SOCIAL SCIENCE RESEARCH NETWORK

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
UC DAVIS SCHOOL OF LAW
Vol. 8, No. 4: October 17, 2006

Editors: KEVIN R. JOHNSON
Associate Dean for Academic Affairs, School of Law, and Mabie/Apallas Professor of Public Interest Law and Chicana/o Studies, University of California, Davis
KRJOHNSON@UCDAVIS.EDU

T A B L E O F C O N T E N T S

"Taking Free Exercise Rights Seriously"
UC Davis Legal Studies Research Paper No. 81
Case Western Reserve Law Review, Vol. 47, No. 1, Fall 2006

Contact: ALAN E. BROWNSTEIN
University of California at Davis Law School
Email: aebrownstein@ucdavis.edu
Auth-Page: http://ssrn.com/author=72089

Full Text: http://ssrn.com/abstract=931687

ABSTRACT: This article attempts to begin a conversation about taking free exercise rights seriously. If we read current case law and commentary, the constitutional project of protecting religious liberty requires an unpalatable, all or nothing, choice: Courts can strictly scrutinize everything a state does that substantially burdens religious exercise or they can deferentially uphold all such state action - as long as it does not discriminate against religion or a particular faith. The only alternative is the worst scenario of all - a regime where judges engage in unprincipled, unpredictable, subjective, and completely ad hoc balancing of free exercise rights against competing state interests.

This article suggests that there is a fourth choice. Courts can develop a nuanced, complex free exercise jurisprudence as they have done in adjudicating free speech and equal protection cases. Even an initial sketch of this alternative must confront formidable problems, however. First, protecting religious exercise often provides religious individuals and institutions benefits of secular value as well as the freedom to practice their faith. A persuasive framework for adjudicating free exercise cases must explain or mitigate those surplus secular advantages. Second, a principled doctrine framework requires drawing distinctions that justify the application of different standards of review in different circumstances. One possible free exercise model would provide greater protection to religious exercise involving the operation of religious institutions - when instrumental as opposed to dignitary values are furthered.

Another would consider how the location where religion is practiced should influence the level of protection it receives. Third, the balancing process itself, under any standard of review, must be constrained and guided. Free exercise doctrine can not develop in a constitutional vacuum if we are even to begin to address this problem. Useful analogies should be drawn between the

costs society accepts as the price it must pay to protect other fundamental rights, and the costs and harms that may result from protecting the exercise of religion. Similarly, claims for religious exemption need not be drawn on a blank slate. The consequences of past and continuing legislative accommodations can inform courts and help to provide an objective basis for evaluating state interests alleged to justify restrictions on religious exercise.

"IP3"
UC Davis Legal Studies Research Paper No. 82
Stanford Law Review, Vol. 59, 2006

Contact: MADHAVI SUNDER
University of California, Davis - School of Law
Email: msunder@ucdavis.edu
Auth-Page: http://ssrn.com/author=280597

Full Text: http://ssrn.com/abstract=897753

ABSTRACT: A quarter century ago, Margaret Jane Radin interrupted the hegemonic law and economic discourse on property with a theory of personhood. And the New Jersey Supreme Court declared in the historic case of State v. Shack that property rights serve human values. From these our modern social relations theory of property was born. Now, the pundits declare that intellectual property has come of age. But is intellectual property philosophically and theoretically mature enough to face the world? Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as about incentives. To put it bluntly, there are no giant-sized intellectual property values. But there should be.

Intellectual property has grown, perhaps exponentially, but its march into all corners of our lives and to the most destitute corners of the world has paradoxically exposed the fragility of its economic foundations while amplifying its social and cultural effects. Indeed, with full compliance to the TRIPS Agreement now required in all but the world's very least developed countries, bringing with it patents in everything from seeds to drugs, intellectual property law becomes literally an issue of life or death. Despite these real world changes, intellectual property scholars increasingly explain their field through the lens of economics alone, evidence of Amartya Sen's observation that theories have lives of their own, quite defiantly of the phenomenal world that can be actually observed.

The theory is behind the practice. On the ground, underground, and in the ether, intellectual property is spurring what the New York Times calls the first new social movement of the century. I show that in case after case, from MGM v. Grokster, to new licenses from the Creative Commons for developing nations and cultural heritage, to the rise of Internet auteurs of fan fiction, mash-ups, and machinima, to efforts to deliver medicines to the world's poor, to demands for Geographical Indications for sarees and other crafts of the developing world, and to the nascent global movement for Access to Knowledge, traditional economic analysis fails to capture fully the struggles at the heart of local/global intellectual property law conflicts. This Article builds from these examples to lay a foundation for a cultural analysis of intellectual property. I offer IP3 as a metonym. The twentieth century closed with the rise of identity politics, the Internet Protocol, and intellectual property rights. I suggest that the convergence of these IPs begins to explain the growth of intellectual property rights where traditional justifications for intellectual property do not. IP3 reveals intellectual property's social effects and this law as a tool for crafting cultural relations. Call it the ripping, mixing, and burning of law.

"Election Commissions and Electoral Reform: An Overview"
UC Davis Legal Studies Research Paper No. 86
Election Law Journal, Vol. 5, 2006

Contact: CHRISTOPHER S. ELMENDORF
University of California, Davis - School of Law
Email: cselmendorf@ucdavis.edu
Auth-Page: http://ssrn.com/author=345940

Abstract: http://ssrn.com/abstract=931462

ABSTRACT: This article offers an introductory look at the roles of independent commissions in electoral reform. Part I surveys the range of de jure powers and responsibilities that different countries have assigned to independent electoral commissions, and then explores the functional mechanisms by which these commissions can wield influence in practice. The main lesson is that even agencies whose formal authority over the ground rules of political competition is quite limited (e.g., monitoring and advice-giving bodies) may significantly affect the development of election law, thanks to the mediating forces of public opinion and constitutional judicial review. Part II maps out four subjects for future research: first, the workings of the mechanisms of influence posited in Part I; second, the consequences of combining election administration and law reform responsibilities in the same body, as opposed to segregating these functions in different bodies; third,

the relationship between the independent body's structure and powers and its selection of law reforms; and, fourth, the implications of different theories of political process failure for the structure and de jure authority of electoral commissions.

"Using Science in a Political World: The Importance of Transparency in Natural Resource Regulation"
UC Davis Legal Studies Research Paper No. 87
RESCUING SCIENCE FROM POLITICS, Wendy Wagner, Rena Steinzor, eds., Cambridge University Press, July 2006

Contact: HOLLY DOREMUS
University of California, Davis - School of Law
Email: hddoremus@ucdavis.edu
Auth-Page: http://ssrn.com/author=37460

Abstract: http://ssrn.com/abstract=906921

ABSTRACT: The process of using scientific information to make natural resource policy decisions is a complex one necessarily involving both political and scientific judgments. The fundamental challenge is to ensure that political judgments match societal goals and remain accountable to the public, while scientific judgments match our best understanding of the natural world and remain accountable to the relevant scientific community. Transparency is an important tool for ensuring both types of accountability. Transparency about who makes regulatory decisions, about the scientific basis for those decisions, and especially about the value choices made in the translation step from science to policy are essential to the effective use of scientific information in the political world of policymaking.

Yet transparency is notably lacking in natural resource regulatory decisions that bridge the worlds of science and policy. In particular, the value choices underlying those decisions are often hidden. In addition, it is often very difficult for outsiders to discover what role agency scientific advice ultimately played in a decision, or even what the substance of that advice was. I argue that the courts can and should address both problems, the first by applying well established principles of administrative law to demand that regulatory agencies reveal and explain their value choices, and the second by limiting the use of the deliberative process privilege to prevent disclosure of scientific reports and recommendations.