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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"The Emergence of New Corporate Social Responsibility Regimes in China and India"

UC Davis Business Law Journal, Vol. 14, p. 175 (2014)
UC Davis Legal Studies Research Paper No. 386

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In an era of financial crises, widening income disparities, and environmental and other calamities linked to corporations, calls for greater corporate social responsibility (“CSR”) are increasing rapidly around the world. Though CSR efforts have generally been viewed as voluntary actions undertaken by corporations, a new CSR model is emerging in China and India. In a marked departure from CSR as it is known in the United States and as it has been developing through global norms, China and India are moving towards mandatory, not voluntary, CSR

regimes. They are doing so not only in a time of great global economic change, but at a time when both countries are themselves undergoing massive economic and social changes as they re-orient towards more market-based economies and seek to enter the ranks of global economic superpowers.

This Article conducts a comparative analysis of the emerging CSR regimes in China and India and highlights key characteristics of these developing frameworks. This Article begins an inquiry into some of the most significant implications of the CSR regimes now unfolding in China and India, and their potential for effecting legal and societal change. It also raises questions about why China and India are moving towards mandatory CSR when other key global players are taking a largely voluntary approach. Finally, this Article seeks to add to global debates over corporate governance models by enhancing understanding of the corporate governance developments and innovations now arising in China and India.

"Realigning Parties"

Utah Law Review, Vol. 2014, No. 1, 2014
UC Davis Legal Studies Research Paper No. 289

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The doctrine of realignment -- which permits a federal court to change a party's litigating position from plaintiff to defendant or vice versa -- has been virtually ignored in federal procedure scholarship. This stark neglect is genuinely astonishing because the federal circuit courts are split as to the appropriate standard. The source of the standard -- and the circuit courts' confusion -- is a 1941 U.S. Supreme Court decision, City of Indianapolis v. Chase National Bank. In that decision, rather than focusing on realignment's purpose, the Supreme Court focused unduly on the specific context in which the realignment issue arose. The result was a muddled articulation of the appropriate standard.

Realignment's purpose lies in assuring the necessary adversarial context mandated by Article III's references to "cases" and "controversies" -- but City of Indianapolis makes no mention of the case-or-controversy requirement in either the majority or dissenting opinions. Instead, the Court erroneously and confusingly defined its analysis within the specific diversity-jurisdiction context in which the realignment issue arose. This analytical error resulted in a perplexing and misguided standard and contributed to the common misperception that the doctrine of realignment is only applicable to diversity cases.

Had the City of Indianapolis Court properly analyzed the realignment doctrine according to its purpose, its analysis would have mirrored that in declaratory judgment cases. An identical concern underlies both the doctrine of realignment and declaratory judgment actions -- i.e., ensuring the existence of a case or controversy -- and therefore the same standard should apply in the realignment context: whether there is a substantial controversy between parties having adverse legal interests.

"Free Speech in Unfree Countries"

UC Davis Legal Studies Research Paper No. 393

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In the United States, First Amendment protections for free speech are deeply associated with democracy. The dominant view in the Supreme Court and among commentators is that the primary (albeit not necessarily the only) reason we protect free speech is because of its essential role in advancing democratic self-governance. What are the implications of the democratic self-governance theory for free-speech protections outside the United States, in particular in nondemocratic countries? If we assume that the role of free speech is to advance democratic politics, then presumably non-democratic countries would have no reason to protect or tolerate speech. After all, if one rejects western-style liberal democracy, presumably one also rejects the subsidiary rules that undergird that system of government. The truth, however, is more complex. First of all, the vast majority of constitutions in the world grant at least some level of written protection for free speech, even though many of these constitutions are in countries which do not even purport to be free, multiparty democracies. Of course, many of these constitutional protections are shams; but it is simply not the case that no autocratic regimes permit free speech. The purpose of this paper is to explore how and why that might be so, and to consider whether the answers to these questions might have implications for domestic law.

I begin by surveying the scope of global protections for free speech in written constitutions, and then examining in some detail three case studies of autocratic countries which have provided a degree of room for free speech: modern Communist China, the Soviet Union during the Glasnost era under Mikhail Gorbachev, and modern Qatar. In each case, I demonstrate that the regime provides meaningful protections for free speech, albeit with clear limits. I also argue that in each of these cases, the leadership has absolutely no interest in advancing democracy or surrendering their monopoly on power. Yet even without democracy, they perceive that permitting some degree of free speech advances their interests and the interests of their citizens and nations.

Based on my case studies, I identify three distinct reasons why autocratic leaders might have an interest in permitting some freedom of speech by citizens. The first, and most significant, is internal control. In any large, bureaucratic system, central leadership often faces great difficulty in getting local officials to advance central policies and follow central leadership. Citizens can play an important role in identifying, and publicizing, corruption and lawlessness, as well as violations of central policy, at the local level. Second, free speech can act as a safety valve. Permitting some degree of free speech can, therefore, alleviate pressures for political change. Third, free speech as a form of citizen participation in government can lend legitimacy to a government, even without the legitimacy conferred by popular consent through elections. I also explore the countervailing factors – notably the desire for rulers to maintain their power – which result in clear limits on what sorts of speech will be tolerated in autocracies.

I close by considering whether these alternative justifications for protecting free speech have any implications for speech within the United States. I argue they do, for this reason: even though our system of government is at its base democratic, actual citizen interactions with the government often are not experienced this way. This means that in addition to protecting democratic government, free speech also plays some of the same roles in the U.S. as in autocracies: permitting oversight over the bureaucracy, providing a safety valve, and granting legitimacy to high officials. I close by considering some doctrinal implications of this insight.

"In Partial Defense of Probate: Evidence from Alameda County, California"
Georgetown Law Journal, February 2015, Forthcoming
UC Davis Legal Studies Research Paper No. 390

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For five decades, probate — the court-supervised administration of decedents' estates — has been condemned as unnecessary, slow, expensive, and intrusive. This backlash has transformed succession in the U.S., as probate avoidance has become a booming industry and contract-like devices such as life insurance, transfer-on-death accounts, and revocable trusts have become the primary engines of intergenerational wealth transmission. Despite this hunger to privatize the inheritance process, we know very little about what happens in contemporary probate court. This Article improves our understanding of this issue by surveying every estate administration stemming from individuals who died in Alameda County, California in 2007. This original dataset of 668 cases challenges some of the most entrenched beliefs about probate. For one, although succession is widely seen as a tranquil process in which beneficiaries settle disputes amicably and pay a decedent's debts voluntarily, both litigation and creditor's claims are common. In addition, attorneys' and personal representatives' fees are far lower than assumed. The Article then uses these insights to critique the demand for probate avoidance, to contend that probate's cautious approach to creditors should also govern non-probate transfers, and to suggest reforms to the probate process.

"Should the Mortgage Follow the Note?"
Ohio State Law Journal, Vol. 75, No. 1, 2014
UC Davis Legal Studies Research Paper No. 392

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The law of mortgage assignment has taken center stage amidst foreclosure crisis, robosigning scandal, and controversy over the Mortgage Electronic Registration System. Yet a concept crucially important to mortgage assignment law, the idea that "the mortgage follows the note," apparently has never been subjected to a critical analysis in a law review.

This Article makes two claims about that proposition, one positive and one normative. The positive claim is that it has been much less clear than typically assumed that the mortgage follows the note, in the sense that note transfer formalities trump mortgage transfer formalities. "The mortgage follows the note" is often described as a well-established principle of law, when in fact considerable doubt has attended the proposition at least since the middle of the last century.

The normative claim is that it is not clear that the mortgage should follow the note. The Article draws on the theoretical literature of filing and recording to show that there is a case that mortgage assignments should be subject to a filing rule and that "the mortgage follows the note," to the extent it implies that transferee interests should be protected without filing, should be abandoned.

Whether mortgage recording should in fact be abandoned in favor of the principle "the mortgage follows the note" turns on the resolution of a number of empirical questions. This Article identifies key empirical questions that emerge from its application of principles from the theoretical literature on filing and recording to the specific case of mortgages.

"Distinguishing Lay from Expert Opinion: The Need to Focus on the Epistemological Differences between

the Reasoning Processes Used by Lay and Expert Witnesses"
Southern Methodist University Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 385

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Justice Holmes once remarked that the law is constantly drawing lines. That remark certainly holds true in Evidence law. On a daily basis trial judges must distinguish between character and noncharacter uses of evidence and differentiate hearsay from nonhearsay theories of logical relevance. The topic of the enclosed article is another evidentiary distinction: that between lay opinions and expert opinions.

That distinction has assumed tremendous importance since 1993. In that year, Federal Rule of Civil Procedure 26 was amended to prescribe mandatory pre-discovery disclosures. One of the most important parts of that scheme is a mandate that the proponent of a testifying expert provide the opposition with a detailed report previewing the expert's opinion. Federal Rule of Criminal Procedure 16 imposes a similar requirement for an expert report. However, there is no requirement under either rule for such a report when the opinion is lay in nature. In the same year, the Supreme Court handed down its celebrated decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Daubert announced a new empirical validation test for the admissibility of scientific testimony. In 1999 in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the Court expanded Daubert and held that the proponent of any type of expert testimony must establish objective indicia of the reliability of the testimony. Like the Civil Rule 26 and Criminal Rule 16 amendments, Daubert and Kumho are inapplicable to lay opinion testimony.

These two 1993 developments have created a strong incentive for litigants to characterize their witnesses' opinions as lay rather than expert. If the judge accepts that characterization, there is no need for the litigant to file a Rule 26 report or lay a Daubert foundation. Unfortunately, as Part I of the enclosed article points out, the courts are experiencing difficulty drawing the line between lay and expert opinions. Part I considers several possible bases for distinguishing the two types of opinions that have been proposed in the past. Part I demonstrates that each of those potential bases is unsatisfactory.

Part II argues that in order to properly differentiate between the two types of opinions, the court should focus on the underlying reasoning processes. The essential insight is that in both cases, the witness makes a comparative judgment, comparing a generalization to the case-specific fact or facts being evaluated. However, there are fundamental differences between the reasoning processes employed by lay and expert witnesses. In the case of lay opinions, the witness: derives his or her generalization primarily from personal experience; and must rely on firsthand knowledge to acquire his or her information about the case-specific fact or facts. In sharp contrast, in the case of expert opinions, the witness: may draw on hearsay sources such as lectures and professional literature to derive his or her generalization; and under Federal Rule of Evidence 703, may rely on hypothetical questions and secondhand reports as well as personal knowledge as methods of obtaining information about the case-specific fact or facts.

Part III of the article explains how the courts may use the insights discussed in Part II to both differentiate between the two types of opinion and determine the admissibility of such opinions. To illustrate the utility of this approach, Part III discusses one of the modern battlegrounds, that is, police officers' testimony about alleged code words used by drug traffickers. In many cases, prosecutors have argued that the testimony is mere lay opinion testimony, eliminating the need for either a pretrial expert report or a Daubert foundation at trial. Although the courts have struggled to draw the line in these cases, Part III demonstrates that the courts can draw the line with confidence by employing the analysis proposed in Part II.

"Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism"
Oklahoma Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 388

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With appropriate caution necessitated by the lessons of recent history, this Article posits that the Supreme Court's contemporary immigration decisions suggest that the plenary power doctrine, the foundation of immigration exceptionalism, is again headed toward its ultimate demise. To test that thesis, this Article carefully scrutinizes the Supreme Court's immigration decisions, as well as some other actions, such as certiorari denials in significant immigration cases, from 2009 to the present. This period coincides with the first five years of the Obama presidency, which has been a time during which the Executive Branch has seldomly relied on the plenary power doctrine in arguments to the Court.

The review of Supreme Court decisions reveals that, even though the Court now reviews considerably fewer cases than it once did, immigration matters regularly comprise a bread-and-butter part of its docket. Indeed the Court decided five immigration-related merits cases in one Term, an extraordinarily large number for a specialty substantive area of law. The fact that the Court frequently exercises its discretion to accept immigration cases for

review suggests that the Justices – like the nation as a whole – consider immigration to be an important, at times contentious, national issue worthy of attention, raising many questions that go to the core of the modern administrative state. In light of the controversy surrounding some of the cases that have come before it, most notably the much-publicized constitutional challenge to Arizona's SB 1070 and state and local efforts to push the federal government to more vigorously enforce the U.S. immigration laws, the Court could hardly help but be aware of that plain and simple truth.

What is perhaps most noteworthy from the review of immigration decisions of the Supreme Court of the last five Terms is that a conservative Court characterized as ideologically driven by some observers consistently has not taken an extreme approach to immigration law and its enforcement. The Roberts Court's body of immigration decisions indeed is firmly and comfortably within the jurisprudential mainstream of its decisions in other areas of substantive law. The Court has applied ordinary, standard, and routine legal doctrines for the most part in ordinary, standard, and routine ways.

Analyzing the body of immigration decisions of the Supreme Court under the leadership of Chief Justice John Roberts in the 2009-13 Terms, this Article concludes that the Court in effect has to a large extent continued to bring U.S. immigration law into the legal mainstream. It has interpreted statutes to avoid constitutional questions and avoided invoking the plenary power doctrine to shield vulnerable statutes from judicial review. Although not yet eliminating the doctrine, the Court has slowly but surely moved away from anything that might reasonably be characterized as immigration exceptionalism. The undeniable trend in the Court's immigration jurisprudence is entirely consistent with its efforts over more than a decade to, whenever possible, interpret the immigration laws to avoid deciding serious constitutional questions, and find creative ways to ensure judicial review of removal orders in the face of stringent congressional restrictions that some might reasonably read as purporting to wholly eliminate judicial review.

In applying the U.S. immigration laws, both conservative and liberal Supreme Court Justices look first to the text of the Immigration and Nationality Act and spend considerable time debating the proper interpretation of the (often complex) statutory provision in question. In addition, the Justices occasionally differ about the application of conventional legal doctrines to immigration cases, but rarely debate whether generally applicable doctrines should apply to immigration cases.

"Law Stretched Thin: Access to Justice in Rural America"
South Dakota Law Review, Vol. 59, 2014
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About two percent of small law practices in the United States are in small towns and rural areas, a figure greatly disproportionate to the nearly twenty percent of the population living in those places. This mismatch leaves many rural legal needs unmet. In 2013, responding to the well-documented lawyer shortage in the upper Great Plains, South Dakota became the first state to offer subsidies to lawyers who practice in rural areas through a program called Project Rural Practice.

This article takes the opportunity invited by Project Rural Practice — and this symposium issue about it — to discuss a range of access to justice issues in rural places. Those providing rural legal services face challenges, of course, the most obvious being the struggle for economic viability, along with others generally associated with small firms and solo practice. Rural lawyers also face socio-spatial barriers to professional development and networking opportunities, and the lack of anonymity associated with rural places creates both ethical and economic conflicts of interest. Beyond the challenges facing rural lawyers, we recognize that individuals residing in rural America encounter obstacles to seeking legal services. These obstacles include affordability, confidentiality, and even inability to actually get to courthouses and other legal institutions and actors. Compounding matters, rural denizens are associated with an ethic of law avoidance. Persistently high poverty rates in rural America aggravate the challenge because poor people are less likely to have their legal needs met, wherever they live.

We situate our discussion of rural legal practice within the larger body of access to justice scholarship. While we recognize Project Rural Practice as a strong step in support of rural legal practice, and therefore in support of rural communities, we argue that it should be supplemented by programs aimed at helping those least likely to get the legal assistance they need, especially low-income and other vulnerable populations. We also advocate additional supports for lawyers willing to provide such assistance. Among other issues, we discuss the roles that paralegals, technology, and the broader social-service, non-profit community can play in responding to rural legal needs. We pay particular attention to pro bono publico in the rural context. Lastly, our article includes a modest comparative component, surveying available information about rural lawyering and access to justice in other nations, most notably Canada and Australia.

We conclude that achieving robust access to justice requires the attention and effort of an entire community. Enabling access to justice should include partnerships with a wide array of service providers who can meet non-

legal needs while also helping those confronting problems to identify when legal assistance could be of use. Given the dearth of rural lawyers, the surfeit of urban lawyers, and the preference of many attorneys to deliver pro bono services away from their usual practice settings, we also see collaboration among lawyers across and along the rural-urban continuum as critical pieces of the rural access to justice puzzle. We believe not only that these myriad collaborations can help rural residents get the legal assistance they need to solve their most pressing problems, but that the collaborations also hold promise for ameliorating the structural deficits that afflict entire rural communities.

"State-Level Carbon Taxes and the Dormant Commerce Clause: Can Formulary Apportionment Save the World?"

Chapman Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 387

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This short Article, a contribution to a symposium, outlines some possible design responses to the primary legal issue raised by the implementation of a state-level carbon tax. There are at least two reasons for states to consider a carbon tax. First, somewhat prosaically, the Environmental Protection Agency just released draft rules requiring states to reduce carbon emissions; these rules appear to permit states to achieve at least some of the required reduction through carbon taxes. Second, and more importantly, economists offer strong arguments for preferring carbon taxes as a method of greenhouse gas mitigation. Accordingly, even before the new EPA rules were proposed, a carbon tax was already being considered in some U.S. states, such as Oregon, and a carbon tax is in place in one Canadian province, British Columbia.

The primary legal issue with a state-level tax in the United States is the following: a carbon tax imposed in only one state will presumably make goods and services produced in that state more expensive. The direct response would be to impose a complementary carbon tax on imports. Yet it would appear that the dormant Commerce Clause, and particularly the Supreme Court's narrow interpretation of the complementary tax doctrine, bars the way to such border adjustments. This Article argues that appearances might be deceiving and that border adjustments might be possible. Alternatively, this Article argues that formulary apportionment could take the place of border adjustments.

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