THE UNIVERSITY OF WISCONSIN LAW SCHOOL ON CONSTITUTIONALISM AND DEMOCRACY

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While the University of Wisconsin (UW) Law School and its faculty are recognized as having a long tradition of law and society scholarship, it is only over the last decade that its contributions to debates over both domestic and international constitutionalism and democracy have gained increasing recognition. Whether in democratization, constitution-making, or constitutional jurisprudence, our faculty has been deeply engaged. From working with Native American nations in building tribal constitutions to participating in constitution-making processes and academic meetings around the globe, different members of our faculty have made, and continue to make, important contributions to the advancement of constitutionalism. Most recently, UW Law School has been one of a small group of academic institutions across the United States to hold annual interdisciplinary workshops—informally described as "schmoozes"—to discuss various developments in constitutionalism. Hosting this annual "Wisconsin Discussion Group on Constitutionalism" over the last decade has drawn UW Law School faculty into a community of scholars from various law schools that have been meeting for more than two decades to engage in intensive, but informal, roundtable discussions on a range of timely and provocative constitutional topics. UW Law School has also recently emerged as an important locus of studies on state constitutions and election law, adding a significant dimension to this faculty's contribution to understanding democratic engagement and practice at both the state and local level.

Joining the panel on "Constitutionalism and Democracy" to celebrate the *Wisconsin Law Review*'s 100th Anniversary, Harvard Law Professor Mark Tushnet, who began his academic career at UW Law, explained that he could discern three themes from the tradition of constitutional law at Wisconsin: "legal process, legal consciousness, and law in action."[1] The contributions of our faculty may also be viewed through these three dimensions of our law school's scholarly tradition. Describing "legal process" as requiring a "focus on the way different institutions of governance deal with problems of governance in a democracy" in order to

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1. Mark Tushnet, William Nelson Cromwell Professor of L. Emeritus, Harvard L. Sch., Panel Discussion at the *Wisconsin Law Review* Symposium: Wisconsin's Intellectual History and Traditions (Oct. 23, 2020) (transcript on file with *Wisconsin Law Review*), https://youtu.be/lkLf8yUh5jA [https://perma.cc/8VRP-AXG3].

explore how to "organize the institutions that we have or might have, so as to promote the values of democratic governance,"[2] Professor Tushnet pointed to Professor Robert Yablon's presentation, an analysis of U.S. Supreme Court jurisprudence demonstrating how the Court "has unabashedly advocated robust enforcement of federalism and the separation of powers while simultaneously writing itself out of the law of democracy."[3] Professor Yablon argued, "the Court has preoccupied itself with two sets of constitutional relationships, relationships between state and federal authorities and between the federal government's three branches, while neglecting a third relationship, namely the relationship between the people and those who exercise governmental authority in their name."[4] According to Professor Yablon:

> [T]he same justices who energetically construct constitutional meaning when it comes to federalism and the separation of powers somehow find themselves wholly unable to do so when it comes to democracy. The same justices who readily leap from the general to the specific in federalism and separation of powers cases insist that they can discern no operative rules in cases involving democratic representation. The same justices who view the courts as indispensable guardians against perceived affronts to federalism and the separation of powers unceremoniously abandon the field when asked to secure democratic rights.[5]

In the tradition of "legal process," Professor Yablon's account of constitutional politics today demonstrates his thesis that, as an institution, "[t]he Supreme Court has increasingly come to embrace a warped vision of the Constitution's structure, one that shows insufficient regard for the [Constitution's] democratic foundations."[6]

Turning to the second theme underlying Wisconsin's constitutional law tradition, Professor Tushnet noted that if legal process focused on institutions, it is also understood that "institutions are patterns of behavior according to shared beliefs. . . . [B]oth about what the institutions, in some sense, are, and about how they should operate."[7] Distinctions between legislatures and courts or between a statute or a constitution turn out,

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2. *Id.*

3. Robert Yablon, Assistant Professor, Univ. of Wis. L. Sch., Panel Discussion at *Wisconsin Law Review* Symposium: Wisconsin's Intellectual History and Traditions (Oct. 23, 2020) (transcript on file with *Wisconsin Law Review*), https://youtu.be/lkLf8yUh5jA [https://perma.cc/8VRP-AXG3].

4. *Id.*

5. *Id.*

6. *Id.*

7. Tushnet, *supra* note 1.

Professor Tushnet argued, to "rest centrally on widely shared beliefs," invoking the idea of "legal consciousness."[8] He then described how, in the Wisconsin tradition, legal consciousness is embedded in legal historian Willard Hurst's "great book, *Law and the Conditions of Freedom*, which is about the culture of belief about legality."[9] If not for this broader Wisconsin tradition of legal process, in which institutions become central, "you would think about legal consciousness at every moment" instead of doing, for example, what Professor David Schwartz has done in his work by bringing a "historical understanding to contemporary issues," one shaped by "the underlying structures of how we think about" the law and institutions over time.[10]

Describing his recent book, *The Spirit of the Constitution*,[11] which traces the 200-year history of how *McCulloch v. Maryland*[12] was understood differently in different eras, Professor Schwartz noted,

> [T]he potentially broad theory of implied powers, which is kind of pure doctrine in a way, was blunted for more than a century by a Supreme Court that believed that its role was to advance a national constitutional project of protecting, at first, slavery, and then protecting Jim Crow laws under the neutral-sounding doctrines of federalism and states' rights.[13]

As Professor Tushnet argued, "[s]eeing how those structures worked [historically] can help us understand how our contemporary legal consciousness is shaped today."[14]

Professor Linda Greene's contribution to the panel provides a clear link between a historical understanding rooted in legal consciousness and law in action by exploring the repeated calls for reparations. Her analysis ran from the unfulfilled promise of General Sherman's Field Order No. 15—to provide emancipated slaves with forty acres and a mule[15]—to Martin Luther King's argument that "African-Americans deserve

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8. *Id.*

9. *Id.* (citing JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956)).

10. *Id.*

11. DAVID SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF *MCCULLOCH V. MARYLAND* (2019).

12. 17 U.S. (4 Wheat.) 316 (1819).

13. David Schwartz, Foley & Lardner Bascom Professor of L., Univ. of Wis. L. Sch., Panel Discussion at the *Wisconsin Law Review* Symposium: Wisconsin's Intellectual History and Traditions (Oct. 23, 2020) (transcript on file with *Wisconsin Law Review*), https://youtu.be/lkLf8yUh5jA [https://perma.cc/8VRP-AXG3].

14. Tushnet, *supra* note 1.

15. W.R. Sherman, Special Field Order No. 15 (Jan 16. 1865), *in* 47 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES I, pt. 2 at 60–61 (1895).

compensation for slavery, for segregation, and for discrimination,"[16] and on to the multiple attempts in Congress to introduce reparation bills.[17] Pointing to the murder of George Floyd, Professor Greene questioned what it means "to talk about the idea of equal citizenship and what would it mean to eradicate the structural disparities that exist, that confine Black Americans to . . . one of the lowest economic rungs in our society."[18] In doing so, she highlighted three bases for reparations today: "reparations for mass incarceration, reparations for racialized police violence, and reparations for community disinvestment."[19] In the tradition of law in action, Professor Greene argued that, in each of these areas, "we need to think about who are the actors responsible, how did the discrimination actually operate, and what have been the harms."[20]

Taking up the case of reparations for mass incarceration, Professor Greene explained how several institutions are responsible. She described the origins of mass incarceration:

> Black Codes . . . were designed to criminalize. . . . [F]ast forward to today, where a Black person is five times more likely to be stopped without cause, while one out of every three Black boys today can expect to be sentenced to prison compared to one out of six Latino boys or one out of 17 white boys, where 5% of the illicit drug users are African-Americans, and, yet they're 29% of those arrested and 33% of those incarcerated.[21]

Professor Greene then adopted UW Law's signature law in action lens:

> The harms are at a community level[—]you're removing valuable assets from the community. You are affecting the capacity of the community. Social scientists have demonstrated that imprisoning many individuals from a single neighborhood adversely affects the entire neighborhood because of the cumulative effect of straining multiple social networks to which

16. Linda S. Greene, Evjue-Bascom Professor of L., Univ. of Wis. L. Sch., Remarks at the *Wisconsin Law Review* Symposium: Wisconsin's Intellectual History and Traditions (Oct. 23, 2020) (transcript on file with *Wisconsin Law Review*) (citing MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 127–28 (1963)), https://youtu.be/lkLf8yUh5jA [https://perma.cc/8VRP-AXG3].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

> inmates belong. Sociologists have talked about this in terms of impeding the formation of social capital. [22]

She continued:

> [S]ocial scientists have . . . theorized, based on social control research, that people who live in neighborhoods with high prison rates tend to feel a strong distrust of formal society. They [feel] less obligat[ed] to obey the law, less confiden[t] in the capacity of informal social control in their community.[23]

She argued that, as a result, "mass incarceration dramatically constrains the participation of African-American communities . . . in the mainstream political economy. And these are the invisible punishments that accompany a prison sentence."[24] She then identified the challenge ahead:

> [A]ddressing these consequences to a community [is challenging for] social scientists and others to begin to quantify the effects of mass incarceration. We know that mass incarceration affects families, that it deprives families of income, that it exposes those who are in prison to many forms of ill, including violence, illness, et cetera. But what are the community harms?[25]

Professor Greene applied that same law in action approach to questions of police violence and community disinvestment, noting that "community disinvestment operates in many ways," with multiple actors over long periods of time, making traditional legal remedies ineffective.[26] For example, it is not often acknowledged that when President Franklin Roosevelt's administration created the Home Owners' Loan Corporation in 1932, "it undertook a major enterprise, the redlining of neighborhoods. . . . [E]nact[ing] race-motivated impairments by drawing color-coded maps documenting the so-called riskiness in lending across neighborhoods in over 200 cities[,]" and that those risk factors "included race, ethnicity, and immigration status."[27] Thus, on the basis of race, "entire communities were cut off from the opportunity to build wealth through home ownership. Entire neighborhoods were the object of

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

disinvestment."[28] Beyond housing, Professor Greene pointed to the consequences of the wholesale disinvestment in the economic aspect of communities that exacerbated economic criminal activity, contributing to the perception that the Black poor are presumptively suspects and thus entire communities experience racialized hyper policing.[29] She goes on to note how the anger that has spilled over from police murders has made visible to us the conditions under which Black communities live.[30] Yet, solutions do not lie in individual lawsuits, which cannot repair these conditions, but in the systemic repair of structural racial subordination that transitional justice like reparations programs envision.

Concluding, she wondered if political consensus leads to meaningful reparations, would it lead to the full participation of Blacks in "the economic, education, and political mainstream America," or would "our constitutional democracy foreclose[] racial remedies for systemic disparities . . . [?]"[31] She also noted that "[d]uring Reconstruction, our equal citizenship aspirations were dashed against a Constitution" that enshrined unequal citizenship.[32] Thus, when Congress passed the historic Civil Rights Act in the mid-1960s, it could not rely on the Fourteenth Amendment for its authority—it had to use the Commerce Clause.[33] Finally, she questioned whether the demand for reparations will continue in this post-George Floyd moment and whether the Supreme Court will have a renewed opportunity to decide if our Constitutional imagination will embrace, or thwart, the deferred dream of equal citizenship for African Americans.[34]

While UW Law's law in action tradition has long encouraged faculty to reach beyond academia, in the constitutional arena, it is exemplified by Professor Richard Monette's role in working with indigenous nations who have sought his advice in making their own constitutions. Drawing on indigenous ideas and practices as well as his deep knowledge of the history of the relationship between the federal government and indigenous nations, Professor Monette argued that native nations are sovereign and should adopt their own constitutions to govern the affairs of their communities. Presenting his paper, *Conquest by State Citizenships*,[35] Professor Monette argued counterintuitively that the "Indian tribes," as they are labeled in the U.S. Constitution, "are again facing an existential

28. *Id.*

29. *Id.*

30. *Id.*

31. Linda S. Greene, Beyond George Floyd: Remedies for Systematic Racism? 1–2 (July 2020) (unpublished manuscript) (on file with the *Wisconsin Law Review*).

32. Greene, *supra* note 16.

33. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

34. Greene, *supra* note 31, at 1–2.

35. Richard Monette, Conquest by State Citizenships (2020) (unpublished manuscript) (on file with *Wisconsin Law Review*).

threat, [and] this time their usual enemies have found some unexpected allies—the natives themselves."[36] Here, Professor Monette engaged directly in the debate over whether Native Americans living on federally recognized reservations are wise to participate in state elections, whereby they declare themselves to be citizens of a state, not only citizens of the United States. Concerned about this trajectory, Professor Monette argued that "in the end, state citizenship for reservation-based natives, including civic participation and voting for or holding state office, will be the final nail in the coffin for tribal sovereignty."[37] The consequence being that "native nations and their own citizens, by donning their individual identity, are, in the counterbalance, shunning their collective identity, and in the balance, will be undermining their own sovereignty."[38] As Professor Tushnet noted, the interdisciplinary tradition of our campus and law school means that "when Wisconsin constitutional lawyers [think] about constitutional law, they . . . think about the Constitution as a vehicle for the exercise of political power, both in doctrine, which is the legal consciousness version of this, and on the ground."[39]

36. Richard Monette, Dir. of Great Lakes Indian L. Ctr. & Professor of L., Univ. of Wis. L. Sch., Remarks at the *Wisconsin Law Review* Symposium: Wisconsin's Intellectual History and Traditions (Oct. 23, 2020) (transcript on file with *Wisconsin Law Review*), https://youtu.be/lkLf8yUh5jA [https://perma.cc/8VRP-AXG3].

37. *Id.*

38. *Id.*

39. Tushnet, *supra* note 1.