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CARLTON F. W. LARSON, University of California, Davis -  
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"Homeward Bound"

UC Davis Legal Studies Research Paper No. 68  
New York University Law Review, Forthcoming

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Full Text: <http://ssrn.com/abstract=880166>

Where once the emigrant was remembered in her homeland through yellowing photographs, eventually perhaps forgotten to history or even cursed as a traitor, the emigrant today is celebrated, reconfigured as heroine. As Kim Barry argues in *Home and Away*, homeland states now see the emigrant as crucial to their projects of national advancement.

Today, states undertake a variety of bonding mechanisms - political, economic, and cultural - seeking to strengthen their ties to their diasporas. I survey such bonding mechanisms, offering a taxonomy that connects governmental policies from Mexico to the Philippines. Governments seeking to cement political ties have offered dual citizenship, voting from abroad, direct representation of expatriates, special visas for the diaspora, and government-issued diaspora membership documents.

States have sought to capitalize on the economic strength of their overseas members by soliciting their support for sovereign diaspora bonds, development programs, and direct investment. They have also sought to attract returnees, who will often bring with them significant financial and human capital, and to ease return by negotiating for returnees' pensions to be transferred to them from the nation in which they worked. Finally, nations have sought to reshape their own collective image to include the diaspora, achieving this through explicit state recognition of the diaspora, establishment of agencies to serve the diaspora, legal protections for their overseas citizens, and special outreach to youth and retirees living abroad.

I ask to what extent such bonding practices are subject to regulation by the emigrant's host country. I assess constraints on such regulation

in the United States created by the freedoms of association, speech, and travel. U.S. laws of general applicability, such as securities laws, and U.S. courts' unwillingness to enforce foreign revenue laws may make it more difficult for emigration states to pursue certain bonding mechanisms. Despite these limits, the domestic laws of immigration states like the United States should provide sufficient space for emigration states to bond with their diasporas.

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"Discretionless Policing: Technology and the Fourth Amendment"  
UC Davis Legal Studies Research Paper No. 72  
California Law Review, Vol. 95

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What if we could eliminate police discretion from traffic stops? What if a computer could accomplish what police officers do, with efficiency and accuracy, and more important, without racial prejudice? How would this technology work? Would its use be consistent with the Fourth Amendment? And if constitutional, would the public accept this automated enforcement? Could the war on drugs continue, once traffic stops became discretionless?

This scenario isn't just a thought experiment. The technology and a plan to automate law enforcement exist, yet neither has received serious attention. An automated enforcement program would eliminate stops based not only on excessive speeding, but on nearly all the most frequently used justifications to stop drivers, including record checks and other vehicle code violations. If the war on drugs continued to exist, it would no longer use the traffic stop. Recent federal regulatory approval for the technical standards for the federal intelligent highway initiative shows that this is a real and practicable solution to the problem of police discretion in traffic stops, one that sidesteps entrenched difficulties in Fourth Amendment law and politics.

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"Legislation and Legitimation: Congress and Insider Trading in

the 1980s"

UC Davis Legal Studies Research Paper No. 70

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Orthodox corporate law-and-economics holds that American corporate and securities regulation has evolved inexorably toward economic efficiency. That position is difficult to square with the fact that regulation is the product of government actors and institutions. Indeed, the rational behavior assumptions of law-and-economics suggest that those actors and institutions would tend to place their own self-interest ahead of economic efficiency. This article provides anecdotal evidence of such self-interest at work. Based on an analysis of legislative history - primarily Congressional hearings - this article argues that Congress had little interest in the economic policy effect of insider trading legislation in the 1980s. Rather, those laws were motivated primarily by a desire to legitimate the existing political and economic order.

The policy and doctrinal grounds for prohibiting insider trading are unclear. Yet Congress devoted a great amount of attention to increasing the penalties for insider trading in the 1980s.

Meanwhile, more serious economic issues went unaddressed. What explains this odd focus? Congress routinely explains corporate and securities legislation as motivated by a need to bolster investor confidence and protect the capital formation process. In the 1980s, legislators argued that insider trading scandals were undermining investor confidence. That argument is unconvincing, however, because those scandals were contemporaneous with unprecedented stock prices.

An alternative explanation for the 1980s legislation is that Congress sought political legitimacy: not investor confidence in the markets, but voter confidence in the political-economic system. Our government has a symbiotic relationship with a capitalist system under which the power of business and finance sometimes rivals that of the state. This arrangement is acceptable to most voters during prosperous times, but can undermine the legitimacy of the political-economic system in times of perceived economic crisis. Government crafts its responses to such crises to protect its legitimacy. The process of self-legitimation does

not consist merely of responding to exogenous preferences of constituents. It also includes attempts to mold constituents' preferences to be more consistent with the self-interest and problem-solving abilities of Congress.

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"The Story of Whren v. United States: The Song Remains the Same"

UC Davis Legal Studies Research Paper No. 71

RACE AND LAW STORIES, Devon Carbado and Rachel F. Moran, eds., 2006

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This book chapter, which will be part of a book of famous U.S. Supreme Court decisions that touch on issues of race and civil rights, considers the decision of Whren v. United States, 517 U.S. 806 (1996). In that case, the Court, in a unanimous decision written by Justice Antonin Scalia, held that, so long as police officers had probable cause for a stop, it did not violate the Fourth Amendment - even if the reason for the stop was pretextual. The Court instead held that a claim for racial discrimination was properly made under the Equal Protection Clause of the Fourteenth Amendment. This chapter places the case in its proper historical context of the war on drugs and the trajectory of the Court's Fourth Amendment decisions, and analyzes how the decision made it difficult through the U.S.

Constitution to put an end to racial profiling. The chapter further tells the story of the various interested parties, including the two defendants, Michael Whren and James Brown, before and after the Court's decision, with some surprising information; Michael Whren ended up in college while the vice officers primarily involved in the arrest had less illustrious turns in their careers. From a social change perspective, the Court's decision in Whren shifted efforts to end racial profiling from the legal to the political realm, which at least before the events of September 11, 2001 yielded some positive developments.

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"Draft Article V of the Federal Rules of Evidence on Privileges,  
One of the Most Influential Pieces of Legislation Never Enacted:  
The Strength of the Ingroup Loyalty of the Federal Judiciary"

UC Davis Legal Studies Research Paper No. 73  
Alabama Law Review, Forthcoming

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As the Introduction to the article notes, one of the well settled bromides in statutory construction is that the court should attach little or no weight to legislative inaction. There are so many possible explanations for a legislature's decision not to enact a bill or a particular provision of a bill that it is treacherous in the extreme to infer legislative intent from inaction.

In some cases, though, in construing an enacted statute, a court may put legislative inaction to a legitimate, negative use.

Suppose, for example, that during its deliberation over a bill the legislature rejected certain proposed language for a provision. That action may justify an inference that the legislature did not intend the enacted provision to operate in the fashion indicated by the rejected language. While courts occasionally put legislative inaction to such a limited negative use, they almost never rely on legislative inaction as the basis for affirmatively adopting a construction consistent with the rejected provision.

Yet, that is exactly what has happened with draft Article V of the Federal Rules of Evidence on privileges. When the Supreme Court approved its draft of the Federal Rules, Article V included 13 rules, four general provisions and nine devoted to specific privileges. However, when the Court transmitted the draft to Congress, Article V proved to be so controversial that Congress blocked the Court's promulgation of the rules. During its subsequent deliberation over the proposed rules, Congress decided to reject draft Article V in its entirety. Instead, Congress compromised and adopted the current Rule 501, authorizing the federal courts to develop privilege doctrine in accordance with the principles of the common law as they may be interpreted . . .

in light of reason and experience. Despite Congress' wholesale rejection of draft Article V, in the past 30 years the federal courts have in effect resurrected the draft by generally construing Rule 501 as requiring the very same outcomes that were prescribed by the draft.

Part I of the enclosed article traces the history of draft Article V and demonstrates the remarkable extent to which the federal courts have breathed life back into the draft. Part II explores a number of possible explanations for this extraordinary phenomenon. Part II initially discusses a number of explanatory hypotheses based on either evidentiary policy or politics.

However, ultimately Part II concludes that the most powerful explanatory hypothesis is that the federal judiciary's subconscious ingroup loyalty and outgroup bias have prompted the courts to consistently resolve close privilege questions in favor of the outcomes prescribed by draft Article V. Part II surveys the psychological literature on ingroup loyalty, identifies the factors which trigger such loyalty, and establishes that those factors are present here. The article concludes by drawing broader implications for legislators drafting statutes with separation of powers overtones and for judges tasked to interpret such statutes.

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"The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem"

UC Davis Legal Studies Research Paper No. 69

University of Pennsylvania Law Review, Forthcoming

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This Article argues that the issue of enemy combatant detentions should be studied through the lens of the Treason Clause of Article III. Specifically, the Article argues that the Treason Clause prohibits the exercise of military authority over individuals who are subject to the law of treason, a category that includes not only United States citizens, but almost all persons merely present within the United States. From at least the seventeenth century through the nineteenth century, English and American treatise writers, public officials, and courts consistently distinguished between persons subject to the law of treason, and thus entitled to trial under the ordinary processes of the criminal courts, and persons who could be treated as enemies under military authority. This long-standing rule was abandoned without coherent explanation by the Supreme Court in the 1942 decision of *Ex parte Quirin*, a decision unfortunately affirmed in 2004 by *Hamdi v.*

Rumsfeld. This Article argues for reinstatement of the traditional rule.

The Article also argues that many terrorist actions are appropriately punished as treason, either as acts of levying war against the United States or of adhering to their enemies. Rather than representing a fundamental departure from the ordinary criminal law paradigm, terrorist actions fit comfortably within it.

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