

REGULA PRO
LEGE, SI
DEFICIT LEX

THE LATIN
SAPIENCE OF
HIGH
JUDGES

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With any discussion of Latin in the law you will hardly need to stem the flood of enthusiasm from most attorneys, but at common law *regula pro lege, si deficit lex* was doctrine (if the law is inadequate, the Latin maxim serves in its place). Sir James Mackintosh described Latin maxims in the law as “the condensed good sense of nations.” *Black’s Law Dictionary* states in the preface, “Latin still supplies a formidable stock of legal terms and phrases. The ability to use a Latin phrase correctly and pronounce it with authority and consistency belongs to the equipment of a well-rounded jurist.”¹

Duhaime’s Law Dictionary goes a step further, “Latin maxims articulate the principled foundations on which the law is built. Each is a time-tested, ancient treasure of Roman law which not only embellish as much the common law as the civil law, but rightfully shape, mold and intellectually structure and ground lawyers, from their first day of law school to the last law journal they read in retirement.”²

The 10th edition of *Black’s Law Dictionary* contains over 4,000 entries in Latin. Despite its declining usage as the language of scholarship in science, the use of Latin in the law has experienced a revival over the last 40 years in reported opinions in federal circuits.³ Although our precedential system of jurisprudence is inherently retrospective, the judicial deference traditionally afforded to most erstwhile systems of jurisprudence, including the Bible, has become disfavored over time. Yet, the law’s deference to the wisdom of pagan Rome is renescent.

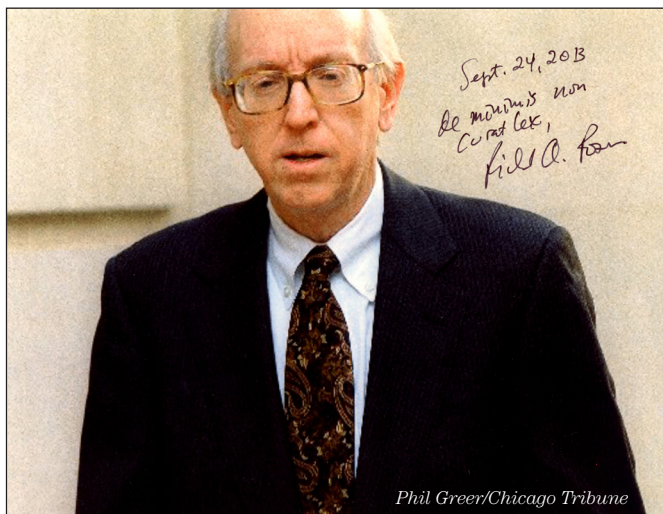
Some years ago I found myself sitting in the office of an attorney who had decorated his walls with autographed sports memorabilia, none of which had any apparent relevance to his practice. To his charge that I should do likewise, I demurred, but weighed the appeal that autographed legal memorabilia might have to me. I wondered whether the tendency of judges to use simple Latin maxims in their decisions to emblemize complex legal reasoning might give rise to a similar temptation to do the same for their own judicial philosophy outside of their decisions. I proceeded to mail carefully crafted letters to a handful of preeminent U.S. jurists whose writing I admired, asking each to formulate in Latin some expression that summarized their most incisive, most revealing statement of judicial philosophy, commit it in pen to a photograph of themselves, and return it to me. I informed each recipient of my letters that I hoped someday my compilation of any expatiation they had might be of interest to their biographers or historians. Whether any would have time for such intellections, I was unsure.



I began first by writing Robert Bork and Richard Posner, followed by each justice of the U.S. Supreme Court, followed by other predominant legal commentators. To my surprise, of the 11 current and retired living U.S. Supreme Court justices (all of whom I wrote), nine responded with signatures and thoughts on the law in Latin while the two that did not nonetheless

sent brief letters of explanation. Additionally, each of the federal appellate judges I wrote likewise responded, including Richard Posner, Robert Bork, and Stephen Reindhardt; as did liberal and conservative commentators on the law, including Cornell West and Ann Coulter. *Ex hyacintho*, I found myself in possession of a trove of personal insights into the law. Each judge who responded crafted some statement of legal exegesis in Latin that appears in some way to harken back to traceable themes in that judge’s earlier writings.

Retired Justice Sandra Day O’Connor wrote, “*salus populi suprema lex est*” (“the safety of the people is the supreme law”). O’Connor is known to have been influenced by the social contract theory of John Locke,⁴ who believed civil society’s *raison d’être* was to defend “life, health, liberty, or possessions.”⁵ Most U.S. historians attribute



inspiration for the phrase “life, liberty, and the pursuit of happiness” in the Declaration of Independence to Locke. *Salus populi suprema lex est* is more than *ipse dixit* for O’Connor. O’Connor’s judicial philosophy seems consistent with Locke’s view that nation-states are formed by individuals bound by the Law of Nature not to harm each other, and that government exists only as a delegatee of the citizens’ right of self-defense. It is also worth noting that, in applying rational basis review and intermediate scrutiny when the prevention of violent crime is the legitimate government interest at stake, O’Connor has always given great deference to government action.⁶ Critics of O’Connor contend that she goes too far in weighing these legitimate interests and point to statements throughout her career which they posit show that O’Connor is dismissive of the Bill of Rights, such as quoting the Constitution of Bahrain in advocating the expansion of the role of the judiciary in governance, which states that “[n]o authority shall prevail over the judgment [sic] of a judge, and under no circumstances may the course of justice be interfered with.”

Perhaps fitting for the ultimate legal economist, Judge Richard Posner wrote, “*de minimis non curat lex*” (“the law does not concern itself with trifling matters”). Posner is a Judge on the Seventh Circuit Court of Appeals, professor of law at the University of Chicago, and the most cited American jurist in the last hundred years.⁷ Posner is well-known for his writing on antitrust legislation and economics in the law. *The New York Times* called him “one of the most important antitrust scholars of the past half-century,”⁸ and Posner was considered a likely candidate in 2005 to replace O’Connor. Posner has invoked the doctrine of *de minimis non curat lex* to deny relief to plaintiffs in a multitude of cases, including *SmithKline Beecham v. Apotex*,⁹ in which Posner seemingly indicated the doctrine is of sufficient importance to rise to the level of an affirmative defense. Posner denied relief to union workers in *Sandifer v. U.S. Steel Corp.*¹⁰ but refused to do so in the prisoner assault case of *Washington v. Hively*.¹¹ In Posner’s view, “[t]he doctrine *de minimis non curat lex* is concerned with harm rather than with force.”¹² In short, Posner believes



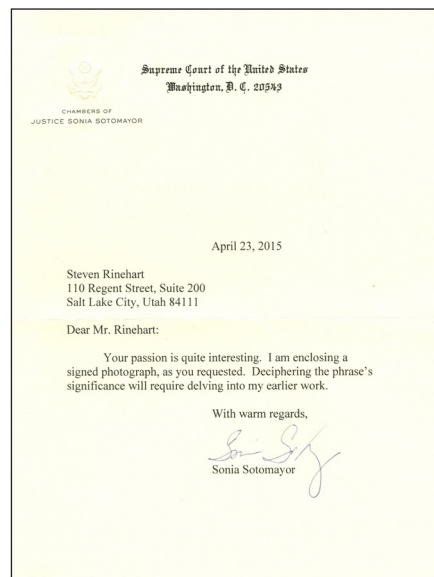
the doctrine applies only when the quantification of damages is trivial, not when qualifying departure from law.

Justice Sonia Sotomayor wrote “*caveat emptor*” (“buyer beware”), with a note explaining “deciphering the phrase’s significance will require delving into my earlier work.” Although this legal term-of-art would seem cliché from a distance, the doctrine of *caveat emptor qui ignorare non debuit quod jus alienum emit* (let a purchaser beware, for he ought not to be ignorant of the nature of the property which he is buying from another party) in fact played an important role both in Sotomayor’s earlier writing and her confirmation before the Senate to U.S. Supreme Court. In 1996, Sotomayor used *caveat emptor* as an example of necessary judicial overhaul of existing law in response to changing social policy, writing:

The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions . . . as the common law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed “*caveat emptor*.” As these cases show, change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes.¹³

During her confirmation hearings in 2009, this passage was used by Republicans to accuse Sotomayor of being a legal realist—someone who believes existing law should evolve with changing social policy. Sotomayor asserted, “I don’t apply that label [legal realist] to myself at all.” Sen. Lindsey Graham then inquired, “So you would not be a disciple of the legal realism school?” Sotomayor answered in the negative, “No.”¹⁴

Given this background, in selecting the doctrine of *caveat emptor* to define her judicial philosophy, Sotomayor redirects attention once again to her writing cited above. Using this form of surreptitious apophasis, one could argue persuasively that Sotomayor is in fact affirming solidarity anew with the legal realism philosophy, or a derivative of it.



Stephen Reinhardt of the Ninth Circuit Court of Appeals, a celebrated feeder judge with unimpeachable progressive credentials, joined the other signatories of my collection in opining on his judicial philosophy in Latin. Opinions of Reinhardt range from presidents and countless judges who describe him as “brilliant”¹⁵ to my old law professor, Magistrate Judge Ronald Boyce, who treated citation of Reinhardt’s opinions as *casus belli* for Rule 11 sanctions. Reinhardt penned “*ex aequo et bono*” (“from equity and conscience”). The preponderancy of history’s philosophers is not lost on Reinhardt, who has himself relied on excerpts of William Shakespeare, David Hume, Michel De Montaigne and even Lewis Carroll to support reported decisions.¹⁶ *Ex aequo et bono* is a doctrine in international law that empowers judges to dispense with applicable law and decide a case based entirely on what they consider to be equitable.¹⁷ Reinhardt may be best known to history not just as brilliant, but also as the most reversed federal appellate judge in U.S. history. He has been described as a “renegade judge” and is someone who by his own admission has been “a liberal from a very young age.”¹⁸ Reinhardt has authored a series of notable, fire-breathing opinions on everything from right-to-die legislation, to the Second Amendment, to gay marriage—all of which his detractors vie disregard the Constitution and established law. *Ex aequo et bono* serves to justify Reinhardt’s decision-making tenets. That Reinhardt would choose to embody his judicial philosophy with the equitable doctrine of *ex aequo et bono* is nothing short of bold even for a judge with a history of it. In so doing, Reinhardt makes no apology for being at odds with the maxim *optimus iudex qui minimum sibi* (he is the best judge who leaves least to his own discretion).

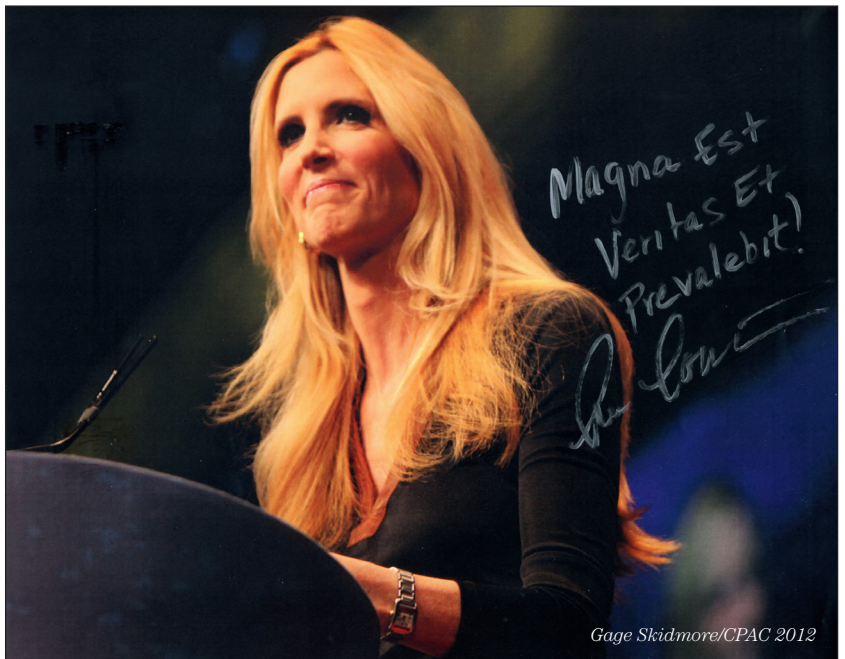
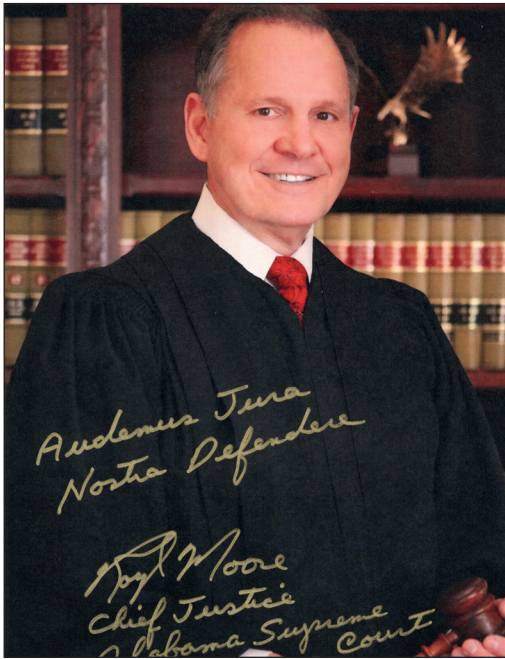
Of the law, consummate originalist, unconfirmed Reagan nominee to the U.S. Supreme Court, and judge of the D.C. Circuit Court of Appeals, the late Robert Bork penned “*si non possint omnia reddi bona tamen ut tractentur commode fiantque quoad licet quam minime mala*” (“strive to organize what cannot be perfect with as little harm as possible”). In so doing, Bork chose to channel Sir Thomas More. Bork is quoting from More’s *Utopia*,¹⁹ written in Latin in 1516 (whose 500th anniversary we mark this year). More was beatified by the Catholic Church in 1886. Bork authored an essay on Thomas More in 1999, and he converted to Roman Catholicism in 2003. In his 1999 essay, Bork wrote, “When moral consensus fades, as it did in More’s time and does in ours, we turn to law; when law falters, as it must when morality is no longer widely shared, society and culture teeter



on the brink of chaos.”²⁰ Bork shared More’s belief in the “fallibility of human moral reasoning” and once said that a “judge who looks outside the Constitution always looks inside himself and nowhere else.”²¹ Bork argues in his essay that “it is a man’s duty to enter public life,” that citizens have an obligation to involve themselves in society, and his quotation of More appears to be a proleptic admonition to citizens and legislators, as well an affirmation of the primacy of natural law. In Bork, religion is not lost. In Bork, the “law cannot be divorced from morality.” You cannot ultimately separate church from state. Bork believes there is reason to be leery of those who view religion as an anachronism bipolarizing judicial thought, and he likely would have approved of the University of Pennsylvania’s motto, *leges sine moribus vanae* (law without morals is useless).



STEPHEN REINHARDT OF THE NINTH CIRCUIT COURT OF APPEALS, A CELEBRATED FEEDER JUDGE WITH UNIMPEACHABLE PROGRESSIVE CREDENTIALS, JOINED THE OTHER SIGNATORIES OF MY COLLECTION IN OPINING ON HIS JUDICIAL PHILOSOPHY IN LATIN. OPINIONS OF REINHARDT RANGE FROM PRESIDENTS AND COUNTLESS JUDGES WHO DESCRIBE HIM AS “BRILLIANT” TO MY OLD LAW PROFESSOR, MAGISTRATE JUDGE RONALD BOYCE, WHO TREATED CITATION OF REINHARDT’S OPINIONS AS CASUS BELLI FOR RULE 11 SANCTIONS.



While arguably, O'Connor, Reinhardt, and even Posner all articulated views that could sustain judicial disregard of black-letter law, the competition of philosophies between these judges is no starker than that between Reinhardt and Bork. *Ruunt magna in se* (great powers are apt to clash). In Bork, *lex est ab aeterno* (the law is from eternity), and *neminem oportet esse sapientiores legibus* (no one ought to be wiser than the laws).

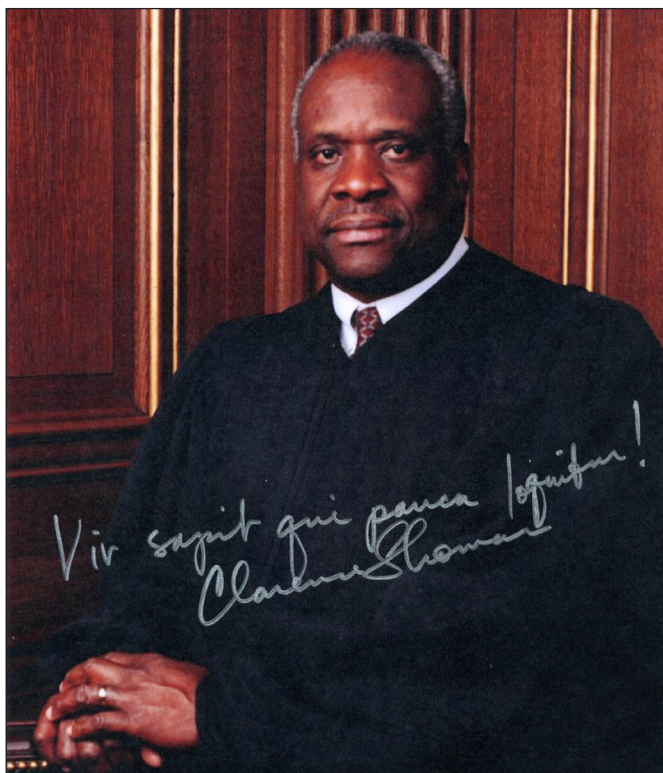
Controversial suspended Chief Justice Roy Moore of the Alabama Supreme Court wrote “*audemus jura nostra defendere*” (“audaciously our rights we defend”). Justice Moore gained national

attention in 2003 when he refused to remove a monument to the Ten Commandments from the Alabama Judicial Building on orders to do so from a federal judge. Justice Moore was consequently removed involuntarily from his post, only to run and be reelected as chief justice in 2012. Most recently, in 2016, Moore ordered Alabama probate judges not to issue gay marriage licenses after the U.S. Supreme Court legalized gay marriage, redounding again to his suspension as chief justice by the Alabama Court of the Judiciary. This West Point alumnus is cut from the same philosophical cloth as Bork in his view of religion’s legacy in a system of law in which *stare decisis* has not been relegated from a doctrine to a guideline. In evoking this Latin axiom, *audemus jura nostra defendere*, Justice Moore chooses not to affirm the supremacy of the judiciary, but rather to identify himself within the body politic before it—and with those who fear both the erosion of state sovereignty and abrogation of their First Amendment rights by judicial activism.

Some of the judges’ responses were simple, some humorous, most were profound. Justice Clarence Thomas quipped, “*vir sapit qui pauca loquitur*” (“wise is the man who speaks little”). My sampling also included jurists who do not hold official positions in the judiciary, but whose influence on popular opinion of the law is nonetheless prolific. Polemic Ann Coulter, who clerked for the Eighth Circuit Court of Appeals and was editor of the *Michigan Law Review*, said, “*magna est veritas et prevalens*” (“the mighty truth will prevail”), while Cornell West simply penned “*lux*” (“light”).

My enthusiasm for collecting Latin incunabula has contributed to my interest in Latin aphorisms. That which may be ephemeral or tractile in English stands sacrosanct and timeless in Latin. The Roman focus on order above all else, the need in the law for constancy, the simplicity of the doctrines, all steady Latin’s continued centrum in the law.

Vance Packard once said, “the difference between a top-flight creative man and the hack is his ability to express powerful meanings indirectly.” It is not lost on these judges, nor should it be on those of us to who advocate before them, that some arguments are made more forcefully with a whisper than a shout. The wordsmith knows



she can persuade with text and subtext alike. In modernity, you could not address a female law professor as *profressor* or *doctress*, but nobody would second-guess your use of *alumni* or *alumnae* in a legal brief. On strict adherence to structure, formality, and respect for organization, Latin roots our evolving system of jurisprudence with the permanence of antiquity. In the law, *via antiqua via est tuta* (the old way is the safe way).

Useful Latin maxims unconstrained by newfangled pressures are plentiful. For a debtor's attorney: *Bis dat qui cito dat* (he pays twice who pays promptly). For a prosecutor: *Aleator quanto in arte est melior, tanto est nequior* (the more skillful the gambler is in his art, the more wicked his heart). To the common-law husband of a prostitute: *Fera vagans est nullius in rebus* (a wandering beast belongs to no one). For the judge who dislikes an attorney's oral argument: *Ex nihilo nihil fit* (from nothing comes nothing). For a criminal defense attorney with a mental capacity issue: *Furiosus solo furore punitur* (an insane person is punished by insanity alone). To the debtor with unexpected medical bills: *Incendium aere alieno non exiit debitorem* (a fire does not release a debtor from his debt). For an attorney responding to an objection to an expert witness designation: *In re lupanari teste lupanares admittentur* (in a matter concerning a brothel, prostitutes will be admitted as witnesses). In support of recusal: *Odio iudex careat* (let a judge be free from hatred). For the attorney with few credible witnesses: *Testes ponderantur, non numerantur* (witnesses are weighed, not numbered). For the attorney who forgot the exceptions to Rule 802: *In generalibus latet error* (error lurks in generalities). In response to a demand letter: *Si vis pacem, para bellum* (if you want peace, prepare for war). To the associate who wants some family time: *Feris caret necessitas* (necessity knows no holiday). And, finally, for the public defender with a satin tongue: *Iudex, non furtum facies non hie currus emere pharmaca. A paucis medicinae subitis raedam enim toti* (no, Your Honor, my client did not steal the car to buy drugs. He requisitioned it for a temporary medicinal emergency).

Latin maxims embody the timeless secular might of the Roman Empire in our pluralistic judicial heritage. In the rulings of our British Commonwealth written in a Germanic language derived from Old Norse, may the wisdom of Rome live eternal. In the words of Lucius Calpurnius Piso Caesoninus (Julius Caesar's father-in-law), "*fiat iustitia ruat coelum*" ("let justice be done, though the heavens fall").[©]



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Endnotes

¹BLACK'S LAW DICTIONARY, at vii (6th ed. 1990).

²DUHAIME'S LAW DICTIONARY, preface (Feb. 9, 2016), available at www.duhaime.org/dictionary.

³Peter R. Macleod, *Latin in Legal Writing: An Inquiry into the Use of Latin in the Modern Legal World*, 39 B.C.L. REV. 235, note 6 (1998).

⁴Ami Dodson, *O'Connor Urges International Understanding*,

William & Mary (Oct. 14, 2011), available at www.wm.edu/news/stories/2011/oconnor-says-appreciation-of-diverse-property-rights-traditions-beneficial-to-u.s.-and-china.php.

⁵*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

⁶See *Tennessee v. Garner*, 105 S. Ct. at 1694 (O'Connor, J., dissenting) ("[t]he public interest in the prevention and detection of the crime is of compelling importance.").

⁷Fred R. Shapiro, *The Most-Cited Legal Scholars*, J. LEGAL STUDIES 29 (1): 409–26 (Jan. 2000).

⁸Neil A. Lewis, *Man in the News: Richard A. Posner; Wide-Ranging Legal Thinker*, N.Y. TIMES (Nov. 20, 1999) (quoting William Kovacic of George Washington University).

⁹247 F.Supp.2d 1011 (7th Cir. 2003).

¹⁰678 F.3d 590 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014) (under the doctrine of *de minimis non curat lex*.)

¹¹695 F.3d 641 (7th Cir. 2012).

¹²*Id.* at 643.

¹³Hon. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty To The Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35 (1996).

¹⁴*Sotomayor Hearing: The Complete Transcript—Part 5 of 5*, L.A. TIMES (Jul. 14, 2009), available at latimesblogs.latimes.com/washington/2009/07/soto0mayor-hearings-complete-transcript-part-5.html.

¹⁵Diarmuid O'Scannlain, Keynote Address, *Must a Faithful Judge Be a Faithless Judge?*, 4 UNIV. ST. THOMAS L. J. 157 (2006), available at ir.stthomas.edu/cgi/viewcontent.cgi?article=1109&context=ustlj.

¹⁶*Hollingsworth v. Perry*, 671 F.3d 1052 (9th Cir. 2012).

¹⁷See Article 33 of the United Nations Commission on International Trade Law's Arbitration Rules (1976); see also Article 38(2) of the Statute of International Court of Justice.

¹⁸Bill Blum, *The Last Liberal*, CALIF. LAWYER (Feb. 6, 2003).

¹⁹Sir Thomas More, *De Optimo Rei Publicae Statute Deque Nova Insula Utopia*, 34:64, Louvain: Servatius Sassenus (1516) rpt Bielefeld University Library (2016), available at ds.lib.ub.uni-bielefeld.de/viewer/image/2006024/120/.

²⁰Robert Bork, *Thomas More For Our Season*, 94 FIRST THINGS 17–21 (Jun./Jul. 1999), available at www.firstthings.com/article/1999/06/thomas-more-for-our-season.

²¹Dennis J. Goldford, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 174 (Cambridge University 2005).