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### **"Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in Town of Greece v. Galloway"**

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It is difficult to analyze a Supreme Court decision that is as fundamentally misguided and unpersuasive as last term's decision in *Town of Greece v. Galloway*, the case upholding state-sponsored prayers before town board meetings. In attempting to do so in this article, I critically evaluate the Court's repeated failures to adequately address the serious religious equality and religious liberty issues presented in this case. With regard to religious equality concerns, for example, the Court all but completely ignores the town's discrimination in favor of established organized churches and against minorities with too few adherents to organize a congregation in the town, nonaffiliated spiritual residents of the community, and nonreligious residents. Even worse, the Court suggests that allowing low level functionaries to develop informal and imprecise criteria to determine who should be invited to offer prayers at board meetings without adopting a policy or providing any guidance on how these decisions should be reached somehow immunizes the town from serious constitutional scrutiny. Instead, I argue that this lack of guidelines and policy itself should be understood to violate the First Amendment because it so obviously increases the risk of biased and discriminatory conduct.

The Court's discussion of plaintiffs' religious liberty concerns is even more untenable. Plaintiffs argued that if a government official or deliberative body has the discretionary authority to make decisions that will seriously impact the needs and interests of individuals or small groups of citizens, it is intrinsically coercive for those officials to ask these citizens to engage in a religious exercise such as a prayer before they submit their arguments or petitions to government decision-makers. In order to reject these claims, Justice Kennedy describes an understanding of social reality that is difficult to believe and impossible to share. Perhaps most egregiously, Kennedy's analysis treats prayer as if it is some kind of abstract ceremonial activity instead of what it is for most Americans – a personal,

meaningful communication between the individual and G-D.

The article concludes with a discussion of the possible implications of this decision for the constitutional protection of religious liberty and equality in other contexts and circumstances.

## "Formalism versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts that Have Not Resulted in a Conviction"

*UC Davis Legal Studies Research Paper No. 396*

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In the adversary system, a litigant not only has the right to present evidence supporting his or her theory of the case; the litigant is also entitled to attack the opposing testimony. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Supreme Court held that under the Sixth Amendment, the accused has a constitutional right to attack the weight and credibility of opposing testimony.

There are two ways in which the litigant can mount such an attack. First, the litigant may cross-examine the opposing witness. Second, the litigant can present "extrinsic evidence" of the impeaching facts: After the witness to be impeached has left the stand, the litigant may present documentary or testimonial evidence to prove the impeaching fact. Of course, if the witness to be impeached fully concedes the impeaching fact on cross-examination, there is no need for the litigant to resort to extrinsic evidence.

However, problems arise when, during cross-examination, the witness denies the impeaching fact. As a generalization, when the witness does so, the litigant may introduce extrinsic evidence to establish the impeaching fact. Thus, if the witness denies that she is biased against the cross-examiner's client, the litigant may call another witness to prove the witness's conduct evidencing the bias. Similarly, if the witness refuses to concede that he has suffered a felony conviction, the litigant may later introduce a certified copy of the conviction. Likewise, the litigant may sometimes employ extrinsic evidence when the litigant relies on prior inconsistent statement or specific contradiction impeachment.

There is, though, one notable exception to this generalization. Restyled Federal Rule of Evidence 608(b) permits the litigant to cross-examine a witness about a witness's prior untruthful acts that have not resulted in a conviction. However, the text of Rule 608(b) prohibits the litigant from introducing "extrinsic evidence...to prove specific instances of a witness's conduct in order to attack...the witness's character for truthfulness." In its 2014 decision in *Nevada v. Jackson*, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2014) the Supreme Court not only noted that prohibition; in dictum, the Court added that "[t]he constitutional propriety of this rule cannot be seriously disputed." *Id.* at 1993, 186 L.Ed.2d 67.

Although the Supreme Court evidently does not have substantial doubts about the constitutionality of the prohibition, many lower courts entertain serious misgivings about the wisdom of the prohibition. Three lines of authority have emerged. In some jurisdictions, the litigant may at least confront the witness with documentary proof of an untruthful act when the witness himself or herself would be competent to authenticate the document. In other jurisdictions, the litigant may introduce extrinsic evidence when the evidence takes the form of a formal judicial finding that on a prior occasion the witness gave untruthful testimony. In still other jurisdictions, in sexual assault cases the accused may cross-examine the complainant about prior false rape accusations; and if the complainant denies the falsity of the prior complaints, the accused may introduce extrinsic evidence.

The thesis of this article is that the lower courts' misgivings about the wisdom of Rule 608(b)'s absolute ban on extrinsic evidence are sound. It is true that formally, proof of another untruthful act by the witness is "collateral" in the sense that it relates only to the witness's credibility. However, as a practical matter in a given case a showing of such an act may have far more probative value for impeachment than proof of a prior inconsistent statement or specific contradiction. Moreover, the ban can serve as a virtual invitation to perjury. Many witnesses will realize that a subsequent perjury prosecution is only a remote possibility. Worse still, a sophisticated witness may appreciate that there is no civil liability for perjurious testimony.

After critiquing the absolute ban codified in Rule 608(b), the article proposes an amendment to the rule. The article notes that the three lines of authority diverging from the ban all rely on considerations cognizable under Federal Rule 403's balancing test: minimal expenditure of court time, strong proof of the witness's commission of the untruthful act, or an acute need for the evidence. The article suggests abolishing Rule 608(b)'s rigid ban and replacing it with a provision modeled after the balancing provisions set out in Rules 403, 412, and 609.

The thrust of this article is that it is unjustifiable to single out Rule 608(b) impeachment for a categorical ban on extrinsic evidence. The stated justification is flawed, and as a practical matter the ban can encourage perjury. If the witness's earlier untruthful act did not result in a conviction, the witness might be emboldened because he "got away with it" once; and a sophisticated witness may reason that as a practical matter there is little risk in lying again. Rule 608(b) ought to be amended to create a disincentive for perjury.

## "Federalism and Family Status"

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The myth of family law's inherent localism is sticky. In the past, it was common to hear sweeping claims about the exclusively local nature of all family matters. In response to persuasive critiques, a narrower iteration of family law localism emerged. The new, refined version acknowledges the existence of some federal family law but contends that certain "core" family law matters — specifically, family status determinations — are inherently local. I call this family status localism. Proponents of family status localism rely on history, asserting that the federal government has always deferred to state family status determinations. Family status localism made its most recent appearance (although surely not its last) in the litigation challenging Section 3 of DOMA.

This Article accomplishes two main goals. The first goal is doctrinal. This Article undermines the resilient myth of family law localism by uncovering a long history of federal family status determinations. Although the federal government often defers to state family status determinations, this Article shows that there are many circumstances in which the federal government instead relies on its own family status definitions.

The second goal of this Article is normative. Having shown that Congress does not categorically lack power over family status determinations, this Article begins a long overdue conversation about whether the federal government should make such determinations. Here, the Article brings family law into the rich, ongoing federalism debate — a debate that, until now, has largely ignored family law matters. In so doing, this Article seeks to break down the deeply-rooted perception that family law is a doctrine unto itself, unaffected by developments in other areas, and unworthy of serious consideration by others.

### "Lessons from the Past for Assessing Energy Technologies for the Future"

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Addressing climate change will require the successful development and implementation of new energy technologies. Such technologies can, however, pose novel and uncertain hazards. Furthermore, the process of energy innovation is technically difficult and occurs in the face of powerful forces hostile to new technologies that disrupt existing energy systems. In short, energy innovation is difficult and hazardous but essential. This Article presents case studies of three existing energy technologies to obtain insights in anticipating technological change, managing uncertain hazards, and designing appropriate laws and policies. The Article then applies these insights to a varied sample of emerging energy technologies. Ultimately, laws and policies should distinguish between new energy technologies according to (1) their state of readiness, (2) their potential to complement or disrupt existing energy infrastructures, and (3) the possible hazards associated with their full-scale deployment.

### "The Return of Noncongruent Equal Protection"

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Contemporary equal protection doctrine touts the principle of congruence: the notion that equal protection means the same thing whether applied to state or to federal laws. The federalism-tinged equal protection analysis at the heart of Justice Kennedy's opinion in *United States v. Windsor*, however, necessarily violates the congruence principle. Commentators and courts — especially those deciding how *Windsor's* federalism should affect the ever-growing number of state same-sex marriage cases — have so far failed to account for *Windsor's* noncongruent equal protection, much less ask whether noncongruence is generally desirable, and if so, what form it should take.

This Article draws answers to those questions from the Supreme Court's alienage discrimination cases, which offer three distinct models of noncongruence, each of which is reflected in *Windsor*. The alienage cases show that instead of applying different levels of scrutiny to federal and state laws, a better understanding of noncongruence would allow different levels of government to assert different interests in defending their laws. By reconstructing and evaluating the ways that structure and rights intersect in the alienage cases, this Article considers for the first time what the return of noncongruent equal protection could mean both for cases that follow *Windsor* and for equal protection doctrine more broadly.

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