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VIKRAM D. AMAR, EDITOR
Associate Dean and Professor of Law, University of California, Davis - School of Law
vdamar@ucdavis.edu

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
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"Law and the Geography of Cyberspace"
6 W.I.P.O.J., Issue 1 (2014)
UC Davis Legal Studies Research Paper No. 432

ANUPAM CHANDER, University of California, Davis - School of Law
Email: achander@ucdavis.edu

The Internet was supposed to end geography. Anyone, anywhere could now run a newspaper, a search engine, a game service, and the world could access it. After millennia of geography dictating destiny, the world was now flat, and opportunity evenly distributed everywhere. Yet, a quick glance at the world's leading internet companies, from Facebook to Zillow, leads one remarkably often to the United States. In this article, I argue that law played a crucial role in creating the geography of cyberspace — specifically, that flexible intellectual property rules which permitted internet entrepreneurship in the United States proved a key ingredient in American commercial success on the Internet.

"After the Revolution: An Empirical Study of Consumer Arbitration"

Georgetown Law Journal, Vol. 104, 2015, Forthcoming
UC Davis Legal Studies Research Paper No. 436

DAVID HORTON, University of California, Davis - School of Law
Email: dohorton@ucdavis.edu
ANDREA CANN CHANDRASEKHER, University of California, Davis - School of Law
Email: achandrasekher@ucdavis.edu

For decades, mandatory consumer arbitration has been ground zero in the war between the business community and the plaintiffs' bar. Some courts, scholars, and interest groups argue that the speed, informality, and accessibility of private dispute resolution create a conduit for everyday people to pursue claims. However, others object that arbitration's loose procedural and evidentiary rules dilute substantive rights, and that arbitrators favor the repeat playing corporations that can influence their livelihood by selecting them in future matters. Since 2010, the stakes in this debate have soared, as the U.S. Supreme Court has expanded arbitral power and mandated that consumers resolve cases that once would have been class actions in two-party arbitration. But although the Court's jurisprudence has received sustained scholarly attention, both its defenders and critics do not know how it has played out behind the black curtain of the extrajudicial tribunal.

This Article offers fresh perspective on this debate by analyzing nearly 5,000 complaints filed by consumers with the American Arbitration Association between 2009 and 2013. It provides sorely-needed information about filing rates, outcomes, damages, costs, and case length. It also discovers that the abolition of the consumer class action has changed the dynamic inside the arbitral forum. Some plaintiffs' lawyers have tried to fill this void by filing numerous freestanding claims against the same company. Yet these "arbitration entrepreneurs" are a pale substitute for the traditional class mechanism. Moreover, by pursuing scores of individual disputes, they have inadvertently transformed some large corporations into "extreme" repeat players. The Article demonstrates that these frequently-arbitrating entities win more and pay less in damages than one-shot entities. Thus, the Court's consumer arbitration revolution not only shields big businesses from class action liability, but gives them a boost in the handful of matters that trickle into the arbitral forum.

"The Effect of the Successful Assertion of the State Secrets Privilege in a Civil Lawsuit in Which the Government Is Not a Party: When, If Ever, Should the Defendant Shoulder the Burden of the Government's Successful Privilege Claim?"

Wyoming Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 428

EDWARD J. IMWINKELRIED, University of California, Davis - School of Law
Email: EJIMWINKELRIED@ucdavis.edu

It is well-settled that the national government has an evidentiary privilege protecting state and military secrets. The privilege protects information that can be vital to the country's safety and survival. It was expectable that the national government would begin asserting the privilege more frequently after 9/11. The government has invoked the privilege in several prosecutions of alleged terrorists.

However, the privilege also applies in civil actions. Indeed, the government may assert the privilege in a civil action even when the government is not joined as a party. The government has the right to intervene for the purpose of claiming the privilege. In recent years, the government has asserted the privilege in a large number of civil actions, including cases involving high technology companies, private security firms, infrastructure contractors, and weapons and aircraft manufacturers.

When the government successfully asserts the privilege in a civil action in which it is not a party, the question naturally arises: What is the procedural effect of the assertion? As the quotations at the beginning of this article indicate, the generalization has been that the only effects are that the privileged information becomes unavailable as evidence and that the case can proceed without the privileged evidence. However, Part I of this article demonstrates that that generalization is a gross over-simplification. In many cases, the court terminates the litigation, resulting in a peremptory victory for the defense. The plaintiff loses the opportunity to conduct discovery or take the case to trial.

Part II of this article presents a critical evaluation of the current state of the law. The primary thrust of Part II is that at least in one set of circumstances, the plaintiff ought to be permitted to proceed – namely, when (1) the plaintiff has sufficient unprivileged evidence to present a prima facie case, (2) proceeding would not raise a significant risk of the inadvertent revelation of privileged information, (3) the privilege claim affects the defense's ability to develop an affirmative defense, and (4) the defendant has a closer relationship to the government than the plaintiff. A factual proposition is considered an affirmative defense because the law assigns the defendant the burdens of pleading, production, and proof on the proposition. The allocation of these burdens to the defendant can be outcome determinative. If there were sufficiently weighty policies to assign those burdens to the defendant, in these circumstances the defendant should also bear the burden of the loss of the privileged evidence. The government's privilege claim neither extinguishes nor diminishes the policies that originally warranted assigning the burdens to the defense. Part II adds that there is a colorable argument that the plaintiff should also be permitted to proceed when the government claim interferes with the defendant's ability to present a simple defense, merely negating an element of the plaintiff's case.

Part II emphasizes that although the plaintiff should be permitted to proceed in these exceptional cases, the court should not grant the plaintiff the sort of peremptory victory that the defense usually obtains after the government's claim. Even when the plaintiff proceeds, it is not a foregone conclusion that there will be a plaintiff's verdict. A key plaintiff's witness may become unavailable for trial, a nervous witness might forget information critical to the plaintiff's case, or the witness may display negative demeanor that prompts the jury to disbelieve the witness's testimony. Hence, the judge should neither enter summary judgment for the plaintiff nor direct a verdict in the plaintiff's favor. However, the thesis of this article is that in these cases the law should be reformed to accord the plaintiff an opportunity to proceed and fairly win a verdict.

"Under the Sun: Casebooks and the Future of Contracts Teaching"

68 Hastings Law Journal 899 (2015)
UC Davis Legal Studies Research Paper No. 433

THOMAS WUIL JOO, University of California - Davis Law School
Email: twjoo@ucdavis.edu

What is the future of the casebook in legal education? It is tempting and fashionable to blame the current woes of law schools on their supposedly "outdated" educational practices, such as casebooks. As this Essay shows, however, most of the current criticisms of casebooks and the case method are perennial ones. This does not render the critiques invalid, but it does undermine the notion that they reveal a contemporary crisis in legal education. Indeed, they are not even specific to legal education. Rather, they reflect fundamental tensions in the learning of any field: theory versus practice, general understanding versus specific technical knowledge. By saying that there is nothing truly new in these criticisms, I do not mean to say that proposals for reform are futile or ill-advised. It is simply that there is nothing new under the sun, in legal education or anywhere else. Legal education has gone back and forth on these matters, and will continue to do so, and that is probably as it should be.

"Family Support and Supporting Families"

68 Vanderbilt Law Review En Banc 153 (2015)
UC Davis Legal Studies Research Paper No. 427

COURTNEY G. JOSLIN, University of California, Davis - School of Law
Email: cgjoslin@ucdavis.edu

This Essay is a Response to Professor Laura Rosenbury's recent article Federal Visions of Private Family Support. Rosenbury's piece offers critical new insights into the role of the federal government in the family. Rosenbury's first important contribution is to demonstrate that, contrary to the dominant narrative, the federal government does not "consistently defer to states' authority to define family." Second, Rosenbury takes this point further by offering one of the few theories that seeks to explain why the federal government intervenes in the family. Rosenbury argues that the overriding reason the federal government recognizes families is "to privatize the dependencies of family members," that is "to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another." At a time when one of the most visible family law questions is whether same-sex couples will be permitted to marry, this aspect of family recognition is often overlooked, or at least undertheorized. This oversight is a mistake. Rosenbury's piece seeks to keep this consequence of family recognition at the forefront of family law reform conversations.

This Essay highlights the significance of the contributions Rosenbury offers and then pushes her analysis even further. As Rosenbury herself acknowledges, the imposition of family-care obligations is not the only consequence of family recognition. In many circumstances, the government — at both the state and the federal level — also distributes family-based benefits or subsidies to help people fulfill these caregiving and support responsibilities. And while both sides of this equation — the legal obligations of and the subsidies for caretaking — clearly are interrelated, additional insights can be gained by separating these two effects of family recognition. In particular, this Essay argues that by looking at both the imposition of family-care obligations and the distribution of family-based subsidies one can better assess the effectiveness (or lack thereof) of family law and policy on particular families. In addition, looking at both sides of the equation can also provide a deeper understanding of why governments recognize families.

"The Supreme Court's *Myriad* Effects on Scientific Research: Definitional Fluidity and the Legal Construction of Nature"

5 U.C. Irvine Law Review, 2015, Forthcoming
UC Davis Legal Studies Research Paper No. 431

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

This article examines the implications for biomedical research of the Supreme Court's ruling in Association for Molecular Pathology v. Myriad Genetics that isolated DNA does not comprise patentable subject matter but that complementary DNA (cDNA) does. Although most of the commentary surrounding this case has focused on the availability of genetic diagnostic tests, this Article considers the related and important implications of this opinion for scientific research. At the outset, it argues that this issue is beset with definitional complexity, as it is often difficult to disentangle "commercial" from "research" uses of patented genes. This Article further argues that context matters significantly in assessing the impact of the Court's ruling on research. Accordingly, this Article examines the implications of Myriad Genetics from three perspectives. First, considering the conduct of Myriad Genetics itself, it argues that the Supreme Court's decision creates greater real and perceived freedom to operate for uses of BRCA genes that may yield important scientific insights. Second, reviewing the literature on gene patents and anticommons, this Article argues that the Court's ruling will help enhance access to diagnostic testing more generally, thus advancing biomedical research. Third, at a doctrinal level, this Article suggests that Myriad Genetics may have significant long-term implications. The Court's opinion reflects a strong policy interest in excluding "nature" from patentable subject matter as well as a high degree of discretion in determining the contours of nature for that purpose. Such a policy-oriented, pragmatic approach to patent eligibility may create significant flexibility to challenge patents in research contexts going forward.

"The Supreme Assimilation of Patent Law"

UC Davis Legal Studies Research Paper No. 435

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

Although tensions between universality and exceptionalism apply throughout law, they are particularly pronounced in patent law, a field that deals with highly technical subject matter. Focusing on this tension, this Article explores an underappreciated descriptive theory of recent Supreme Court patent jurisprudence. Commentators observe that the Court has reined in expansive Federal Circuit patent doctrine and established holistic standards to replace bright-line rules. This Article augments these prevailing interpretations by exploring another. Building upon and significantly extending previous scholarship, it argues that the Supreme Court's recent patent jurisprudence reflects a project of eliminating "patent exceptionalism" and assimilating patent doctrine to general legal principles. In a variety of areas including appellate review of lower courts and agencies, jurisdiction, remedies, and the award of attorney's fees, the Federal Circuit has developed rather exceptional doctrine for patent cases. However, the Supreme Court has consistently eliminated such exceptionalism, bringing patent law in conformity with general legal standards. Among other observations, the Supreme Court's intervention reveals its holistic outlook as a generalist court concerned with broad legal consistency, concerns which are less pertinent to the quasi-specialized Federal Circuit. The Article concludes by arguing in favor of selective, refined exceptionalism for patent law. Although the Supreme Court should strive for broad consistency, this Article argues that unique features of patent law — particularly the role and expertise of the Federal Circuit — justify some departure from general legal norms. Finally, this Article turns to tensions between legal universality and exceptionalism more broadly, articulating principles to guide the deviation of specialized areas of law from transcendent principles.

"The Missing Pieces of Geoengineering Research Governance"

Minnesota Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 434

ALBERT LIN, University of California, Davis - School of Law
Email: aclin@ucdavis.edu

Proposals to govern geoengineering research have focused heavily on the physical risks associated with individual research projects, and to a somewhat lesser degree on fostering public trust. While these concerns are critical, they are not the only concerns that research governance should address. Generally overlooked, and more difficult to address, are the systemic concerns geoengineering research raises: technological lock-in — the danger that sustained research efforts will predetermine geoengineering deployment decisions; moral hazard — the danger that increased attention to geoengineering will undermine efforts to reduce greenhouse gas emissions; and the potential that research itself will increase the probability of future global conflict. Developing mechanisms to address these systemic concerns is a difficult but essential task. This Article proposes an ongoing programmatic technology assessment to analyze the physical and systemic risks associated with geoengineering research, prioritization of research into techniques involving lesser risks, and establishment of safeguards against such risks.

"Brief of Interested Law Professors in Direct Marketing Association v. Brohl (10th Circuit)"

UC Davis Legal Studies Research Paper No. 429

DARIEN SHANSKE, University of California, Davis - School of Law
Email: dshanske@ucdavis.edu
ALAN B. MORRISON, George Washington University - Law School
Email: abmorrison@law.gwu.edu
KIRK J. STARK, University of California, Los Angeles (UCLA) - School of Law
Email: STARK@LAW.UCLA.EDU
JOSEPH BANKMAN, Stanford Law School
Email: JBANKMAN@LELAND.STANFORD.EDU
JORDAN M. BARRY, University of San Diego School of Law
Email: jbarry@sandiego.edu
BARBARA H. FRIED, Stanford Law School
Email: bfried@stanford.edu
JOHN A. SWAIN, University of Arizona - James E. Rogers College of Law
Email: john.swain@law.arizona.edu
DENNIS J. VENTRY, University of California, Davis - School of Law
Email: djventry@ucdavis.edu

This case, Direct Marketing Association v. Brohl, was recently remanded by the U.S. Supreme Court to the Tenth Circuit Court of Appeals. The Tenth Circuit then requested a full supplemental briefing; amici law professors submitted this brief.

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 make three specific arguments. First, amici demonstrate that 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. Therefore, from the broader perspective of tax collection theory and history, including the history of very similar transaction-based taxes that attempt to tax consumption, the Colorado Statute is an unexceptional response to an otherwise intractable problem.

Second, amici argue that the Supreme Court's decision in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), does not apply to the statute at issue in this case. Quill imposed a bright-line physical presence test as a precondition for a state to impose a use tax collection obligation on a retailer. Because of its own self-limiting language and logic, not to mention greatly changed circumstances, the rule of Quill should not be extended into a new area.

Third, amici argue that, because sales and use taxes constitute a unified system, there is no discrimination simply because differently situated retailers are required to aid in the collection of what is essentially a single tax in different ways.

"Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929, by Ajay K Mehrotra (Review)"
46 Journal of Interdisciplinary History 133 (Summer 2015)
UC Davis Legal Studies Research Paper No. 430

DENNIS J. VENTRY, University of California, Davis - School of Law
Email: djventry@ucdavis.edu

Mehrotra's award-winning book is a tour de force. It chronicles a transformative period in the development of the American fiscal state during which the old order — characterized by indirect, hidden, mercilessly regressive, and partisan taxation — gave way to a direct, transparent, steeply progressive, and professionally administered tax regime

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BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: **bblack@northwestern.edu**

RONALD J. GILSON
Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)
Email: **rgilson@leland.stanford.edu**

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