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Table of Contents

When Avoiding Federal Questions Should not Evade Federal Review: Michigan v. Long Meets, and Trumps, Ashwander v. TVA

Vikram D. Amar, University of California, Davis - School of Law
Alan E. Brownstein, University of California, Davis - School of Law

Trade 2.0

Anupam Chander, University of California, Davis - School of Law

Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services

Lisa Chiyemi Ikemoto, University of California, Davis - School of Law

The Implied Obligation of Good Faith in Contract Law: Is it Time to Write its Obituary?

Edward J. Imwinkelreid, University of California, Davis - School of Law

An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The 'High-Tech Lynching' of a 'Wise Latina'?

Kevin R. Johnson, University of California, Davis - School of Law

Deconstructing the Charitable Deduction: Devising a Workable Framework to Analyze 'Charitable' Transfers

Shannon Weeks McCormack, UC Davis School of Law, Harvard Law School

Migration, Development, and the Promise of CEDAW for Rural Women

Lisa R. Pruitt, University of California, Davis - School of Law

[^top](#)

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"When Avoiding Federal Questions Should not Evade Federal Review: Michigan v. Long Meets, and Trumps, Ashwander v. TVA"

UC Davis Legal Studies Research Paper No. 183

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The principle that courts should construe statutes to avoid constitutional problems that might require their invalidation has been conventionally accepted by both state and federal courts at least since Justice Brandeis set out this prudential requirement in *Ashwander v. Tennessee Valley Authority* in 1936. Almost 50 years later in *Michigan v. Long*, the United States Supreme Court adopted a bright line standard to determine when it was appropriate for the Court to review state court decisions that discussed both state and federal law in resolving an issue. The Court held that it would be free to review all such cases in the future unless the state court's opinion included 'a plain statement' that it was based on an 'independent' and 'adequate' state law ground. Left open is the question of how these long accepted rules of constitutional adjudication fit together? What if the state court does not look to federal constitutional law to resolve the merits of a constitutional claim, but instead discusses federal constitutional law as a basis for giving a challenged state statute a narrow construction to avoid having to reach the federal constitutional question. To what extent, if any, should the Supreme Court be able to review such

state court decisions under the authority of *Michigan v. Long*? In reconciling these doctrines in this article, we suggest that both the Ashwander avoidance principle and the presumption favoring Supreme Court review in *Michigan v. Long* are both best understood as judicial attempts to respond to concerns about political accountability. Further, we argue that the plain statement requirement of *Michigan v. Long* more effectively furthers political accountability goals than does Ashwander's emphasis on the narrow construction of statutes to avoid constitutional conflicts. Building on this foundation, we provide a framework by which the Supreme Court might apply the *Michigan v. Long* requirement to state court decisions in which state law is interpreted to minimize the risk of federal constitutional violations.

"Trade 2.0"

Yale Journal of International Law, Forthcoming
U of Chicago Law & Economics, Olin Working Paper No. 465
UC Davis Legal Studies Research Paper No. 173

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Where the last century saw the dismantling of barriers to trade in goods, the new century will see the dismantling of barriers to trade in services. Once theorized as nontradable, services now join goods in a global marketplace powered by advances in communications technology. Today, an engineer, accountant, or lawyer can supply her services across the globe without boarding a plane. Less well understood is that cyber-trade encompasses not just the services outsourced to Bangalore, but also the online services supplied by Silicon Valley to the world. Apple, eBay, and Yahoo too are exporters of information services, seeking to become middlemen to the world. Google now earns half of its income overseas. Almost sub rosa, the Internet has become a global trading platform rivaling any history has yet produced. But law developed over millennia for the paradigm of goods is unprepared for trade, version 2.0.

The pressure on law is clear: Antigua challenges U.S. rules barring online gambling; Brazil demands that Google identify hate speakers; an Alien Torts Statute suit charges Yahoo with abetting Chinese torture; and the United States challenges Chinese media restrictions on movie, music, and financial information services. Once we recognize the connections between these disputes, we can begin to form a general theory of cyber-trade. Ricardo's theory of comparative advantage applies to all trade, whether in goods or in information. Economic theory thus counsels, and international treaties compel, the dismantling of barriers to cyber-trade. Yet, because of its remote nature, it is easy to assert consumer protection to bar online competition. I articulate a principle of technological neutrality to smoke out barriers hiding under this veneer. To flourish, cyber-trade will also require digital analogues to the physical infrastructure for services, from handshakes to courts.

The footloose nature of cyber-trade poses a more fundamental challenge - to law itself. Via the net, service providers can flout local law from afar. This race to the bottom arises from the exploitation of overly liberal regimes, lacking consumer and other protections. A second potential race to the bottom arises from overly repressive regimes, which require service providers to serve as auxiliaries of the authoritarian state. I offer principles to protect local control of global Internet trade without jeopardizing either human rights or the World-Wide nature of the Web.

"Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services"

Law and Inequality: A Journal of Theory and Practice, Vol. 27, 2009
UC Davis Legal Studies Research Paper No. 189

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Assisted reproductive technology (ART) lures people across borders. The willingness to travel for ART access and the practices that facilitate fertility travel are known as "reproductive tourism." The supply side of reproductive tourism has formed into a sprawling commercial enterprise that is sophisticated in some respects and crude in others.

The first task of this Article is to set out a snapshot account of reproductive tourism. ART commerce across jurisdictional lines is fluid. The participants on both the demand and the supply side of the global fertility market change based on legal, medical, and normative innovations (or regressions). Participants include prospective patients, States, countries, providers, health care facilities, sperm banks, egg donors, surrogates, agencies, and brokers. When legal rules, technology, or social norms change, the destination spots and departure points of reproductive tourism change as well. The geographic shifts echo in the identities of the human participants.

The dominant narrative of reproductive tourism speaks of the private sphere desire for family formation. This narrative characterizes reproductive tourism as the fortuitous means of achieving the dream of parentage. This Article challenges the way in which the narrative separates family and market. It examines how the human need of family formation interacts with commerce, and how geopolitical differences shape that interaction.

This Article also examines the material and normative equality concerns embedded in reproductive tourism. Some

of the concerns arise from geopolitical differences between the destination spots and points of departure. Others arise from the use of women as third party sources of gestation and eggs. This Article examines the effects of reproductive tourism on health care priorities and resources in destination spots, the unequal allocation of health risks to women in reproductive tourism, reproductive tourism's perpetuation of reproductive entitlement, and racial alignment/racial distancing effected by reproductive tourism's practices.

"The Implied Obligation of Good Faith in Contract Law: Is it Time to Write its Obituary?"

Texas Tech Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 185

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The concept of good faith has existed for thousands of years in Western civilization. Indeed, it has been asserted that the concept is "one of the bases of our civilized society." The ancient Greeks recognized something similar to the notion of bona fides as "a universal social norm governing the relationships of its citizens." For their part, the Romans converted the notion into a basis for legal action; Roman jurists incorporated the notion into the essence of "a number of legal rules defining the obligations in . . . normal commercial transactions . . ." The notion played an especially important role in the enforcement of informal consensual contracts in classical Roman law.

The concept has also found its way into American commercial law. A majority of our jurisdictions recognize the concept as a matter of case law. Likewise, the American Law Institute included the doctrine in the Restatement (Second) of Contracts. The concept has a prominent role in the Uniform Commercial Code. Fifty of the 400 Code provisions expressly mention good faith. Article 2 of the Code, devoted to sales, includes 13 sections explicitly using good faith standards. The Code's general good faith provision, § 1-304, announces: "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." Moreover, if one can take the broad language in some of the judicial opinions at face value, the obligation has meaningful substantive content; many opinions contain sweeping language to the effect that the obligation precludes a contracting party from taking any action that would destroy or impair the other party's contractual rights or benefits. If anything, the obligation appears to be growing stronger. As originally adopted in 1952, the Code's general definition of good faith required only "honesty in fact." However, in 2003 that definition was amended to mandate "the observance of reasonable commercial standards of fair dealing" as well as honesty in fact.

However, the thesis of this short article is that the Code's endorsement of good faith has not had the desired effect. The first part of the article describes the Code's initial adoption of good faith standards and the early, high hopes raised by that adoption. The second part details the controversy over good faith that arose shortly after the Code's adoption. This part reviews the debate that ensued over the meaning of "good faith" in contract enforcement. The third part surveys the modern case law on good faith. This part demonstrates that although there is a split of authority over the approach to good faith under the Code, the majority of jurisdictions have embraced a cautious, restrictive interpretation of "good faith." The fourth part explores the most plausible explanations for the courts' unwillingness to expansively construe good faith. The final part discusses the implications for transactional attorneys and counsel litigating cases under the Code.

"An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The 'High-Tech Lynching' of a 'Wise Latina'?"

UC Davis Legal Studies Research Paper No. 188

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This Essay analyzes the broader lessons of race, gender, and identity that can be gleaned from the nomination and confirmation of Justice Sonia Sotomayor. It compares and contrasts the nominations of Justices Sotomayor and Thurgood Marshall, which are remarkably similar in important respects, and shows how little, in certain ways, the nation has progressed over more than four decades with respect to the color line in American social life. As we shall see, the two confirmations were very different substantively, as well as in tone from that of the first woman to serve on the Court, Justice Sandra Day O'Connor.

Part I of this Essay offers a glimpse at the experiences of Justice Thurgood Marshall, who was the first African American nominated and confirmed to the U.S. Supreme Court. Part II considers the lessons from the more recent nomination and confirmation of Justice Sotomayor. Over forty years later, she unfortunately was treated in many of the same harsh and unfair, if not outright racist, ways as Justice Marshall, including the grossly exaggerated claim that she was some kind of "judicial activist," which has become code for liberal positions on social wedge issues, dissection of her speeches, distortion of her civil rights affiliations, and attempts to paint her as nothing less than anti-white. And, a sign of the nation's lack of racial progress, she received one less vote in favor of confirmation than Thurgood Marshall did.

During his tense confirmation hearings in 1991, Justice Clarence Thomas, the second African American on the Supreme Court, famously declared that the Senate Judiciary Committee had subjected him to nothing less than a

"high-tech lynching," a controversial statement in light of the politics and circumstances of that confirmation battle. Whether or not one agrees with Justice Thomas on the merits, it is worth acknowledging that people of color being considered for the federal bench - and other positions in the United States, such as on law faculties and administrators - often feel subjected to qualitatively different kinds of inquiries and attacks - such as that one is anti-white - than white candidates, which helps explain Justice Thomas's outrage.

In my estimation, the confirmations of Justices Marshall and Sotomayor might more aptly be characterized as a "high-tech lynching" than that of Justice Thomas - confirmations in which both effectively were required to defeat the unjustified presumption that, as people of color committed to civil rights, they were anti-white. In the end, people of color face an entirely different set of assumptions, presumptions, and barriers to assuming leadership positions, whether it is Barack Obama becoming President of the United States or Sonia Sotomayor getting confirmed to the U.S. Supreme Court. There are many other examples as well, including Thurgood Marshall.

Despite the success of President Obama and Justice Sotomayor, the idea of a level-playing field is but a far-away dream for people of color in the United States. We should not forget this fundamental fact as the nation engages in massive self-congratulations over two momentous racial achievements in the last year, with some even declaring that racism is dead in America.

Moreover, the Sotomayor confirmation process specifically reveals the continuing suspicion of, and at times antipathy, for Latina/os in the modern United States. Race and gender proved to be an incendiary mix and resulted in Senate confirmation hearings that differed dramatically in tone and substance from those of the first two women on the Supreme Court. Indeed, the challenge to Sonia Sotomayor's judicial temperament and attacks on Latina/o civil rights groups arguably have little to do in reality about Justice Sotomayor and much to do about the perceptions of Latina/os in American society.

"Deconstructing the Charitable Deduction: Devising a Workable Framework to Analyze 'Charitable' Transfers"

UC Davis Legal Studies Research Paper No. 187

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For almost a century, taxpayers have been entitled to deduct amounts donated to designated organizations, thereby reducing their taxable income. Despite its longevity, the rationale for the so-called charitable deduction is the subject of continuing debate. Subsidy theory was developed to identify the circumstances in which a deduction is needed to encourage giving that would not occur in its absence. Under this theory, a deduction is warranted for efficiency-enhancing transfers to organizations providing under-funded public goods. While providing a useful starting point, little has been written on how to conduct this analysis. This Article seeks to fill that gap. The Article first develops guidelines to determine when charitable donations can be considered efficient and identifies the limitations of this inquiry in justifying a charitable deduction. Several cases are presented and analyzed. In cases where harms are limited, there is a strong argument for a charitable deduction, as transfers are likely to be efficient using traditional economic models. However, in cases where harms are particularly profound, it is argued that a charitable deduction should not be granted regardless of whether the transfer satisfies these models. The analysis provides a different way of viewing the charitable deduction by identifying and focusing on the harms caused by donations. In doing so, it reveals inadequacies in the tax laws that are often overlooked. After discussing efficiency, the Article turns to the question of under-funding, identifying circumstances in which a deduction is needed to encourage investment in sub-optimally provided goods and, perhaps more importantly, identifying circumstances in which the deduction is not needed because production levels are already optimal. It is argued that the law not only fails to properly make this separation but also unwittingly provides advantages to organizations least likely to be under-funded and, therefore, least in need of the incentive provided by the charitable deduction.

"Migration, Development, and the Promise of CEDAW for Rural Women"

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This Article explores the potential of international development efforts and human rights law to enhance the livelihoods of rural women in the developing world. In particular, the Article takes up the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which enumerates in Article 14 specific rights for rural women as a class. Pruitt's focus here is on Article 14's guarantees in relation to land ownership, education, development planning, access to credit, marketing facilities and technology, and other rights that are linked closely to women's role as the architects of food security. While CEDAW has attracted enormous attention among legal scholars in the decades since its inception, Pruitt's is the first scholarly article to focus on the Convention's attention to rural women. To better understand the potential of CEDAW in relation to this particular population, Pruitt examines the drafting history of Article 14, as well as the most recent country reports of four Member States: China, Ghana, India, and South Africa.

Written for a symposium called "Territory without Boundaries," Pruitt's discussion of CEDAW's Article 14 is situated in the context of massive rural-to-urban migration worldwide. Indeed, its publication comes just months after demographers report that, on a global scale, urban dwellers began to outnumber those living in rural areas. As globalization creates conditions that induce migration, causing the populations of cities to burgeon and their territories to sprawl, those same forces shape rural places, too. Although that which is rural is often thought of as quintessentially local, rural livelihoods around the world are buffeted by economic restructuring, migration, and climate change. Pruitt thus considers CEDAW in relation to migration's consequences for the women who are left behind. Among these consequences are enormous challenges, but also opportunities for change and empowerment.

Pruitt's analysis raises several broad, structural issues. The first is the impact of rural spatiality—including a relative absence of formal legal institutions and actors—on the ability of rural women to realize the promise of international instruments such as CEDAW. The second is the extent to which development entails or encourages urbanization and how CEDAW's vision for empowering rural women might influence the trajectory of development efforts. The third is the wisdom of development strategies that fuel migration's urban juggernaut, particularly in light of changing perceptions and priorities in the developed world regarding food production and sustainability.

Among other observations and conclusions, Pruitt lauds the priorities and framework of CEDAW's Article 14 in terms of the ways in which they seek to foster women's agency and material well-being. These include CEDAW's aspiration to secure women's roles in development planning and implementation and to empower them as producers of food. Pruitt also discusses the potential for CEDAW's Article 14 to accommodate legal pluralism, which can be particularly relevant in rural places, where custom and local sources of authority tend to be more entrenched and influential than in urban locales. Finally, Pruitt suggests that the population churn associated with migration represents an opening for the renegotiation of gender roles and other cultural practices in rural places. This is because migration enhances the prospect of raising the consciousness of rural communities regarding national and international legal norms, while also facilitating enforcement of rural women's rights by fostering their access to formal legal actors and institutions at higher scales, in urban places. Throughout her analysis, Pruitt considers parallels between developing and developed nations with regard to rural-urban difference, population trends, the industrialization of agriculture, and the social and economic consequences of these phenomena.

[^top](#)

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