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"Protecting the Religious Liberty of Religious Institutions"
This article is a preliminary inquiry into the question of whether the freedom of the Church, as a distinct religious institution, can be justified from an American legal perspective. The first part of the article identifies respect for the individual dignity and autonomy of the person as a primary justification for providing distinctive legal protection to religious liberty. It goes on to discuss whether distinctive religious liberty protection for religious institutions can be derived from the dignitary interests of the institution’s members – and if so, whether there is some limit beyond which institutional religious liberty claims cannot be grounded in the individual dignitary interests of congregants or constituents.

The second and longer part of the Article examines whether an argument for protecting and accommodating the autonomy of religious institutions can be grounded in American history during the 1700’s and early 1800’s. The history of this period includes multiple cross currents of values and interests that very by time and region – making it difficult to reach more than tentative conclusions. However, the Protestant commitment by religious liberty proponents to the belief that each man must judge for himself on matters relating to religion, the virulent anti-Catholicism of the period, at least some of which may be attributed to fear of and antipathy toward top down ecclesiastical hierarchy, and the prevalence of anti-clerical attitudes suggest some limits to the American commitment to the freedom of the Church as an institution. Clearly, a sphere of religious liberty extended to the local congregation and to a considerable extent to democratically created and accountable ecclesiastical decision-making bodies. It may be argued, however, that Americans of this period viewed non-democratic, hierarchical religious institutional structures - that challenged the intrinsic right of individual conscience in matters of faith - to be much less deserving of respect and protection.

"Are Ballot Titles Biased? Partisanship in California's Supervision of Direct Democracy"  
UC Davis Legal Studies Research Paper No. 322

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This study investigates whether and if so under what conditions the California Attorney General, who authors the ballot title and summary (“label”) for statewide ballot initiatives, writes ballot language that is biased rather than impartial. State law demands an impartial label, but commentators frequently complain that the AG chooses misleading language to bolster (undermine) measures that the AG or his/her party supports (opposes). Using a convenience sample of students from several universities, we measure ordinary observers’ perceptions of bias in ballot labels for initiatives dating back to 1974. Separately, we calculate an objective measure of bias using a readability algorithm. We then test hypotheses about AG strategy, examining whether the extent of bias in ballot labels varies with the closeness of the election and the degree to which the measure elicits partisan division. We also examine the correlation between bias perceptions and observer characteristics such as support for the ballot measure, trust in government, and social trust.

"Rebalancing Public and Private in the Law of Mortgage Transfer"  
UC Davis Legal Studies Research Paper No. 327

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The law governing the United States’ $13 trillion mortgage market is broken. Courts and legislatures around the country continue to struggle with the fallout from the effort to build a 21st century global market in mortgages on a fragmented, arguably archaic legal foundation. These authorities’ struggles stem in large part from the lack of clarity about the legal requirements for mortgage transfer, the key process for contemporary mortgage finance.

We demonstrate two respects in which American mortgage transfer law is unclear and offer suggestions for fixing it. Revisions to the Uniform Commercial Code adopted around the turn of the century may be interpreted as doing away with preexisting laws arguably requiring parties to record their ownership interests to protect them. But the interaction of these revisions and preexisting state recording laws is most unclear.

Moreover, it is not clear just what parties have to do to invoke the provisions in question: the rules require that the mortgages be transferred “in return for any consideration sufficient to support a simple contract,” but that concept is notoriously malleable. In fact, our study indicates that in many transactions the requirement may not have been met because the parties used only nominal or other questionable consideration. At least in some states, the use of questionable consideration in existing transactions makes foreclosure more difficult and makes mortgage investments less secure. Consequently, the use of nominal consideration seems to strengthen mortgage investors’ claims that transactions were not executed properly.

We suggest an approach to law reform that would provide needed clarity and bring about an appropriate balance between private and public. The Article 9 revisions reflect a preoccupation, prevalent in the 1990s, with reducing the cost of mortgage transfers to the transacting parties. Obviating public recording, as the Article 9 revisions purport to do, does reduce cost, but it also tends to eliminate public records of mortgage ownership. As we show, these public records have value not just for parties that may transact in mortgages, but for the public more generally. A more balanced approach would clearly require transacting parties to record their interests in order to protect them, but would adopt this change in tandem with an expansion of low-cost digital recording. This approach provides the public benefits of high-quality mortgage records while reducing the cost and inconvenience of recording to transacting parties.

"Wading into the Daubert Tide: Sargon Enterprises, Inc. v. University of Southern California"  
UC Davis Legal Studies Research Paper No. 323

There are two competing approaches to determining the admissibility of expert testimony, including scientific evidence. Under the traditional, Frye approach, the question is whether the expert is relying on a theory or technique that is generally accepted in the relevant specialty fields. At one time that test was employed by the federal courts as well as 46 states. However, in 1993 in its celebrated Daubert decision, the Supreme Court construed the Federal Rules of Evidence as impliedly overturning Frye. The Court derived a new validation test from the text of Federal Rule 702. As of 2013, only a minority of courts continue to adhere to Frye while a majority of states have embraced some version of the Daubert standard.

Although most states have adopted a version of the Daubert test, until recently the California Supreme Court continued to staunchly follow Frye. The California Supreme Court initially adopted the Frye test in 1976. In 1994, the year after the United States Supreme Court rendered Daubert, the California Supreme Court declined the invitation to abandon Frye.
However, as more jurisdictions shifted to Daubert, in a growing number of cases advocates urged the California courts to modify their position and incorporate some elements of the Daubert approach into California jurisprudence. In November of 2012, the California Supreme Court handed down its decision in Sargon. Sargon certainly represents a step toward the Daubert approach. In Sargon, the court approvingly cited Daubert as well as the two later cases in the Daubert trilogy, Joiner and Kumho. Moreover, in its opinion the court followed many of the essential teachings of Daubert, Joiner, and Kumho. Most importantly, the substance of the analysis in Sargon is strikingly similar to the Supreme Court’s analysis in Joiner.

In this light, some commentators are now declaring that California has joined the ranks of the Daubert jurisdictions. The purpose of this article is cautionary; the thesis of this article is that it is premature to proclaim that California is now a Daubert jurisdiction. To begin with, in footnote the Sargon court affirmed its commitment to Frye. Moreover, the facts in Sargon were so extreme that in future cases, attorneys will have a plausible argument for distinguishing Sargon. Finally, in Sargon the court emphasized that it was authorizing trial judges to conduct a carefully circumscribed inquiry. The court stopped well short of tasking trial judges to conduct the sort of probing inquiry that Daubert empowers federal trial judges to conduct under Federal Rule of Evidence 104(a). The California courts may have embarked on a gradual, incremental movement toward Daubert, but California is not there yet.

"Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases"
UC Davis Legal Studies Research Paper No. 321

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Current immigration laws governing the detention of noncitizens are rife with statutes and regulations that raise due process concerns. The Automatic Stay provision found at 8 C.F.R. § 1003.19(i)(2) is one such regulation. This regulation allows the Department of Homeland Security to, in effect, ignore an Immigration Court’s order of release on bond in certain cases, simply by filing a notice with the Court stating their intention to invoke the Automatic Stay. This means that even where an Immigration Judge has determined that an individual should be released on bond, the Department of Homeland Security can choose to nullify that order by invoking the Automatic Stay. Once invoked, the Immigration Judge’s order of release is stayed pending final resolution from the Board of Immigration Appeals; a process that can take up to 177 days.

This article first provides a historical context for the Automatic Stay provision and compares the October 2001 regulations with the November 2006 regulations currently in place. The article argues that the 2001 regulations failed to cure the constitutional concerns raised by the previous ones. The article then examines the operation of the Automatic Stay in detail, exploring the way in which DHS derives an unfair legal advantage from the stay that impacts the outcome of any deportation case. Contextualizing the discussion in an exploration of the significance of human incarceration, the article also compares bail procedures in the federal criminal context to bond procedures in the civil immigration context, arguing that there are fewer due process protections in the latter. Finally, the author argues that the Automatic Stay provision is unconstitutional and recommends that it be immediately repealed.

"Patents and the University"
UC Davis Legal Studies Research Paper No. 324

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This Article advances two novel claims about the internalization of academic science within patent law and the concomitant evolution of “academic exceptionalism.” Historically, relations between patent law and the university were characterized by mutual exclusion, based in part on normative conflicts between
academia and exclusive rights. These normative distinctions informed “academic exceptionalism” — the notion that the patent system should exclude the fruits of academic science or treat academic entities differently than other actors — in patent doctrine. As universities began to embrace patents, however, academic science has become internalized within the traditional commercial narrative of patent protection. Contemporary courts frequently invoke universities’ commercial nature to reject exceptional treatment for such institutions. The twin trends of internalization and exceptionalism have evolved again in recent legislative patent reform. On one hand, the interests of academic science have become completely internalized within the patent system to the extent that they inform general rules of patentability applying to all inventions. On the other hand, academic exceptionalism has been resurrected in the form of special statutory carve-outs for universities. Turning from the descriptive to the normative, this Article concludes with recommendations for improving the patent system’s regulation of academic science.

"Trade Secret and Human Freedom"

In INTELLECTUAL PROPERTY AND THE COMMON LAW (Cambridge University Press 2013), Forthcoming UC Davis Legal Studies Research Paper No. 325

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Trade secret law has long sought to promote the freedom of employees to leave their employment and seek a better life. But recent accounts of this law rationalize trade secret as having one goal: promoting efficiency. Scholars argue that trade secret law prevents over-investment in secrets. This article turns to the common law roots of trade secret law and seeks to reinstate this law’s plural values, including the promotion of human freedom.

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