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University of Texas at Austin
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Academic Positions

University of Texas at Austin

Dean	2006–2011
Alice Jane Drysdale Sheffield Regents Chair in Law	2002–

University of California at Los Angeles

Distinguished Visitor in Law and Philosophy	2016—
Acting Professor of Law	1968–1971
Assistant Professor of Law	1966–1968

New York University

Robert B. McKay Professor of Law	1995–2002
Professor of Law	1974–1995
Associate Professor of Law	1972–1974

Visiting Appointments

Boston University
Harvard University
Rice University
University of Mich.
Princeton University

Publications

Books

Religious Freedom and the Constitution (Cambridge, MA: Harvard University Press, 2007)
(with Christopher L. Eisgruber).

Justice in Plainclothes: A Theory of American Constitutional Practice (New Haven: Yale University Press, 2004)

Book Chapters

Forthcoming: *Religious Freedom: A Moral Theory of Mandatory Exemptions*, in
Discrimination for and Against Religion (Oxford Univ, Press 2025, Laborde,

Schwartzman & Tebbe, eds.)(with Mark Greenberg).

Forthcoming: *Excuse Me, Hercules: The Legal Status of Imperfect Constitutional Duties*, in Interpretivism and Its Critics, (Bloomsbury-Hart 2024, Stavropoulos, ed.)

Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate, in The Rise of Corporate Religious Liberty, (Oxford Univ. Press 2017, Schwartzman, Flanders & Robinson, eds.)

Putting Law in Its Place, in The Legacy of Ronald Dworkin (Oxford Univ. Press, 2017).

When Churches Discriminate: Dyadic and Group Associational Rights, in Religions, Rights, and Institutions, (Princeton Univ. Press, 2017).

Equal Membership, Religious Freedom, and the Idea of a Homeland, in *Religion and the Discourse of Human Rights* 25 (ed. Hanoch Dagan, Shahar Lifshitz & Yedida Stern, Israel Democracy Institute 2014) (with Christopher L. Eisgruber).

Constitutional Courts, Social Rights, and the Collaborative Space Between Meaning and Doctrine (Cortes constitucionales, derechos sociales y el "spacio de colaboracion" entro el significado y la doctrina), in *Dioalogos constitucionales de Colombia Constitution el mundo* (Universidad Externado di Colombia 2013).

Just Lotteries, in *Lotteries in Public Life* (ed. Peter Stone, Imprint Academic 2011) (with Lewis Kornhauser),

The Moral Economy of Religious Freedom, in *Law and Religion in Theoretical and Historical Context* 16 (Peter Cane, Carolyn Evans & Zoë Robinson eds.; Cambridge, UK; New York: Cambridge Univ. Press, 2008).

Civil Liberties in the Dragons' Domain: Negotiating the Blurred Boundary between Domestic Law and Foreign Affairs after 9/11 in *September 11 in History: A Watershed Moment?* 163 (Mary Dudziak, ed.; Durham, North Carolina: Duke University Press, 2003) (with C. Eisgruber).

Free Exercise of Culture: Some Doubts and Distinctions in *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* 165 (R. Schweder, H. Markus, & M. Minnow, eds.; New York: The Russell Sage Foundation, 2002) (modification of prior essay in *Daedalus*).

The Birth Logic of a Democratic Constitution in Constitutional Culture and Democratic Rule 110 (J. Ferejohn, J. Rakove & J. Riley, eds.; New York, NY: Cambridge Univ.

Press, 2001).

Equal Regard in Law and Religion: A Critical Anthology 200 (S. Feldman, ed.; New York: New York Univ. Press, 2001) (with C. Eisgruber).

Good Constitutions and Bad Choices in Constitutional Stupidities and Constitutional Tragedies 147 (W. Eskridge & S. Levinson, eds.; New York: New York Univ. Press, 1998) (with C. Eisgruber).

The Domain of Constitutional Justice in Constitutionalism: Philosophical Foundations 235 (L. Alexander, ed.; New York: Cambridge Univ. Press 1998)

The Source and Limits of Legal Authority in Fundamentals of American Law 27 (Alan B. Morrison, ed.; New York: Oxford University Press, 1996).

Federal Jurisdiction and Congressional Power in Encyclopedia of the American Constitution (1991-92 supp.) (Leonard W. Levy, ed.; New York: Macmillan Pub. Co., 1992).

Troubled Waters: Litigation in the Federal Courts Against Exclusionary Land Use Restraints, in Exclusionary Land Use Litigation: Policy and Strategies For the Future 20 (Washington, D.C.: National Committee Against Discrimination in Housing, 1975).

Articles

Forthcoming: Defending Religious Equality, Journal of Law and Religion (2025)(with Mark Greenberg).

Salvaging Tandon, 31 Widener L.Rev. 1 (2025)(with Nelson Tebbe).

Discriminatory Permissions and Structural Injustice, 106 Minnesota L.Rev.803 (2021)

Our Lady of Guadalupe v.Morrissey, Oral Argument 2.0 (Oyez 2020).

The Reality Principle, 2019 Constitutional Commentary. 1168. (With Nelson Tebbe)

In the Name of God: Structural Injustice and Religious Faith, the Childress Memorial Lecture, 60 St. Louis Law Review 585 (2016).

Congress's Authority to Enact the Violence Against Women Act: One More Pass at the Missing Argument, 121 Yale Law Journal Online 629 (2012).

Material Rights, Underenforcement, and the Adjudication Thesis, [Symposium: Justice for Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book], 90 Boston University Law Review 579 (2010).

Our Hero, 89 Texas Law Review 9 (2010).

Does it Matter What Religion is? [Symposium: The Supreme Court's Hands-Off Approach to Religious Doctrine], 84 Notre Dame Law Review 807 (2009) (with Christopher L. Eisgruber).

Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle, 85 Texas Law Review 1273 (2007) (with Christopher L. Eisgruber).

Cool Federalism and the Life-Cycle of Moral Progress [Symposium: Dual Enforcement of Constitutional Norms], 46 William & Mary Law Review 1385 (2005).

Courting Disaster [Symposium: Theories of Taking the Constitution Seriously Outside the Courts], 73 Fordham Law Review 1361 (2005).

The Why of Constitutional Essentials [Symposium: Rawls and the Law], 72 Fordham Law Review 1421 (2004).

Comparative Avenues in Constitutional Law: An Introduction [Symposium: Comparative Avenues in Constitutional Law], 82 Texas Law Review 1653 (2004) (with William E. Forbath).

The Many As One: Integrity and Group Choice in Paradoxical Cases, 32 Philosophy & Public Affairs 249 (2004) (with L. Kornhauser).

Commitment and Constitutionalism [Symposium: Precommitment Theory In Bioethics and Constitutional Law], 81 Texas Law Review 1929 (2003) (with J. Ferejohn).

Constitutional Justice, 6 New York University Journal of Legislation & Public Policy 11 (2002-2003).

Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan [Symposium: The Brennan Center Jorde Symposium on Constitutional Law], 90 California Law Review 819 (2002).

Thin Constitutions and the Good Society [Symposium: The Constitution and the Good

Society: The Constitution Outside the Courts and the Pursuit of a Good Society], 69 Fordham Law Review 1989 (2001).

The Free Exercise of Culture: Doubts and Distinctions, 149 Daedalus 193 (2000).

Religious Liberty and the Moral Structure of Constitutional Rights, 6 Legal Theory 253 (2000) (with C. Eisgruber).

A Letter to the Supreme Court Regarding the Missing Argument in *Brzonzkala v. Morrison*, 75 New York University Law Review 150 (2000).

Impeachment and Constitutional Structure, 5 Widener Law Symposium Journal 249 (2000) (with C. Eisgruber).

Punishing The President: The Use and Abuse of Impeachment, 1 Punishment & Society 223 (1999) (with C. Eisgruber).

Forgetting and Advancing the Religious Liberty Vision of Justice Brennan [Symposium: The Domain of Constitutional Justice], 43 New York University Law Review 101 (1999).

Contemporary Challenges Facing the First Amendment's Religion Clauses [Symposium: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.], 43 New York School Law Review 101 (1999) (with Todd Rakoff, Steven Green & Martha Minow).

Special Exemptions? A Compelling Case Against 'Compelling State Interest'?, 93 Liberty 10 (November/December 1998).

Congress As Partner/Congress As Adversary [Symposium: Reviving the Structural Constitution--Symposium on Law and Public Policy-1998], 22 Harvard Journal of Law & Public Policy 85 (1998).

Klein's First Principle: A Proposed Solution [Symposium: Congress and the Courts: Jurisdiction and Remedies], 86 Georgetown Law Journal 2525 (1998).

Protecting Without Favoring Religiously Motivated Conduct, 2 Nexus 103 (1997) (with Eisgruber).

Congressional Power and Religious Liberty After *City of Boerne v. Flores*, 1997 Supreme Court Review 79 (with C. Eisgruber).

The Betrayal of Judgment [Symposium: Fidelity in Constitutional Theory], 65 Fordham Law Review 1545 (1997).

The Dead Hand and Constitutional Amendment [Federalist Society Symposium: Originalism, Democracy and the Constitution], 19 Harvard Journal of Law & Public Policy 275 (1996).

The Vulnerability of Conscience: the Constitutional Basis for Protecting Religious

Liberty, 61 University of Chicago Law Review 1245 (1994) (with C. Eisgruber).

Why the Religious Freedom Restoration Act is Unconstitutional, 69 New York University Law Review 437 (1994) (with C. Eisgruber).

The One and the Many: Adjudication in Collegial Courts, 81 California Law Review 1 (1993) (with L. Kornhauser).

Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law [Symposium: One Hundred Years of Judicial Review: The Thayer Centennial Symposium], 88 Northwestern University Law Review 410 (1993).

The Incorrigible Constitution, 65 New York University Law Review 893 (1990).

Righting Rights [Symposium: Hegel and Legal Theory], 10 Cardozo Law Review 1311 (1989).

Just Lotteries, 27 Social Science Information 483 (1988) (with L. Kornhauser).

You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment? [Symposium: Interpreting the Ninth Amendment], 64 Chicago-Kent Law Review 239 (1988).

Unpacking the Court, 96 Yale Law Journal 82 (1986) (with L. Kornhauser).

Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law [Symposium: The Emergence of State Constitutional Law], 63 Texas Law Review 959 (1985).

Some Observations About Race, Sex and Equal Protection, 59 Tulane Law Review 928 (1985).

Rights Skepticism and Process-Based Responses, 56 New York Law Review 417 (1981).

Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harvard Law Review 17 (1981).

Pareto Superiority, Consent, and Justice, 8 Hofstra Law Review 913 (1980).

Property Rights and the Constitution, XXII Nomos 376 (1980).

Questions I Wish I Had Never Asked: The Burger Court and Exclusionary Zoning, 11 Southwestern Law Review 509 (1979).

Insular Majorities Unabated: *Warth v. Seldin* and *Eastlake v. Forest City Enterprises*, 91 Harvard Law Review 1373 (1978).

Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harvard Law Review 1212 (1978).

The ALI Model Land Development Code, a Critique, 29 Land Use Law & Zoning Digest 7 (1977).

Brief for Constitutional Lawyers' Committee on Undeclared War as Amicus Curia, *Massachusetts v. Laird*, 17 Wayne Law Review 67 (1976),

Burnt Bridges: The Retreat of the Federal Judiciary From Land Use Litigation, 27 Land

Use Law & Zoning Digest 7 (1976).

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Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stanford Law Review 767 (1969).

Reviews

Unthinking Religious Liberty, 74 Texas Law Review 577 (1996) (reviewing Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses, by Jesse

H. Choper; and Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom, by Steven D. Smith) (with C. Eisgruber).

Memoirs of a General in the Inglorious Revolution, 90 Michigan Law Review 1203 (1992) (reviewing Order and Law: Aging the Regan Revolution: A First-Hand Account, by Charles Fried).

Back to Bork, New York Review of Books, Oct. 25, 1990, at 16.

What's a Nice Court Like You Doing In a Democracy Like This?, 36 Stanford Law Review 1087 (1984) (reviewing The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary, by Michael J. Perry).

The Shortcut to Outlaw Abortion, New York Review of Books, June 25, 1981, at 11.

Constitutional Triage, 81 Columbia Law Review 707 (1981) (reviewing Judicial Review and the National Political Process, by Jesse H. Choper).

Education

<u>Columbia University</u> LL.B.	1966
Magna Cum Laude	
Law Review	

<u>Pomona College</u> B.A.	1963
Distinguished Alumni Award	