The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

January 5, 2006

Dear Senators Specter and Leahy,

As law professors from across the United States, we write to express our opposition to the confirmation of Judge Samuel Alito to the United States Supreme Court.

Nominated by President Bush to replace moderately conservative Justice Sandra Day O'Connor, Judge Alito has a 15-year record of trying to push the law sharply to the right. According to the *National Law Journal*, Judge Alito "is described by lawyers as exceptionally bright, but much more of an ideologue than most of his colleagues."[1] Analyses show that in close cases – the kinds of cases the Supreme Court reviews – Judge Alito consistently takes positions that devalue individual rights and protections. And despite the president's pledge to nominate someone who embraces the principle of judicial restraint, Judge Alito often reaches his conclusions by overturning or weakening federal statutes, diminishing constitutional safeguards, and hollowing out precedent.

Invalidating Federal Statutory Protections

Judge Alito has sought to curb Congress' authority to tackle issues of national importance, voting to invalidate the federal prohibition on machine gun possession and part of the federal Family and Medical Leave Act. Republicans and Democrats alike have criticized both the Supreme Court and lower federal courts for voting to strike down federal protections without appropriately deferring to Congress as a co-equal branch of government. While several decisions in the past two years have slowed the trend, Judge Alito's record suggests that he would accelerate it once again.[2] There are several significant federalism cases already before the Court this term.

Machine Gun Ban. In *United States v. Rybar*,[3] Judge Alito argued in dissent that the federal ban on machine gun possession – which had been on the books in some form since 1934 – is unconstitutional Commerce Clause legislation. His colleagues accused him of disrespectfully requiring the "coordinate branches of government" to "play 'Show and Tell' with the federal courts at the peril of invalidation of a Congressional statute."[4] All of the other appeals courts that had considered the law in the wake of the Supreme Court's 1995 ruling in *United States v. Lopez*[5] agreed with Judge Alito's colleagues. Every court to have looked at the law since then has done the same, except one, and the Supreme Court

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[1] Joseph Slobodzian, *Third Circuit – Microcosm of Change*, NAT'L L. J., Dec. 7, 1992, at 1.
[2] As Jeffrey Rosen has noted, between 1995 and 2003 the Rehnquist court struck down thirty-three federal laws on constitutional grounds, doing so at a higher annual rate than any court in American history. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005.
[3] 103 F.3d 273 (3d Cir. 1996), *cert. denied* 522 U.S. 807 (1997).
[4] *Id.* at 282.
[5] 514 U.S. 549 (1995).

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summarily vacated that decision this year after issuing its decision in *Gonzales v. Raich*,[6] which rejected Judge Alito's cramped view of Congress' law-making authority.

Family and Medical Leave Act. In *Chittister v. Department of Community and Economic Development*,[7] Judge Alito held that Congress does not have the authority to give the country's nearly five million state employees the right to sue their employers for damages for violating the Family and Medical Leave Act's guarantee of personal unpaid sick leave. Facing a similar challenge in *Nevada Department of Human Resources v. Hibbs*,[8] the Supreme Court later found that a state employee can enforce his or her rights under the part of the law requiring employers to provide for family leave.

Weakening Federal Statutory Protections

Judge Alito has voted, often in dissent, to curb judicial enforcement of vital federal statutes, including the following.

Title VII of the Civil Rights Act of 1964. In several divided decisions, Judge Alito has also undermined Congressional intent by voting in dissent to make it harder to prove claims of job discrimination. In *Bray v. Marriott Hotels*,[9] Judge Alito unsuccessfully tried to keep a worker's claim of race discrimination from being heard by the jury. His colleagues in the majority asserted that anti-discrimination statutes "would be eviscerated if our analysis were to halt where [Alito's] dissent suggests."[10] In *Sheridan v. E.I. Dupont de Nemours & Co.*,[11] he was outvoted 10-1 by the *en banc* Third Circuit when he tried to get around precedent to throw out a jury verdict in favor of a worker claiming sex discrimination.

Clean Water Act. In *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,[12] Judge Alito voted to make it harder than Congress intended for citizens to establish standing to sue for toxic emissions that violate the Clean Water Act; in fact, he agreed that Congress lacked the authority to authorize certain citizen suits. Several years later, by a 7-2 vote in *Friends of the Earth v. Laidlaw*,[13] with only Justices Scalia and Thomas dissenting, the Supreme Court effectively rejected Judge Alito's position.

Sherman Antitrust Act. In *LePage's, Inc. v. 3M Corp.*,[14] Judge Alito voted in dissent to strike down a $68 million jury verdict against 3M Corporation for violating the Sherman Antitrust Act by monopolizing scotch tape sales at the expense of a smaller competitor with less diverse product lines.

Rehabilitation Act. In *Nathanson v. Medical College of Pennsylvania*,[15] Judge Alito tried to raise the bar for proving disability discrimination. He dissented from a ruling finding that a disabled medical student had produced sufficient evidence to take to a jury her claim that she had to drop out because the school failed to provide her a seating arrangement that accommodated her disability. The majority

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[6] 125 S. Ct. 2195 (2005).
[7] 226 F.3d 223 (3d Cir. 2000).
[8] 538 U.S. 721 (2003).
[9] 110 F.3d 986 (3d Cir. 1997).
[10] *Id.* at 993.
[11] 100 F. 3d 1061 (3d Cir. 1996) (*en banc*).
[12] 123 F.3d 111 (3d Cir. 1997).
[13] 528 U.S. 167 (2000).
[14] 324 F.3d 141 (3d Cir. 2003) (*en banc*).
[15] 926 F.2d 1368 (3d Cir. 1991).

accused Judge Alito of raising the student's burden of proof to the point where "few if any Rehabilitation Act cases could survive" a defendant's motion to have a case dismissed before trial.[16]

Immigrants' Statutory Rights. In *Dia v. Ashcroft*, a majority of the full court accepted a Guinean citizen's asylum claims and said that Judge Alito's dissent "not only guts the statutory standard, but ignores our precedent."[17] In *Lee v. Ashcroft*, the court majority agreed with a Korean immigrant's claim that a conviction for filing a false tax return did not make him deportable and said that Judge Alito's dissent engaged in "speculation" about what Congress intended, in violation of the "well-recognized rules of statutory construction."[18] In *Sandoval v. Reno*,[19] Judge Alito wrote in dissent that certain aliens in custody could not seek waivers of their deportation orders in court; the Supreme Court rejected his view in *INS v. St. Cyr*.[20]

Diminishing Constitutional Protections and Hollowing Out Precedent

Freedom from Illegal Search and Seizure. In a series of cases, Judge Alito pushed to narrow the Fourth Amendment's protection against unreasonable search and seizure.[21] In *Doe v. Groody*,[22] for instance, he wrote in dissent that police officers did not violate the Constitution when they strip-searched a mother and her 10 year-old daughter – who were not criminal suspects – while executing a warrant that only authorized the search of the target of their investigation. Homeland Security Secretary and long-time federal prosecutor Michael Chertoff, then Judge Alito's colleague on the Third Circuit, wrote the majority opinion, asserting that if the court were to accept Judge Alito's theory that the judge who issued the warrant intended to authorize everything the police sought, even though the warrant he signed did not, it would "transform the judicial officer into little more than the cliché 'rubber stamp.'"[23]

Women's Reproductive Freedoms. In *Planned Parenthood v. Casey*,[24] Judge Alito wrote in dissent that he would uphold a Pennsylvania law requiring a woman in certain circumstances to notify her husband before obtaining an abortion. The Supreme Court, including Justice O'Connor, rejected that view. It found that the restriction placed an undue burden on women's reproductive freedom, saying that "women do not lose their constitutionally protected liberty when they marry."[25] Commentators from across the political spectrum believe that Judge Alito's dissent in *Casey*, together with his terse, seemingly grudging concurrences in other abortion cases, demonstrate that he disagrees with *Roe v. Wade*[26] and would, at the very least, uphold significant restrictions on the right to choose.[27]

Right to Effective Counsel. In *Rompilla v. Horn*,[28] Judge Alito evaded recently decided Supreme Court precedent to hold that a death row inmate's defense attorneys were not constitutionally ineffective, even though they failed to investigate key files containing important evidence about their client's

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[16] *Id.* at 1387.
[17] *Dia v. Ashcroft*, 353 F.3d 228, 251 n.22 (3d Cir. 2003) (*en banc*).
[18] *Lee v. Ashcroft*, 368 F.3d 218, n.11 (3d Cir. 2004)
[19] 166 F.3d 225 (3d Cir. 1999).
[20] 533 U.S. 289 (2001).
[21] Robert Gordon, *If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005 *at* http://www.slate.com/id/2129107/.
[22] 361 F.3d 232 (3d Cir.) *cert. denied*, 125 S. Ct. 111 (2004).
[23] *Id.* at 243.
[24] 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).
[25] *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).
[26] 410 U.S. 113 (1973).
[27] *See* Charles Lane, *Nominee's Reasoning Points to a Likely Vote Against* Roe v. Wade, WASH. POST, Nov. 2, 2005.
[28] 355 F.3d 233 (2004), *rev'd*, 125 S. Ct. 2456 (2005).

troubled childhood which may have persuaded a jury not to impose the death sentence. The dissent called the lawyers' performance "shocking," and Judge Alito's holding "inexplicable."[29] By a 5-4 margin, with Justice O'Connor casting the deciding vote, the Supreme Court rejected Judge Alito's conclusion. Justice O'Connor noted in a concurrence that the evidence the lawyers failed to investigate went to the "very heart" of the prosecution's case for the death penalty.[30]

Right to Race-Neutral Jury Selection. In *Riley v. Taylor*,[31] Judge Alito dissented from the full Third Circuit's grant of *habeas corpus* to a death row inmate who claimed that the prosecution violated the holding of *Batson v. Kentucky*[32] by using racially-motivated peremptory strikes to remove African Americans from the jury. Judge Alito said that inferring racial discrimination from the striking of every single potential black juror from all of Delaware's four first-degree murder trials during the year Riley was tried was no more reasonable than inferring an electoral preference for lefties from the hypothetical fact that five of the last six presidents happened to be left-handed. The majority condemned the analogy, writing that it ignored the underlying constitutional right and "minimize[d] the history of discrimination against prospective black jurors and black defendants … ."[33]

Church-State Separation. In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,[34] Judge Alito argued in dissent that a public school board could get around an earlier Supreme Court ruling, which barred school-approved, clergy-led prayers at graduation ceremonies, by allowing students to approve student-led prayers at graduation ceremonies. Effectively disagreeing with Judge Alito in *Santa Fe Independent School District v. Doe*,[35] decided several years later, a six-justice Supreme Court majority, including Justice O'Connor, held that a public school board policy of allowing student-approved, student-led prayers at public high school football games was unconstitutional.

The Supreme Court is the guardian of our rights and freedoms. For decades to come, Judge Alito's one vote could work significant changes in the law affecting these rights and freedoms. This is particularly true given that Judge Alito is nominated to replace Justice O'Connor, who has provided the swing vote in many important 5-4 decisions. Based on his fifteen-year record on the bench, we believe that Judge Alito would reshape the law in ways that make our country less equal and less free.

We urge you to reject the nomination of Judge Alito nomination to the Supreme Court.

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[29] *Id.* at 273-274 (Sloviter, J., dissenting).
[30] *Rompilla v. Beard*, 125 S. Ct. 2456, 2470 (2005) (O'Connor, J., concurring).
[31] 277 F.3d 261 (3d Cir. 2001) (*en banc*).
[32] 476 U.S. 79 (1986).
[33] *Riley*, 277 F.3d at 292.
[34] 84 F.3d 1471 (3d Cir. 1996) (*en banc*).
[35] 530 U.S. 290 (2000).

Mark N. Aaronson
Clinical Professor of Law and Civil Justice Clinic Director
University of California - Hastings College of the Law

Richard L. Abel
Connell Professor of Law
University of California at Los Angeles School of Law

Paula Abrams
Professor of Law
Lewis and Clark Law School

Harold Abramson
Professor of Law
Touro Law Center

Cynthia Matson Adams
Clinical Associate Professor of Law
Indiana University School of Law

Robert W. Adler
James I. Farr Chair and Professor of Law
University of Utah, S.J. Quinney College of Law

Muneer Ahmad
Associate Professor of Law
American University, Washington College of Law

Janet Ainsworth
Professor of Law
Seattle University School of Law

Raquel Aldana
Associate Professor of Law
University of Nevada Las Vegas, William S. Boyd School of Law

Barbara Bader Aldave
Loran L. Stewart Professor
University of Oregon School of Law

Janet Cooper Alexander
Frederick I. Richman Professor of Law
Stanford University Law School

Ty Alper
Visiting Clinical Professor of Law
Boalt Hall School of Law, University of California at Berkeley

Derek Alphran
Associate Professor of Law
University of the District of Columbia, David A. Clarke School of Law

Anthony G. Amsterdam
University Professor and Professor of Law
New York University School of Law

William R. Andersen
Judson Falknor Professor of Law Emeritus &
Freeman Professor of Law, Center for Chinese American Studies
University of Washington School of Law &
Johns-Hopkins/Nanjing University

Jill Anderson
Assistant Professor of Law
Western New England College School of Law

Mark F. Anderson
Associate Professor of Law
Temple University, James E. Beasley School of Law

Michelle J. Anderson
Professor of Law
Villanova University School of Law

William L. Andreen
Edgar L. Clarkson Professor of Law
University of Alabama School of Law

Claudia Angelos
Professor of Clinical Law
New York University School of Law

Fran Ansley
Distinguished Professor of Law
University of Tennessee College of Law

Annette R. Appell
William S. Boyd Professor of Law
University of Nevada Las Vegas, William S. Boyd School of Law

Maria Arias
Adjunct Professor of Law
City University of New York School of Law

Robert H. Aronson
Betts, Patterson & Mines Professor of Law
University of Washington School of Law

Marie Ashe
Professor of Law
Suffolk University Law School

Michael Avery
President, National Lawyers Guild, Professor of Law
Suffolk University Law School

Barbara Allen Babcock
Judge John Crown Professor of Law, Emeritus
Stanford University Law School

James Francis Bailey III
Professor of Law Emeritus and Director Emeritus of the Ruth Lilly Law Library
Indiana University School of Law

Brian L. Baker
Director of the Law Library and Assistant Professor of Law
University of the District of Columbia, David A. Clarke School of Law

C. Edwin Baker
Nicholas Gallicchio Professor
University of Pennsylvania Law School

David C. Baldus
Professor of Law
University of Iowa College of Law

Fletcher Baldwin
Chesterfield Smith Professor of Law
University of Florida Fredric G. Levin College of Law

Milner S. Ball
Harmon W. Caldwell Chair in Constitutional Law
University of Georgia School of Law

Beverly Balos
Clinical Professor of Law
University of Minnesota Law School

Mark Barenberg
Professor of Law
Columbia University School of Law

Robert Bartels
Professor of Law
Arizona State University College of Law

Elizabeth Bartholet
Morris Wasserstein Public Interest Professor of Law; Faculty Director, Child Advocacy
Harvard Law School

Robert Batey
Professor of Law
Stetson University College of Law

Linda M. Beale
Richard W. and Marie L. Corman Scholar and Associate Professor
University of Illinois College of Law

Loftus Becker
Professor of Law
University of Connecticut School of Law

Theresa Beiner
Nadine H. Baum Distinguished Professor of Law
University of Arkansas at Little Rock, William H. Bowen School of Law

George Bell
Associate Professor of Clinical Law
University of Illinois College of Law

Derrick Bell
Visiting Professor of Law
New York University School of Law

Leslie Bender
Board of Advisors Professor of Law
Syracuse University College of Law

Steven Bender
James and Ilene Hershner Professor of Law
University of Oregon School of Law

Robert Benson
Professor of Law
Loyola Law School

Steve Berenson
Associate Professor of Law
Thomas Jefferson School of Law

Paula Berg
Professor of Law
City University of New York School of Law

Adele Bernhard
Associate Professor of Law; Director, Pace Criminal Justice Clinic & Post-Conviction Project
Pace University School of Law

Tori Berres-Paul
Legal Writing Professor
Lewis and Clark Law School

Donald N. Bersoff
Professor of Law Emeritus
Villanova University School of Law

Tamar R. Birckhead
Clinical Assistant Professor of Law
University of North Carolina School of Law

Dorothy Bisbee
Assistant Professor of Law
Southern New England School of Law

Susan Bisom-Rapp
Professor of Law
Thomas Jefferson School of Law

Susan H. Bitensky
Professor of Law
Michigan State University College of Law

Susan H. Bitensky
Professor of Law
Michigan State University College of Law

Barbara Aronstein Black
George Welwood Murray Professor of Legal History
Columbia University School of Law

Walker J. Blakey
Professor of Law
University of North Carolina School of Law

Beryl Blaustone
Professor of Law; Director, Mediation Clinic, Main Street Legal Services
City University of New York School of Law

Robert M. Bloom
Professor of Law and Popeo Scholar
Boston College Law School

Carolyn P. Blum
Clinical Professor of Law Emeritus
Boalt Hall School of Law, University of California at Berkeley

Karen M. Blum
Professor of Law
Suffolk University Law School

Grace Ganz Blumberg
Professor of Law
University of California at Los Angeles School of Law

Eric Blumenson
Professor of Law
Suffolk University Law School

Michael C. Blumm
Professor of Law
Lewis and Clark Law School

Charles S. Bobis
Professor of Law
St. John's University School of Law

Ivan Bodensteiner
Professor of Law
Valparaiso University School of Law

John Charles Boger
Wade Edwards Distinguished Professor of Law
University of North Carolina School of Law

Carl T. Bogus
Professor of Law
Roger Williams University School of Law

John E. Bonine
Professor of Law
University of Oregon School of Law

Amelia Helen Boss
Professor of Law
Temple University, James E. Beasley School of Law

Ida L. Bostian
Teaching Scholar, Center for Social Justice and Public Service
Santa Clara University School of Law

Richard Boswell
Professor of Law
University of California - Hastings College of the Law

Kristi L. Bowman
Assistant Professor of Law
Drake University

Cynthia Grant Bowman
Professor of Law
Northwestern University School of Law

Karen Boxx
Professor of Law
University of Washington School of Law

Carolyn S. Bratt
W.L. Matthews Professor of Law
University of Kentucky College of Law

Jacquelyn Bridgeman
Associate Professor of Law
University of Wyoming College of Law

Pamela D. Bridgewater
Professor of Law
American University, Washington College of Law

Paul H. Brietzke
Professor of Law
Valparaiso University School of Law

Katherine S. Broderick
Dean and Professor of Law
University of the District of Columbia, David A. Clarke School of Law

Mark S. Brodin
Professor of Law
Boston College Law School

Robert Brookins
Professor of Law; Labor Arbitrator
Indiana University School of Law

Mark R. Brown
Newton D. Baker/Baker & Hostetler Professor of Law
Capital University Law School

Elizabeth M. Bruch
Associate Professor of Law
Valparaiso University School of Law

Susan Bryant
Director of Clinical Education and Associate Professor of Law
City University of New York School of Law

Neil H. Buchanan
Assistant Professor of Law
Rutgers University School of Law - Newark

Sande L. Buhai
Clinical Professor of Law
Loyola Law School

Lewis Burke
Professor of Law and Director of Clinics
University of South Carolina School of Law

Marcilynn A. Burke
Assistant Professor of Law
University of Houston Law Center

John M. Burman
Professor of Law and Faculty Supervisor, Legal Services Program
University of Wyoming College of Law

Margaret Burnham
Associate Professor of Law
Northeastern University School of Law

Burton Caine
Professor of Law
Temple University, James E. Beasley School of Law

Robert Calhoun
Professor of Law
Golden Gate University School of Law

Emily Calhoun
Professor of Law
University of Colorado School of Law

Janet M. Calvo
Professor of Law
City University of New York School of Law

John J. Capowski
Associate Professor of Law
Widener University School of Law

W. Jonathan Cardi
Assistant Professor of Law
University of Kentucky College of Law

Gilbert Paul Carrasco
Professor of Law
Willamette University School of Law

Kathleen Carrick
Law Library Director and Associate Professor of Law
Case Western Reserve University School of Law

Sheryll Cashin
Professor of Law
Georgetown University Law Center

Francis Catania
Associate Professor of Law; Director, Judicial Externship Program
Widener University School of Law

Rosanna Cavallaro
Professor of Law
Suffolk University Law School

Leonard L. Cavise
Professor of Law
DePaul University College of Law

Martha Chamallas
Robert J. Lynn Chair in Law
The Ohio State University, Moritz College of Law

David Chambers
Professor of Law
University of Michigan Law School

Ellen P. Chapnick
Dean for Social Justice Initiatives and Lecturer-in-Law
Columbia University School of Law

Erwin Chemerinsky
Alston & Bird Professor of Law and Professor of Political Science
Duke University School of Law

William Childs
Assistant Professor of Law
Western New England College School of Law

Carol Chomsky
Professor of Law
University of Minnesota Law School

Margaret Chon
Professor and Dean's Distinguished Scholar
Seattle University School of Law

Craig W. Christensen
Professor of Law
Southwestern Law School

Marisa S. Cianciarulo
Reuschlein Clinical Teaching Fellow
Villanova University School of Law, Clinic for Asylum, Refugee & Emigrant Services

Stephen Clark
Associate Professor of Law
Albany Law School

Donald Clarke
Professor of Law
George Washington University Law School

Marjorie Cohn
President-elect, National Lawyers Guild;
Professor of Law
Thomas Jefferson School of Law

Douglas Colbert
Professor of Law
University of Maryland School of Law

Luke Cole
Visiting Professor of Law
University of California - Hastings College of the Law

Carl H. Coleman
Professor of Law & Director, Health Law & Policy Program
Seton Hall University School of Law

Malina Coleman
Associate Professor of Law
University of Akron School of Law

Nancy Cook
Associate Professor of Law and Director of the Community Justice and Legal Assistance Clinic
Roger Williams University School of Law

Rhonda Copelon
Professor of Law
City University of New York School of Law

Roberto L. Corrada
Professor of Law
University of Denver, Sturm College of Law

Lois Cox
Clinical Professor of Law
University of Iowa College of Law

Andrea Curcio
Professor of Law
Georgia State University College of Law

Judith Daar
Professor of Law
Whittier Law School

Thomas J. Davis
Professor of Law
Arizona State University College of Law

Peter L. Davis
Associate Professor of Law
Touro Law Center

Michael H. Davis
Professor of Law
Cleveland State University Cleveland-Marshall College of Law

Benjamin Davis
Associate Professor of Law
University of Toledo College of Law

Richard A. Daynard
Professor of Law
Northeastern University School of Law

Connie de la Vega
Professor of Law
University of San Francisco School of Law

Frank Deale
Associate Professor of Law
City University of New York School of Law

Richard Delgado
University Distinguished Professor of Law &
Derrick Bell Fellow
University of Pittsburgh School of Law

Christine Desan
Professor of Law
Harvard Law School

Robert Dinerstein
Professor of Law
American University, Washington College of Law

Victoria Dodd
Professor of Law
Suffolk University Law School

Curtis Doebbler
Professor of Law
An-Najah National University in Nablus

Jane Dolkart
Associate Professor of Law
Southern Methodist University School of Law

Sharon Dolovich
Professor of Law
University of California at Los Angeles School of Law

Nancy E. Dowd
Chesterfield Smith Professor of Law; Co-Director, Center for Children and Families
University of Florida Fredric G. Levin College of Law

Melinda Drew
Director, Academic Success Program
Northeastern University School of Law

Melvyn R. Durchslag
Professor of Law
Case Western Reserve University School of Law

Peter Edelman
Professor of Law
Georgetown University Law Center

Pamela Edwards
Professor of Law
City University of New York School of Law

Linda Edwards
Professor of Law
Mercer University School of Law

Howard Eglit
Professor of Law
Chicago-Kent College of Law

Nancy Ehrenreich
Professor of Law
University of Denver, Sturm College of Law

Maxine Eichner
Associate Professor of Law
University of North Carolina School of Law

Jon B. Eisenberg
Adjunct Professor of Law
University of California - Hastings College of the Law

Steven Eisenstat
Professor of Law
Suffolk University Law School

Jorge Elorza
Assistant Professor of Law
Roger Williams University School of Law

Anne Emanuel
Professor of Law
Georgia State University College of Law

Russell Engler
Clinical Director & Professor of Law
New England School of Law

Garrett Epps
Orlando John and Marian H. Hollis Professor of Law
University of Oregon School of Law

Patricia J. Falk
Professor of Law
Cleveland State University Cleveland-Marshall College of Law

Anthony Paul Farley
Associate Professor of Law
Boston College Law School

Marvin A. Fein
Associate Professor of Legal Writing and Director, John P. Gismondi Civil Litigation Certificate Program
University of Pittsburgh School of Law

Stephen M. Feldman
Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law
University of Wyoming College of Law

Mary Louise Fellows
Everett Fraser Professor of Law
University of Minnesota Law School

Zanita E. Fenton
Professor of Law
University of Miami School of Law

Todd D. Fernow
Professor of Law
University of Connecticut School of Law

Paul Finkelman
Chapman Distinguished Professor
University of Tulsa College of Law

Arlene Rivera Finkelstein
Professor of Legal Methods; Director, Public Interest Resource Center
Widener University School of Law

Paul Fisher
Adjunct Professor of Law, Straus Institute for Dispute Resolution
Pepperdine University School of Law

Linda E. Fisher
Professor of Law & Director, Center for Social Justice
Seton Hall University School of Law

Matthew L. M. Fletcher
Assistant Professor of Law
University of North Dakota School of Law

Taylor Flynn
Associate Professor of Law
Northeastern University School of Law

James W. Fox, Jr.
Associate Professor of Law
Stetson University College of Law

Mary Louise Frampton
Professor of Law, Director, Center for Social Justice
Boalt Hall School of Law, University of California at Berkeley

Leslie Francis
Alfred C. Emery Professor of Law
University of Utah, S.J. Quinney College of Law

Sally Frank
Professor of Law
Drake University

Kris Franklin
Associate Professor of Law; Director, Academic Skills Program
New York Law School

Lawrence Friedman
Assistant Professor of Law
New England School of Law

Leon Friedman
Professor of Law
Hofstra Law School

Craig B. Futterman
Associate Clinical Professor of Law
University of Chicago Law School, Edwin F. Mandel Legal Aid Clinic

Christine D. Galbraith
Associate Professor of Law
University of Maine School of Law

Paula Galowitz
Clinical Professor Law
New York University School of Law

Steven G. Gey
David and Deborah Fonvielle & Donald and Janet Hinkle Professor of Law
Florida State University College of Law

Llewellyn Joseph Gibbons
Associate Professor of Law
University of Toledo College of Law

Lauren Gilbert
Associate Professor of Law
St. Thomas University School of Law

Barbara J. Gilchrist
Clinical Professor of Law
St. Louis University School of Law

Theresa Glennon
Professor of Law
Temple University, James E. Beasley School of Law

Brian Glick
Associate Clinical Professor of Law
Fordham University School of Law

Howard A. Glickstein
Dean Emeritus and Professor of Law
Touro Law Center

Dale D. Goble
Margaret Wilson Schimke Distinguished Professor of Law
University of Idaho College of Law

Dwight Golann
Professor of Law
Suffolk University Law School

Carole Goldberg
Professor of Law
University of California at Los Angeles School of Law

A. Thomas Golden
Professor of Law
Thomas Jefferson School of Law

Phyllis Goldfarb
Professor of Law
Boston College Law School

Alvin L. Goldman
William T. Lafferty Professor of Law
University of Kentucky College of Law

Jesse A. Goldner
John D. Valentine Professor of Law
Saint Louis University School of Law

Julie Goldscheid
Associate Professor of Law
City University of New York School of Law

Anne B. Goldstein
Professor of Law
Western New England College School of Law

Toby Golick
Clinical Professor of Law
Yeshiva University, Cardozo School of Law

Laura E. Gómez
Professor of Law
University of New Mexico School of Law

Carmen G. Gonzalez
Associate Professor of Law
Seattle University School of Law

Victor M. Goode
Associate Professor of Law
City University of New York School of Law

Robert W Gordon
Chancellor Kent Professor of Law and Legal History
Yale Law School

David J. Gottlieb
Professor of Law
University of Kansas School of Law

Stephen E. Gottlieb
Professor of Law
Albany Law School

Sonia Bychkov Green
Assistant Professor of Law, Associate Director, Lawyering Skills Program
The John Marshall Law School

Stuart P. Green
Professor of Law & Director, Pugh Institute for Justice
Louisiana State University Law School

Michael Green
Bess & Walter Williams Professor of Law
Wake Forest University School of Law

Steven K. Green
Associate Professor of Law
Willamette University School of Law

David A. Green
Associate Dean and Associate Professor of Law
North Carolina Central University School of Law

Martin Guggenheim
Fiorello LaGuardia Professor of Clinical Law
New York University School of Law

Isabelle R. Gunning
Professor of Law
Southwestern Law School

Kaaryn Gustafson
Associate Professor of Law
University of Connecticut School of Law

Jonathan M. Gutoff
Associate Professor of Law
Roger Williams University School of Law

Phoebe A. Haddon
Professor of Law
Temple University, James E. Beasley School of Law

David Hall
Professor of Law
Northeastern University School of Law

Louise Halper
Professor of Law
Washington & Lee University School of Law

Vivian Hamilton
Associate Professor of Law
West Virginia University College of Law

Gwen Thayer Handelman
Scholar in Residence
Nova Southeastern University, Shepard Broad Law Center

Ian F. Haney Lopez
Professor of Law
Boalt Hall School of Law, University of California at Berkeley

Sidney L. Harring
Professor of Law
City University of New York School of Law

David A. Harris
E.N. Balk Professor of Law and Values
University of Toledo College of Law

Keith M. Harrison
Professor of Law
Franklin Pierce Law Center

Robert Harrison
Lecturer in Legal Method, Yale Law School
Yale Law School

Jeffrey H. Hartje
Professor of Law
University of Denver, Sturm College of Law

Lisa H. Healy
Professor of Legal Writing
Suffolk University Law School

William Hellerstein
Professor of Law
Brooklyn Law School

Virginia E. Hench
Professor of Law
University of Hawaii at Manoa, William S. Richardson School of Law

Lynne Henderson
Visiting Professor of Law
Santa Clara University School of Law

Randy Hertz
Professor of Law
New York University School of Law

Steven J. Heyman
Professor of Law
Chicago-Kent College of Law

Gregory Hicks
Professor of Law
University of Washington School of Law

Michael H. Hoffheimer
Professor of Law
University of Mississippi Law School

Betsey R. Hollingsworth
Clinical Professor of Law
Seattle University School of Law

Wythe W. Holt, Jr.
University Research Professor of Law Emeritus
University of Alabama School of Law

Andrew Horwitz
Professor of Law and Director of Clinical Programs
Roger Williams University School of Law

Oliver A. Houck
Professor of Law
Tulane University Law School

H. Cabanne Howard
Assistant Professor of Law
University of Maine School of Law

Joan W. Howarth
Boyd Professor of Law
University of Nevada Las Vegas, William S. Boyd School of Law

Kent Hull
Adjunct Associate Professor
University of Notre Dame Law School

Linda Hume
Professor of Law
University of Washington School of Law

Tim Iglesias
Associate Professor of Law
University of San Francisco School of Law

Lisa C. Ikemoto
Professor of Law
Loyola Law School

Anthony C. Infanti
Associate Professor of Law
University of Pittsburgh School of Law

David B. Isbell
Adjunct Professor of Law
University of Virginia School of Law

Carol L. Izumi
Professor of Clinical Law and Associate Dean for Clinical Affairs
George Washington University Law School

Peter Jaszi
Professor of Law
American University, Washington College of Law

Stewart Jay
Professor of Law, William L. Dwyer Chair in Law
University of Washington School of Law

Steven Jonas
Adjunct Professor of Legal Education
Touro Law Center

William S. Jordan III
C. Blake McDowell Professor of Law
University of Akron School of Law

Timothy S. Jost
Robert L. Willett Family Professor
Washington & Lee University School of Law

Jose Roberto Juarez, Jr.
Professor of Law
St. Mary's University School of Law

James L. Kainen
Director of Trial Advocacy Competitions, Associate Professor
Fordham University School of Law

David Kairys
James E. Beasley Professor of Law
Temple University, James E. Beasley School of Law

Howard Kalodner
Professor of Law
Western New England College School of Law

Pamela S. Karlan
Kenneth and Harle Montgomery Professor of Public Interest Law
Stanford University Law School

Madeline June Kass
Assistant Professor of Law
Thomas Jefferson School of Law

Eileen Kaufman
Professor of Law
Touro Law Center

Susan L. Kay
Clinical Professor Law
Vanderbilt University Law School

Kevin B. Kelly
Associate Clinical Professor of Law
Seton Hall University School of Law

Michael Kelly
Professor of Law
Creighton University School of Law

Walter J. Kendall III
Professor of Law
The John Marshall Law School

Joseph E. Kennedy
Associate Professor of Law, Associate Dean for Academic Affairs
University of North Carolina School of Law

Robert B. Kent
Distinguished Visiting Professor of Law
Roger Williams University School of Law

Paul Kibel
Adjunct Professor of Law
Golden Gate University School of Law

Kenneth Kimerling
Adjunct Professor of Law
Fordham University School of Law

Kenneth J. King
Practitioner in Residence
Suffolk University Law School, Juvenile Justice Center

Neil Kinkopf
Associate Professor of Law
Georgia State University College of Law

Alan Kirtley
Associate Professor & Director of Clinics
University of Washington School of Law

Karl Klare
Professor of Law
Northeastern University School of Law

James M. Klebba
Victor H. Schiro Professor of Law
Loyola University of New Orleans

Ilene Klein
Clinical Professor of Law
New England School of Law

Richard Klein
Professor of Law
Touro Law Center

Minna J. Kotkin
Professor of Law
Brooklyn Law School

Svitlana Krarchenko
Adjunct Professor of Law
University of Oregon School of Law

Timothy Kuhner
Assistant Professor of Law
Roger Williams University School of Law

James Kushner
Professor of Law
Southwestern Law School

Ronald B. Lansing
Professor of Law
Lewis and Clark Law School

Bridgit Lawley
Professor of Law
John F Kennedy University School of Law

Charles Lawrence III
Professor of Law
Georgetown University Law Center

Robert G. Lawson
Professor of Law
University of Kentucky College of Law

Donna H. Lee
Associate Professor of Law
City University of New York School of Law

Arthur S. Leonard
Professor of Law
New York Law School

Leon Letwin
Professor of Law Emeritus
University of California at Los Angeles School of Law

Laurie L. Levenson
Professor of Law, William M. Rains Fellow and Director, Center for Ethical Advocacy
Loyola Law School

Betsy Levin
Visiting Professor of Law
Nova Southeastern University, Shepard Broad Law Center

Mark Levin
Associate Professor of Law
University of Hawaii at Manoa, William S. Richardson School of Law

Lawrence C. Levine
Professor of Law
University of the Pacific, McGeorge School of Law

Raleigh Hannah Levine
Associate Professor of Law
William Mitchell College of Law

John M. Levy
Chancellor Professor of Law Emeritus
William and Mary Law School

Norman Lichtenstein
Professor of Law
Pace University School of Law

Raven Lidman
Clinical Professor of Law
Seattle University School of Law

Vicki J. Limas
Associate Dean of Students and Professor of Law
University of Tulsa College of Law

Peter Linzer
Professor of Law
University of Houston Law Center

Robert Justin Lipkin
Professor of Law
Widener University School of Law

Stephen Loffredo
Professor of Law
City University of New York School of Law

Antoinette Sedillo Lopez
Professor of Law
University of New Mexico School of Law

William V. Luneburg
Professor of Law
University of Pittsburgh School of Law

Mary Lynch
Clinical Professor of Law and Director, Clinical Legal Studies Program
Albany Law School

David Lyons
Professor of Law and Philosophy
Boston University School of Law

Gregory P. Magarian
Professor of Law
Villanova University School of Law

Rhonda Magee
Professor of Law
University of San Francisco School of Law

Holly Maguigan
Professor of Clinical Law
New York University School of Law

Joan Mahoney
Professor of Law
Wayne State University Law School

Randi Mandelbaum
Clinical Professor of Law
Rutgers University School of Law - Newark

Karl Manheim
Professor of Law
Loyola Law School

Mari Matsuda
Professor of Law
Georgetown University Law Center

Gary M. Maveal
Associate Dean for Academic Affairs & Associate Professor of Law
University of Detroit Mercy School of Law

Martha McCluskey
Professor of Law
State University of New York at Buffalo

Ann C. McGinley
William S. Boyd Professor of Law
University of Nevada Las Vegas, William S. Boyd School of Law

Patrick C. McGinley
Professor of Law
West Virginia University College of Law

Kathleen McGinnis
Senior Lecturer
University of Washington School of Law

Susan McGraugh
Assistant Professor of Law
Saint Louis University School of Law

Betsy McKenzie
Professor of Law
Suffolk University Law School

Michael Meltsner
Matthews Distinguished University Professor of Law
Northeastern University School of Law

Vanessa Merton
Professor of Law
Pace University School of Law

Carlin Meyer
Professor of Law
New York Law School

Binny Miller
Professor of Law
American University, Washington College of Law

Elliot S. Milstein
Professor of Law
American University, Washington College of Law

Joel A. Mintz
Professor of Law
Nova Southeastern University, Shepard Broad Law Center

Alan D. Minuskin
Associate Clinical Professor of Law
Boston College Law School

Margaret E. Montoya
Professor of Law
University of New Mexico School of Law

Denise C. Morgan
Professor of Law
New York Law School

Muriel Morisey
Associate Professor of Law
Temple University, James E. Beasley School of Law

Scott Moss
Assistant Professor of Law
Marquette University Law School

Gregory S. Munro
Professor of Law; Director of Professional Skills
University of Montana School of Law

Russell G. Murphy
Professor of Law
Suffolk University Law School

Cynthia Nance
Associate Professor of Law
University of Arkansas, Fayetteville

Smita Narula
Assistant Professor of Clinical Law
New York University School of Law

Odeana R. Neal
Associate Professor of Law
University of Baltimore School of Law

Michael deHaven Newsom
Professor of Law
Howard University School of Law

Cheryl Nichols
Assistant Professor of Law
Howard University School of Law

Sheldon M Novick
Adjunct Professor of Law and History
Vermont Law School

Michelle Oberman
Professor of Law
Santa Clara University School of Law

Molly O'Brien
Associate Professor of Law
University of Akron School of Law

Charles J. Ogletree Jr.
Jesse Climenko Professor of Law
Harvard Law School

Angela Onwuachi-Willig
Professor of Law
University of California at Davis School of Law

Laura Oren
Law Foundation Professor
University of Houston Law Center

Nancy Ota
Associate Professor of Law
Albany Law School

Laura M. Padilla
Professor of Law
California Western School of Law

Anthony J. Pagano
Professor of Law
Golden Gate University School of Law

Gary H. Palm
Profess of Law Emeritus
University of Chicago Law School

Patrick Parenteau
Professor of Law
Vermont Law School

Marcy E. Peek
Assistant Professor of Law
Whittier Law School

Eduardo Moises Peñalver
Associate Professor of Law
Fordham University School of Law

Juan F. Perea
Professor of Law
University of Florida Fredric G. Levin College of Law

Andrew Perlman
Associate Professor of Law
Suffolk University Law School

Richard M. Perlmutter
Professor of Law
Suffolk University Law School

LeRoy Pernell
Dean and Professor of Law
Northern Illinois University College of Law

Mark A. Peterson
Clinical Professor of Law
Lewis and Clark Law School

Mary Pickering
Professor
San Jose State University

Michael Pinard
Assistant Professor of Law
University of Maryland School of Law

Ascanio Piomelli
Associate Clinical Professor, Hastings Civil Justice Clinic
University of California - Hastings College of the Law

Madeleine Plasencia
Associate Professor of Law
University of Tulsa College of Law

Zygmunt J.B. Plater
Professor of Law
Boston College Law School

Daniel H. Pollitt
Professor Emeritus
University of North Carolina School of Law

Deborah Post
Professor of Law
Touro Law Center

john a. powell
Professor of Law, Williams Chair in Civil Rights and Civil Liberties
The Ohio State University, Moritz College of Law

Ann Powers
Associate Professor of Law
Pace University School of Law

Kathleen Price
Associate Dean for Library and Technology;
Clarence J. TeSelle Professor of Law
University of Florida Fredric G. Levin College of Law

Harry G. Prince
Professor of Law
University of California - Hastings College of the Law

Edward A. Purcell, Jr.
Joseph Solomon Distinguished Professor
New York Law School

Vernellia R. Randall
Professor of Law
University of Dayton School of Law

Alan Raphael
Associate Professor of Law
Loyola University Chicago School of Law

Jamin Raskin
Professor of Constitutional Law
American University, Washington College of Law

Clifford Rechtschaffen
Professor of Law
Golden Gate University School of Law

Anthony F. Renzo
Professor of Law
Vermont Law School

Ann Bishop Richardson
Associate Professor of Law and Associate Dean for Academic Affairs
University of the District of Columbia, David A. Clarke School of Law

Henry J. Richardson III
Professor of Law
Temple University, James E. Beasley School of Law

William M. Richman
Distinguished University Professor
University of Toledo College of Law

Alison Rieser
Professor of Law
University of Maine School of Law

Dean Hill Rivkin
College of Law Distinguished Professor
University of Tennessee College of Law

Thomas E. Roberts
Professor of Law
Wake Forest University School of Law

William Robinson
Professor of Law
University of the District of Columbia, David A. Clarke School of Law

Richard L. Roe
Professor of Law
Georgetown University Law Center

Joel Rogers
Professor of Law
University of Wisconsin Law School

Naomi Roht-Arriaza
Professor of Law
University of California - Hastings College of the Law

Florence Roisman
Professor of Law
Indiana University School of Law

Mary Romero
Professor of Law
Arizona State University College of Law

Victor C. Romero
Maureen B. Cavanaugh Research Professor
Pennsylvania State University Dickinson School of Law

Tom I. Romero, II
Assistant Professor of Law
Hamline University School of Law

Amy D. Ronner
Professor of Law
St. Thomas University School of Law

Michael M. Rooke-Ley
Emeritus Professor of Law
Nova Southeastern University, Shepard Broad Law Center

Leslie Rose
Associate Professor and Director, Advanced Legal Writing Programs
Golden Gate University School of Law

Howard I. Rosenberg
Professor of Law
University of Denver, Sturm College of Law

Susan Deller Ross
Professor of Law, Director, International Women's Human Rights Clinic
Georgetown University Law Center

Thomas Ross
Professor of Law
University of Pittsburgh School of Law

Laura Rovner
Professor of Law
University of Denver, Sturm College of Law

Judith Royster
Professor of Law, Co-Director, Native American Law Center
University of Tulsa College of Law

Constance L. Rudnick
Professor of Law
Massachusetts School of Law

Margaret M. Russell
Professor of Law
Santa Clara University School of Law

Susan Rutberg
Director, Criminal Litigation Clinic
Golden Gate University School of Law

Herbert Sablove
Adjunct Professor of Law
Rutgers University School of Law - Camden

Natsu Saito
Professor of Law
Georgia State University College of Law

Kenneth Salzberg
Associate Professor of Law
Hamline University School of Law

Ann Scales
Associate Professor of Law
University of Denver, Sturm College of Law

Elizabeth M. Schneider
Rose L. Hoffer Professor of Law
Brooklyn Law School

Anne N. Schroth
Clinical Professor of Law; Director of Poverty Law Outreach, Michigan Clinical Law Program
University of Michigan Law School

Herman Schwartz
Professor of Law
American University, Washington College of Law

Michael A. Schwartz
Assistant Professor of Law; Director, Public Interest Law Firm
Syracuse University College of Law

Sean Scott
Professor of Law
Loyola Law School

Robert A. Sedler
Distinguished Professor of Law
Wayne State University Law School

Kathryn J. Sedo
Clinical Professor of Law
University of Minnesota Law School

Ilene Seidman
Clinical Professor of Law; Family Advocacy Clinic
Suffolk University Law School

Elisabeth Semel
Clinical Professor of Law
Boalt Hall School of Law, University of California at Berkeley

Theodore P. Seto
Professor of Law
Loyola Law School

Ann Shalleck
Professor of Law & Carrington Shields Scholar
American University, Washington College of Law

Jeffrey M. Shaman
Vincent de Paul Professor of Law
DePaul University College of Law

Peter Shane
Joseph S. Platt/Porter Wright Morris & Arthur Professor of Law
The Ohio State University, Moritz College of Law

Laurie Shanks
Professor and Director, Field Placement Project
Albany Law School

Katherine C. Sheehan
Professor of Law
Southwestern Law School

Jeffrey G. Sherman
Professor of Law
Chicago-Kent College of Law

Edward F. Sherman
Professor of Law
Tulane University Law School

Marjorie M. Shultz
Professor of Law
Boalt Hall School of Law, University of California at Berkeley

Arnold I. Siegel
Clinical Professor and Director of Legal Writing
Loyola Law School

Franklin Siegel
Adjunct Professor of Law
City University of New York School of Law

Jessica Silbey
Assistant Professor of Law
Suffolk University Law School

Jay Silver
Professor of Law
St. Thomas University School of Law

Marjorie Silver
Professor of Law
Touro Law Center

Andy Silverman
Joseph M. Livermore Professor & Director, Clinical Programs
University of Arizona Rogers College of Law

Amy Sinden
Associate Professor of Law
Temple University, James E. Beasley School of Law

Norman J. Singer
Charles O. Stokes Professor of Law & Professor of Anthropology
University of Alabama School of Law

Deirdre M. Smith
Associate Professor of Law and Director, Cumberland Legal Aid Clinic
University of Maine School of Law

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Mark Spiegel
Professor of Law
Boston College Law School

Ralph Spritzer
Professor of Law
Arizona State University College of Law

Jean Stefancic
Research Professor of Law
University of Pittsburgh School of Law

Joan Steinman
Distinguished Professor of Law
Chicago-Kent College of Law

Beth Stephens
Professor of Law
Rutgers University School of Law - Camden

Matthew C. Stiegler
Adjunct Professor of Law
University of North Carolina School of Law

Kristen Stilt
Assistant Professor of Law
University of Washington School of Law

Randolph Stone
Clinical Professor of Law
University of Chicago Law School

John A. Strait
Associate Professor of Law
Seattle University School of Law

Mark Strasser
Trustees Professor of Law
Capital University Law School

Robert N. Strassfeld
Professor of Law
Case Western Reserve University School of Law

Andrew Strauss
Professor of Law
Widener University School of Law

William Taylor
Adjunct Professor of Law
Georgetown University Law Center

Kim Taylor-Thompson
Professor of Clinical Law
New York University School of Law

Stephen C. Thaman
Professor of Law
Saint Louis University School of Law

Erica Jayne Thorson
Clinical Professor of Law, International
Enviornmental Law Project
Lewis and Clark Law School

Adam Thurschwell
Associate Professor of Law
Cleveland State University Cleveland-Marshall
College of Law

Grace Calabrese Tonner
Clinical Professor of Law
University of Michigan Law School

Michael Tonry
Sonosky Professor of Law and Public Policy
University of Minnesota Law School

Debora Tuerkheimer
Associate Professor of Law
University of Maine School of Law

Joseph B. Tulman
Professor of Law
University of the District of Columbia, David A.
Clarke School of Law

Francisco Valdes
Professor of Law
University of Miami School of Law

Reynaldo Anaya Valencia
Professor of Law
St. Mary's University School of Law

Jon M. Van Dyke
Professor of Law
University of Hawaii at Manoa, William S.
Richardson School of Law

Lawrence R. Velvel
Dean
Massachusetts School of Law

Joan Vogel
Professor of Law
Vermont Law School

Rachel Vorspan
Professor of Law
Fordham University School of Law

Martin Wagner
Adjunct Professor of Law
Golden Gate University School of Law

Nancy Wanderer
Professor of Law
University of Maine School of Law

Lu-in Wang
Professor of Law
University of Pittsburgh School of Law

Robert V. Ward, Jr.
Dean
Southern New England School of Law

Rhonda Wasserman
Professor of Law
University of Pittsburgh School of Law

Janet Weinstein
Professor of Law
California Western School of Law

Deborah M. Weissman
Professor of Law and Director of Clinical Programs
University of North Carolina School of Law

James Wheaton
Visiting Lecturer, Journalism Law
Stanford University Graduate School of Communications

Valerie White
Former Adjunct Professor of Legal Writing
Massachusetts School of Law

Donald E. Wilkes, Jr.
Professor of Law
University of Georgia School of Law

Kenneth Williams
Professor of Law
Southwestern Law School

Dan Williams
Associate Professor of Law
Northeastern University School of Law

Lucy A. Williams
Professor of Law
Northeastern University School of Law

Verna Williams
Associate Professor of Law
University of Cincinnati College of Law

Paulette J. Williams
Associate Professor of Law
University of Tennessee College of Law

Darryl C. Wilson
Professor of Law
Stetson University College of Law

Evelyn Wilson
Professor of Law
Southern University Law Center

Bruce J. Winick
Professor of Law, Professor of Psychiatry and Behavioral Sciences
University of Miami School of Law

Adam Winkler
Acting Professor
University of California at Los Angeles School of Law

Jane Winn
Professor of Law
University of Washington School of Law

Michael J. Wishnie
Professor of Clinical Law
New York University School of Law

Stephen Wizner
William O. Douglas Clinical Professor of Law and Supervising Attorney
Yale Law School

Mark E. Wojcik
Professor of Law; Director, Global Legal Studies
The John Marshall Law School

Lou Wolcher
Professor of Law
University of Washington School of Law

William J. Woodward, Jr.
Professor of Law
Temple University, James E. Beasley School of Law

Richard W. Wright
Professor of Law
Chicago-Kent College of Law

Jennifer L. Wright
Associate Professor of Law
University of St. Thomas School of Law

Larry Yackle
Professor of Law
Boston University School of Law

Maryann Zavez
Professor of Law; Staff Attorney
Vermont Law School, South Royalton Legal Clinic

Richard O. Zerbe, Jr.
Research in Law and Economics
University of Washington School of Law

Candace Zierdt
Alan E. Gray Professor of Law
University of North Dakota School of Law

Rebecca E. Zietlow
Charles W. Fornoff Professor of Law and Values
University of Toledo College of Law

*Institutional affiliations are included for identification purposes only.