CURRENT CONTENTS

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<table>
<thead>
<tr>
<th>title</th>
<th>volume</th>
<th>issue</th>
<th>date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akron Law Review</td>
<td>37</td>
<td>4</td>
<td>2004</td>
</tr>
<tr>
<td>American University Law Review</td>
<td>53</td>
<td>3</td>
<td>February 2004</td>
</tr>
<tr>
<td>Annals of Health Law</td>
<td>13</td>
<td>2</td>
<td>Summer 2004</td>
</tr>
<tr>
<td>Columbia Journal of Law and Social Problems</td>
<td>37</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Columbia Law Review</td>
<td>104</td>
<td>5</td>
<td>June 2004</td>
</tr>
<tr>
<td>DePaul Law Review</td>
<td>53</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Ecology Law Quarterly</td>
<td>31</td>
<td>1</td>
<td>2004</td>
</tr>
<tr>
<td>Emory International Law Review</td>
<td>18</td>
<td>1</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Energy Law Journal</td>
<td>25</td>
<td>1</td>
<td>2004</td>
</tr>
<tr>
<td>European Environmental Law Review</td>
<td>13</td>
<td>4</td>
<td>April 2004</td>
</tr>
<tr>
<td>Federal Communications Law Journal</td>
<td>56</td>
<td>3</td>
<td>May 2004</td>
</tr>
<tr>
<td>Florida State University Law Review</td>
<td>31</td>
<td>4</td>
<td>Summer 2004</td>
</tr>
<tr>
<td>Fordham International Law Journal</td>
<td>27</td>
<td>5</td>
<td>May 2004</td>
</tr>
<tr>
<td>Georgetown Journal of Legal Ethics</td>
<td>17</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Georgia State University Law Review</td>
<td>20</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Harvard Law Review</td>
<td>117</td>
<td>8</td>
<td>June 2004</td>
</tr>
<tr>
<td>International Journal of Law and Psychiatry</td>
<td>27</td>
<td>3</td>
<td>May/June 2004</td>
</tr>
<tr>
<td>International Legal Materials</td>
<td>43</td>
<td>3</td>
<td>May 2004</td>
</tr>
<tr>
<td>Iowa Law Review</td>
<td>89</td>
<td>4</td>
<td>April 2004</td>
</tr>
<tr>
<td>Journal of College and University Law</td>
<td>30</td>
<td>3</td>
<td>2004</td>
</tr>
<tr>
<td>Journal of Contemporary Health Law and Policy</td>
<td>20</td>
<td>2</td>
<td>Summer 2004</td>
</tr>
<tr>
<td>Juvenile and Family Court Journal</td>
<td>55</td>
<td>2</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Loyola University Chicago Law Journal</td>
<td>35</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>North Dakota Law Review</td>
<td>79</td>
<td>4</td>
<td>2003</td>
</tr>
<tr>
<td>Notre Dame Journal of Law, Ethics &amp; Public Policy</td>
<td>18</td>
<td>2</td>
<td>2004</td>
</tr>
<tr>
<td>Osgoode Hall Law Journal</td>
<td>42</td>
<td>1</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Practical Lawyer</td>
<td>50</td>
<td>3</td>
<td>June 2004</td>
</tr>
<tr>
<td>Securities Regulation Law Journal</td>
<td>32</td>
<td>2</td>
<td>Summer 2004</td>
</tr>
<tr>
<td>South Dakota Law Review</td>
<td>49</td>
<td>2</td>
<td>2004</td>
</tr>
<tr>
<td>South Texas Law Review</td>
<td>45</td>
<td>4</td>
<td>Fall 2004</td>
</tr>
<tr>
<td>St. John's Law Review</td>
<td>78</td>
<td>2</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Suffolk Transnational Law Review</td>
<td>26</td>
<td>2</td>
<td>Summer 2003</td>
</tr>
<tr>
<td>Syracuse Law Review</td>
<td>54</td>
<td>4</td>
<td>2004</td>
</tr>
<tr>
<td>Taxes - The Tax Magazine</td>
<td>82</td>
<td>7</td>
<td>July 2004</td>
</tr>
<tr>
<td>Texas International Law Journal</td>
<td>39</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>Texas International Law Journal</td>
<td>39</td>
<td>4</td>
<td>Summer 2004</td>
</tr>
<tr>
<td>Tulane Law Review</td>
<td>78</td>
<td>4</td>
<td>March 2004</td>
</tr>
<tr>
<td>Tulane Maritime Law Journal</td>
<td>28</td>
<td>2</td>
<td>Summer 2004</td>
</tr>
<tr>
<td>U.C. Davis Law Review</td>
<td>37</td>
<td>5</td>
<td>June 2004</td>
</tr>
<tr>
<td>Villanova Law Review</td>
<td>49</td>
<td>3</td>
<td>2004</td>
</tr>
<tr>
<td>Virginia Journal of International Law</td>
<td>44</td>
<td>3</td>
<td>Spring 2004</td>
</tr>
<tr>
<td>William Mitchell Law Review</td>
<td>30</td>
<td>4</td>
<td>2004</td>
</tr>
<tr>
<td>Yale Law Journal</td>
<td>113</td>
<td>8</td>
<td>June 2004</td>
</tr>
</tbody>
</table>
AKRON LAW REVIEW
Volume 37, No. 4 2004

CONTENTS

INTRODUCTION .......................... Edward F. Sherman 589

ARTICLES

SYNGENTA, STEPHENSON AND THE FEDERAL
JUDICIAL INJUNCTIVE POWER ........... Lonny Sheinkopf Hoffman 605

SUPPLEMENTAL SERENDIPITY: CONGRESS’
ACCIDENTAL IMPROVEMENT OF
SUPPLEMENTAL JURISDICTION .......... James M. Underwood 653

"PROCEDURAL SWIFT": COMPLEX LITIGATION REFORM,
STATE TORT LAW, AND DEMOCRATIC VALUES ....... JoEllen Lind 717

DUE PROCESS LIMITATIONS ON PUNITIVE DAMAGES:
WHY STATE FARM WON'T BE THE LAST WORD ... Laura J. Hines 779

WILL EMPLOYMENT DISCRIMINATION
CLASS ACTIONS SURVIVE? ..................... Melissa Hart 813

MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
AMERICAN UNIVERSITY
LAW REVIEW

VOLUME 53  FEBRUARY 2004  NUMBER 3

SYMPOSIUM INTRODUCTION AND AGENDA ......................... 531

KEYNOTE ADDRESS ..................... The Honorable Susan Ness 533

PANEL DISCUSSION

FEW GATE KEEPERS, MANY VIEWS: WILL THE NEW RULES
COMPROMISE REPRESENTATION OF MARGINALIZED VOICES? ...... 547

ESSAYS

COMMENTS ON THE FCC’S RECENT MASS
MEDIA OWNERSHIP DECISION ..................... William Fishman 583

MONOLITH OR MOSAIC: CAN THE FEDERAL
COMMUNICATIONS COMMISSION LEGITIMATELY
PURSUE A REPETITION OF LOCAL CONTENT AT
THE EXPENSE OF LOCAL DIVERSITY? ........... Cheryl A. Leanza 597

ON MEDIA CONSOLIDATION, THE PUBLIC
INTEREST, AND ANGELS EARNING WINGS .... Victoria F. Phillips 613

MEDIA CONCENTRATION: A CASE OF POWER,
EGO, AND GREED CONFRONTING
OUR SENSIBILITIES ......................... W. Curtiss Priest 635

THE POLITICS AND POLICY OF MEDIA OWNERSHIP ... Ben Scott 645

BIOGRAPHIES OF SYMPOSIUM PARTICIPANTS .................... 679

Patricia Auferheide  Susan Ness
Leonard M. Baynes  Victoria F. Phillips
Jonathan P. Cody  Madeleine Plasencia
Mark N. Cooper  W. Curtiss Priest
W. Kenneth Ferree  Ben Scott
William Fishman  Peter Tannenwald
Cheryl A. Leanza  Margaret L. Tobey
Jeffery Lubbers  Anita L. Wallgren
Jane E. Mago  Stephen J. Wermiel
COMMENT

THE UHF DISCOUNT: SHORTHANDING THE
PUBLIC INTEREST ..................... Cecilia Rothenberger 689
CONTENTS

Foreword ................................................................. i

ARTICLES

Federal Tax-Exemption Requirements
For Joint Ventures Between Nonprofit Hospital Providers and For-Profit Entities:
Form Over Substance? ..................... GARY J. YOUNG, J.D., PH.D. 327
This article discusses the IRS rule on hospital joint ventures and related legal developments. The central thesis is that the IRS’s emphasis on operational control is misplaced from both a legal and a policy perspective, and reflects a decidedly strong preference for the form of a joint venture’s governance over the substance of its charitable and community service activities. More specifically, the article challenges the IRS position that the rule is a corollary of existing tax law principles. Additionally, social science research is presented to demonstrate that the rule is not likely to promote, and may in fact undermine, United States health policy objectives.

A Dutch Perspective:
The Limits of Lawful Euthanasia ..... UBALDUS DE VRIES, PH.D. 365
Dutch author Ubaldus de Vries reviews the current state of the euthanasia law in the Netherlands. The legislation, enacted in 2001, creates a medical exception that allows for euthanasia in cases where patients experience “hopeless and unbearable suffering.” A brief history of the Dutch approach to euthanasia is set forth, case law is reviewed, and the unique role of the doctor is examined in seeking to understand the extent of one’s right to euthanasia in the Netherlands. Because the courts must determine what constitutes “hopeless and unbearable suffering,” Professor de Vries analyzes the judicial interpretation of “suffering” and concludes that judicial interpretation has reached its limits, and thus by implication, the limits of lawful euthanasia have been reached.

Breaking Through the Silence:
The Illegality of Performing Resuscitation Procedures on the Newly Dead ............. DANIEL SPERLING, LL.B., LL.M. 393
Israeli author Daniel Sperling brings to light a disturbing practice that is taking place in some teaching hospitals throughout the world – the practice of resuscitation procedures on newly dead patients without the consent of the next-of-kin. Mr. Sperling examines some of the policies and procedures in place to prevent such practice and also looks at the ethical principles that should guide such procedures. The paper also reviews the general issue of consent in the context of medical decision-making and
discusses potential legal claims that might be available to persons who have not been consulted or informed before such procedures are performed. The evolving jurisprudence surrounding the treatment of the newly dead is analyzed and Mr. Spelling concludes by suggesting ways to improve upon the procedures currently in place at some teaching facilities.

Will the Supreme Court Finally Eliminate ERISA Preemption?  . DAVID L. TRUEMAN, J.D., PH.D.  427

David Trueman's article reviews the history of ERISA preemption by analyzing seminal Supreme Court cases and predicts the future of ERISA preemption in his analysis of recent federal case law. Traditionally, the ability to hold a managed care entity responsible for its actions has been hampered by a strict interpretation of the preemption clauses of ERISA but as the Supreme Court’s jurisprudence has evolved and loosened, several federal courts have allowed suits against managed care companies to go forward. Conflict among the federal circuits has arisen and the Supreme Court has granted certiorari to two cases from Texas in order to clarify ERISA preemption. Mr. Trueman discusses the future of ERISA preemption in light of these decisions.

Is There an Acceptable Answer to Rising Medical Malpractice Premiums?  ...................... WILLIAM P. GUNNAR, M.D.  465

This article explores the key issues involved in the attempts at reform of the present medical malpractice system. Investigating the effects that federal tort reform legislation would have on physicians, patients, lawyers, and the medical malpractice insurers, Dr. Gunnar succinctly outlines the issues surrounding the present "crisis in healthcare" and explores the separate interests involved. The article examines the economic forces influencing the medical malpractice insurance industry, reviews previous tort reform, and predicts the future of federal tort reform legislation. Dr. Gunnar concludes by proposing alternatives for malpractice reform.

Third Annual Health Law Colloquium:
The Medical Malpractice Crisis:
Federal Efforts, States’ Roles and Private Responses  ......................... TRANSCRIPT  501

The Current Medical Liability Insurance Crisis:
An Overview of the Problem,
Its Catalysts and Solutions  ............... CHRISTINA O. JACKIW  505

Session One: Professors Barry Furrow and David Hyman

Transcribed Speeches of
Professors Barry Furrow and David Hyman  ....................... 521

Session Two: Private Responses to the Crisis

Medical Societies' Self-Policing of Unprofessional Expert Testimony  ....... RUSSELL M. PELTON, J.D.  549

Transcribed Speech of Mr. Russell M. Pelton  ....................... 563
An Institutional Perspective on the Medical Malpractice Crisis ........................................ SARAH GUYTON 571
Transcribed Speech of Ms. Barbara Youngberg ..................................................... 581

The Patient Perspective:
Focusing on Compensating Harm ................. VALERIE WITMER 589
Transcribed Speech of Ms. Susan Schwartz .................................................. 601

An Insurance Perspective on the Medical Malpractice Crisis .............. NICOLE WILLIAMS KOVIAK 607
Transcribed Speech of Mr. Robert Mulcahey ...................................... 617

A Physician's Perspective on the Medical Malpractice Crisis ............... AMANDA CRAIG, R.N. 623
Transcribed Speech of Dr. Joseph Murphy ................................................. 633

List of Attendees ......................................................................................... 647
CRIME IMPACT STATEMENTS ..................................................329
Environmental Impact Statements, which detail the impact of particular development decisions on the environment, are required by many states. This Note argues that requiring Crime Impact Statements, which detail the impact of particular development decisions on crime, could spur builders to implement Crime Prevention through Environmental Design ("CPTED") principles in the planning process, reduce crime, and lead to better-designed cities.

A NATION'S GENES FOR A CURE TO CANCER: EVOLVING ETHICAL, SOCIAL AND LEGAL ISSUES REGARDING POPULATION GENETIC DATABASES ........................................359
The advent of the human genome sequence has focused research on understanding underlying genetic links to complex diseases such as cancer, asthma and heart disease. In the past few years, individual countries, such as Iceland, Estonia, Singapore and the United Kingdom, have created national databases of their citizens' DNA for comparative research. Most recently, an international consortium including Nigeria, Japan, China and the United States launched a $100 million project called the International HapMap to map the human genome according to haplotypes, blocks of DNA that contain genetic variation. Such population genetic databases present challenging ethical, social and legal issues, yet regulation of genetic information has developed sporadically, from region to region, without a consistent international standard. Without a clear understanding of the consequences of genetic research in terms of individual and community-wide discrimination and stigmatization, genetic databases raise concerns about the protection of genetic information.
This Note provides a survey of the evolving landscape of population genetic databases as a legislative and public policy tool for national and international regulators. It compares different approaches to regulating the collection and use of population genetic databases in order to understand what areas of consensus are formulating a foundation for an international standard. As the first population genetics project that will span multiple countries for the collection of DNA, the International HapMap has the potential to become an influential standard for the protection of population genetic information. This Note highlights issues among the national databases and the HapMap project that raise ethical, social and legal concerns for the future and recommends further protections for both individual donors and community interests.
ABANDONING THE CAUSE: AN INTERSTATE COMPARISON OF CANDIDATE WITHDRAWAL AND REPLACEMENT LAWS

In 2002, the New Jersey Supreme Court allowed Frank Lautenberg to replace Robert Torricelli as the Democratic nominee for United State Senator. In light of this incident, this Note examines the variety of candidate withdrawal and replacement laws among the states. It finds that these laws are woefully inadequate to deal with strategic substitutions because they misconstrue the nature of electoral campaigns. Instead, the Note suggests that such laws should be designed (i) to remain consistent to the underlying purpose of the primary law scheme, that is, to reduce the influence of political bosses, (ii) to provide objective criteria in order to avoid the presence or appearance of undue judicial influence in the political process, and (iii) to distinguish legitimate political decisions from corrupt practices.

LABOR RIGHTS AND THE ATCA: CAN THE ILO’S FUNDAMENTAL RIGHTS BE SUPPORTED THROUGH ATCA LITIGATION?

This Note examines the possibility of supporting the International Labour Organization’s (“ILO’s”) fundamental rights, as set out in the 1998 Declaration on Fundamental Principles and Rights at Work, though litigation under the Alien Tort Claims Act (“ATCA”). In response to labor rights violations abroad, the ATCA has been endorsed as a vehicle for aggrieved employees to bring suit in U.S. courts for violations of transnational labor standards. Several cases in support of labor rights rest their claims on the act. These cases contemplate a broader scope for the ATCA, one that includes labor rights violations as violations of international law, thereby making the ATCA a useful tool for promoting corporate accountability abroad and global labor rights. This Note, however, argues that while the ATCA can be useful in supporting some labor rights, it will be unable to support all four of the ILO’s fundamental labor rights due to its requirement that the tort committed be in violation of the law of nations. As a result, this Note argues that those seeking to support labor rights should either (1) use the ATCA to support labor rights violations that are committed through means already considered part of customary international law (such as torture or arbitrary detention); or (2) support new federal legislation that explicitly supports the ILO’s fundamental labor rights.
CONTENTS

ARTICLE

Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts

Barry Friedman 1211

NOTES

Valuation of Diversity Jurisdiction Claims in the Federal Courts

Jaren Casazza 1280

Rights as Property

Olivia A. Radin 1315

Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment

Hannah Shay Chanoine 1356

COMMENTARY

The Domesticated Liberty of Lawrence v. Texas

Katherine M. Franke 1399
CONTENTS

SYMPOSIUM

RACE AS PROXY IN LAW AND SOCIETY:
EMERGING ISSUES IN RACE AND THE LAW

AN INTRODUCTION TO RACE AS PROXY .......... Mark R. Bradford 929
RACE AS PROXY: AN INTRODUCTION .......... Michele Goodwin 931

ARTICLES

DEMOCRACY, CHOICE, AND THE IMPORTANCE OF
VOICE IN CONTEMPORARY MEDIA ............... Blake D. Morant 943

PROCESSING CIVIL RIGHTS SUMMARY
JUDGMENT AND CONSUMER
DISCRIMINATION CLAIMS ................. Deseree A. Kennedy 989

RACE AS PROXY: SITUATIONAL RACISM
AND SELF-FULFILLING STEREOTYPES ............. Lu-in Wang 1013

RACE AS A PROXY FOR DRUG RESPONSE:
THE DANGERS AND CHALLENGES OF
ETHNIC DRUGS ................................ Rene Bowser 1111

GOOD ENOUGH TO USE FOR RESEARCH,
BUT NOT GOOD ENOUGH TO BENEFIT
FROM THE RESULTS OF THAT RESEARCH:
ARE THE CLINICAL HIV VACCINE TRIALS
IN AFRICA UNJUST? ............................... Ruqaijah Yearby 1127

REPARATIONS FOR APARTHEID'S VICTIMS:
The PATH TO RECONCILIATION? .............. Penelope E. Andrews 1155

THE CULTURAL WAR OVER REPARATIONS
FOR SLAVERY ................................... Alfred L. Brophy 1181

THE MASTER NORM: ON THE QUESTION
OF REDRESSING SLAVERY ............... Maria Grahn-Farley 1215
NOTES AND COMMENTS

PUBLICITY AND PRIVACY RIGHTS: EVENING OUT
THE PLAYING FIELD FOR CELEBRITIES AND
PRIVATE CITIZENS IN THE MODERN
GAME OF MASS MEDIA ...................... Claire E. Gorman 1247

ATKINS v. VIRGINIA: DEATH PENALTY FOR
THE MENTALLY RETARDED—CRUEL AND
UNUSUAL—THE CRIME,
NOT THE PUNISHMENT ..................... Kelly Christine Elmore 1285

FATHER CONSTITUTION, TELL THE POLICE TO
STAY ON THEIR OWN SIDE: CAN
EXTRA-JURISDICTITIONAL ARRESTS MADE IN
DIRECT VIOLATION OF STATE LAW EVER
CROSS THE FOURTH AMENDMENT’S
“REASONABLENESS” LINE? .................. Nicholas L. Lopuszynski 1347
ARTICLE

Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach .......... Nancy A. McLaughlin 1

COMMENT

Addressing California’s Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step? ................. Ryan Waterman 117

BOOKS REVIEWED ........................................ 205

The Ecology Law Quarterly is printed on reclaimed paper
ARTICLES

International Law at a Grotian Moment: The Invasion of Iraq in Context .................................................. Ibrahim J. Gassama 1

The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation ....................... Hilary K. Josephs 53

International Labor Standards in Free Trade Agreements of the Americas ..................................................... Thomas J. Manley 85

Ambassador Luis Laulredo

BOOK REVIEWS


International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law .... Johan D. van der Vyver 133

COMMENTS

A Piece of the Puzzle: Telemedicine as an Instrument to Facilitate the Improvement of Healthcare in Developing Countries? ..................................................... Leah B. Mendelsohn 151

Adding Smoke to the Fire: Ministry of Finance (Tax Office) v. Philip Morris GMBH and the Expanding Concept of Permanent Establishment ......................................................... Michiel Muizelaar 211

Was Its Bite Worse Than Its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate into Costs to the United States ......................................................... Anupama J. Naidu 271

Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law ............................................................ Daniel W. Schwartz 317
CONTENTS

Editor's Page viii

ARTICLES

Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders 1
Nicholas W. Fels

Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines 21
William A. Mogel
John P. Gregg

Reconstituting the Natural Gas Industry From Wellhead to Burnertip 57
Richard J. Pierce, Jr.

Open Access and Transition Costs: Will the Electric Industry Transition Track the Natural Gas Industry Restructuring? 113
Donald F. Santa, Jr.
Clifford S. Sikora

Retail Wheeling: Is This Revolution Necessary? 161
Hon. Richard D. Cudahy

Securitization and Stranded Cost Recovery 173
Walter R. Hall II

SUBMITTED COMMITTEE REPORTS

Natural Gas 217
Oil Pipeline 259
European Environmental Law Review

Volume 13 No 4 April 2004

Contents

Country Reports

Hungary 98

Registration, Evaluation, Authorisation and Restrictions of Chemicals: An Analysis 99

Ruxandra Cana

Safety of Nuclear Installations, Spent Nuclear Fuel and Radioactive Waste Management in the EU: A Legal Analysis 109

Ikbal Abbassi A. Kacem

Book Review

Scientific Evidence in European Environmental Rule-Making: The Case of the Landfill and End-of-Life Vehicles Directives by Andrea Biondi, Marcello Cecchetti, Stefano Grassi and Maria Lee Reviewed by Carolyn Abbot 115

Eurobrief 118
Articles

Parity Rules: Mapping Regulatory Treatment of Similar Services
By Sherille Ismail .........................................................447

The notion of regulatory parity has greatly impacted the evolution of American communications regulation, but the difficulties associated with applying this standard are frequently under-appreciated by industry participants. Throughout this Article, the Author acknowledges the difficulties in applying equal treatment standards to operators of various communications, video, and data services. Mr. Ismail asserts that several problems arise with attempts to ameliorate apparent disparities in how entities are regarded under current regulations, including difficulties in assessing revenue resources, channel control, and service delivery methods. The Article concludes that parity is difficult to define and apply in an effort to eliminate inefficiencies associated with disparate treatment of similarly-situated players. Therefore, a more workable approach to achieving equal treatment of industry participants would include concentrating on rights by resolving the issues according to identifiable policies instead of general notions of equality.

Wandering Along the Road to Competition and Convergence—The Changing CMRS Roadmap
By Leonard J. Kennedy and Heather A. Purcell .........................489

In this timely follow-up piece to a 1998 piece entitled A Federal Regulatory Framework that is "Hog Tight, Horse High, and Bull Strong," the Authors of this Article revisit the progress of American commercial mobile radio services ("CMRS") proliferation and regulation. The piece expresses the concern that balkanization has continued to plague wireless regulation in the United States, as misguided legal analyses and state regulation further hinder wireless development across the nation. While the European Union has witnessed unprecedented growth in this sector, conflicting court and FCC decisions and continued federal, state, and local burdens on CMRS have placed hurdles throughout the process of efficient U.S. wireless technology adoption in many fundamental areas. Challenges such as consumer protection, convergence, and the optimization of competition have further complicated the CMRS
regulatory scene. The Authors conclude that in order to promote a healthy wireless communications industry in the United States in the future, obstacles to sustainable competition, regulatory predictability, limited taxation, and facilitated investment must soon be overcome.

_VERIZON COMMUNICATIONS, INC. v. FCC—TELECOMMUNICATIONS ACCESS PRICING AND REGULATOR ACCOUNTABILITY THROUGH ADMINISTRATIVE LAW AND TAKINGS JURISPRUDENCE_
By Michael J. Legg ...............................................................563

In this Article, Michael Legg examines the Supreme Court decision in Verizon Communications, Inc. v. FCC, and asserts that shortcomings associated with administrative law have led to an environment of unaccountability in the sphere of telecommunications regulations. Arguing that communications oversight has become exceedingly reliant upon regulatory expertise and that power over economic policy has been excessively ceded to the regulators, the Author concludes that Congress should become more involved in access pricing to prevent further undermining of the democratic governance in this important sector. Finally, Mr. Legg maintains that without further guidance with respect to the relationship between TELRIC and the Takings Clause, further ratesetting cases may become inevitable.

_A HORIZONTAL LEAP FORWARD: FORMULATING A NEW COMMUNICATIONS PUBLIC POLICY FRAMEWORK BASED ON THE NETWORK LAYERS MODEL_
By Richard S. Whitt .......................................................587

Over the course of the last several decades, legal and structural fictions have evolved and have been integrated into the reality of communications theory and regulation. In this Article, the Author argues that the development of a "layers approach" to communications regulation of IP networks would lead to greater efficiencies while addressing public policy issues. By reconceptualizing communications regulation along horizontal layers, Mr. Whitt posits that the logical walls surrounding the key components of IP networks should be removed to promote increased functionality of communications oversight and management. In this way, the outdated vertical separation associated with the legal legacy of communications regulation may be replaced by a horizontal system designed to accommodate new technologies and functions, as opposed to attempting to force congruency between new network characteristics and twentieth century regulations.

Note

_STAYING AFOLOAT IN THE INTERNET STREAM: HOW TO KEEP WEB RADIO FROM DROWNING IN DIGITAL COPYRIGHT ROYALTIES_
By Emily D. Harwood .....................................................673

In the 1990's, the development of "streaming" technology allowed webcasters to begin broadcasting music on the Internet. The public took advantage of a plethora of free media players, and the number of web-based radio stations soared. However, a crippling dispute over broadcast rates left the viability of this technology in doubt. This Note criticizes current policies that curtail radio streaming by providing harsh financial restrictions on webcasters. In looking to the future, this Note argues that Congress should extend licensing exemptions to cover those Internet stations most like their AM/FM counterparts who do not have to pay additional fees.
# TABLE OF CONTENTS

## TRIBUTE

**TRIBUTE**

**Edwin M. Schroeder** ........................................... **Steven G. Gey**

## ARTICLES

**Are Women More Ethical Lawyers? An Empirical Study** ........................................ **Patricia W. Hatamyar & Kevin M. Simmons** 785

**Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law** ........ **Kenneth R. Davis** 859

**The Market for Elite Law Firm Associates** ........................................ **Tom Ginsburg & Jeffrey A. Wolf** 909

**The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution** .......... **Huyen Pham** 965

## COMMENTS

**Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief** ........................................... **Thomas Burch** 1005

**Between “Merit Inquiry” and “Rigorous Analysis”: Using Daubert to Navigate the Gray Areas of Federal Class Action Certification** ............... **L. Elizabeth Chamblee** 1041

CONTENTS

SPECIAL REPORT

No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia ............... Maria McFarland Sánchez-Moreno 1663
& Tracy Higgins

NOTE

Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum .......................... Jason Adolfo Otaño 1806
2004 SYMPOSIUM ARTICLES

ACCESS TO JUSTICE: CONNECTING PRINCIPLES TO PRACTICE
Deborah Rhode 369

Richard Zorza 423

2004 SYMPOSIUM TRANSCRIPT
ACCESS TO JUSTICE: DOES IT EXIST IN CIVIL CASES? 455

NOTES

CONFLICT AND SOLIDARITY: THE LEGACY OF EVANS V. JEFF D.
Daniel Nazer 499

THE MIGUEL Estrada CONFIRMATION HEARINGS AND THE CLIENT OF A GOVERNMENT LAWYER
Joshua Panas 541

DESTIGMATIZING THE REASSIGNMENT POWER
James A. Worth 565
# CONTENTS

## ARTICLES

The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws

*Andrea A. Curcio* .......................................................... 565

Lawyers as “Tattletales”: A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information

*David A. Green* .......................................................... 617

Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism

*Thaddeus Mason Pope* .................................................. 659

## NOTES & COMMENTS

The Meaning of Fifth and Sixth Amendment Rights: Sentencing in Federal Drug Cases after *Apprendi v. New Jersey* and *Harris v. United States*

*Derrick Bingham* ....................................................... 723

A Malpractice Suit Waiting to Happen: The Conflict Between Perfecting Security Interests in Patents and Copyrights (A Note on *Peregrine, Cybernetic*, and Their Progeny)

*R. Scott Griffin* ....................................................... 765
Should Juvenile Adjudications Count as Convictions for 
\textit{Apprendi} Purposes?

\textit{Kimberly L. Johnson} ......................................................... 791
CONTENTS

ARTICLES

Plea Bargaining Outside the Shadow of Trial .................................. Stephanos Bibas ............... 2463

Plea Bargaining and Criminal Law's Disappearing Shadow ....... William J. Stunts .............. 2548

BOOK REVIEW

Comparative Constitutional Law in a Global Age ......................... Ruti Teitel .................. 2570

NOTES

The Implications of Coalitional and Influence Districts for Vote Dilution Litigation ................................................................. 2598

The Ties That Bind: Coalitions and Governance Under Section 2 of the Voting Rights Act ...................................................... 2621

Challenging Concentration of Control in the American Meat Industry ........................................................ 2643

Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action ............................................. 2665

Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage ......................................................... 2684
CONTENTS

Satisfying the “Appearance of Justice”:
The Uses of Apparent Impropriety in
Constitutional Adjudication ................................................................. 2708

Making Outcasts Out of Outlaws:
The Unconstitutionality of
Sex Offender Registration and
Criminal Alien Detention ................................................................. 2731

RECENT CASES

Constitutional Law — Free Speech —
Ninth Circuit Upholds Oregon Sign
Regulation That Distinguishes Among
Signs Based on Their “Onsite” or
Warner, 353 F.3d 774 (9th Cir. 2003) ................................................ 2753

Constitutional Law — First
Amendment — California Supreme
Court Upholds Compulsory
Insurance Coverage of
Contraceptives over Establishment
and Free Exercise Objections. —
Catholic Charities of Sacramento,
Inc. v. Superior Court, 85 P.3d 67
(Cal. 2004) .................................................................................................. 2761

International Law — Genocide —
U.N. Tribunal Finds That Mass
Media Hate Speech Constitutes
Genocide, Incitement to Genocide,
and Crimes Against Humanity. —
Prosecutor v. Nahimana, Barayagwiza,
and Ngese (Media Case), Case No.
ICTR-99-52-T (Int’l Crim. Trib. for
Rwanda Trial Chamber I Dec. 3, 2003) .............................................. 2769
CONTENTS

Constitutional Law — Free Speech —
Second Circuit Upholds
New York’s Anti-Mask Statute
Against Challenge by Klan-Related
Group. — Church of the American
Knights of the Ku Klux Klan v.
Kerik, 356 F.3d 197 (2d Cir. 2004) ........................................ 2777

Abortion Rights — Parental Consent
Requirement — Arizona Court of
Appeals Holds That a Minor Must
Show Fitness by Clear and Convincing
Evidence To Bypass the State’s
Parental Consent Requirement. —

Constitutional Law — Substantive
Due Process — Eleventh Circuit
Upholds Florida Statute Barring
Gays from Adopting. — Lofton v.
Secretary of the Department of
Children & Family Services,
538 F.3d 804 (11th Cir. 2004) ............................................ 2791

CORRESPONDENCE .......................................................... 2799

RECENT PUBLICATIONS ..................................................... 2804
International Journal of Law and Psychiatry

Volume 27, Number 3, May/June 2004

CONTENTS

Miroslav Goreta
Ivana Peko Ćović


M. Cima
H. Nijman
H. Merckelbach
K. Kremer
S. Hohlack
E.M. Coles

215 Claims of Crime-Related Amnesia in Forensic Patients

223 Psychological Support For the Concept of Psycholegal Competencies

Martin Hildebrand
Corine de Ruiter

233 PCL-R Psychopathy and Its Relation To DSM-IV Axis I and II Disorders in a Sample of Male Forensic Psychiatric Patients in the Netherlands

Mark S. Lipian
Mark J. Mills
Anne Brantman

249 Assessing the Verity of Children’s Allegations of Abuse: A Psychiatric Overview

Charles A. Morgan III
Gary Hazlett
Anthony Doran
Stephan Garrett
Gary Hoyt
Paul Thomas
Madelon Baranoski
Steven M. Southwick
Tim Rogers
Séan Whyte
Robin Jacoby
Tony Hope

265 Accuracy of Eyewitness Memory For Persons Encountered During Exposure To Highly Intense Stress

281 Diagnostic Validity and Psychiatric Expert Testimony

291 Testing Doctors’ Ability To Assess Patients’ Competence


ISSN 0160-2527
(295)
INTERNATIONAL LEGAL MATERIALS
—Contents—

TREATIES AND OTHER AGREEMENTS

Text of Agreement ........................................................... 515

JUDICIAL AND SIMILAR PROCEEDINGS

European Court of Human Rights (ECHR): Case of Jahn and Others v. Germany
Text of Decision ............................................................. 522

European Court of Human Rights (ECHR): Case of Slivenko v. Latvia
Text of Decision ............................................................. 543

International Court of Justice (ICJ): Case Concerning Avena and Other Mexican Nationals
(Mexico v. United States of America)
Text of Decision ............................................................. 581

International Court of Justice (ICJ): Application for Revision of Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)
Text of Decision ............................................................. 661

Uganda Supreme Court: Constitutional Appeal of Onyango-Obbo and Mwenda
Text of Decision ............................................................. 686

United Nations Compensation Commission (UNCC) Governing Council: Report and Recommendations Made by the Panel of the Commissioners Concerning the Third Installment of "F4" Claims
Text of Report ............................................................... 704

OTHER DOCUMENTS RECEIVED ........................................ 746
# Table of Contents

## Articles

<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow &amp; Shavell</td>
<td>Ronen Avraham, David Fortus, Kyle Logue</td>
<td>1125</td>
</tr>
<tr>
<td>Embracing the Writing-Centered Legal Process</td>
<td>Suzanne Ehrenberg</td>
<td>1159</td>
</tr>
<tr>
<td>Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups</td>
<td>Tom Lininger</td>
<td>1201</td>
</tr>
<tr>
<td>Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory</td>
<td>Ilya Somin</td>
<td>1287</td>
</tr>
</tbody>
</table>

## Notes

<table>
<thead>
<tr>
<th>Title</th>
<th>Author(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Psychotherapist-Patient Privilege and Post-Jaffe Confusion</td>
<td>Daniel M. Burroker</td>
<td>1373</td>
</tr>
<tr>
<td>Riding Without a Helmet: Liability, Social Efficiency, and the More Perfect Wisconsin Compromise to Motorcycle Helmet Liability</td>
<td>John W. Schuster</td>
<td>1391</td>
</tr>
<tr>
<td>Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine</td>
<td>Christopher Russell Smith</td>
<td>1419</td>
</tr>
</tbody>
</table>
FOCUS ON *GRUTTER AND GRATZ*

You’ve Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases

Jonathan Alger
Marvin Krislov

The unprecedented number, variety, and quality of amicus briefs in the University of Michigan admissions lawsuits appear to have influenced the Supreme Court’s decisions in *Gratz* and *Grutter*. Comparing the amici in the Michigan cases and *Bakke*, this article explores the role of amici in affecting judicial decisions. The article concludes that the extent to which amicus briefs can and should play a significant role in litigation depends largely on whether amici can best: (1) supply interdisciplinary or specialized research and information that can independently validate or contradict important claims of the parties; and (2) describe the societal importance and implications of decisions.

Institutional Academic Freedom—A Constitutional Misconception: Did *Grutter v. Bollinger* Perpetuate the Confusion?

Richard H. Hiers

Recently the Supreme Court stated in dicta that public colleges and universities themselves are entitled to academic freedom or institutional autonomy under the First Amendment. Two federal appellate courts had previously so stated. There is no basis in either Supreme Court holdings or in constitutional theory for such statements. The idea of institutional academic freedom or autonomy under the First Amendment rests solely upon concurring opinions and dicta, and is best characterized as a misconception.
Judicial Deference to Educational Judgment:
Justice O’Connor’s Opinion in Grutter Reapplies
Longstanding Principles, As Shown By Rulings Involving
College Students in the Eighteen Months Before Grutter
Edward N. Stoner II
J. Michael Showalter

In Grutter, the Supreme Court deferred to the University’s “educational judgment” that diversity in its student body is essential to its educational mission. This deference is not new: the special place of higher education has been recognized since the Renaissance. Moreover, judicial deference to the educational judgment of college administrators is also illustrated by numerous recent rulings involving college students. The lesson for educators: it is imperative to exercise this educational judgment carefully, and often.

ARTICLES

Jeffrey R. Armstrong

The 1980 Bayh-Dole Act has had an extraordinarily positive effect on the U.S. research university sector. Some suggest, however, that Bayh-Dole may also have an “anticommons” effect, caused by a proliferation of patent rights in the area of upstream technology tools, which impairs the ability of a single entity to easily commercialize products. This article examines whether Madey v. Duke University, widely seen as contracting the right of a university to freely use third-party patented technology for research or even educational purposes, may exacerbate the “anticommons” effect by moving this problem even further upstream and impairing pure research and development activities.

University Controlled or Owned Technology: The State of Commercialization and Recommendations
Mark L. Gordon

Technology commercialization by universities holds continuing great promise, but faces many challenges. This article outlines the history of university commercialization, growth trends, selected commercialization models employed, and analyzes the tension of commercialization efforts with universities’ missions. In addition, some practical concerns for legal practitioners are presented in addition to recommendations for universities as they focus their commercialization efforts or re-evaluate their current efforts.
BOOK REVIEWS

Review of Richard S. Ruch's *Higher Ed, Inc.: The Rise of the For-Profit University*
David Palfreyman 673

Review of Alexander Tsesis' *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*
Kevin O'Shea 681

A Necessary but Insufficient Solution: A Review of Abigail & Stephan Thernstrom's *No Excuses: Closing the Racial Gap in Learning*
Maureen T. Hallinan 689

Review of Stephen Cole & Elinor Barber's *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students*
Alvin Bernard Tillery, Jr. 703

Review of William G. Bowen & Sarah A. Levin's *Reclaiming The Game: College Sports and Educational Values*
Kermit L. Hall 711
Anre Venter 717
Andrew Zimbalist 731
Remarks

Remarks for the Celebration of the Twentieth Anniversary of *The Journal of Contemporary Health Law and Policy*
Leon R. Kass, M.D. ..........................................................275

Articles

Deaths Associated with Abortion Compared to Childbirth - A Review of New and Old Data and the Medical and Legal Implications
David C. Reardon, Ph.D., Thomas W. Strahan, J.D.,
John M. Thorp, Jr., M.D., and Martha W. Shuping, M.D. ...............279

The Reawakening of Complementary and Alternative Medicine at the Turn of the Twenty-First Century: Filling the Void in Conventional Biomedicine
Andrew M. Knoll, M.D., J.D. ................................................329

Intellectual Property Reform for Genetically Modified Crops: A Legal Imperative
Carlos Scott López ..........................................................367

Essay

The Health Insurance Portability and Accountability Act (HIPAA) Implementation via Case Law
Joan M. Kiel, Ph.D., C.H.P.S. .............................................435

Note

Discovery Rule in Medical Malpractice Under the Federal Tort Claims Act: The Supreme Court's Decision in *United States v. Kubrick* Was not Meant To Be Secondary Authority
Cory Zajdel ............................................................443

Comments

Please, Sir, I Want Some More: Congress' Carrot-and-Stick Approach to Pediatric Testing Leaves Therapeutic Orphans Needing More Protection
Gregory Hazard ..........................................................467

The Medical Malpractice Crisis – Who Will Deliver the Babies of Today, The Leaders of Tomorrow?
Lauren Elizabeth Rallo ....................................................509

Internet Drug Sales: Is It Time to Welcome "Big Brother" Into Your Medicine Cabinet?
Ludmila Bussiki Silva Clifton ............................................541

Twentieth Anniversary Cumulative Index
SPECIAL ISSUE - INFANTS AND TODDLERS IN COURT

SEPARATION AND REUNIFICATION: USING ATTACHMENT THEORY AND RESEARCH TO INFORM DECISIONS AFFECTING THE PLACEMENTS OF CHILDREN IN FOSTER CARE
BY DOUGLAS F. GOLDSMITH, DAVID OPPENHEIM, AND JANINE WANLASS .............................................................. 1

ZERO TO THREE: CRITICAL ISSUES FOR THE JUVENILE AND FAMILY COURT
BY JULIE COHEN AND VICTORIA YOUCHA .......................................................... 15

BUILDING BRIDGES FOR BABIES IN FOSTER CARE: THE BABIES CAN’T WAIT INITIATIVE
BY SHERYL DICKER AND ELYSA GORDON .......................................................... 29

QUESTIONS EVERY JUDGE AND LAWYER SHOULD ASK ABOUT INFANTS AND TODDLERS IN THE CHILD WELFARE SYSTEM
BY JOY D. OSOPFSKY, CANDICE L. MAZE, JUDGE CINDY S. LEDERMAN,
CHIEF JUSTICE MARTHA GRACE, AND SHERYL DICKER ........................................... 45

FETAL ALCOHOL SPECTRUM DISORDER (FASD) AND THE ROLE OF FAMILY COURT JUDGES IN IMPROVING OUTCOMES FOR CHILDREN AND FAMILIES
BY DIANE V. MALBIN ...................................................................................... 53

ARE THOSE COOKIES FOR ME OR MY BABY? UNDERSTANDING DETAINED AND INCARCERATED TEEN MOTHERS AND THEIR CHILDREN
BY LESLIE ACOCOA ....................................................................................... 64

ADDRESSING INFANT AND TODDLER ISSUES IN THE JUVENILE COURT: CHALLENGES FOR THE 21ST CENTURY
BY CONSTANCE M. LILLAS, JUDGE LESTER LANGER, AND MONICA DRINANE .............................................................. 81
CONTENTS

ARTICLES


Guiding Civil Case Settlement Conferences and Their Aftermath: The Need To Amend Illinois Supreme Court Rule 218 ................. Jeffrey A. Parness & Lance C. Cagle 779


NOTE

Remembering the Victims of Sexual Abuse: The Treatment of Juvenile Sex Offenders in In re J.W. ...................... Joanna C. Enstice 941
ARTICLES

World Agricultural Trade in Purgatory: The Uruguay Round Agriculture Agreement and Its Implications for the DOHA Round
Raj Bhala ................................................................. 691

Special and Differential Treatment in International Trade Law: A Concept in Search of Content
Uché Ewelukwa .......................................................... 831

Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs
Zakir Hafez ............................................................... 879

Trade Remedy Laws in the United States: Bilateral Grain Trade Disputes with Canada
Won W. Koo & Ihn H. Uhn ............................................ 921

CASE COMMENTS

Stephen A. Bott ....................................................... 953

Constitutional Law—Search and Seizure: The Price for Participation Just Went Up, Mandatory Suspicionless Drug Testing of Students Involved in Extracurricular Activities via the Fourth Amendment
Lisa K. Brewster ..................................................... 983

CUMULATIVE INDEX .................................................. 1013
SYMPHONIUM ON CRIMINAL PUNISHMENT

CONTENTS

FOREWORD

Foreword ................................... Diarmuid F. O'Scanlairn 303

SPEECHES

Why Mandatory Minimums
Make No Sense .............................. John S. Martin, Jr. 311

Sentencing Reform, The Federal Criminal
Justice System, and Judicial and
Prosecutorial Discretion ....................... William B. Mateja 319

Mandatory Minimums: Fine in Principle,
Inexcusable When Mindless ................. G. Robert Blakey 329

ESSAYS

Punishment, Guilt, and Shame in
Biblical Thought .............................. George P. Fletcher 343

Aquinas and Capital Punishment:
The Plausibility of the Traditional
Argument .................................. Christian Brugger 357

Punishment, Forgiveness, and the
Proxy Problem ................................ Daniel N. Robinson 373

Copyright © 2004 by Thomas J. White Center on Law & Government
Prescription For Safer Communities ........Chuck Colson and Pat Nolan 387

Child Pornography: An Unspeakable Crime
Augmented by the Court ...................... Orrin G. Hatch 401

Our Millian Constitution: The Supreme
Court’s Repudiation of Immorality as a
Ground of Criminal Punishment........Keith Burgess-Jackson 407

Does Attempted Murder Deserve Greater
Punishment than Murder? Moral Luck
and the Duty to Prevent Harm..........Russell Christopher 419

Economic and Historical Implications
for Capital Punishment Deterrence ......Rudolph J. Gerber 437

The Burdens of Representing the Accused
in an Age of Harsh Punishment ..........Abbe Smith 451

ARTICLES

On Aristotelian Criminal Law:
A Reply to Duff.......................... Kyron Huigens 465

Moral Ambiguity in White Collar
Criminal Law.............................. Stuart P. Green 501

Boundary Changes and the Nexus
Between Formal and Informal
Social Control: Truancy Intervention
as a Case Study in Criminal
Justice Expansionism...................Gordon Bazemore,
Leslie A. Leip, and
Jeanne Stinchcomb 521

NOTES

Victims’ Rights and the Danger of
Domestication of The
Restorative Justice Paradigm ..........Christa Obold-Eshleman 571

How Can the United States Rectify
its Post-9/11 Stance on
Noncitizens' Rights?......................Quinn H. Vandenber 605
CONTENTS

ARTICLES

OCEANS APART OVER SUNKEN SHIPS: IS THE UNDERWATER CULTURAL HERITAGE CONVENTION REALLY WRECKING ADMIRALTY LAW? .......... Liza J. Bowman 1

TAX TREATMENT OF CHARITABLE CONTRIBUTIONS IN CANADA: THEORY, PRACTICE, AND REFORM .................... David G. Duff 47

BLOCS, SWARMS, AND OUTLIERS: CONCEPTUALIZING DISAGREEMENT ON THE MODERN SUPREME COURT OF CANADA ............... Peter McCormick 99

WORK, SEX, AND SEX-WORK: COMPETING FEMINIST DISCOURSES ON THE INTERNATIONAL SEX TRADE ............. Kate Sutherland 139

BOOK REVIEWS

COMMERCIAL LAW AND HUMAN RIGHTS EDITED BY STEPHEN BOTTOMLEY & DAVID KINLEY ...... Freya Kodar 169

LESSONS OF EVERYDAY LAW/LE DROIT DU QUOTIDIEN BY RODERICK A. MACDONALD ......................... Rosanna Langer 176

PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW BY ROBERT C. POST WITH K. ANTHONY APPIAH, JUDITH BUTLER, THOMAS C. GREY, & REVA B. SIEGEL ................. Sonia Lawrence 180

CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? BY JANET L. HIEBERT .................. Lorne Sossin 189

BOOK NOTES

REVIEWS OF RECENT LEGAL PUBLICATIONS .......................... 197

VOLUME 42 NUMBER 1 SPRING 2004
Drafting Confidentiality, Non-Compete, And Non-Solicitation Agreements: The Employee’s Wish List
Mary L. Mikva
Negotiating the terms of an employment agreement is usually more about the benefits to the employee than to the employer. But in many cases, the employer will want the employee to sign a confidentiality, non-compete, or non-solicitation agreement. The employee or prospective employee might not be too interested, but this is the time for action—the only time there is any leverage for the employee is when the employer wants something. In this article, Mary L. Mikva discusses the basics of confidentiality, non-compete, and non-solicitation agreements, and the employee-favorable terms including the statement of consideration for the covenant, the statement of the employer’s business interests, the definition of the scope of the covenant, the modification/severability clause, the choice of law agreement, the provision for remedies, the integration clause, and the assignment clause.

Environmental Disclosures After Sarbanes-Oxley
Andrew N. Davis and Stephen J. Humes
The effects of the Sarbanes-Oxley Act are already being felt throughout the nation. But what effect does the Act have on environmental disclosures? Does the corporation have to disclose more than the EPA requires? In this article, Andrew N. Davis and Stephen J. Humes discuss the disclosure of “material” information, SEC Regulation S-K (Items 101, 103, and 303), SEC/EPA coordination, the EPA ECHO Web site, the impetus of “corporate citizenship,” the usefulness of relevant ASTM standards, taking advantage of the safe harbor under the Private Securities Litigation Reform Act, and insuring against liability.

An Introduction To Antidilution Provisions (Part 1)
David A. Broadwin
An inherent danger of venture capital transactions is that the value of outstanding shares might be diluted by the issuance of new shares. The only way to deal with the problem is through a well-designed antidilution provision. In this article, David A. Broadwin discusses the main contexts in which antidilution provisions are important, the low-priced issuance problem, why risk-shifting is important, and the typical terms of the provision, including the definition of additional securities, exceptions to the definition, formulas for certain types of adjustments, adjustments for structural changes in the business, adjustments for financially dilutive events, and miscellaneous ministerial clauses.

Implementing Attorney Ethics Policies In Law Firms And Corporate Law Departments After Sarbanes-Oxley (Part 2 With Hypotheticals and Forms)
Michael W. Tankersley
The Attorney Conduct rules under the Sarbanes-Oxley Act have raised many questions about what to report, when to report it, and under what circumstances. Answers are emerging, but the development in this area will be continuing. In this article, Michael W. Tankersley discusses protection of issuer confidences and privileges, whether or not the company should consider forming a qualified legal compliance committee, resolving ambiguities that exist in the Attorney Conduct rules, and examines hypotheticals illustrating the application of the rules.
Securities Regulation
Law Journal

Volume 32 Number 2 Summer 2004

Corporate Governance Update:
Real Time Disclosure Becomes a
Reality and the SEC Nixes Shell
Company Schemes
By Joris M. Hogan 142

State Responses to Corporate
Corruption: Thirteen Mini
Sarbanes-Oxley Acts
By Timothy A. French and
Larry D. Soderquist 167

Sec Enforcement of Auditor
Independence Violations: Recent
Cases and Developments
By Russell G. Ryan 178

Selective Waiver in the Context of
Government Investigations: A
Justified Exception to the Third-
Party Disclosure Waiver Corollary
to the Attorney-Client Privilege and
Work Product Doctrine Rules
By M. Owen Donley III 194

Control and Restricted Securities —
Determining Whether a Particular
Person is an "Affiliate" of an Issuer
By Robert A. Barron 213

Quarterly Survey of SEC
Rulemaking and Major Appellate
Decisions
By Victor M. Rosenzweig 218

Mat #40206355
TABLE OF CONTENTS

ARTICLES

Merit Selection: A Better Method to Select South Dakota's Circuit Court Judges ........ Honorable Tim Dallas Tucker and Christina L. Fischer 182

Daubert, Kumho, and Its Impact on South Dakota Jurisprudence: An Update ...... Honorable Janine M. Kern and Scott R. Swier 217

Twenty-Five Propositions on Writing and Persuasion .................... Jonathan K. Van Patten 250

The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform ...... Patrick M. Garry, Candice J. Spurlin, Debra A. Owen, William A. Williams, and Lindsay J. Efting 275

STUDENT ARTICLES

State v. De La Rosa: Creating a De Minimis Exception to the Fourth Amendment .... Andrew Lindstad 313

Western Wireless Corp. v. Department of Revenue: State Taxation on Interstate Transactions and How to Comply with the Dormant Commerce Clause ............... Dylan A. Wilde 341

The Whole is Greater than the Sum of the Parts: The Discipline of Benjamin J. Eicher, Attorney at Law ...................... William A. Williams 373

BOOK REVIEWS

Powell, Wiggins and Turow: Competent Counsel for the Capital Defendant ........ Chris Hutton 409

The New York Yankees: Off the Field ...... John F. Hagemann 421

© Copyright 2004 by the South Dakota Law Review
South Texas Law Review

Fall 2004

Vol. 45 No. 4

Symposium: The Ethics of Law Students

Articles

Lawyering or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct ............... Linda McGuire 709

The Law Professor as Fiduciary: What Duties Do We Owe to Our Students .................. Robert P. Schuwerk 753

The Ethics of Law School Clinic Students As Student-Lawyers ............. Peter A. Joy 815

The Ethos and Pathos of Ethics and Law Students: A Clinician’s Perspective ... Betty J. Luke 843

Making Ethical Lawyers ............... Patrick J. Schiltz 875

Moral Judgment of Law Students Across Three Years: Influences of Gender, Political Ideology and Interest in Altruistic Law Practice ........ Maury Landsman 891

Steven P. McNeel

Character and Fitness Inquiries in Law School Admissions .............. John S. Dzienkowski 921

Transcripts

Law Student Admissions and Ethics—Rethinking Character and Fitness Inquiries .... Susan Saab Fortney 983

A Vocation-Based System of Ethics for Law Students ..................... Jerome M. Organ 997

Addressing Law Student Dishonesty: The View of one Bar Admissions Official ....................... Julia E. Vaughan 1009
ST. JOHN'S LAW REVIEW

SYMPOSIUM:
BROWN V. BOARD OF EDUCATION AT FIFTY:
HAVE WE ACHIEVED ITS GOALS?

FOREWORD ........................................ Philip Weinberg 253

INTRODUCTORY REMARKS .................. Joseph Bellacosa 257

REMARKS ........................................ Jack Greenberg 259
Michael Rebell 263
Nicholas de B. Katzenbach 277
John C. Brittain 281
Michelle Adams 289
Richard D. Kahlenberg 295
Juan F. Perea 307
Peter Schuck 311

CONCLUDING REMARKS .................... Rosemary C. Salomone 321

ARTICLE

Charter School Accessibility for
Historically Disadvantaged Students:
The Experience in New Jersey .......... Robert J. Martin 327

NOTES

And Then There Were None: The Repeal of Sodomy Laws
After Lawrence v. Texas and Its Effect on the Custody
and Visitation Rights of Gay and Lesbian Parents ........ 397

Liability of Media Companies for the Violent Content of
Their Products Marketed to Children ............... 427

In Re Pennie & Edmonds: The Second Circuit Returns to A
Subjective Standard of Bad Faith for Imposing Post-Trial
Sua Sponte Rule 11 Sanctions ..................... 449
SUFFOLK TRANSNATIONAL LAW REVIEW

VOLUME 26   Summer 2003   NUMBER 2

CONTENTS

LEAD ARTICLE
Antitrust Subject Matter Jurisdiction Over State Owned Enterprises and the End of Prudential Prophylactic Judicial Doctrines
S.W. O'Donnell 247

NOTES
Copyright Problems in India Affecting Hollywood and “Bollywood” 295

Choice of Law: International Copyright Laws or United States Constitution? 323

Spring Break 2023 – Sea of Tranquility: The Effect of Space Tourism on Outer Space Law and World Policy in the New Millennium 349

Compulsory Licensing During Public Health Crises: Bioterrorism’s Mark on Global Pharmaceutical Patent Protection 385

Cloning Consensus: Creating a Convention to Ban Human Reproductive Cloning 411

The Child Soldiers of Sierra Leone: Are They Accountable for Their Actions in War? 445

CASE COMMENTS

International Law—Extradition and the Political Offense Exception—In re Extradition of Singh, 170 F. Supp. 2d 982 (E.D. Cal. 2001). 479
<table>
<thead>
<tr>
<th>Section</th>
<th>Authors</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Law</td>
<td>Joseph J. Saltarelli</td>
<td>787</td>
</tr>
<tr>
<td>Business Associations</td>
<td>Sandra S. O'Loughlin, Christopher J. Bonner</td>
<td>807</td>
</tr>
<tr>
<td>Civil Practice</td>
<td>Paul H. Aloe</td>
<td>825</td>
</tr>
<tr>
<td>Commercial Law</td>
<td>William F. Savino, David S. Widenor</td>
<td>855</td>
</tr>
<tr>
<td>Conflict of Laws</td>
<td>Patricia Youngblood Reyhan</td>
<td>933</td>
</tr>
<tr>
<td>Employment Law</td>
<td>Thomas G. Eron</td>
<td>991</td>
</tr>
<tr>
<td>Environmental Law</td>
<td>Philip Weinberg</td>
<td>1035</td>
</tr>
<tr>
<td>Estates and Trusts</td>
<td>Elizabeth A. Hartnett</td>
<td>1051</td>
</tr>
<tr>
<td>Evidence</td>
<td>Michael J. Hutter</td>
<td>1075</td>
</tr>
<tr>
<td>Family Law</td>
<td>Katheryn D. Katz</td>
<td>1127</td>
</tr>
<tr>
<td>Health Law</td>
<td>Edward F. McArdle</td>
<td>1179</td>
</tr>
<tr>
<td>Insurance Law</td>
<td>Alan J. Pierce</td>
<td>1241</td>
</tr>
<tr>
<td>Local Government</td>
<td>John B. Nesbitt</td>
<td>1275</td>
</tr>
<tr>
<td>Professional Responsibility</td>
<td>Steven Wechsler</td>
<td>1299</td>
</tr>
<tr>
<td>Section</td>
<td>Author(s)</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------------</td>
<td>------</td>
</tr>
<tr>
<td>REAL PROPERTY LAW</td>
<td>Keith E. Sealing</td>
<td>1359</td>
</tr>
<tr>
<td>STATE AND LOCAL TAXATION</td>
<td>Maria T. Jones</td>
<td>1379</td>
</tr>
<tr>
<td></td>
<td>Blake A. Rigel</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Anwen Jiang</td>
<td></td>
</tr>
<tr>
<td>TORT LAW</td>
<td>Scott L. Haworth</td>
<td>1419</td>
</tr>
<tr>
<td></td>
<td>Melissa Cronin Welch</td>
<td></td>
</tr>
<tr>
<td>ZONING AND LAND USE</td>
<td>Terry Rice</td>
<td>1451</td>
</tr>
</tbody>
</table>
CONTENTS

19
Income Tax Treatment of Contingent Legal Fees: Overview and Recent Developments
By Amy Avitable

25
Enron and the Boundaries of Aggressive Tax Advice
By Frank J. Gould

39
An Analysis of the Final Code Sec. 263(a) Regulations on Capitalization of Intangible Assets
By Richard L. Altizer and Jeffrey J. Bryant

Columns

Tax Trends
By Mark A. Luscombe

International Tax Watch
By Gregg D. Lemein and John D. McDonald

Individuals and Passthrough Entities
By Susan Kalinka
CONTENTS

Symposium: Globalization and the Judiciary: Key Issues of Economic Law, Business Law, and Human Rights Law

FOREWORD: GLOBALIZATION AND THE JUDICIARY .......................................................... 347
Carl Baudenbacher

SYMPOSIUM ARTICLES

LOOKING ABROAD WHEN INTERPRETING THE U.S. CONSTITUTION: SOME REFLECTIONS ................................................................. 353
Sanford Levinson

LEARNING FROM THE FOREIGNERS: A RESPONSE TO JUSTICE SCALIA’S AND PROFESSOR LEVINSON’S PROFESSIONAL MORAL PAROCHIALISM ......................................................... 367
Richard S. Markovis

JUDICIALIZATION: CAN THE EUROPEAN MODEL BE EXPORTED TO OTHER PARTS OF THE WORLD? ................................................................. 381
Carl Baudenbacher

LONE STAR: THE HISTORIC ROLE OF THE WTO ............................................................. 401
James Bacchus

THE GERMAN SUPREME COURT: AN ACTOR IN THE GLOBAL CONVERSATION OF HIGH COURTS ................................................................. 415
Joachim Bornkamm

EXPERIENCES FROM EUROPE: LEGAL DIVERSITY AND THE INTERNAL MARKET ............. 429
Horatia Muir Watt

FOCUSBING ON THE EUROPEAN PERSPECTIVE OF JUDICIAL DIALOGUE: ISSUES IN THE AREA OF COMPETITION LAW ........................................ 461
Sir Christopher Bellamy

CONSTITUTIONAL REFORM IN CHINA: THE CASE OF HONG KONG ............................... 467
Daniel R. Fung

COMMENT

STEM CELL DIVISION: ABORTION LAW AND ITS INFLUENCE ON THE ADOPTION OF RADICALLY DIFFERENT EMBRYONIC STEM CELL LEGISLATION IN THE UNITED STATES, THE UNITED KINGDOM, AND GERMANY ......................................................... 479
Kara L. Belew
ARTICLES

THE WAR IN IRAQ AND THE DILEMMA OF CONTROLLING THE INTERNATIONAL USE OF FORCE ................................................................. 521
   A. Mark Weisburd

TWO HUNDRED YEARS OF A FAMOUS CODE: WHAT SHOULD WE BE CELEBRATING? ................................................................. 561
   Basil Markesinis

THE HEADSCARF AFFAIR: THE CONSEIL D'ETAT ON THE ROLE OF RELIGION AND CULTURE IN FRENCH SOCIETY ..................................................... 581
   Elisa T. Beller

SIXTH ANNUAL INTERNATIONAL ROUNDTABLE ON COMPETITION & TRADE POLICY

PUBLIC SECTOR RESTRAINTS: BEHIND-THE-BORDER TRADE BARRIERS .................. 625
   Shanker A. Singham and D. Daniel Sokol

COMPETITION POLICY AND INTERNATIONAL TREATY NEGOTIATIONS: WHAT NOW? ............................................................... 647
   Daniel K. Goldberg

COMMENTS

DEACCESSIONING AND ITS COSTS IN THE HOLOCAUST ART CONTEXT: THE UNITED STATES AND GREAT BRITAIN ........................................... 655
   Daniel Range

SHOULD THE BRAIN DRAIN BE PLUGGED? A BEHAVIORAL ECONOMICS APPROACH .............................................................. 675
   Lisa Leitman

BOOK REVIEW

WAR OR JUSTICE AND OTHER HARD CHOICES AFTER SEPTEMBER 11 ..................... 697
   Lesley Wexler

INDEX TO VOLUME 39 ........................................................................ 703
CONTENTS

ARTICLES

FREE EXERCISE OF RELIGION IN GERMANY AND THE UNITED STATES ................................. Edward J. Eberle 1023

CRIMINAL JUSTICE AND VIDEOCONFERENCE TECHNOLOGY: THE REMOTE DEFENDANT .................. Anne Bowen Poulin 1089

OF GOD’S MERCY AND THE FOUR BIBLICAL METHODS OF CAPITAL PUNISHMENT: STONING, BURNING, BEHEADING, AND STRANGULATION .................................... Irene Merker Rosenberg Yale L. Rosenberg 1169

THE REAL STORY OF U.S. HATE CRIMES STATISTICS: AN EMPIRICAL ANALYSIS ...................... William B. Rubenstein 1213

EASON-WEINMANN LECTURE

CHOICE OF LAW FOR PRODUCTS LIABILITY: THE 1990S AND BEYOND ............................ Symeon C. Symeonides 1247
COMMENT

PROMOTING MEANINGFUL RATIONAL AUTONOMY: A PROPOSAL TO AMEND LOUISIANA'S CONDITIONAL DISCHARGE LAW ......................... Mandy C. Foster 1351

RECENT DEVELOPMENTS

A MATTER OF ENFORCEMENT: THE FIFTH CIRCUIT CONSIDERS THE ISSUANCE OF PUNITIVE DAMAGES UNDER THE FAIR HOUSING ACT IN LINCOLN V. CASE ......................... Laurie R. Kaufman 1377

otto candies, l.l.c. v. nippon kaigi kyokai corp.: in a novel decision, the fifth circuit recognizes the tort of negligent misrepresentation in connection with maritime classification societies and third-party plaintiffs .................. Rory B. O'Halloran 1389
CONTENTS

ARTICLES

LIMITATION OF LIABILITY: THE DEFENSE PERSPECTIVE .......... Jason A. Schoenfeld
                                                                   Michael M. Butterworth  219

ARREST AND DETENTION OF SHIPS AND OTHER PROPERTY IN NIGERIA ......................... Chudi Nelson Ojukwu  249

WON'T YOU LET ME TAKE YOU ON A SEA CRUISE: THE AMERICANS WITH DISABILITIES ACT AND CRUISE SHIPS ......................... Curtis D. Edmonds  271

MARITIME TRANSPORTATION SECURITY ACT OF 2002 (POTENTIAL CIVIL LIABILITIES AND DEFENSES) ......................... Christopher E. Carey  295

RIVERBOAT CASINOS AND ADMIRALTY AND MARITIME LAW: PLACE YOUR BETS! .......... Brian D. Wallace
                                                                   Evan T. Caffrey
                                                                   Evans Martin McLeod  315
RECENT DEVELOPMENTS

RECENT DEVELOPMENTS IN MARITIME LAW......................... Kathleen K. Charvet
Heather A. Waterman 375

CRUISE PASSENGER’S DILEMMA:
TWENTY-FIRST-CENTURY SHIPS,
NINETEENTH-CENTURY RIGHTS........ Thomas A. Dickerson 447

ESSAY

SURVEYING THE SERBONIAN BOG:
A BRIEF HISTORY OF A
JUDICIAL METAPHOR .................... Parker B. Potter, Jr. 519

NOTES

OIL POLLUTION ACT OF 1990’S
DOUBLE HULL REQUIREMENT
COLLIDES WITH THE TAKINGS
CLAUSE: Maritrans v.
United States......................... Paul Balanon 555

SEAMEN, NOT AS “FRIENDLESS
AND POOR” AS THEY USED TO BE:
Ammar v. United States.............. Tom DeSimone 575

Becker v. Tidewater:
The Fifth Circuit Clarifies
The Exception to Chandris
V. Latsis’s Thirty Percent
Temporal Benchmark for
Jones Act Seaman Status......... Jeremy Herschaft 583
Hertz v. Treasure Chest
Casino: No Dice for Jones
Act Claims Aboard Moored
Riverboat Casinos ....................... Martin Doyle 591

Pay the Man . . . Again!
The Fourth Circuit Requires
Shippers to Pay Freight Twice
When Cargo Consolidators
Default in Hawkeper
Shipping Co. v. Intamex, S.A. .... Matthew Lynch 603

Otto Candies, L.L.C. v.
Nippon Kaigi Kyokai Corp.:
Further Extending Negligent
Misrepresentation to Protect
Third-Party Buyers that
Rely on Erroneous
Certificates Issued by Vessel
Classification Societies................. Courtney P. Cochran 613

British Columbia Sinks
Forum Selection Clauses:
Friesen v. Norwegian
Cruise Lines............................ Jayson Haile 625

Cumulative Index
Title by Subject Index.......................... 635
Subject Index ................................... 679
TABLE OF CONTENTS

ARTICLES

TOO MUCH HEART AND NOT ENOUGH HEAT:
THE SHORT LIFE AND FRACTURED
EGO OF THE EMPATHIC,
HEROIC PUBLIC DEFENDER .................... Abbe Smith 1203

BANKRUPTING TRADEMARKS .................. Xuan-Thao N. Nguyen 1267

NOT FOR ATTRIBUTION: GOVERNMENT’S INTEREST
IN PROTECTING THE INTEGRITY
OF ITS OWN EXPRESSION ...................... Helen Norton 1317

ESSAY

DOING RIGHT BY CHARLES ALAN WRIGHT .............. Carl Tobias 1351

NOTES

INTERNATIONAL LAW IN UNITED STATES COURTS:
WHY THE NINTH CIRCUIT SHOULD HAVE
CONSIDERED SELF-DETERMINATION WHEN
DECIDING GUAM V. GUERRERO ................... Elizabeth Myers 1359

SALES VERSUS SAFETY: THE LOSS OF BALANCE
IN THE COMMERCIAL SPEECH STANDARD IN
THOMPSON v. WESTERN STATES
MEDICAL CENTER ............................ Elizabeth Spring 1389

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CONTENTS

REUSCHLEIN LECTURE

THE LAWFULNESS OF THE ELECTION DECISION:
A REPLY TO PROFESSOR TRIBE ......................... Peter Berkowitz 429
& Benjamin Wittes

ARTICLE

ONE MAN’S TOKEN IS ANOTHER WOMAN’S
BREAKTHROUGH? THE APPOINTMENT OF THE
FIRST WOMEN FEDERAL JUDGES ....................... Mary L. Clark 487

NOTES

MAKING IT EASIER TO MILK THE COW:
The Southern District of New York
Collapses the Culpable Participation
Doctrine and Sidesteps the Private
Securities Litigation Reform Act .......... Matthew W. Goulding 551

DON’T BITE THE HAND THAT PROVIDES
Life-Saving Drugs: Application of the
Hatch-Waxman and Sherman Acts to the
Pharmaceutical Industry and the Detrimental
Effects to Future Innovation in Order to
Achieve Current Savings for Consumers ....... Edward J. King 591

AFTER BILLIONS SPENT TO COMPLY WITH HIPAA
and GLBA PRIVACY PROVISIONS, WHY IS
IDENTITY THEFT THE MOST PREVALENT
CRIME IN AMERICA? ....................................... R. Bradley McMahon 625
GOD, JESUS, ALLAH AND YAHWEH SHOULD BE
GOVERNMENT EMPLOYEES: HOW ZELMAN V.
SIMMONS-HARRIS CAN ESTABLISH A
CONSTITUTIONAL FRAMEWORK FOR
GOVERNMENT FUNDING OF
FAITH-BASED SERVICES ......................... Craig A. Newell, Jr. 661

COMMENT

A DEATH SENTENCE FOR JUSTICE:
THE FEENEY AMENDMENT FRUSTRATES
FEDERAL SENTENCING .............................. Patrice Stappert 693
The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention
Daniel K. Tarullo

Can Legalization Last?: Whaling and the Durability of National (Executive) Discretion
John K. Setear

Constitutionalizing Islam: Theory and Pakistan
Jeffrey A. Redding

Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations On the Right of Return
Lewis Saideman

Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest
Elletta Sangrey Callahan, Terry Morehead Dworkin, & David Lewis

Essay

Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas
Roger P. Alford
William Mitchell
Law Review

VOLUME 30  2004  NUMBER 4

CORPORATE GOVERNANCE AND THE SARBANES-OXLEY ACT

The Sarbanes-Oxley Act and Fiduciary Duties
Lyman P.Q. Johnson and Mark A. Sides .......................... 1149

Corporate Constituency Statutes and Employee Governance
Brett H. McDonnell .................................................. 1227

Earnings Management and the Business Judgment Rule: An
Essay on Recent Corporate Scandals
Franklin A. Gevurtz ................................................. 1261

Public Choice Theory, Federalism, and the Sunny Side to
Blue-Sky Laws
Stefania A. Di Trolio ............................................... 1279

The Sarbanes-Oxley Act: A Bird’s-Eye View
Niels Schaumann ................................................... 1315

ARTICLES

“Your Honor, Tear Down That Illinois Brick Wall!” The
National Movement Toward Indirect Purchaser Antitrust
Standing and Consumer Justice
Daniel R. Karon ..................................................... 1351

Secured Transactions History: The First Chattel Mortgage
Acts in the Anglo-American World
George Lee Flint, Jr. and Marie Juliet Alfaro .................. 1403

A Thirtieth Anniversary Tribute to the William Mitchell Law
Review
Michael K. Steenson ............................................... 1465

NOTES AND COMMENTS

Comment: Proposal to Allow Shareholder Nomination of
Corporate Directors: Overreaction in Times of Corporate
Scandal
Lewis J. Sundquist III .............................................. 1471
Note: A Business or a Trust?: Janssen v. Best & Flanagan and Judicial Review of For-Profit and Nonprofit Board of Director Decisions
Mark Fellows .......................................................... 1503

Note: Nike v. Kasky: Leaving Corporate America Speechless
Vicki McIntyre ....................................................... 1531

BOOK REVIEWS

A History of the Corporate Entity's Accession to Power
Michael R. Kuhn ................................................... 1571

Crooked Business, Enron Style
Kristopher Kehner .................................................. 1581

Divinest Sense or Starkest Madness: Defending Civil Liberties in a Post-September 11 World
Corwin R. Kruse .................................................... 1589

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The Yale Law Journal
Volume 113, Number 8, June 2004

Contents

Article
The Eleventh Amendment and the Reading of Precise Constitutional Texts
                John F. Manning 1663

Essays
Editor's Note 1751

The Priority of Morality:
   The Emergency Constitution's Blind Spot
                David Cole 1753

The Anti-Emergency Constitution
                Laurence H. Tribe and Patrick O. Gudridge 1801

Response
This Is Not a War
                Bruce Ackerman 1871

Notes
Appurtenancy Reconceptualized:
   Managing Water in an Era of Scarcity
                Olivia S. Choe 1909

What Feeney Got Right:
   Why Courts of Appeals Should Review Sentencing Departures De Novo
                Andrew D. Goldstein 1955

Case Comments
Dual Sovereignty and the Sixth Amendment Right to Counsel
                David J. D'Addio 1991
Is the Right To Organize Unconstitutional?

Aron Fischer 1999

Non-Self-Executing Treaties and the Suspension Clause After St. Cyr

Stephen I. Vladeck 2007

Index to Volume 113 2015