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### **"Beyond Fragmentation"**

*NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW – IN MEMORIAM THOMAS WÄLDE*, CMP Publishing, 2011  
*UC Davis Legal Studies Research Paper No. 243*

**ANDREA K. BJORKLUND**, University of California, Davis - School of Law

Email: [akbjorklund@ucdavis.edu](mailto:akbjorklund@ucdavis.edu)

**SOPHIE NAPPERT**, *affiliation not provided to SSRN*

Email: [snappert@3vb.com](mailto:snappert@3vb.com)

The fragmentation of international law is in some ways an embarrassment of riches, with multiple tribunals creating jurisprudence in particularized areas. This richness leads also to complexity and to the phenomenon that Marti Koskiennemi has so accurately termed "fragmentation." Our purpose in this essay is to look "beyond fragmentation" given that the status quo of multiple discrete nuclei developing in isolation from one another is unsatisfactory and, we argue, stands in the way of the continuing relevance of international law in modern times. The international investment arena, with its myriad ad hoc tribunals and legal doctrines enshrined in treaties that either codify or build on customary international law, offers an excellent laboratory in which to theorize about communication between the nuclei and when such communication is appropriate. We have suggested an inter-nuclei communication model for use when tribunals are obliged to give content to treaty norms that are inherently vague or to fill lacunae in treaties. This approach takes advantage of the positive aspect of fragmentation – the development of specialized jurisprudence in particular areas of the law. Yet this does not mean that all expertise is freely transferable. A specialized doctrine deeply embedded in a complex treaty might be a poor candidate for transfer to another regime in which the analogous doctrine operates in an altogether different context. For this reason we have suggested a cautious approach to inter-nuclei communication characterized by a willful awareness by tribunals in one sphere of international law of what goes on in other related spheres, and an exercise of canvassing the views expressed by other tribunals in these related spheres for guidance to inform, or test, one's own analysis. We test our propositions by reference to two recurring issues in international investment arbitration

– the principle of denial of justice and the doctrine of necessity.

## "The Importance of Student and Faculty Diversity at Law Schools: One Dean's Perspective"

*Iowa Law Review, Forthcoming*

*UC Davis Legal Studies Research Paper No. 242*

**KEVIN R. JOHNSON**, University of California, Davis - School of Law  
Email: [krjohnson@ucdavis.edu](mailto:krjohnson@ucdavis.edu)

My contribution to this symposium on "The Future of Legal Education" sketches one dean's thoughts on the case for the importance of diversity at law schools. Let me begin with two questions. In these times, can a truly excellent law school have a homogenous student body and faculty? Can we truly – and do we want to – imagine a top twenty-five law school comprised of predominantly white men?

Law school deans at virtually each and every turn receive direction and guidance on how to achieve a more diverse student body and faculty. To be selected for the job, most law deans, as well as most other campus leaders, experienced a career in which they were conditioned to express their deep and enduring commitment to diversity. Despite this oft-stated commitment, the racial diversity of law school student bodies and faculties leveled off in the early twenty-first century.

Before becoming a dean, I firmly believed – and continue to believe – that racial, socioeconomic, and other diversity among students and faculty is critically important to ensure excellence at any law school. In my estimation, for reasons outlined in this Essay, diversity and excellence both are inextricably interrelated, mutually reinforcing, and well worth striving for by any law school worth its salt.

In an increasingly diverse nation and integrating global political economy, who would want to be a dean assigned the unenviable task of defending homogeneity within a law school to the public, faculty, and students. To the contrary, I have advocated that both student and faculty diversity should be factored into the multi-variable formula employed by the much-watched U.S. News & World Report rankings of law schools. Those rankings, for better or worse, have a profound influence on the decisions made by law schools as well as the existing incentives for law school administrators.

This Essay builds on the premise that diversity is highly relevant to evaluating the quality of a law school and the education of its student body. It sketches the arguments for the importance of a multitude of diversities – racial, socioeconomic, gender, and more – for U.S. law schools in their student bodies and faculties to best achieve their educational mission. Borrowing liberally from the Supreme Court's rejection of a constitutional challenge to the University of Michigan Law School's race-conscious admissions program in *Grutter v. Bollinger*, Part I of this Essay considers the educational benefits offered by a diverse law student body. Part II outlines the similar, yet somewhat different, teaching and scholarship benefits that a diverse law faculty bring to a high quality legal education. Part III outlines the educational importance of diversity among law students and faculty based on a wide array of experiences, characteristics, and knowledge other than race. Part IV of this Essay summarizes some of the legal restrictions, as well as limited incentives, for deans and law schools engaged in the active pursuit of diversity among students and faculty.

## "Naming Baby: The Constitutional Dimensions of Parental Naming Rights"

*UC Davis Legal Studies Research Paper No. 241*

**CARLTON F. W. LARSON**, University of California, Davis - School of Law  
Email: [clarson@ucdavis.edu](mailto:clarson@ucdavis.edu)

This Article provides the first comprehensive legal analysis of parents' rights to name their own children. Currently, state laws restrict parental naming rights in a number of ways, from restrictions on particular surnames to restrictions on diacritical marks to prohibitions on obscenities, numerals, and pictograms. Yet state laws do not prohibit seemingly horrific names like "Adolf Hitler," the name recently given to a New Jersey boy.

This Article argues that state laws restricting parental naming rights are subject to strict scrutiny under both the Due Process Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment. This Article concludes that although many restrictions are constitutional, prohibitions on diacritical marks, such as that employed by the state of California, are unconstitutional. If parents wish to name their child Lucia or José, they have a constitutional right to do so. Similarly, current laws restricting parental choice of surnames fail strict scrutiny. This Article also considers the constitutionality and desirability of statutory reforms that would address certain harmful names not prohibited by current law.

Along the way, readers will encounter heavy metal bands with unusual umlauts, boys named Sue, the history of birth certificates, false implications of paternity, and dozens of truly awful, but very real, names given by parents to their children.

## "The Accession Insight and Patent Infringement Remedies"

*Michigan Law Review, Vol. 110, 2011*

**PETER LEE**, University of California, Davis - School of Law  
Email: ptrlee@ucdavis.edu

How should property rights be allocated when one party, without authorization, substantially improves the property of another? According to the doctrine of accession, a good-faith improver may take title to such improved property, subject to compensating the original owner for the value of the source materials. While shifting title to a converter seems like a remarkable remedy, this merely highlights the equitable nature of accession, which aims for fair allocation of property rights and compensation between two parties who both have plausible claims to an improved asset.

This Article draws on accession – a physical property doctrine with roots in Roman civil law – to enhance patent law’s treatment of technological improvement. While patents and property exhibit significant differences, this Article argues that accession can provide helpful guidance for allocating rights and obligations when an infringer substantially improves upon another party’s patented technology. Drawing on the Supreme Court’s decision in *eBay v. MercExchange*, it proposes that courts apply accession in equitable determinations to deny injunctive relief and compel “substantially improving” infringers to compensate patentees through reasonable royalties. Accession would thus shift meaningful ownership of enhanced technologies to improvers based in part on their substantial contributions to them. Such liability rule protection would ameliorate holdup in “blocking patents” scenarios, provide a viable alternative to the rarely-used reverse doctrine of equivalents, and encourage the dissemination of improved technologies. While this proposal seems radical, this Article shows that elements of the “accession insight” already appear in *eBay* and its progeny. The Article concludes by exploring the theoretical implications of accession for the intersection of patents and property.

### "Human Rights and Development for India’s Rural Remnant: A Capabilities-Based Assessment"

*UC Davis Law Review*, Vol. 44  
*UC Davis Legal Studies Research Paper No. 244*

**LISA R. PRUITT**, University of California, Davis - School of Law  
Email: lrpruitt@ucdavis.edu

The cachet that India currently enjoys on the world stage is linked largely to the booming high-tech and service economies associated with its megacities. Yet in terms of sheer numbers, India is not an urban nation. About a third of India’s population lives in urban areas, though that figure is rising quickly. One projection indicates that thirty-one villagers will continue to show up in an Indian city every minute over the next forty-three years - 700 million people in all.

Lack of sustainable development in rural areas is a major force behind the massive rural-to-urban migration across Asia. An enormous challenge currently facing India and many of its neighbors is thus how to manage the migration. One aspect of that challenge is providing for the nation’s rural remnant - for those who are left behind in villages and towns as cities burgeon and sprawl. To mitigate rural-to-urban migration and accommodate growth that is sustainable both environmentally and economically, India must attend to rural development. This means responding to infrastructure deficits in order to meet some very basic needs (e.g., water, sanitation), but it also means providing education and health care, along with rural economic development through strategic thinking about agricultural production and job creation. Meeting this challenge has clear implications for how the nation of India, along with its state and local governments, distribute government resources.

This Article considers India’s uneven development across the rural-urban axis through the lens of the capabilities framework developed by Amartya Sen and Martha Nussbaum. The capabilities approach argues for universal human rights based on a recognition of each human being “as an agent and an end” and calls for a “threshold level of each capability” below which citizens are not truly functioning as humans. Nussbaum also refers to equality as an aspect of capabilities, linking it in particular to dignity and seeing it as a salient concern in relation to core socioeconomic rights, such as those to health care and education.

Nussbaum’s thinking on capabilities has been greatly informed by her time in India and by the situation there. Further, Nussbaum references the rural-urban axis as among the power disparities relevant to citizens’ realization of capabilities. In using a capabilities frame for assessing India’s approach to rural development, this Article attends particularly to the life, bodily health, and education capabilities, arguing that India should aspire to a degree of parity across the rural-urban axis in providing these foundational capabilities. Further, the Article analogizes rurality to disability and gender as a crucial characteristic to which government should attend in programming to meet the needs of rural citizens. The Article also considers briefly the potential of the Indian Constitution to mitigate distributive inequities associated with government’s relative neglect of rural populations.

Finally, the Article discusses what is at stake for India and the rest of Asia in staking out a path of sustainable development that explicitly considers the rural-urban axis. This path should move beyond the parallel tracks of urban planning and rural development so that development and planning go hand in hand along the rural-urban continuum and across the nation. Regional towns and small cities are sure to be a critical part of any solution to the present state of grossly uneven development.

## "Border-Crossing Stories and Masculinities"

UC Davis Legal Studies Research Paper No. 247

**LETICIA M. SAUCEDO**, University of California, Davis - School of Law  
Email: [imsaucedo@ucdavis.edu](mailto:imsaucedo@ucdavis.edu)

In 2008, sociologist M. Cristina Morales and I visited Hidalgo, Mexico, the sending state of many of the workers in residential construction in Las Vegas, Nevada. This trip and the interviews we conducted were part of a larger project involving over 100 male and female workers who discussed with us their work conditions, their migration patterns, and their involvement in organizing or grievance efforts in the U.S. workplaces (Saucedo and Morales 2010). In Hidalgo, Mexico, we interviewed 32 male migrants who had worked in the United States and who had returned to their hometowns. Among the topics of conversation with these workers were discussions about their own migration and border crossing stories. By focusing on their border crossing stories, this chapter explores the behavioral responses of border crossing migrants between the United States and Mexico to restrictive immigration measures and to economic and social conditions. The stories explain the migration pattern and the reasons for it, and correspondingly, the reasons that individual immigrants journey across the border.

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