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C O N T E N T S

ESSAY

Governments “Erasing History” and the Importance of Free Speech

Noah C. Chauvin 1

Nationwide protests against police brutality and structural racism have led to a renewed push for governments to take down or alter Confederate monuments and symbols. Advocates for these changes argue that they will make our public spaces more just and welcoming to all people. Not everyone agrees. Some defenders of the monuments and symbols accuse pro-removal protestors and the governments who acquiesce to their demands as conspiring to “erase history.” In this essay, I argue that those who oppose removing the monuments should come away from the controversy with an appreciation for the importance of free speech. On the other hand, supporters of removal should come away from the controversy with an appreciation for the importance of free speech.

ARTICLES

Circumventing Consultation Under the National Historic Preservation Act:
How Judicial Misapplication of Section 106 is Putting Historic and Cultural
Resources at Risk

Samuel W. Gieryn 16

The Advisory Council on Historic Preservation’s website proudly features “Section 106 Success Stories” where broad and meaningful consultation led to exemplary outcomes. But what if the consultation process that led to those successes was never triggered? Unfortunately, there are too many stories of far less success because of legal opinions that mistakenly determined federal actions not to be “undertakings” under Section 106 of the National Historic Preservation Act. This article attempts to settle the question of “What is an ‘undertaking’ in Section 106?” Through an analysis of statutory and regulatory changes, legislative history, and legal opinions, this article demonstrates that courts have misapplied “undertaking” to federal actions by interpreting the term narrowly, failing to follow Congress’s more broad intent. Congress did not intend for each word in Section 106 to be interpreted as individual prerequisites. Instead, Congress intended the undertaking determination as dependent on amount of federal involvement -- more specifically whether the federal agency has discretionary approval authority over a proposed action. While reconstructing the legislative and judicial history of Section 106, this article also reveals an interesting tussle between the three branches of government related to the triggering of federal historic preservation’s most significant compliance process.

Amazon’s Antitrust Fair Play, A Transatlantic Evaluation

Angelos Vlzakis and Angeliki Varela.....64

For the first time after a century, antitrust law has been making headlines around the country. Amazon, among other technological giants, finds itself in the middle of a cyclone against economic power. This article joins the endeavor of several scholars to understand Amazon’s conduct, but through a different lens. It tries to see the big picture of Amazon’s relevant market of operation, it evaluates indirect and potential competition and reaches the conclusion that the legendary e-retailer has a weak monopoly, if not any monopoly power. Subsequently, the article assesses several doctrines that could sanction Amazon’s market conduct through comparative legal research between American and European law to reach the conclusion that a broad interpretation of the current theory would have an adverse impact on social welfare. What if Amazon is a fair market player after all?

Global Innovation Law

P.Sean Morris96

This Article is about opening up a debate on global innovation law. The Article argues that a new hybrid area of transglobal law has emerged in the past decade due to the rise of various disruptive and technological challenges to law beyond the state. As such, the Article argues that global innovation law is a new field that encapsulates the dynamics of law making and regulatory governance in how law operates in a transglobal environment. With the rapid changes in law and regulation to meet the demands of the global economy—the interaction of law and these changes at the domestic and international level can no longer be subjected to the interaction of domestic and international law. Although, there have been efforts to engage in a steady stream of scholarship to address similar developments, whether as “global administrative law,” “legal pluralism,” “transnational law,” amongst others—they do not capture the dynamics of how law meets innovation as a result of disruptive technology. Hence, global innovation law is meant to address some of these challenges by looking at the confluence of globalization, innovation, and disruptive technologies such as artificial intelligence, data governance, and the financial technology sector. The premise of this Article is therefore to map the foundations of global innovation law.

A History of Elector Discretion

Michael L. Rosin	125
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In its opinion in Chiafalo v. Washington, the Supreme Court disposes of the actual history of elector discretion as too inconsequential to merit its serious analysis. A history of elector discretion not only includes a history of the electors who exercised discretion when casting electoral votes, it also includes a history of commentary on the role of electors as the Constitution was created and, more importantly, as Congress was attempting to amend it. The Court almost completely ignores this history. When Congress crafted the Twelfth Amendment in 1803 it recognized that “the right of choice [of president] [...] devolve[s] upon” the House of Representatives from the Electoral College. Section 4 of the Twentieth Amendment twice repeats this text. As the House Committee reporting the Twentieth Amendment reported it to the full House in 1932 it acknowledged that electors are free to exercise discretion. Earlier versions of this Article served as the primary input to amicus briefs filed in the author’s name in Chiafalo. This Article reviews the relevant episodes of congressional history as well as election history to demonstrate that Congress has never understood the Constitution to allow electors to be bound with legal consequences.

COMMENTS

Secret Surveillance Scores: Pay No Attention to What’s Behind the Curtain

Allison Piper Geber203

This Comment discusses the potential and actual misuse of consumers’ secret surveillance scores in e-commerce, employment, and housing situations, as evidenced in a 2019 FTC complaint. The calculation and use of these secret surveillance scores are currently unregulated. The Comment presents two main arguments: First, secret surveillance scores are equivalent to credit scores used in the financial credit reporting industry and should thus undergo similar regulation. Second, the collection of consumer data points to calculate secret surveillance scores highlights the need for broad, nation-wide consumer digital data privacy legislation. The collection and use of secret surveillance scores are akin to the collection and use of credit scores in the financial credit reporting industry. Therefore, the secret surveillance scores should be regulated in a similar fashion by the same regulating bodies. Regulatory oversight will ensure protections for consumers from the consideration of sensitive demographic characteristics in score calculations. There also exist model digital data privacy laws that empower consumers to control the data points collected about them online. The European Union’s General Data Protection Regulation and the California Consumer Privacy Act both serve as solid foundations for broader nation-wide legislation to protect consumer digital data information. The ideal solution would realize and implement both arguments to protect consumers in an emerging digital commercial industry.

Researching the Jury’s Internet and Social Media Presence: The Ethical and Privacy Implications

Whitni Hart230

This Comment discusses the lack of guidelines regulating attorneys’ online research of potential and sitting jurors. Instantaneous online access to the personal lives of jurors provides attorneys with the opportunity to exploit private information throughout the entire trial process, ranging from voir dire to closing arguments. Because this research most often occurs outside of the courtroom doors, courts have had little opportunity to address the issue. Very few courts and ethics committees have implemented policies related to the use of social media to investigate jurors, which leaves it up to the attorneys in most jurisdictions to decide what is or is not acceptable conduct. Because attorneys have a duty to act in the best interests of their clients, it is unlikely that they will find on their own that simple online research would violate a juror’s privacy or threaten the integrity of a trial. After providing a summary of the limited authority from various jurisdictions regulating the use of online research of jurors, this Comment analyzes the differences and reconciles them by proposing uniform model guidelines for attorneys to follow.

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