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The Conference Board Director Notes No. DN-V6N14 (August 2014)
UC Davis Legal Studies Research Paper No. 399

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In an era of financial crises, widening income disparities, and environmental and other calamities linked to some corporations, calls around the world for greater corporate social responsibility (CSR) are increasing rapidly. Unlike the United States and other major players in the global arena, which have largely emphasized voluntary approaches to the adoption and spread of CSR, India has chosen to pursue a mandatory CSR approach. This report discusses India's emerging CSR regime and its potential strengths and weaknesses.

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UC Davis Legal Studies Research Paper No. 408

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In 2008, India passed a ground-breaking law to introduce the Limited Liability Partnership form into Indian business law. The Indian LLP Act was the first major introduction of a new business form in India in over 50 years. While the partnership and corporate forms (i.e. companies under the Indian Companies Act) have long flourished in India, both forms have presented challenges for certain Indian businesses. The Indian government's impetus for the LLP Act was to develop a business association form that could better meet the needs of entrepreneurs and professionals with respect to liability exposure, regulatory compliance costs and growth. This chapter begins with a broad overview of the political and legislative process which led to the adoption of the LLP Act. It then addresses the critical aspects of the Indian LLP Act, and analyzes some of the challenges and uncertainties that may derail the success of the LLP form.

"Reed v. Town of Gilbert: Signs of (Dis)Content?"

NYU Journal of Law & Liberty, Forthcoming
UC Davis Legal Studies Research Paper No. 403

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This essay provides a preview of the Reed v. Town of Gilbert, Arizona, a case currently (OT 2014) pending in the Supreme Court. The case concerns the regulation of signs by a town government, and requires the Supreme Court to resolve a three-way circuit split on the question of how to determine whether a law is content-based or content-neutral for First Amendment purposes. The basic question raised is whether courts should focus on the face of a statute, or on the legislative motivation behind a statute, in making that determination. I demonstrate that under extant Supreme Court doctrine, the focus should clearly be on the face of the statute, and that under this approach the Town of Gilbert's sign regulation is (contrary to the Ninth Circuit) clearly content-based.

That the Ninth Circuit erred here is, however, not the end of the matter. More interesting is why it erred. I argue that the Ninth Circuit's resistance to finding Gilbert's ordinance content-based was based on subterranean discontent with the most basic principle of modern free speech doctrine – that all content-based regulations are almost always invalid. At heart, what the Gilbert ordinance does is favor signs with political or ideological messages over other signs. Current doctrine says that this is problematic. I question whether that makes any sense. Given the broad consensus that the primary purpose of the First Amendment is to advance democratic self-government, why shouldn't legislators, and courts, favor speech that directly advances those purposes over other speech, especially when allocating a scarce resource such as a public right of way? Given the brevity of this essay, I only raise but do not seek to answer this question, but argue that it is worthy of further attention by the Court (and of course by scholars).

"Brand New World: Distinguishing Oneself in the Global Flow"

UC Davis Law Review, Vol. 27, No. 2, December 2013

UC Davis Legal Studies Research Paper No. 410

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Ancient physicians engaged in property disputes over the seals they impressed on the containers of their medications, making brand marks the oldest branch of intellectual property. The antiquity of brand marks, however, has not helped their proper understanding by the law. While the conceptual and historical foundations of copyrights and patents continue to be part and parcel of contemporary legal debates, the full history and theorizing on business marks is largely external to trademark doctrine. Furthermore, with only a few and by now outdated exceptions, whatever scholarship exists on these topics has been performed mostly not by legal scholars but by archaeologists, art historians, anthropologists, sociologists, and historians of material culture. Such a striking imbalance suggests that the law is more eager to assume and state what trademarks should be rather than understand how they actually work today. Nor does the law often acknowledge the many different ways in which marks have always been deployed to distinguish both goods and their makers. This is not just a scholarly problem: given the extraordinary importance of brands in the global economy, the growing disjuncture between the way brands function in different contexts and cultures and trademark law's simplified conceptualization of that function has become a problem with increasingly substantial policy implications.

"Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule"
Boston University Law Review, Vol. 94, No. 5, 2014
UC Davis Legal Studies Research Paper No. 411

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In Shelby County v. Holder, the Supreme Court invalidated Section 4 of the Voting Rights Act of 1965, which required certain jurisdictions with histories of discrimination to "preclear" changes to their voting practices under Section 5 before those changes could become effective. This Article proposes that Congress ground its responsive voting rights legislation in the Constitution's Guarantee Clause, in addition to the Fourteenth and Fifteenth Amendments. The Court has made clear that the Guarantee Clause is a power granted exclusively to Congress and that questions of its exercise are nonjusticiable. It is also clear from the Federalist Papers and from scholarly writing – as well as from what little the Court has said – that the purpose of the Guarantee Clause is to protect majority rule. That is precisely what was at issue after the Civil War when Congress first used the Guarantee Clause to protect African American votes. As an absolute majority in three states and over forty percent of the population in four others, African Americans possessed political control when allowed to vote; when disenfranchised, they were subjected to minority rule. African Americans are no longer the majority in any state. But in a closely divided political environment, whether African Americans and other minorities can vote freely may be decisive in many elections. For this reason, Congress could legitimately ground a revised Voting Rights Act in the Guarantee Clause, and the Court should treat its validity as a nonjusticiable political question committed by the Constitution to Congress.

"Wills Law on the Ground"
UCLA Law Review, Vol. 62, 2015 Forthcoming
UC Davis Legal Studies Research Paper No. 404

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Traditional wills doctrine was notorious for its formalism. Courts insisted that testators strictly comply with the Wills Act and refused to consider extrinsic evidence to construe instruments. However, the 1990 Uniform Probate Code revisions and the Restatement (Third) of Property: Wills and Donative Transfers replaced these venerable bright-line rules with fact-sensitive standards in an effort to foster individualized justice. Although some judges, scholars, and lawmakers welcomed this seismic shift, others objected that inflexible principles provide clarity and deter litigation. But with little hard evidence about the operation of probate court, the frequency of disputes, and decedents' preferences, these factions have battled to a stalemate. This Article casts fresh light on this debate by reporting the results of a study of every probate matter stemming from deaths during the course of a year in a major California county. This original dataset of 571 estates reveals how wills law plays out on the ground. The Article uses these insights to analyze the issues that divide the formalists and the functionalists, such as the requirement that wills be witnessed, holographic wills, the harmless error rule, ademption by extinction, and anti-lapse.

"Can Human Embryonic Stem Cell Research Escape its Troubled History?"
44 Hastings Center Report 7 (Nov.-Dec. 2014)
UC Davis Legal Studies Research Paper No. 409

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In 2013 and 2014, three U.S.-based research teams each reported success at creating cell lines after somatic cell nuclear transfer with human eggs. This essay assesses the disclosures about how oocytes were obtained from women for each of the three projects. The three reports described the methods used to obtain eggs with varying degrees of specificity. One description, in particular, provided too little information to assess whether or not the research complied with law or other ethical norms. This essay then considers methodological transparency as an ethical principle. Situating the research within the ethical and moral controversies that surround it and the high-profile fraudulent claims that preceded it, the essay concludes that transparency about methodology, including the means of obtaining human cells and tissues, should be understood as an ethical minimum.

"Evidence of a Third Party's Guilt of the Crime that the Accused is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0"

UC Davis Legal Studies Research Paper No. 401

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Defense counsel have employed a version of the SODDI defense for decades. The late Johnny Cochran successfully employed the defense in the O.J. Simpson prosecution, and the legendary fictional defense attorney Perry Mason used the defense in all his cases.

However, in most jurisdictions there are significant limitations on the availability of the defense. In an 1891 decision, the United States Supreme Court announced that evidence of a third party's misconduct is admissible only if it has a "legitimate tendency" to establish the accused's innocence. Today most jurisdictions follow a version of the "direct link" test. Under this test, standing alone evidence of a third party's motive or opportunity to commit the charged offense is inadmissible unless it is accompanied by substantial evidence tying the third party to the commission of the charged crime. Moreover, the evidence that the accused proffers to support the defense must satisfy both the hearsay and character evidence rules. If the defense offers out-of-court statements describing the third party's conduct, the statements must fall within an exemption from or exception to the hearsay rule. If the defense attempts to introduce evidence of the third party's perpetration of offenses similar to the charged crime, the defense must demonstrate that the evidence is admissible on a noncharacter theory under Federal Rule of Evidence 404(b)(2).

However, a new version of the SODDI defense has emerged – SODDI 2.0. When the defense relies on this theory, the accused makes a more limited contention. The defense does not contend that reasonable doubt exists because there is admissible evidence of the third party's guilt. Rather, the defense argues that there is reasonable doubt because the police neglected to investigate the potential guilt of a third party who was a plausible person of interest in the case. Two 2014 decisions, one from the Court of Appeals for the Second Circuit and another from an intermediate Utah court, approved this version of the defense. Even more importantly, both courts ruled that the trial judge violated the accused's constitutional right to present a defense by curtailing the accused's efforts to develop the defense at trial.

The advent of this new version of the defense is both significant and controversial. The development is significant because the defense can often invoke this version of the defense when the restrictions on the traditional SODDI defense preclude the accused from relying on the traditional defense. As the two 2014 decisions point out, when the defense invokes the 2.0 version of the defense, the hearsay rule does not bar testimony about reports to the police about the third party's misconduct. Under the 2.0 version of the defense, those reports are admissible as nonhearsay to show the reports' effect on the state of mind of the police officers: putting them on notice of facts that should have motivated them to investigate the third party. Similarly, when the defense relies on the 2.0 version of the defense, the prosecution cannot invoke the character evidence prohibition to bar testimony that the third party has committed offenses similar to the charged crime. The prohibition applies only when the ultimate inference of the proponent's chain of reasoning is that the person engaged in conduct consistent with his or her character trait. In this setting, the prohibition is inapplicable because the ultimate inference is the state of mind of the investigating officers.

Since the restrictions on the new version of the SODDI defense are much laxer than those on the traditional defense, the advent of this defense is also controversial. Are the inferences from the 2.0 version of the defense so speculative that as a matter of law, the defense is incapable of generating reasonable doubt? Moreover, is it wrong-minded to recognize a version of the defense with such minimal requirements when the prevailing view is that traditional version is subject to much more rigorous requirements?

This article addresses those questions and concludes that it is legitimate to recognize the SODDI defense 2.0. In the past few decades, there has been a growing realization of the incidence of wrongful convictions. In the late Johnny Cochran's words, some of those convictions were a product of a "rush to judgment" by the police. The recognition of the SODDI defense 2.0 will provide a significant disincentive to such premature judgments by police investigators.

"Should Arrestee DNA Databases Extend to Misdemeanors?"

Recent Advances in DNA & Gene Sequences, 2015, Forthcoming
UC Davis Legal Studies Research Paper No. 406

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The collection of DNA samples from felony arrestees will likely be adopted by many more states after the Supreme Court's 2013 decision in Maryland v. King. At the time of the decision, 28 states and the federal government already had arrestee DNA collection statutes in places. Nevada became the 29th state to collect DNA from arrestees in May 2013, and several others have bills under consideration. The federal government also encourages those states without arrestee DNA collection laws to enact them with the aid of federal grants. Should states collect DNA from misdemeanor arrestees as well? This article considers the as yet largely unrealized but nevertheless important potential expansion of arrestee DNA databases.

"Racial Profiling in the 'War on Drugs' Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder"

University of Michigan Journal of Law Reform, Forthcoming
UC Davis Legal Studies Research Paper No. 402

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This paper is an invited contribution to an immigration symposium in the Michigan Journal of Law Reform.

In 2013, the Supreme Court in Moncrieffe v. Holder rejected a Board of Immigration Appeals order of removal from the United States of a long-term lawful permanent resident based on a single criminal conviction involving possession of a small amount of marijuana. In so doing, the Court answered a rather technical question concerning the definition of an “aggravated felony” under the U.S. immigration laws.

Because the arrest and drug conviction were not challenged in the federal removal proceedings, the Court in Moncrieffe v. Holder did not have before it the full set of facts surrounding the state criminal prosecution of Adrian Moncrieffe. However, examination of the facts surrounding the criminal case offers important lessons about how the criminal justice system works in combination with the modern immigration removal machinery to disparately impact communities of color. By all appearances, the traffic stop that led to Moncrieffe’s arrest is a textbook example of racial profiling.

This Article considers the implications of the facts and circumstances surrounding the stop, arrest, and drug crimination of Adrian Moncrieffe for the racially disparate enforcement of the modern U.S. immigration laws. As we shall see, Latina/os, as well as other racial minorities, find themselves in the crosshairs of both the modern criminal justice and immigration removal systems.

Part II of the Article provides details from the police report of the stop and arrest that led to Adrian Moncrieffe’s criminal conviction. The initial stop for a minor traffic infraction is highly suggestive of a pretextual traffic stop of two Black men on account of their race. Wholly ignoring the racial tinges to the criminal conviction, the U.S. Supreme Court only considered the conviction’s immigration removal consequences – and specifically the Board of Immigration Appeals’ interpretation of the federal immigration statute, not the lawfulness of the original traffic stop and subsequent search.

The police report describes what appears to be a routine traffic stop by a police officer who, while apparently trolling the interstate for drug arrests in the guise of “monitoring traffic.” The officer stopped a vehicle with two Black men – “two B/M’s,” as the officer wrote – based on the tinting of the automobile windows. Even if the stop and subsequent search did not run afoul of the Fourth Amendment, Moncrieffe appears to have been the victim of racial profiling. A police officer, aided by a drug sniffing dog, in drug interdiction efforts relied on a minor vehicle infraction as the pretext to stop two Black men traveling on the interstate in a sports utility vehicle with tinted windows.

The Moncrieffe case exemplifies how a racially disparate criminal justice system exacerbates racially disparate removals in a time of record-setting deportations of noncitizens. Although he was fortunate enough to stave off deportation and separation from an entire life built in the United States, many lawful permanent residents are not nearly so lucky.

"Social Innovation"

Washington University Law Review, Vol. 92, No. 1, 2014
UC Davis Legal Studies Research Paper No. 407

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This Article provides the first legal examination of the immensely valuable but underappreciated phenomenon of

social innovation. Innovations such as cognitive behavioral therapy, microfinance, and strategies to reduce hospital-based infections greatly enhance social welfare yet operate completely outside of the patent system, the primary legal mechanism for promoting innovation. This Article draws on empirical studies to elucidate this significant kind of innovation and explore its divergence from the classic model of technological innovation championed by the patent system. In so doing, it illustrates how patent law exhibits a rather crabbed, particularistic conception of innovation. Among other characteristics, innovation in the patent context is individualistic, arises from a discrete origin and history, and prioritizes novelty. Much social innovation, however, arises from communities rather than individual inventors, evolves from multiple histories, and entails expanding that which already exists from one context to another. These attributes, moreover, apply in large part to technological innovation as well, thus revealing how patent law relies upon and reinforces a rather distorted view of the innovative processes it seeks to promote. Moving from the descriptive to the prescriptive, this Article cautions against extending exclusive rights to social innovations and suggests several nonpatent mechanisms for accelerating this valuable activity. Finally, it examines the theoretical implications of social innovation for patent law, thus helping to contribute to a more holistic framework for innovation law and policy.

"Brief of Interested Law Professors as Amici Curiae Supporting Respondent in Direct Marketing Association v. Brohl"

Stanford Public Law Working Paper No. 2516159
San Diego Legal Studies Paper No. 14-71
UC Davis Legal Studies Research Paper No. 400
UC Berkeley Public Law Research Paper No. 2516159
UCLA School of Law Research Paper No. 14-19

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The petitioner in this case has framed the question presented as follows: “Whether the Tax Injunction Act bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax, nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration.”

Amici agree with the respondent, the State of Colorado, that the Tax Injunction Act bars federal courts from enjoining the operation of the Colorado Statute at issue in this case because this lawsuit is intended to create the very kind of premature federal court interference with the operation of the Colorado use tax collection system that the TIA was designed to prevent. To assist the Court in understanding the application of the TIA to this case, amici (i) place the reporting requirements mandated by the Colorado Statute in the broader context of tax administration and (ii) explain the potential interaction between a decision on the TIA issue in this case and the underlying dispute concerning the dormant Commerce Clause.

Third-party reporting of tax information is a ubiquitous and longstanding feature of modern tax systems. When tax authorities rely on taxpayers to self-report their taxable activities, compliance rates for the collection of any tax is low. Like all states with a sales tax, Colorado faced – and faces – a voluntary compliance problem with the collection of its use tax. The use tax is a complement to the sales tax; in-state vendors collect and remit the sales tax, while in-state consumers are responsible for remitting the use tax on purchases made from out-of-state vendors that do not collect the sales tax. To this compliance challenge, Colorado turned to a third-party reporting solution. In broad strokes, the Colorado Statute imposes a modest requirement on one party to a taxable transaction – specifically on relatively large retailers who do not collect the use tax - to report information on their Colorado sales both to the consumer/taxpayer and to the taxing authorities.

Amici law professors contend that the centrality of third-party reporting to tax administration in general, and its aptness for this problem in particular, indicate that enjoining the operation of the Colorado Statute constitutes

"restrain[ing] the assessment, levy or collection" of Colorado's use tax.

Amici also observe, however, that even a narrow ruling on the scope of the TIA in the Supreme Court could have an unexpected - and we would argue undesirable – impact on the federalism concerns that we think should decide this case. This is because any interpretation of the Colorado Statute for purposes of the TIA made by the Court might be erroneously construed as carrying over to interpreting the Statute for purposes of the dormant Commerce Clause.

We think it likely and reasonable for the courts below to look to the Supreme Court's decision on the TIA for guidance as to what test to apply under the dormant Commerce Clause. However, amici fear that a decision that held that Colorado's reporting requirement is integral to Colorado's "tax collection" for purposes of the TIA will exert a gravitational pull on the lower courts, encouraging them to apply the physical presence test from Quill Corp. v. North Dakota, 504 U.S. 298 (1992) to the Colorado Statute. The Quill test is an especially strict test under the dormant Commerce Clause, and one arguably meant only for "taxes." Thus, a victory for sensible state tax administration and federalism in this Court could be transmuted into a defeat for those principles below. Amici believe that NFIB v. Sebelius, 132 S. Ct. 2566 (2012), teaches that an answer on the TIA does not compel an answer concerning the dormant Commerce Clause. We call this issue to the Court's attention so that the Court is aware of how a decision on the TIA issue might be used – or misused – when the case reaches the merits, either in the state or federal court system.

"Non-Citizen Nationals: Neither Aliens Nor Citizens"
UC Davis Legal Studies Research Paper No. 405

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The modern conception of the law of birthright citizenship operates along the citizen/noncitizen binary. Those born in the United States generally acquire automatic U.S. citizenship at birth. Those who do not are regarded as non-citizens. Unbeknownst to many, there is another form of birthright membership category: the non-citizen national. Judicially constructed in the 1900s and codified by Congress in 1940, non-citizen national was the status given to people who were born in U.S. territories acquired at the end of the Spanish-American War in 1898. Today, it is the status of people who are born in American Samoa, a current U.S. territory.

This Article explores the legal construction of non-citizen national status and its implications for our understanding of citizenship. On a narrow level, the Article recovers a forgotten part of U.S. racial history, revealing an interstitial form of birthright citizenship that emerged out of imperialism and racial restrictions to citizenship. On a broader scale, this Article calls into question the plenary authority of Congress over the territories and power to determine their people's membership status. Specifically, this Article contends that such plenary power over the citizenship status of those born in a U.S. possession conflicts with the common law principle of jus soli and the Fourteenth Amendment's Citizenship Clause. Accordingly, this Article offers a limiting principle to congressional power over birthright citizenship.

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