

Table of Contents

■ **Producing Speech**

[Ashutosh Avinash Bhagwat](#), University of California, Davis - School of Law

■ **Town of Greece v. Galloway: Constitutional Challenges to State Sponsored Prayers at Local Government Meetings**

[Alan E. Brownstein](#), University of California, Davis - School of Law

■ **Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles after Morrison and Kiobel**

[Katherine J. Florey](#), University of California, Davis

■ **Vulnerability and Power in the Age of the Anthropocene**

[Angela P. Harris](#), University of California, Davis - King Hall School of Law

■ **A Statute Overtaken by Time: The Need to Re-Interpret Federal Rule of Evidence 803(8)(a)(iii) Governing the Admissibility of Expert Opinions in Government Investigative Reports**

[Edward J. Imwinkelried](#), University of California, Davis - School of Law

■ **The Worst Test of Truth: The 'Marketplace of Ideas' as Faulty Metaphor**

[Thomas Wuil Joo](#), University of California - Davis Law School

■ **Why the Affordable Care Act Authorizes Tax Credits on the Federal Exchanges**

[David Gamage](#), University of California, Berkeley - Boalt Hall School of Law

[Darien Shanske](#), University of California, Davis - School of Law

■ **The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante**

[Donna Shestowsky](#), University of California, Davis - School of Law

[^top](#)

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

UC DAVIS SCHOOL OF LAW

■ **"Producing Speech"**

William & Mary Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 366

ASHUTOSH AVINASH BHAGWAT, University of California, Davis - School of Law

Email: aabhagwat@ucdavis.edu

In recent years, a large number of disputes have arisen in which parties invoke the First Amendment, but the government action they challenge does not directly regulate "speech," as in communication. Instead, the government is restricting the creation of communicative materials that are intended to be disseminated in the future – i.e., they restrict producing speech. Examples of such disputes include bans on recording public officials in public places, Los Angeles County's ban on bareback (condom-less) pornography, restrictions on tattoo parlors, so-called "Ag-Gag" laws forbidding making records of agricultural operations, as well as many others. The question this article address is whether such laws pose serious First Amendment problems.

I conclude that they do. First Amendment protection for conduct associated with producing speech is justified for two distinct reasons: first, because such protection is necessary to make protection for communication meaningful;

and second, because the Press Clause provides a textual and historical basis for such protection. However, because speech production involves conduct that can have substantial, negative social consequences, it is also true that First Amendment protection for speech production must be limited, and probably less extensive than protection for actual communication.

In the balance of this article, I propose a doctrinal framework for how restrictions on speech production might be analyzed. The framework draws on broader free-speech principles such as the content-based/content-neutral dichotomy, and the Supreme Court's repeated statements that the First Amendment accords special importance to speech relevant to the democratic process. However, the framework is distinct from general free-speech analysis, and for the reasons discussed above, generally more tolerant of regulation. I close by applying my proposed doctrinal rules to a number of recent disputes.

"Town of Greece v. Galloway: Constitutional Challenges to State Sponsored Prayers at Local Government Meetings"

47 UC Davis Law Review, (2014 Forthcoming)
UC Davis Legal Studies Research Paper No. 365

ALAN E. BROWNSTEIN, University of California, Davis - School of Law
Email: aebrownstein@ucdavis.edu

This article, based on the Edward L. Barrett Lecture presented in November, 2013, examines the constitutionality of state sponsored prayers at town board meetings using the Town of Greece case as the focus of the discussion. While recognizing that the Town of Greece's conduct raised significant Establishment Clause concerns under both a coercion test and an endorsement test, the article sets out the conditions under which state-sponsored prayers might withstand constitutional review. These include: (1) The town must employ a transparent, open, and egalitarian system for inviting individuals to offer prayers at board meetings. Invitations cannot be limited to established congregations in the community. (2) The prayers offered should be "I" prayers rather than "We" prayers. The person offering the prayer should do so in his or her own name, not as the voice of the audience or the community. As a matter of first principles, government is not vested with the power to speak to God in our names. (3) Officials introducing the person offering the prayer should explain that the prayer offered is the personal expression of the speaker, not the government, and that the board recognizes and respects the diversity of beliefs among its residents. (4) The audience should not be asked to stand, bow their heads, or join in reciting the prayer. These constraints are arguably sufficient to ameliorate the burdens on religious liberty and equality created by state-sponsored prayers without involving the town or the courts in unacceptably intrusive monitoring of the content of prayers.

"Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles after Morrison and Kiobel"

Pacific McGeorge Global Business & Development Law Journal, Vol. 27, May 2014
UC Davis Legal Studies Research Paper No. 367

KATHERINE J. FLOREY, University of California, Davis
Email: florey@gmail.com

The Supreme Court's recent expansion of the federal presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.* and *Kiobel v. Royal Dutch Petroleum* has had an unexpected consequence: In many circumstances, state law may apply abroad far more broadly than does federal law. Thus, even as the Supreme Court has significantly scaled back the reach of federal law abroad, advocates and litigators have awakened to the potential use of state law to obtain relief in disputes occurring partially or largely outside U.S. borders. While procedural difficulties may exist in bringing such cases, those who surmount these hurdles are likely to find that, at the choice-of-law stage, many state courts readily apply their own law or the law of a different U.S. state to disputes with foreign elements.

Thus, in the wake of *Morrison* and *Kiobel*, it appears that state law may have greater extraterritorial application than federal law. This result is surely not what anyone would have intended, much less desired. State law applied abroad indiscriminately raises concerns similar to those present when federal law is applied too broadly to foreign disputes. Moreover, extraterritorial application of state law raises issues of unpredictability and lack of uniformity that are present to an even greater extent than when federal law is involved. Because of this, to the extent that U.S. law is to be applied abroad, sound reasons exist for such law to be predominately federal.

Existing state choice-of-law doctrine, however, slights such considerations, giving courts little doctrinal guidance in how to navigate the special issues that are present when an otherwise routine conflicts problem involves foreign rather than sister-state law. At the same time, the federal presumption against extraterritoriality leaves little or no room for taking into account the possibility that state law may apply where federal law does not. With this background in mind, this Article argues that, even as state-law and federal-law approaches regarding extraterritoriality have been growing farther apart, a strong case can be made for greater convergence.

"Vulnerability and Power in the Age of the Anthropocene"

Washington and Lee Journal of Energy, Climate, and the Environment (Forthcoming)

ANGELA P. HARRIS, University of California, Davis - King Hall School of Law
Email: apharris@ucdavis.edu

For several decades, critical race feminists have struggled with the limits of equality jurisprudence. Recently, feminist legal theorist Martha Fineman has argued that “vulnerability” should be a starting point for thinking about the state’s obligations to its citizens. In this essay, I argue that Fineman’s concept of vulnerability makes an important contribution to the project of situating political and legal theory within the natural world. We live in what some scientists have dubbed the Anthropocene – an age in which our political choices have implications for the flourishing of all life on earth. The idea of vulnerability can serve as an important bridge between critical legal theory and the emerging “green” legal theory. However, I temper this endorsement of vulnerability theory with the observation that, as the environmental policy literature shows, the term “vulnerability” can also mask social inequality and its political sources. Vulnerability must therefore be supplemented with a robust commitment to power analysis as we begin to craft a political theory appropriate to the age of the Anthropocene.

Admit that humans have crawled or secreted themselves into every corner of the environment; admit that the environment is actually inside human bodies and minds, and then proceed politically, technologically, scientifically, in everyday life, with careful forbearance, as you might with unruly relatives to whom you are inextricably bound and with whom you will engage over a lifetime.

"A Statute Overtaken by Time: The Need to Re-Interpret Federal Rule of Evidence 803(8)(a)(iii) Governing the Admissibility of Expert Opinions in Government Investigative Reports"

UC Davis Legal Studies Research Paper No. 364

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

The thesis of this article is that the current interpretation of Federal Rule of Evidence 803(8)(a)(iii) allows the proponent of an expert opinion in hearsay form to flout Daubert and expose the jury to unreliable expert testimony. When the Federal Rules took effect in 1975, the statutory scheme included both Rule 702 and Rule 803(8)(C), the predecessor to restyled Rule 803(8)(a)(iii). The latter statute permits the introduction of trustworthy “factual findings” in government investigative reports. At that time the majority of jurisdictions, including most federal courts, followed the traditional general acceptance test for the admissibility of expert testimony, and the courts interpreted Rule 702 as permitting the courts to adhere to that standard. In fact, government investigators regularly employ generally accepted methodologies. On that assumption, the courts developed the view that if a government factual finding is trustworthy enough to satisfy Rule 803(8)(a)(iii), there is no need for the proponent to make a separate showing that the finding passes muster under Rule 702.

However, two 1993 developments have overtaken that view. To begin with, in that year the Supreme Court rendered Daubert. Daubert jettisoned the traditional general acceptance test and held that the proponent of expert testimony must show that the testimony qualifies as reliable “scientific knowledge” within the meaning of that expression in Rule 702. The Court explained that “knowledge” requires more than the expert’s subjective belief and that “scientific” mandates that the proponent demonstrate that there is adequate validation for the opinion—supporting empirical reasoning and data. Although the Court stated that the judge may consider the general acceptance of the expert’s theory in evaluating reliability, standing alone general acceptance is an inadequate foundation. Thus, even if the government investigator utilized a widely approved methodology, the opinion may be inadmissible under 702. The Daubert mode of analysis not only deviates from the traditional general acceptance test for expert testimony; Daubert’s reliability analysis also differs fundamentally from the trustworthiness analysis under Rule 803(8)(a)(iii). While the 702 reliability analysis places a premium on objective indicia of the theory’s validity, the latter focuses on classic hearsay factors such as the subjective sincerity of the declarant.

Another 1993 development, an amendment to Federal Rule of Civil Procedure 26, intensified the proponent’s incentive to offer a questionable opinion in hearsay form to evade Daubert. That amendment introduced mandatory pre-discovery disclosures. The mandatory disclosures include a report comprehensively detailing the analysis of any expert witness whom the litigant contemplates calling at trial. However, the disclosure requirements apply only when the proponent intends to call the expert as a witness – not when the proponent proffers the opinion in hearsay form. Considered together, these two 1993 development necessitate the re-interpretation of Rule 803(8).

The article concludes that the courts should go to the length of demanding that the proponent of an investigative finding lay a foundation demonstrating reliability under Rule 702. The courts ought to abandon the view that the proponent’s compliance with Rule 803(8)(a)(iii) automatically or presumptively satisfies Rule 702.

"The Worst Test of Truth: The 'Marketplace of Ideas' as Faulty Metaphor"

UC Davis Legal Studies Research Paper No. 369

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

Dissenting in *Abrams v. United States*, Justice Holmes proclaimed that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” This Article critiques the basic argument that has developed from the “marketplace of ideas” metaphor: that speech should be “free” because markets are “free,” and because free markets produce “truth.” These assertions about markets are taken for granted, but they portray markets and market regulation inaccurately; thus economic markets provide a poor analogy for the deregulation of speech.

First Amendment jurisprudence invokes the supposed truth-finding function of markets to argue that competition, not law, should distinguish the true from the false, and that the law should refrain from attempting to equalize the relative strength of competing speakers. The Supreme Court used the marketplace metaphor to support the first assertion in *Alvarez v. United States* (2011), and the second in *Citizens United v. Federal Election Commission* (2010).

The assumptions of the metaphor are inconsistent with theory and experience, however. Economic markets do not produce normative or empirical “truth.” Existing regulatory law reflects this understanding. Mail fraud law and securities regulation, for example, assume that markets are particularly bad at identifying the truth, and thus information is more aggressively regulated in the market context than in other contexts. Economic regulation also assumes that markets require some degree of “equalizing.” Antitrust law and insider-trading law, for example, treat certain types of advantages as impediments that must be corrected in order to ensure that markets remain competitive.

Holmes, the great dissenter of *Lochner*, opportunistically appropriated free-market language for its rhetorical appeal in the interest of free speech. But he inadvertently gave support to laissez-faire norms and contributed to the present pervasiveness of free-market rhetoric in legal discourse.

"Why the Affordable Care Act Authorizes Tax Credits on the Federal Exchanges"

State Tax Notes, Vol. 71, No. 4, 2014

UC Berkeley Public Law Research Paper No. 2389446

UC Davis Legal Studies Research Paper No. 368

DAVID GAMAGE, University of California, Berkeley - Boalt Hall School of Law

Email: david.gamage@gmail.com

DARIEN SHANSKE, University of California, Davis - School of Law

Email: dshanske@ucdavis.edu

This Essay refutes Adler’s and Cannon’s argument that the Affordable Care Act (“Obamacare”) does not authorize premium tax credits for insurance policies purchased from the federal healthcare Exchanges. Adler’s and Cannon’s argument is the basis of challenges in a number of ongoing lawsuits, including *Oklahoma ex rel. Pruitt v. Sebelius* and *Halbig v. Sebelius*. This Essay conducts a textual analysis of the Affordable Care Act and concludes that the text clearly authorizes premium tax credits for insurance policies purchased from the federal healthcare Exchanges.

"The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante"

Iowa Law Review, Vol. 99, No. 2, 2014

UC Davis Legal Studies Research Paper No. 363

DONNA SHESTOWSKY, University of California, Davis - School of Law

Email: dshest@ucdavis.edu

This Article reports the findings of the first multi-jurisdictional study of litigants’ perceptions of legal procedures shortly after their cases are filed in court. It begins by explaining why research on how litigants assess procedures could be used to advance procedural justice and mitigate the negative impact that the economic downturn has had on the resolution of civil cases. It then presents analyses regarding: (1) how attractive litigants find various legal procedures (e.g., Negotiation, Mediation, Non-binding Arbitration, Binding Arbitration, Jury Trials, Judge Trials); (2) how they assess the relative probability that they will use each procedure; (3) how their attraction ratings and “expected use” estimates compare for each procedure; and (4) whether demographic, case type, relationship, and attitudinal factors predict their attraction to each procedure. The analyses revealed that litigants preferred Mediation, the Judge Trial, and Attorneys Negotiate with Clients Present to all other examined procedures. The lack of relations between attraction to procedures and many of the predictor variables (i.e., demographic, case type, relationship, and attitudinal factors) suggests that some factors previously associated with ex ante perceptions are not significant predictors when evaluated concurrently. The major findings are discussed in the context of dispute resolution systems design in courts, client counseling protocols, procedural justice, and the psychology of litigants more broadly.

 [top](#)

About this eJournal

The University of California, Davis School of Law Legal Studies journal contains abstracts and papers from this

institution focused on this area of scholarly research. To access all the papers in this series, please use the following URL: <http://www.ssrn.com/link/UC-Davis-Legal-Studies.html>

Submissions

To submit your research to SSRN, sign in to the [SSRN User Headquarters](#), click the My Papers link on left menu and then the Start New Submission button at top of page.

Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: RPS@SSRN.com

Distributed by

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

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

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

[^top](#)

Links: [Subscribe to Journal](#) | [Unsubscribe from Journal](#) | [Join Site Subscription](#) | [Financial Hardship](#)

Subscription Management

You can change your journal subscriptions by logging into [SSRN User HQ](#). If you have questions or problems with this process, please email Support@SSRN.com or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

[Accounting Research Network](#)

[Cognitive Science Network](#)

[Corporate Governance Network](#)

[Economics Research Network](#)

[Entrepreneurship Research & Policy Network](#)

[Financial Economics Network](#)

[Health Economics Network](#)

[Information Systems & eBusiness Network](#)

[Legal Scholarship Network](#)

[Management Research Network](#)

Political Science Network
Social Insurance Research Network
Classics Research Network
English & American Literature Research Network
Philosophy Research Network

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact site@ssrn.com for more information.

Individual Membership (for those not covered by a site subscription)

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User Headquarters:
<http://www.ssrn.com/subscribe>

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to Subscribe@SSRN.com

[^top](#)

To ensure delivery of this eJournal, please add LSN@publish.ssrn.com (**Legal Scholarship Network**) to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email Support@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at Site@SSRN.com

[^top](#)

Copyright © 2014 Social Science Electronic Publishing, Inc. All Rights Reserved