

EDITOR-IN-CHIEF'S PAGE

Whether to simply humor me or not, the Journal's Executive Editor, Kat Gamache, has remarked that she looks forward to the "time capsules" that I've made part of the Editor-in-Chief's page (well, more accurately, pages). For the last few years the worldwide COVID pandemic and the now millions of lives it has taken, has been a subject of these pages, as have the spread of disinformation, the impeachment (the second one) of the then President, the insurrection at the Capitol instigated by that same former president and the UN's report on now irreversible impacts of climate change. We enter this new edition of the Journal in a still different world than we were in just six months ago.

COVID, unfortunately, continues to plague the globe. As we go to print, nearly a million persons in the United States have died from the disease and more than six million worldwide. The good news is that its spread has receded and death tolls have dropped substantially. But we've unfortunately seen a new U.S. export – the trend to turn even public health measures into political issues. A caravan of Canadian truckers dissatisfied with Canada's vaccine and masking requirements created havoc with the lives of Ottawa residents for weeks as the truckers camped out in that nation's capital. The impact spilled over to the U.S. when another caravan blocked passage of goods across the Ambassador Bridge connecting Windsor, Ontario to my hometown, Detroit – our country's busiest international border crossing.

We've seen a barrage of other news. There was the nearly spectator-free Beijing Olympic games marred further by another Russian doping scandal and against the backdrop of the host country's repression of its Uyghur population -- including mass detentions in "reeducation camps." The prolonged owner lock-out of major league baseball players came to an end. Matthew Stafford, who in thirteen years as quarterback of the hapless Detroit Lions did not win a single playoff game, won four in his first year with the Los Angeles Rams, including the Super Bowl. New Orwellian phrases have been added to the vocabulary – "special military operation" to describe Russian war crimes, "denazification" to rationalize Russia's attack on a country led by Volodymyr Zelenskyy, a democratically-elected Jewish president and "legitimate political *discourse*" to describe the January 6, 2021 *physical* attacks on the Capitol and its police officers. Add to the mix the acrimonious hearings over the nomination and ultimate confirmation of Ketanji Brown Jackson, the first Black woman to serve on the Supreme Court, the shocking leak to Politico of a draft opinion by Justice Alito striking down *Roe v. Wade*, and the defeat of xenophobe, antisemite, and Putin admirer Marie Le Pen in France's presidential election. And who will soon forget actor Will Smith's physical assault on comedian Chris Rock before millions during the live broadcast of the Oscars? And who, unfortunately, will remember months from now that there were ten mass shootings in the U.S. during a ten-day period in April?

While unemployment levels have dropped dramatically – nearly to pre-pandemic levels - inflation has increased to levels not seen for forty years. The

increase has been significant enough that even persons who were unemployed a year ago can ironically still feel worse off because, though now employed, their rising wages have not kept up with faster rising prices.

Fighting a subpoena by the House of Representatives' Jan. 6th committee, John Eastman sought to withhold communications with former President Trump as shielded by attorney client and work product privileges. But after an *in camera* review of the disputed documents, federal district court Judge Daniel Carter not only rejected the claim, but found that the claimed “work product” was in fact unprotected action in furtherance of a crime. It was “more likely than not,” he found, both that Trump and Eastman “dishonestly conspired” to obstruct the January 6 joint session of Congress and that they had unlawfully attempted to obstruct an official proceeding.¹ In a separate proceeding a New York state trial judge found Trump in contempt of court for failing to turn over documents to the state's Attorney General in connection with her civil fraud investigation into the business practices of the former president and his company.

And of course, there is the Russian invasion of Ukraine. It has been horrific to watch the news as Russian artillery, bombs and missiles indiscriminately – no, intentionally killed thousands of civilians, destroyed homes, businesses and infrastructure – including hospitals and schools - and created nearly five million refugees. The world (and our own Congress) has remained largely united against the invasion. But one notable exception to this unity was the nauseating spectacle of a former President of the United States -- already previously impeached (the first time) for holding military aid to Ukraine hostage to his demands that Ukraine investigate his political rival -- joined by his former Secretary of State, actually praise Russia's President Putin – a war criminal - for his “savvy” and “genius” military strategy.

Putin's savage war – carried out, not by soldiers, but by a combination of bewildered and untrained conscripts expecting to be welcomed and Russian butchers in uniform who have murdered unarmed civilians in their homes and on the streets and left their corpses to rot, has pushed other major human tragedies occurring around the world off the front pages, in some cases out of the news almost entirely. For example: what the State Department has designated as the Myanmar military's genocide and crimes against humanity against the Rohingya and the Taliban's resubjugation of the women of Afghanistan.

Russia's unprovoked war on Ukraine has also brought new attention both to the vulnerability of nuclear power plants to military attacks and to the vulnerability of Europe, particularly Germany, to cut offs of oil and gas supplies from Russia. While Germany ultimately delayed indefinitely the Nordstream II natural gas pipeline that would have brought new supplies of Russian natural gas to that country and other European nations, Eurostat reports that 30% of the European Union's current oil imports and 39% of its natural gas imports come from Russia. Because of this heavy reliance on Russian imports, months after Russia's invasion of Ukraine and the imposition of severe international sanctions, Russia continues to supply oil and natural gas to Europe. As proof of the adage that even a broken clock is right twice a day (think Space Force, maybe?), the former President warned of this problem several years ago.

Referring to a “rapidly closing window,” the February 2022 report of the UN's Intergovernmental Panel on Climate Change issued an even starker warning about the urgency of taking measures to reduce the world's dependence on

1. *Eastman v. Thompson, et al.*, Case No. 8:22-cv-00099-DOC-DFM, Order Re Privilege of Docs., slip op. at 39-40 (C.D. Cal. filed Mar. 28, 2022).

fossil fuels than its already dire August, 2021 report. And in early March, a study published in the Journal Nature Climate Change, found that more than half of the globe's biggest carbon sink, the Amazon rainforest, could become savannah in a couple of decades, further accelerating climate change.² Climate change and unchecked authoritarianism both represent existential threats – the first to humanity itself and the second to democracy. The lessons of these reports and the reality of today's geopolitical climate will pose difficult questions for energy policymakers and regulators who may be asked to weigh these geopolitical considerations against concerns about climate impacts.

CNN analyst Fareed Zakaria, for example, has urged that the US ramp up its production and export of oil and gas and for other oil producing nations to do likewise, reasoning in response to climate concerns that Russian fossil fuels would have been consumed anyway, while US production would have come with fewer methane leaks. This would require regulators, for example, to consider expanding authorizations to export liquefied natural gas. The International Energy Agency instead suggests that accelerating the deployment of heat pumps would save “2 bcm of gas use in the first year, requiring an additional investment of EUR 15 billion.”³ Environmentalist Bill McKibben has suggested that President Biden could invoke the Defense Production Act to order the manufacture of heat pumps for delivery to Europe in advance of the next winter heating season, saving enough fuel to nearly eliminate the need for Russian natural gas.⁴ Energy continues to play an integral role in world politics.

Last, as a reminder of the importance of editorial independence for scholarly journals like this one, we've also seen a rising level of intolerance with a resurgence of book banning and censorship in public schools. *Inherit the Wind*, the classic 1960 film, dramatized the real life case of a Tennessee science teacher accused of the crime of teaching evolution – the Scopes “Monkey Trial.” The film, like the play on which it was based, was written by a screenwriter who had been blacklisted during the McCarthy era and was itself a thinly disguised response to the chilling impact the McCarthy investigations had on free speech. But the court case on which it was based was itself a lesson on the dangers of censorship of ideas.

Nearly a hundred years after the Scopes trial, we see history repeating itself in Tennessee. Last January the McMinn County School Board voted to remove a fifty-year old Pulitzer Prize-winning graphic novel about the Holocaust from its eighth grade curriculum. Their grounds? They objected that the book, which depicted persecuted Jews as mice and Nazis as cats, included a picture of a partially nude cat. As the New York Times story about the dispute recounted, the book's author, Art Spiegelman, “compared the board to Vladimir V. Putin of Russia” and suggested that McMinn officials would rather “teach a nicer Holocaust.”⁵ Despite the public outcry – and the book's rise to the top of best-seller lists - Tennessee's governor used the incident to propose a law requiring a statewide

2. Sarah Kaplan, *Amazon rainforest is nearing 'tipping point, scientists say,'* WASH. POST, Mar. 8, 2022, at A3.

3. IEA, *A 10-Point Plan to Reduce European Union's Reliance on Russian Natural Gas* Section 7, IEA (Mar. 2022), <https://www.iea.org/reports/a-10-point-plan-to-reduce-the-european-unions-reliance-on-russian-natural-gas>.

4. Michelle Lewis, *How US-made heat pumps could help weaken Russian power over Europe*, ELECTREK (Feb. 28, 2022), <https://electrek.co/2022/02/28/how-us-made-heat-pumps-could-help-weaken-russian-power-over-europe/>.

5. Sophie Kasakove, *The Fight Over 'Maus' Is Part of a Bigger Cultural Battle in Tennessee*, N.Y. TIMES (Mar. 4, 2022), <https://www.nytimes.com/2022/03/04/us/maus-banned-books-tennessee.html>.

review of the content of school libraries in order to root out and remove “age inappropriate” content from their shelves.⁶

And in Virginia, on his first day in office, the new governor issued an executive order banning the teaching of “inherently divisive concepts” in public schools and creating a tip line where parents and others could anonymously report teachers whose class lessons were making students feel uncomfortable. Apparently, as Virginia’s Department of Education now interprets that order, it includes the banning of existing programs teaching such “divisive” concepts as “teaching 911,” “diversity,” “equity” and “inclusion.”⁷ Other states, including Georgia, New Hampshire, South Dakota, Tennessee and Florida have unfortunately followed suit with similar bans or proposed bans on public school instruction that might make a student feel, for example, “discomfort, guilt anguish, or any other form of psychological distress because of his or her race.”⁸

But who is instructing students to feel discomfort *because* of their race? German school children have been instructed for several generations about the country’s Nazi past and Nazi claims of Aryan racial superiority to support the extermination of Jews, gays and the Romanies. This no doubt has caused discomfort among the students, many of whose grandparents may have been silent bystanders to Nazi atrocities or worse-- collaborators or perpetrators. Their discomfort, however, was not because of their race, but because of the actions of their forbears. Few would argue that this education has not been for the good.

It is historical fact that in its 1857 *Dred Scott v. Stanford* decision the Supreme Court ruled that the U.S. Constitution was not meant to include American citizenship for any person of African descent,⁹ that slavery was enshrined in our original Constitution, and that the Page Act of 1875 placed restrictions on immigration from East Asia and included language referring to the “lewd and immoral” behavior of East Asian women, and the threat they posed to white men and white boys.¹⁰ Teaching these facts might not technically violate some of these new laws, but the classroom discussions they are likely to prompt is what worries teachers. The evidence is accumulating that these laws are promoting teacher self-censorship.¹¹

6. *Tennessee Governor, GOP Push More Scrutiny of School Libraries*, ASSOCIATED PRESS (Feb. 9, 2022), <https://news.wttw.com/2022/02/09/tennessee-governor-gop-push-more-scrutiny-school-libraries>.

7. Hannah Natanson & Karina Elwood, *Virginia Education Department rescinds diversity, equity programs in response to Youngkin’s order*, WASH. POST (Feb. 25, 2022), <https://www.washingtonpost.com/education/2022/02/25/maryland-youngkin-education-diversity/>

8. See, e.g., Georgia House Bill 1084.

9. 60 U.S. 393 (1856).

10. Section 141, 18 Stat. 477, 3 Mar. 1875.

11. Laura Meckler and Hannah Natanson, *New critical race theory laws have teachers scared, confused and self-censoring*, WASH. POST (Feb. 14, 2022), <https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/>. And censorship has not been limited to silencing teachers. “[O]fficial reprisal for protected speech ‘offends the Constitution [because] it threatens to inhibit exercise of the protected right.’” *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998)) Yet, in nakedly and shockingly overt retaliation for the Disney Corporation’s opposition to Florida’s “don’t say gay” law, the Florida legislature passed a law, signed with great fanfare by the governor, removing the municipal utility status of Reedy Creek Improvement District formed more than a half century ago to provide utility services to the expansive Disneyworld properties. That retaliation was the entire motive for the state’s actions could not have been clearer. “Disney and other woke corporations won’t get away with peddling their unchecked pressure campaigns any longer,” explained Florida’s governor as the reason for the legislation. Ian Millhiser, *Ron DeSantis’s attack on Disney obviously violates the First Amendment*, VOX (Apr. 23, 2022), <https://www.vox.com/23036427/ron-desantis-disney-first-amendment-constitution-supreme-court>. State representative Randy Fine, the sponsor of the bill, was equally candid about the retaliatory nature of the legislation. “Disney,” he explained, “is learning that they’re a guest in this state. We have given them special privileges for 55 years and it’s time for them to remember that we are not interested in their “California values.” <https://ms-my.facebook.com/newsmax/photos/a.10151127234237377/10159063930367377/?type=3>

Actual and threatened book bans are having a similar effect. In April, Florida's Department of Education rejected 41 percent of *math* text books submitted for approval as instructional materials for what it said were references to critical race theory, or CRT. "School book bans are soaring," writes Hannah Natanson of the Washington Post. As she reports, "the American Library Association's Office for Intellectual Freedom counted 330 incidents of book censorship in just the three months from September to November, 2021." That, she adds, was the highest rate of censorship since the Association began tracking it more than thirty years ago.¹² But the bigger impact of this trend is its chilling effect. Natanson reports that school libraries around the country, anticipating possible challenges are engaging in self-censorship and removing books from the shelves.¹³

Thankfully, the editors of this Journal have enjoyed broad editorial independence, a bedrock for the credibility of a scholarly journal. To be sure we have faced reader criticism from time to time about articles we have published. The Journal's readership is comprised of people with different experiences, interests, and perspectives and we know there will be disagreement and (hopefully professional) debate. The Journal promotes scholarship, not censorship.

But do not mistake the Journal's editorial independence for freedom from responsibility. The ELJ is also among the heaviest-vetted law journals in the country and is one of the very few peer-reviewed law journals. We have lost a number of articles over the years because of the rigor of our peer review process, authors finding it simpler to submit their manuscripts to student-run publications. It is easy to see why.

An author's manuscript must pass an initial review by the editor in chief and the executive editor. The article is then reviewed by one and sometimes two or more peer review editors. It is only then sent to the student editors, who proof read, cite check, run plagiarism software and format the article for publication. We do not control the conclusions of our authors, but where there are opposing viewpoints we ask the authors to acknowledge and tackle them fairly. If a reader takes issues with an author's conclusions, we have entertained - and published - counterpoints to the articles. Past editions of the Journal include several examples of responsive articles.

The British Medical Journal (BMJ) has a relationship to its affiliate organization much like the relationship between the ELJ and the EBA and between the ELJ and its Editor-in-Chief. BMJ is editorially independent from its trade-union owner, the British Medical Association. Over fifteen years ago, in words that ring just as true today, it explained the importance of that independence to the credibility of a scholarly journal:

Editors-in-chief and the owners of their journals both want the journals to succeed, but they have different roles. The primary responsibilities of the editors-in-chief are to inform and educate readers, with attention to the accuracy and importance of journal articles, and to protect and strengthen the integrity and quality of the journal and its processes. Owners are ultimately responsible for all aspects of publishing the journal, including its staff, budget, and business policies. The relationship between owners and editors-in-chief should be based on mutual respect and trust, and recognition of each other's authority and responsibilities, because conflicts can damage the intellectual integrity and reputation of the journal and its financial success.¹⁴

12. Hannah Natanson, *Schools try to quietly shelf book disputes*, WASH. POST, MAR. 23, 2022, at A1, A7.

13. *Id.*

14. Mary E. Northridge, et al., *Editorial independence at the journal*, 95 AM. J. PUB. HEALTH 377, 377-99 (2005) (quoting World Association of Medical Editors, WAME Policy Statements), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449185/>.

The Journal remains atop Washington and Lee's annual rankings of the nation's nineteen scholarly journals covering energy and natural resources law. Editorial independence has served the Journal and EBA membership well.

We hope you'll enjoy the thought-provoking contents of this edition. And let us hope that the next six months are happier than the last six. The Detroit Tigers won their home opener, their future Hall-of-Famer, Miguel Cabrera, joined Hank Aaron and Willie Mays as the only players in Major League Baseball history to hit 500 homeruns, collect 3000 hits and have a lifetime batting average above .300, the Detroit Pistons' Cade Cunningham finished third in the balloting for NBA Rookie of the Year and Detroit Red Wings' Moritz Seider is the leading candidate for the NHL's rookie of the year award. So that's a start . . .

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