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UC DAVIS SCHOOL OF LAW

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"Interface: The Push and Pull of Patents"

Fordham Law Review, Vol. 77, p. 2225, 2009
UC Davis Legal Studies Research Paper No. 165

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Patents, and the profits they enable, exert a tangible "pull" on university research. Influenced by commercial interests, universities may favor research pathways that generate appropriable (i.e., patentable) results, thus diverting resources away from basic research. Indeed, empirical evidence suggests that revenue maximization constitutes the overriding goal of most university technology transfer offices. Commercial interests are also influencing university research in a different way, as the rush to patent biomedical research tools may inhibit academic science. Amidst these legitimate concerns, this essay explores an underappreciated, salutary facet of university patenting. While such patenting may accelerate the commercialization of academic science, it also creates opportunities for academic institutions to project their unique normative commitments into the marketplace. In this sense, patents function as interfaces that mediate two-way normative exchange between academics and industry. Increasingly, universities are utilizing patents to "push" a number of nonmarket goals into the private sector, such as ensuring wide access to patented resources for research and public health purposes. Among other effects, these efforts are increasing the availability of patented research tools for noncommercial investigations as well as expanding access to essential medicines in low-income countries. The essay concludes by exploring the normative implications of the push and pull of patents. Eschewing once-size-fits-all prescriptions, it suggests that the unique histories, constituencies, and aspirations of particular institutions should inform their approach to technology transfer.

"Saving Seaborn: Ownership as the Basis of Family Taxation"
UC Davis Legal Studies Research Paper No. 166

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This Article examines the historical and jurisprudential development of the principle that ownership determines federal taxation of families. It traces the "ownership equals taxability" principle from the late nineteenth century to 1930; that is, from the decades leading up to ratification of the Sixteenth Amendment to the U.S. Supreme Court's landmark decisions in Poe v. Seaborn and Lucas v. Earl. It is a story of the early federal income tax and its administration; of tax avoidance opportunities for families; of the nature of spouses' legal interests as defined by state property laws; and of early tax enforcement efforts by the Treasury Department and Congress. It is also a story of how the Supreme Court sought to protect Congress' taxing power by articulating an expansive definition of ownership for purposes of determining taxability that relied on indicia of ownership such as control, management, dominion, beneficial interests, equitable interests, enjoyment, and even a "flow of satisfactions" concept that tracked consumption tax principles more closely than income tax principles.

In the end, the Article lays the groundwork for removing the modern-day false barometer of marriage between a man and a woman as the basis of family taxation. In place of marriage, it reestablishes ownership principles grounded in longstanding Supreme Court jurisprudence as the historically and legally accurate gauge for family taxation. In so doing, the Article presages an argument that will be articulated in a subsequent Article for taxing members of all state-recognized civil partnerships - marriage, domestic partnerships, civil unions, reciprocal beneficiary relationships - according to ownership interests as determined by state law.

"Free Seeds, Not Free Beer: Participatory Plant Breeding, Open Source Seeds, and Acknowledging User Innovation in Agriculture"
Fordham Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 167

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This essay discusses the expansion of intellectual property rights in plants, plant tissues and genetic sequences in plants and problems this poses for global food supply and agriculture. The article then goes on to analyze recent treaties such as the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) and ways that such treaties create a "limited commons" in certain plant genetic resources. The article then goes on to discuss ways that open source software licenses may be adapted to the plant genetic resources context, and argues that open source seed licens may be a vehicle for leveraging greater access to plant genetic resources by farmers and public plant breeders around the world.

"A Letter About Investing to a New Foundation Trustee, with Some Focus on Socially Responsible Investing"
ACTEC Journal, Vol. 34, p. 234, 2009
UC Davis Legal Studies Research Paper No. 169

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Cast in the form of an e-mail, this article provides investment guidance to a new board member of a private foundation. Included in the advice offered is a discussion of socially responsible investing and its various subcategories.

"The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically Correct Originalism, and Other Second Amendment Musings"
Hastings Law Review, Vol. 60, 2009
UC Davis Legal Studies Research Paper No. 170

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This article considers several issues raised by the Supreme Court's opinion in District of Columbia v. Heller. One question is whether Heller requires the constitutionalization of self-defense decisions in tort and criminal law. If the Second Amendment protects the right to keep and bear arms for immediate self-defense purposes, as Heller holds, it arguably also protects the right to use firearms for self defense purposes. Put simply, does it make sense to interpret the Second Amendment to protect to the means to exercise self-defense without extending some level of protection to the act of self-defense itself?

Answering this question in the affirmative leads to other issues. The privilege or excuse of self-defense is grounded on an ad hoc evaluation by juries of the reasonableness of the defendant's conduct. That analysis may be appropriate for tort or criminal law purposes, but it is arguably much more problematic as a constitutional

standard. There is also the question of whether a constitutionally required determination as to the reasonableness of defendant's conduct must be independently reviewed by appellate courts.

Heller may influence tort law in another way. Gun owners are often held liable for negligence if they store a firearm in a location where a child gains access to it and injures themselves or others with the weapon. The same safeguards that prevent a child from obtaining a firearm, however, such as storing it in a locked drawer, may make the weapon less available for immediate self-defense. Thus, state courts may need constitutional guidance as to how these negligence lawsuits should be resolved in order to avoid the substantial burdening of a gun owner's Second Amendment rights.

The article addresses other issues as well, such as the role of so-called prefatory clauses in developing doctrine for the protection of enumerated rights.

"Yick Wo Re-Revisited: Nonblack Nonwhites and Fourteenth Amendment History"
University of Illinois Law Review, Fall 2008
UC Davis Legal Studies Research Paper No. 171

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The 1886 Supreme Court case Yick Wo v. Hopkins is often viewed as a precursor of the racial civil rights era represented by Brown v. Board of Education. In fact, the case was primarily about economic rights. In a new article, Unexplainable on Grounds of Race: Doubts About Yick Wo,* forthcoming in the Illinois Law Review, Professor Gabriel Chin argues that Yick Wo "is not a race case at all." I argue that it is a "race case" because the Court's use of the Fourteenth Amendment to vindicate economic rights necessarily entangled economic rights with race - in an ultimately pernicious way. While issues of "race" in American law tend to focus on nonwhiteness, the "race" of the Chinese plaintiffs in Yick Wo was legally significant in its nonblackness. The Reconstruction Court had previously refused to apply the Amendment to whites or to economic rights in The Slaughter-House Cases. But Yick Wo both revived the literal meaning of the Amendment's phrase "all persons" and applied it to economic rights. It thus ushered in a two-pronged civil rights counter-revolution symbolized by Lochner v. New York's protection of economic "substantive due process" for white persons and corporations and Plessy v. Ferguson's denial of civil rights protection to blacks. The counter-revolution also turned against the nonblack nonwhites who had helped create it, allowing the exclusion of Asians from immigration and naturalization, state laws prohibiting Asians from owning land, and the internment of Japanese Americans during World War II.

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