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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES UC DAVIS SCHOOL OF LAW

- **"The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond"** 
Loyola of Los Angeles Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 320

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Supreme Court cases can be analyzed and understood in many different ways. Often it is helpful to examine a case on its own terms, within its own four corners, to see whether the assumptions are sound, the reasoning is solid, and the result is tenable. At other times, it is interesting to look at a case in relation to seemingly unrelated yet roughly contemporaneous cases to compare methodological similarities and seeming inconsistencies. In yet other situations, to make useful sense of a case (or a group of related cases), one must pull back the lens and ask what the cases can tell us about the larger doctrinal field - its ascendancy or its marginalization - of which they are a part.

In our essay for this Supreme Court issue, we examine two First Amendment speech cases from the 2011-2012 Term from each of these perspectives. In particular, we take up *United States v. Alvarez* and *Knox v. Service Employees International Union*. After describing and dissecting each of the two rulings and the various positions the Justices asserted in them, we compare the opinions in these cases to some of the other landmark rulings of the last few years whose reasoning seems connected to *Knox* and *Alvarez*, even though these other cases fall outside the First Amendment. We then situate these recent cases in the larger pattern of ascendancy of First Amendment doctrine and values over the last few decades; specifically, we analyze the ways in which expressive autonomy now seems regularly to trump competing constitutional and societal values that have traditionally been given great weight - somewhat in the same way that equal protection reasoning seemed to dominate constitutional analysis

and balancing in the previous generation.

"Federal Arbitration Act Preemption, Purposivism, and State Public Policy"

Georgetown Law Journal, Vol. 101, 2013

UC Davis Legal Studies Research Paper No. 318

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The relationship between the Federal Arbitration Act ("FAA") and state public policy has long been unsettled. According to some judges, scholars, and litigants, the FAA precludes courts from invalidating arbitration clauses under the contract defense of violation of public policy. However, in a practice that is impossible to square with that understanding of FAA preemption, courts have traditionally nullified arbitration clauses when necessary to preserve substantive rights or remedies under state law. Nevertheless, in its recent decision in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court held that the FAA eclipses a rule that deemed class arbitration waivers to be unconscionable when they prevented plaintiffs from pursuing numerous, low-value state law claims. Both Justice Scalia's majority opinion and Justice Thomas's decisive concurrence strongly implied that state public policy is not a permissible basis for striking down an arbitration clause. As a result, lower courts are now compelling arbitration — often through gritted teeth — of lawsuits that are destined to fail.

Counter-intuitively, I argue that *Concepcion* holds the seeds of an approach to FAA preemption that gives judges greater freedom to strike down arbitration provisions to further state interests. FAA preemption stems from its centerpiece, section 2, which makes agreements to arbitrate specifically enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Under the leading account of FAA preemption, the plain language of this "savings clause" immunizes arbitration clauses from state public policy: few state regulations apply across-the-board to "any contract." Yet the courts and commentators who embrace this view have not explained why its rigid textualism is appropriate in the context of the FAA, which displaces state law through the purposivist mechanism of obstacle preemption. And indeed, *Concepcion* relied not on section 2's text, but on Congress' "purposes and objectives" when it enacted the FAA. I show that the purposivism that animates *Concepcion* is superior to the textualism that dominates FAA preemption cases. The incoherence of the literalistic "any contract" test and the centrality of context and legislative history to "purposes and objectives" preemption suggest that purposivism should be the primary technique for mapping the FAA's dominion over state law. However, this path leads to a starkly different end-point than the one *Concepcion* reached. A faithful, full-bore examination of Congress' intent reveals that section 2 allows courts to strike down arbitration clauses under any traditional contract doctrine, including some strands of the venerable defense of violation of public policy. I conclude by proposing a test for when the FAA preempts state public policy and applying it to controversial issues now pending in courts, including class arbitration, the unconscionability doctrine, and judicial or legislative rules that prohibit that arbitration of particular claims.

"Forensic Metrology: The New Honesty about the Uncertainty of Measurements in Scientific Analysis"

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In many cases, forensic scientists rely on measurements as a basis for their opinions. For instance, toxicologists measure the concentration of the toxic drug in human bodies to determine whether the level of toxin was high enough to have caused the person's death. Accident reconstruction experts measure the length of skidmarks and yaw marks to determine the velocity of a vehicle. Measurements of blood alcohol concentration have long been critical in drunk driving prosecutions. Metrology is the science that studies measurement. Metrologists have long recognized that there is an unavoidable, inherent element of uncertainty in every measurement. Thus, if at trial the court permits the expert to testify to a single point value for the measurand, the trier of fact may erroneously conclude that the number is the exact value of the measurand. The presentation of a single point value can easily mislead the trier.

It was understandable that in the past, the courts allowed the expert to present such testimony. The early view was that the expert had to vouch for his or her opinion as a scientific or medical certainty. Many courts demanded that the expert use the term "certainty" in the phrasing of his or her opinion.

However, that view has fallen into disrepute. In *Daubert*, the Supreme Court recognized the limitations of the scientific enterprise. In one passage, Justice Blackmun wrote that "arguably, there are no certainties in science." In investigational science, researchers typically rely on inductive reasoning. There are limits to inductive logic. It is true that if repeated experiments yield the same result, the outcomes can give the researcher a good deal of confidence in the hypothesis. However, another experimental test is always conceivable; and so long as that possibility remains, subsequent falsification of the hypothesis remains possible. Thus, the expert cannot regard the hypothesis as certainly or conclusively validated.

This new understanding of the limits of the scientific process is impacting the judicial treatment of expert opinions. The initial step was to abandon the insistence that the expert vouch for his or her opinion as a certainty; the

courts allowed the expert to testify in terms of probabilities and possibilities. However, the logic of the new understanding led farther. Post-Daubert, now a substantial number of courts forbid the expert from testifying to a “certainty” or “zero error rate.”

This article points out that some courts are now taking an additional step. In several drunk driving cases in Washington, the courts have insisted that the prosecution expert provide the trier of fact with both a best estimate (e.g. a bias-adjusted mean) and a quantitative measure of the error or uncertainty of the estimate. The Washington cases have demanded that the expert compute a confidence interval for the estimate. However, as this article explains, in metrology there are other possibilities such as coverage intervals.

This development is hopeful for two reasons. First, this development reduces the risk that the trier of fact will attach undue weight to a point value cited by an expert. The development may produce more accurate factfinding. Second and perhaps even more importantly, the development can promote a more honest, open relationship between law and science. Scientists have long known that there is an inherent element of uncertainty in measurement, and this judicial development permits them to be honest and frank in their courtroom testimony.

■ "Gideon v. Wainwright and the Right to Counsel in Immigration Removal Cases: An Immigration Gideon?"



Yale Law Journal, Forthcoming
UC Davis Legal Studies Research Paper No. 316

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Fifty years ago, the Supreme Court decided *Gideon v. Wainwright*, the landmark case that constitutionally guaranteed counsel to defendants in criminal cases in the United States. Together with the Court's decision three years later in *Miranda v. Arizona*, the decision radically transformed the American criminal justice system, both in the courtrooms and in the public eye.

Few would disagree that the guarantee of a lawyer in criminal prosecutions can make a world of difference to the ultimate outcome of a case. It surely did for Clarence Gideon, who was convicted of burglary without an attorney but, in a new trial, was acquitted of the charges with the assistance of counsel. Besides affecting the outcomes of individual cases, the guarantee of counsel renders the results of a criminal justice system more legitimate and trustworthy to ordinary Americans.

The contributions to this symposium no doubt will highlight the many legacies – legal and otherwise – of *Gideon v. Wainwright*. In thinking about the important impacts of the decision, it is critical to remember that the case involved a criminal defendant; the Court's decision rested on the Sixth Amendment right to counsel for the accused in criminal prosecutions. As a legal matter, the law sharply demarcates between the many rights available to criminal defendants and the significantly more limited bundle of protections for civil litigants.

The rationale for the dichotomous allocation of rights is that the potential loss of liberty justifies significantly greater constitutional protections for the criminal defendant than those available to civil litigants. The all-important criminal/civil distinction is embedded in many of the Bill of Rights, which provide protections to criminal defendants but not civil litigants.

As is often the case for dichotomies, the differences between civil and criminal proceedings blur at the margins. There are, for example, civil cases where the stakes are extraordinarily high, so high that they arguably approximate the life and liberty interests implicated by a criminal prosecution. A loss of public benefits or potential eviction from a dwelling, to offer two examples, can have devastating impacts on the lives of people. Importantly, for poor and working Americans, access to the courts with the assistance of a lawyer can make all the difference in the outcome of such important civil proceedings.

Part I of this essay first analyzes the right to counsel in civil cases involving litigation for high stakes to poor and working people. Part II proceeds to study the right to counsel in a particular category of civil cases – immigration removal cases, which implicate life and liberty concerns similar in important respects to those raised by criminal prosecutions.

■ "Marriage, Biology, and Federal Benefits"

Iowa Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 315

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This Article approaches the topic of same-sex marriage from a novel perspective by scrutinizing the historical accuracy of primary defense proffered by same-sex marriage opponents – “responsible procreation.” In the context of challenges to Section 3 of DOMA, responsible procreation posits that the federal government's historic purpose in extending marital benefits is to single out and specially support families with biologically-related children. Because same-sex couples cannot fulfill this long-standing purpose, it is permissible to deny them all federal

marital rights and obligations. While advocates disagree about whether and to what extent DOMA furthers this alleged federal interest, to date, all sides have accepted this historical account.

This Article is the first to interrogate the accuracy of this account. To do so, the Article examines two of the largest and most important federal benefits programs – Social Security benefits and benefits for active and retired members of the U.S. military. This analysis demonstrates that Congress has not and does not condition the receipt of federal family-based benefits on biological parent-child relationships. To the contrary, Congress long has implicitly and explicitly extended such benefits to families with children known to be biologically unrelated to one or both of their parents. This Article thus reveals that responsible procreation is based on myth, not history and tradition.

"Power to the People: Restoring the Public Voice in Environmental Law"

Akron Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 319

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Although the last forty years of environmental law have witnessed some successes, they have also increasingly revealed the limitations of existing laws and regulatory structures. Congress has been unable to pass substantial environmental legislation in recent years, notwithstanding widespread recognition of the need for better tools for responding to climate change, toxic chemicals, non-point source water pollution, and other problems. In addition, the Environmental Protection Agency (EPA) has struggled in the wake of limited resources and politicization to effectively use the tools it has, and its rulemaking processes are often dominated by industry and other repeat players. To deal with the environmental challenges we face, we must better account for the interests of the general public and harness the insights and goodwill of those outside the conventional regulatory state. This article proposes two mechanisms for doing so: (1) establishment of regulatory contrarians within EPA to serve as a voice for underrepresented interests and future generations in agency proceedings; and (2) government sanction of environmental certification systems to facilitate more sustainable purchasing decisions.

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