

**MASTERING THE DRIFT: AN INTRODUCTION TO THE
MICHIGAN JOURNAL OF LAW & SOCIETY**

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In many ways, the early twenty-first century is strikingly different from the early twentieth; but in more than few respects, it is radically the same. Wealth inequality and the concentration of corporate power mirror or exceed their peaks in the 1920s,¹ dislocating person from place, fraying social bonds, and destroying prior land stewardship.² Union participation is stymied at every corner, depressing wages.³ Authoritarianism is rising around the globe.⁴ The “united” states are engaged in a vitriolic cultural battle over how to deal with their bloody history of racialized violence.⁵ A pandemic has taken millions of lives and exposed global health inequities.⁶ And war rages in continental Europe.⁷

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1. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 31 fig. 1.1 (2017) (charting the two most economically unequal periods in American history—the Gilded Age and our own).

2. See Timothy O. Randhir, *Globalization Impacts on Local Commons: Multiscale Strategies for Socioeconomic and Ecological Resistance*, 10 INT’L J. COMMONS 387 (2016).

3. See, e.g., *The Productivity-Pay Gap*, ECON. POL’Y INST. (Aug. 2021), [https://www.epi.org/productivity-pay-gap/#:~:text=From%201979%20to%202020%2C%20net,\(after%20adjusting%20for%20inflation\)](https://www.epi.org/productivity-pay-gap/#:~:text=From%201979%20to%202020%2C%20net,(after%20adjusting%20for%20inflation)) [https://perma.cc/QW4F-LY2J].

4. See, e.g., Melissa Morgan, *Understanding the Global Rise of Authoritarianism*, STANFORD UNIV. FREEMAN SPOGLI INST. INT’L STUD. (Nov. 8, 2021), <https://fsi.stanford.edu/news/understanding-global-rise-authoritarianism> [https://perma.cc/GCS8-V595].

5. See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [https://perma.cc/FY25-NJE7].

6. See, e.g., Shu Ting Liang, Lin Ting Liang & Joseph M. Rosen, *COVID-19: A Comparison to the 1918 Influenza and How We Can Defeat It*, 97 POSTGRADUATE MED. J. 273 (2021).

7. *Ukraine War in Maps: Tracking the Russian Invasion*, BBC NEWS (Apr. 1, 2022), <https://www.bbc.com/news/world-europe-60506682> [https://perma.cc/P7ZC-C7QP].

While the present moment includes many new challenges inconceivable at the turn of the nineteenth century, current legal scholars should take note of strategies our predecessors used to confront their turbulent times. Mainly, how meeting the challenges of the past required scholars, practitioners, and jurists to rethink the role of law and our understanding of it.

The legal realists, responding to a formalist jurisprudence that prioritized abstract concepts and artificial boundaries between private and public, advocated for an active jurisprudence that could use the law to promote social justice. While legal realists and Progressive thinkers did not succeed in solving all of the issues of their day, and exacerbated many others, we share their goal of invigorating the law to meet pressing needs. And their method—seeking to understand the law through humanistic and social-scientific inquiry—is one we thoroughly endorse.

Now, as then, we need an active jurisprudence furnished with insights provided by new methodologies and approaches to the study of law. Yet now, as then, artificial boundaries and a laissez-faire approach to myriad social, political, and economic issues serve to limit our understanding and intensify existing inequalities. But we at the *Michigan Journal of Law & Society* believe that a more-perfect world is possible. To achieve it, activists, publics, scholars, and practitioners alike need to better understand the law *in* society, both past and present. Exploring the law from the greatest variety of perspectives, with an egalitarian and democratic ethos, using all of the tools and models at our disposal, can help legal scholars rise to this moment with more holistic preparation.

LEGAL REALISM'S RESPONSE

As Morton Horwitz traces in *The Transformation of American Law, 1870-1960*, early-twentieth-century efforts to respond to monopolization, the dissolution of social bonds, and massive inequality were frustrated by a formalist jurisprudence that embodied: (1) “a sharp distinction between” “coercive” public law and “a non-coercive private law of tort” contract, and

property;⁸ (2) “highly abstract and general legal conceptions;”⁹ and (3) the “vocabulary and concepts of natural rights individualism.”¹⁰

Thus, to address the problems of their day, Progressive thinkers first needed to loosen the hold that legal formalism had on nineteenth-century jurisprudence, best embodied in cases like *United States v. E.C. Knight Co.*,¹¹ *Lochner v. New York*,¹² and *Hammer v. Dagenhart*,¹³ with an approach up to the tasks confronting them. Their solution was twofold: (1) to undermine legal formalism, and (2) to advocate a new school of legal thought—legal realism—which treated the law as made rather than found, and thus viewed the law as malleable for achieving social ends.

This two-pronged approach is perhaps best embodied by the Progressive writer and theorist Walter Lippmann’s *Drift and Mastery: An Attempt to Diagnose the Current Unrest*. To Lippmann, drift—“a lack of control over dynamic forces in the world”¹⁴—was the cause of his day’s social unrest. Drift was due to rapidly changing social conditions that were unanswerable when faced with an ossified, formalistic jurisprudence. The solution, he suggested, was mastery. Mastery required rejecting old formal distinctions between law and society, private and public, and social and economic. Mastery was “people taking control of their circumstances and making active choices about the path forward.”¹⁵ To believe in mastery was to believe that “[t]he scientific spirit is the discipline of democracy, the escape from drift, the outlook of a free man.”¹⁶ Mastery was a necessary component of human liberty.

Armed with a scientific spirit, legal realists advocated a jurisprudence based in human experience, social policy, and a democratic ethos rather

8. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 10 (1992).

9. *Id.* at 68

10. *Id.* at 101

11. 156 U.S. 1 (1895) (finding that Congress does not have the power to regulate manufacturing under the Sherman Antitrust Act).

12. 198 U.S. 45 (1905) (finding that the State of New York cannot set maximum working hours in bakeries).

13. 247 U.S. 251 (1918) (finding that Congress does not have the power to regulate goods manufactured with child labor).

14. GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 162–63 (2017).

15. *Id.* at 163.

16. WALTER LIPPMANN, *DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST* 151 (1914).

than on universal principles derived from a disembodied formal logic. For Oliver Wendell Holmes, to understand the law was not to become a moral philosopher but to see it for what it was: a set of political compromises influenced by both material circumstances and evolving social standards.¹⁷

John Dewey, recognizing that the law is “through and through a social phenomenon; social in origin, in purpose or end, and in application,”¹⁸ argued that judges should balance the goal of choosing legal rules that have desirable social consequences¹⁹ with the goal of enabling judicial decisions that “possess the maximum possible . . . stability and regularity.”²⁰ Hence, Progressive jurisprudence advocated balancing the need for regularity and predictability with the flexibility needed to achieve social justice.²¹

One of the most lasting legacies of legal realist jurisprudence was replacing old forms of categorical thought with “balancing tests in numerous areas of the law.”²² Legal realists instituted the rule of reason in antitrust, the reasonableness standard in negligence, and the clear and present danger test for free speech.²³ As legal realist Roscoe Pound expounded, these tests were designed to reorient legal thinking away from abstract categories and toward the “weighing of social interests,” thus creating the legal space for public law remedies to address pressing social needs.²⁴

At its base, then, legal realism was a movement that sought to re-center the law in reality—how law actually operates—and to think about better, more-efficient forms that law could take. If we accept the legal realist argument that law is not a set of universal, abstract rules but rather the result of various social forces, it’s easy to accept that law can be consciously shaped to better meet the needs of society.

17. Oliver Wendell Holmes, *The Path of the Law*, 1 BOSTON L. SCH. MAG. 1, 2 (1897). (“[O]ne of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse and consider the right or duty as something existing apart from and independent of the consequences of its breach.”).

18. JOHN DEWEY, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS (Boston L. Book Co., 1941), reprinted in 14 JOHN DEWEY, THE LATER WORKS, 1925-1953, at 117 (Jo Ann Boydston ed., 1988).

19. John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 26 (1924).

20. *Id.* at 24.

21. *Id.* at 27.

22. HORWITZ, *supra* note 8, at 18.

23. *Id.*

24. Roscoe Pound, *A Theory of Social Interests*, 15 PAPERS & PROC. AM. SOC. SOC’Y 16 (1921).

The way to accomplish this positive repurposing of law was by encouraging judges “to stop thinking like lawyers and start thinking more like social scientists, to tailor their decisions to the social context and consequences of the case before them.”²⁵ Legal theorist Roscoe Pound would later dub this methodology “sociological jurisprudence.”²⁶

A NEW SOCIOLOGICAL JURISPRUDENCE

We at the *Michigan Journal of Law & Society (MJLS)* strongly endorse Pound’s concept of sociological jurisprudence. The reason is simple: we fundamentally believe that theoretically and methodologically diverse approaches to law enrich our understanding of the law and the lawmaking process. While it may not be possible to ever uncover universal truths or maxims from the study of law, we wholeheartedly believe that multidisciplinary approaches grant a more holistic understanding of our object of study. We further believe that this more complete understanding of the law—unlocked through interdisciplinary cross-fertilization—may better enable citizens and lawmakers to meet the pressing legal challenges of today and tomorrow.

The legal realists launched their revolt against formalism because the late-nineteenth-century study of law lacked perspective: it had failed to treat the law as it actually was, centered abstract principles at the expense of all other concerns, and, as a result, could not effectively respond to the various crises that confronted it. The legal realists, championing a more active and positivist jurisprudence, did not artificially limit the power of legislatures, executives, and judges to shape society to meet present challenges. This does not mean, however, that the legal realists succeeded in codifying utopia. Rather, and perhaps ironically, the legal realists were themselves substantially hampered by a lack of perspective that failed to fully comprehend the law for what it actually was, particularly its harmful effects on historically marginalized groups. While Progressive jurisprudence undoubtedly solved some social problems, it undeniably amplified and created others.

25. MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* xxvii (2003).

26. *Id.*

For instance, by codifying dominant racist attitudes in science and the emerging social sciences at the time, Progressive jurisprudence inscribed a white Protestant morality in the law, expanding criminal liability and subjecting those most vulnerable to increased policing and criminalization.²⁷ And while the Progressive movement sought to check the worst impulses of capitalism, its advocates perhaps put too much faith in the power of an expert-run, administrative state,²⁸ enlarging the gap between the government and the governed.²⁹ Any endorsement of legal realism must also reckon with its role in laying the legal groundwork for the contemporary crises of mass incarceration and systemic racism.³⁰

But the failures of legal realism and Progressive jurisprudence are not a reason to abandon the goal underlying their revolt against legal formalism—a goal *MJLS* endorses: a lawmaking process anchored in the real needs and complexities of modern society that better meets those needs, that makes the social outcomes of law a central concern, and that mobilizes the best available tools—including empirical research—to pursue a just, free, and equal society for all. If anything, the way to solve the crises that predate the Progressives, in addition to those that they amplified, is by further embracing diversity of thought, perspective, and experience. *MJLS* hopes to further the legal realist project by turning to empirical research and the social sciences in legal reasoning, all while taking stock of its early failures.

Systemic bias occurs because of systemic exclusion and a lack of full-and-proper perspective. Thus, *MJLS* aims for a legal understanding that maximizes perspective in terms of race, gender, and discipline; cultivates cross-disciplinary and cross-institutional conversations; and encourages scholars—junior and senior alike—to learn from one another. In doing so, we hope to provide a platform for marginalized and excluded voices and, in

27. See, e.g., Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. R. CRIMINOLOGY 261, 269 (2021).

28. See, e.g., Thomas C. Leonard, *Progressive Era Origins of the Regulatory State and the Economist as Expert*, 47 HIST. POL. ECON. 49 (2015).

29. See, e.g., James Goodwin, *Regulation as Social Justice: A Crowdsourced Blueprint for Building a Progressive Regulatory System*, CTR. FOR PROGRESSIVE REFORM (2019), <https://cpr-assets.s3.amazonaws.com/documents/Regulation-as-Social-Justice-Report-FINAL.pdf> [<https://perma.cc/K54E-M6AK>].

30. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 7 (2010).

that process, understand how the law functions—for better and worse—with greater clarity.

In these regards, *MJLS* takes inspiration from decades of critical legal thought, which has greatly expanded our understanding of the lived experience of law. For example, since the 1960s, feminist legal theorists have explored how the law has been used to maintain gender-based domination. Scholars like Martha Fineman and Susan Okin have illuminated the ways in which gender inequality is perpetuated in custody and alimony determinations.³¹ Sylvia Law, Wendy Williams, and others have demonstrated systemic biases exhibited toward pregnant employees.³² Critical race theorists, like Kimberlé Crenshaw, have introduced the concept of intersectionality, which has provided an analytic framework for understanding how various identities combine and interact to create varying forms of privilege and oppression.³³ Catherine A. MacKinnon pioneered the idea that sexual harassment in the workplace is a form of sex-based discrimination, which is now firmly embodied in American jurisprudence.³⁴ Feminist legal theorists succeeded in getting every state to modify their rape statutes to include spousal violence³⁵ and their Supreme Court and legislative victories have helped dismantle gender-based barriers in education,³⁶ employment,³⁷ juror com-

31. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM*, (1991); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1987).

32. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1008-10 (1984); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 330 (1984- 1985).

33. Bim Adewunmi, *Kimberlé Crenshaw on Intersectionality: "I Wanted to Come Up with An Everyday Metaphor that Anyone Could Use,"* THE NEW STATESMAN (Apr. 2, 2014), <https://www.newstatesman.com/politics/welfare/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could> [<https://perma.cc/TM4Y-98QK>].

34. Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book 'Sexual Harassment of Working Women,'* N. Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/books/review/metoo-workplace-sexual-harassment-catharine-mackinnon.html> [<https://perma.cc/PN2F-Y3CX>].

35. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

36. See *United States v. Virginia*, 518 U.S. 515 (1996) (striking down the Virginia Military Institute's male-only admissions policy as unconstitutional).

37. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (finding that employers cannot be sued under Title VII of the Civil Rights Act of 1964 for race or gender pay discrimination if the claims are 180 days or older) and the law passed in response, the Lilly Ledbetter Fair Pay Act of 2009, 29 U.S.C. §§ 621–794a (2009) (resetting the statute of limitations for filing an equal-pay lawsuit with each new discriminatory action).

position,³⁸ property ownership,³⁹ and more. These scholars have not only brought in new -and -frequently excluded perspectives into the study of law, like the legal realists who came before them, critical legal theorists have utilized their methodological approaches to create a more equal society.

MJLS also seeks to continue and expand upon the work of the movement it's named after: the law and society movement. This movement, home to sociolegal conferences,⁴⁰ journals,⁴¹ and research centers,⁴² has sought to understand the law, legal practices, and legal institutions for six decades in and through their social contexts.⁴³ By employing the power of scientific and humanistic inquiry, law-and-society scholarship has engaged in systematic comparison between theory and data. By looking beyond traditional law-review fodder—appellate cases, statutes, and treaties—and by employing various methodologies—like ethnographies, surveys, and archival research—law-and-society scholars have fundamentally expanded our understanding of law in action, rather than merely studying law on the books. We hope that our journal may do so, too.

Today, there are hundreds of law reviews and law-school journals whose monumental efforts undoubtedly enrich the legal profession and our understanding of the law. These student-led journals publish articles quickly, usually within a matter of months, while also verifying the accuracy of every quote and citation to guarantee they appropriately support each claim made. There are also hundreds of peer-reviewed social science and humanities journals that similarly perform the herculean task of expanding our collective understanding and pushing disciplines forward in exciting new directions. These peer-reviewed journals, while slower to publish than law

38. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that peremptory challenges based solely on gender are unconstitutional).

39. See *Kirchberg v. Feenstra*, 450 U.S. 455 (finding unconstitutional a Louisiana law that gave sole control of marital property to the husband).

40. *Global Meeting on Law & Society*, L. & SOC'Y ASS'N <https://www.lawandsociety.org/lisbon-2022-homepage/> [<https://perma.cc/4BQU-QHQ3>].

41. See, for instance, the *Law & Society Review*, the *Journal of Law & Society*, *Law & Social Inquiry*, and various others.

42. The early years of the law and society movement were supported by the Russell Sage Foundation, which funded four research centers at the University of California at Berkeley, the University of Denver, Northwestern University, and the University of Wisconsin. See Susan S. Silbey, *Law and Society Movement in 2* LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL AND CULTURAL ENCYCLOPEDIA 860-63 (2002).

43. *Id.* at 861.

reviews, come with the benefits of peer-review, in which subject matter and methodological experts scrutinize data, methodology, theoretical framework, and empirical findings prior to publication.

Unfortunately, today the legal academy is still cloistered apart from other scholarly disciplines that clearly overlap its ambit. This is despite a rise in the number of dual-degree faculty at law schools,⁴⁴ the creation of new interdisciplinary approaches to the study of law,⁴⁵ and a pressing societal need for fresh approaches to present challenges. *MJLS* seeks to break down these artificial boundaries while simultaneously keeping the benefits that expert-driven peer review and student-led, citation-based scrutiny provide.

A NEW APPROACH

Our vision for legal scholarship is inspired by both sociological jurisprudence and the law and society movement. It requires escaping the dogmatic, siloed approach to legal studies that still prevails and embracing a maximalist and diverse set of perspectives. The law that shapes our world cannot be informed by scholarship boxed in by its own logic. This is why our journal is the nation's first law-school journal to incorporate law-student editors (like a typical law journal) as well as Ph.D. candidates and students from history, political science, sociology, American studies, philosophy, and other fields. And to ensure that our interdisciplinary articles meet the demands of academic rigor, we have convened a faculty review board—consisting of renowned scholars from the University of Michigan as well as other institutions—that reviews and comments on selected articles, sometimes requiring substantive revision before publication.

Our rigorous, cross-disciplinary editorial process is the heart of what makes *MJLS* unique. The process begins with a screening. Student leadership selects a set of articles that conforms to the forthcoming volume's

44. See Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506. ("American law schools began hiring Ph.D.s no later than the early 1960s. . . . In the two most recent years—2014 and 2015—twenty-two of the thirty-three entry-level hires at the top twenty-six law schools (67%) held Ph.D.s.")

45. Examples include the law and disability movement, carceral studies, critical race theory, women and gender studies, ethnic studies, and law and organizations scholars.

theme and that may contribute novel insights to interdisciplinary legal thought. Selected articles are then reviewed with a fine-toothed comb by law and Ph.D. students, who pick apart the article's claims and scrutinize its engagement with existing literature. The most promising articles are then sent to faculty reviewers, who perform an abbreviated version of the traditional peer-review process. Based on their feedback, student leadership selects which authors receive publication offers. Once authors have accepted and made required changes, the student editorial team engages in the laborious process typical of many law-review journals: we ensure all claims are well-supported, gather every source cited by the author, guarantee the sources provided accurately support the author's claims, and provide the author with style and line-edits through an iterative revision process. Every source is screened. The veracity of every claim is verified. It is a demanding process, but it ensures the quality and robustness of our published articles.

In the end, we believe this unique editorial process results in scholarship that is rooted in the established literature, reliable, trustworthy, and (we hope you agree) deeply insightful and thought provoking. We hope the scholarship we publish brings to bear an understanding of the law and various social sciences to arrive at novel insights and arguments about the interplay between law and society. Ultimately, we hope these insights may enrich our understanding of the most important issues facing the contemporary world.

CONTENT FOR VOLUME I

Because we fundamentally believe in breaking down boundaries that serve to calcify and limit understanding, our first issue appropriately revolves around the nature of the boundaries inscribed in law and the limits of juridical belonging. And because we believe in applying new, creative angles of vision to established problems, it is only fitting that our first volume begins by re-examining some of the most enduring questions at the heart of modern legal studies: questions of sovereignty and the state, nation and citizenship, and law's role in constructing spaces of inclusion and boundaries of exclusion in the modern world. While some scholars have advocated for an end to the concept of sovereignty, calling it a "zombie

concept, undead, stalking the world, terrifying people,”⁴⁶ our current historical moment is still fraught with questions of sovereignty and nationhood. Contemporary social problems have certainly taken on an increasingly global scope, but solutions to these problems—from climate change to the COVID-19 pandemic to the Great Recession—remain largely national in character. For many, this is the contradiction of our age. We see it in the decision of states to shut their doors to mass refugee movements,⁴⁷ like those of the Syrian Civil War, which spill over the borders of international conflicts. We see it in the national suffering wrought by sovereign debt crises, as in Greece, while global trade and investment flows accelerate to unprecedented levels.⁴⁸ We see it in the sanguine assumption that European integration had made wars of conquest on the continent unthinkable, before the rise of a land war motivated by just such imperial ambitions this past year.

In short, the postwar liberal order was built on promises of global integration and harmony among discrete sovereign nations. It is unclear how this project will fare in a new historical moment characterized by growing ethnonationalism and populism, pressing global social problems, and geopolitical multipolarity. This Volume offers important analytical leverage for comprehending our changing world and (re)envisioning contemporary solutions.

In this Volume’s first article, Joseph Conti⁴⁹ begins by challenging our inherited understanding of “stateness.” What is a state in the twenty-first century? Through two case studies of international organizations (the World Trade Organization and the Court of Justice of the European Union), Conti persuasively shows that the defining characteristics of states—legitimacy and the capacity for coercion—can no longer be said to belong

46. DON HERZOG, SOVEREIGNTY, RIP 291 (2020).

47. See, e.g., Krista Mahr, *Pressure Builds on White House to End Divisive Health-border Policy*, POLITICO (Mar. 27, 2022), <https://www.politico.com/news/2022/03/27/pressure-builds-on-white-house-to-end-divisive-health-border-policy-00020553> [<https://perma.cc/HLT4-9WV2>].

48. See, e.g., *Explaining Greece’s Debt Crisis*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html> [<https://perma.cc/XS6K-HKE3>]; *Global Trade Hits Record High of \$28.5 Trillion in 2021, But Likely to be Subdued in 2022*, U.N. CONF. TRADE & DEV. (Feb. 17, 2022), <https://unctad.org/news/global-trade-hits-record-high-285-trillion-2021-likely-be-subdued-2022#:~:text=%E2%80%9COverall%2C%20the%20value%20of%20global,the%20COVID%2D19%20pandemic%20struck.> [<https://perma.cc/V6QZ-DXXD>].

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to nation-states alone. And, in fact, such sovereignty has existed in polities and organizations of varying dimensions throughout historical time, from the Mongol Empire to the Vatican. Contemporary global governance invites us to destabilize the enshrined Weberian “state” so we may recognize novel state formations where they exist today, even if they “break radically with modern notions of territorial sovereignty.”⁵⁰

Next, Alicia Pastor y Camarasa⁵¹ reveals the transnational nature of contemporary constitution-making through a case study on the drafting of Tunisia’s 2014 constitution. While the study of constitutional governance is an established academic field, the practice of drafting itself remains understudied. Drawing on an in-depth examination of external actor involvement during the 2014 drafting in Tunisia, Camarasa demonstrates how a once-thought quintessentially national activity has become (or perhaps always was) deeply transnational, thus challenging previous mythical origin stories.

Finally, Smita Ghosh⁵² further complicates the concept of national borders by revealing their permeability. Through extensive archival research, Ghosh finds a pattern of detention and exclusion—what she calls the “two faces of sovereignty.”⁵³ Abolishing detention alone, she argues, might encourage a nation to permanently close its doors to those fleeing persecution abroad. By historicizing interdiction, exclusion, and “emergency,” Ghosh reveals the limits of abolition and asks crucial questions about the United States’ relationship with noncitizens. Ultimately, she argues that closing detention facilities will not stop the carceral tentacles of U.S. domestic policy from spreading across borders, and that abolishing detention alone may in fact be counterproductive to justice-minded policy.

50. Joseph Conti, *Supranational Stateness: International Courts and the Globalization of Political Power*, 1 MICH. J.L. & SOC’Y (forthcoming summer 2022) (manuscript at 1).

51. Research Fellow at the University of Lausanne, Switzerland.

52. Appellate Counsel, Constitutional Accountability Center.

53. Smita Ghosh, *Border Games*, 1 MICH. J.L. & SOC’Y (forthcoming summer 2022) (manuscript at 1).

CONCLUSION

Many turn-of-the-last-century problems are now turn-of-this-century problems. But we have new problems as well, both domestically and abroad. Globally, we face free flowing rhetoric that is rapidly radicalizing politics and sewing disinformation;⁵⁴ a world on fire because of climate change, which many expect to create a mass climate-refugee crisis;⁵⁵ and mass surveillance and technological-based social control in the private and public sectors alike.⁵⁶ Domestically, we face a gun-violence problem so pervasive that, for the first time in reported history, gun deaths have surpassed auto accidents as the number one killer of children;⁵⁷ declining life expectancy, largely driven by the opioid epidemic;⁵⁸ and a Supreme Court selectively enhancing constitutional rights for a cherished few⁵⁹ while slashing them for many more.⁶⁰ Certainly, we need new legal innovations to address these crises. But now, as then, an ossified, formalistic jurisprudence—a jurisprudence that claims to emanate from “history and tradition,” which uncritically reveres an imaginary past and thus enshrines past injustices in per-

54. See SAFER-LICHTENSTEIN ET AL., NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, UNIV. OF MD., THE USE OF SOCIAL MEDIA BY UNITED STATES EXTREMISTS (2018), https://www.start.umd.edu/pubs/START_PIRUS_UseOfSocialMediaByUSExtremists_ResearchBrief_July2018.pdf; Julian E. Barnes, *Russian Disinformation Targets Vaccines and the Biden Administration*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/08/05/us/politics/covid-vaccines-russian-disinformation.html> [<https://perma.cc/28SV-3UZ5>].

55. See, e.g., *Climate Change and Disaster Displacement*, U.N. REFUGEE AGENCY (2022), <https://www.unhcr.org/en-us/climate-change-and-disasters.html> [<https://perma.cc/6QW3-XY9R>].

56. See, e.g., SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019), Eunsun Cho, *The Social Credit System: Not Just Another Chinese Idiosyncrasy*, PRINCETON UNIV. J. PUB. & INT'L AFFS. (May 1, 2020), <https://jpia.princeton.edu/news/social-credit-system-not-just-another-chinese-idiosyncrasy#Eunsun%20Cho> [<https://perma.cc/HX84-2SFS>].

57. *Firearms Overtook Auto Accidents as the Leading Cause of Death in Children*, NPR (Apr. 22, 2022), <https://www.npr.org/2022/04/22/1094364930/firearms-leading-cause-of-death-in-children> [<https://perma.cc/QR5W-QM9V>].

58. Sam Harper, Corinne A. Riddell & Nicholas B. King, *Declining Life Expectancy in the United States: Missing the Trees for the Forest*, 42 ANN. REV. PUB. HEALTH 381 (2021).

59. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (invalidating “aggregate contribution limits” to political campaigns); *Carson v. Makin*, No. 20-1088 (2022) (finding a Maine law prohibiting school vouchers in private religious schools unconstitutional).

60. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (effectively writing a preemption provision into the Federal Arbitration Act to make it harder for states to fight forced arbitration); *Vance v. Ball State Univ.*, 570 U.S. 421 (2013) (redefining “supervisor” under Title VII of the Civil Rights Act to make it more difficult for employees to sue employers for sexual harassment); *Shelby County v. Holder*, 570 U.S. 529 (2013) (finding Section 4(b) of the Voting Rights Act unconstitutional).

petuity—is entrenching itself in cases that will no doubt be considered modern-day *Lochners* in the future.⁶¹ So now, as then, we call for the breaking down of rigid boundaries of thought, increased cross-disciplinary conversation, and a broadening of perspective in our approach to the law. Perhaps old/new problems require old/new solutions.

We don't know whether *MJLS* will ever settle outstanding legal questions or offer new solutions. But we hope that our mission of breaking down disciplinary borders, encouraging collaboration and conversation, and mobilizing all the tools at our disposal to advance justice, equality, and freedom for all may encourage other journals, institutions, and schools to pursue the same aims.

And perhaps this is what Walter Lippmann meant, or should have meant, in writing about “mastery” in 1914. It is only with a more illuminated view, provided by the wisdom of experience, the insights of the humanities and social sciences, and the broadening of perspective to include *all* voices, that the creative energy of democracy can be properly unleashed, allowing society to reassert control over the chaos, to master the drift.

61. See, e.g., *N.Y. St. Rifle & Pistol Assoc., Inc. v. Bruen*, No. 20-843 (2022) (finding New York's Sullivan Act, which required concealed-carry firearm applicants to show proper cause and had stood for 111 years, unconstitutional).