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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"A Shareholders' Put Option: Counteracting the Acquirer Overpayment Problem"

96 Minnesota Law Review 1018 (2012)
UC Davis Legal Studies Research Paper No. 303

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Acquisition transactions are often the most significant activity undertaken by corporations. Despite the plethora of acquisition transactions, numerous empirical studies find that large-scale acquisition transactions involving public companies result in significant losses for acquiring firms and their shareholders. Finance scholars have attributed these losses to managerial agency costs (such as personal benefits in the form of increased compensation for management) and behavioral biases (such as ego and hubris) of boards and management.

Curiously, corporate law has remained largely silent in the face of this evidence. Acquisition transactions involve fundamental questions pertaining to the allocation of power between managers and shareholders. While corporate law has robust doctrines pertaining to the rights of shareholders of selling firms, it gives little attention to shareholders of acquiring firms. Under current statutory schemes, acquirer shareholders rarely enjoy any decision-making role in acquisitions. Moreover, judicial doctrine's deferential stance toward the acquirer's management means that acquirer shareholders are unable to seek any redress through the courts.

The Article proposes a novel solution to alter the stark imbalances in power between managers and shareholders of acquiring firms: a shareholders' put option. The market pricing and shareholder direct participation contemplated by this proposal offer a referendum and monetary mechanism through which shareholders of acquiring firms could participate in acquisition decisions. The Article also provides a market-oriented incentive and process through which boards of acquiring firms could meaningfully consider whether to acquire another firm and how to properly value it. A diligent board could in fact use the put option to signal a well-valued transaction. Moreover, if exercised, a shareholders' put option would force the acquirer's management to internalize the costs of a value-destroying acquisition. If successfully used, a shareholders' put option may be an optimal way to alter the balance of power in acquisition transactions so as to address the destruction of value suffered by acquirer shareholders.

"Is Honesty the Best (Judicial) Policy in Affirmative Action Cases? Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes"
Vanderbilt Law Review En Banc, 2012 Forthcoming
UC Davis Legal Studies Research Paper No. 298

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This essay explores the likely options the Supreme Court has before it in the pending Fisher v. University of Texas affirmative action case, and locates the case in a larger framework that is rife with doctrinal and historical inconsistency, both as to substance and procedure, and that as a result opens the Court to the charge of intellectual dishonesty (or at least under-explanation).

"Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis"
McGeorge Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 301

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In the almost twenty-five years that Justice Anthony M. Kennedy has served on the United States Supreme Court, he has gained a reputation as being the foremost defender of free speech principles on the modern Court. In this paper, we seek to determine whether Justice Kennedy's reputation as a defender of free speech principles is justified. To that end, we undertake both a quantitative and qualitative analysis of the Supreme Court's free speech jurisprudence during the period of Justice Kennedy's tenure on the Court (i.e., from February 11, 1988 through the present), with a view towards determining whether Justice Kennedy has been more likely to support free-speech rights than the Court as a whole. Our clear conclusion is that as a quantitative matter, Justice Kennedy is in fact substantially more likely to defend free speech claims than the Court as a whole, across a wide range of First Amendment disputes. In addition, an examination of his majority and separate opinions in free speech cases demonstrates that Justice Kennedy has during his tenure made important and lasting contributions to the law of freedom of speech, most of which have expanded rather than contracted First Amendment liberties.

"Facebookistan"
North Carolina Law Review, Vol. 90, p. 1807, 2012
UC Davis Legal Studies Research Paper No. 295

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Who rules Facebookistan? Who makes the rules that govern the way a tenth of humanity connects on the Internet? The United States, France, China, or Mark Zuckerberg? Facebook represents a type of multinational corporation new to the world stage — one that raises issues different than those raised by earlier generations of multinational corporations. A review of international controversies involving Facebook reveals that Facebook has changed some of its policies as a result of pressures from governments around the world, while resisting other pressures. At the same time, Facebook has itself helped spur changes in the law, most evidently in helping undermine repressive governments. Ultimately, this Article finds that regulatory power is, de facto, dispersed across a wide array of international actors.

"Districting for a Low-Information Electorate"
Yale Law Journal, Vol. 121, No. 7, pp. 1846-1886, May 2012
UC Davis Legal Studies Research Paper No. 294
George Mason Law & Economics Research Paper No. 12-40

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Most commentary on redistricting is concerned with fairness to groups, be they racial, political, or geographic. This Essay highlights another facet of the redistricting problem: how the configuration of districts affects the ability of low-information voters to secure responsive, accountable governance. We show that attention to the problem of voter ignorance can illuminate longstanding legal-academic debates about redistricting, and that it brings into view a set of questions that deserve our attention but have received little so far. District designers should be asking how alternative maps are likely to affect local media coverage of representatives, as well as the "branding" strategies of political party elites. Bearing these questions in mind, we offer some tentative suggestions for reform.

"The Epistemological Trend in the Evolution of the Law of Expert Testimony: A Scrutiny at Once Broader, Narrower, and Deeper"
Georgia Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 299

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This article is a contribution to a symposium occasioned by Georgia's adoption of an evidence code modeled after the Federal Rules of Evidence. The purpose of the article is to trace the evolution of the law governing the admissibility of expert testimony.

Prior to the Supreme Court's 1993 decision in Daubert, most jurisdictions followed some variation of the Frye general acceptance test. There are three noteworthy aspects of the state of the law prior to Daubert. First, many, if not most, Frye jurisdictions limited the reach of the test to instrumental, purportedly scientific evidence. These jurisdictions tended to exempt both soft science such as psychology and non-scientific expertise from scrutiny. Secondly, in some instances courts in Frye jurisdictions took a global approach to evaluating the admissibility of expert testimony. Rather than examining the specific theory or technique the expert relied on, the courts asked whether the general discipline or field was recognized and accepted. Thirdly, since the test was general acceptance, the courts accepted at face value knowledge claims by practitioners of the discipline; if the clear majority of the members of the field had embraced the scientific theory or technique, the courts did not probe beyond the discipline's ipse dixit.

The Daubert trilogy has changed the law governing the admissibility of expert testimony in each of these respects. To begin with, Daubert adopted a broad definition of science, which the lower courts quickly realized applied to soft as well as hard science. In Kumho, the Court made it clear that the reliability test announced in Daubert applies across the board to all species of expert testimony. Next, trilogy establishes that global analysis is no longer acceptable; rather, the trial judge's responsibility is to evaluate the reliability of the specific theory or technique that the expert proposes relying on. All three cases, Daubert, Joiner, and Kumho subjected the proffered expert testimony to highly particularized scrutiny. Finally, while Daubert rejected the general acceptance and implicitly announced that the ipse dixit claims by the field are unacceptable, Joiner and Kumho explicitly ruled that ipse dixit claims by individual experts are equally unsatisfactory.

As a result of these changes, the law of expert testimony is evolving toward an epistemological analysis of proffered expert evidence – a scrutiny that is at once broader, narrower, and deeper than the pre-Daubert mode of analysis. The Court has made it clear that the trial judge must test the expert's knowledge claim. The claim is not exempt from scrutiny because it relates to soft science or non-scientific expertise. Nor is the claim exempt because the expert making the claim is a member of a recognized field. The expert must establish that there is a sufficient warrant for the specific knowledge claim that he or she is making.

This trend toward an epistemological approach is no accident. In both Daubert and Kumho, the Court began its analysis by construing the word "knowledge" in the text of Federal Rule of Evidence 702. Even more importantly, when the Daubert Court undertook to define "scientific" in Rule 702, the Court focused on science as a methodology or process for validating claims. That focus leads naturally to an epistemological approach. Many of the great epistemologists, including Aristotle, Hume, and Collingwood were serious students of the scientific method precisely because they appreciated that it was a premier technique for validating knowledge claims. If we are interested in accurate judicial outcomes, moving toward a fundamentally epistemological approach is a step in the right direction.

"Immigration and Civil Rights: Is the 'New' Birmingham the Same as the 'Old' Birmingham?"
William & Mary Bill of Rights, 2012

UC Davis Legal Studies Research Paper No. 300

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This paper was prepared for the William & Mary Bill of Rights Journal's 2012 immigration symposium on "Non-Citizen Participation in the National Polity."

In the past few years, state legislatures have passed immigration enforcement laws at breakneck speed. The architect of many of the state immigration enforcement laws, Kris Kobach, has stated that their aim is to encourage undocumented immigrants to "self-deport" by making their everyday lives as difficult as possible.

In 2011, Alabama, a state considered by some to be the heart and soul of Dixie, entered the national immigration debate, which surprised many Americans given that the state is not ordinarily thought of as home to many immigrants. The Alabama legislature did not enact any ordinary law but passed what some, including its supporters, claimed was the toughest state immigration enforcement law of them all. The Beason-Hammon Taxpayer and Citizen Protection Act, or H.B. 56, built on Arizona's controversial S.B. 1070 but goes much further in its efforts to encourage self-deportation, including by directly and indirectly limiting access of undocumented students to public education.

This article analyzes Alabama's foray into immigration enforcement. It looks at H.B. 56 with the basic understanding that the enforcement of immigration laws implicate the civil rights of immigrants and U.S. citizens. Part I of this Article places the events leading to the passage of H.B. 56 into their proper historical context. Part II generally considers the possible civil rights consequences of the law on immigrants and Latino/as. Part III specifically focuses on Alabama's efforts to limit access to education -- with, as in the days of Jim Crow, ensuring educational access central to the struggle of outsiders for fundamental civil rights and full membership in American society.

In analyzing Alabama's H.B. 56, this Article identifies various social and legal parallels between the state immigration enforcement laws and the racial caste system of the Jim Crow South. It contends that race, class, and caste, with significant social and economic (labor market) aspects, are integral to both episodes in U.S. history. In both instances, supporters of the caste system invoked a claim of states' rights, or their equivalents, in the defense of state-sanctioned discrimination. Both then and now, access to education is ground zero for the two civil rights movements.

Supporters of state intervention often claim that they merely want to promote obedience to the rule of the law, frequently combined with the exaggerated and unproven accusation that the federal government has "failed" to enforce the immigration laws. This Article looks deeply into, and beyond, this simplistic characterization to analyze how the current debates over immigration and immigration enforcement implicate the fundamental civil rights of residents of the United States and, specifically, the quest by Latina/os and immigrants for full membership in American society.

"Antiformalism at the Federal Circuit: The Jurisprudence of Chief Judge Rader"

7 Wash. J.L. Tech. & Arts (2012 Forthcoming)
UC Davis Legal Studies Research Paper No. 288

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While the Federal Circuit has long been characterized as producing formalistic patent doctrine, this essay argues that its Chief Judge does not share this methodological tendency. The essay starts by exploring the formalistic nature of Federal Circuit jurisprudence. In a variety of ways, Federal Circuit patent doctrine favors bright-line rules as well as syllogistic reasoning and eschews extensive consideration of context. The essay then examines Chief Judge Rader's rejection of formalism by considering his contributions to three areas of patent doctrine: claim construction, patentable subject matter, and the written description requirement. Throughout his engagement with patent law, Chief Judge Rader exhibits a striking sensitivity to context, policy considerations, and exogenous sources of authority that distinguishes himself from his more formalistic peers. The essay concludes with a brief normative assessment of Chief Judge Rader's "antiformalist" methodology and its value to patent jurisprudence.

"The Good, the Bad, and the Ugly"

University of Missouri-Kansas City Law Review, Vol. 80, p. 821, 2012
UC Davis Legal Studies Research Paper No. 302

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This is a contribution to a collection of reflections by former chairs of the AALS Section on Women in Legal Education. The collection begins with Justice Ruth Bader Ginsberg's reflections on her year as chair in 1972 and continues through Danne L. Johnson's reflections from 2011. Professor Pruitt was Chair of the Section in 2010.

"Introduction: Culture and Freedom"

M. Sunder, From Goods to a Good Life: Intellectual Property and Global Justice, Yale University Press, 2012
UC Davis Legal Studies Research Paper No. 296

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Most scholarship on intellectual property considers this law from the standpoint of law and economics. Under this conventional wisdom, intellectual property is simply a tool for promoting innovative products, from iPods to R2D2. In this highly original book Madhavi Sunder calls for a richer understanding of intellectual property law's effects on social and cultural life. Intellectual property does more than incentivize the production of more goods. This law fundamentally affects the ability of citizens to live a good life. Intellectual property law governs the abilities of human beings to make and share culture, and to profit from this enterprise in a global Knowledge economy. This book turns to social and cultural theory to more fully explore the deep connections between cultural production and human freedom.

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