

Lewis & Clark Law Review

Volume 25

2021

Number 3

ARTICLES

The Structure of Intermediate Review

R. Randall Kelso.....691

Today, there are two well-established versions of intermediate review: standard intermediate review, used for cases like gender discrimination or content-neutral regulations of speech in a public forum, and a heightened intermediate review standard used for content-based, subject-matter regulations of commercial speech under *Central Hudson*. Yet, in actual use, four other kinds of intermediate review tests have been formulated by the Court in some cases. These four should be viewed as “mutations” of the two kinds of intermediate review proper to apply. This Article discusses both the well-established versions of intermediate review, and the four variations on intermediate review applied by the Court. This Article ultimately argues that the four mutated kinds of intermediate review should be rejected—the first three of these mutated anomalies should adopt standard intermediate review, and the fourth should adopt the established heightened intermediate review of *Central Hudson*.

Dissing Ability

Tory L. Lucas759

People with disabilities have historically endured the horrors of exclusion and elimination because America has incessantly fixated on disability without seeing ability. To correct a disabling view of people with disabilities, this Article prescribes a paradigm shift that permanently redirects the focus from disability to ability. If America achieves this hopeful vision to no longer diss—or disrespect—ability, then people with disabilities will enjoy equal access to equal opportunity.

Tobacco Reborn: The Rise of E-Cigarettes and Regulatory Approaches

Dr. Daniel G. Aaron.....827

This Article examines e-cigarettes, FDA-regulated products which heat nicotine-containing fluid into an aerosol to be breathed into the lungs. Recent data show that e-cigarettes are used by about one-fifth of U.S. high school students. Given that we have, in the Surgeon General’s words, reached an epidemic of youth e-cigarette use, it is worth asking how a product within FDA jurisdiction became a serious threat to 3.6 million youth.

This Article reviews the law surrounding e-cigarettes and the history of FDA’s attempts to regulate them. Administrative law doctrines instruct us that increased presidential control will rein in misbehaving agencies by allowing the people to vote out a president who improperly directs the

administrative state. However, e-cigarettes present a potent counterexample. On multiple occasions, presidential control over FDA stymied essential tobacco regulations by increasing the influence of the tobacco industry over expert agency policymaking. Yet children harmed by these tobacco policies have no right to vote and little political clout with which to advocate for their interests. Ultimately, the emerging approach to regulating e-cigarettes stands in opposition to a looming historical context and a boiling epidemic of nicotine addiction. By painting the context of e-cigarettes in lush detail, drawing from history, law, medicine, and public health, this Article charts a path forward for e-cigarettes and other addicting products.

The Rule of Technology: How Technology Is Used to Disturb Basic Labor Law Protections

Tammy Katsabian.....895

Much has been written on technology and the law. Leading scholars are occupied with the power dynamics between capital, technology, and the law, along with their implications for society and human rights. Alongside that, various labor law scholars focus on the implications of smart technology on employees’ rights throughout the recruitment and employment periods and on workers’ status and rights in the growing phenomenon of platform-based work. This Article aims to contribute to the current scholarship by zooming out and observing from a bird’s-eye view how certain actors use technology to manipulate and challenge basic legal categories in labor today. This is done by referring to legal, sociological, and internet scholarship on the matter.

The main argument elaborated throughout this Article is that digital technology is used to blur and distort many of the basic labor law protections. Because of this, legal categories and rights in the labor field seem to be outdated and need to be adjusted to this new reality.

By providing four detailed examples, the Article unpacks how employers, giant high-tech companies, and society use various forms of technology to constantly disturb legal categories in the labor field regarding time, spheres, and relations. In this way, the Article demonstrates how social media sites, information communication technologies, and artificial intelligence are used to blur the traditional concepts of privacy, working time and place, the employment contract, and community. This increased blurriness and fragility in labor have created many new difficulties that require new ways of thinking about regulation. Therefore, the Article argues that both law and technology have to be modified to cope with the new challenges. Following this, the Article proposes three possible ways in which to start considering the regulation of labor in the digital reality: (1) embrace flexibility as part of the legal order and use it as an interpretive tool and not just as an obstacle; (2) broaden the current legal protection and add a procedural layer to the legal rights at stake; and (3) use technology as part of the solution to the dilemmas that technology itself has emphasized. By doing so, the Article seeks to enable more accurate thinking on law and regulation in the digital reality, particularly in the labor field, as well as in other fields and contexts.

ESSAY

Legislative Redistricting in the Time of COVID

Norman R. Williams953

Due to the COVID pandemic, the U.S. Census Bureau was unable to provide 2020 census data to Oregon in time for the Legislature to engage in redistricting during the 2021 session, as required by the Oregon Constitution. As a result of this delay, the Oregon Legislature asked the Oregon Supreme Court to push back the constitutionally imposed deadlines for redistricting—a request which the Court agreed to in part. This Essay examines the Court’s power to revise constitutionally prescribed deadlines and the extent to which any districting plan must be based on federal census data.

LECTURE

2021 Distinguished International Law Visitor Lecture

East and West, to the Ratline, and Beyond: On Memory and Identity

Philippe Sands981

Each year, Lewis & Clark Law School hosts the Distinguished International Law Visitor Lecture. In 2021, this lecture was given by Philippe Sands, Professor of Public Understanding of Law and Director of the Centre for International Courts and Tribunals at University College London. Professor Sands spoke about the flight of Nazis from Germany to Argentina to avoid prosecution, as well as the origins of the legal concepts of genocide and crimes against humanity.

NOTES & COMMENTS

Matter of Negusie and the Failure of Asylum Law to Recognize Child Soldiers

Ruth Campbell997

In *Matter of Negusie*, Attorney General William Barr struck yet another blow to asylum seekers by rejecting any exception for duress or coercion in applying the “persecutor bar” to immigration relief. Commentators have previously observed that the victims of the “strict-liability persecutor bar” to asylum will often be child soldiers, usually discussed in the context of children fleeing conflicts in parts of Africa and the Middle East. This Comment aims to re-contextualize concern about the availability of asylum for child soldiers as part of an ongoing crisis of children fleeing recruitment by powerful gangs and cartels in Mexico, Honduras, El Salvador, and Guatemala. In so doing, this Comment examines a glaring disparity in conventional understanding of who is a child soldier, questioning why children with strikingly similar experiences may be labeled “child soldiers” on one continent, but “members” of gangs or cartels on another. Part I explores the history and rhetorical power behind the term “child soldier,” situating this discussion within a broader post-colonial framework. Part II explains how children recruited by gangs and cartels fit in to the international legal definition of child soldiers. Part III reviews U.S. international legal commitments to child soldiers and the role *Matter of Negusie* plays in the failure to meet these commitments for children arriving at the U.S. border. Ultimately, this Comment argues that in order for the United States to fulfill its international commitments to child soldiers, it must adopt a duress defense to the persecutor bar to protect children fleeing recruitment by armed groups in Mexico and Central America.

Parents and the Interstate Compact on the Placement of Children: A Flexible Approach

Alex Jones1021

Before an Oregon court can send a child across the Columbia River to live with a Washington foster parent, the authorities on the Washington side must first approve the move. Unless and until that happens, the child stays in Oregon. But what if the Washington “foster” parent is the child’s biological father?

The Interstate Compact on the Placement of Children (ICPC) imposes conditions on the sending of children across state lines to live with foster parents or potential adoptive parents. Courts in different states have long disagreed over whether those conditions ever apply to the placement of children with their own natural parents. This Note discusses the split between the states, past attempts to resolve it, and potential future solutions. The Note concludes that the ICPC should be replaced with a revised compact that is written broadly enough to allow, but not mandate, the application of the compact to natural parents, allowing an interstate commission to adopt binding regulations that specify whether, when, and how the compact applies. Such a compact would provide for both national uniformity and long-term flexibility.