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VIKRAM D. AMAR, EDITOR
Associate Dean and Professor of Law, University of California, Davis - School of Law
amarv@uchastings.edu

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"The Intersection of Race and Class in U.S. Immigration Law and Enforcement"

Law & Contemporary Problems, Vol. 72, 2009
UC Davis Legal Studies Research Paper No. 156

KEVIN R. JOHNSON, University of California, Davis - School of Law
Email: krjohnson@ucdavis.edu

This issue of Law and Contemporary Problems will no doubt make a contribution to the literature on the intersection of race and class in modern American social life. In my estimation, there is no better body of law to illustrate the close nexus between race and class than U.S. immigration law and enforcement. At bottom, the U.S. immigration laws historically have operated - and continue to operate - to prevent many poor and working people of color from migrating to, and punish those living in, the United States.

Matters of race and class in the U.S. immigration laws unquestionably are more complicated today than in the past. Namely, express racial exclusions fortunately can no longer be found in the U.S. immigration laws. A by-product of the civil rights movement, the Immigration Act of 1965 abolished the discriminatory national origins quotas system that had remained a bulwark of the U.S. immigration laws since 1924. As a consequence of the change in the law, the nation saw a dramatic shift in the racial demographics of immigration, with an especially sharp increase in migration from Asia.

Although racial exclusions are something of the past, the express - and aggressive - exclusion of the poor remains a fundamental function of the modern U.S. immigration law, the Immigration and Nationality Act of 1952 (INA). In sharp contrast, domestic laws generally cannot - constitutionally at least - discriminate de jure against the poor. The express discrimination against poor and working immigrants by U.S. law, as we shall see, has disparate national origin and racial impacts.

Part II of this article sketches how race and class interact synergistically in the U.S. immigration laws and their enforcement. Part III offers case studies from recent immigration events in the United States demonstrating race and class at work in the experiences of noncitizens.

"The Application of Communal Theories to Urban Property"

UC Davis Legal Studies Research Paper No. 157

DYLAN OLIVER MALAGRINO, University of California, Davis - School of Law
Email: domalagrino@ucdavis.edu

The advantages of privatized property regimes and common property regimes have been debated in legal and economic discourse for ages. Although private property is prevalent in the developed world, a reading of the available anthropological literature shows that common property regimes still thrive in many parts of the developing world to maintain natural resources and to spread the risk of property ownership. Considering the present U.S. housing crisis and its global effect on world markets, perhaps the developed world should incorporate more communal theories to - what has now become the developed world's scare resource - urban land. In fact, after a close look of the lessons learned from the successful operation of common property regimes in the developing world related to their natural resource systems, we see that the theories are relevant to the understanding of a wide-variety of property regimes used in modern societies such as the United States. Thus, the developed world should embrace a more pluralistic property regime. Why? The elaboration of common property regimes in the West, as in the use of instruments such as land trusts, could lessen the social exclusion from the right to property by making housing more affordable. With affordable housing, we can possibly avoid future housing crises such as the one the West is experiencing today.

"Investment Treaty Arbitral Decisions as Jurisprudence Constante"

UC Davis Legal Studies Research Paper No. 158

ANDREA K. BJORKLUND, University of California, Davis - School of Law
Email: akbjorklund@ucdavis.edu

Decisions by arbitral tribunals in investment treaty cases do not have formal precedential status. Yet certain issues recur, and prior decisions at the least provide guidance to later tribunals. The content of the most frequently invoked substantive treaty provisions - the obligations to accord national treatment and fair and equitable treatment to foreign investors, and to expropriate the property of foreign investors only in accordance with international law and on payment of due compensation - is far from clear. Furthermore, procedural matters, such as decisions regarding the place of arbitration or the allocation of costs, play an increasingly important role in investment arbitrations but are also not addressed thoroughly in the treaties themselves. Given those limitations, it seems inevitable that arbitral decisions, as they accumulate, will help to flesh out the extent of state parties' obligations and investors' legitimate expectations when their relationship is governed by an investment treaty. Thus, the decisions of investment treaty arbitral tribunals are proving to be essential in establishing the modern international law of investment. The actual compilation of a generally accepted set of standards will be an accretive process developed little by little as tribunals make decisions in individual cases, and as those decisions are tested by other tribunals, by publicists and international organizations, and by the states themselves. Gradually one may expect the institution of a jurisprudence constante, and the emergence of key decisions that are judged to be the influential starting points from which further analysis should flow.

"Sovereign Immunity's Penumbras: Common Law, 'Accident' and Policy in the Development of Sovereign Immunity Doctrine"

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KATHERINE J. FLOREY, University of California, Davis
Email: florey@gmail.com

At their core, what sovereign immunity doctrines prohibit is generally clear: a suit against an unconsenting sovereign (whether a state, a tribe, a foreign nation, or the federal government) for money damages. When suits fall outside this configuration, however, courts often have difficulty determining exactly how far the doctrine should extend. What should courts do, for example, when a sovereign is not a named defendant in a given suit, but will have to join the litigation if it wishes to defend its interests? What about a suit that is against a party closely affiliated with the sovereign and that aims to influence the sovereign's exercise of its traditional prerogatives? In situations like these, some courts have held that sovereign immunity bars the suit from going forward - even though, under the formal doctrinal definition of sovereign immunity, it is by no means clear that any obstacle to these suits exists.

This Article aims both to explore this phenomenon in its own right and to use it as a jumping-off point to consider what continuing role courts can and should have in the evolution of sovereign immunity doctrine. To do so, it sketches out a theory of how sovereign immunity has functioned and continues to function as a common-law doctrine, evaluates the guiding policy principles that courts have considered in choosing whether to extend sovereign immunity beyond its strict doctrinal boundaries, and surveys the main circumstances under which courts have formulated what might be called a "penumbral" version of sovereign immunity. It concludes by attempting to set forth several principles courts should consider in deciding whether sovereign immunity applies in novel situations.

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