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"Continuing the Constitutional Dialogue: A Discussion of Justice Stevens' Establishment Clause and Free Exercise Jurisprudence"

Northwestern University Law Review, Vol. 106, 2012
UC Davis Legal Studies Research Paper No. 265

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This article examines Justice John Paul Stevens' religion clause jurisprudence from the perspective of a continuing dialogue about the meaning of the Free Exercise Clause and the Establishment Clause. The term continuing dialogue suggests that even for as formidable and long-tenured a jurist as Justice Stevens, important questions remain open and unresolved. The article identifies the values and concerns reflected in the many opinions Justice Stevens authored or joined. Then it moves beyond those writings to discuss unanswered questions about Justice

Stevens' understanding of the two religion clauses. In particular, the article explores potential dissonance between Justice Stevens' contrasting interpretation of the Establishment Clause and Free Exercise Clause.

With regard to Establishment Clause challenges to religious displays, for example, Justice Stevens expressed substantial concern for the status and sensibilities of religious minorities confronted with state sponsored symbols reflecting majoritarian religious beliefs. These messages had the tendency to divide communities along religious lines by affirming the beliefs of larger faiths while disfavoring religious minorities and nonbelievers. Religious sensibilities, however, may be just as offended by regulations interfering with religious as they are by preferential displays. Minority faiths may suffer a similar sense of alienation and unequal treatment when government adopts general laws that avoid burdening the religious practices of majority faiths while denying exemptions to minority religions whose practices are burdened by comparable legislation. Yet these status and sensibility concerns are seldom discussed by Justice Stevens in free exercise cases.

Also, Justice Stevens joined the majority opinion in Employment Division v. Smith, a decision that sharply restricted free exercise rights and assigned the problem of providing religious accommodations to the political branches of government. One key argument supporting the holding in Smith was the Court's concern that judicial protection of free exercise rights would require federal judges to engage in subjective, value-based, ad hoc balancing of free exercise rights and competing state interests, a task that exceeded their competence and judicial role. Justice Stevens also believed, however, that the Court must exercise vigilant oversight over discretionary religious accommodations. To satisfy Establishment Clause requirements, the Court must determine that accommodations do not unfairly favor certain faiths over others, and do not extend so far that they impose an unacceptable burden on others. The open question here is whether this Establishment Clause task can be accomplished by federal courts without undertaking the same kind of subjective, value-based, ad hoc analysis the Court rejected in free exercise cases.

"The Asian Century?"

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How might an Asian Century to come differ from the American Century just past? Will an Asian Century, should it come to pass, mark a retreat for human rights, including women's rights and gay rights? In this introduction to a UC Davis Law Review symposium, I contrast Henry Luce's vision for an American Century with the internationalism of his near contemporary, the Indian Poet Laureate Rabindranath Tagore. As the United States entered World War II, Luce, publisher of Time, Life, and Fortune, asked, "What are we fighting for?" Luce's manifesto declaring an "American Century" answered that it was the internationalization of American ideas - promulgated from Hollywood to Washington. Luce's vision presaged American support for human rights after the war and its forceful, if inconsistent, critique of despots during the latter half of the Twentieth Century.

In the Post-War era, China and India embraced the sovereign nation-state, often proving reluctant to support intervention in the affairs of other countries, even when human rights were at stake. Tagore offered an alternative vision. Hailing from a land that long suffered at the hands of British traders and imperialists, Tagore proposed an internationalism led by neither the merchant nor the soldier. Instead, Tagore offered a world order founded on a kind of critical friendship, unflinchingly focused on human dignity for all.

"The Unconstitutionality of State Regulation of Immigration through Criminal Law"

Duke Law Journal, Forthcoming
Arizona Legal Studies Discussion Paper No. 10-25
UC Davis Legal Studies Research Paper No. 268

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The "mirror image" theory of cooperative state enforcement of federal immigration law is a phenomenon, one of the most wildly successful legal movements and ideas in decades. The mirror-image theory proposes that states can enact and enforce criminal immigration laws based on federal statutes. The theory that it is unobjectionable for a state to carry out federal policy is the basis of Arizona's SB1070, similar immigration laws already in force in seven states, and copycat bills pending in dozens more. The mirror-image theory has succeeded not only in legislatures, but also as an idea in the larger political culture: it has been embraced by dozens of U.S. Senators and Representatives, by policy groups, private citizens, and commentators including George Will, Sarah Palin, and the editors of the New York Post and Washington Times.

The mirror image theory is indeed appealing. But it is also fundamentally flawed. This article, the first to subject the mirror image theory to sustained scholarly scrutiny, demonstrates that the mirror image theory fails to identify a legitimate source of state power to legislate on immigration matters.

No one denies that Congress and the Federal executive have exclusive authority over the substance and procedure of admission, exclusion and removal of non-citizens, documented and undocumented. To the extent there has ever been any question, this proposition was firmly established by a pair of Supreme Court decisions from 1876. The mirror image theory does not challenge this deep-rooted idea head-on, but instead proposes that state legislative authority over immigration flows from cases and provisions of the Immigration and Nationality Act (INA) authorizing states to assist in the enforcement of federal immigration law. However, those authorities contemplated state assistance with enforcement only through arrests. Arrest authority does not imply the power to legislate or prosecute. To the contrary, other provisions of the INA make clear that federal agencies have exclusive power to make prosecutorial and administrative decisions after arrest, and to create supplementary regulations.

The mirror image theory rests on the erroneous premise that Congress has implicitly authorized state enforcement of federal immigration law. This article argues that state enforcement would be unconstitutional even if it were explicitly authorized by Congress. First, the federal immigration power is exclusive and non-delegable. Second, criminal prosecution and immigration enforcement is an executive power which Congress cannot remove from the President and share with non-Executive branch officials. Finally, the Supreme Court has held that states cannot prosecute crimes which affect only the sovereign interests of the United States. Accordingly, state immigration prosecutions are irremediably unconstitutional.

"Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties"

California Law Review, Vol. 100
UC Davis Legal Studies Research Paper No. 264

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Too often popular political power – whether it is in the form of direct democracy or other more innovative forays in participatory or deliberative democracy – presents itself as a counterweight to the political power parties wield. Yet setting up “popular democracy” and “party democracy” in opposition to one another in the American political landscape is not only unnecessary but also pathological: it thwarts an understanding of their potential for mutual enrichment. Popular democracy and party-based representative democracy in the American states each have characteristic limitations. Mass popular democracy – the ballot initiative and the referendum – presents a daunting informational challenge for ordinary voters. Popular democracy in its more selective, deliberative forms gives rise to unanswered questions about agenda-setting and legitimation. Meanwhile, party democracy as practiced in the American states often fails to realize the virtues claimed for it, because structural features of state government occlude party-based accountability, and because parties may not develop coherent, competitive state-level brands. We argue that institutional designers can use parties to solve some of the characteristic problems of popular democracy, and popular democracy to improve the functioning of party democracy. We illustrate our claims with a discussion of two seemingly disparate problems: state budget stalemates, and the design of state constitutional conventions.

"Partners Without Partners: The Legal Status of Single Person Partnerships"

Fordham Journal of Corporate and Financial Law, Forthcoming
UC Davis Legal Studies Research Paper No. 267

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Is it possible to have a partnership consisting of one person, a partner without a partner? The question will arise when all but one of the members leaves a partnership. The Revised Uniform Partnership Act attempts to give greater stability to partnerships by narrowing the circumstances under which dissolutions occur, but it also fails to address the fundamental and important question of whether a partnership may be continued by a sole surviving partner.

In this article, we explore the issues raised by a single person partnership. In particular, we address the central issue of whether the departure of the penultimate partner from a term partnership triggers a winding up of the business or whether the statutory buyout is called into play. We have structured much of the discussion as a dialog between the authors. This allows us both to focus on the precise issues under RUPA presented by a single person partnership and to probe the competing arguments on whether such a partnership may exist. Although we have differing views on whether a single person partnership is possible under RUPA, we conclude on common ground that the buyout is appropriate. We also unite in a call for statutory clarification.

"The End of Mortgage Securitization? Electronic Registration as a Threat to Bankruptcy Remoteness"

UC Davis Legal Studies Research Paper No. 269

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A central tenet of asset securitization in the United States - that assets are bankruptcy remote from their sponsors - may be threatened by innovations in the transfer of mortgage loans from the loan-originators (sponsors) to the legal entities that own the mortgage pools (the Special Purpose Vehicles (SPVs)). The major legal argument advanced in the paper is that because the mortgage is an interest in real property, the bankruptcy-remoteness rules applicable to real property, including S 544(a)(3) of the Bankruptcy Code, create a risk to the bankruptcy remoteness of mortgage transactions unless proper recording occurs. We review the traditional mortgage transfer process and discuss why the real-property characteristics of mortgages makes them special. We next discuss how the chain of title transfer using traditional recorded assignment at the local jurisdiction helps to assure that the promissory note and the mortgage that are transferred into the SPVs are, indeed, bankruptcy remote from the loan originators and sponsors. We then discuss why the more recently introduced Mortgage Electronic Registration System (MERS) method of transfer introduces significant vulnerability into the mortgage transfer process and leads to a significant risk that bankruptcy remoteness will fail. Our arguments address scholarly and case-law theories of the legal foundations of achieving bankruptcy remoteness for mortgage transfers, the eligibility requirements for "true-sale" accounting treatment of transferred mortgages under Financial Accounting Standards (FAS 140), and the finance literature that addresses the economics of securitization through bankruptcy remoteness. We conclude with a first step toward policy prescriptions concerning possible promissory note and mortgage transfer processes that could achieve bankruptcy remoteness and the associated economic efficiency objectives of mortgage securitization.

"Rationalization and Limitation: The Use of Learned Treatises to Impeach Opposing Witnesses"

Vermont Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 266

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The numbers tell the importance of this topic. Litigators are calling expert witnesses more frequently than ever before, and there has never been such a vast body of technical literature available to impeach expert witnesses.

The maddening aspect of this topic is that although in some circumstances all courts will permit the use of publications to impeach an opposing expert, the courts almost never explain why the publication's contents are logically relevant on an impeachment theory. At one time the courts' failure to do so was tolerable; until the last few decades, most jurisdictions did not recognize a learned treatise exception to the hearsay rule. However, following the lead of Federal Rule of Evidence 803(18), most jurisdictions now recognize that exception - at the same time they permit the impeachment use of treatises. Today it is imperative that the courts distinguish between the two doctrines. When a court allows the use of a publication solely for the purpose of impeachment, that distinction determines both what the judge should say in a limiting instruction and what counsel may say during closing argument.

As the title of this article suggests, the purpose of the article is twofold: rationalization and limitation. After describing the current split of authority, the article attempts to rationalize the impeachment doctrine. The article evaluates the various positions taken by the courts to determine under which positions the publication possesses legitimate, nonhearsay relevance to the expert's credibility. The article then argues for a policy limitation on the scope of the impeachment doctrine. Having identified several impeachment theories of logical relevance, the article demonstrates that some courts have gone too far in allowing the impeachment use of publications.

"Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts"

Boston University Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 262

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There are tens of thousands of same-sex married couples in the United States. A significant number of these couples, however, cannot divorce. First, many same-sex spouses cannot divorce in their home states because the relevant state law precludes recognition of same-sex marriages. Second, an anomalous jurisdictional rule makes it difficult for these spouses to divorce elsewhere. In contrast to the rules governing other civil actions, one of the spouses must be domiciled in the forum for a court to have jurisdiction over a divorce.

This Article considers the second hurdle – the domicile rule. Previously, divorce jurisdiction was a subject of intense interest to the Court and to legal scholars. But despite an ever increasing disjunction between divorce jurisdiction and general principles of state court jurisdiction, critical examination of the domicile rule has largely disappeared.

This Article responds to recent calls to challenge the myth of family law exceptionalism by critically analyzing the domicile rule. After considering the domicile requirement in the context of state court jurisdiction doctrine more generally, this Article contends the time has come to abandon the domicile rule. Abandonment of the rule alone, however, does not fully resolve the problem. Accordingly, this Article advances a set of normative proposals to ensure that all spouses have a forum in which to divorce.

"Rethinking Rule 59's Appellate 'Waiver' for Magistrate Judge Adjudication Post-Olano"

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UC Davis Legal Studies Research Paper No. 270

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In 1985, the U.S. Supreme Court held in Thomas v. Arn that a federal court of appeals may establish a rule that failure to file objections to a magistrate judge's report and recommendations "waives" both the right to further review by the district court and the right to appeal the judgment to the court of appeals. The Arn majority determined that such a rule did not remove the essential attributes of the judicial power from the Article III court or elevate non-life-tenured magistrate judges to the functional equivalents of Article III judges. Rather, loss of the right to any Article III review through failure to object to a magistrate judge's report and recommendations merely constituted a nonjurisdictional "procedural default," similar to failure to pay an appellate filing fee or failure to file an appeal before an internal court deadline. The Court emphasized that discretionary appellate review "in the interest of justice" remained available.

Despite describing such a rule as a "procedural default," the Arn Court consistently used the term "waiver" throughout the opinion to describe the operation of the rule. Many circuits - although not all - adopted analogous rules under their own supervisory powers, and in 2005 an Arn-type rule became codified as Federal Rule of Criminal Procedure 59. Similar to Arn, Rule 59 established for criminal matters that failure to timely object to a magistrate judge's decision "waives a party's right to review."

However, in the twenty-year span between the Arn decision and the promulgation of Rule 59, the 1993 U.S. Supreme Court case of United States v. Olano carved out a special meaning for the word "waiver." The Olano Court established that there is a procedural and substantive distinction between waiver - "the intentional relinquishment or abandonment of a known right" - and forfeiture - "the failure to make the timely assertion of a right." Substantively, waiver fully extinguishes any error, precluding any form of review, whereas "mere" forfeiture means that an error, which is clear and affects substantial rights, remains potentially reversible under plain error review.

Failing to timely object is the paradigm example of forfeiture, and Thomas v. Arn's "interest of justice" discretion has been held equivalent to review for plain error.

Accordingly, "waiver" is an inapt description of the default rules authorized by Arn, despite the initial use of "waiver" in the Arn Court's opinion, before Olano had specifically construed the term. By using the language of "waiver" post-Olano, Rule 59 semantically insinuates that every avenue of review, even plain error review, is foreclosed by the failure to timely file objections to a magistrate judge's report and recommendations. As such, the language of Rule 59 obfuscates the actual availability of plain error review. The parameters of appellate "waiver" rules demand greater clarity, particularly to the extent that this misleading choice of words subtly disrupts the constitutional rationale for magistrate judge adjudication, which rests on the presumption, at minimum, of some level of review by a life-tenured Article III judge. Among other conclusions, this Article recommends a change in the language of Rule 59 to more accurately reflect the current limits of appellate "waiver" for failure to timely object to a magistrate judge's report and recommendations, and to aid the future constitutional analysis of magistrate judge adjudication.

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