

2-8-2019

Table of Contents

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Table of Contents

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CHICAGO-KENT LAW REVIEW

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NUMBER 1

CONTENTS

CHICAGO-KENT LAW REVIEW VOLUME 94, ISSUE 1

SYMPOSIUM EDITORS

THE MEMBERS OF THE CHICAGO-KENT LAW REVIEW

THE PIPER LECTURE

THE METASTASIZATION OF MANDATORY
ARBITRATION

Alexander J.S. Colvin 3

Mandatory arbitration procedures have expanded to become a common feature of American employment relations. This article presents the results of a new original survey examining the extent of mandatory arbitration, where it is most commonly used, and which employees it is most likely to affect. Overall, 53.9 percent of private sector business establishments, representing 56.2 percent of nonunion employees, have mandatory arbitration procedures. Larger employers are more likely to have adopted mandatory arbitration, as are workplaces with lower paid employees. Mandatory arbitration is particularly common in California, North Carolina, and Texas, but is widespread nationwide. Class action waivers are included in the mandatory arbitration agreements of 41.1 percent of the employees covered by these procedures. Some 39.5 percent of the mandatory arbitration procedures were adopted within the last five years, indicating that there has been a rapid recent growth in this practice. These findings indicate a metastasization of mandatory arbitration, where it has now replaced litigation as the most common method of enforcement of employment rights for nonunion employees, with potential major negative consequences for workers.

STUDENT NOTES

“GOOD REASON” LAWS UNDER THE GUN:
MAY-ISSUE STATES AND THE RIGHT
TO BEAR ARMS

Jack M. Amaro 27

This note proposes a framework for analyzing the point at which discretionary restrictions on the concealed carry of firearms are unconstitutional under the Second Amendment, which, at its core, guarantees the responsible, law-abiding citizen at least the right to use a firearm for self-defense. Although the Supreme Court has yet to affirmatively answer whether and to what extent this right extends beyond the home, every state allows its residents to publicly carry a firearm in some form—be it open or concealed. But states have the power to limit who may exercise this right; and some states curtail it to the point at which few, if any, individuals are granted a permit to carry a firearm. Should the Supreme Court face this issue, I argue that the latter approach is impermissible under the Second Amendment’s developing jurisprudence.

To briefly illustrate, most states develop a list of criteria that a permit applicant must satisfy, and, assuming he or she does so, the state will issue the applicant a concealed carry permit. However, some states, although they have a similar list of criteria, may also require an applicant to prove he or she has a special need for self-defense above that of the general public. Because permit schemes are already designed to isolate law-abiding citizens from potentially dangerous ones, I argue that, by drawing a distinction between (a) responsible, law-abiding citizens and (b) responsible, law-abiding citizens with a special need for self-defense, states have infringed upon the Second Amendment's core.

THE "ART" OF FUTURE LIFE: RETHINKING PERSONAL INJURY LAW FOR THE NEGLIGENT DEPRIVATION OF A PATIENT'S RIGHT TO PROCREATION IN THE AGE OF ASSISTED REPRODUCTIVE TECHNOLOGIES	<i>Erika N. Auger</i>	51
---	-----------------------	----

CONSEQUENCES FOR PATENT OWNERS IF A PATENT IS UNCONSTITUTIONALLY INVALIDATED BY THE PATENT TRIAL AND APPEAL BOARD	<i>Mark Magas</i>	79
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There have been many constitutional challenges against the Patent Trial and Appeal Board ("PTAB") since it was created by the America Invents Act in 2011. While the merits of these challenges have been widely debated, there has been little analysis of what would happen if one of these challenges succeeded and patents are found to have been unconstitutionally invalidated. This note examines how issues with waiver, retroactivity, and finality may prevent patent owners from getting their patent rights back, considering the type of constitutional challenge and the different stages of the PTAB process. While the odds are stacked against patent owners in most circumstances, they may have more success at obtaining relief with due process challenges.

PATH TO DESTRUCTION: COOK COUNTY'S PROPERTY TAX SYSTEM IS A CAUSE FOR CONCERN AS IT MIMICS THE DEFUNCT TAXING PROCEDURES THAT LED TO THE DETROIT FORECLOSURE CRISIS	<i>Robert Romano</i>	107
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For decades, Cook County, Illinois, has had one of the highest property tax rates in the country, and as a result the County has begun to experience unprecedented foreclosure rates which has contributed, in part, to the State's significant population decline. Residents are forced to endure a property tax system that disproportionately burdens low-income homeowners, while providing tax breaks to higher-income individuals and commercial owners. The primary causes and characteristics of Cook County's defunct property tax system are strikingly similar to those that sent the City of Detroit spiraling into bankruptcy in 2013.

This note provides a comparative analysis of the economic, societal, and political factors that led to the Detroit Foreclosure Crisis and how these same factors are prevalent in modern-day Cook County. Along with the various causes behind Cook County's defective property tax system, this note explores the detrimental effects that the excessive property taxes have on low-income residents, particularly within the impoverished communities on the South Side of Chicago. Ultimately, significant changes to the property tax system are necessary to prevent Cook County from suffering the same fate as Detroit.

CLARIFYING THE SCOPE OF THE SELF-
INCRIMINATION CLAUSE:

CITY OF HAYS v. VOGT

Samantha Ruben 137

Three months after oral arguments, the Supreme Court dismissed the writ of certiorari in *City of Hays v. Vogt* as improvidently granted. The question in *Vogt* was whether the Fifth Amendment right against self-incrimination is violated when incriminating statements are used at a probable cause hearing, as opposed to a criminal trial. As a result of the “DIG,” the Court left a circuit split unresolved surrounding the meaning of a “criminal case” within the Fifth Amendment’s Self-Incrimination Clause.

This note argues that the Supreme Court should not have dismissed *Vogt* and should have decided that the Fifth Amendment right against self-incrimination is a broad right not limited to trial. Historical evidence signals that the Framers of the Constitution meant for the Self-Incrimination Clause to apply beyond the trial stage. Further, when a self-incriminating statement is used at a probable cause hearing, it can effectively deprive the individual of life, liberty, and property, implicating the Fourteenth Amendment. While some circuits narrowly define a criminal case as a criminal trial, other circuit courts have broadened the right against self-incrimination to a variety of pre-trial proceedings. The Supreme Court should set clear and consistent precedent concerning the right against self-incrimination and should establish that the Fifth Amendment protects individuals at probable cause hearings.

ENHANCED PATENT INFRINGEMENT
DAMAGES POST-*HALO* AND THE PROBLEM
WITH USING THE *READ* FACTORS

Betul Serbest 157

The United States Patent Act allows a patent holder to recover treble damages for “willful infringement.” The standard for willful infringement has changed over the years, with the United States Supreme Court providing the most recent explanation of what is “willful” in *Halo Electronics, Inc. v. Pulse Electronics, Inc.* in 2016. Courts, however, continue to use a set of factors set forth in *Read Corp. v. Portec, Inc.* in 1992 to aid their discretion in awarding willful infringement enhanced damages. In this article, I argue that at least two of the *Read* factors are inconsistent with the Supreme Court’s *Halo* opinion: factor 3, the infringer’s behavior as a party during litigation, and factor 5, the closeness of the case. I suggest that courts continue to use the remaining seven of the nine *Read* factors to guide their discretion. However, to the extent that courts consider a party’s litigation behavior and the closeness of the case, this is inconsistent with *Halo*.

PRESIDENT TRUMP'S BIG BEAUTIFUL WALL:
DISCRIMINATION, EMINENT DOMAIN, AND
THE PUBLIC USE REQUIREMENT

Meghan K. Tierney 179

At a press conference held in Trump Tower New York City on June 16, 2015, Donald Trump announced his candidacy for President of the United States by promising to expand the border wall along the Southern United States. President Trump has insisted that his only reasons behind completely separating the United States from Mexico are to curtail illegal immigration and curb drug cartel activity, but many argue that his statements indicate a much more sinister motive based in racial discrimination. The public use requirement of the Fifth Amendment Takings Clause allows the federal government to take private land for the greater public benefit. While the public use requirement of the takings clause is incredibly broad, this note will argue that there can be no public use when the sole motivation behind a taking is racial discrimination. While there have been no direct cases involving the use of eminent domain for a solely discriminatory purpose, cases in other areas make it clear that such a purpose would run afoul of the public use requirement for failure to serve even a basic legitimate government interest. The Equal Protection Clause, specifically the lack of a legitimate government interest or the government's bare desire to harm a particular group, are useful tools with which this note will analyze President Trump's statements and opinions about the border wall and whether they are discriminatory in nature and therefore outside the realm of the public use requirement.

IS DNA REALLY A NATURAL PRODUCT?
IT'S TIME TO SEPARATE FACT FROM
(LEGAL) FICTION: AN EXAMINATION OF
DNA PATENTABILITY AS A BIOLOGICAL
ALGORITHM IN THE POST-MYRIAD ERA

Nicholas Ulen 205

In 2013, the United States Supreme Court delivered its landmark decision in *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, holding isolated DNA unpatentable, thereby invalidating the claims of thousands of DNA patents in the process. The opinion, delivered by Justice Thomas, reasoned that the act of separating DNA from the body did not sufficiently transform the molecule beyond what naturally exists. Yet the Court found that line to be crossed when it held certain artificially synthesized complementary DNA molecules coding for the exact same gene patentable. Unlike the Federal Circuit, the Court focused its analysis not on the structural differences in DNA molecules but on the genetic information held within Myriad's BRCA genes. Since genetic information is not a tangible quantity, categorizing isolated DNA unpatentable as a product of nature causes tension with the Court's current characterization of DNA. Should the patent law continue to view DNA as a physical entity and base patentability on those differences? Or should it instead view DNA as an abstract idea based on the application of a gene's information to an invention?

This note adopts the latter approach and proposes a test for DNA patentability as a biological algorithm, using the Myriad case as an example. As biotechnology continues to evolve, scientists are increasingly concerned about the coding information in genes. The patent law accordingly should accommodate this shift in principle, even if it means crafting a new legal fiction by no longer treating DNA as a purely tangible entity. By doing so, this note seeks to reconcile the tension in Myriad and provide a standard for future DNA patentability.

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