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It is commonly thought that elections help to secure the positive legitimacy of the political order, leading citizens who may vehemently disagree with the current course of public policy to accept the government's right to rule, to comply voluntarily with duly enacted laws, and to channel their disagreements toward the next election. The Supreme Court's constitutional election law jurisprudence seems motivated, at least in part, by a desire to ensure that American elections perform this function. As yet, however, the Court's legitimacy-minded interventions have been predicated on judicial surmise about the relationship between election law and positive legitimacy. Recent research by political scientists has cast doubt on some of the Court's suppositions, while also suggesting that features of the electoral process which the Court has treated as inconsequential may have significance for empirical legitimacy. It will not be long before this body of work is regularly cited in legal briefs. That will put pressure on the courts either to clarify the sense in which the exigencies of empirical legitimacy inform the substance of (and limitations upon) constitutional political rights, or else to abandon the notion that citizens' legitimacy-related beliefs or behaviors have doctrinal relevance. In recognition of the moment at hand, I seek in this paper to clarify why a reasonable judge might want to make constitutional election law responsive to social science findings about positive legitimacy; to summarize the relevant empirical findings to date; and to outline a path forward for the courts.

"Institutional Racism, ICE Raids, and Immigration Reform"

University of San Fransisco Law Review, Vol. 44, p. 1, 2009
UC Davis Legal Studies Research Paper No. 197

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This Article argues that the structure of immigration laws has institutionalized a set of values that dehumanize, demonize, and criminalize immigrants of color. The result is that these victims stop being Mexicans, Latinos, or Chinese and become “illegal immigrants.” We are aware of their race or ethnicity, but we believe we are acting against them because of their status, not because of their race. This institutionalized racism made the Bush ICE raids natural and acceptable in the minds of the general public. Institutionalized racism allows the public to think ICE raids are freeing up jobs for native workers without recognizing the racial ramifications. Objections to ICE raids and the Border Patrol's Operation Gatekeeper are debated in non-racial terms. However, not viewing these operations from an institutionalized racial perspective inhibits the total revamping of our immigration system that needs to take place. Part I begins with a description of selected ICE raids. Part II follows with a discussion of the institutional racism that is grounded in the history of U.S. immigration laws and policies. Part III explains how the racial history of immigration policy has become institutionalized so that seemingly neutral policies actually have racial effects. Understanding the historical underpinnings of race-driven immigration policy offers a broader range of solutions to current policy and enforcement challenges. Recognizing the racist nature of the system allows for a framework to remedy a racist system.

"The Second Coming of Res Gestae: A Procedural Approach to Untangling the 'Inextricably Intertwined' Theory for Admitting Evidence of an Accused’s Uncharged Misconduct"

UC Davis Legal Studies Research Paper No. 198

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This article deals with a facet of the uncharged misconduct doctrine. On the one hand, the doctrine forbids the prosecution from treating an accused’s uncharged misconduct as circumstantial proof of the accused’s commission of the charged offense. The prosecution cannot rely on the simplistic theory, “He did it once, ergo he did it again.” On the other hand, the doctrine permits the prosecution to offer the evidence on non-character theories of logical relevance such as proof of identity or motive. Federal Rule of Evidence 404(b) codifies the doctrine.The numbers tell the story of the importance of the doctrine. Rule 404(b) generates more published opinions than any other provision of the Federal Rules; it is the most litigated issue on appeal. In many states, errors in the admission of such evidence are the most common ground for appellate reversal. One of the most controversial facets of the doctrine is the “inextricably intertwined” theory. According to this theory, even when the prosecution cannot articulate a conventional non-character theory for introducing evidence of an accused’s uncharged misconduct, the court should admit the evidence if the evidence is “inextricably intertwined” with the prosecution witness’s narrative of the charged crime. The courts have invoked the inextricably intertwined theory in hundreds of cases. The treatise writers and law review commentators have been virtually unanimous in criticizing the theory. The thrust of the criticism is that the substantive test is nebulous, allowing trial judges to admit evidence possessing neither genuine non-character relevance nor a truly inseverable connection to the testimony about the charged offense.

Although the criticism of the theory’s substantive test has merit, the thesis of this article is that the substantive criticisms largely miss the mark. The essential decision confronting the judge is an editorial task: Can the references to the uncharged misconduct be redacted from the witness’s account of the charged crime without rendering the witness’s incomprehensible or significantly reducing the narrative’s legitimate credibility? Editing must be done on a sensitive, case-by-case basis. The nature of the task makes it wishful thinking to believe that the courts will ever formulate a bright line substantive test.

The real hope for reining in the theory’s excesses lies in procedural reform. The enclosed article proposes four reforms: A requirement for pretrial notice, an exchange of versions of the witness’s narrative between the prosecution and defense, new constraints on the trial judge’s ruling, and a mandate for a limiting instruction on any references to uncharged misconduct submitted to the jury. These reforms would give trial judges the time and procedural tools needed to engage in deliberate, thoughtful editing.

"The Evolution of the American Family"

SUMMER-Human Rights, Vol. 36, p. 2, Summer 2009
UC Davis Legal Studies Research Paper No. 200

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This short piece examines the changing meaning of marriage and the family in the U.S. Among other developments, the piece chronicles: the changing role and legal status of women in marriage; race restrictions in marriage; the legal recognition of same-sex relationships; and the increasing numbers of nonmarital families. The article is the lead piece in the Summer 2009 issue of the ABA Human Rights magazine devoted to the New American Family

"The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest"

Law & Contemporary Problems, Vol. 72, 2010
UC Davis Legal Studies Research Paper No. 196

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This Article traces the mortgage interest deduction from accident to birthright, from one of many deductible personal interest items to one of the few left standing, and from a nominal tax offset to the second most expensive tax subsidy. It tells the story of how the mortgage interest deduction and other federal housing subsidies fueled the post-World War II surge in rates of homeownership and, more recently, how those programs contributed to the collapse of the housing and financial markets. Finally, the Article offers a eulogy to the mortgage interest deduction that draws on criticisms of the subsidy from two generations of tax reformers and tax policymakers that are more applicable today than at any time during the deduction's nearly 100-year history.

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