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UC DAVIS SCHOOL OF LAW

■ "Liberty or Equality?"

Lewis & Clark Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 464

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This paper was presented as the Seventh Annual Anthony Kennedy lecture at the Lewis & Clark School of Law on September 23, 2015. My topic was Justice Kennedy's majority opinion in the recent Obergefell case, recognizing a constitutional right to same-sex marriage. In the first part of my lecture, I placed the Obergefell opinion in context, taking into account Justice Kennedy's place on the current Court, and his past jurisprudence. In particular, I noted that while Justice Kennedy is undoubtedly the co-called "swing Justice" on the Roberts Court, he is quite different from past swing Justices such as Sandra Day O'Connor and Lewis Powell. The latter were considered to be moderate pragmatists, lacking strong judicial philosophies. Not so for Justice Kennedy. From his first years on the Court, his jurisprudence has been notable for a passionate commitment to Liberty in all of its aspect, and his firm belief that protection for Liberty is intrinsically tied to protection of individual Dignity. This commitment appears in his privacy jurisprudence of course (culminating in Obergefell), but also in other areas including notably free. Moreover, unlike his colleagues, Justice Kennedy's commitment to liberty transcends political boundaries, encompassing such "liberal" Liberty claims as abortion and the free speech rights of pornographers, and such "conservative" claims as property rights and commercial speech.

I then raised some doubts about the reasoning in Obergefell. I noted that the plaintiffs in the case had raised both Due Process (i.e., Liberty), and Equal Protection (i.e., Equality) claims, and the Court's formulation of the questions presented preserved both. Yet Kennedy's opinion is almost all Liberty, with a tiny dollop of Equality. I suggested that this emphasis is probably a product of Kennedy's own preferences and comfort levels. While Justice Kennedy has always been a strong advocate of Liberty claims, his relationship to Equality is more ambivalent. He unquestionably is firmly committed to nondiscrimination principles, and even (unlike his conservative colleagues) committed to racial integration. However, he has demonstrated -- notably in the Parents Involved decision -- grave discomfort with policies that classify individuals based on qualities such as race. Indeed, this discomfort ties into his commitment to Dignity, because he sees such typecasting as itself inconsistent with individual Dignity. As a consequence, Liberty must have seemed the easier path to take.

Ultimately, however, I do believe this choice was a mistake, for several reasons. First, I think that jurisprudentially, Equality is the stronger argument. The Court's entire substantive due process jurisprudence, which was the basis of the Due Process holding in Obergefell, rests on somewhat shaky foundations, given its lack of textual grounding. Equal Protection, on the other hand, is a well-established, textually based doctrine; and the argument for extending heightened scrutiny to discrimination against LGBT individuals strikes me as extremely powerful, under existing precedent. Second, an Equality based holding would have been broader, granting more protections to sexual minorities than a narrow decision focused on marriage. Third, it is possible that an Equality based holding would have generated less intense opposition than a holding that redefines marriage (though this is admittedly speculative). Finally, I also believe that Justice Jackson was correct in his argument, in the Railway Express case, that in a democracy, equality-based constitutional decisions are generally preferable to liberty-based ones, because they interfere less with legislative authority.

"Racially Polarized Voting"

University of Chicago Law Review, 2016, Forthcoming
UC Davis Legal Studies Research Paper No. 461

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Whether voting is racially polarized has for the last generation been the linchpin question in vote dilution cases under the core, nationally applicable provision of the Voting Rights Act. The polarization test is supposed to be clear-cut ("manageable"), diagnostic of liability, and free of strong racial assumptions. Using evidence from a random sample of vote dilution cases, we argue that these objectives have not been realized in practice, and, further, that they cannot be realized under current conditions. The roots of the problem are twofold: (1) the widely shared belief that polarization determinations should be grounded on votes cast in actual elections, and (2) normative disagreement, often covert, about the meaning of racial vote dilution. We argue that the principal normative theories of vote dilution have conflicting implications for the racial polarization test. We also show that votes are only contingently related to the political preferences that the polarization inquiry is supposed to reveal, and, further, that the estimation of candidates' vote shares by racial group from ballots cast in actual elections depends on racial homogeneity assumptions similar to those the Supreme Court has disavowed. Our analysis casts serious doubt on the notion — promoted in dicta by the Supreme Court and supported by prominent commentators — that courts should establish bright-line, vote-share cutoffs for "legally significant" racial polarization. The courts would do better to screen vote dilution claims using evidence of preference polarization derived from surveys, or non-preference evidence of minority political incorporation.

"Taxes and Ability to Pay in Municipal Bankruptcy"

Washington Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 463

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Scholars and commentators have argued that municipalities can and should use bankruptcy to shed unwanted liabilities, particularly employee healthcare and pension commitments. Courts increasingly have agreed: Detroit's approved bankruptcy plan cut pensions, and the bankruptcy court overseeing the bankruptcy of Stockton, California brought down barriers to pension-cutting. Both courts found their way around state provisions arguably protecting municipal pensions.

Now that pension-cutting in bankruptcy has momentum, we can expect to hear arguments for using bankruptcy not just in cases like Detroit and Stockton where the municipality can't meet all its obligations, but also in cases where residents or politicians come to regret municipal promises to workers.

This Article presents the most sustained, straightforward, and comprehensive argument to date that existing law requires bankruptcy courts to provide relief only when municipalities are reasonably unable to meet their

obligations. The legislative history of the municipal bankruptcy statutes consistently sounds this theme, and judicial precedents are in agreement.

Congress did not provide a clear standard for courts to apply when looking at tax levels in municipal bankruptcy. Although the legislative history and caselaw provide some support for the proposition that municipalities should be required to tax at the level that maximizes revenue, the Article suggests a more moderate criterion: courts could require that a municipality tax at the top of its peer group as a condition of bankruptcy eligibility and plan confirmation.

"The Challenge of Bitcoin Pseudo-Anonymity to Computer Forensics"

Criminal Law Bulletin, 2016, Forthcoming
UC Davis Legal Studies Research Paper No. 462

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Digital forensics must constantly adapt to new technological developments. The advent of Bitcoin is such a development. Bitcoin represents a new model for financial transactions. In many cash transactions between strangers, the underlying model is parties-unknown/transaction-unknown. There is no ledger record of the transaction. In contrast, PayPal illustrates the parties-known/transaction-known model. An intermediary will record both items of information. Bitcoin differs from both of these models; Bitcoin uses a parties-unknown/transaction-known model. The Bitcoin block chain records the transaction, but the user's Bitcoin address is not expressly tied to an identity. Thus, Bitcoin users enjoy pseudo-anonymity.

As the recent experience with Silk Road demonstrates, there is a downside to this pseudo-anonymity. Precisely because of that feature, Silk Road served a marketplace for vendors to sell illegal narcotics, forged identifications, and other illicit goods and services. Given that danger, law enforcement authorities have a felt need to develop techniques to penetrate the pseudo-anonymity. To do so, they have turned to digital forensics experts.

This article evaluates two techniques that have been proposed for this purpose. The first is traffic analysis. This technique relies on the entry nodes that users employ to access the Internet. The second is transaction graph analysis. This technique clusters transactions to identify natural chokepoints in the Bitcoin economy, that is, service islands where, for example, the user might convert Bitcoins to fiat currency. The chokepoints becomes a target for a law enforcement subpoena to learn the user's IP address.

After describing each technique, the article assesses the research conducted to date. In particular, the article reviews Alex Biryukov's research into traffic analysis and Sarak Meiklejohn's work with transaction graph analysis. The article applies the standards announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to determine whether, given the available data, expert testimony based on either technique would be admissible today. The article explains that it is doubtful whether testimony based on either technique would survive a Daubert admissibility challenge. The article concludes that further research is needed to enable law enforcement authorities to effectively penetrate the pseudo-anonymity of the new parties-unknown/transaction-known model.

"Marital Status Discrimination 2.0"

Boston University Law Review, Vol. 90, p. 805, 2015
UC Davis Legal Studies Research Paper No. 460

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In the 1970s, almost half the states enacted laws prohibiting marital status discrimination in a range of areas. The push to ban this form of discrimination, however, has largely been on hiatus since the early 1980s. This Article, part of a symposium on the 50th Anniversary of the Civil Rights Act of 1964, urges reconsideration of this largely forgotten civil rights category.

Although it has surely lessened over time, bias against those living in nonmarital families continues to be widespread. Close to half of the U.S. population believes that nonmarital cohabitation is bad for society, and nearly three quarters of American adults believe that single parenting is bad for society. But the reality is that a very large and ever-growing slice of the U.S. population lives in these very family forms. The number of nonmarital cohabiting couples has increased more than 1500% since 1960. Today, about 40% of all children are born to unmarried women. The nonmarital families who are the targets of this moral disapproval are disproportionately likely to be nonwhite, lower income, and less educated.

Moreover, in the last half-century, these relationships have moved from ones that were almost universally criminalized to ones that are entitled to at least some level of constitutional protection. In light of these demographic and changes, this Article argues it is time to reinvigorate the movement to prohibit discrimination on this basis.

"Centralization, Fragmentation, and Replication in the Genomic Data Commons"

Governing Medical Research Commons, Brett M. Frischmann, Michael J. Madison, and Katherine J. Strandburg, eds., Cambridge University Press, 2016 Forthcoming
UC Davis Legal Studies Research Paper No. 448

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Researchers around the world deposit enormous amounts of genomic sequence data and related information into public databases, thus creating a genomic data commons. This chapter examines specific governance challenges of correcting, updating, and annotating these data. Delving into the science of genome sequencing, assembly, and annotation, it highlights the indeterminate nature of sequence data and related information and the high rate of errors in public databases such as GenBank. Drawing on the Institutional Analysis and Development framework, it then examines four approaches for dynamically correcting and modifying these data: author-centric data management, third-party biocuration, community-based wikification, and specialized databases and genome browsers. Notably, these approaches reveal deep tensions between centralization and fragmentation in the structure of the genomic data commons. On the one hand, author-centric data management and third-party biocuration represent highly centralized mechanisms for controlling data. On the other hand, wiki-based annotation disperses control throughout the community, exploiting the power of the commons and parallel data analysis to update existing data records. Attempting to capture the best of both worlds, specialized databases and genome browsers exploit replication and the nonrivalrous nature of information to preserve original data records while allowing users to codify vast amounts of value-added knowledge. This study shows that far from being a passive repository of information, the genomic data commons is a teeming, dynamic entity in which communal intervention is critical to enhancing collective knowledge. Ultimately, the genomic data commons is an intensely human commons in more ways than one.

"The False Choice between Race and Class and Other Affirmative Action Myths"

Buffalo Law Review, Vol. 63, 2015, Forthcoming
UC Davis Legal Studies Research Paper No. 449

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This article refutes the widely held assumption that affirmative action is appropriate either to support only racial and ethnic minorities or to support only low-income students, but that it cannot or should not support both. Pruitt argues that we need not make such a choice and that we should aspire to socioeconomically diversify higher education institutions — including the most elite sector — with low-income students of all colors. Pruitt thus disputes the framing of Richard Kahlenberg and Richard Sander who have long argued that we should seek socioeconomic diversity in lieu of racial/ethnic diversity, a stance that has needlessly pitted underrepresented minorities against whites of low socioeconomic status (SES), thus fueling the race-vs.-class debate in the prestigious admissions context. The article also takes on other common myths about affirmative action, including the notion that low-income whites add no value because they are essentially redundant of the upper-income whites who are abundant in elite higher education, and the proposition that such educational opportunity is strictly aimed at racial integration of the middle classes, leaving no place or need for the poor and socioeconomically disadvantaged.

This article analyzes socioeconomic disadvantage as diversity from three vantage points: case law, rhetoric, and the practice of elite higher education admissions. The high-water mark for socioeconomic disadvantage as an aspect of “diversity” in case law came in *Bakke v. University of California* (1978). Justice Powell’s opinion in that case famously held that racial and ethnic disadvantage could be considered in the holistic review of applicants. Virtually unnoticed and uncommented upon by judges and scholars since *Bakke*, however, is the fact that Powell also listed socioeconomic disadvantage as an aspect of diversity, treating it as on par with racial and ethnic disadvantage in that holistic review. The U.S. Supreme Court and other federal courts since *Bakke* have largely ignored that stance, implicitly or explicitly re-defining diversity strictly in relation to underrepresented racial and ethnic groups. Meanwhile, the plaintiffs in affirmative action cases like *Grutter*, *Gratz*, *Hopwood* and *Fisher* are often popularly perceived as socioeconomically disadvantaged whites who pitted the interests of that group against racial and ethnic minorities. In fact, neither Alan Bakke nor any of the plaintiffs in more recent affirmative action cases self-identified as socioeconomically disadvantaged. Indeed, Abigail Fisher in particular admits that she is relatively socioeconomically advantaged.

In the other two contexts — diversity rhetoric and diversity “in action,” as reflected in who gets admitted to prestigious higher education institutions — Pruitt documents a widespread erasure or denial of class, of poor and working-class whites in particular. For better or worse, diversity has become a buzzword for a key value and aspiration of the academy, but diversity generally is not defined to include socioeconomic diversity except to the extent that underrepresented minorities happen also to be socioeconomically disadvantaged.

In this first of a series of articles that explicitly takes up the white working class and poor whites as critical race projects, Pruitt begins to theorize why low-SES whites are so little valued in the elite college admissions race. In addition to the race-vs.-class framing that has distracted us from the possibility — indeed, the imperative — of

supporting both groups of underrepresented students, Pruitt concludes that stereotypes of low-SES whites as conservative and racist are also powerful deterrents to their inclusion in the prestigious higher education sector. Long-standing elite disdain for poor and working-class whites, as well as distance from and ignorance of their milieu, further skews how institutions of higher education assess disadvantaged white strivers.

In this age of escalating wealth and income inequality, we need socioeconomic diversity in higher education — including in the most elite sectors — more than ever before. Yet evidence shows that wealthier but less able students often get the coveted spots in that prestigious and narrowing pipeline to our nation's leadership, a phenomenon with significant implications for our nation's democratic ideals and economic flourishing. The current system effectively silences many perspectives and undermines our egalitarian principles, short-circuiting the prospects of strivers by failing to get them into elite higher education or to support adequately the few there. That failure also has economic implications for our nation, as we fail to optimize development of our raw human capital.

While Pruitt acknowledges the shortcomings of the diversity analysis in the higher education context, she ultimately calls for a return to Justice Powell's position in *Bakke*, which endorsed a broader conception of diversity, specifically including low-income students. The practical reality is that race-based affirmative action does not enjoy broad popular support and is widely believed to be doomed given the current composition of the U.S. Supreme Court. But a broader definition of diversity — an explicit valuing of low-income students in rhetoric and in practice — could be the political quid pro quo that helps save affirmative action for racial and ethnic minorities.

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