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| *Frederick W. & Vi Miller Professor of Law* *Vilas Distinguished Achievement Professor**University of Wisconsin Law School* *975 Bascom Mall* *Madison, WI 53706* | *email: dsschwartz@wisc.edu*  |

**ACADEMIC EMPLOYMENT**

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| Aug. 1999 – present June 2022-present | **FREDERICK W. & VI MILLER PROFESSOR OF LAW**, and **VILAS DISTINGUISHED ACHIEVEMENT PROFESSOR**, University of Wisconsin Law School, Madison, WI. Assistant Professor, Aug. 1999-July 2005; Associate Professor with tenure, July 2005-Aug. 2008; Professor, Aug. 2008-June 2013; Foley & Lardner-Bascom Professor, July 2013-June 2022.**Visiting Professorships:** Denver University, Sturm College of Law, Spring 2012, Spring 2011. *Subject: Constitutional Law.* Justus-Liebig-Universität Giessen, Germany, summer program, 2005, 2013, 2015. *Subject: The American Jury Trial System*. UCLA School of Law, Fall 2003. *Subjects: Evidence, Remedies*. Adjunct Professor of Law, University of Southern California Law School, Fall 1997; Spring 1999. *Subject: Remedies*. **Editor-in-Chief and Founding Editor,** [**Journal of American Constitutional History**](https://jach.law.wisc.edu/). |

**EDUCATION**

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| 1982-86  | **Yale Law School, J.D., 1986.** Articles Editor, Yale Law Journal.  |
| 1983-86  | **Yale University, M.A., 1986**, Political Science.  |
| 1977-81  | **Yale University, B.A., 1981**, Economics & Political Science. *Magna cum laude,* Distinction in the Major.  |

**TEACHING INTERESTS**

*Current teaching program*: Constitutional Law, Evidence; seminars: “Originalism and its Critics,” “The Constitution in the American Civil War.” *Have also taught*: Civil Procedure, Civil Rights Litigation, Employment Law, Employment Discrimination Law, Remedies, Legal Research and Writing, Conflict of Laws, Trial Advocacy.

**HONORS AND AWARDS**

Vilas Distinguished Achievement Professorship, 2023

Sheldon B. Lubar Distinguished Research Chair in Law, 2018

Classroom Teacher of the Year Award, University of Wisconsin Law Alumni, 2012

Teacher of the Year Award, University of Wisconsin Law Alumni, 2004

University of Wisconsin Distinguished Teaching Award, nominee, 2002

**SCHOLARLY WORKS**

 **In Progress**

*The Myth of Enumeration: Federal Power and the Failure of Originalism* (with Andrew Coan) (forthcoming Oxford University Press, 2025)

 **Books**

The Spirit of The Constitution: John Marshall And The 200-Year Odyssey Of *McCulloch v. Maryland* (Oxford University Press, 2019)

Constitutional Law: a Context and Practice Casebook (with Lori A. Ringhand) (Carolina Academic Press, 3d ed. 2021; 2d. ed., 2017; 1st ed. 2013)

An Analytical Approach to Evidence: Text, Problems & Cases (7th ed. 2021) (with Allen, Pardo and Stein); (6th ed. 2016) (with Allen, Swift, Pardo and Stein); (5th ed. 2011) (with Allen, Kuhns, Swift, and Pardo); (4th ed. 2006) (with Allen, Kuhns and Swift)

 **Articles**

*May 30, 1787*, 103 Texas Law Review Online (forthcoming 2024)

*Is the Constitution of 1787 a White Supremacist Document? Against Essentialism in Constitutional Interpretation*, 33 William and Mary Bill of Rights Journal (forthcoming 2024)

303 Creative *and the High Price of Legal Performance Art,* 39 Constitutional Commentary (forthcoming 2024)

*The Original Meaning of Enumerated Powers* (with Andrew Coan), 109 Iowa Law Review 971 (2024)

*The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 Journal of American Constitutional History 629 (2023)

*Interpreting Ratification* (with Andrew Coan), 1 Journal of American Constitutional History 449 (2023)

*Mr. Madison’s War on the General Welfare Clause*, 56 UC Davis Law Review 887 (2022)

*Framing the Framer: a Comment on Treanor’s Gouverneur Morris as “Dishonest Scrivener*,” 120 Michigan Law Review Online 51 (2022)

*The Committee of Style and the Federalist Constitution*, 70 Buffalo Law Review 781 (2022)

*Reconsidering the Constitution’s Preamble: the Words that Made Us U.S.*, 37 Constitutional Commentary 55 (2022)

*Recovering the Lost General Welfare Clause*, 63 William & Mary Law Review 857 (2022)

*Foreword: The Federalist Constitution* (symposium introduction) (with Jonathan Gienapp, John Mikhail, and Richard Primus), 89 Fordham Law Review 1669 (2021)

*The Other Madison Problem* (with John Mikhail), 89 Fordham Law Review 2033 (2021)

*McCulloch v. Maryland and the Incoherence of Enumerationism*, 19 Georgetown Journal of Law & Public Policy 25 (2021)

*Coin, Currency, and Constitution: Reconsidering the National Bank Precedent*, 118 Michigan Law Review 1005 (2020)

*Judicial Capacity, Causation, and History: Next Steps for the Judicial Capacity Model*, vol. 2020 Wisconsin Law Review 195 (2020)

*Madison’s Waiver: Can Constitutional Liquidation be Liquidated?,* 72 Stanford Law Review Online 17 (2019)

 *Defying McCulloch? Jackson’s Bank Veto Reconsidered*, 72Arkansas Law Review129 (2019)

 *McCulloch at 200 (symposium introduction),* 72Arkansas Law Review1 (2019)

*What is Relative Plausibility?* (with Elliott Sober) 23 International Journal of Evidence and Proof 198 (2019)

*An Error and an Evil: the Strange History of Implied Commerce Powers*, 68 American University Law Review 927 (2019)

*The Conjunction Problem and the Logic of Jury Findings* (with Elliott Sober) 59 William & Mary Law Review 619 (2017)

*A Question Perpetually Arising: Implied Powers, Capable Federalism and the Limits of Enumerationism*, 59 Arizona Law Review 573 (2017)

*An Excess of Discretion? “Thayer’s Triumph” and the Uncodified Exclusion of Speculative Evidence*, 105 California Law Review 591 (2017)

*Justice Scalia’s Jiggery-Pokery in Federal Arbitration Law*, 101 Minnesota Law Review Headnotes 75 (2016)

*Disfavored Treatment of Third Party Guilt Evidence* (with Chelsey Metcalf), 2016 Wisconsin Law Review 337 (2016)

*Misreading* McCulloch v. Maryland, 18 U. Penn. J. Con. L. 1 (2015)

*Presidential Politics as a Safeguard of Federalism*, 62 Buffalo Law Review 599 (2014)

*High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 Cardozo Law Review 567 (2013)

*Reply to Professor Rothstein*, 100 Geo. L. J. Online 16 (2012)

*Claim-Suppressing Arbitration*, 87 Indiana Law Journal 239 (2012)

*A Foundation Theory of Evidence,* 100 Georgetown Law Journal 95 (2011)

*Mandatory Arbitration and Fairness*, 84 Notre Dame Law Review 1247 (2009)

*If You Love Arbitration, Set it Free: How* “*Mandatory”* *Undermines “Arbitration,”* 8 Nevada Law Review 400 (2007)

*The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 Oregon Law Review 541 (2005)

*State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 Washington University J. Law & Pol. 129 (2004)

*Correcting Federalism Mistakes in Statutory Interpretation: the Supreme Court and the Federal Arbitration Act*, 67 Law & Contemporary Problems 5 (2004)

*Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability and Preclusion Principles*, 38 U.S.F. Law Review 49 (2003)

*When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 University of Pennsylvania Law Review 1697 (2002)

*The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action and Racial Balancing*, 2000 Wisconsin Law Review 657 (May 2000)

*Choice of Forum by Contract: Compelled Arbitration*, (book chapter), in Kent Spriggs et al., Representing Plaintiffs in Title VII Litigation (2d Ed. 1998, Aspen Law Publishers; rev. eds. 1999, 2001)

*Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisconsin Law Review 33 (May 1997)

*The Amorality of Consent*, 74 California Law Review 2143 (Dec. 1986)

Note, *Making Intramilitary Tort Law More Civil*, 95 Yale Law Journal 995 (1986)

**LAW PRACTICE EMPLOYMENT**

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| Sep. 1996 – June 1999  | **SENIOR STAFF ATTORNEY,** American Civil Liberties Union Foundation of Southern California, Los Angeles. Conducted broad range of civil rights litigation, in state and federal trial and appellate courts.  |
| Sep. 1986 – July 1996  | **ATTORNEY**, private practice, San Francisco. Lucas Law Firm (1993-1996), representing plaintiffs in employment litigation. Henry G. Wykowski & Associates (1989-1993), civil litigation and criminal appeals. Heller, Ehrman, White & McAuliffe (1986-87), civil litigation.  |
| Sep. 1987 – Sep. 1988  | **JUDICIAL LAW CLERK, The Honorable Betty B. Fletcher,** U.S. Court of Appeals for the Ninth Circuit, Seattle, Washington. |

**RECENT PRESENTATIONS AND OTHER PROFESSIONAL PUBLICATIONS**

“The Mark Graber Problem,” Symposium on Mark Graber, *Punish Treason, Reward Loyalty*, Balkinization Blog, June 26, 2024 (forthcoming)

“May 30, 1787,” Journal of American Constitutional History Biennial Conference, University of Wisconsin Law School (Sep. 29, 2023)

“Rescuing Interposition,” Symposium on Christian G. Fritz, *Monitoring American Federalism*, [Balkinization Blog, June 19, 2023](https://balkin.blogspot.com/2023/06/rescuing-interposition.html)

“Enumeration and Original Meaning,” 14th Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference, University of San Diego Law School (Feb. 10, 2023)

“Democratic Constitutional Estoppel,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 14, 2022)

“What Originalists Have to Own About *Dred Scott*,” University of Maryland Francis King Carey School of Law, Discussion Group on Constitutionalism (Mar. 18, 2022)

“Madison’s Federal Negative and the Fourteenth Amendment,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 15, 2021)

“McCulloch Overruled? The Odyssey of a Landmark Case” to the Supreme Court Historical Society (Virtual: July 14, 2021)

“Recovering the Lost General Welfare Clause,” presented at the National Conference of Constitutional Law Scholars, Tucson, AZ (Mar. 6, 2021); University of Wisconsin Law School Wednesday Workshop (Oct. 21, 2020)

“The Other Madison Problem,” Fordham Law Review Symposium: The Federalist Constitution, (October 2, 2020); Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 16, 2020)

“Presidential Elections in the House?” [Balkinization Blog, May 9, 2020](https://balkin.blogspot.com/2020/05/presidential-elections-in-house.html)

“John Marshall and the Spirit of the Constitution,” University of the Air, Wisconsin Public Radio, Air date: Jan. 26, 2020, https://www.wpr.org/shows/john-marshall-and-spirit-constitution

“A Response to Professor Ramsey,” [Originalism Blog, Jan. 13, 2020](https://originalismblog.typepad.com/the-originalism-blog/2020/01/a-response-to-professor-ramseydavid-schwartz.html)

Legal History Blog, [guest blogger for December 2019](https://legalhistoryblog.blogspot.com/2019/12/thank-you-david-schwartz.html)

“*McCulloch v. Maryland* and the Incoherence of Enumerationism,” Sixth Annual Salmon P. Chase Lecture & Colloquium, Georgetown University Law Center, Washington, DC (Dec. 6, 2019)

“A Government of Limited Enumerated Powers: Is it the Constitution’s Original Meaning?” Debate with Prof. Kurt Lash, University of Wisconsin Law School (Nov. 20, 2019)

Book Symposium on David S. Schwartz, The Spirit of the Constitution, [Balkinization Blog, (Nov.-Dec. 2019)](https://balkin.blogspot.com/2019/12/symposium-on-david-schwartz-spirit-of.html)

“Judicial Capacity, Causation, and History: Next Steps for the Judicial Capacity Model,” 2019 Wisconsin Law Review Symposium, University of Wisconsin Law School (Oct. 25, 2019)

“*McCulloch v. Maryland*, State Sovereignty, and Reserved State Powers,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 18-19, 2019)

“Conventional Wisdom: Limited Enumerated Powers as a Non-Originalist Idea,” Loyola Law School, Los Angeles, CA (Sep. 12, 2019)

“ ‘Withholding the Most Appropriate Means’: The New Deal and Judicial Crisis, 1932-1936,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 16-17, 2018); also presented at the National Conference of Constitutional Law Scholars, Tucson, AZ (Mar. 10, 2019)

“Defying *McCulloch*? Jackson’s Bank Veto Reconsidered,” University of San Diego School of Law, San Diego, CA (Jan. 10, 2019)

“Why John Roberts Should Have Listened to John Marshall,” [*The Atlanic* (online), Dec. 18, 2018](https://www.theatlantic.com/ideas/archive/2018/12/chief-justice-roberts-made-texas-obamacare-mess/578371/),

“*McCulloch v. Maryland* at 200—A Reappraisal,” American Society for Legal History Annual Meeting, Houston, TX (Nov. 10, 2018).

“An Error and an Evil: The Strange History of Implied Commerce Powers,” University of Arizona, James E. Rogers College of Law, Faculty Workshop, Tucson, AZ (Mar. 22, 2018); Denver, Sturm College of Law, faculty workshop, Denver, CO (Jan. 24, 2018)

“The Strange History of Implied Commerce Powers,” presented at the National Conference of Constitutional Law Scholars, Tucson, AZ (Mar. 17, 2018)

“Abraham Lincoln, Expounder of the Constitution; or How John Marshall Won the Civil War,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 6-7, 2017)

“2016 as a Constitutionally Transformative Presidential Election,” presented at Symposium: The Presidential Election of 2016: Campaign and Results, at the Interdisciplinary Center (IDC) Herzliya, Lauder School of Government, Diplomacy and Strategy (Herzliya, Israel, Jan. 8-9, 2017)

“The Red State / Blue State Republic: McCulloch v. Maryland and the Making of American Constitutional Law,” Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Sep. 30-Oct. 1, 2016)

“Reconstituting McCulloch v. Maryland: an Intellectual History,” presented paper on panel, “Reconstructing the Framers’ Constitution,” at the American Society for Legal History Annual Meeting, Washington, DC (Oct. 30, 2015).

“Is Separation of Powers Justiciable?”, Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Oct. 2-3, 2015)

“Misreading *McCulloch v. Maryland,*” presented at NYU Colloquium on Legal History (April 8, 2015); also presented at American Bar Foundation, Chicago Legal History Workshop (April 22, 2015).

“Assessing the Rehnquist Court’s Federalism,” presented at conference: The Rehnquist Court: Ten Years Later, hosted by The William H. Rehnquist Center on the Constitutional Structures of Government, University of Arizona James E. Rogers College of Law (Feb. 6, 2015)

“Judicial Supremacy in Race Policy: the Strange Career of Strict Scrutiny,” 2014 Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 21-22, 2014)

“Presidential Politics as a Safeguard of Federalism,” 2013 Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 1-2, 2013)

“Political Safeguards of Federalism, Revisited: the Case of Marijuana Legalization,” presented at Symposium: The Presidential Election of 2012: Campaign and Results, at the Interdisciplinary Center (IDC) Herzliya, Lauder School of Government, Diplomacy and Strategy (Herzliya, Israel, Jan. 6-7, 2013)

“‘Faithful Execution’: the Scope of Executive Discretion to Enforce the Controlled Substances Act Against Medical Marijuana,” presented at Symposium: Marijuana at the Crossroads, University of Denver, Sturm College of Law (January 27, 2012)

“The ‘Conjunction Problem’:  Its Cause and Cure,” AALS Evidence Section Newsletter (Fall/Winter 2011)

Community discussion, Crawford v. Washington, [SCOTUS Blog (Dec. 13, 2011)](http://www.scotusblog.com/2011/12/today-in-the-community-december-13-2011/)

“Do-it-yourself tort reform: How the Supreme Court quietly killed the class action,” [SCOTUS Blog (Sep. 16, 2011)](http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/)

“ ‘The Literature of Constitutional Law’: an Intellectual History of *McCulloch v. Maryland*,”

 2011 Wisconsin Discussion Group on Constitutionalism, University of Wisconsin Law School (Nov. 4-5, 2011)

“Claim-suppressing Arbitration,” Symposium: Labor and Employment Law Under the Obama Administration: a Time for Hope and Change?, Indiana University, Maurer School of Law, (Bloomington, IN, November 12-13, 2010)

**SIGNIFICANT LITIGATION AND PUBLIC SERVICE**

Wisconsin State Judicial Council, advisor on restyling project of the Wisconsin Rules of Evidence, August 2021-present.

Seventh Circuit Advisory Committee on Circuit Rules, August 2014-present.

Drafted 14-page opinion letter at request of Governor James Doyle concluding that Wisconsin domestic partnership provisions in 2009 state budget are constitutional under federal and state constitutions (June 4, 2009)

Consulted in drafting H.R. 3010, S. 1782, Fair Arbitration Act of 2007 (reintroduced as the Arbitration Fairness Act of 2009, H.R. 1020, S. 931)

Congressional testimony: “Mandatory Arbitration: Do-it-yourself Court Reform Becomes Do-it-yourself Tort Reform,” written and oral testimony presented to the at the hearing on “Mandatory Binding Arbitration Agreements: Are They Fair For Consumers?” before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee (June 12, 2007)

*Wisconsin Auto Title Loans v. Jones*, 2006 Wisc. LEXIS 344 (Wis. Sup. Ct. 2006), author of U.W. Law Professors’ amicus brief in support of consumer in predatory lending case, filed in Wisconsin Supreme Court, December 7, 2005

*Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204 (2006). Wrote amicus brief of law professors in support of respondent, arguing that Federal Arbitration Act does not apply to the states.

*Anheuser-Busch, Inc. v. Melena*, 2006 Ill. LEXIS 329 (Ill. Sup. Ct. 2006), author of amicus brief in support of consumer in employee rights/ arbitration case filed in April, 2005.

*Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Wrote amicus brief of law professors in support of respondent, arguing that Federal Arbitration Act does not apply to the states. Organized amicus group of 25 law professors nationwide.

*Eastman v. Conseco Financial Servicing Corp.*, author of U.W. Law Professors’ amicus brief filed in Wisconsin Supreme Court, December 18, 2002.

*EEOC v. Luce Forward Hamilton & Scripps,*345 F.3d 742 (9th Cir. 2003) (en banc). Author of amicus curiae brief on behalf of 14 members of the U.S. House of Representatives, filed in U.S. Court of Appeals for the Ninth Circuit, December 13, 2002.

*Circuit City Stores v. Adams*, 532 U.S. 105 (2001). Wrote amicus brief of law professors in support of respondent, arguing that Federal Arbitration Act does not apply to employment disputes. Organized amicus group of 15 law professors nationwide.

*Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1991), aff’g *Roe v. Anderson,* 134 F.3d 1400 (9th Cir. 1998), aff’g 966 F. Supp. 977 (E.D. Cal. 1997). Prepared papers and appeal brief in winning preliminary injunction against unconstitutional welfare penalty on new state residents; assisted in Supreme Court briefing.

*In re Pratt*, 69 Cal. App. 4th 1294 (1999). Wrote respondent’s brief winning affirmance against district attorney’s appeal from order overturning 1972 first degree murder conviction of former Black Panther Geronimo Pratt, on habeas corpus. Co-counsel included Professors Anthony Amsterdam (NYU), Robert Weisberg (Stanford), and James Liebman (Columbia).

*Lagatree v. Luce, Forward, Hamilton & Scripps; Lagatree v. Keesal*, *Young & Logan*, 74 Cal. App. 4th 1105 (1999), review denied (2000). Unsuccessful, first-of-its-kind wrongful discharge lawsuit on behalf of a legal secretary fired from two successive jobs due to his refusal to sign arbitration agreement.

*Wright v. Universal Maritime Service Corp*., 525 U. S. 70 (1998). Co-authored ACLU amicus brief successfully urging reversal of Fourth Circuit decision compelling arbitration of employment discrimination claims pursuant to an arbitration clause in a collective bargaining agreement.

*Bureerong v. Uvawas*, 959 F. Supp. 1231 (C. D. Cal. 1997). Litigated precedent-setting damages action against manufacturers and retailers on behalf of formerly enslaved Thai garment workers. Briefed and argued motion in which court held for first time that manufacturers could be liable for full tort damages for buying or selling sweatshop-produced goods on negligence per se theory based on Fair Labor Standards Act.

*McDougal v. Ramon*, (C. D. Cal. CV 97-5331-R(E) (1997)). Wrote successful habeas corpus petition on behalf of “Whitewater” witness Susan McDougal. McDougal had been held illegally in L.A. County jail under maximum security conditions for eight months. Habeas petition sought transfer to minimum security federal facility. Federal respondents gave all relief sought without filing opposition.

*Stirlen v. Supercuts*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997). Briefed and argued successful challenge to unconscionable employee arbitration agreement. *Stirlen* has become one of the leading cases on the application of unconscionability doctrine to arbitration agreements.

*Nordlin v. Kmart,* (Cal. Super. Ct., Tuolumne Co., No. 35243 (1996)). Won $1.5 million verdict as lead counsel in 5-week sexual harassment jury trial against national retail chain, Mar.-Apr. 1996 (1st ever sexual harassment verdict in Tuolumne County).

*Perry v. PG&E,* (S.F. Superior Ct. No. 948562 (1995)). Co-counselled jury trial in disability discrimination case, won verdict of $800,000 plus punitive damages and attorneys fees, Aug.-Sep. 1995*.* Liability was established on the novel issue that subtle personality changes due to brain condition met the statutory standard for a disability.

**BAR MEMBERSHIPS**

State Bar of California; U.S. Courts of Appeals for the Sixth and Ninth Circuits; U.S. District Courts for the Northern, Eastern and Central Districts of California, the Northern District of Ohio and the Western District of Wisconsin; and the Supreme Court of the United States.