

March 2023

## The Return of Public Goods: Introduction to a Symposium

Dr. Charles J. Reid, Jr.  
cjreid@stthomas.edu

Follow this and additional works at: <https://ir.stthomas.edu/ustjlpp>



Part of the [Agriculture Law Commons](#), [Constitutional Law Commons](#), [Environmental Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Other Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Science and Technology Law Commons](#)

---

### Recommended Citation

Dr. Charles J. Reid, Jr., *The Return of Public Goods: Introduction to a Symposium*, 16 U. ST. THOMAS J.L. & PUB. POL'Y 1 (2023).  
Available at: <https://ir.stthomas.edu/ustjlpp/vol16/iss1/1>

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact the Editor-in-Chief at [jlpp@stthomas.edu](mailto:jlpp@stthomas.edu).

# THE RETURN OF PUBLIC GOODS: INTRODUCTION TO A SYMPOSIUM

DR. CHARLES J. REID, JR.\*

## I. INTRODUCTION

The 117<sup>th</sup> Congress was uncommonly active. It passed at least four major pieces of legislation. In March, 2021, President Joe Biden signed into law the American Rescue Plan Act of 2021, enacted through the budget reconciliation process.<sup>1</sup> It proposed to remedy at least some of the harm caused by the COVID-19 pandemic, and included numerous discrete provisions to help particular industries harmed by the shutdown and the shift in social practices that followed in its wake. The restaurant industry thus received funding,<sup>2</sup> as did performing-arts venues,<sup>3</sup> places of public recreation,<sup>4</sup> tourist destinations,<sup>5</sup> and other small businesses.<sup>6</sup>

---

\* Professor of Law, University of St. Thomas (MN).

<sup>1</sup> Pub. L. No. 117-2, 135 Stat. 4 (2021).

<sup>2</sup> Peter Romeo, *Stimulus Bill With \$29B in Direct Restaurant Aid Appears Headed for Passage*, RESTAURANT BUS. (Mar. 8, 2021), <https://www.restaurantbusinessonline.com/financing/stimulus-bill-29b-direct-restaurant-aid-appears-headed-passage>; Joyce M. Rosenberg, *Restaurants Are Big Beneficiaries of COVID-19 Relief Bill*, AP NEWS (Mar. 10, 2021), <https://apnews.com/article/lifestyle-small-business-bills-coronavirus-pandemic-eb58f48a99570165af24387424b9c047>.

<sup>3</sup> L.B. Cantrell, *Entertainment Companies Comment on Passage of American Rescue Plan Act of 2021*, MUSIC ROW (Mar. 10, 2021), <https://musicrow.com/2021/03/entertainment-companies-comment-on-passage-of-american-rescue-plan-act-of-2021/>.

<sup>4</sup> Ann Thompson, *A Look at the Continuing Effects of COVID-19 on the Amusement Park Industry*, NPR (Feb. 22, 2021, 4:19 PM), <https://www.npr.org/2021/02/22/970278658/a-look-at-the-continuing-effects-of-covid-19-on-the-amusement-park-industry>.

<sup>5</sup> See, for example, Marsha Heller & Colin Baillie, *Lt. Gov. Coleman Visits Western KY, Announces \$15 Million in Funding for Tourism, Infrastructure*, KFVS12 (Jan. 26, 2023), <https://www.kfvs12.com/2023/01/26/lt-gov-coleman-visit-western-kentucky-thursday/>; and *Green Bay Celebrates Success of Tourism Grants, Has Money Left Over*, WBAY (Jan. 3, 2023), <https://www.wbay.com/2023/01/04/green-bay-celebrates-success-tourism-grants-has-money-left-over/>.

<sup>6</sup> Jeanne Shahedi, *What's In the \$1.9 Trillion Rescue Plan for Small Businesses*, CNN (Mar. 25, 2021), <https://www.cnn.com/2021/03/10/success/rescue-plan-small-businesses-feseries/index.html>.

In November, 2021, President Biden signed the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Bill.<sup>7</sup> Among this bill's many provisions were climate-friendly initiatives, such as funding for the electric vehicle industry,<sup>8</sup> and support for transitioning the power grid away from fossil fuels and towards renewable resources.<sup>9</sup> On August 9, 2022, President Biden signed a second bipartisan infrastructure bill, known as the CHIPS and Science Act.<sup>10</sup> The passage of this Act was described as "A new era of industrial policy" by the Washington Post.<sup>11</sup> The purpose of the legislation is to provide subsidies for the research and manufacture of new generations of microchips, essential to the computer industry.<sup>12</sup> The Inflation Reduction Act, finally, signed one week later, on August 16, 2022,<sup>13</sup> provided important subsidies for green energy and other climate initiatives.<sup>14</sup> A principal goal is the gradual decarbonization of the American economy.<sup>15</sup>

---

<sup>7</sup> Pub. L. No. 117-58, 135 Stat.429 (2021).

<sup>8</sup> See, for example, M. Moaz Uddi, *Electric Vehicle Programs in the Bipartisan Infrastructure Bill*, GREAT PLAINS INSTITUTE (Dec. 6, 2021), <https://betterenergy.org/blog/electric-vehicle-programs-in-the-bipartisan-infrastructure-bill/>; Jennifer Hiller, *Electric-Vehicle Charging Stations Win Jolt of Energy in Congress*, WALL ST. J. (Nov. 7, 2021), <https://www.wsj.com/articles/electric-vehicle-charging-stations-win-jolt-of-energy-in-congress-11636309097>.

<sup>9</sup> Rebecca Leber, *The infrastructure law aims to clean up pollution in your community*, VOX (Nov. 15, 2021), <https://www.vox.com/22772701/biden-infrastructure-law-environmental-funding>; Joy Ditto, *Power on, America: Why the infrastructure bill is a win for the energy sector*, THE HILL (Dec. 11, 2021), <https://thehill.com/opinion/energy-environment/585407-power-on-america-why-the-infrastructure-bill-is-a-win-for-the/>.

<sup>10</sup> Pub. L. No. 117-167, 136 Stat. 1366 (2022).

<sup>11</sup> Jeanne Whalen, *A new era of industrial policy kicks off with signing of the chips act*, WASH. POST (Aug. 9, 2022), <https://www.washingtonpost.com/us-policy/2022/08/09/micron-40-billion-us-subsidies/>.

<sup>12</sup> See, for example, Jane Lanhee Lee, *U.S. Congress passage of subsidies prompts chip makers to move on projects*, REUTERS, July 28, 2022, <https://www.reuters.com/technology/us-congress-passage-subsidies-prompts-chip-makers-move-projects-2022-07-28/>.

<sup>13</sup> Pub. L. No. 117-169, 136 Stat. 1818 (2022).

<sup>14</sup> Jane Margolies, "Game Changer" For Green Infrastructure, N.Y. TIMES (Sept.13, 2022); Gordon Laforge, Ann Florini, & Hollie Russon, *How the green transition can revitalize American democracy*, THE HILL (Jan. 12, 2023), <https://thehill.com/opinion/energy-environment/3811224-how-the-green-transition-can-revitalize-american-democracy/>.

<sup>15</sup> Sarah Kuta, *What the Inflation Reduction Act Hopes to Do About Climate Change*, SMITHSONIAN MAG. (Aug. 18, 2022),

Driving these developments, of course, are larger currents. A global pandemic; geopolitical crisis and exposed supply chains; implacable climate change. Some have called the intersection of these converging concerns the “polycrisis.”<sup>16</sup> We can point to these causes and to others, but the effect has been a radical questioning of the bipartisan neoliberal paradigm of the last thirty years; and the revitalization, after a long quiescence, of a commitment to public goods.

This is the context in which this Symposium occurred. The contributors to this volume come from very different perspectives. They do not all agree. And that is actually a good thing. Their contributions to the ongoing debate are welcome. The renewal of interest in public goods has only just begun. So, some words about each of the contributions and the contributors.

## II. THE CONTRIBUTORS

### A. Alfredo Saad Filho

Professor Alfredo Saad-Filho of Kings College, London, delivered the Symposium’s keynote address. There are few scholars in the world who have offered a more comprehensive and compelling critique of neoliberalism than Professor Saad-Filho. He is the co-editor of Neoliberalism: A Critical Reader.<sup>17</sup> He is the author of Growth and Change in Neoliberal Capitalism<sup>18</sup> and Value and Crisis: Essays on Labour, Money, and Contemporary Capitalism.<sup>19</sup> He has raised important questions concerning

---

<https://www.smithsonianmag.com/smart-news/us-to-invest-370-billion-to-tackle-climate-change-180980596/>.

<sup>16</sup> Adam Tooze, *Welcome to the world of the polycrisis*, FIN. TIMES (Oct. 28, 2022), <https://www.ft.com/content/498398e7-11b1-494b-9cd3-6d669dc3de33>. Cf., Barry C. Lynn, *Manufacturing and Liberty*, WASH. MONTHLY (Jan. 8, 2023), <https://washingtonmonthly.com/2023/01/08/manufacturing-and-liberty/> (“[W]hat we see is terrifying. Just in the past three years we have found ourselves suddenly without face masks to protect against a pandemic, without the chemicals we need to test for viruses, without container ship and rail capacity to move basic goods, without semiconductors to build airplanes and medical devices, without formula to feed babies, without natural gas, and with roaring inflation”).

<sup>17</sup> ALFREDO SAAD-FILHO & DEBORAH JOHNSTON, *NEOLIBERALISM: A CRITICAL READER* (Pluto Press, London, 2005).

<sup>18</sup> ALFREDO SAAD-FILHO, *GROWTH AND CHANGE IN NEOLIBERAL CAPITALISM: ESSAYS ON THE POLITICAL ECONOMY OF LATE DEVELOPMENT* (Brill, Leiden, 2021).

<sup>19</sup> ALFREDO SAAD-FILHO, *VALUE AND CRISIS: ESSAYS ON LABOUR, MONEY, AND CONTEMPORARY CAPITALISM* (Brill, Leiden, 2019).

commodification, wage labor, and the contingency and social constructedness of markets.<sup>20</sup> He has written a profoundly important study of the crisis of the Brazilian economic and political order in the early 2000s and 2010s, that concludes with a powerful call for reform.<sup>21</sup>

His contribution to the Symposium builds particularly on his critical analysis of neoliberalism. Financialization, “the subordination of economic reproduction and social reproduction to the accumulation of financial capital in all its forms,” is neoliberalism’s “most important feature.” And, Professor Saad-Filho demonstrates, neoliberalism is responsible for grave social ills. Neoliberalism requires a consuming society.<sup>22</sup> Thus Professor Saad-Filho notes that “[c]onsumption is the way in which you validate yourself in neoliberal society.” It depends upon the willingness of most persons to take on debt and even to see debt – home mortgages, say, or home equity lines of credit – as forms of wealth. And it has resulted in a society in which those who manage and control the financial sector grow immensely wealthy, while those who depend upon wages as a primary source of income have seen their standard of living stagnate for a half-century. In the end, Professor Saad-Filho perceives a “highly unstable” tension between a democratic order committed to social and political equality and a neoliberal economic order that is highly unequal and exclusionary.

#### B. Anne Marie Lofaso, Hallie Arena, and Anna Williams

Anne Marie Lofaso is the Arthur B. Hodges Professor of Law at the University of West Virginia, and a recognized expert in the field of labor law. She has edited and authored important books in the field,<sup>23</sup> and has also

---

<sup>20</sup> ALFREDO SAAD-FILHO, *Value, Capital, and Exploitation, in ANTI-CAPITALISM: A MARXIST INTRODUCTION* 27, 27-41 (Pluto Press, 2003).

<sup>21</sup> ALFREDO SAAD-FILHO & LECIO MORAIS, *BRAZIL: NEOLIBERALISM VERSUS DEMOCRACY* (Pluto Press, London, 2017) (“Neoliberalism can be transcended only if its material basis is systematically dismantled, initially through democratic economic policy initiatives supporting a model of development generating more equal distributions of income, wealth, and power, and improved material welfare for the poor”). *Id.* at 171-72.

<sup>22</sup> Fernando Pérez and Luigi Esposito, *The Global Addiction and Human Rights: Insatiable Consumerism, Neoliberalism, and Harm Reduction*, PGDT 9 84, 85 (2010) (“in the US, the explicit associations people make between consumerism, personal identity, success, and worthiness [constitute] patterns of *hyper-consumption*”) *Id.* (emphasis in original).

<sup>23</sup> See, for example, ANNE MARIE LOFASO, ET AL., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS* (3d ed. 2021); ANNE M. LOFASO, *DRAFTING THE UNION CONTRACT: A HANDBOOK FOR THE MANAGEMENT*

produced a large number of leading articles.<sup>24</sup> In her contribution to the Symposium – co-authored with two members of the West Virginia Law School Class of 2023 – Professor Lofaso seeks to make the case that labor must be conceived of as a public good. Thus she and her co-authors write: “In a capitalist system, economists typically treat labor as a private good. This means that an individual can sell their labor in exchange for wages. . . . [W]e can reconceptualize labor as a public good within the framework of the U.S.-American capitalist system.”

Professor Lofaso and her collaborators build this case through a many-layered argument. Their article is instructive, informative, and rich with insight. We learn, for instance, that Adam Smith assigned labor the central role “in raising or maintaining a nation’s wealth.” We encounter the bloody and tragic history of industrialization in the United States in the late nineteenth and twentieth centuries. Few industries, furthermore, suffered as many mass casualty events as coal mining, and in a series of charts Professor Lofaso and company make it plain just how awful that death toll was. They reject suggestions that the neoliberal marketplace is either “natural” or “morally neutral.” They make the case – and it is a powerful case – that the United States as a matter of public policy should commit itself to a “flourishing economics” that makes its principal concern “not just the accumulation of material things but also includes other conditions of well-being.”

### C. Chad G. Marzen

Chad G. Marzen is the American General Insurance Professor of Insurance Law at Florida State University. Professor Marzen is a prolific scholar and one gains a sense of how wide-ranging his interests are by reviewing his published work. Thus he has written extensively on COVID-19, including both the public-health and economic dimensions of the pandemic.<sup>25</sup> A native of Iowa, Professor Marzen has written in defense of the

---

NEGOTIATOR (New York, 2020).

<sup>24</sup> See, for example, Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous, Dignified Union Worker Back to Work*, 5 FIU L. REV. 495, 495-549 (2010); Anne Marie Lofaso, *Workers’ Rights as Natural Human Rights*, 71 U. OF MIAMI L. REV. 565, 565-644 (2017); Anne Marie Lofaso, “Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker,” 76 UMKC L. REV. 1, 1-64 (2007).

<sup>25</sup> Chad G. Marzen, *COVID-19 Vaccine Distribution: A Brief Proposal For Future Pandemics*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 377, 377-394 (2021); Chad G. Marzen, *The Extraordinary Force of Nature Defense as a Defense*

Iowa caucuses.<sup>26</sup> He has defended the right of self-determination for Balochistan, a large and mineral-rich province of Pakistan.<sup>27</sup> But he has developed a truly significant expertise in the field of agricultural law.<sup>28</sup>

It is in his capacity as an expert on agricultural law, that Professor Marzen addressed the Symposium on Public Goods. He grounds his paper on the premise that American political life is polarized and that a sharp and acrimonious partisan divide often frustrates the possibility of real legislative accomplishment. He builds, further, on the unspoken premise that agriculture – the American food supply – should, if anything, be the subject of bipartisan cooperation. The United States, after all, is in the midst of a genuine crisis of hunger<sup>29</sup> and malnutrition.<sup>30</sup> Alleviating the crisis should thus command center stage.

The argument he crafts is a subtle and important one. There are a number of actions that Congress might take to provide real and meaningful benefits to the American public. Farmers should receive financial protections for their use of cover crops. Similarly, he recommends Congress take action on the bipartisan Healthy Food Access for All Americans Act. The bill is intended to promote the expansion of farmers markets and grocery stores into so-called food deserts. Congress might also provide targeted student loan relief for young persons entering farming or ranching, and also offer other forms of financial assistance for persons undertaking a career in agriculture.

---

to *Coronavirus (COVID-19) Pandemic Liability*, 14 NY U. J. L. & LIBERTY 709, 709-732 (2021); Chad G. Marzen & Michael Conklin, *Coronavirus “Cures” and the Courts*, 12 WM. & MARY BUS. L. REV. 1, 1-22 (2020).

<sup>26</sup> Chad G. Marzen, *In Defense of the Iowa Caucuses*, 54 CREIGHTON L. REV. 359 (2021).

<sup>27</sup> Chad G. Marzen, *Balochistan, Self-Determination, and U.S. Foreign Policy*, 45 NC J. INT'L L. 195 (2020).

<sup>28</sup> See, for instance, Chad G. Marzen, *Purchase Options in Agricultural Farmland Leases*, 25 DRAKE J. OF AGRIC. L. 41 (2020); Chad G. Marzen, *Statutes of Limitation and Crop Insurance*, 69 SYRACUSE L. REV. 1 (2019); Chad G. Marzen, *The 2018 Farm Bil: Legislative Compromise in the Trump Era*, 30 FORDHAM ENV'T L.J. 49 (2019); Chad G. Marzen, *Agriculture and Res Ipsa Loquitur*, 70 OKLA. L. REV. 679 (2018).

<sup>29</sup> See, for instance, Adam Minter, *America's Hunger Pandemic Is Getting Worse*, BLOOMBERG (Jan. 2, 2022), <https://www.bloomberg.com/opinion/articles/2022-01-02/america-s-hunger-pandemic-is-still-getting-worse?leadSource=unverify%2520wall#xj4y7vzkg>.

<sup>30</sup> Caitlin Welsh & Eilish Zembilci, *From Chronic to Crisis: How Malnutrition Makes COVID-19 Lethal*, CTR FOR STRATEGIC & INT'L STUD. (July 13, 2020), <https://www.csis.org/analysis/chronic-crisis-how-malnutrition-makes-covid-19-lethal>.

These proposals, furthermore, are only a few of the many ideas that Professor Marzen identifies in the course of his paper. What he has done, in short, is the hard work of real legislative reform. He has selected out discrete but doable projects that will produce real and tangible benefits in the lives of most Americans. He has put forward solutions that should gain wide support even in our own deeply fractured times; and he has demonstrated how the public interest is served by their adoption.

#### D. Daniel R. Correa

Daniel R. Correa is an Associate Professor of Law at South Texas College of Law in Houston, Texas. He has already built an impressive record of publication. His examination of “Civil Dissent by Obedience and Disobedience,” is a thoughtful study of the phenomenon of the use of visible and theatrical forms of literal compliance with the law as a form of actual dissent.<sup>31</sup> His article on “The Slavery Clause and Felony Disenfranchisement”<sup>32</sup> makes the powerful argument that a unified interpretation of the Reconstruction Amendments should likely render constitutionally suspect the felony disenfranchisement provisions of many states.<sup>33</sup>

In “Taking Democracy Seriously: Toward a Jury-Centered Jurisprudence,”<sup>34</sup> Professor Correa takes seriously Jeremy Waldron’s call for the establishment of a democratic jurisprudence.<sup>35</sup> The article is a deft and learned synthesis: Is, or should, democracy be direct or representative? How equal must persons’ participation be? What role do courts – especially appellate courts that exercise judicial review – play in the system? He concludes by defending the jury as an institution that simultaneously represents the community and that serves to check abusive legislation in the absence of strong judicial review.<sup>36</sup>

---

<sup>31</sup> Daniel Correa, *Civil Dissent by Obedience and Disobedience: Exploiting the Gap Between Official Rules and Society Norms and Expectations*, 8 WASH. UNIV. JURISPRUDENCE REV. 219 (2016).

<sup>32</sup> Daniel Correa, *The Slavery Clause and Felony Disenfranchisement: How the Thirteenth Amendment Informs the Debate on Crime-Based Franchise Restrictions*, 53 LOYOLA UNIV. CHI. L.J. 89 (2021).

<sup>33</sup> *Id.* at 157-58.

<sup>34</sup> Daniel Correa, *Taking Democracy Seriously: Toward a Jury-Centered Jurisprudence*, 22 VA J. SOCIAL POL’Y & L. 307 (2015)..

<sup>35</sup> Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 688-691 (2009).

<sup>36</sup> Correa, *supra* note 34, at 350-58.



His contribution to this Symposium on Public Goods is similarly thoughtful and well-argued. Professor Correa commences by stating his agreement with Patrick Deneen's book, Why Liberalism Failed.<sup>37</sup> Developing Deneen's critique of the liberal project, Professor Correa writes that liberalism has failed because it "treats people as sprung from nothing and from nowhere, always free-choosing individuals with no preexisting or deeply embedded cultural or relational commitments." This philosophical perspective has the further effect, Professor Correa continues, of shaping, or, even better, warping the legal order: "Positive law, guided by philosophical liberalism, aims to free individuals from these cultural constraints and preexisting commitments, and, in doing so, leaves citizens feeling only tenuously connected to each other, their elected representatives, and their government." Professor Correa further identifies tangible social problems caused by this primacy of the liberal individual, such as the abandonment of "local settings and communities" and the creation of "an emaciated representative form" of democracy.

Professor Correa takes these insights as the premise of his paper and proposes as a solution the creation of a system of public service that would serve to unite Americans into causes larger than themselves. For support he looks to the scholarship of Martha Nussbaum<sup>38</sup> and Michael Sandel,<sup>39</sup> both of whom recommend public service as an antidote to toxic individualism. Professor Correa contributes to this debate with a reading of Thirteenth-Amendment jurisprudence that is largely supportive of the idea of mandatory community service.

I should state, in responding to Professor Correa, that I tend to agree with a number of Patrick Deneen's criticisms. And I am open to the possibility of community service as a partial solution to the problem of the lack of social cohesion.<sup>40</sup> Social solidarity is an elusive concept, and this is

---

<sup>37</sup> PATRICK J. DENEEN, JAMES DAVISON HUNTER, & JOHN M. OWEN, *WHY LIBERALISM FAILED* (Yale Univ. Press, New Haven, CT, 2018).

<sup>38</sup> MARTHA C. NUSSBAUM, *THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS* (2018).

<sup>39</sup> MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (Farrar Straus Grioux, New York, 2009).

<sup>40</sup> One might consult the experience of Switzerland and Israel, both of which require national service – usually but not invariably military service – as a component of citizenship. See, for instance, Tibor Szvircsev Tresch, *The Transformation of Switzerland's Militia Armed Forces and the Role of the Citizen In Uniform*, 37 *ARMED FORCES & SOCIETY* 239 (2011); and Yohanon Plesner, *The IDF's Greatest Challenge*, JEWISH FUNDERS NETWORK (June 7, 2022),

not the place to define it, but I would stipulate that we have too little of it today. Some form of mandatory service might help to restore it.

But I would encourage Professor Correa, in future work, to look at a second aspect of Deneen's denunciation of the present order. Consider the following fulsome sentence drawn from Deneen's book: "Our society is increasingly defined by economic winners and losers, with winners congregating in wealthy cities and surrounding counties, while losers largely remain in place – literally and figuratively – swamped by a global economy that rewards the highly educated cognitive elite while offering bread crumbs to those left in 'flyover country.'"<sup>41</sup> Yanis Varoufakis has warned of an emerging "Techno-feudalism."<sup>42</sup> Is this not the phenomenon that Deneen is describing? And what do we do about it? Neoliberal economics has destroyed any number of mediating social institutions that once contributed to a vibrant social solidarity, from trade unions<sup>43</sup> to the local ownership of radio and television.<sup>44</sup> How and where do we begin to rebuild? Mandatory public service might assist the process of reconstruction, but the problems bred by hyper-individualism run very deep and require comprehensive solutions.

#### E. Timon Cline

Timon Cline has served as a Deputy Attorney General in the State of New Jersey and has also been a fellow at the Craig Center at Westminster Theological Seminary in Glenside, Pennsylvania. He has written some important law review articles, such as an analysis of COVID-19 vaccine

---

[https://www.jfunders.org/the\\_idf\\_s\\_greatest\\_challenge](https://www.jfunders.org/the_idf_s_greatest_challenge) (service in the Israeli Defense Force "plays [a role] in fostering social solidarity and instilling an ethos of service to a higher cause than personal advancement").

<sup>41</sup> Deneen, *supra* note 37, at 149. Deneen continues by noting that these trends "are today institutionalized through family, neighborhood, and schools, replicated by generational succession." *Id.*

<sup>42</sup> Yanis Varoufakis, *Techno-Feudalism Is Taking Over*, PROJECT SYNDICATE (June 28, 2021), <https://www.project-syndicate.org/commentary/techno-feudalism-replacing-market-capitalism-by-yanis-varoufakis-2021-06>.

<sup>43</sup> See, for instance, Gillian Lester, *Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity*, in *THE IDEA OF LABOUR LAW* 329-343 (Guy Davidov & Brian Langille eds., 2011).

<sup>44</sup> David McCabe, *Bill Clinton's Telecom Law: Twenty Years Later*, THE HILL (Feb. 7, 2016), <https://thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later/>; Michael Corcoran, *Democracy In Peril: Twenty Years of Media Consolidation Under the Telecommunications Act*, TRUTHOUT (Feb. 11, 2016), <https://truthout.org/articles/democracy-in-peril-twenty-years-of-media-consolidation-under-the-telecommunications-act/>.

mandates under the police power and the constitutional authority of Jacobson v. Massachusetts;<sup>45</sup> and “Originalist Cherry-Picking,” which is a criticism of the historical selectivity of at least some practitioners of originalist constitutional interpretation.<sup>46</sup> In thoughtful essays, he has argued for the “recovery of a substantive vision of social order,” drawn from the historical reformed tradition.<sup>47</sup>

His contribution to the Journal of Law and Public Policy Symposium might be described as an exercise in historical retrieval and revival. The first section of his paper, entitled “Politaea,” looks to a body of older cases – and to Thomas Cooley’s treatise, Constitutional Limitations<sup>48</sup> – to propose revitalization of local government. His second section, named “Sociability,” investigates an older body of sources – treatises, again, like those by Zephaniah Swift<sup>49</sup> and Nathaniel Chipman,<sup>50</sup> as well as cases, and the writings of founders like John Adams – to recapture an early American republican ethos that valued the good of the commonwealth above individual wants and interests.

Under the heading “Tasteful Policing,” Cline attempts to capture the range of activities – large, but not unlimited – that fell within the police power’s authority to regulate. He makes the important point, in his section “Public Health and Public Wealth,” that “well-being was multifaceted because the whole man, body, and soul, as a sociable creature, was still

---

<sup>45</sup> Timon Cline, *Common Good Constitutionalism and Vaccine Mandates: A Review of Jacobson v. Massachusetts in Light of COVID-19*, 21 APPALACHIAN J. L. 1 (2021).

<sup>46</sup> Timon Cline, *Originalist Cherry-Picking*, 12 HARV. J. L. & PUB. POL'Y PER CURIAM 1 (2022).

<sup>47</sup> Timon Cline, *A Puritan Politics: Life, Unity, and the Pursuit of God*, AMERICAN CONSERVATIVE (Sept. 30, 2022), <https://www.theamericanconservative.com/a-puritan-politics-life-unity-and-the-pursuit-of-god/>. Cf., Timon Cline, *Against Public Atheism*, AMERICAN CONSERVATIVE (Aug. 2, 2022), <https://www.theamericanconservative.com/against-public-atheism/> (examining the question, “what would national, governmental honor of Christianity look like?”).

<sup>48</sup> THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868). Cf., Lawrence B. Solum, *Cooley’s Constitutional Limitations and Constitutional Originalism*, 18 GEORGETOWN J. L. & PUB. POL'Y 49 (2020) (seeking to revive interest in Cooley’s nineteenth-century treatise).

<sup>49</sup> ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (Windham, 1795).

<sup>50</sup> NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS (1833).

acknowledged.” He closes with a reminder that the nineteenth century, especially prior to the Civil War, was expressly Protestant and Christian and that Christian beliefs constituted an overt part of the common law’s heritage.

Cline’s essay pairs neatly with Correa’s. If, for the sake of argument, liberalism has failed as a public philosophy, or is at least deficient, then the question arises what can or should arise to take its place, or at least supplement it? Cline makes some sound and important points. A more authentic and personal localism under a state or local government attentive to a wholistic conception of the human being may have some real appeal to large numbers of Americans. But there is also the question of scale. The United States, for better, and quite possibly for worse, has become a continental nation of more than 330 million persons, most of whom live largely anonymous lives in largely anonymous urban areas. How do we return to the Garden?

#### F. Elizabeth M. Chu

Elizabeth M. Chu is the Executive Director of the Center for Public Research and Leadership at Columbia University, where she is also a lecturer in the School of Law. She has made important contributions to the intersection of law and education.<sup>51</sup> Her contribution to the symposium, which also features multiple co-authors, begins with the premise that the educational response to the COVID-19 pandemic “has exposed and exacerbated systemic inequities, making stark an unconscionable reality: our public school system fails too many students and families.”

In response to the harsh disparities revealed by COVID-19, Dr. Chu outlines a program that she and collaborators have named “RISE-to-Thrive.” It emphasizes an individualized, customizable educational experience meant to maximize each student’s talents and to address the particular obstacles that

---

<sup>51</sup> See, for instance, Elizabeth M. Chu and Douglas D. Ready, *Exclusion and Urban Public High Schools: Short- and Long-Term Consequences of School Suspensions*, 124 AM. J. EDUC. 479 (2018); Douglas D. Ready & Elizabeth M. Chu, *Sociodemographic Inequality in Early Literacy Development: The Role of Teacher Perceptual Accuracy*, 26 EARLY EDUC. & DEV. 970 (2015); A. Chris Torres & Elizabeth M. Chu, *Preparation Programs for Alternate-Route Teachers: Teacher Satisfaction With Instructions Aligned to Clinical Practice*, 29 TEACHER EDU. & PRAC. 213 (2016). Cf., Elizabeth M. Chu, *Out of Class and Off Track: High School Suspension in New York City* (2014) (Ph.D. dissertation, Columbia University) (examining the fairness and the harmful effects of exclusionary forms of school discipline).

stand as barriers to success. Not only students, but educators must be open to learning. Solutions come in many packages, and an openness to understanding and meeting a student's individual needs is crucial. The process, furthermore, must be democratic, not in the narrow sense that parties vote on outcomes, but in the broad, value-driven sense that demands a healthy respect for all affected parties, students and families alike. There are RISE teams that meet to define and determine how best to meet student needs; and teachers, who facilitate the process and ensure its success.

There is no question that education, especially the education of children from low-income families, has been stressed to the breaking point by the COVID-19 crisis.<sup>52</sup> It is not an exaggeration to call the situation an emergency.<sup>53</sup> Dr. Chu and her colleagues have advanced an important set of recommendations, which should be widely read and considered.

#### G. Matthew Titolo

Matthew Titolo is a Professor of Law at the University of West Virginia College of Law. He has an impressive and extensive publication record. His article "The Jargon of Corruption" seeks to reinvigorate our moral/legal/ethical vocabulary of corruption in the face of "an emergent neoliberal conception of the state that . . . domesticated and drained [corruption] of moral force."<sup>54</sup> In "Legal Education as Training for Hierarchy in 2015," Titolo urges law schools to ask foundational questions that challenge "the neoliberal consensus, largely unshaken even by the events of

---

<sup>52</sup> See, for example, João Pedro Azevedo, et al., *Simulating the Potential Impacts of COVID-19 School Closures on Schooling and Learning Outcomes: A Set of Global Estimates*, WORLD BANK RSCH OBSERVER (March 17, 2021); Megan Kuhfeld, et al., *The Pandemic Has Had Devastating Impacts on Learning: What Will It Take to Catch Up?*, BROOKINGS (Mar. 3, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/03/03/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/>; Megan Kuhfeld, et al., *Projecting the Potential Impact of COVID-19 School Closures on Academic Achievement*, 49 EDUC. RESEARCHER 549 (2020)5; J. Tom Mueller, et al., *Impacts of the COVID-19 Pandemic on Rural America*, 118 PNAS (Dec. 28, 2020).

<sup>53</sup> Simon Read, *COVID Created an Education Crisis That Has Pushed Millions of Children into 'Learning Poverty' – Report*, WORLD ECON. FORUM (July 21, 2022), <https://www.weforum.org/agenda/2022/07/education-schools-pandemic-learning-poverty/>.

<sup>54</sup> Matthew Titolo, *The Jargon of Corruption*, 43 SW. L. REV. 591, 593-94 (2014).

2008.”<sup>55</sup> And, furthermore, Professor Titolo has a book forthcoming from Cambridge University Press, Privatization and Its Discontents: Infrastructure, Law, and American Democracy, due this summer.

There are two major aspects to Professor Titolo’s paper. First, he makes the crucial point that there is a tremendous deficit of public goods in the United States today. Whether we look at “waterways, ports, airports, rainwater, [or] wastewater.” the United States confronts large, unmet needs. He then sets these needs alongside proposals for infrastructure funding from the Biden Administration to conclude that its legislative accomplishments have been surprisingly efficacious.

Still, Professor Titolo has noticed that the American conception of infrastructure is in need of expansion. There is the “hard” infrastructure of major construction projects. A new highway, a rebuilt bridge, flood controls, and wastewater treatment facilities are all examples of hard infrastructure.<sup>56</sup> But the law must take better account of “soft” infrastructure. A healthy workforce, whose basic medical needs have been met, is also a more productive workforce. So also, housing security means greater social stability. Predictable sources of childcare mean that employees will face less familial uncertainty and less absenteeism at work.

Good health, a thriving work force, a rising young generation whose needs for security and stability are adequately tended to, are all intrinsically valuable goods. They are in that sense their own justification. But they also contribute to the public welfare and thus qualify as public goods. Professor Titolo does a fine job of drawing out these points.

Professor Titolo closes with a warning. Public-private partnerships can be devastating to public goods, because in the end the projects built with private funds may prove to be exploitive of those who are supposed to be served, or they may be diverted to nonpublic, exclusionary ends. Public goods, in other words, ought to remain in the control of the public, which can exercise supervisory responsibilities and ensure proper implementation.

---

<sup>55</sup> Matthew Titolo, *Legal Education as Training for Hierarchy in 2015*, 10 UNBOUND: HAR. J. OF THE LEGAL LEFT 91, 93 (2015) (Cf., Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 54-75 (David Kairys ed., 1982) (the article to which Titolo is responding).

<sup>56</sup> See, for example, Linda H. Geaves and Edmund C. Penning-Rowsell, *Flood Risk Management as a Public or a Private Good, and the Implications for Stakeholder Engagement*, 55 ENV’T SCI. & POL’Y 281 (2016); *Water as a Public Good: Pittsburgh’s Our Water Campaign* (Feb. 8, 2022), <https://www.demos.org/research/water-public-good-pittsburghs-our-water-campaign>.

## H. Felipe Jardim and Co-Authors

Felipe Jardim is a Ph.D. candidate at the State University of Rio de Janeiro in Brazil and at the Sociology Institute of the Friedrich-Schiller Universität in Jena, Germany. His paper is a collaborative project, that lists four authors as contributing – Mr. Jardim of course, but also three other collaborators at two institutions in Rio de Janeiro and one in Jena. Jardim's contribution to the Symposium represents an important comparative perspective to the concept of public goods. He writes about the nation of Brazil, the largest and most populated country of Latin America,<sup>57</sup> and an important participant in the global order.<sup>58</sup>

Jardim's particular focus is the operation of urban gardens in the City of Rio de Janeiro. Food, Jardim well recognizes, is a fundamental human right.<sup>59</sup> And he acknowledges that access to a predictable and adequate supply of food is a gateway to the realization of other important human rights, such as good health and dignity. He also knows that “deforestation for the purpose of adding more land dedicated to agricultural use” is “unsustainable.”

This is therefore the context in which Rio de Janeiro launched its Hortas Cariocas – its urban garden – project. Jardim identifies a number of social problems the gardens are attempting to solve. Food quality and nutritional standards are enhanced. Food insecurity is reduced. Land that otherwise might not be put to productive use is transformed into fruitful, fecund, high-yielding gardens.<sup>60</sup> And the gardens have proven to be

---

<sup>57</sup> Uwe P. Gielen & Oksana Chumachenko, *All the World's Children: The Impact of Global Demographic Trends and Economic Disparities*, in CHILDHOOD AND ADOLESCENCE: CROSS-CULTURAL PERSPECTIVES AND APPLICATIONS 81, 86 (Jaipaul Roopnarine ed., Praeger, Westport, 2004).

<sup>58</sup> Luis L. Schenoni & Diego Leiva, *Dual Hegemony: Brazil Between the United States and China*, in HEGEMONIC TRANSITION: GLOBAL ECONOMIC AND SECURITY ORDERS IN THE AGE OF TRUMP 233, 233-255 (Florian Böller & Welf Werner eds., Cham, Switzerland, 2021).

<sup>59</sup> Sandra Raponi, *A Defense of the Human Right to Adequate Food*, 23 RES PUBLICA 99 (2017) (“While a common assumption is that the right to adequate food means a right to be fed, it is primarily a right to feed oneself and to have access to food”). *Id.* at 102. Cf. Andhressa Fagundes, et al., *Public Infrastructure for Food and Nutrition Security in Brazil: Fulfilling the Constitutional Commitment to the Human Right to Adequate Food*, 14 FOOD SECURITY 897 (2022) (reviewing Brazilian efforts to meet this essential human need).

<sup>60</sup> Natália Sant'Anna de Medeiros, et al., *Diverse Food In Urban Gardens in the Promotion of Food and Nutrition Security in Brazil: A Review*, 100 J. SCI. FOOD

successful.<sup>61</sup> Thus we find that “[t]he city of Rio de Janeiro is working with local favelas to build what organizers say will be the biggest urban garden in the world.”<sup>62</sup>

Felipe Jardim, in other words, has produced an important paper on a food production practice that can be emulated in other places. Like Brazil, the United States has its own problems with food deserts<sup>63</sup> and lack of access to quality nutrition.<sup>64</sup> If comparative law is the study of a diverse range of solutions to problems that are common to an extensive range of legal orders, then Jardim’s research should have wide applicability. Food must be seen as a basic human right, since without food other human rights lose their meaning. Food is therefore also a public good. And Felipe Jardim has drawn an excellent roadmap that should be scalable to other societies and contexts.

### I. Patrick A. Parenteau

Patrick Parenteau is Professor of Law Emeritus at the Vermont Law School, and Senior Fellow for Climate Policy. He has written extensively on environmental issues since the 1970s. His article “Regulation of Nuclear Power Plants,” published in 1976, remains significant today.<sup>65</sup> In “Small Handles, Big Impact,” Professor Parenteau made the case that NEPA – the National Environmental Policy Act – should be broadly construed to reach a wide range of actions implicating federal involvement.<sup>66</sup> In “Everything You Need to Know About Environmental Law, You Learned in Kindergarten,” he authored an important article intended to introduce non-specialists to the

---

AGRIC. 1383 (2020).

<sup>61</sup> Sebastian Rocandio, *Urban garden in Rio feeds hundreds of families in former ‘crackland,’* REUTERS (Dec. 6, 2021), <https://www.reuters.com/markets/commodities/urban-garden-rio-feeds-hundreds-families-former-crackland-2021-12-05/>.

<sup>62</sup> Leda Alvim, *Brazil Set to Build the World’s Biggest Urban Garden by 2024*, BLOOMBERG (Aug. 21, 2022), <https://www.bloomberg.com/news/articles/2022-08-21/rio-de-janeiro-brazil-set-to-build-world-s-largest-urban-garden>.

<sup>63</sup> Dymond Green, *Why food deserts are still a problem in america*, CNBC (Aug. 20, 2020), <https://www.cnbc.com/2020/08/20/trader-joes-kroger-walmart-supervalu-and-americas-food-deserts.html>.

<sup>64</sup> Tara O’Neill Hayes & Rakeb Asres, *The Economic Costs of Poor Nutrition*, AM. ACTION FORUM (Mar. 9, 2022), <https://www.americanactionforum.org/research/the-economic-costs-of-poor-nutrition/>.

<sup>65</sup> Patrick A. Parenteau, *Regulation of Nuclear Power Plants: A Constitutional Dilemma for the States*, 6 ENV’T L. 675 (1976).

<sup>66</sup> Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?*, 20 ENV’T L. 747 (1990).



essential principles of environmental law.<sup>67</sup> In “Citizen Suits Under the Endangered Species Act,” he examined the range of enforcement possibilities under that federal statute.<sup>68</sup> His “Bug Eye’s View of the Sixth Extinction” explored the consequences of a “rate of human-caused extinctions . . . hundreds or thousands of times the natural rate.”<sup>69</sup> And in “My Own Private Idaho Wetland,” Professor Parenteau anticipates the Supreme Court decision in Sackett v. Environmental Protection,<sup>70</sup> for which certiorari was granted for the 2022/2023 Supreme Court term.<sup>71</sup>

In his contribution to the Symposium, Professor Parenteau builds on the insight of Sir Nicholas Stern that climate change represents the “greatest market failure the world has seen.”<sup>72</sup> At the heart of climate change, of course, is the release of environmentally damaging quantities of carbon and other greenhouse gases into the atmosphere. How, therefore, to protect the atmosphere?

Professor Parenteau explores several potential legal mechanisms that could serve this protective purpose. First, he looks to the Public Trust Doctrine, which has deep historical roots in American legal thought.<sup>73</sup> He finds encouraging steps recently taken by the Pennsylvania Supreme Court,<sup>74</sup> and proposes that cases decided by that Court “provide an elegant framework for examining how the general law of trusts can be applied to natural resource conservation.” Regrettably, he points out, most courts have been reluctant to extend the public trust doctrine to cases involving the atmosphere. Litigants, however, have enjoyed greater success in European courts, winning victories in both the Netherlands and Germany.

---

<sup>67</sup> Patrick A. Parenteau, *Everything You Learned About Environmental Law, You Learned in Kindergarten*, 23 ENV’T L. 223 (1993).

<sup>68</sup> Patrick A. Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321 (2004).

<sup>69</sup> Patrick A. Parenteau, *A Bug Eye’s View of the Sixth Extinction*, 36 ENV’T FORUM 57, 57 (2019).

<sup>70</sup> *Sackett v. U.S. Environmental Protection Agency*, 8 F.4th 1075 (9th Cir. 2021) (cert. granted, 142 S.Ct. 896 (2022)).

<sup>71</sup> Patrick A. Parenteau, *My Own Private Idaho Wetland: What Will the Supreme Court Do in the Sackett Case?*, 52 ENV’T L. 373 (2022).

<sup>72</sup> Alison Benjamin, *Stern: Climate change a ‘market failure,’* THE GUARDIAN (Nov. 29, 2007), <https://www.theguardian.com/environment/2007/nov/29/climatechange.carbonemissions>.

<sup>73</sup> *See, for instance*, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

<sup>74</sup> *See Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (affirmed and broadened, *Robinson Township v. Commonwealth*, 637 Pa. 239 (Pa. 2016)).

He closes with an appeal to the social responsibility of major corporations and writes in conclusion: “A stable climate is clearly a global public good, and so is the conservation of the earth’s endangered biological diversity.” And he adds, more ominously: “Environmental law in the United States is outdated, moribund, and incapable of dealing with these profoundly wicked problems.” Professor Parenteau has written an article that makes for timely and compelling reading. One hopes that his voice is heeded.

#### J. Lucas Clover Alcolea

Dr. Lucas Clover Alcolea is a lecturer in law at the University of Otago, in New Zealand. He has his law degree from the University of Aberdeen and an L.L.M. from the University of Edinburgh. He earned his D.C.L. – doctorate in civil law – from McGill University, in Montreal, Quebec.

In 2022, he published an important book entitled The Arbitration of Trust Disputes.<sup>75</sup> Disputed trusts have not traditionally been subject to arbitration, and, in fact, there are seeming barriers to such procedures found within the common law, which Alcolea is well aware of. How, for instance, to secure the agreement of all of the relevant parties – “the trustee, the settlor, the beneficiaries, any protectors and enforcers” – to be bound by the results of arbitration?<sup>76</sup> How does one “ensure that unborn, minor, incapable and unascertained beneficiaries are represented[?]”<sup>77</sup> Dr. Alcolea navigates his way expertly through these and a number of other challenging questions involving the pitfalls and possibilities of relying on arbitration to resolve controversies over trusts. Additionally, Dr. Alcolea has written an important series of articles on topics such as “The Rise of the International Commercial Court”<sup>78</sup> and “Arbitration and the Right to Have Your Day in Court.”<sup>79</sup>

His contribution to the Symposium, however, deals neither with the intricacies of trust law or with arbitration, but with some of the most serious questions of jurisprudence: what is property? Where does it come from? What objectives does it serve? And, crucially for our purposes, what claims

---

<sup>75</sup> LUCAS CLOVER ALCOLEA, *ARBITRATION OF TRUST DISPUTES* (2022).

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 5.

<sup>78</sup> Lucas Clover Alcolea, *The Rise of the International Commercial Court: A Threat to the Rule of Law?*, 13 J. INT’L DISPUTE SETTLEMENT 413 (2022).

<sup>79</sup> Lucas Clover Alcolea, *Arbitration and the Right to Have Your Day in Court: Meeting Again at the Turning of the Tide*, 22 PEPP. DISPUTE RESOLUTION L. J. 539 (2022).

can the public make on private property?

Dr. Alcolea chooses to answer these questions by a learned excursion through the western legal tradition. Two branches of this tradition are of particular interest to his investigation. First, there is the scholastic tradition, represented by the great medieval and early modern philosophers – Thomas Aquinas, William of Ockham, Duns Scotus, Domingo de Soto, Francisco Suarez, and others. The second avenue Dr. Alcolea explores is that of the common law of property in all of its glorious obscurity and impenetrability.

From the medieval and early modern scholastics, Dr. Alcolea takes several lessons: in that time of grace before Adam and Eve committed their grave, disqualifying sin, there was no property. All was held in common. Private property was a product of sin, of the fall from grace, it was an accommodation made in the recognition that human beings might behave even more badly if it did not exist. In the end, Dr. Alcolea concludes that, yes, property was a natural right, in that it was grounded in the character of the human person and in the person's need for self-preservation. But even as a natural right, property was not an absolute human good. Human beings might own property, but never completely. God always had final claim on property. And, furthermore, in time of necessity, property might be deemed common to all, thus permitting the poor to claim a share of the property of the wealthy.<sup>80</sup>

If that was the teaching of the scholastic tradition, then the common law also had its share of qualifications and restrictions on the institution of property. Dr. Alcolea distinguishes between the Anglo-Saxon and Anglo-Norman systems of land tenure, noting that the old Saxon institution of allodial title – land that was “wholly independent, and held of no superior”<sup>81</sup> – had been practically abolished by the Normans. All interests in property henceforward were traceable in some form or another to the Crown. Again, consequences followed upon this conception of property. Where a landholder died without heirs, the land escheated – it returned – to the sovereign power. And where the sovereign has identified some great public good that possession of one's estate might serve, then it might make appropriate compensation and take that property under the theory of eminent domain. For support, Dr. Alcolea cites the case of Matter of New York City Housing

---

<sup>80</sup> See, for instance, Matthew Philipp Whelan, “A Shadowy Sort of Right:” *The Ius Necessitatis and Catholic Moral Theology*, 11 J. MORAL THEOLOGY 7, 13 (2022) (“property is common because social claims always inhere to it”). *Id.*

<sup>81</sup> ARTHUR BROWNE, 1 A COMPENDIOUS VIEW OF THE CIVIL LAW 187-88 (Halsted & Voorhies, N.Y., 1840).

Authority v. Muller: “The people still own the land with a power to take it back upon payment of just compensation if the taking back is for the use of the people.”<sup>82</sup>

Dr. Alcolea uses this historical investigation as a foundation first to criticize the Supreme Court’s decision in Cedar Point Nursery v. Hassid that restricted access by union organizers to private property as not only likely to spawn confusion but also as incompatible with the long and rich tradition of property as it has been understood in the western tradition.<sup>83</sup> On the other hand, Dr. Alcolea finds that contemporary land-use regulation goes too far in the restrictions it imposes on the use and enjoyment of real property. Reviewing these many limitations, Dr. Alcolea laments that the freedom to use property as one sees fit, “surely lie[s] in tatters.” Thus property is simultaneously a natural right that confers on property owners the security of use and enjoyment; but the use of this right is never absolute, in that it is always at least potentially limited by large, supervening public interests.

In the end, Dr. Alcolea is trying to thread a needle, and he does so masterfully. On the one hand, he wants to make the case that private property is a natural right, that it is essential to the human person, but that ownership should never be viewed in absolutist terms. On the other hand, he wishes to reject the proposition that property is a “socially derived right” whose extent, and whose very existence is premised merely on shifting social conventions, temporary expedients, and provisional arrangements. What do these findings mean for a Symposium dedicated to the question of public goods? First, property serves the public interest when its owners use it wisely and well. But, in the final analysis, in moments of pressing need, the state might, in the name of the common good, also make just claim on its title.

#### K. Jennifer Haskin Will

Jennifer Haskin Will is a graduate of Hope College and of the University of Michigan School of Law. After a long period of legal practice, she joined the faculty of the Hamline University Department of Legal Studies as Assistant Professor. In her article “Following in the Footsteps of Fair Pay,” Professor Will begins with the premise that “[o]ppressive work hours are the norm for many salaried office workers in the United States today,”<sup>84</sup> and she

---

<sup>82</sup> *Matter of New York City Housing Authority v. Muller*, 155 Misc. 681, 681 (1935).

<sup>83</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

<sup>84</sup> Jennifer Haskin Will, *Following in the Footsteps of Fair Pay: The Case for Exempt ‘Time Transparency’ and the Mandatory Disclosure of White-Collar Work*

goes on to propose legislative remedies to ameliorate these burdensome conditions.

Professor Will's contribution to the Symposium builds upon this prior article. She makes the case that the Fair Labor Standards Act of 1938 – the statute which mandated the forty-hour work week – is in need of amendment. It is “a relic of the Industrial Age and it is ill-suited for the mental labor performed by digital service workers in the Information Age.”

Professor Will's article makes several interrelated points. First, the nature of work has changed, at least for many persons. Work in the Information Age – at least for a large number of persons – is not repetitive or rote, but cognitive and collaborative. Second, the social context of work has changed. Family and Medical Leave statutes have created a more flexible workplace, and the demands of modern life have added even further layers of complexity. Third, technology has increasingly made it possible to perform effectively from remote locations. No longer are employees tethered tightly to desks and cubicles. They can literally “phone it in,” and this is actually a good thing. Indeed, the flowering of remote work in response to the COVID-19 emergency has proven the success of distance work.

These three developments, Professor Will argues, should lead us to a reconceptualization of the Fair Labor Standards Act, at least where white-collar employees are concerned. She argues that if “remote-ready workers are already widely expected to work outside of so-called office hours, they should not be beholden to keep regular office hours, too.” She seeks a statutory amendment to the FLSA that “make[s] scheduling freedom a condition of white-collar exemption, restricting employers from setting required hours of work for this cohort.”

Important to Professor Will's essay is that word “exemption,” quoted above. White-collar workers are known as “exempt” workers. Employers do not need to extend to white-collar workers the protections the FLSA gives to other classes of employees. But implicit in this exemption is the possibility of exploitation. And, Professor Will indicates, the American workplace is rife with exploitation. She builds a strong case for a reform of the law to address what can fairly be described in many instances as oppressive working conditions.<sup>85</sup>

---

*Hours*, 20 GEO. J. L. & PUB. POL'Y 671, 671 (2022).

<sup>85</sup> See, for instance, Ashley M. Rothe, *Blackberries and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Protection?*, 54 ST. LOUIS UNIV. L. J. 709, 711 (2010) (describing the “sweatshop” conditions of white-collar employment lacking fixed office-hours);

In addition to creating a fairer, more equitable workplace, Professor Will emphasizes that her proposed reforms would accomplish a second important social goal. And that is the restoration of work/life balance which has in too many cases been lost by the round-the-clock work pressures of the modern electronic workplace. Her argument echoes and amplifies the case made by other contributors to this Symposium that “soft infrastructure” – the emotional and physical well-being of employees – is crucial not only a personal level, but on a societal level because productivity and performance is thereby enhanced.<sup>86</sup>

L. Charles J. Reid, Jr.

Finally, mention must be made of the contribution of Professor Charles J. Reid, Jr. His article “Hamiltonian Constitutionalism Through the Ages: In Defense of Public Goods,” is the second article he has written on Hamilton. In “America’s First Great Constitutional Crisis: Alexander Hamilton’s Bank of the United States,” Professor Reid investigated the constitutional debate surrounding the creation of the First Bank of the United States.<sup>87</sup> In “Hamiltonian Constitutionalism,” Professor Reid continues his examination of Alexander Hamilton’s contributions to both the constitutional and commercial history of the United States. The Article is intended as an exploration of Hamilton’s Report on Manufactures. It looks at the principal intellectual opposition Hamilton encountered in his proposal to build an American industrial powerhouse; the main arguments he advanced in his

---

Michael Cicala, *Equalizing Workers in Ties and Coveralls: Removal of the White-Collar Exemption to the Fair Labor Standards Act*, 27 SETON HALL LEGIS. J. 139, 140 (2002) (“The white-collar class does not get the benefit of overtime pay and workweek limitations that their blue-collar counterparts do. Regardless, both blue and white-collar workers now share common concerns for job security and satisfaction”).

<sup>86</sup> See, for instance, Yodit Stanton, *Reorganising workspace post COVID19*, OPEN SENSORS (May, 2020), <https://www.opensensors.com/blog/reorganising-workspace-post-covid19>; Joe Bankoff, *The Innovation Wars: The Competition Between America and China*, CHINA RSCH CTR. (Mar. 31, 2022), [https://www.chinacenter.net/2022/china\\_currents/21-1/the-innovation-wars-the-competition-between-america-and-china/](https://www.chinacenter.net/2022/china_currents/21-1/the-innovation-wars-the-competition-between-america-and-china/); Trevor Hancock, *Building healthy communities – the social dimension*, HEALTHYDEBATE (Nov. 18, 2020), <https://healthydebate.ca/2020/11/topic/building-healthy-communities/>

<sup>87</sup> Charles J. Reid, Jr., *America’s First Great Constitutional Controversy: Alexander Hamilton’s Bank of the United States*, 14 UNIV. ST. THOMAS L. J. 105 (2018).

Report; and the two-centuries long story of the reception of that Report by generations of American policy-makers, historians, and academic lawyers.