminent violence rather than equality or discrimination. Japan has enacted hate speech laws too weak to impact freedom of expression at all.

The Canadian approach does not find the perfect equilibrium, but it suggests a better way to strike the balance. Drawing on this comparative review, this Article argues that hate speech laws should be enacted with the object and purpose of fulfilling the constitutional guarantee of equal protection and equal treatment. Such laws would thus be narrowly drawn to prevent the fostering of hatred that would in turn lead to increased discrimination against identifiable groups, which are themselves defined in terms of the prohibited grounds of discrimination in the constitutional right to equality. The laws would address, and take seriously, the principle harms caused by hate speech—to the members of such groups, to the principles of equality, and to freedom of expression itself. But this objective also constitutes a compelling state interest, and a constitutionally informed basis for tailoring them narrowly, thus reducing to a justifiable minimum their impact on

the right to freedom of expression. The right balance, then, is to be found in understanding and reconciling this tension between two constitutional rights.

The History of Japanese Racism, Japanese American Redress, and the Dangers Associated with Government Regulation of Hate Speech
by Hiroshi Fukurai and Alice Yang 533
http://bit.ly/2FEeV0x
This Article analyzes the historical roots of the Japanese government's rhetoric of racial supremacy that merged with nationalist agendas to rationalize and promote Japanese colonial aggression, military ventures, and brutal rule in Asia in the first half of the twentieth century. Next, this Article examines the movement in the U.S. to obtain redress for Japanese Americans who suffered mass removal and incarceration during World War II. This Article explores why grassroots activism and political lobbying succeeded in obtaining the passage of American redress legislation in 1988 and the possible lessons of this campaign for other victims of government policies. Finally, this Article concludes by discussing how the history of government racism in the U.S. and Japan portends possible dangers associated with increasing government power to regulate hate speech that might limit the freedom of speech, especially speech critical of the government.

Hating Hate Speech: Why Current First Amendment Doctrine Does Not Condemn a Careful Ban
by Rory K. Little 577
http://bit.ly/2HzL06k
In the wake of the 2017 Charlottesville protests and the recent revival of "white supremacy" rallies, some constitutional scholars have asserted once again that a "hate speech ban" is unconstitutional under the First Amendment. There are certainly strong policy and historical arguments to oppose such a ban, although the Supreme Court upheld such a ban in 1942 and has never overruled that precedent. The doctrinal objection to such a ban is based on a restrictive adoption of *Brandenburg v. Ohio*, and a failure to fully explicate the alternative ground for prohibition found in the Supreme Court's repeated definition of "fighting words." After a brief and selective review of First Amendment history and twentieth century precedents, this Essay argues that current constitutional doctrine—and most significantly the Supreme Court's 2003 "hate speech" decision in *Virginia v. Black*—does not condemn a careful ban on racial hate speech that is intended to create injury to, or fear of injury in, its targets. So that critics will have something concrete to shoot at, a potential draft "Hate Speech Prohibited" statute is provided.

The Diet of Japan enacted the Hate Speech Elimination Act in 2016 amid heated debates over the appropriate role that the government should play in confronting the vulgar racist hate speech that had been permeating the country. The Act, however, does not criminalize or make illegal hate speech and is thus criticized by Professor Craig Martin. This Article argues that while the principles of freedom of speech under the Constitution of Japan may tolerate criminalization of narrowly defined hate speech, one should be cautious in advocating for immediate criminalization of racist hate speech in the country. This Article provides an overview of the basic legal structures surrounding racist hate speech in Japan: the international laws, the Constitution of Japan, the provisions of both criminal and civil laws that could be applied to certain types of hate speech, and the judiciary decisions involving hate speech. This Article analyzes the impact of the Act on national and local government and the judiciary and examines the legislative history of the Act, which shows the intricate intent of the lawmakers.

NOTE

Labeling is a primary method of providing information about food such as the production, ingredients, and nutrition facts—but what happens when labels become less accessible? This Note explores the justice implications of the first genetically modified organism (GMO) labeling bill, The Safe and Accurate Food Labeling Act, or known to opponents as The DARK Act (Denying Americans the Right to Know). This Act allows for a "QR" code, website, or 1-800 number to constitute a label for GMO labeling requirements. This Act discriminates against 100 million Americans who do not own smart phones or have access to Wi-Fi or data, and thus are unable to access this information. This Note presents the current GMO debate. The legislative history and lobbying expenditures behind the Act are examined. Next, this Note examines the constitutional implications involving preempting state laws and equal protection concerns. Finally, this Note evaluates whether all Americans have the same rights in an increasingly digital world.