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Table of Contents

^top

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"Refining the Democracy Canon"

Cornell Law Review, Vol. 95, 2010
UC Davis Legal Studies Research Paper No. 193

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This Article responds to Professor Rick Hasen's important new work, The Democracy Canon. Hasen identifies an intriguing and until now largely unnoticed practice in many state courts-to wit, the construing of election statutes with a strong thumb-on-the-scales in favor of easing voters' access to the polls and of rendering ballots eligible to be counted. Hasen defends this "pro voter" canon of interpretation and commends it to the federal courts. I argue that Hasen's Canon cannot stand on the normative foundation he has poured for it, and that the federal courts' adoption of the Canon would probably have significant costs (for example, weakened incentives for bipartisan compromise on electoral reform) that Hasen either overlooks or undersells. I propose three alternative "democracy canons," arguing that each would be more normatively defensible and less politically treacherous than Hasen's Canon. The first, the Effective Accountability Canon, would stand in for the Supreme Court's reluctance to directly enforce the constitutional principle (arguably embodied in the Guarantee Clause, Article I, and the Seventeenth Amendment) that electoral systems should be designed to render elected bodies responsive to the interests and concerns of the normative electorate, i.e., the class of persons entitled to vote. Representative voter participation and aggregate voter competence would be this canon's polestars. A second option, the Carrington Canon, counsels for the narrow construction of voting requirements enacted on a substantially party line vote. It could also negate the normal presumption of deference to administrative agencies - with respect to voting issues - if the agency is headed by a political partisan. The Carrington Canon would function as a means of indirectly enforcing an underenforced constitutional norm against ideological discrimination with respect to the franchise. Third, plausible arguments can be mounted on behalf of what I term the Neutrality Canons, which weigh in favor of statutory interpretations that reduce the fact or appearance of judicial partisanship.

"Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts"

UC Davis Legal Studies Research Paper No. 194

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The national campaign against child abuse has changed the face of American evidence law during the past 30 years. The campaign has led to the relaxation of witness competency standards for alleged child victims, the

recognition of new procedures for presenting child testimony such as the use of support persons, the creation of new hearsay exceptions, and the development of novel species of expert testimony. One of the most controversial new types of expert testimony is shaken baby syndrome. The proponents of the syndrome claim that the violent shaking of an infant by an adult can generate enough force to inflict fatal brain injuries on the infant even without impact. Many pediatricians and pathologists subscribe to this theory. However, many biolmechanical experts dispute the theory. To date, the vast majority of courts have admitted testimony based on the syndrome. The purpose of this article is to critically evaluate the available empirical data relevant to the question of the validity of the syndrome. The article concludes that this is one of the rare situations in which both sides' expert claims pass muster under Federal Rule of Evidence 702 and the Supreme Court's leading decisions, Daubert and Kumho. Once a decision-maker posits the validation standard enunciated in Daubert, it is possible to have genuine battles of the experts. In this case, the syndrome opponents can point to relatively well designed experiments finding that even violent shaking by an adult cannot generate enough force to cause fatal injuries to the infant brain. However, syndrome opponents note that in a large number of cases in which infants suffered such fatal brain injuries, the infant's custodian admitted shaking without impact. It may be tempting to conclude that classical experimentation should always trump more anecdotal expert reasoning. However, that conclusion is indefensible as a matter of both statutory construction and epistemology.

"A Field Guide to Cancellation of Debt Income"
The Tax Lawyer, Forthcoming
UC Davis Legal Studies Research Paper No. 195
University of Florida Levin College of Law Research No. 2009-33

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The United States is awash in a sea of debt. In the midst of the most severe recession since the Great Depression, loan delinquencies and charge-offs are at levels heretofore unknown in the modern financial era. Every loan charge-off and mortgage foreclosure has tax consequences. While the creditor most often claims a bad debt deduction or business related loss, the debtor generally must recognize gross income and pay income taxes on an amount roughly equal to the creditor's loss, unless a special exception applies to exclude the debt relief from income. This article deals with the tax consequences to the debtor of the discharge of a debt for less than full payment. It first explain the origins and rationale for the rule, now codified in § 61(a)(12), that requires the inclusion of '[i]ncome from discharge of indebtedness.' The article then examines the various events that trigger recognition of income under § 61(a)(12). Following that discussion, the article deals with the manner in which the amount of income from discharge of indebtedness is computed. This part of the article also discusses the tax consequences to a business entity that issues an equity interests to a creditor to satisfy a debt. Finally, the article explores the myriad of statutory rules in §108 that permit nonrecognition income from discharge of indebtedness under particular circumstances, and the various ancillary consequences that follow from nonrecognition. Throughout, the article explores the relationship of income from discharge of indebtedness to realization of gain from the transfer of property to satisfy a debt by contrasting the tax consequences of transfers of property to discharge a debt with the consequences of discharge of a debt for less than full payment.

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