

**CONNECTICUT LAW REVIEW**  
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**ARTICLES**

**Curbing Energy Sprawl**..... Sara C. Bronin

*Energy sprawl—the phenomenon of ever-increasing consumption of land, particularly in rural areas, required to site energy generation facilities—is a real and growing problem. Over the next twenty years, at least sixty-seven million acres of land will have been developed for energy projects, destroying wildlife habitats and fragmenting landscapes. According to one influential report, even renewable energy projects—especially large-scale projects that require large-scale transmission and distribution infrastructure—contribute to energy sprawl. This Article does not aim to stop large-scale renewable energy projects or even argue that policymakers focus solely on land use in determining whether energy projects are allowed to proceed. Rather, it proposes that we advance the legal institutions necessary to facilitate one possible solution to energy sprawl: the alternative energy microgrid—that is, small-scale distributed generation between neighbors of energy derived from sources such as solar collectors, wind power systems, microturbines, geothermal wells, and fuel cells.*

**Acceptable Deviance and Property Rights**..... Mark Edwards

*Compliance with—or deviance from—law is often dependent upon the law’s convergence with—or divergence from—normative sensibilities. Where the legality and social acceptability of behavior diverge, deviance is socially acceptable. Property rights evolve in response to changes in normative sensibilities. Constructing a model of acceptable deviance and applying it to property rights, we can predict and actually observe the evolution of property rights in response to changes in normative sensibilities in areas as diverse as file-sharing, foreclosures, the use of public space, and fishing rights. We can also predict and observe stresses in legal institutions created by divergences in the legality and social acceptability of behavior with regard to property rights. Law functions as an anchor on behavior, providing stability, but also space for deviance which permits the evolution of property rights.*

**Abstention: The Unexpected Power of Withholding Your Vote**..... Grant M. Hayden

*Democratic institutions make their most significant decisions by voting on them. The public elects representatives at the federal, state, and local level, who, in turn, use voting procedures to pass laws and ordinances. People participate more directly in the lawmaking process through votes on initiative, referendum, or recall votes. Higher courts (and some lower ones) with multiple judges typically resolve their cases through votes. Stockholders elect corporate board members, who then vote on firm decisions. Employees decide whether they want union representation by voting on it, and then do the same to elect union officers, approve contracts, and authorize strikes. Countless numbers of other organizations—from charities to universities to private clubs—employ voting procedures to make their most important decisions. Most of these democratic institutions, however, also allow people to abstain—to withhold their vote. In some cases, people abstain when they are indifferent among the electoral choices, or when they judge the benefits of voting to be outweighed by the costs. In other cases—when, for example, a potential voter has a conflict of interest—an institution may actually compel one of its members to abstain as a kind of “forced” indifference on the matter. The*

*underlying assumption in both of these cases is that abstention, unlike voting, is neutral with respect to the outcome. But while the contours of the right to vote have been the subject of a tremendous amount of scholarship across many disciplines, abstention, despite its obvious connection to the right to vote, has been almost completely ignored. This article fills that void.*

**Burning Crosses on Campus: University Hate Speech Codes..... Alexander Tsesis**

*Debates about the value and constitutionality of hate speech regulations on college campuses have deeply divided academics for over a decade. The Supreme Court's recent decision in Virginia v. Black, recognizing a state's power to criminalize intentionally intimidating cross burning, at long last provides the key to resolving this heated dispute. The opponents of hate speech codes argue that such regulation guts our concept of free speech. One prominent scholar claims that this censorship would nullify the First Amendment and have "totalitarian implications." Another constitutional expert, Erwin Chemerinsky, asserts that the "public university simply cannot prohibit the expression of hate, including anti-Semitism, without running afoul of [established First Amendment principles]." On the other end of the spectrum, are authors who argue that hate speech attacks individuals' Fourteenth Amendment right to equality, which outweighs any cathartic desire to degrade people because of their race, ethnicity, sexual orientation, and religion. This line of thinking, recognizes the fundamental right to free speech but argues that it can be restrained when used to intrude on others' dignity rights. The advocates of campus hate speech codes claim that a college's mission to further intellectual freedom is not undermined by restricting intimidating speech on campus; consequently, some scholars argue that curbing racist and xenophobic speech would not undermine the core purpose of higher education, the acquisition of truth. This article adds a fresh perspective to this decades-old academic tempest of intellectual disagreement about First Amendment theory.*

**Cultural Norms and Race Discrimination Standards:**

**A Case Study in How the Two Diverge..... Derek W. Black**

*The appropriate legal measure for race discrimination has been a point of serious contention for decades. Although it initially permitted claims based solely or primarily upon discriminatory effects, the Supreme Court subsequently issued any number of decisions that indicate that plaintiffs must also demonstrate intentional discrimination. Disagreeing with the Court, Congress has, in some instances, responded by passing legislation to reinstate plaintiffs' ability to assert a claim based on discriminatory effects. Where Congress has been unable to reverse the Court due to constitutional constraints, scholars have roundly criticized the Court as misunderstanding discrimination and furthering illegitimate ends. But what has been sorely missing from this conversation is the public's appraisal of racial discrimination. In many respects, the public's appraisal is the most important because neither race nor discrimination are self-defining concepts. Rather, as many, including some members of the Court, have pointed out, discrimination is an ambiguous term. The meaning of discrimination is dependent on the context in which it exists. Thus, the public rather than the courts add real substance to discrimination through cultural norms that determine what is offensive, racist, neutral or appropriate. Without this substance, the entire legal regime of racial discrimination runs the risk of serious flaws. This Article lays an initial foundation for correcting this gap.*

**Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports..... Dionne L. Koller**

*Title IX as applied to athletics is a high-profile, controversial public policy effort that has opened up the world of athletics to millions of girls and women. Yet as it is both celebrated for the strides it has made for women, or decried as going too far at the expense of men, a reality persists that women do not pursue or remain committed to sport in numbers comparable to men. This article seeks to explore this phenomenon by moving the discourse beyond the debate over whether women are inherently as “interested” in sport as men to examine the conception of equality incorporated into Title IX and how this might affect women’s interest in participating. In doing so, this article asserts that it is not at all clear that greater Title IX enforcement alone can serve to stimulate interest in the population of girls and women who do not currently participate in sport. This is because Title IX’s anti-discrimination mandate only serves to secure opportunities for females to assimilate into a model for sport – emphasizing elite ability and commercial appeal -- which was constructed by and for males. This model, incorporated into Title IX through the requirement that schools must only provide opportunities to female athletes who are “interested” and have the “ability” to play varsity-level sport, can in many cases create what this article describes as an “interest paradox,” extinguishing the interest of those girls and women who would engage in sport, but are not willing to assimilate into the current model. While this article supports the position that greater Title IX enforcement is a worthy goal, it argues that the time has come to incorporate fully women’s voices in education-based athletics, and redefine norms for sport participation so that the benefits of such participation may be enjoyed by a greater population of females.*