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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES UC DAVIS SCHOOL OF LAW

■ **"A Brief Overview of Corporate Governance Reforms in India"**

Conference Board Director Notes No. DN-020
UC Davis Legal Studies Research Paper No. 258

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Since the late 1990s, Indian regulators as well as industry representatives and companies have undertaken significant efforts to overhaul the country's corporate governance. These reform initiatives have been revived or accelerated following the Satyam scandal of 2009. The current corporate governance regime in India straddles both voluntary and mandatory requirements: for listed companies, the vast majority of Clause 49 requirements are mandatory; it remains to be seen whether some of the more recent voluntary corporate governance measures will become mandatory for all companies through a comprehensive revision of the Companies Act.

This report briefly outlines the process undertaken to reform India's corporate governance laws. It also provides an

overview of Clause 49, the pending corporate governance-related provisions in the Companies Bill (2009), and the MCA's Corporate Governance Voluntary Guidelines (2009).

"The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause are Stronger When Both Clauses are Taken Seriously"



Cardozo Law Review, Vol. 32, 2011
UC Davis Legal Studies Research Paper No. 255

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Legal commentary often describes the Free Exercise Clause and Establishment Clause of the First Amendment as either being in tension with each other or as serving overlapping and redundant purposes. Both of these perspectives commonly share a willingness to dispense with or subordinate the requirements of one clause while calling for the rigorous implementation of the other. This Essay suggests a different and overlooked dimension of the relationship between the two clauses: in important ways each of the religion clauses supports and reinforces the justification for and rigorous enforcement of the other. Correspondingly, the dilution of one clause undermines the arguments for taking the other clause seriously. To some significant extent, the religion clauses stand or fall together

These reinforcement and dilution connections cover a range of justifications for, and applications of, the two clauses. Establishment Clause constraints on state subsidies of religious institutions and activities support the value formation justification for protecting free exercise rights. The holding of *Employment Division v. Smith*, eliminating constitutional protection against neutral laws of general applicability, undermines the taxpayer liberty justification for limiting state aid to religious institutions. Free exercise exemptions and accommodations standing alone unacceptably advantage religion in the market place of ideas, and establishment clause limits on government support for religious organizations and beliefs standing alone unacceptably disadvantage religion in the market place of ideas. The rigorous enforcement of each clause (or neither clause) is necessary to balance out these distorting impacts. This essay identifies and discusses these and other ways in which the arguments supporting or undermining each of the religion clauses reinforces or weakens the other.

"Revitalizing Section 2"



University of Pennsylvania Law Review, Vol. 160, 2011
UC Davis Legal Studies Research Paper No. 257

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This article develops a fresh account of the meaning and constitutional function of Section 2, the Voting Rights Act's core provision of nationwide application, which has long been portrayed as conceptually opaque, counterproductive in effect, and quite possibly unconstitutional. Section 2 on my account delegates authority to the courts to develop a common law of racially fair elections, anchored by certain substantive and evidentiary norms, as well as norms about legal change. The central substantive norm is that injuries within the meaning of Section 2 only arise when electoral inequalities owe to race-biased decision-making by majority-group actors, whether public or private. But as an evidentiary matter, plaintiffs need only show a "significant likelihood" of race-biased decision-making, rather than proving it more likely than not. So cast (and with a few more details worked out), Section 2 emerges as a constitutionally permissible response to, *inter alia*, the largely unrecognized problem of election outcomes that are unconstitutional because of the racial basis for the electorate's verdict – a problem that generally cannot be remedied through constitutional litigation. My account of Section 2 has numerous practical implications. Most importantly, it suggests that electoral arrangements that induce or sustain race-biased voting are vulnerable under Section 2, irrespective of their potentially "dilutive" effect on minority representation. My account also resolves a number of prominent circuit splits over the application of Section 2. And it clears the ground for overruling the many Section 2 precedents that rest on the constitutional avoidance canon.

"Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities"



Texas Tech Law Review, Vol. 43, p. 449, 2011
UC Davis Legal Studies Research Paper No. 256

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To say that law firms and lawyers are restricted by the norm of client choice does not mean they are not without options in structuring their relationships in ways that may affect their positions as opposing parties should litigation or disputes develop because of breakups and lawyer mobility. This article explores risk management opportunities with a particular emphasis on avoiding litigation or, if that is not possible, affecting the outcome of litigation. It discusses the role of the partnership agreement and limitations on law firm partnership agreements, including difficulties of negotiating and amending agreements, centralized management as an agreement substitute, past

practices as agreement waivers, and challenges to enforcement of agreements. Particular attention is given to five issues that often are inadequately addressed in law firm partnership agreements; these include intellectual property rights, departure process, partner removals and dequitizations, winding up, and dispute resolution.

"The End of the Era of Proxies"

UC Davis Legal Studies Research Paper No. 250

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In the past, in deciding whether to admit testimony about a particular scientific technique or theory, American courts have largely relied on proxies for the validity of the theory or technique. Rather than directly evaluating the empirical data relevant to the validity question, the courts have turned to surrogates for validity. For example, they have employed such proxies as general acceptance by laypersons in the marketplace, general acceptance by experts in the relevant specialty field, and approval by governmental administrative agencies. To justify such reliance, the American appellate courts have often asserted that trial judges are incompetent to resolve genuine "battles of the experts" and that untrained lay jurors are inclined to overestimate the trustworthiness of expert testimony.

This reliance on proxies has been sharply criticized. To begin with, numerous psychological studies have called into question the assertion that lay juries are naively overawed by expert testimony. More importantly, the use of proxies has led to false negatives as well as false positives. Even if a theory lacks the requisite popularity or approval, the available empirical data may demonstrate its validity. Conversely, even when a theory enjoys the required popularity or approval, the data may establish its invalidity. Thus, there is significant tension between the use of proxies and the priority on rectitude of decision under the truth theory of adjudication.

In 1993 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court ruled that federal judges may no longer use the proxy of general acceptance by specialists as the test for determining the admissibility of scientific testimony. At the same time, the Court mandated that lower federal courts employ an essentially epistemological approach to determining whether the proffered testimony qualifies as admissible "scientific . . . knowledge" under Federal Rule of Evidence 702. The majority of states have adopted some variation of this test.

The *Daubert* decision is challenging. The courts are writing on a tabula rasa because, during the era of proxies, the courts accumulated little experience dealing directly with the empirical data relating to the validity of scientific theories. *Daubert* now mandates that judges do so.

American law has taken several steps to ensure that judges, jurors, and attorneys are up to the challenge assigned them by *Daubert*. To begin with, many American jurisdictions have greatly expanded the breadth of the pretrial discovery of expert information. This expansion gives the litigant a fair opportunity to critically evaluate the scientific reasoning of the opponent's expert witness. In addition, there has been a proliferation of texts, courses, and continuing education programs designed to familiarize law students, lawyers, and judges with the rudiments of scientific methodology. Further, there has been an increase in the use of court-appointed experts and special masters in cases involving extensive scientific testimony.

There is no guarantee that even with the benefit of these measures, the American legal system will meet the challenges posed by the abandonment of proxies. However, there is good reason to be hopeful. In the past, particular segments of American legal practice such as the patent bar have demonstrated their ability to work with sophisticated expert information. In those areas, the bench and bar have proven themselves to be educable. In addition, as Sir Karl Popper famously observed, in the final analysis the scientific method is simply "common sense writ large."

This topic is significant for three reasons. First, American litigants offer expert testimony in the vast majority of cases that go to trial. The courts' ability to properly assess the expert testimony can determine the quality of the justice dispensed by the courts. Second, if the doubts about layperson's ability to critically assess evidence have been overstated, it may be time to reconsider some of the other exclusionary rules such as the hearsay doctrine. Finally, the topic has broader implications for the issue of the courts' institutional competence.

"The Forgotten Constituency? Law School Deans and Students"

University of Toledo Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 254

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Although law schools unquestionably vary dramatically, law school administrations tend to follow a somewhat formulaic hierarchical model. In essence, the dean supervises the law school administrators and staff who regularly work directly with law students. As any law dean can readily attest, unaddressed student dissatisfaction can make a dean's life miserable and produce unhappy alumni who are less likely than happy alumni to provide much-

needed financial support to the school.

Specifically, law school deans at various (often inopportune) times must deal with an array of demands – requests, if you will – from individual students and several different student organizations. In thinking about the dean's relationship with students, it seems important that deans, as the leaders of their law schools, to some degree must be visible to law students and interact with them on a number of different levels. Students are students, consumers, and future alumni, all rolled into one.

Part I of this essay sketches the nature of the relationship between the law school dean and students at UC Davis School of Law, the law school where I have the privilege to serve as Dean. Part II sketches a process-oriented approach to the administration's response to student interests and concerns.

This essay draws some basic lessons from my experience with law students about how a law school dean might build and maintain positive relationships with students. Deans ignore students at their peril, and they cannot satisfy their entire constituency's or any constituency's demands, or follow all of their suggestions. As with other leadership roles, deans must work hard to listen to students, faculty, staff, alumni, and other interest groups, and offer the respect, opportunity to be heard, accessibility, and transparency in decision-making that students demand, value, and in my experience and appreciate. Through collaboration with students, just as with other constituencies, deans and law schools can create an environment that ensures students receive a high quality legal education and the support that they need to thrive in law school.

"A Contrarian View of Copyright: Hip-Hop, Sampling, and Semiotic Democracy"

Connecticut Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 259

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A dominant trend in intellectual property (IP) theory asserts that technologies such as digital copying enable individuals to resist the cultural dominance of the media industry. Under this view, individuals appropriate cultural material and "recode" it by assigning alternative meanings to it. By enabling more people to participate in the making of cultural meanings, recoding supposedly enhances "semiotic democracy." IP theorists tend to argue that copyright law inhibits recoding, thus stifling semiotic democracy. The use of sampling in hip-hop music is frequently cited as a paradigmatic example of recoding that has been stifled by IP law.

This paper uses history, economics, and critical theory to question these arguments on both the empirical and theoretical levels. Many scholars assert that copyright law turned against recoding in the 1990s by requiring samplers to pay for copyright permission. But the music business – including the hip-hop sector – was already in the practice of paying for copyright permission. Judicial decisions simply codified existing practice, which treated copyright permission as merely one of the many costs of making music. Thus copyright law did not impede musical recoding generally or hip-hop specifically.

While economic markets work well in allocating recoding rights, however, this does not necessarily advance semiotic democracy, because market failures afflict the marketplace of ideas. Recoding embodies contradictory forces that both advance and retard semiotic democracy. Law and technology facilitating recoding not only help independent record labels and artists question the cultural meanings advanced by major record companies; they also allow the latter to appropriate from the former. Moreover, recoding not only creates new meanings from existing cultural materials, but also repeats and reinforces those dominant cultural meanings. Indeed, by creating alternative meanings for dominant cultural materials such as popular music, recoding can contribute to their commercial appeal and cultural influence.

"Searching for Harm: Same-Sex Marriage and the Well-Being of Children"

Harvard Civil Rights-Civil Liberties Law Review (CR-CL), Vol. 46, No. 81, 2011

UC Davis Legal Studies Research Paper No. 252

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For the past two decades, claims related to the welfare and well-being of children have been invoked by those defending same-sex marriage bans. This Article offers a new and fruitful perspective on why courts should seriously question the credibility of these asserted child welfare claims. Many assume that these repeated invocations of child welfare related concerns have remained constant, or at least consistent, over time. A closer examination, however, reveals that while children have remained front and center, the particular proffered interests have continued to mutate over time and that more recent claims are inconsistent or at least in tension with earlier arguments. Drawing upon employment discrimination law, this Article argues that this historical perspective should cause courts to be suspicious of these ever changing rationales for same-sex marriage bans.

"The Geography of the Class Culture Wars"

Seattle University Law Review, Vol. 34, p. 767, 2011

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This Essay is a contribution to a colloquy about Joan C. Williams's book, *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press 2010). Williams argues that class matters because socially conscious progressives need working class allies to achieve work-family reform for the benefit of all. Williams calls us not only to think about class and recognize it as a significant axis of stratification and (dis)advantage, but also to treat the working class with respect and dignity. Williams writes of the "class culture wars" between social progressives (mostly within the "professional/managerial class") and the white working class. She asserts that improved relations between these groups will require progressives to better understand the white working class, including why they seem to elevate cultural issues over their economic self-interest. To that end, Williams surveys the major recent ethnographies of the white working class to present a composite portrait of that milieu.

My Essay seeks to enhance Williams's powerful and path-breaking discussion of the white working class in four ways. Part I brings geography explicitly into consideration by arguing that the culture wars – which I believe Williams aligns correctly along a broad and fuzzy line between the working class and the professional/managerial class – similarly align along the rural-urban axis. Just as liberal elites tend to shun the white working class, they also express disdain for rural and small-town residents. Indeed, among urbanites and "coastal elites," rural Americans have become a proxy for the working class – the uncouth, the uncultured, and the illiberal. I document this increasing geographic polarization specifically in relation to the 2008 Presidential election.

Based on this argument that the opposing sides in the class culture wars are now represented (at least rhetorically) by the rural and the urban, I take up three other issues. Part II of the Essay adds nuance to Williams's broad-brush class dichotomy by introducing other classes and sub-classes that are particularly relevant to the rural context. Specifically, I show how Williams's implicitly metropolitan class taxonomy parallels a similar divide in nonmetropolitan communities, and I discuss the role of morality as a basis for differentiation among factions of working class whites in rural settings. Then, in Part III, I argue that cultural and political disdain for rural folks prevents law- and policy-makers from seeing and addressing the distinct challenges facing the rural citizenry, including issues associated with work-life security. I conclude in Part IV with thoughts on work itself as common ground between the professional/managerial class and the white working class. I call for the work-identified professional/managerial class to let go of stereotypes of the white working class as lazy and ignorant and to acknowledge how hard the working class actually do work. I also argue that liberal elites should recognize the structural and cultural obstacles to education and advancement facing working class whites, just as they have recognized similar obstacles stemming from race, ethnicity, gender, sexuality and religion. Recognizing a shared commitment to work across the classes could foster political détente and, ultimately, a more robust political coalition in support of work-family reform.

My thoughts about Williams's book and the class culture wars are informed by my own rural upbringing, as well as by my status as a "class migrant," which Williams defines as those "born and raised working class, who join the upper-middle class through access to elite education." In addition, my comments and analysis rely heavily on two sources – one conventional, the other not – which complement Williams's fine work. First, I draw on Jennifer Sherman's 2009 book, *Those Who Work, Those Who Don't: Poverty, Morality, and Family in Rural America*. This book provides a rural-specific counterpart to Williams's more generalized explanation of why morality and family – and therefore cultural issues more broadly – are so important to the white working class. The second, rather unorthodox source is journalist Joe Bageant's 2007 book, *Deer Hunting with Jesus: Dispatches from America's Class War*. Bageant's insights as a cultural critic – though articulated in a sharper tone and reflecting a more anecdotal method – are uncannily similar to those which Williams and Sherman document in academic fashion. Finally, I illustrate how President Obama has endorsed the core ideas of all three authors.

"Americans Don't Hate Taxes, They Hate Paying Taxes"

University of British Columbia Law Review, Vol. 44, 2011
UC Davis Legal Studies Research Paper No. 251

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This Article recommends reforming the way Americans pay taxes with a plan that eases the burden for taxpayers and paid preparers, and communicates with taxpayer-citizens in a more responsive, dialogic fashion. By leveraging technology and exploiting the government's core competency for maximizing efficiencies in filing taxes, the plan slashes costs (monetary as well as psychological), and offers a consumer friendly, secure, and educational tax-filing portal.

The proposed "data retrieval" platform allows taxpayers and preparers to view, access, and download tax information from a secure database maintained by the government. Rather than having to gather this information from employers, financial institutions, and third parties, taxpayers and their advisors rely on a centralized clearinghouse. Taxpayers with sophisticated returns may still need to input certain information, such as charitable contributions and some capital gains, but data retrieval can simplify filing for all 145 million taxpayers. It also offers an opportunity to communicate with taxpayers and preparers, listen to concerns, meet needs, and improve

the system through a dialogue that enhances fiscal literacy and tax consciousness.

Finally, the government - not the private sector - is uniquely positioned to lead this reform. Data retrieval leverages the government's competitive advantage and core competency in the area of tax filing. Under current taxpayer confidentiality laws, the private sector is prohibited from providing a comparable service for maintaining and updating a centralized database that contains sensitive tax account information. Only the government can bring these efficiencies to the filing process, and ease the filing burden for all taxpayers and their advisors.

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