

## TODD E. PETTYS

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### EDUCATION

University of North Carolina School of Law: Juris Doctor with Highest Honors (May 1995).

- Class Rank: 1/232.
- Editor-in-Chief, *North Carolina Law Review*.
- Chancellor's Scholar (full-tuition merit scholarship).
- James E. and Carolyn B. Davis Honorary Society.
- Order of the Coif.

Seattle Pacific University: Bachelor of Arts (philosophy), summa cum laude (June 1988).

- University Scholar, 1984-1988.
- Faculty Award, 1987-1988.

### CURRENT EMPLOYMENT

University of Iowa College of Law, Iowa City, Iowa.

- Associate Dean for Faculty (January 2011-present).
- H. Blair and Joan V. White Chair in Civil Litigation (2009-present).
- Professor of Law (2004-2009).
- Associate Professor of Law (1999-2004).
- Bouma Fellow in Trial Law (2007-2009).
- Lauridsen Family Fellow (2005-2007).
- Courses taught: Constitutional Law I, Constitutional Law II, Evidence, Federal Courts, Postconviction Remedies, and a Supreme Court Seminar.
- Winner, President and Provost Teaching Award (2011) (the University of Iowa's highest campus-wide teaching honor).
- Winner, Collegiate Teaching Award (2001).

### PUBLICATIONS

*Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFFALO LAW REVIEW \_\_\_\_ (forthcoming Spring 2012): The 2010 election season brought the nation an unprecedented number of organized campaigns aimed at denying retention to judges who had ruled in ways that some voters found objectionable. In this article, I push back against the common wisdom in legal circles by arguing that the leading rhetorical strategies of those who seek to defend judges against anti-retention campaigns are

fundamentally misguided. I argue that ousting judges in response to their rulings is often perfectly consistent with a commitment to the rule of law, and that the key consequentialist arguments that judges and their defenders commonly advance lack the rhetorical power necessary to persuade morally outraged voters to set their anger aside on Election Day.

*Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 KANSAS LAW REVIEW 715 (2011) (31 pages): In this invited symposium contribution, I examine the path from the Iowa Supreme Court's 2009 ruling in *Varnum v. Brien* (in which the court struck down the state's ban on same-sex marriage) to the ouster of three of the court's seven justices in Iowa's 2010 judicial retention election. I describe and evaluate the campaign efforts of the justices' detractors and supporters. I then suggest a number of lessons that academics, activists, and judges nationwide can learn from the Iowa experience.

*Judicial Discretion in Constitutional Cases*, 26 JOURNAL OF LAW & POLITICS 123 (2011) (55 pages). I argue that popular constitutional discourse is frequently hindered by reliance upon what I call the "legitimacy dichotomy"—the notion that, when adjudicating constitutional disputes, judges either obey the sovereign people's determinate constitutional instructions or illegitimately trump the sovereign people's value judgments with their own. I critique that dichotomy from a variety of vantage points, including popular rhetoric, Supreme Court confirmation hearings, the law school classroom, and the debate between Justice Stevens and Justice Scalia in *McDonald v. City of Chicago* about the extent to which judges may properly exercise their discretion when adjudicating questions of substantive due process. I argue that judicial discretion, properly understood, plays a vital role in our system of democratic constitutionalism.

*The Vitality of America's Sovereign*, 108 MICHIGAN LAW REVIEW 939 (2010) (reviewing CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (Cambridge University Press 2008)) (17 pages). In *American Sovereigns*, Professor Fritz argues that two very different conceptions of the American people's sovereignty—one broad and one narrow—battled for the nation's allegiance in the eighteenth and nineteenth centuries, and that the narrow conception ultimately prevailed. In my review, I dispute Professor Fritz's claim that the broad conception of the people's sovereignty no longer plays a viable role in American politics. Most fundamentally, I argue that the American people have learned that they can transcend the more extreme elements of the broad and narrow conceptions that Professor Fritz describes. The sovereign people have learned that they can retain ultimate control over their government while still permitting government leaders to retain the credibility and power they need in order to do the people's work.

*Sodom's Shadow: The Uncertain Line Between Public and Private Morality*, 61 HASTINGS LAW JOURNAL 1161 (2010) (54 pages). I examine the frequently encountered argument that a political community must proscribe certain forms of

private conduct if it wishes to avoid divine punishment. Drawing from the work of Ronald Dworkin and others, I contend that this argument has an influential secular counterpart that often pushes in precisely the same direction—toward using the law as a means of restricting individuals’ freedom to make certain moral decisions for themselves. I argue that there are seven questions that advocates of these and other worldviews ought to address when determining whether the morality of a given form of conduct should be resolved collectively by the political community or by each individual on his or her own.

*Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URBAN LAW JOURNAL 37 (2010) (35 pages): In this invited symposium contribution, I argue that the application of the Fourth Amendment exclusionary rule in jury trials raises troubling moral issues that are not present when a judge adjudicates a case on his or her own. I contend that courts infringe on jurors’ deliberative autonomy in a morally problematic way whenever they refuse to admit evidence that is both relevant and reasonably available; this infringement is especially problematic in the Fourth Amendment setting; and although there are several ways in which these moral problems could be mitigated, the best approach might be to abandon the exclusionary rule entirely. I conclude by identifying three legislative reforms that are needed in order to render the exclusionary rule dispensable.

*Counsel and Confrontation*, 94 MINNESOTA LAW REVIEW 201 (2009) (59 pages). Responding to the Court’s recent reworking of its confrontation jurisprudence, I argue that, under the Anglo-American common-law principles that the Confrontation Clause now incorporates, defendants are not entitled to an attorney’s assistance when interrogating witnesses prior to trial. Although the Assistance of Counsel Clause and the Due Process Clauses will pick up the slack in many cases, I contend that there are other instances in which the Constitution now leaves unrepresented defendants responsible for cross-examining witnesses on their own. I suggest that legislative reform may be necessary to ameliorate the new constitutional landscape’s deficiencies.

*The Myth of the Written Constitution*, 84 NOTRE DAME LAW REVIEW 991 (2009) (64 pages). Drawing on two different meanings of the term “myth,” I argue that many Americans’ commonly held assumptions about the written Constitution and its role in constitutional adjudication are not literally true, but that Americans’ widespread attachment to those assumptions serves critical functions, thereby posing extraordinary challenges for courts and constitutional scholars.

*Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASHINGTON UNIVERSITY LAW REVIEW 313 (2008) (48 pages). I critique (and find lacking) five leading rationales for privileging the originally understood meaning of the Constitution over the meaning that a majority of

Americans would assign to the Constitution's text today. I then provide five reasons to believe that, if the ultimate power to interpret the Constitution's text were shifted from the courts to the political domain, the American people would prove themselves able to distinguish between their long-term commitments and their short-term desires in the manner that constitutionalism demands.

*The Immoral Application of Exclusionary Rules*, 2008 WISCONSIN LAW REVIEW 463 (50 pages). Drawing on the work of Jeremy Bentham, Immanuel Kant, Thomas Scanlon, and others, I argue that, when courts withhold relevant, readily available evidence from jurors pursuant to evidentiary exclusionary rules, they often infringe upon jurors' autonomy in ways that cannot be morally justified.

*State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINNESOTA LAW REVIEW 265 (2007) (58 pages). I argue that the Court's nineteenth-century rulings in *Ableman v. Booth* and *Tarble's Case* marked a little-known but sharp break with state courts' decades-long practice of granting habeas relief to federal extrajudicial detainees. I contend that the Court's reasoning in those cases is unpersuasive, and that modern efforts to rationalize those cases' outcomes fare no better. I also argue that the Suspension Clause bars Congress from stripping state courts of their power to grant habeas relief to persons being extrajudicially detained by federal authorities.

*The Emotional Juror*, 76 FORDHAM LAW REVIEW 1609 (2007) (32 pages). Addressing the dichotomy often drawn between emotions and rationality, I argue that, while emotions sometimes exert undesirable influences in the courtroom, there are a variety of ways in which emotions aid rational decision-making by jurors.

*Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WILLIAM & MARY LAW REVIEW 2313 (2007) (50 pages). As a springboard, I examine Roger Coleman's notoriously futile efforts to secure federal habeas relief in the 1980s and early 1990s, despite what many at the time perceived to be powerful reasons to doubt his guilt of the murder for which he had been convicted. I argue that the story of Coleman's case illustrates the way in which the Court's habeas jurisprudence suffers from an "innocence gap"—a gap between the amount of exculpatory evidence sufficient to thwart the finality that habeas law purports to achieve and the amount of exculpatory evidence sufficient to persuade a federal habeas court to forgive a prisoner's procedural mistakes and adjudicate the merits of his or her constitutional claims.

*Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?*, 22 JOURNAL OF LAW & POLITICS 231 (2006) (51 pages). After identifying the original rationales for our longstanding tradition of permitting the President and Senate to decide which of the Court's nine members will serve as Chief Justice,

I argue that those rationales are anachronistic, that the tradition creates unnecessary conflicts of interest and separation-of-powers concerns, and that the Court's members should be permitted to decide for themselves which of them will serve as Chief Justice.

*Our Anticompetitive Patriotism*, 39 U.C. DAVIS LAW REVIEW 1353 (2006) (61 pages). I contend that the nation's seemingly exclusive claim to citizens' patriotism significantly shields the federal government from regulatory competition with the states, thereby blunting the competitive forces that the Framers believed would restrain Congress and the President from governing in objectionable ways. I suggest that we might usefully expose the federal government to new forms of regulatory competition by encouraging Americans to extend their political affections beyond the nation's borders and to place greater reliance on regulatory arrangements that require negotiation with others in the international community.

*The Mobility Paradox*, 92 GEORGETOWN LAW JOURNAL 481 (2004) (41 pages). Responding to the common argument that the work of Charles Tiebout suggests that citizens' interests would best be served by shrinking the federal government and permitting state and local government to regulate a greater number of important matters, I argue that citizens' mobility—the very mobility on which Tiebout's model relies—paradoxically gives citizens powerful incentives to oppose decentralization and to seek federal legislation embodying their preferences.

*Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VANDERBILT LAW REVIEW 329 (2003) (64 pages). I argue that the Rehnquist Court's leading federalism decisions are best understood as being animated by the Court's desire to preserve the political marketplace in which federal and state authorities compete with one another for the nation's regulatory business.

*Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO STATE LAW JOURNAL 731 (2002) (67 pages). After examining ways in which the "unreasonably erroneous" standard prescribed by the Antiterrorism and Effective Death Penalty Act of 1966 is incompatible with leading theories of adjudication, I identify three analytic touchstones that can help federal courts determine the likelihood that state courts' rulings should be deemed objectively unreasonable.

*Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA LAW REVIEW 467 (2001) (65 pages). Responding to the Court's assertion that the government's evidence in a criminal case has "fair and legitimate weight" if it tends to show that a guilty verdict would be morally reasonable, I argue that adopting the Court's conception of relevance would necessitate significant changes in the rules relating to jury nullification.

*The Intended Relationship Between Section 1983's "Laws" and Administrative Regulations*, 67 GEORGE WASHINGTON LAW REVIEW 51 (1998) (49 pages). After examining the history surrounding Section 1983's enactment, I argue that Congress did not intend Section 1983 to provide a remedy for rights that are grounded entirely in administrative regulations.

PUBLICATIONS: *Laissez Faire*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (2008).  
ENCYCLOPEDIA  
ENTRIES

*Habeas Corpus: A Modern History*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (2007).

*Coleman v. Thompson*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (2007).

PUBLICATIONS: *Making the Government Pay: The Application of the Equal Access to Justice Act in EEOC v. Clay Printing Company*, 72 NORTH CAROLINA LAW REVIEW 1575 (1994) (22 pages).  
STUDENT NOTES

*Punishing Offensive Conduct on University Campuses: Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 72 NORTH CAROLINA LAW REVIEW 789 (1994) (24 pages).

COLLEGE AND  
UNIVERSITY  
SERVICE  
ACTIVITIES

Associate Dean for Faculty (January 2011-present).

Co-Founder and Co-Chair (with Professor Herb Hovenkamp), the Iowa Legal Studies Workshop (2008-present).

Faculty Advisor, *Iowa Law Review* (2001-2007; 2009-present).

Faculty Advisor, Middle Eastern Law Students Association (2007-2009).

Member, University of Iowa Faculty Senate (2003-2006).

University and College of Law Committees:

- Chair, Faculty Appointments Subcommittee on Lateral Appointments (2010-2011).
- Chair, Ad Hoc Long-Range Planning Committee (2010-2011).
- University Non-Resident Fee Review Committee (2008-2011; Chair, 2010-2011).
- Dean Search Committee (2009-2010).
- Student Honors and Awards Committee (2008-2010).
- Promotion Committee for Associate Professor Christina Bohannon

- (2008-2009).
- Speakers and Professional Development Committee (2006-2009; Chair, 2006-2007).
- College of Law Internal Campaign Steering Committee (2008-2009).
- Post-Tenure Peer Review Committee (2007-2008).
- Chair, Promotion and Tenure Committee for Professor Angela Onwuachi-Willig (2006-2007).
- Diversity Committee (2006-2007).
- Faculty Appointments Committee (2005-2006).
- Curriculum and Externship Approvals Committee (2005-2006).
- Co-chair, Curriculum Policy Committee (2004-2005).
- Teaching Improvement Committee (2003-2005).
- Dean Search Committee (2003-2004).
- Small-Section Committee (2001-2002).
- Career Services Committee (1999-2002).
- Internal Procedures Committee (1999-2001).

OTHER  
RECENT  
ACTIVITIES

Rather than list all of my professional and community activities throughout my career, I offer the following representative examples from the past twelve to eighteen months:

- Member of the Advisory Committee for the *Journal of Legal Education*, published by the American Association of Law Schools (2009-present).
- Public Lecture, “Explaining *Varnum*,” Christ Episcopal Church of Cedar Rapids (July 2011).
- Presenter, Hubbard Law School Preparation Program, June 2011 (concerning the Equal Protection Clause and the power of judicial review).
- Appeared as a panelist on a February 2011 episode of *Ethical Perspectives on the News* for KCRG-TV, addressing issues relating to gun control.
- Moderator and Co-Organizer, “The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote,” February 2011 (featuring Justice Michael Streit, formerly of the Iowa Supreme Court; Seth Andersen, Executive Director of the American Judicature Society; Brian Fitzpatrick, of the Vanderbilt University Law School; Kathie Obradovich, of the *Des Moines Register*, and David Perlmutter, Director of the University of Iowa School of Journalism and Mass Communication).
- Symposium Panelist, “State Constitutional Law Steps Out of the Shadows,” University of Kansas School of Law (November 2010).
- Appeared as a panelist on a December 2010 episode of *Ethical Perspectives on the News* for KCRG-TV, addressing issues relating to airport security and other matters involving tension between individual

- liberties and governmental interests.
- Provided online commentary for the *Des Moines Register* throughout the U.S. Senate's Supreme Court confirmation hearings for Elena Kagan (as I did the prior year throughout the confirmation hearings for Sonia Sotomayor) (July 2010).
- Research Fellow, Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany) (July 2010).
- Faculty Seminar, University of North Carolina School of Law (April 2010).
- Served as a reviewer for the Yale University Press and for the University of Chicago Press.
- Appeared as a panelist on an April 2010 episode of *Ethical Perspectives on the News* for KCRG-TV, addressing same-sex marriage and issues relating to the judicial enforcement of individual rights.
- Provided feedback on drafts of articles written by untenured faculty members at other institutions.
- Mentored former students wishing to enter the teaching profession.
- Served as a media resource on matters relating to courts, evidentiary rulings, and constitutional questions.
- Served as a judge for the "Iowa City Spells" fundraiser benefiting the Iowa City Public Library (served annually as a judge since 2008).

OTHER  
EMPLOYMENT

University of North Carolina School of Law, Chapel Hill, North Carolina.

- Visiting Associate Professor of Law (Spring and Summer 2003).
- Courses taught: Constitutional Law and Comparative Evidence.

Perkins Coie LLP, Seattle, Washington.

- General Litigation Associate (1996-1999).

Judge Francis D. Murnaghan, Jr., United States Court of Appeals for the Fourth Circuit, Baltimore, Maryland.

- Judicial Clerk (1995-1996).

Duke University, Capital Campaign for the Arts & Sciences, Durham, North Carolina.

- Assistant Director (1990-1992).
- Public Relations Specialist (1990).
- Staff Writer (1989-1990).

PROFESSIONAL  
AFFILIATIONS

Member, Iowa State Bar Association.

Member, Washington State Bar Association.

Member, Who's Who Among American Teachers.

