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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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VIKRAM D. AMAR, EDITOR
Associate Dean and Professor of Law, University of California, Davis - School of Law
vdamar@ucdavis.edu

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)"

Florida International University Law Review Annual Symposium, Forthcoming
UC Davis Legal Studies Research Paper No. 278

VIKRAM D. AMAR, University of California, Davis - School of Law
Email: VDAMAR@UCDAVIS.EDU

The challenges to the federal healthcare statute making their way to the Supreme Court appear to suffer from a problematic blend of doctrinal hypertechnicality, theoretical imprecision, and (an understandable but misplaced) fear of an all-powerful Congress. None of this is to say it will be impossible for any of these challenges ultimately to succeed. Instead, it is to say that any such success would either be revolutionary (in the way that Justice Clarence Thomas's desire to return to nineteenth century cases concerning the scope of federal power would, if implemented, completely upend the current constitutional convention), or it would be tailored to reach a particular result on a particular contentious issue (in the way Bush v. Gore is considered by many to be a ruling good for only one day and one election.)

In particular, the challengers make a number of untenable moves. They mistake novelty for constitutionality. They

also overstate the novelty of the so-called mandate provision of the healthcare law, when it is properly viewed in constitutional context. Importantly, the word "regulate" (used in the Commerce Clause) does not presuppose preexisting activity as it is used elsewhere in the Constitution. Moreover, Congress could easily have satisfied any activity requirement by including a jurisdictional element in the law or styling it in terms of anti-discrimination. Importantly, no practical or theoretical values would be served by making Congress go through these drafting hoops; the claim that an activity requirement is necessary or helpful to protect Tenth Amendment principles does not hold up to close scrutiny. Congress mandated purchase of healthcare for plausible economic reasons and reasons that do not violate any constitutional anti-commandeering/anti-instrumentalization principles. Finally, there is no requirement that Congress label a tax as such to have the power to impose one.

"The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power"
Georgetown Law Journal, Forthcoming
UC Davis Legal Studies Research Paper No. 279

VIKRAM D. AMAR, University of California, Davis - School of Law
Email: VDAMAR@UCDAVIS.EDU

This essay addresses and debunks various criticisms of the National Popular Vote Compact movement, including the suggestion that a move to a national popular presidential election would undermine federalism or regionalism values and the notion that a national popular vote would produce plurality winners and/or embolden third-party candidates. The essay then turns to the key question of whether a national popular vote with different voting rules in each state is workable, and in particular the sources of power Congress has to remedy any problems with the design of the current National Popular Vote Compact plan being adopted by many states. There are good arguments in favor of Congressional power to iron out difficulties, especially once a compact is up and running. For this reason, the idea floated by some that only a constitutional amendment can bring about a national popular vote is misguided.

"Details: Specific Facts and the First Amendment"
UC Davis Legal Studies Research Paper No. 276

ASHUTOSH A. BHAGWAT, University of California, Davis - School of Law
Email: aabhagwat@ucdavis.edu

First Amendment theory and judicial decisions have traditionally focused their analysis primarily on the regulation and suppression of ideas, opinions, and advocacy. The great free speech disputes of the Twentieth Century have produced a robust body of law which, at least in the political sphere, gives very strong protection to such speech. But ideas and opinions are not the only sorts of information conveyed by speech. What about facts, and in particular, what about specific facts, what I call details? Cases such as New York Times v. Sullivan and its progeny discuss the proper treatment of false facts, but what of true, accurate details? Here, both the courts and the commentators have been almost entirely silent. An examination of recent cases reveals, however, that factual speech has been at the center of in a number of important First Amendment disputes, and that with the rise of the Internet such disputes are increasing in number. Such cases arise in a wide variety of contexts, including privacy disputes over disclosure of personal details, attempts to regulate dangerous speech, disputes over technical and scientific speech, and disclosure of military or diplomatic secrets. Furthermore, the judicial decisions in this area are in utter disarray. Courts apply inconsistent doctrinal rules to essentially identical cases, and reach wildly varying results. Some reconsideration is clearly needed here.

Turning to First Amendment theory, I argue that if one accepts (as I do) the view that the primary, albeit not necessarily the only, purpose of the First Amendment is to protect the process of democratic self-governance, then it will often be true that specific, factual speech is less central to First Amendment values than ideas or opinions, because it contributes little to self-governance. On the other hand, sometimes details can play a central role in self-governance, and furthermore details may also have some, albeit reduced, value because of their contribution to other goals relevant to free speech such as the search for truth. As such, no categorical denial or even reduction of constitutional protection for details is warranted. Instead, I propose a two-tiered approach. In a case where the government seeks to regulate or suppress details (or punish the disclosure of details), courts must first evaluate the relationship between the specific details at issue and the process of self-governance (defined with sufficient breadth). If a direct such relationship exists, then courts should continue to apply the extremely protective doctrine it has developed in cases involving advocacy and ideas, including the strict scrutiny test and the highly stringent incitement test of Brandenburg v. Ohio. However, if the details at issue are only peripherally connected to self-governance or are unrelated altogether, then a more permissive approach is called for. My solution is to apply, in such cases, a version of the intermediate scrutiny test developed in the Supreme Court's commercial speech jurisprudence. This test is sufficiently robust to permit significant protection for such details, but sufficiently flexible to permit courts to consider both the constitutional value of the relevant speech, and scale of the social harm threatened by disclosure of the details, in drawing a proper balance. I conclude the article by considering how this approach would have altered the analysis in a number of litigated cases.

"Jasmine Revolutions"
Cornell Law Review, Vol. 97, 2012

UC Davis Legal Studies Research Paper No. 272

ANUPAM CHANDER, University of California, Davis - School of Law
Email: achander@ucdavis.edu

Will the Internet help topple tyrants, or will it help further cement their control? Prominent skeptics challenge the notion that the Internet will help rid the world of dictators. They suggest that the Internet will simply serve as a new opiate of the masses, or worse, will assist autocrats in manipulating popular opinion. I defend the liberalizing promise of cyberspace. Where others have set out the value of the Internet to dissidents, I answer the main critiques of that position - that Internet activism is futile, that the Internet is simply the new opiate of the masses, and that autocrats will benefit more from the Internet than dissidents. I argue that dictators have revealed their own appraisals of the Internet: when threatened, they shut it down. Tyrants today fear the Internet more than they benefit from it. This summer's events again confirmed this truth: On the day when the rebels marched into Tripoli, they restored Libya to the Internet.

"Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process"

UCLA Law Review, Vol. 58, p. 1417, 2011
UC Davis Legal Studies Research Paper No. 275

GABRIEL JACKSON CHIN, University of California, Davis - School of Law
Email: gjackchin@gmail.com

In Padilla v. Kentucky, the U.S. Supreme Court held that the Sixth Amendment required counsel to advise clients pleading guilty that conviction might result in deportation. The Court rested its decision on the idea that this information was important to the client's decision-making process. However, the Court did not explore a stronger reason for developing a more precise understanding of a client's immigration status: namely, the effect of that status on ordinary criminal prosecutions, such as burglary or assault. This Article proposes that under current law, immigration status can have substantial effects on the criminal prosecution and sentencing of non-citizens for ordinary non-immigration crimes.

This Article examines the position of non-citizens in the United States. For some non-citizens, particularly those without legal status, courts treat unlawful entry or removability as a quasi-crime, negatively affecting the case in ways similar to the effect of a prior criminal conviction. For other non-citizens, particularly but not exclusively those with legal status, the possibility of deportation is treated as a quasi-punishment, which sometimes mitigates other punishments or affects charging decisions if deportation or the overall package of sanctions would be too harsh. This Article proposes that it is consistent both with fairness to all individuals in the United States and with widely accepted principles of criminal justice to consider – carefully – immigration status in the criminal process.

"The Validity of the 2010 Federal Rule of Civil Procedure 26 Amendment Governing the Waiver of Work Product Protection: Is the Work Product Doctrine an Evidentiary Privilege?"

University of Daytona Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 277

EDWARD J. IMWINKELRIED, University of California, Davis - School of Law
Email: EJIMWINKELRIED@ucdavis.edu

One of the most celebrated procedural developments in 2010 was the promulgation of an amendment to Federal Rule of Civil Procedure 26. Beginning in 1993, Rule 26 had generally provided that as part of mandatory prediscovery disclosure, the proponent of an expert witness had to submit a report outlining the expert's proposed testimony in detail. As the years passed, the courts came to construe the provision very broadly. In particular, many courts interpreted the provision as requiring the proponent's expert to disclose all prior drafts of the expert's final report as well as virtually every communication between the proponent and the expert about the report's subject-matter. This interpretation pressured counsel to hire two experts - one to testify and one to consult (without the fear of having to disclose all communications between the consultant and the attorney). This practice made the pretrial preparation of experts both awkward and very costly.

In 2010, an amendment to Rule 26 purported to take effect. With specified exceptions, the amendment now shields prior drafts of the required expert report and the expert's communications with counsel about the report from discovery. The Advisory Committee explained that the purpose of the amendment is to extend the protection of the work product doctrine to these drafts and communications. The amendment has been widely applauded as a sensible reform.

The rub, though, is that the amendment may be invalid. Although the Supreme Court promulgated the amendment, the amendment was never submitted to Congress for approval. 28 U.S.C. section 2074(b) states that "[a]ny rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." Thus, although the 2010 amendment may be eminently sensible, the amendment is invalid if the work product doctrine is "an evidentiary privilege" within the intendment of section 2074(b).

At first blush, there is a plausible case that the doctrine constitutes a privilege and that, consequently, the 2010 amendment is invalid. In its seminal work product decision, Hickman v. Taylor, 329 U.S. 495 (1947), the Court

noted that the English courts refer to the doctrine as a “privilege.” In his lead opinion in United States v. Nobles, 422 U.S. 225 (1975), Justice Powell repeatedly described the doctrine as a “privilege.” Moreover, in 2008, Congress adopted Federal Rule of Evidence 502 prescribing some common waiver standards for the work product doctrine and the attorney-client privilege. In other words, Congress chose to insert work product waiver rules in the article of the Federal Rules of Evidence devoted to privileges.

Nevertheless, the thesis of the enclosed article is that the work product production is a procedural immunity rather than an evidentiary privilege. While Part I of the article lists many of the common denominators between the privilege and work product, Part II identifies some of the most important doctrinal differences. More deeply, Part III contrasts the policy rationales for the privilege and the work product protection. Part III concludes that true communications privileges such as attorney-client are secondary rights granted persons as a means of securing their primary right to personal autonomy. The purpose of such privileges is to assist persons to make more intelligent, independent life preference choices. Part III then argues that in contrast, holders such as attorneys and clients enjoy work product protection in a representative capacity as functionaries in the adversary procedural system. Part III analogizes the work product doctrine to the immunities that functionaries in the litigation system enjoy from tort immunity under 42 U.S.C. section 1983. Given this rationale for the work product doctrine, the article concludes that the work product doctrine is not a privilege and that, hence, the 2010 amendment to Rule 26 is valid. More broadly, this conception of the work product doctrine can explicate the numerous differences between the doctrine and true communications privileges.

"Judge Michael Daly Hawkins, the Jury System, and American Democracy"
Arizona State Law Journal, Vol. 43, No. 48, 2011
UC Davis Legal Studies Research Paper No. 273

CARLTON F. W. LARSON, University of California, Davis - School of Law
Email: clarson@ucdavis.edu

This Tribute Essay, written for Arizona State Law Journal’s celebration of Judge Michael Daly Hawkins, examines Judge Hawkins’s decisions with respect to the rights of grand juries. It also offers personal reflections of the author’s service as a law clerk to Judge Hawkins.

"Judging Parents, Judging Place: Poverty, Rurality and Termination of Parental Rights"
Missouri Law Review, Vol. 77, p. 95, 2011
UC Davis Legal Studies Research Paper No. 253

LISA R. PRUITT, University of California, Davis - School of Law
Email: lrpruitt@ucdavis.edu
JANET L. WALLACE, *affiliation not provided to SSRN*
Email: jlw@dshlawfirm.com

Parents are judged constantly, by fellow parents and by wider society. But the consequences of judging parents may extend beyond community reputation and social status. One of the harshest potential consequences is the state’s termination of parental rights. In such legal contexts, the state assesses parents’ merits as parents in relation to a wide array of their characteristics, decisions and actions, including where the parents live.

Among those parents judged harshly in relation to geography are impoverished parents who live in rural places. We argue that such judgments are unjust because poor rural parents often do not have ready access to state support in the form of programs that would permit them to be better parents. That is, spatial obstacles may prevent these parents from meeting their children’s first order needs by gaining access to public benefits. Rural parents are often similarly without reasonable access to the types of services and programs that would enhance their parenting skills, either because such programs are not offered in rural places or because the transportation obstacles to reach the programs are too great. We thus highlight the state’s hypocrisy in judging rural parents, including these parents’ failure to avail themselves of public services, even as the state fails to make meaningfully available the very assistance and services that would enable them to be better parents.

In considering termination of parental rights in rural contexts, we survey cases that have used rural residence as a strike against a parent in termination proceedings. Our critiques based on these cases fall into three categories: First, while courts have stated that poverty is an impermissible basis for terminating parental rights, cases reveal that place may become a proxy for poverty and may be cited to justify removal of a child or termination of parental rights. Second, courts sometimes make decisions based on rural stereotypes, and these decisions may disserve rural families. Third, and in a similar vein, courts sometimes fail to account for rural realities when making child welfare decisions about populations and circumstances with which they may be less familiar. In short, courts often impose impractical expectations upon parents. All of these critiques call particular attention to the plight of rural families, who – like rural people and places generally – often are overlooked in the increasingly metrocentric realm of law and legal scholarship.

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BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: **bblack@northwestern.edu**

RONALD J. GILSON
Stanford Law School, Columbia Law School
Email: **rgilson@leland.stanford.edu**

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