

SOCIAL SCIENCE RESEARCH NETWORK

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
UC DAVIS SCHOOL OF LAW
Vol. 9, No. 1: February 27, 2007

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"John Paul Stevens, Human Rights Judge"

UC Davis Legal Studies Research Paper No. 97
Fordham Law Review, Vol. 74, p. 1569, 2006

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ABSTRACT: This article explores the nature and origins of Supreme Court Justice John Paul Stevens' engagement with international and foreign law and norms. It first discusses Stevens' pivotal role in the revived use of such norms to aid constitutional interpretation, as well as 1990s opinions testing the extent to which constitutional protections reach beyond the water's edge and 2004 opinions on post-September 11 detention. It then turns to mid-century experiences that appear to have contributed to Stevens' willingness to consult foreign context. The article reveals that as a code breaker Stevens played a role in the downing of the Japanese general responsible for attacking Pearl Harbor, and that this sowed seeds of concern about another targeted state killing, capital punishment. Also illuminating are memoranda from Stevens' clerkship with Justice Wiley Rutledge.

Parts of Stevens' drafts found their way into two Rutledge opinions whose themes remain relevant: one decried executive detention of German nationals; the other, denial of meaningful review to an Italian teenager who had pleaded guilty to murder in a hearing at which the arresting officer acted as interpreter.

Fully six years before the decision in *Brown v. Board of Education*, clerk Stevens advised that segregation be ruled unconstitutional.

"Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness"

UC Davis Legal Studies Research Paper No. 99
 OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW,
 Peter Muchlinski & Federico Ortino, eds., Oxford University Press, 2007

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ABSTRACT: States can defend themselves in cases alleging that they have violated investment treaty obligations on the grounds that situations of economic crisis required that they take emergency action. Likely defenses are the customary international law doctrines of necessity and force majeure, although a State faces stiff hurdles to establish their availability, as well as exculpatory provisions found in the investment treaties themselves. There is an inescapable tension, of course, between undertaking an obligation, on the one hand, and excusing oneself

from complying with it, on the other. At bottom is the question of risk allocation and determining who should bear the burden in situations of unforeseen events or economic crises. The state of necessity defense in particular has an uneasy relationship with the obligations States have undertaken in their investment treaties. By entering into investment treaties, States provide assurances to investors that their investments will be safe notwithstanding the State's inherent power to regulate and legislate in ways adverse to investors' interests. Moreover, a successful invocation of the necessity defense suspends a State's obligations only temporarily, and the State may still be responsible for losses resulting from the measures it has taken during that period, particularly when those damages are economic in nature and readily quantifiable. The limited case law on necessity, and the divergence in those cases that have been decided, suggest a legal doctrine that will develop haltingly. It remains an open question whether the necessity defense has been so stringently limited that its successful invocation is virtually impossible in the context of foreign investment, or whether flexibility in interpretation might yet give it a role to play.

"Clarifying the Curative Admissibility Doctrine: Using the Principles of Forfeiture and Deterrence to Shape the Relief for an Opponent's Evidentiary Misconduct"

UC Davis Legal Studies Research Paper No. 98

Fordham Law Review, Forthcoming

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ABSTRACT: The purpose of this article is to redefine the scope of the curative admissibility doctrine. To do so, the article relies on two basic principles: forfeiture drawn from criminal procedure jurisprudence and deterrence borrowed from legal ethics. The first part of the article presents the policy proposal for invoking those two principles to reshape curative admissibility. The second part of the article demonstrates that this proposal can be implemented without amending the Federal Rules of Evidence. At first blush, some might question the propriety of using an evidentiary doctrine to deter legal ethics violations; but on closer scrutiny, in this narrow context pressing evidentiary doctrine into the service of legal ethics is perfectly legitimate. This use of evidentiary doctrine to enforce legal ethical norms might appear to be at odds with Federal Rule 402's general mandate that all logically relevant evidence be admitted. However, Rule 402 must be construed in light of Rule 102. The courts have rarely interpreted Rule 102, but this article argues that Rule 102 ought to be construed as authorizing the proposed version of the curative admissibility doctrine.

"Immigration Reform, National Security After September 11, and the Future of North American Integration"

UC Davis Legal Studies Research Paper No. 101

Minnesota Law Review, Vol. 91, 2007

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ABSTRACT: This article is part of a symposium on national security to be published in volume 91 of the *Minnesota Law Review*.

This article critically examines how national security concerns have come to dominate—inappropriately in our view—the much-needed debate over comprehensive immigration reform. This article specifically contends that the security concerns that animated the conduct of the U.S. government after the horrible events of September 11, 2001, later distorted the debate over reform of the immigration laws. When it comes to immigration reform, the myopic fixation with security and the so-called “war on terror,” has made it next to impossible for law- and policy-makers to see the forest through the trees. This is most unfortunate because meaningful reform of the U.S. immigration laws is long overdue.

Part I of this article analyzes the U.S. government's scatter-shot attempts in the years since September 11th at improving national security by tightening the immigration laws and increasing border enforcement. Besides being overbroad, under-inclusive, and, in many instances, grossly unfair, the measures appear to have done little to truly improve the security of the United States but have done much to alienate the very communities whose help is desperately needed to effectively protect national security in modern times. Part I further discusses how both Canada and Mexico responded individually to September 11th and worked with the United States on various anti-terrorism measures. Although a certain amount of regional cooperation followed the tragic events of September 11th, not nearly enough was done to truly improve the overall security of North America as a region. A safer North America will require future cooperation between the United States, Canada and Mexico.

Part II of the article demonstrates how the “war on terrorism” has distorted the recent national debate over immigration reform. Security concerns have made it nearly impossible to have a rational discussion of changes to immigration law and policy necessary to fulfill important economic, political, and social goals of the United States. In no small part due to the “close the borders” mentality fostered by September 11th, border enforcement has increasingly been the only item of consensus in Congress when it comes to immigration reform. However, a focus on border enforcement, to the exclusion of other important policy goals, is short sighted. The United States requires more realistic laws that better comport with the economic, political and social realities of modern immigration. A truly multifaceted and comprehensive approach to immigration reform, more far-reaching than any contemplated by the U.S. Congress in recent memory, is needed to bring the nation's immigration laws in line with its various needs in the twenty-first century.

"Missing the Mark: Welfare Reform and Rural Poverty"
UC Davis Legal Studies Research Paper No. 100
Journal of Gender, Race and Justice, Spring 2007

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ABSTRACT: This article, written for a symposium assessing the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) a decade after its passage, considers welfare reform's impact in rural America. Professor Pruitt asserts that federal welfare reform legislation reflects an urban political agenda that failed to consider rural realities. Based on her analysis of two particular populations - those living in persistent poverty and those in female-headed households - she concludes that PRWORA has exacerbated rural poverty.

While PRWORA's focus was on work and time limits on assistance, it gave individual states latitude to design and implement programs tailored to their economic and demographic circumstances. Pruitt illustrates how some states with significant rural populations used this latitude to institute programs that respond to the structural barriers endemic to rural locales: greater transportation challenges in light of spatial isolation from jobs, services, and training opportunities; limited child care choices; and deficits in human capital. But she also points out how states' responses to these challenges have been piecemeal, and their ameliorative impact limited, in the absence of rural economic development. Pruitt analyzes the contradiction between the decline in the number of rural families receiving welfare (a rate commensurate with that of urban families in the PRWORA era) and the rise in rural poverty since 2002.

Building on evidence that PRWORA has aggravated the hardships of the rural poor, the article closes by theorizing our national failure to address rural poverty. Pruitt asserts that the failure is due in part to rural myths and stereotypes, including the significance of the informal economy as a safety net for the rural poor. She also discusses the difficulty in seeing the problem of rural poverty because of a tendency for urban residents to romanticize even hardship in the context of the rural idyll they imagine. Pruitt asserts that these rural myths must be revealed as such, and the limitations and downsides of rural interpersonal familiarity and community must be acknowledged, before law and policy makers can and will address rural poverty in an appropriate and meaningful way.

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